Small Claims School For Magistrates

Small Claims School For Magistrates

May 19-23, 2008 • School of Government

2008 SMALL CLAIMS SCHOOL
NORTH CAROLINA JUDICIAL COLLEGE
May 19-23, 2008

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Introductory Materials

NORTH CAROLINA Judicial COLLEGE

Agenda

Small Claims School for Magistrates

May 19-23, 2008
School of Government, Chapel Hill, NC

Monday, May 19

8:30 AM	WELCOME Dona Lewandowski
9:00 AM	JUDICIAL DEMEANOR AND ETHICS Dona Lewandowski and Cheryl Howell
9:45 AM	BREAK
10:00 AM	JUDICIAL DEMEANOR, Cont'd
11:45 AM	LUNCH (on your own)
1:00 PM	CONTRACTS Cheryl Howell
2:30 PM	BREAK
2:45 PM	CONTRACTS, Cont'd
4:30 PM	RECESS

Tuesday, May 20

8:30 AM	CIVIL PROCEDURE Dona Lewandowski
10:00 AM	BREAK
10:15 AM	CIVIL PROCEDURE, Cont'd
12:00 PM	LUNCH (on your own)
1:15 PM	CIVIL PROCEDURE, Cont'd
2:30 PM	BREAK
2:45 PM	CIVIL PROCEDURE, Cont'd
3:30 PM	BREAK
3:45 PM	JUDICIAL BIAS
5:00 PM	RECESS

Wednesday, May 21

8:30 AM	ACTIONS TO RECOVER POSSESSION Dona Lewandowski
10:15 AM	BREAK
10:30 AM	ACTIONS TO RECOVER POSSESSION, Cont'd
12:15 PM	LUNCH (on your own)

1:30 PM TORTS
Cheryl Howell
3: 15 PM VIDEOTAPING (schedule distributed on Tuesday)
Dona Lewandowski & Cheryl Howell
5:00 PM RECESS

Thursday, May 22

8:30 AM SUMMARY EJECTMENT
Dona Lewandowski
9:45 AM BREAK
10:00 AM SUMMARY EJECTMENT, Cont'd
12:00 PM LUNCH at the School of Government
12:30 PM VIDEOTAPING Begins (schedule distributed on Tuesday)
12:45 PM SUMMARY EJECTMENT, Cont'd
5:00 PM RECESS

Friday, May 23

8:30 AM BREAKOUTS
A. Videotape Feedback (8:00AM to 12:00PM)
B. Structured Discussion Group: Getting Organized For Small Claims Court
C. Structured Discussion Group: Dealing With Attorneys
D. Listening Skills
12:00 PM LUNCH at the School of Government
12:45 PM SMALL GROUP REPORTS
1:30 PM AWARD OF CERTIFICATES
1:45 PM ADJOURN

This conference will have **_30.5__** hours of instruction, all of which will qualify for continuing judicial education credit under Rule II.C of Continuing Judicial Education.

Any lunch provided as part of this program is paid for by the Administrative Office of the Courts. When claiming reimbursement for expenses for this program, the portion of the daily travel allowance allocated for this lunch may not be claimed. Reimbursements will not include this allocation for lunch on any day in which lunch is provided.

Admission to all School of Government schools and conferences is without regard to race, color, religion, sex, national origin, age, disability status, veteran status, or sexual orientation. If you need accommodation to participate in any School program, please let us know. We will be glad to assist you.

SMALL CLAIMS SCHOOL
MAY 19 23, 2008
CAST OF CHARACTERS

Judicial Demeanor: Monday, May 19

Exercise #1:
- Mr. Jones –Joseph Robinson
- Mrs. Smith – Carrie Waters

Exercise #2:
- Ms. Spooner – Deborah Glass
- Mr. Shell – McNair-Wright

Exercise #3:
- Mr. Rufus – Eric Snider
- Max Horton – James Pfaff
- Mr. Jesse – Michael Kimel

Exercise #4:
- Ms. Arcade – Althea Williams
- Ms. Follett – Jeannette Emerick

Civil Procedure Tuesday, May 1

Exercise #1:
- Judge –Christopher Hardin
- Plaintiff-Jump – Eric Fogleman
- Defendant-Teller – Franklin Hare

Exercise #2:
- Judge – Gary Laws
- Plaintiff-Ellis –James McAteer
- Defendant-James – John Glass

Exercise #3:
- Judge – John Terry
- Plaintiff-Ms. Ear – Jeannette Emerick
- Defendant-Fortas – Natalie Jacobs
- Defendant-Mr. Smith – Nicole Hewett

Exercise #4:
- Judge – John Woodson
- Defendant-Lockhart –James Dickey
- Plaintiff-Gilbert Ralph Phillips
- Defendant-Eddie – Randolph Carter

Summary Ejectment Thursday May 3

- Judge – John Woodson
- Plaintiff – Joe Knight
- Defendant-John Stokes

Break-Out Group Assignments for Friday

Group 1:
Glass, D.
Williams
Snider
Woodson
McAteer
Knight
Terry
Hardin
Laws

Group 2:
Fogelman
Hare
Jacobs
Hewett
Phillips
Waters
Glass J.
Emerick
Dickey

Group 3:
Pfaff
Stokes C
Robinson
Kimel
Carter
McNair-Wright

School of Government
The University of North Carolina at Chapel Hill

Small Claims School
May 19-23, 2008

PROGRAM EVALUATION

Part I: Individual Subjects and Instructors

Monday, May 19

Please circle the number that best reflects your agreement with the items in the table below. The rating scale is:

SD = strongly disagree **D** = disagree **N** = neutral **A** = agree **SA** = strongly agree **NA** = not applicable

Judicial Demeanor and Ethics Dona Lewandowski & Cheryl Howell	SD	D	N	A	SA	NA
1. Introduced objectives and provided an overview of the session	1	2	3	4	5	NA
2. Presented content that supported the objectives	1	2	3	4	5	NA
3. Organized content logically	1	2	3	4	5	NA
4. Used clear examples and explanations	1	2	3	4	5	NA
5. Asked appropriate questions	1	2	3	4	5	NA
6. Gave helpful responses to questions	1	2	3	4	5	NA
7. Provided relevant activities and exercises for practice	1	2	3	4	5	NA
8. Demonstrated energy and interest in the topic	1	2	3	4	5	NA
9. Reviewed key points	1	2	3	4	5	NA
10. Session content was relevant to the work I do	1	2	3	4	5	NA
11. Handouts are helpful and will be useful in my work	1	2	3	4	5	NA
12. I will be able to apply what I learned as a result of this session	1	2	3	4	5	NA

Comments:

Please circle the number that best reflects your agreement with the items in the table below. The rating scale is:

SD = strongly disagree **D** = disagree **N** = neutral **A** = agree **SA** = strongly agree **NA** = not applicable

Contracts Cheryl Howell	SD	D	N	A	SA	NA
1. Introduced objectives and provided an overview of the session	1	2	3	4	5	NA
2. Presented content that supported the objectives	1	2	3	4	5	NA
3. Organized content logically	1	2	3	4	5	NA
4. Used clear examples and explanations	1	2	3	4	5	NA
5. Asked appropriate questions	1	2	3	4	5	NA
6. Gave helpful responses to questions	1	2	3	4	5	NA
7. Provided relevant activities and exercises for practice	1	2	3	4	5	NA
8. Demonstrated energy and interest in the topic	1	2	3	4	5	NA
9. Reviewed key points	1	2	3	4	5	NA
10. Session content was relevant to the work I do	1	2	3	4	5	NA
11. Handouts are helpful and will be useful in my work	1	2	3	4	5	NA
12. I will be able to apply what I learned as a result of this session	1	2	3	4	5	NA

Comments:

Tuesday, May 20

Please circle the number that best reflects your agreement with the items in the table below. The rating scale is:

SD = strongly disagree **D** = disagree **N** = neutral **A** = agree **SA** = strongly agree **NA** = not applicable

Civil Procedure Dona Lewandowski	SD	D	N	A	SA	NA
1. Introduced objectives and provided an overview of the session	1	2	3	4	5	NA
2. Presented content that supported the objectives	1	2	3	4	5	NA
3. Organized content logically	1	2	3	4	5	NA
4. Used clear examples and explanations	1	2	3	4	5	NA
5. Asked appropriate questions	1	2	3	4	5	NA
6. Gave helpful responses to questions	1	2	3	4	5	NA
7. Provided relevant activities and exercises for practice	1	2	3	4	5	NA
8. Demonstrated energy and interest in the topic	1	2	3	4	5	NA
9. Reviewed key points	1	2	3	4	5	NA
10. Session content was relevant to the work I do	1	2	3	4	5	NA
11. Handouts are helpful and will be useful in my work	1	2	3	4	5	NA
12. I will be able to apply what I learned as a result of this session	1	2	3	4	5	NA

Comments:

Wednesday, May 21

Please circle the number that best reflects your agreement with the items in the table below. The rating scale is:

SD = strongly disagree **D** = disagree **N** = neutral **A** = agree **SA** = strongly agree **NA** = not applicable

Actions to Recover Possession Dona Lewandowski	SD	D	N	A	SA	NA
1. Introduced objectives and provided an overview of the session	1	2	3	4	5	NA
2. Presented content that supported the objectives	1	2	3	4	5	NA
3. Organized content logically	1	2	3	4	5	NA
4. Used clear examples and explanations	1	2	3	4	5	NA
5. Asked appropriate questions	1	2	3	4	5	NA
6. Gave helpful responses to questions	1	2	3	4	5	NA
7. Provided relevant activities and exercises for practice	1	2	3	4	5	NA
8. Demonstrated energy and interest in the topic	1	2	3	4	5	NA
9. Reviewed key points	1	2	3	4	5	NA
10. Session content was relevant to the work I do	1	2	3	4	5	NA
11. Handouts are helpful and will be useful in my work	1	2	3	4	5	NA
12. I will be able to apply what I learned as a result of this session	1	2	3	4	5	NA

Comments:

Please circle the number that best reflects your agreement with the items in the table below. The rating scale is:

SD = strongly disagree **D** = disagree **N** = neutral **A** = agree **SA** = strongly agree **NA** = not applicable

Torts Cheryl Howell	SD	D	N	A	SA	NA
1. Introduced objectives and provided an overview of the session	1	2	3	4	5	NA
2. Presented content that supported the objectives	1	2	3	4	5	NA
3. Organized content logically	1	2	3	4	5	NA
4. Used clear examples and explanations	1	2	3	4	5	NA
5. Asked appropriate questions	1	2	3	4	5	NA
6. Gave helpful responses to questions	1	2	3	4	5	NA
7. Provided relevant activities and exercises for practice	1	2	3	4	5	NA
8. Demonstrated energy and interest in the topic	1	2	3	4	5	NA
9. Reviewed key points	1	2	3	4	5	NA
10. Session content was relevant to the work I do	1	2	3	4	5	NA
11. Handouts are helpful and will be useful in my work	1	2	3	4	5	NA
12. I will be able to apply what I learned as a result of this session	1	2	3	4	5	NA

Comments:

Thursday, May 22

Please circle the number that best reflects your agreement with the items in the table below. The rating scale is:

SD = strongly disagree **D** = disagree **N** = neutral **A** = agree **SA** = strongly agree **NA** = not applicable

Summary Ejectment Dona Lewandowski	SD	D	N	A	SA	NA
1. Introduced objectives and provided an overview of the session	1	2	3	4	5	NA
2. Presented content that supported the objectives	1	2	3	4	5	NA
3. Organized content logically	1	2	3	4	5	NA
4. Used clear examples and explanations	1	2	3	4	5	NA
5. Asked appropriate questions	1	2	3	4	5	NA
6. Gave helpful responses to questions	1	2	3	4	5	NA
7. Provided relevant activities and exercises for practice	1	2	3	4	5	NA
8. Demonstrated energy and interest in the topic	1	2	3	4	5	NA
9. Reviewed key points	1	2	3	4	5	NA
10. Session content was relevant to the work I do	1	2	3	4	5	NA
11. Handouts are helpful and will be useful in my work	1	2	3	4	5	NA
12. I will be able to apply what I learned as a result of this session	1	2	3	4	5	NA

Comments:

Friday, May 23

Please circle the number that best reflects your agreement with the items in the table below. The rating scale is:

SD = strongly disagree **D** = disagree **N** = neutral **A** = agree **SA** = strongly agree **NA** = not applicable

Listening Skills	SD	D	N	A	SA	NA
1. Introduced objectives and provided an overview of the session	1	2	3	4	5	NA
2. Presented content that supported the objectives	1	2	3	4	5	NA
3. Organized content logically	1	2	3	4	5	NA
4. Used clear examples and explanations	1	2	3	4	5	NA
5. Asked appropriate questions	1	2	3	4	5	NA
6. Gave helpful responses to questions	1	2	3	4	5	NA
7. Provided relevant activities and exercises for practice	1	2	3	4	5	NA
8. Demonstrated energy and interest in the topic	1	2	3	4	5	NA
9. Reviewed key points	1	2	3	4	5	NA
10. Session content was relevant to the work I do	1	2	3	4	5	NA
11. Handouts are helpful and will be useful in my work	1	2	3	4	5	NA
12. I will be able to apply what I learned as a result of this session	1	2	3	4	5	NA

Comments:

<u>Discussion Group: Getting Organized for Small Claims Court</u>

1. Was this session helpful to you?

2. Do you have ideas or suggestions on how it might have been improved?

Discussion Group: Dealing With Problems in Small Claims Court

1. Was this session helpful to you?

2. Do you have ideas or suggestions on how it might have been improved?

Videotaping and Feedback

1. Was this session helpful to you?

2. Do you have ideas or suggestions on how it might have been improved?

Part II: The School as a Whole (Week 2)

Please circle the number that best reflects your agreement with the items in the table below. The rating scale is:

EX = Excellent G = Good F = Fair P = Poor

	EX	G	F	P
1. How would you evaluate the overall quality of this program (relevance and usefulness of sessions, activities, exercises, materials, etc.)?	1	2	3	4
2. How would you evaluate the opportunities for student participation (question and answer, discussion, small group work, etc.)?	1	2	3	4
3. How would you evaluate the overall design, schedule, and length of the program?	1	2	3	4
4. How would you evaluate the logistics of the program (facilities, food, breaks, etc.)?	1	2	3	4

6. How useful will this training be in doing your work as a magistrate?

Very Useful Somewhat Useful Not Very Useful

7. How would you evaluate the “depth” of the program content?

Too Basic About Right Too Advanced

8. What were the two or three most important things you learned in this program?

9. What was the most valuable, helpful, or useful part or aspect of this program?

10. What was the least valuable, helpful, or useful part or aspect of this program?

11. What should we change about this program if we offer it again?

Contact Information Update Form

After reviewing the class roster, please make any changes or additions to your contact information and return the form at the end of the program.

Full Name:	
Preferred Name:	
Preferred Mailing Address:	
Billing Address (if different from above):	
County:	
District:	
State Bar Number (if applicable):	
Work Phone & Fax:	
Home & Cell Phone:	
Work & Preferred Email:	
Date Appointed As Magistrate:	
Any Special Needs (explain):	
Previous Work History (100 words or less)	

UNC
SCHOOL OF GOVERNMENT

Services and Amenities

At the School of Government we strive to make your visit as comfortable as possible. Whether you need access to a phone or a computer or directions to the nearest shopping mall, we will do our best to provide the assistance and information you need.

Assistive Listening	Headphones for the hearing-impaired are available in Classrooms 2401, 2601, and 2603. Ask a staff member for assistance.
ATM	ATM machines for banks and the State Employees Credit Union are two blocks west at 210 Raleigh Road, behind Davis Library.
Bookstores	School of Government Bookstore: Level 2 near the main elevator. Bull's Head Bookshop: in UNC Student Stores, two blocks west on South Road.
Bus System	Free Chapel Hill Transit buses stop at SOG front entrance; route maps are available at the Hodges Lobby reception desk.
Coffee/Tea	Self-serve coffee, tea, chilled water, and soft drinks for guests attending programs are located in the Atrium near Wicker Classroom (Room 2603).
Computer/E-mail	Internet and e-mail access and file printing are available in the Knapp Library and Rooms 2511 and 2602. Wi-Fi (802.11b) access is available in the Library, Hodges Lobby, Atrium, and Rooms 2601 and 2603.
Copies	Black and white photocopies are available @ 10¢ per page in Knapp Library.
Dining Hall	Catered meals for School programs and events are served in the SOG Dining Hall, Level 1, adjacent to Campbell-Hunt-Ferrell Lounge and vending machines.
Faxing	50¢ per page or free with calling card, in Knapp Library.
First Aid	A first aid kit, cot, and wheelchair are in Room 3100 near the main elevator.
Food	*See* Dining Hall.
Handicap Accessibility	All major walkways are ramped for easy access; there are automatic doors at major entrances and in restrooms on Level 2 near the Library.
Ice/Vending Machines	Ice machines can be found in kitchens (Rooms 1306 and 2606); snack/drinks vending machines are in Rooms 1302 (near Dining Hall) and 2604 (near Atrium).
Information	Local sights, restaurants, maps: Hodges Lobby reception area; http://sog.unc.edu/visitor/index.html; 919-966-5381.
Lost and Found	Hodges Lobby reception desk. Articles unclaimed after 30 days will be donated to charity.
Lounges	Hodges Lobby, Knapp Library, and Campbell-Hunt-Ferrell Lounge adjacent to Dining Hall.
Mail/Post Office	Nearest Postal Service station is in UNC Student Stores, Level 2. Nearest FedEx boxes are adjacent to Law School loading dock and at Kinko's on W. Franklin St. FedEx and UPS boxes are also located in Meadowmont Village. (From NC 54 East, take a left on Meadowmont Drive, then the first left.)
Newspapers	A selection of North Carolina papers, *New York Times*, and *Washington Post* are in the Knapp Library. Copies of the *Daily Tar Heel*, the UNC campus newspaper, can be found at the west entrance near the parking deck.
Outdoor Meeting Areas	Mengel Garden (near Hodges Lobby), patio outside the Dining Hall, and Coates Courtyard (opposite Room 2321). Smoking is allowed in the Coates Courtyard.
Parking	Use gate code or intercom to enter parking deck. Additional parking is available in nearby Visitor Lot on NC 54.
Telephones	Rooms 2511 and 2602. Local service is free; long distance is available with a calling card. Guest messages left at 919-966-5381 can be retrieved at the Hodges Lobby reception desk.
Programs/Conferences	A calendar of School programs is available at http://sogevents.unc.edu.
Restrooms	There are restrooms on each floor near the elevators.
Smoking	Smokers are welcome in the Coates Courtyard (opposite Classroom 2321) and in the Colonnade at the entrance of the building facing South Road.
Snacks, Soft Drinks	Vending machines are available in Room 1302 adjacent to the Campbell-Hunt-Ferrell Lounge and in Room 2604 near the Atrium.
Sundries/UNC Merchandise	UNC Student Stores, two blocks west on South Road.
Visitor Information	Local sights, restaurants, maps: Hodges Lobby reception area; http://sog.unc.edu/visitor/index.html; 919-966-5381
Wireless Access	Wi-Fi (802.11b) access in Knapp Library, Hodges Lobby, Atrium, and Classrooms 2601 and 2603. To use the Wi-Fi adapter on your laptop, search for the available wireless networks. Select **Tar-Heel**, a public access network that requires no password or preregistration.

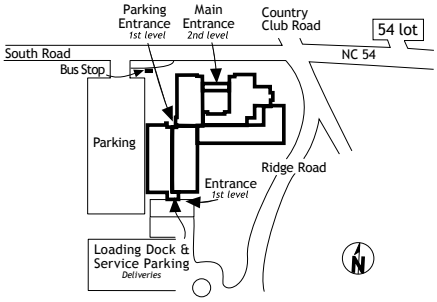
032105

Knapp-Sanders Building

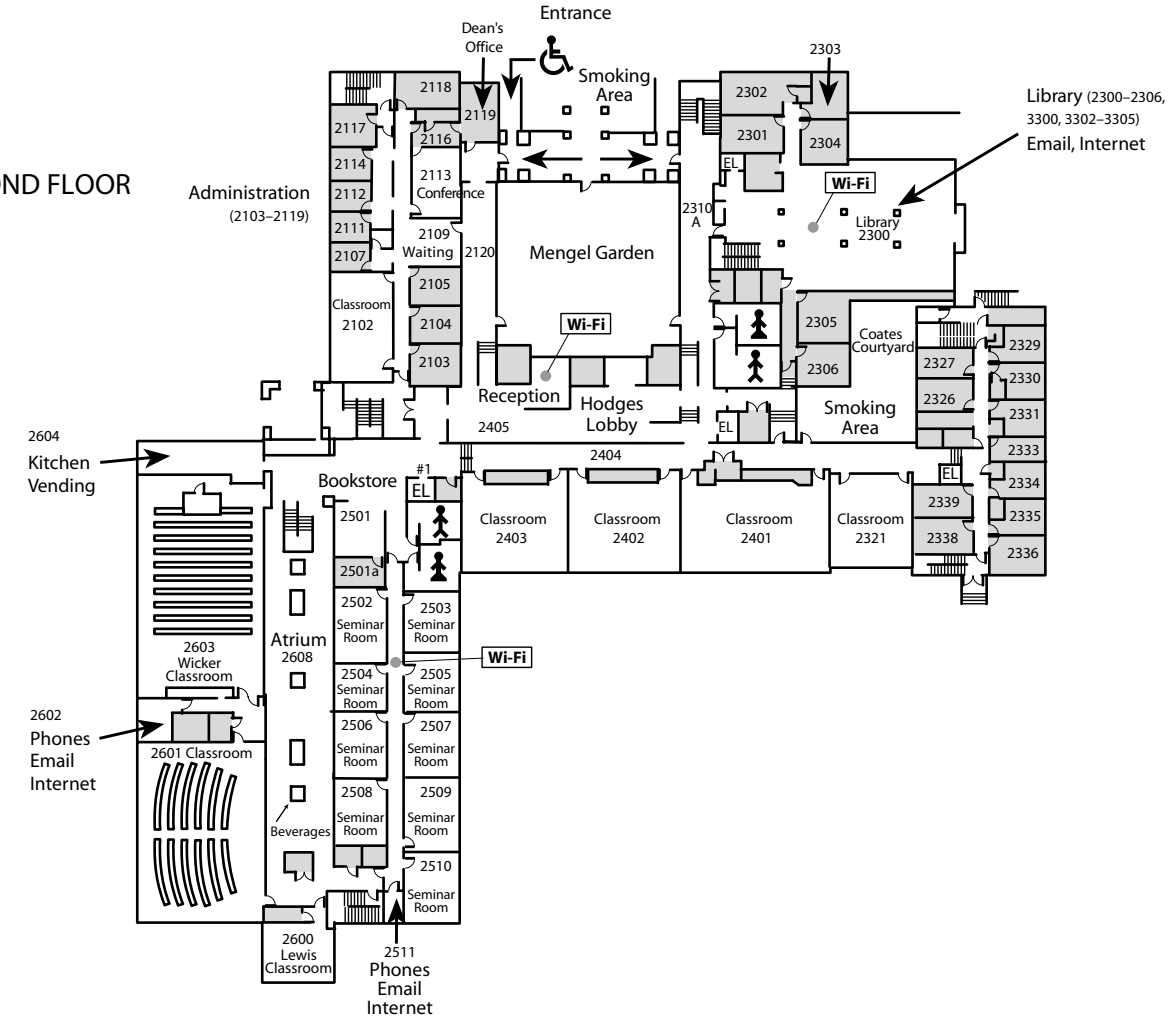
School of Government
UNC Chapel Hill

February 2005
Guest Map

1 FIRST FLOOR



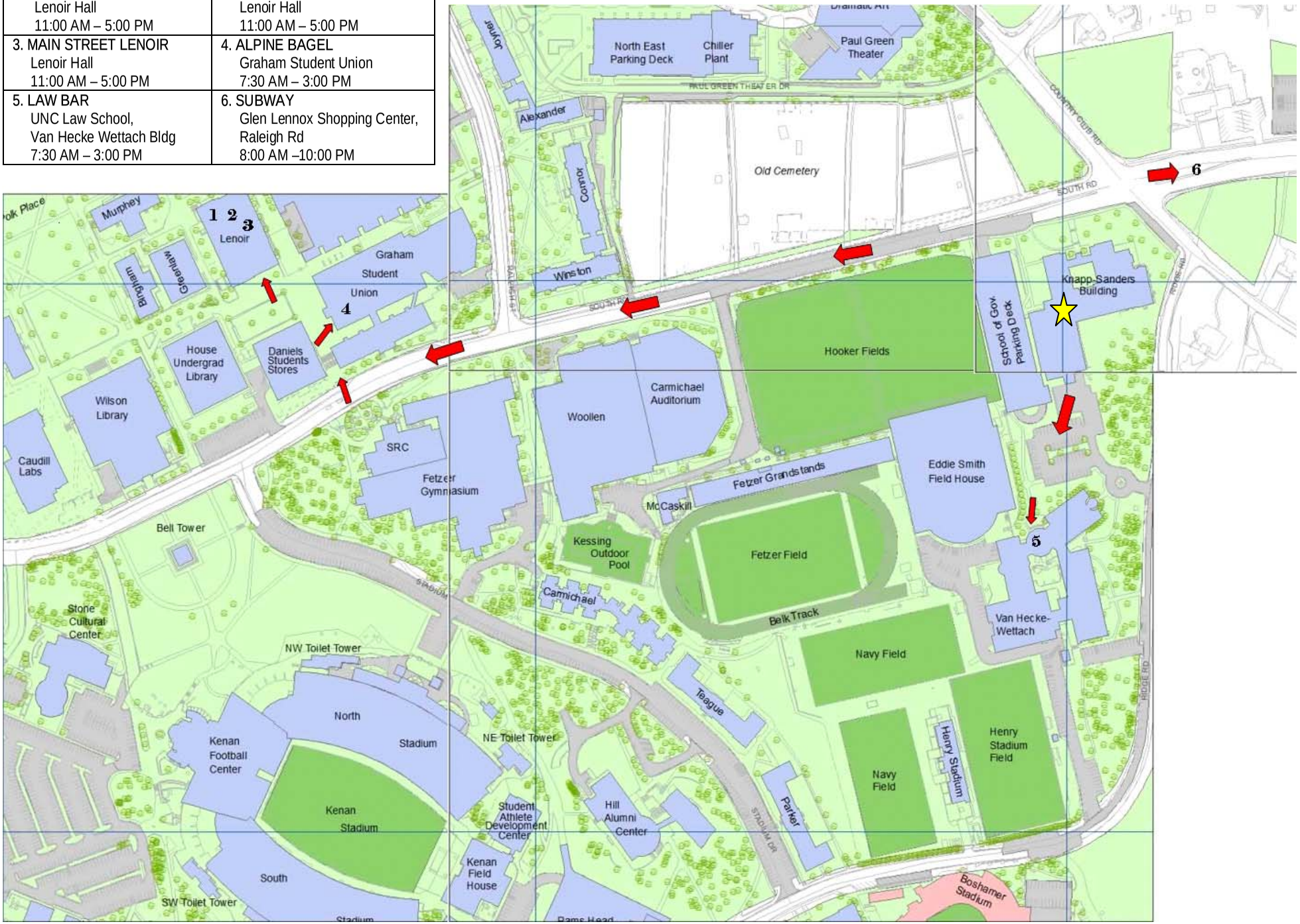
2 SECOND FLOOR



Dining Options:

Below is a map and listing of several options for those attending courses at the School of Government.

1. SUBWAY Lenoir Hall 11:00 AM – 5:00 PM	2. JAMBA JUICE Lenoir Hall 11:00 AM – 5:00 PM
3. MAIN STREET LENOIR Lenoir Hall 11:00 AM – 5:00 PM	4. ALPINE BAGEL Graham Student Union 7:30 AM – 3:00 PM
5. LAW BAR UNC Law School, Van Hecke Wettach Bldg 7:30 AM – 3:00 PM	6. SUBWAY Glen Lennox Shopping Center, Raleigh Rd 8:00 AM –10:00 PM



Tab:

Demeanor, Ethics & Bias

NOTES ON OBSERVATIONS OF JUDICIAL DEMEANOR SKITS

Skit # 1:

_____

_____

_____

_____

Skit # 2:

_____

_____

_____

_____

Skit # 3:

_____

_____

_____

_____

Skit # 4:

_____

_____

_____

A GOOD JUDGE

--appears to be fair and impartial

--appears to listen to the parties

--appears professional
("looks like he knows what he's doing")

--is polite

--controls her courtroom

HOW TO RENDER A JUDGMENT

> "[I]t has been our experience that the results are more satisfactory and the parties are more willing to accept the decision of the court once the judge explains what the law is and how it applies. The disclosure of this information also serves to educate the public and is one of the most important roles the judge has among his many functions." Forbes, Wilson, and Lyden, "The Role of the Judge When a Party Appears Without Counsel in a Civil Case," 14 Judges' Journal 48, 49 (1975).

Steps in Rendering Judgment

1. NOTICE: Tell the parties that, if there is no further evidence, you are going to announce your decision, i.e., separate the evidentiary portion of the case from the judgment phase.

2. DECIDE BEFORE SPEAKING.

3. IDENTIFY PARTY: Clearly identify the party in whose favor you are ruling: "I am going to enter a judgment in favor of Mr. Jones, the plaintiff in this case."

4. EXPLANATION: Briefly explain the reason for your ruling:

    a. State the important facts: "I find that Mr. Smith and Mr. Jones entered into a rental agreement, that the amount of rent due on the first of each month was $300, and that Mr. Smith failed to pay rent for March and April."
    b. Explain the law: "The law is that when a tenant fails to pay rent, the landlord is entitled to a court order requiring the tenant to leave the rental property."

5. CLEARLY ANNOUNCE AND EXPLAIN THE OUTCOME. "I am entering a judgment for possession of the rental property. Mr. Smith, that means that I am finding that you are no longer entitled to live in your apartment. If you are not out within ten days, the sheriff may come out and remove you and your belongings. Mr. Jones, my judgment means that you are entitled to possession of the property--that Mr. Smith will have to leave."

6. ASSISTANCE: Ask the parties whether they understand what you have said, and whether they have questions. But never try to answer a question if you are unsure of the answer.

Things to Remember

1. Avoid using jargon. The parties may not understand terms like "plaintiff," "defendant," "execution," and "judgment." Try hard to use everyday language, and, if you must use jargon, be sure to explain what the legal words mean.

2. Resist the temptation to lecture or to make judgmental statements about the parties' behavior. Try to maintain a professional, matter-of-fact approach. Avoid sarcasm, and use humor with care, so that the parties do not feel embarrassed or that they're being made fun of.

JUDICIAL DEMEANOR AND ETHICS

I. JUDICIAL DEMEANOR

A. Wise People Have Said:

1. "Important as it is that people should get justice, it is ever more important that they be made to feel and see that they are getting it."
2. "To the public, the judge is the personification of legal order."
3. "The overspeaking judge is not always a well-turned cymbal."

B. The Ten Commandments of Being a Judge (with thanks to the Bench Book and the National Judicial College)

1. Be patient.
2. Be kind (but not too kind).
3. Be dignified.
4. Be prompt.
5. Be impartial.
6. Be pleasant.
7. Don't try to be funny.
8. Don't change your decision in the parties' absence.
9. Remember that every case is important.
10. Wait to hear all the witnesses. Don't decide a case based on the testimony of the first witness.

II. ETHICS: BASIC PRINCIPLES (Taken From the Code of Judicial Conduct)

A. A judge should respect and comply with the law.

B. A judge should not imply that others are in a special position to influence him.

C. A judge should not be influenced in his or her decisions by partisan interests, public clamor, or fear of criticism.

D. A judge should maintain order and decorum in the courtroom.

E. A judge should neither initiate nor consider ex parte communication about a case that is pending or impending.

F. A judge should disqualify himself in a case in which his or her impartiality might reasonably be questioned.

G. A judge should not accept a gift, favor, or loan from any party or other person whose interests have come or are likely to come before him.

H. A judge should avoid even the appearance of impropriety.

JUDICIAL DEMEANOR AND ETHICS
PROBLEMS FOR DISCUSSION

1. Louise is a friend of your spouse's, although you've never much cared for her. Her son Frank was recently involved in some unpleasantness, in which he was accused of vandalizing a house. The people whose house was trashed have sued Louise in small claims court.

   (a) You feel that you can be completely impartial. Should you hear the case?

   (b) The plaintiffs are aware of your spouse's relationship with Louise and have asked you to recuse yourself. Should you hear the case?

   (c) Louise calls you on the telephone the night before the case is scheduled to be heard. She says, "I know you can't talk about my case, but I just wanted you to know how happy I am that someone who understands Frank's problems and our financial situation is going to be deciding the matter." What do you say and/or do?

   (d) You feel uncomfortable hearing the case, but you live in a small town, and you often have no choice but to hear cases in which one or both of the parties involved are acquaintances -- sometimes friends. What steps can you take to reduce "the appearance of impropriety"?

2. One of the rental agents who regularly appears before you in summary ejectment cases often drops by to shoot the breeze. One day she mentions that her boss has a place at the beach that he lets his employees use without charge. She says she and her husband are going down this weekend, and asks if you and your spouse would like to come along. Should you go?

3. One of the local merchants has brought an action on an account against Mrs. Smith. You remember that this merchant was in your court last month on the same case, and that he failed to prove the case. You suspect that Mrs. Smith is not aware that she has a good defense. What, if anything, do you do?

   Would your answer differ under any of the following circumstances?

   (a) Mrs. Smith has been in your court several times before, always as a defendant in actions for unpaid debts.

   (b) The merchant has been in your court several times before, twice on claims that had already been tried. Neither you nor the defendants have raised the defense in the past -- the merchant has won each case.

   (c) Mrs. Smith does not appear for trial.

North Carolina Code of Judicial Conduct

Adopted April 2003

The North Carolina Code of Judicial Conduct is hereby amended to read as follows:

Preamble

An independent and honorable judiciary is indispensable to justice in our society, and to this end and in furtherance thereof, this Code of Judicial Conduct is hereby established. A violation of this Code of Judicial Conduct may be deemed conduct prejudicial to the administration of justice that brings the judicial office into disrepute, or willful misconduct in office, or otherwise as grounds for disciplinary proceedings pursuant to Article 30 of Chapter 7A of the General Statutes of North Carolina. No other code or proposed code of judicial conduct shall be relied upon in the interpretation and application of this Code of Judicial Conduct.

Canon 1

A judge should uphold the integrity and independence of the judiciary.

A judge should participate in establishing, maintaining, and enforcing, and should himself observe, appropriate standards of conduct to ensure that the integrity and independence of the judiciary shall be preserved.

Canon 2

A judge should avoid impropriety in all his activities.

A. A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

B. A judge should not allow his family, social or other relationships to influence his judicial conduct or judgment. He should not lend the prestige of his office to advance the private interest of others; nor should he convey or permit others to convey the impression that they are in a special position to influence him. A judge may, based on personal knowledge, serve as a personal reference or provide a letter of recommendation. He should not testify voluntarily as a character witness.

C. A judge should not hold membership in any organization that practices unlawful discrimination on the basis of race, gender, religion or national origin.

Canon 3

A judge should perform the duties of his office impartially and diligently.

The judicial duties of a judge take precedence over all his other activities. His judicial duties include all the duties of his office prescribed by law. In the performance of these duties, the following standards apply.

A. Adjudicative responsibilities.

(1) A judge should be faithful to the law and maintain professional competence in it. He should be unswayed by partisan interests, public clamor, or fear of criticism.

(2) A judge should maintain order and decorum in proceedings before him.

(3) A judge should be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom he deals in his official capacity, and should require similar conduct of lawyers, and of his staff, court officials and others subject to his direction and control.

(4) A judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law, and, except as authorized by law, neither knowingly initiate nor knowingly consider *ex parte* or other communications concerning a pending proceeding. A judge, however, may obtain the advice of a disinterested expert on the law applicable to a proceeding before him.

(5) A judge should dispose promptly of the business of the court.

(6) A judge should abstain from public comment about the merits of a pending proceeding in any state or federal court dealing with a case or controversy arising in North Carolina or addressing North Carolina law and should encourage similar abstention on the part of court personnel subject to his direction and control. This subsection does not prohibit a judge from making public statements in the course of official duties; from explaining for public information the proceedings of the Court; from addressing or discussing previously issued judicial decisions when serving as faculty or otherwise participating in educational courses or programs; or from addressing educational, religious, charitable, fraternal, political, or civic organizations.

(7) A judge should exercise discretion with regard to permitting broadcasting, televising, recording, or taking photographs in the courtroom and areas immediately adjacent thereto during civil or criminal sessions of court or recesses between sessions, pursuant to the provisions of Rule 15 of the General Rules of Practice for the Superior and District Courts.

B. Administrative responsibilities.

(1) A judge should diligently discharge his administrative responsibilities, maintain professional competence in judicial administration, and facilitate the performance of the administrative responsibilities of other judges and court officials.

(2) A judge should require his staff and court officials subject to his direction and control to observe the standards of fidelity and diligence that apply to him.

(3) A judge should take or initiate appropriate disciplinary measures against a judge or lawyer for unprofessional conduct of which the judge may become aware.

(4) A judge should not make unnecessary appointments. He should exercise his power of appointment only on the basis of merit, avoiding nepotism and favoritism. He should not approve compensation of appointees beyond the fair value of services rendered.

C. Disqualification.

(1) On motion of any party, a judge should disqualify himself in a proceeding in which his impartiality may reasonably be questioned, including but not limited to instances where:

(a) He has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceedings;

(b) He served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(c) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(d) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(2) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(3) For the purposes of this section:

(a) The degree of relationship is calculated according to the civil law system;

(b) "Fiduciary" includes such relationships as executor, administrator, trustee and guardian;

(c) "Financial interest" means ownership of a substantial legal or equitable interest (*i.e.*, an interest that would be significantly affected in value by the outcome of the subject legal proceeding), or a relationship as director or other active participant in the affairs of a party, except that:

(i) ownership in a mutual or common investment fund that holds securities is not a “financial interest” in such securities unless the judge participates in the management of the fund;

(ii) an office in an educational, cultural, historical, religious, charitable, fraternal or civic organization is not a “financial interest” in securities held by the organization.

D. Remittal of disqualification.

Nothing in this Canon shall preclude a judge from disqualifying himself from participating in any proceeding upon his own initiative. Also, a judge potentially disqualified by the terms of Canon 3C may, instead of withdrawing from the proceeding, disclose on the record the basis of his potential disqualification. If, based on such disclosure, the parties and lawyers, on behalf of their clients and independently of the judge's participation, all agree in writing that the judge's basis for potential disqualification is immaterial or insubstantial, the judge is no longer disqualified, and may participate in the proceeding. The agreement, signed by all lawyers, shall be incorporated in the record of the proceeding. For purposes of this section, *pro se* parties shall be considered lawyers.

Canon 4

A judge may participate in cultural or historical activities or engage in activities concerning the legal, economic, educational, or governmental system, or the administration of justice.

A judge, subject to the proper performance of his judicial duties, may engage in the following quasi-judicial activities, if in doing so he does not cast substantial doubt on his capacity to decide impartially any issue that may come before him:

A. He may speak, write, lecture, teach, participate in cultural or historical activities, or otherwise engage in activities concerning the economic, educational, legal, or governmental system, or the administration of justice.

B. He may appear at a public hearing before an executive or legislative body or official with respect to activities permitted under Canon 4A or other provision of this Code, and he may otherwise consult with an executive or legislative body or official.

C. He may serve as a member, officer or director of an organization or governmental agency concerning the activities described in Canon 4A, and may participate in its management and investment decisions. He may not actively assist such an organization in raising funds but may be listed as a contributor on a fund-raising invitation. He may make recommendations to public and private fund-granting agencies regarding activities or projects undertaken by such an organization.

Canon 5

A judge should regulate his extra-judicial activities to ensure that they do not prevent him from carrying out his judicial duties.

A. Avocational activities. A judge may write, lecture, teach, and speak on legal or non-legal subjects, and engage in the arts, sports, and other social and recreational activities, if such avocational activities do not substantially interfere with the performance of his judicial duties.

B. Civic and charitable activities. A judge may participate in civic and charitable activities that do not reflect adversely upon his impartiality or interfere with the performance of his judicial duties. A judge may serve as an officer, director, trustee, or non-legal advisor of an educational, religious, charitable, fraternal or civic organization subject to the following limitations.

(1) A judge should not serve if it is likely that the organization will be engaged in proceedings that would ordinarily come before him.

(2) A judge may be listed as an officer, director or trustee of any cultural, educational, historical, religious, charitable, fraternal or civic organization. He may not actively assist such an organization in raising funds but may be listed as a contributor on a fund-raising invitation.

(3) A judge may serve on the board of directors or board of trustees of such an organization even though the board has the responsibility for approving investment decisions.

C. Financial activities.

(1) A judge should refrain from financial and business dealings that reflect adversely on his impartiality, interfere with the proper performance of his judicial duties, exploit his judicial position or involve him in frequent transactions with lawyers or persons likely to come before the court on which he serves.

(2) Subject to the requirements of subsection (1), a judge may hold and manage his own personal investments or those of his spouse, children, or parents, including real estate investments, and may engage in other remunerative activity not otherwise inconsistent with the provisions of this Code but should not serve as an officer, director or manager of any business.

(3) A judge should manage his investments and other financial interests to minimize the number of cases in which he is disqualified.

(4) Neither a judge nor a member of his family residing in his household should accept a gift from anyone except as follows:

(a) A judge may accept a gift incident to a public testimonial to him; books supplied by publishers on a complimentary basis for official or academic use; or an invitation to the judge and his spouse to attend a bar-related function, a cultural or historical activity, or an event related to the economic, educational, legal, or governmental system, or the administration of justice;

(b) A judge or a member of his family residing in his household may accept ordinary social hospitality; a gift, favor or loan from a friend or relative; a wedding, engagement or other special occasion gift; a loan from a lending institution in its regular course of business on the same terms generally available to persons who are not judges; or a scholarship or fellowship awarded on the same terms applied to other applicants;

(c) Other than as permitted under subsection C.(4)(b) of this Canon, a judge or a member of his family residing in his household may accept any other gift only if the donor is not a party presently before him and, if its value exceeds $500, the judge reports it in the same manner as he reports compensation in Canon 6C.

(5) For the purposes of this section "member of his family residing in his household" means any relative of a judge by blood or marriage, or a person treated by a judge as a member of his family, who resides in his household.

(6) A judge is not required by this Code to disclose his income, debts or investments, except as provided in this Canon and Canons 3 and 6.

(7) Information acquired by a judge in his judicial capacity should not be used or disclosed by him in financial dealings or for any other purpose not related to his judicial duties.

D. Fiduciary activities. A judge should not serve as the executor, administrator, trustee, guardian or other fiduciary, except for the estate, trust or person of a member of his family, and then only if such service will not interfere with the proper performance of his judicial duties. "Member of his family" includes a spouse, child, grandchild, parent, grandparent or any other relative of the judge by blood or marriage. As a family fiduciary a judge is subject to the following restrictions:

(1) He should not serve if it is likely that as a fiduciary he will be engaged in proceedings that would ordinarily come before him, or if the estate, trust or ward becomes involved in adversarial proceedings in the court on which he serves or one under its appellate jurisdiction.

(2) While acting as a fiduciary a judge is subject to the same restrictions on financial activities that apply to him in his personal capacity.

E. Arbitration. A judge should not act as an arbitrator or mediator. However, an emergency justice or judge of the Appellate Division designated as such pursuant to Article 6 of Chapter 7A of the General Statutes of North Carolina, and an Emergency Judge of the District Court or Superior Court commissioned as such pursuant to Article 8 of Chapter 7A of the General Statutes of North Carolina may serve as an arbitrator or mediator when such service does not conflict with or interfere with the justice's or judge's judicial service in

emergency status. A judge of the Appellate Division may participate in any dispute resolution program conducted at the Court of Appeals and authorized by the Supreme Court.

F. Practice of law. A judge should not practice law.

G. Extra-judicial appointments. A judge should not accept appointment to a committee, commission, or other body concerned with issues of fact or policy on matters other than those relating to cultural or historical matters, the economic, educational, legal or governmental system, or the administration of justice. A judge may represent his country, state or locality on ceremonial occasions or in connection with historical, educational or cultural activities.

Canon 6

A judge should regularly file reports of compensation received for quasi-judicial and extra-judicial activities.

A judge may receive compensation, honoraria and reimbursement of expenses for the quasi-judicial and extra-judicial activities permitted by this Code, subject to the following restrictions:

A. Compensation and honoraria. Compensation and honoraria should not exceed a reasonable amount.

B. Expense reimbursement. Expense reimbursement should be limited to the actual cost of travel, food and lodging reasonably incurred by the judge and, where appropriate to the occasion, by his spouse. Any payment in excess of such an amount is compensation.

C. Public reports. A judge shall report the name and nature of any source or activity from which he received more than $2,000 in income during the calendar year for which the report is filed. Any required report shall be made annually and filed as a public document as follows: The members of the Supreme Court shall file such reports with the Clerk of the Supreme Court; the members of the Court of Appeals shall file such reports with the Clerk of the Court of Appeals; and each Superior Court Judge, regular, special, and emergency, and each District Court Judge, shall file such report with the Clerk of the Superior Court of the county in which he resides. For each calendar year, such report shall be filed, absent good cause shown, not later than May 15th of the following year.

Canon 7

A judge may engage in political activity consistent with his status as a public official.

The provisions of Canon 7 are designed to strike a balance between two important but competing considerations: (1) the need for an impartial and independent judiciary and (2) in light of the continued requirement that judicial candidates run in public elections as mandated by the Constitution and laws of North Carolina, the right of judicial candidates to engage in constitutionally protected political activity. To promote clarity and to avoid potentially unfair
application of the provisions of this Code, subsection B of Canon 7 establishes a safe harbor of permissible political conduct.

A. Terminology. For the purposes of this Canon only, the following definitions apply.

(1) A “candidate” is a person actively and publicly seeking election to judicial office. A person becomes a candidate for judicial office as soon as he makes a public declaration of

candidacy, declares or files as a candidate with the appropriate election authority, authorizes solicitation or acceptance of contributions or public support, or sends a letter of intent to the chair of the Judicial Standards Commission. The term "candidate" has the same meaning when applied to a judge seeking election to a non-judicial office.

(2) To "solicit" means to directly, knowingly and intentionally make a request, appeal or announcement, public or private, oral or written, whether in person or through the press, radio, television, telephone, Internet, billboard, or distribution and circulation of printed materials, that expressly requests other persons to contribute, give, loan or pledge any money, goods, labor, services or real property interest to a specific individual's efforts to be elected to public office.

(3) To "endorse" means to knowingly and expressly request, appeal or announce publicly, orally or in writing, whether in person or through the press, radio, television, telephone, Internet, billboard or distribution and circulation of printed materials, that other persons should support a specific individual in his efforts to be elected to public office.

B. Permissible political conduct. A judge or a candidate may:

(1) attend, preside over, and speak at any political party gathering, meeting or other convocation, including a fund-raising function for himself, another individual or group of individuals seeking election to office and the judge or candidate may be listed or noted within any publicity relating to such an event, so long as he does not expressly endorse a candidate (other than himself) for a specific office or expressly solicit funds from the audience during the event;

(2) if he is a candidate, endorse any individual seeking election to any office or conduct a joint campaign with and endorse other individuals seeking election to judicial office, including the solicitation of funds for a joint judicial campaign;

(3) identify himself as a member of a political party and make financial contributions to a political party or organization; provided, however, that he may not personally make financial contributions or loans to any individual seeking election to office (other than himself) except as part of a joint judicial campaign as permitted in subsection B(2);

(4) personally solicit campaign funds and request public support from anyone for his own campaign or, alternatively, and in addition thereto, authorize or establish committees of responsible persons to secure and manage the solicitation and expenditure of campaign funds;

(5) become a candidate either in a primary or in a general election for a judicial office provided that he should resign his judicial office prior to becoming a candidate either in a party primary or in a general election for a non-judicial office;

(6) engage in any other constitutionally protected political activity.

C. Prohibited political conduct. A judge or a candidate should not:

(1) solicit funds on behalf of a political party, organization, or an individual (other than himself) seeking election to office, by specifically asking for such contributions in person, by telephone, by electronic media, or by signing a letter, except as permitted under subsection B of this Canon or otherwise within this Code;

(2) endorse a candidate for public office except as permitted under subsection B of this Canon or otherwise within this Code;

(3) intentionally and knowingly misrepresent his identity or qualifications.

D. Political conduct of family members. The spouse or other family member of a judge or a candidate is permitted to engage in political activity.

Limitation of Proceedings

Disciplinary proceedings to redress alleged violations of Canon 7 of this Code must be commenced within three months of the act or omission allegedly giving rise to the violation. Disciplinary proceedings to redress alleged violations of all other provisions of this Code must be commenced within three years of the act or omission allegedly giving rise to the violation; provided, however, that disciplinary proceedings may be instituted at any time against a judge convicted of a felony during his tenure in judicial office.

Scope and Effective Date of Compliance

The provisions of Canon 7 of this Code shall apply to judges and candidates for judicial office. The other provisions of this Code shall become effective as to a judge upon the administration of the judge's oath to the office of judge; provided, however, that it shall be permissible for a newly installed judge to facilitate or assist in the transfer of his prior duties as legal counsel but he may not be compensated therefor.

CREED OF THE MAGISTRATE
"ON THE OTHER SIDE OF THE DESK"

Have you ever thought just a wee little bit
Of how it would seem to be a misfit
And how you would feel if YOU had to sit
On the other side of the desk?

Have you ever looked at the man who seemed a bum,
As he sat before you, Nervous - Dumb
And thought of the courage it took to come
To the other side of the desk?

Have you thought of his dreams that went astray
Of the hard, real facts of his every day,
Of the things in his life that made him stay
On the other side of the desk?

Have you thought to yourself, It could be I
If the good things of life had passed me by,
And maybe I'd bluster and maybe I'd lie
On the other side of the desk.

Did you make him feel he was full of greed,
Make him ashamed of his race or creed,
Or did you reach him in his need
On the other side of the desk.

May God give us wisdom and lots of it,
And much compassion and plenty of grit,
So that we may be kinder to those who sit
On the other side of the desk.

Magistrate Otto R. Morgan

Dona Lewandowski
Institute of Government
April, 2007

Understanding and Avoiding Bias and Stereotyping in the Judicial Process

Definitions

Bias	A tendency to favor or disfavor; a preference
Stereotype	Belief about a personal attribute about a group of people
Prejudice	Negative prejudgment of a group and its members
Discrimination	Unjustifiable negative behavior toward a group or its members

Every human being has biases.

We like chocolate ice cream better than vanilla, or we don't.
We like classical music, or we don't.
We like NASCAR, or we don't.

Every human being makes use of stereotypes.

And think goodness we do. The ability to quickly classify a stranger as friend or foe and act accordingly is a fundamental part of being human, and has allowed our species to survive. Stereotypes are a sort of "mental shortcut" that allow us to make predictions and act accordingly. When we see a three-year-old head toward a busy street, we make rapid assumptions about her ability to negotiate traffic and prevent her from going further.

This example illustrates an important aspect of stereotypes: they are often accurate. Often, our beliefs about groups of people are based on factual knowledge as well as experience over time, and they may be scientifically demonstrated to represent accurate descriptions of the group. Women (as a group) are not as physically strong as men (as a group). People over 65 (as a group) are less active than those in their twenties (as a group).

Stereotypes are an example of a natural and useful mechanism for coping with a complex world. Our brains naturally sort things into categories and then manipulate the categories, rather than attempting to think about individual items. "Fruit is good for you" is much easier to grasp than "this individual banana is likely to be high in potassium, which helps your cells maintain proper water balance."

Nevertheless, when someone suggests that we are biased, or guilty of stereotyping, we are unlikely to feel complimented. These terms are often employed in our society when a person expresses negative beliefs about a group, or when a person moves from making general statements about a group to specific statements about an individual. A belief that "women are weak" may lead to a rule that women are not allowed to train as fire fighters. In such a case, the stereotype has resulted in behavior that is unfavorable to individual women, no matter how strong they might be, based on their membership in the group "women". Here, stereotyping has turned to prejudice, and discrimination is the result.

Social psychologists have extensively studied bias and stereotypes for many decades, and as a consequence we know a lot about how they affect human behavior.

Although bias is a universal human condition, we do not like to see ourselves as being biased in our perceptions, and we are often unconscious of our biases.

The "Hannah" study: Researchers asked students at Princeton University to watch a videotape of a 4th-grade girl named Hannah. She was portrayed in one of two ways: as a poor child living in a depressed urban area, or as a wealthy child in an affluent suburban setting. Students were asked to guess Hannah's ability level in various academic areas, and both groups responded that they thought her to be at grade level. These students were then shown a second video tape, this time of Hannah taking an oral achievement test, in which she answered some items correctly and some incorrectly. This time, all students saw the same videotape. Students who had previously seen Hannah as an affluent child rated her as having superior ability, and remembered that she had gotten most questions correct. Those students who had prior exposure to Hannah as a poor child believed

that she missed more questions than she got correct, and rated her ability level as low.

The "Hannah" study shows us that students resisted drawing conclusions about her ability level when it was obvious that such conclusions would be without evidence; when ambiguous evidence was offered, however, students believed their judgments to be factually based, when in fact they were influenced by their perceptions of Hannah's socioeconomic status.

Social psychologists have conducted thousands of studies like the Hannah study, demonstrating consistent and powerful effects of race and gender in addition to a wide range of other attributes. Recently, research techniques similar to the implicit assumptions test taken by students in this class have revealed that individuals may behave in a biased way while completely unaware of this factor in their decision-making. One study placed experimental subjects in a simulated environment used to train police officers, in which they had to make a immediate decision whether to shoot a suddenly-appearing image. Some images were holding guns, while others were holding cell phones or wallets, and yet others were holding nothing. Black images were shot at faster than White images, and Black images were more often shot in error. The researchers believed that this deadly bias was surprising to and completely unintended by the subjects.

In-group/out-group identification:

One of the most powerful forces in determining how we deal with others is whether we believe them to be like us, or different from us. Human beings seem programmed to seize upon some pretext for classifying people into "us" and "them". We use religion, race, sex, occupation, education, region, age, and we also use much more minute aspects: dog lovers, hunters, "creative types", slobs—many of us move through the world busily classifying others into groups. Social scientists can tell us a lot about what happens next. . .

The mere experience of being a member of a group tends to generate a positive perception of that group. Young children, asked "which are better, the children at your school or the children at {name of neighborhood school}?" will often respond, "My school." The influence of group membership may be identified even when membership is based on something as minor as a shared birthday, or having the same last digit in a drivers' license number. Studies have

shown that people divided into these groups and then asked to divide resources between groups consistently award “their” group more resources.

We tend to see what we expect to see. Numerous studies have demonstrated that our expectations have a huge impact on our perceptions. One writer has described this as a “heat-seeking missile in search of confirming information.” The result is that our beliefs about our group, and about others, are apparently confirmed, over and over again.

In our own group, we tend to perceive individuals in the group with particularity. If they behave in a manner that surprises us, our tendency is to find a way to view that in a positive, or at least less negative manner.

Our perception of other groups, however, is much less individualized. We tend to believe that individuals in other groups are “all the same,” and to view their behavior in a way that maintains our beliefs. If we believe Jews are greedy, for example, we will be inclined to interpret ambiguous behavior in a way that supports that belief. Confronted with a large donation to charity, we might assume that the act was motivated by a desire to impress others, or to receive political favors. The same act by a member of our group might be viewed as an act of incredible generosity. Faced with a number of instances of Jewish people behaving in a generous way, a typical reaction is to form a “subtype”—thus, we might think, “most Jewish people are greedy, but the Jews that live in my town are not like the others.”

The “just world” phenomenon. The research demonstrating the just-world phenomenon is surprising to many of us. . These and many other studies may help explain why so often victims are blamed for their misfortunes. The theory is that we have a need to believe that we live in a just world, in which good is rewarded and bad is punished. Seeing an apparently blameless victim may make us uncomfortable and cause us to shade our perceptions so as to make her fate more predictable and acceptable.

A related concept arises out of the social science principle that “unequal status breeds prejudice.” Again, confronted with a choice between examining and addressing the reasons for inequality, on the one hand, and finding reasons to believe that the inequality is justified, on the other, humanity has demonstrated a consistent preference for the latter. Throughout history, lower-status individuals have been

perceived as having characteristics deserving of that status—lazy, helpless, weak, emotional—the list is long.

The self-fulfilling prophecy cannot be overestimated in explaining how we maintain our beliefs about ourselves and others. Numerous studies have shown that our perceptions, and those of others, are in large part determined by what we expect. Consider three studies:

Research subjects are told that researchers wish to study the reaction of others to disfigurement. They are given a facial scar created with theatrical make-up, but unbeknownst to them, the scar is removed before they leave the room. As a result, they believed throughout the social encounters that followed that they were badly scarred. They subsequently reported that the people with whom they interacted were tense, distant, and patronizing. Their perception was that their scar greatly influenced how they were treated by others.

In the second study, women and men with similar math backgrounds were given a difficult math test. One group of women were told that women and men typically performed the same on the test, while another group were told that men usually performed much better. The first group of women scored dramatically higher than the second group of women.

A classic 1968 study involved giving teachers of elementary school children false information about test results. The teachers were told that certain children (actually, randomly selected) had been found to be on the brink of rapid intellectual growth. At the end of the experimental period, a number of these children demonstrated academic achievement much in excess of that of the sample group. Experimenters hypothesized that teacher expectations had created differences in treatment leading to enhanced achievement.

What's a magistrate to do?

If magistrates, like other human beings, are subject to bias and stereotypes at every turn, and if unconscious bias lurks even when the conscious mind believes itself to be completely fair and objective, what hope is there for an official who is "neutral and detached"? Fortunately, researchers have identified a number of steps that have been proven to loosen the hold of bias on the decision-making process.

1. Take time to carefully note the differences between yourself and the people before you. Resist the temptation to avoid thinking about race or gender or other differences out of a misplaced concern that recognizing these differences is somehow improper. In fact, recognizing these differences, and the potential they present for biased decision-making, is ESSENTIAL to reducing their impact.

2. Build in accountability for your decisions. State your reasons explicitly. Watch for patterns. Recognize that "going with your gut" or "just having a feeling" is an invitation for bias.

3. Research has repeatedly shown that negative bias is more strongly demonstrated when people are angry, annoyed, irritable, upset, or tired. It makes no difference that the person subject to bias is unrelated to the reasons for the negative emotions. The presence of unpleasant emotions alone predict heightened negative bias.

4. Bias is also more strongly displayed following threats to one's ego. A 1984 study demonstrated that having a clumsy accident immediately before evaluating someone's work resulted in lower evaluations. In another study, students were given feedback on a measure of creativity and then questioned about their university and a nearby university. Students who were told they had done poorly on the measure rated their school more highly and the other school less highly than the other students. Apparently, if you feel badly about yourself, you may tend to pump up your "in group" and take shots at the "out group" as a way of making yourself feel better.

5. Avoid the temptation to "lean" toward a decision before all the facts are in. Consciously force yourself to keep an open mind.

6. If you suspect that you may tend toward bias in a particular situation, try imaging the parties reversed. Check to see if you find yourself inclined toward a different decision.

7. The best advice (with credit to Professor Jack Glaser, Goldman School of Public Policy, UC Berkely):

Intention

Attention

Effort

Tab:

Contracts

Joan Brannon
Institute of Government
4/6/2005

SELECTED ISSUES IN CONTRACT LAW

I. Contracts by Minors.

A. Video problem: Judgment for ___ Ms. Tanner ___ John Dean

Reason: _____

_____

_____.

B. General rule: contracts entered into by minor are voidable at option of minor.

C. Exceptions:

1. Contracts for necessaries.

   a) Whether necessaries doctrine applies depends on facts and circumstances of each case. Necessaries include food, clothing, medical care, and shelter, but are not limited to items and services absolutely necessary for physical survival. Also includes property and services reasonably necessary to enable minor to earn money needed to buy necessities of life.

   b) If recovery is based on necessaries doctrine, minor is liable only for reasonable value of goods or services involved, not for contract value.

2. Statutory authorization

3. Contracts entered into by emancipated minors. A minor may become emancipated in either of two ways:

   a) Judicial decree under G.S. Ch. 7A, Art. 56.

   b) Marriage.

4. Ratification: minor approves contract after age 18. May be express approval but is often implied approval (e.g., ratification by conduct).

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II. Rules Governing Contracts By Minors.

A. If action on contract is brought against person who was minor at time contract was formed, defendant has burden of proving minority as defense.

1. Contract is voidable at minor's option, not void. Minor is thus entitled to enforce contract or, in the alternative, to cancel contract. Contract is valid, however, until and unless minor cancels. Cancellation may be express or implied and must occur either before minor becomes 18 or within reasonable time thereafter.

2. Fact that minor lied about age is not relevant to minor's right to cancel contract.

3. Effect of cancellation: As much as possible, parties are to be restored to the same position as before they entered into contract.

a) Creditor must return to minor any money received from him.

b) Minor must return goods received to creditor, if he still has them.

c) If minor has exchanged goods for other property, may be required to turn over that property to creditor.

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PROBLEMS
CONTRACTS WITH MINORS

1. Plaintiff, Ruby Teak, brought this action to recover money paid under a contract with Redway Tanning Salon. She testified to the following facts: She saw an ad advertising Redway's Tanning Salon in the newspaper about one year ago, shortly after she'd had her 17th birthday. She went to an open house at the Salon, where she learned that a one-year membership--entitling her to an unlimited number of visits--cost $250. Ruby joined up that same day, entering into a written contract by which she agreed to make 10 monthly payments of $25. She quickly became disenchanted with the Salon, however, when she began to hear about the bad health effects of the tanning booths. She asked about canceling the contract, but Redway told her that they'd take her to court if necessary. Shortly after she became 18, a lawyer told Ruby that she had a right to cancel because she was a minor when she entered into the contract. Ruby wrote Redway, telling them that she was canceling the contract and demanding her money back. At the time she wrote the letter, Ruby had been eighteen for about one month, and she'd paid $225 of the $250 due under the contract.

   Defendant, Redway Tanning Salon, does not dispute the facts set out in Ruby's testimony, but Redway's lawyer points out that Ruby is 18 now, and that she was 18 when she wrote the cancellation letter. Redway also points out that their facilities were open to Ruby for the entire period of her membership, and that she used the facilities on several occasions. Redway is willing to excuse Ruby from the remainder of her contract, but says there's no way they should also have to refund her money.

   Judgment for ___ Ruby ___ Redway

   Reason: _____

   _____

   _____.

2. Plaintiff Fast Eddie has brought a lawsuit to recover money owed. Eddie testifies that he sold Joe a vintage 1968 Mustang on May 4, 2004, for a mere $1,450. Joe has made a few payments here and there, but still owes $1,200. Eddie says he knew Joe was underage, but Joe told Eddie that his wife and child were depending on him to "bring home the bacon," and that he needed the car in order to get to the construction job he was getting ready to start.

   Defendant Joe says that he doesn't think he should have to pay any more for the car than he's already paid, because he has had to spend another $1,000 just to keep the car running.

   Judgment for ___ Fast Eddie ___ Joe

   Reason: _____

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   _____.

3. Plaintiff, Dr. Hardaway, tells you that Jennifer brought her dog to his veterinarian's office for treatment. The animal had to have surgery, and Jennifer agreed to pay Dr. Hardaway what she owed him a little bit at a time. Even last week, when she was served with papers for this lawsuit, she called the doctor and said she intended to pay him everything she owes. Unfortunately, Jennifer's deed is not as good as her word--she haven't made a single payment since the doctor operated on Fluffy. Plaintiff is seeking to recover $982.

   Jennifer testifies that she heard on TV that minors don't have to pay their debts, so long as they're under 18 when they make a contract. Jennifer just turned 18 last month, so she was 17 when Dr. Hardaway treated Fluffy. She says she hopes she can pay Dr. Hardaway sometime, but she just can't afford it right now.

   Judgment for ___ Dr. Hardaway ___ Jennifer

   Reason: _____

   _____

   _____.

4. Plaintiff Bob Hopewell testifies that defendant, Mike Hardy, buys gas at Bob's gas station all the time, and Bob has always allowed him to put it on account. Bob says he knows Mike's been on his own since his parents died, and that he needs the gas to get to work. Bob got a letter from a lawyer two weeks ago, saying that Mike isn't 18 yet and that he's decided to cancel the account. Bob points out that Mike has already used up the gas, so if the law really allows Mike to do that, Bob will have to write off $224.35.

   Defendant Mike Hardy's lawyer offers into evidence Mike's birth certificate, showing that he will be 18 in a few months.

   Judgment for ___ Bob Hopewell ____ Mike Hardy

   Reason: _____

   _____

   _____.

III. Agency.

A. Video problem: Judgment for

___ Honor Bright ___ Mrs. Connors ____ Mr. Connor

Reason: _____

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_____.

B. An "agent" is a person who has the power to contract or otherwise act on behalf of another person (called a "principal"). This power may be created in either of two ways:

1. Agent may be expressly or impliedly authorized by the principal to act on his behalf.
2. Even when principal has not actually given agent authority to act for him, if principal has given others the impression that agent has such authority, principal will be bound by agent's contracts ("apparent authority").
3. Even when agent acts without authority, principal may create enforceable contract by ratifying the agreement.

C. Anytime you hear a contract case in which the person who actually entered into the contract is not the party sought to be held responsible, you should consider the possibility of an agency relationship.

NOTES:

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D. When an agent is involved in a contract, the following rules apply:

1. If agent acted with permission of principal, and identity of principal is known, PRINCIPAL IS LIABLE AND AGENT IS NOT.

2. If agent acted with permission of principal, but identity of principal is not known, THIRD PARTY CAN SUE EITHER AGENT OR PRINCIPAL.

3. If agent acted without permission of principal, but had apparent authority, THIRD PARTY CAN SUE PRINCIPAL, AND PRINCIPAL CAN SUE AGENT.

4. If agent acted without authority of any sort, THIRD PARTY CAN SUE ONLY AGENT.

5. Sometimes agent is wearing two hats, acting as agent for a principal and also contracting on his own behalf. In this case, BOTH PRINCIPAL AND AGENT ARE LIABLE ON THE CONTRACT.

E. There is no special rule for spouses. Marriage does not create an agency relationship. If a plaintiff seeks a judgment against a spouse who was not a party to a contract, based on a contract entered into by the other spouse, the plaintiff must show that the contracting spouse was acting as an agent for the noncontracting spouse. (One exception is suit for unpaid medical bills. Based on spouse's obligation to provide necessaries (not on agency or contract theory), hospital can hold noncontracting spouse liable.)

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AGENCY PROBLEMS

1. Fritz's Fun Frolics has brought an action against Mr. and Mrs. Coupon to recover $1250--the price of twelve made-to-order softball uniforms. Fritz presents evidence showing that Mrs. Coupon came into his store and placed an order for the uniforms. She told Fritz that the uniforms were for a softball team coached by her husband, and that her husband didn't care about color or style, so long as the uniforms fit. Mrs. Coupon told Fritz to send the bill to her.

   Mr. Coupon testifies that the team members had a meeting and agreed they needed new uniforms, since the old ones were in terrible shape. Each team member agreed to pay for his own uniform, but Mr. Coupon agreed to be the one to take care of placing the order and collecting the money. The team broke up before the uniforms arrived, and now no one wants to pay him. Mrs. Coupon had nothing to do with it--Mr. Coupon just had a lot of appointments that day, and so asked his wife to drop by Fritz's and take care of placing the order.

   Mr. Coupon says that everything her husband said is true.

   Judgment for ___ Fritz's Frolics ___ Mrs. Coupon ___ Mr. Coupon

   Reason: _____

   _____

   _____.

2. Rudyard's Magazine Service has brought an action for $350 against Mr. and Mrs. Reader. Rudyard testifies to the following facts: He placed a call to Mr. and Mrs. Reader. Mrs. Reader answered the telephone, and Rudyard made his sales pitch. Mrs. Reader said, "Mr. Reader makes those kinds of decisions in this family. I'll let you talk to him." Rudyard talked to Mr. Reader, and he agreed to purchase $350 worth of magazine subscriptions. Rudyard's offers a three-month Easy-Payment-Plan, but it's not as easy as the Readers' plan--they plan to pay nothing at all.

   Mr. Reader admits that he entered into this verbal agreement, over the telephone, but after he thought it over, he decided to forget the magazines. He's joined a record club instead, and he can't afford both.

   Mrs. Reader says she didn't enter into this contract--her husband did. Furthermore, it never occurred to her that he would actually fall for this guy's sales pitch. She'd just finished talking to him about how he needed to control his mail-order spending binges.

   Judgment for ___ Rudyard's ___ Mrs. Reader ___ Mr. Reader

   Reason: _____

   _____

   _____.

3. Amanda Plunger decided she was sick of her old, drab bathroom. She signed her husband's name to a contract to have the bathroom remodeled. She knew the company would do a credit check, and she doesn't have any credit to speak of. Furthermore, she knew her husband, John, would raise the roof if she talked to him about it beforehand, so instead she decided to surprise him with it. The company has sued both Amanda and John. Amanda says she doesn't have any money. John says he had nothing to do with this. In fact, when the workmen showed up to do the work, he refused to let them in the door.

Judgment for ___ Company ___ Amanda ___ John

Reason: _____

_____

_____.

IV. Statutes of Limitation.

A. Video problem: Judgment for ___ Woody's Furniture ___ John Dean

Reason: _____

_____

_____.

B. General Rules:

1. Statute of limitation is affirmative defense. Defendant has burden of pleading it and waives his right to rely on it if he does not raise it. Burden shifts to plaintiff to show action is not barred by statute of limitations, once defense is raised.

2. If action is barred by statute of limitation, and defense is properly raised, court has no choice about how to rule: must dismiss claim.

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3. Statute of limitation begins to run at first moment that party has grounds to bring lawsuit. In contract action, that means clock begins to tick when contract is breached. It is of no significance that injured party does not have knowledge of breach. In installment contract, statute of limitation begins to run on each separate payment when it becomes due, unless contract contains acceleration clause and creditor decides to exercise his option to invoke the acceleration clause.

4. Statute of limitations does not begin to run if, at time claim comes into existence, injured party is

   a) under eighteen years of age,

   b) insane, or

   c) mentally incompetent.

   d) Clock does not stop ticking, however, if party becomes insane or mentally incompetent after statute has begun to run.

5. Statute of limitation on debt begins to run all over again if:

   a) debtor makes clear, unconditional, written acknowledgment of debt, and signs it. Written promise must be directed to creditor or his agent.

   b) debtor makes payment on debt in manner amounting to acknowledgment of entire debt;

   c) debtor asks creditor not to sue, promises to pay amount owed, and promises not to raise statute of limitations defense if creditor has to file lawsuit. Debtor's request may be oral or written.

C. Statutes of limitation

1. On sealed instrument: ten years. G.S. 1-47(2).

2. On contract for sale of goods: four years. G.S. 25-2-725. NOTE: If contract for sale of goods involves security agreement under seal, statute of limitations is ten, not four, years, unless facts of case do not involve security agreement aspect of contract.

3. On other contracts (services, money lent, etc.): three years. G.S. 1-52.

NOTES:

STATUTE OF LIMITATIONS PROBLEMS

1. On July 14, 2002, Hoss borrowed $150 from Adam, so that he could buy a horse. He promised to repay Adam on or before July 14, 2005, but he never did. Adam brings this small claims action against Hoss. When you hear the case on July 16, 2008, has the statute of limitations run?

   Answer _____.

   Reason: _____

   _____

   _____.

2. On May 30, 2002, Susan Stanly won first prize in a gooseberry pie baking contest. First prize was a 27-day, all-expense paid trip to Europe. Because she was going to be away from home for such a long time, Susan didn't want to impose on her neighbors to feed her seven cats. Consequently, on June 15, 2002, she entered into a contract with Louise Lovemalot, a professional pet-sitter. Under the contract terms, Louise was to feed, play with, and otherwise nurture Susan's cats. The price was to be $10/day ($270), with $70 paid in advance and the balance paid on or before August 4, 2002. Susan left for her trip on July 1, 2002. When she returned, she learned from a neighbor that Louise had come on July 1, and only every other day thereafter. Fortunately, the neighbor had a key to Susan's house and had fed the crying animals on the days the sitter didn't come. On July 5, 2005, Louise sued Susan for the balance due under the contract: $200. On July 11, Susan filed an answer denying that she owed Louise anything, since Louise had breached the contract, and claiming in addition that Louise's claim is barred by the statute of limitations. Susan also filed a counterclaim for the return of her $70 deposit and for an additional $100 representing costs incurred by the neighbor in taking over for the pet-sitter. (Susan had to reimburse her neighbor for this amount.) At trial, Louise claims that Susan's counterclaim is barred by the statute of limitations. How do you rule?

   On Louise's claim:

   Answer:

   _____.

   Reason: _____

   _____

   _____.

   On Susan's counterclaim:

   Answer:

   _____.

   Reason: _____

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_____.

3. Horace entered into a contract with Effie Mae which provided that Horace would paint Effie Mae's house for $450. Horace completed the job in a satisfactory manner, but Effie Mae wasn't able to pay him right away. Horace got tired of waiting for Effie Mae to pay him and had threatened to take her to small claims court when a brick fell on his head as he walked past a tall building. (Effie Mae just happened to work on the 15th floor--law enforcement authorities were suspicious, but nothing was ever proven.) Horace was in a coma for four years, but he's fully recovered now, and he's still determined to get his money. He's filed an action against Effie Mae. She claims the statute of limitations has run, but Horace points out that he's been in a coma. How do you rule on Effie Mae's statute of limitation defense?

   Answer:

   _____.

   Reason: _____

   _____

   _____.

4. On January 14, 2001, Harry Stalwart executed a promissory note in favor of his mother, Stella Stalwart, in the amount of $500. The note was payable on demand. On August 14, 2002, Stella demanded that Harry repay the note, but he just didn't have the money right then. Harry did make a small payment ($50) on February 14, 2003, but he's made no payment since that time, and Stella has brought him to court, filing the lawsuit on April 15, 2006 . Harry's not sure about the right words, but he says he thinks Stella waited too long to sue. What do you think?

   Answer:

   _____.

   Reason: _____

   _____

   _____.

5. On March 22, 2002, Joyce Davenport charged $230 worth of goods at Frank Furillo's Pizza Supply Store. Joyce and Frank were romantically involved at the time, so Frank never pressed Joyce for the money. On March 15, 2006, however, Frank realized that Joyce had never paid him, and that the statute of limitations was about to run out. He told Joyce that he hoped this wasn't going to interfere with their romance, but that he was going to have to sue her. Instead of being angry, Joyce told him that she understood perfectly, but that if Frank would just give her more time to pay, she would promise never to rely on the statute of limitations as a defense. Frank agreed,

but on April 1, 2006, he and Joyce broke up, and he went ahead and filed a lawsuit. Joyce pleaded the statute of limitations. She also points out that she never agreed to anything in writing. How do you rule?

Answer: _____.

Reason: _____

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6. On June 27, 2001, Mrs. Bill sold Stan Green twelve cases of homemade strawberry jam. Green promised to pay Mrs. Bill $236 by the next day, but he never got around to doing it. After waiting a few months, Mrs. Bill wrote Stan, reminding him of the debt. Stan wrote back, in a letter dated November 15, 2001, explaining that he'd just lost his job and had fallen on hard times, but agreeing to pay what he could when he was able. On July 11, 2005, Mrs. Bill lost patience and filed this action. She introduces into evidence the letter Stan wrote her, as well as a letter Stan wrote to his mother (Mrs. Bill's next-door neighbor). That letter, dated July 10, 2002, said, "I feel really bad about not paying Mrs. Bill the $236 I owe her for the jam. I'm determined to pay her the entire amount, plus 10% interest, no later than the end of this year! I hope you'll tell her that I said so." At trial, Stan says, "Obviously, Your Honor, this woman's claim is barred by the statute of limitations." What do you say?

Answer: _____.

Reason: _____

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V. Breach of Warranty.

A. Video problem: Judgment for ___ Runner ___ False Start

Reason: _____

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B. In contracts for sale of goods, one or more of three types of warranties may be involved. The first is an EXPRESS WARRANTY under G.S. 25-2-313.

1. Requirements for express warranty:

a) Seller makes promise, or statement of fact, about goods sold, and this representation is one of reasons buyer decides to buy goods.

b) Instead of making verbal statement, seller may make express warranty by showing buyer a sample or model.

c) Not necessary that seller use words like "guarantee" or "warranty" in order for express warranty to arise, but statement must amount to more than mere "sales talk" (i.e., statement of opinion, rather than fact, about goods).

2. Determination of terms of express warranty, if any, is really determination of terms of contract itself: what kind and quality of good did seller agree to sell?

3. Buyer has burden of showing that seller made express warranty, that goods did not comply with warranty, and that buyer was injured as result. Evidence that goods were sold "as is" is strong evidence that seller made no express warranty.

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C. A second type of warranty often involved in a contract for the sale of goods is the IMPLIED WARRANTY OF MERCHANTABILITY.

1. This term simply means that a seller promises that goods will be fit for the purpose for which they are ordinarily used. If a consumer

buys an oven, for example, the oven must work well enough to to permit the consumer to use it to bake.

2. This warranty is implied; no statement or behavior by the seller is necessary for it to attach. It is implied only in sales by MERCHANTS regularly selling the particular type of goods involved, however. A person who is not a merchant who sells his used car does not make an implied warranty of merchantability.

D. The third type of warranty sometimes involved in a contract for the sale of goods is the IMPLIED WARRANTY OF FITNESS FOR A PARTICULAR PURPOSE.

1. This warranty arises if, at the time of sale, the seller had reason to know that goods were required for particular purpose, and that buyer was relying on seller's skill or judgment to select the appropriate item.

2. This warranty is also implied, but it differs from the warranty of merchantability in that it attaches even when the seller is not a merchant.

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E. Exclusion of warranty:

1. Exclusion of an express warranty doesn't come up often, since the only thing a seller has to do to keep from being bound by an express warranty is to avoid making it in the first place. Often written contracts will contain a broad exclusion clause that specifies no warranty, express or implied, attaches to a particular sale. If consumer credit sale under Retail Installment Sales Act, seller may not exclude express warranty made a part of the basis of the bargain.

2. A merchant may exclude the implied warranty of merchantability if he makes specific reference to the warranty by name in his statement of exclusion. If the exclusion is in writing, it must also be "conspicuous." The reason for this rule is to prohibit "fine print" exclusions of this basic warranty.

3. A seller may exclude the implied warranty of fitness for a particular purpose only in writing, and the exclusion must be conspicuous. It is

not necessary for the exclusion to refer to the warranty by name, however; it may simply refer to "implied warranties."

4. Both the implied warranty of merchantability and the implied warranty of fitness for a particular purpose are waived by the buyer if:

   a) He purchases goods sold "as is," "with all faults," or otherwise clearly identified as goods not subject to any guarantee or warranty.

   b) He either inspects the goods, or refuses to inspect when seller demands that he do so. In this case, however, the buyer waives the implied warranties only as to defects that are discoverable upon inspection.

   c) A prior course of dealing between the parties suggests that exclusion or waiver of warranty is assumed by both to be part of the contract.

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F. Damages in Action For Breach of Warranty:

1. Usually based on difference between fair market value of goods as warranted and fair market value of goods received. G.S. 25-2-714.

   a) Buyer has burden of proof on value of goods warranted and received.

   b) Owner's testimony about what property is worth is some evidence of value.

   c) Contract price is often good evidence of value of goods as warranted.

2. In addition to regular damages, described in Section 1 above, the buyer may also be entitled to incidental and consequential damages. These damages compensate the buyer for injury or loss caused indirectly by a breach of contract. The damages must be reasonably foreseeable by the seller, however; the buyer cannot recover for remote damages connected only tenuously to the original breach.

3. In order to be entitled to any damages for breach of warranty, the buyer must show that he notified the seller of the breach within a reasonable time after he discovers it. G.S. 25-2-607(3). The policy

behind this requirement is to give sellers an opportunity to correct their mistakes before bringing them into court.

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PROBLEMS
BREACH OF WARRANTY

1. Teresa Cook went to Hotwire City to buy a new refrigerator. She especially liked the kind with tempered glass shelves, because she was sick of trying to clean between the wires of the old wire shelves she had in her old refrigerator. She carefully inspected the sample refrigerators on the floor of Hotwire and selected one that she knew would be just perfect for her. It cost $1,600, but it had everything she'd ever wanted in a refrigerator. The salesman filled out the order form and arranged for delivery. When the refrigerator arrived at her home, however, she discovered that the shelves were wire, not tempered glass. Furthermore, Hotwire has run out of glass-shelved refrigerators. Teresa had already sold her old refrigerator and couldn't afford to wait six months for the new stock to come in. What can she do?

   Answer:
   _____.

   Reason: _____

   _____

   _____.

2. Janice was apprehensive about selling her house and buying a mobile home, but Sam the Salesman assured her that the mobile home she was looking at was in great condition and would last a lifetime. It didn't. Three years after she bought it, she had to pay repair bills in the amount of $1,300. She's sued Sam for that amount. Who wins?

   Judgment for ___ Janice ___ Sam the Salesman

   Reason: _____

   _____

_____.

3. Lynn wanted to buy her husband a computer so that he could write that book he's always talking about, but she didn't know a thing about computers. She went out to Computer Hut and advised the salesman of her ignorance. She explained about what her husband would use the computer for and told the salesman that she would have to rely on his knowledge in picking out the right computer. The salesman sold her a computer that was adequate for the job, but he also sold her a spreadsheet program (for $200) that allowed her husband to do everything <u>but</u> word processing. The salesman told Lynn that Computer Hut excluded all express and implied warranties. Lynn later sold the program through an ad in the paper for $100. The word processing program she should have bought costs $150. Lynn is suing for $50. Computer Hut asserts in defense: (1) Hut's exclusion of warranty; and (2) Lynn's opportunity to inspect the program.

   Judgment for ___ Lynn ___ Computer Hut

   Reason: _____

   _____

   _____.

4. Larry bought a kitchen mixer at a yard sale from his neighbor, Hank. He paid $10 for it and is presently using it as a rather ugly paperweight, since it is useful for nothing else. Larry testifies that Hank told him that the mixer worked like a charm, but Hank insists he made no such statement. Anyway, says Hank, there's no such thing as an enforceable express warranty when goods are sold second-hand. Larry says that even if you don't believe his testimony about Hank's statements, he is entitled to recover because there is a clear breach of the implied warranty of merchantability--after all, the thing simply doesn't work.

   Judgment for ___ Larry ___ Hank

   Reason: _____

   _____

   _____.

5. Adelle bought a used car from Patsy's Pre-Owned Pretties. Patsy told Adelle that the car had been driven only to church and back by its previous owner, a little old lady, and that the car was in sound mechanical condition, with the only defects being that the radio and dash clock didn't work. Patsy urged Adelle to have the car looked over by a mechanic, but Adelle didn't want to spend money on that. She didn't even take it for a test drive before she bought it. As a matter of fact, she didn't take it for a test drive <u>after</u> she bought it, since it wouldn't start. Adelle wants a full refund, since the car as it actually is is a worthless piece of junk. Patsy says that since Adelle had a

chance to inspect the car no warranties attached. Adelle says she would have had it inspected if Patsy hadn't lied to her. How do you rule?

Judgment for ___ Adelle ___ Patsy's Pre-Owned Pretties

Reason: _____

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_____.

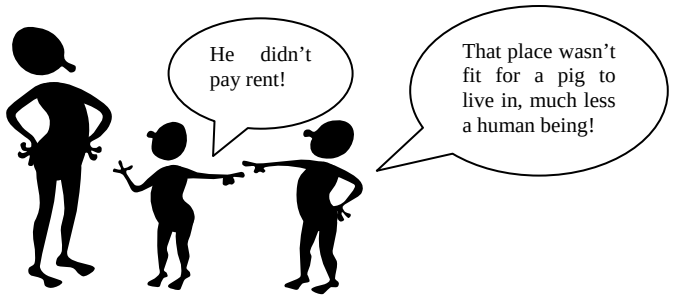
Tab:

Civil Procedure

SELECTED ISSUES IN SMALL CLAIMS PROCEDURE

I. Counterclaims

A. A defendant in a small claims action may file a counterclaim (G.S. 7A-220) so long as it meets the $5,000 jurisdictional requirements. A counterclaim is no different from a claim asserted in a complaint--it is called a "counterclaim" only because the defendant, rather than the plaintiff, is asking for relief. When the defendant in a small claims case files a counterclaim, the magistrate is really hearing two cases at the same time.



B. A counterclaim *must be in writing*, and it must be *filed in the clerk's office before trial.* A copy should also be given to the plaintiff before trial. If a counterclaim is filed shortly before the trial, it may be necessary to grant a continuance so that the plaintiff will have time to prepare a defense against the counterclaim.

C. The rules of civil procedure (G.S. 1A-1, Rule 13) allow the defendant to file any claim he has against the plaintiff in the form of a counterclaim, whether or not defendant's claim has anything to do with plaintiff's claim. A counterclaim usually relates to the same facts involved in the plaintiff's complaint, but the law does not require this.

NOTES:

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D. Because the judge is really hearing two cases when he or she hears a case involving a counterclaim, it is important that the judge keep in mind which party has the burden of proving what issues.

Example:

Landlord must prove:		Tenant must prove:
__ Landlord-tenant relationship	___	Landlord failed to provide
__ Terms of lease		fit premises
__ Failure to pay rent	___	FRV of property as
__ Demand for rent		warranted
__ Waited 10 days before	___	FRV of property in unfit
filing action		condition

This task is made more complicated by the fact that each party may also introduce evidence in defense.

E. A court should enter one judgment in a case involving a counterclaim. If the court finds that both parties are entitled to recover, the smaller amount awarded is offset against the larger amount awarded, so that a money judgment is entered against only one party, for the amount of the difference between the two sums. When a judge enters this type of judgment, he should clearly indicate what issues were resolved in favor of each party. See example, next page.

F. G.S. 7A-219 provides that the general rule of civil procedure about compulsory counterclaims does not apply to small claims cases. Therefore, failure to file a counterclaim in a small claims action or failure by defendant to appeal a small claim does not bar what would be a compulsory counterclaim from being filed as a separate action.

Example: Landlord files an action for summary ejectment and past-due rent. The tenant does not file a counterclaim, and does not appeal the decision in favor of the landlord. A few months later, the tenant files an action seeking return of his security deposit. Although he could have brought this action as a counterclaim in the original lawsuit (the landlord had already failed to account for the deposit by the time the first action was brought), he was not required to do so. The tenant is free to bring his claim as a separate action rather than as a counterclaim if he chooses.

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II. Order of Presentation.

A. N.C.G.S. 7A-222 in pertinent part provides:

> "At the conclusion of plaintiff's evidence the magistrate may render judgment of dismissal if plaintiff has failed to establish a prima facie case. If a judgment of dismissal is not rendered the defendant may introduce evidence. At the conclusion of all the evidence the magistrate may render judgment or may in his discretion reserve judgment for a period not in excess of 10 days."

B. In most courts, there is a formal procedure for the order in which evidence is introduced.

1. Plaintiff testifies.
2. Defendant is allowed to ask plaintiff questions.
3. Plaintiff produces his or her witnesses and asks them questions.
4. Defendant is allowed to ask the witnesses questions.
5. Magistrate decides whether plaintiff has established a prima facie case.
6. If case is not dismissed, defendant testifies.
7. Plaintiff is allowed to ask the defendant questions.
8. Defendant questions defense witnesses.
9. Plaintiff is allowed to question defense witnesses.
10. Court enters judgment.

C. This procedure often does not work well in small claims court. The parties are unfamiliar with the rules, and attempts to force compliance sometimes are so distracting that the judge decides it's not worth it. Many judges use a modified procedure, as follows:

1. The magistrate says to plaintiff: "Tell me about your case."
2. The magistrate asks any questions necessary to clarify the plaintiff's testimony and obtain essential facts.
3. The magistrate tells the defendant that he will have an opportunity to tell his side of the story in a moment, but explains that now is the time at which he can tell the court what questions he would like the judge to ask the plaintiff.
4. The judge determines whether the plaintiff has proven his case by the greater weight of the evidence, assuming that everything presented is accepted as true. If the answer is no, the judge dismisses the case without hearing from the defendant. If the answer is yes, the question becomes whether the defendant has a defense.
5. The magistrate says to the defendant: "Tell me what you have to say in defense against plaintiff's testimony."
6. The magistrate asks any questions necessary to clarify defendant's testimony and obtain essential facts.

7. The magistrate explains to the plaintiff that now is the time at which he can tell the court what questions he would like the judge to ask the defendant.

8. The magistrate asks if either party has any further testimony to offer.

D. Remember that plaintiff has the burden of proving the case, and that defendant does not have to introduce any evidence at all until plaintiff has established a prima facie case.

E. Establishing a prima facie case means introducing enough evidence to win, assuming you believe everything the plaintiff says. If plaintiff does not produce enough evidence to win, you may dismiss the case without ever asking the defendant to tell his side of the story.

F. Only after plaintiff has introduced enough evidence to win does the defendant need to put on evidence.

G. Statutory oath: "You swear (or affirm) that the evidence you shall give to the court in this cause now on trial, wherein A.B. is plaintiff and C.D. defendant, shall be the truth, the whole truth, and nothing but the truth; so help you, God." (Leave out "so help you, God" when affirming.)

Example: Plaintiff testifies that he rents property to defendant, that there is no written lease, and that the only terms of the lease are that defendant will pay rent in the amount of $700 on the first of each month. Defendant did not pay rent for the current month. That concludes plaintiff's testimony.

The magistrate asks: "Did you talk to the defendant about paying the rent? What did you say?" The plaintiff answers, "No, I'm sick of messing with him. I just came right down here and filed this lawsuit." The magistrate dismisses the landlord's claim for possession.

If the plaintiff has asked for money damages for unpaid rent as well, the magistrate cannot dismiss that claim: the plaintiff has testified (1) to the existence of a valid contract obligating the defendant to pay him $700/month and (2) that defendant has not paid him. That testimony establishes a prima facie case for money owed. Thus the magistrate should turn to the defendant and say, "I am dismissing plaintiff's claim for possession of the property, because there is no evidence that the landlord made an appropriate demand for the rent before filing this action. The plaintiff is also seeking damages in the form of past due rent, however. What would you like to tell me in defense of that claim?"

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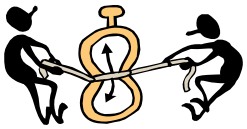
III. Continuances

A. N.C.G.S. 7A-214 provides:



"The time for trial of a small claim action is set not later than 30 days after the action is commenced. By consent of all parties the time for trial may be changed from the time set. For good cause shown, the magistrate to whom the action is assigned may grant continuances from time to time."

B. Continuances are granted on request of one party without consent of other parties.

C. "Continuances are not favored and the party seeking a continuance has the burden of showing sufficient grounds for it." [Shankle v. Shankle, 289 N.C. 473, 223 S.E.2d 380 (1976)]

D. "Considering the myriad circumstances which might be urged as grounds for a continuance, [Rule 40] wisely makes no attempt to enumerate them but leaves it for the judge to determine, in each case, whether 'good cause' for a continuance has been shown." [Id.]

E. "[B]efore ruling on a motion to continue the judge should hear the evidence pro and con, consider it judicially and then rule with a view to promoting substantial justice." Id. But a judge has authority to grant a continuance after hearing from only one party.

For example, if Mr. Jones, a plaintiff in a case scheduled for next Tuesday, calls to say that he has had a heart attack and is scheduled for bypass surgery next Tuesday, a magistrate is not required to hold a hearing before ruling on Mr. Jones' request for a continuance.

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F. "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 in good faith. In reaching its conclusion the court should consider all the facts in evidence, and not act on its own mental impression or facts outside the record. . . . The motion should be granted where nothing in the record controverts a sufficient showing made by the moving party. . . . The chief consideration [in deciding whether to grant a continuance] is whether the grant or denial of a continuance will be in furtherance of substantial justice." [Id. (quoting 17 C.J.S. Continuances § 5 (1963))]

G. There is no time limit on the length of a continuance, or any limitation on the number of continuances that may be granted in a particular case. However, small claims cases are intended to be disposed of promptly.

H. The magistrate must give written notice of a continuance to all parties.

Fact situation: Mrs. Smith hired an attorney to defend her in a small claims case scheduled for today. She appears in court to request a continuance, explaining that her attorney is involved in district court at the moment, but hopes to be available after lunch. The plaintiff points out that continuing the case until after lunch will cause him to miss a full day's work. What do you do?

Fact situation: Mrs. Jones, a plaintiff, appears in court on the day of the hearing but asks that you grant a continuance. She explains that she's been watching the other cases and has concluded that she would be better off with a lawyer. She would like a one-week continuance to obtain counsel. The defendant, who has an attorney, objects, pointing out that Mrs. Jones has had plenty of time to hire a lawyer. What do you do?

Fact situation: Ring-a-Ding Telephone and Mrs. Miller, plaintiff and defendant in a lawsuit, ask that you continue the case Ring-a-Ding has brought against Miller for one month. They've worked out a payment plan, and if Miller is able to pay 50% of the amount she owes before the case comes on for trial, Ring-a-Ding will ask for another continuance. Hopefully, Miller will pay off the amount she owes, and Ring-a-Ding at that point will take a voluntary dismissal. What do you do?

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IV. Dismissals Under Rule 41.

A. Voluntary dismissal [Rule 41(a)]: Plaintiff (or defendant asserting counterclaim) may dismiss his action without the court's permission any time before he finishes presenting evidence, by filing a notice of voluntary dismissal.

1. After the plaintiff presents his evidence, he may take a voluntary dismissal only if the defendant agrees to that in writing.

2. The judge has authority to allow plaintiff's request for a voluntary dismissal even after plaintiff has finished presenting his evidence and thus lost his right to dismiss his case. A voluntary dismissal entered by the judge is governed by the same rules as a voluntary dismissal taken by the plaintiff as a matter of right, unless the judge specifies in his order that different rules apply.

   a. Whether to grant a voluntary dismissal is a discretionary decision: the judge must consider all the circumstances and then do what he thinks is right.

   b. A judge should be careful to exercise this power only in the rare "hardship" case. Remember that plaintiff has a responsibility to be ready to go to trial. In deciding whether to grant a voluntary dismissal, a judge should think not only about the hardship to plaintiff if he does not grant a voluntary dismissal, but also about the inconvenience to defendant in having to come to court again.

   c. If the judge grants a voluntary dismissal, he is authorized to impose conditions on his order to lessen the prejudice to defendant (e.g., ordering plaintiff to pay some of defendant's expenses).

Example: Plaintiff, appearing without counsel, indicates that he has finished presenting his evidence. Defendant's counsel quickly points out a number of areas in which plaintiff's case is lacking—although the circumstances cause you to believe that plaintiff is not <u>unable</u> to prove his case, but is instead unprepared, due to the technical nature of the attorney's points.
The plaintiff, having finished with his evidence, is not automatically entitled to take a dismissal without prejudice, but the magistrate has authority to grant one if he believes that justice so requires.

3. A voluntary dismissal is without prejudice unless:

   a) the plaintiff says otherwise when he dismisses the case; or

   b) the judge says otherwise when he dismisses the case; or

   c) the plaintiff has taken a voluntary dismissal of the same case, or a case involving the same claim, once before.

4. Plaintiff has one year from the date he files a voluntary dismissal to file the same lawsuit again. This one-year period applies even if his claim would otherwise be barred by the statute of limitations. If the plaintiff has more than a year before the statute of limitations runs, however, he may wait more than one year to refile his claim. THE ONE-YEAR PERIOD WILL EXTEND THE STATUTE OF LIMITATIONS, BUT IT DOES NOT RESTRICT IT.

Example: John's lawsuit was filed on Jan. 3, one day before the statute of limitations on his claim expired. On Jan. 15 he takes a voluntary dismissal. He may refile his action any time within one year from Jan. 15.

On the other hand, imagine John's lawsuit was filed on Jan. 3, 2008, and that the statute of limitations will expire on Jan. 3, 2010. On Jan. 15, John takes a voluntary dismissal. He may refile his lawsuit at any time before Jan. 3, 2010.

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B. Involuntary dismissals [Rule 41(b)]

1. An involuntary dismissal is entered by the judge, usually over the objection of the plaintiff. There are four grounds for involuntary dismissal:

a) Failure to prosecute (plaintiff doesn't show up for trial, or ask for continuance)(use "Order" form, AOC-G-108);

b) Failure to comply with procedural rules (usually not relevant in small claims court);

c) Failure to comply with court order (usually not relevant in small claims court); or

d) Plaintiff's evidence, taken as true, doesn't entitle him to judgment (i.e., insufficient evidence) (use judgment form).

2. An involuntary dismissal is almost always a dismissal with prejudice. The court has authority, however, to dismiss a case without prejudice, and to specify in its order that the plaintiff has any period of time, up to one year, to re-file his action in a situation when there is a failure to prosecute, but not when insufficient evidence is presented at trial. [88 N.C. App. 568 (1988)]

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Dismissals: Rule 41

	Voluntary	Involuntary
w/out prejudice	-Absolute right if his evidence not finished -with consent of defendant if evidence is finished -allowed by judge (should be limited to hardship case)	Rare, but possible
With prejudice	-If plaintiff or judge says so -Prior dismissal of same claim once before	-Plaintiff fails to prove case -Failure to prosecute

RULE 41 PROBLEMS

1. Action for money owed. At end of plaintiff's evidence, defendant makes a motion to dismiss, saying that plaintiff has failed to prove that the parties entered into a contract pursuant to which defendant owes money. You agree. You should dismiss the case

___ with prejudice ___ without prejudice

True or False: Plaintiff may refile his lawsuit, so long as he does it within one year.

2. Action for money owed. Plaintiff testifies that under terms of written contract defendant owes him money, but plaintiff has left contract at home. After plaintiff finishes offering evidence, defendant testifies under oath that he never entered into contract. Plaintiff's lawyer stands up and says "Judge, we're going to take a voluntary dismissal." Can he do that?

___ Yes ___ No

3. Same facts as in question 2, except that plaintiff's lawyer asks that you grant a voluntary dismissal. Do you grant plaintiff's motion?

___ Yes ___ No

4. Assume that plaintiff files a voluntary dismissal on June 12, 2003. The statute of limitations expires December 23, 2003. Plaintiff re-filed his lawsuit on June 10, 2004. Is the lawsuit barred by the statute of limitations?

___ Yes ___ No

5. Assume that plaintiff files a voluntary dismissal on June 12, 2003. The statute of limitations expires December 23, 2004 (eighteen months later). Plaintiff re-filed his lawsuit on July 5, 2004. Defendant moves to dismiss, arguing that plaintiff was required to re-file his lawsuit within one year of taking the voluntary dismissal. Do you dismiss plaintiff's case for failure to file in time?

___ Yes ___ No

6. Landlord brings action for summary ejectment based on failure to pay rent for May. Landlord failed to come to court on day of hearing, so you dismissed with prejudice. Landlord has filed action for summary ejectment based on failure to pay rent for June. Tenant's lawyer argues that this is same lawsuit -- landlord is seeking summary ejectment for failure to pay rent in both cases. Do you dismiss landlord's case as barred by previous dismissal with prejudice?

___ Yes ___ No

V. Amending the Complaint and Other Pleadings

A. Not surprisingly, plaintiffs often fail to get their complaints right the first time. They make errors in who they name as the defendant, where the defendant lives, what the nature of their complaint is, and the amount of damages they seek. Sometimes plaintiffs discover before trial that they want to amend the complaint. At other times, the need to make a change comes up during trial. Sometimes it never comes up at all—the evidence that's introduced doesn't match what the complaint says, and no one says anything about it. Rule 15 of the Rules of Civil Procedure allows a plaintiff to amend the complaint with the court's permission, and says that permission *should be freely given.*

B. The fundamental policy behind the rule is that it's most efficient to "get it all done at once." So long as the other party is not disadvantaged, it seems to make the most sense to allow the plaintiff to sue for whatever it is he really wants to sue for. If he makes a mistake in what he says in the complaint, we'd prefer that he correct it, rather than bring another lawsuit later.

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C. Sometimes the evidence actually introduced differs from what the complaint says. For example, a landlord brings an action for back rent. When the case is actually heard, some days or weeks later, the landlord has had an opportunity to inspect the property and he introduces evidence of additional damages due to cigarette burns on the carpet. When this happens, if no objection is made, the law treats the complaint as though it has been amended by the evidence. Sometimes the plaintiff might ask the court to actually make a written change on the complaint to match the evidence, but that's not necessary for judgment to be entered based on the evidence actually produced by the plaintiff. Another example:

> In a summary ejectment action, the complaint states that ejectment is sought for failure to pay rent, but the evidence shows that failure to pay rent was a breach of lease condition resulting in automatic forfeiture. In this case, it does not matter that the landlord checked the wrong block on the complaint. While a landlord might move to amend the pleading to check the correct block, that formal amendment is not required, and the magistrate may enter judgment based on the evidence actually presented.

D. If evidence is objected to at trial because it differs from what would be expected based on the complaint, the court may allow plaintiff to amend the complaint and should do so freely where no material prejudice will result. If necessary, a magistrate may grant a

continuance to enable objecting party to prepare to meet evidence. Example: Plaintiff seeks $250 in an action for injuries suffered in a car accident, but when the parties arrive for trial, she introduces evidence showing that her medical bills are now $4800. Plaintiff is certainly entitled to seek to recover for damages she actually suffered, but the dramatic increase may cause defendant to want to hire an attorney or otherwise modify his preparation for the trial.

E. Kinds of cases in which magistrate might deny request to amend: Amendment is sought to delay proceeding; amendment sought for bad faith or ambush.

F. When evidence differs from allegations in complaint, question of whether to allow amendment and proceed with trial is typically one of fairness to defendant. If defendant is present and doesn't object, variance is okay and judgment is based on evidence presented at trial. On the other hand, if defendant is not present and variance is substantial (for example, landlord sued for possession of property and then also seeks money at trial), the magistrate should not allow the trial to go forward without notice to the defendant. The plaintiff should file an amended complaint with the clerk and serve it on the defendant.

G. Note: an amendment to add or substitute a party presents different considerations, due to concerns about service of process.

In these cases, the magistrate must discriminate between actions in which the amendment corrects the name of the party who has been sued and properly served (e.g., changing "Seamark Foods" to "Seamark Enterprises, Inc.") and actions in which the plaintiff seeks to add or substitute an entirely different party.

In the first case (termed a "misnomer"), there is little reason to be concerned about notice, since the correct party has been served.

In the second case, however, even if the proper defendant is aware of the lawsuit, that awareness does not satisfy the technical requirements of service of process. For example, naming and serving John Smith as a defendant does not allow a court to constitutionally exert jurisdiction over "John Smith Enterprises, Inc." even if John Smith is an officer of the corporation and thus authorized to accept service on the corporation. In such a case, amending the complaint is insufficient; the correct defendant must be properly served.

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VI. Entry of Judgment: When Does a Judgment Become Final?

A. Technically, a judgment becomes final at the moment it is *entered.* G.S. 1A-1, Rule 58 provides that judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court.

B. In small claims court, for practical purposes, a judgment is final when it is announced and signed in open court at the conclusion of a trial. Although the judgment may not have been filed with the clerk of court yet, the law allows parties to give notice of appeal in open court—they don't have to wait until the clerk files the judgment. And a magistrate may not modify the judgment after it is announced in open court and the parties leave the courtroom (unless the magistrate is correcting a clerical error, discussed next in this outline).

C. Sometimes a magistrate is not prepared to announce a decision in open court. G.S. 7A-222 authorizes a magistrate to delay rendering judgment for up to 10 days following trial. A magistrate might choose to do this for a number of reasons: one or both parties are extremely emotional, the magistrate wishes to research relevant legal issues, or the judge simply wants some time to consider his decision. The court is not required to give a reason for deciding to delay rendering judgment.

D. If the magistrate does not announce the judgment at the end of trial, s/he is responsible for notifying the parties of the eventual decision. A copy of the judgment must be served by the magistrate on all parties within three days after the judgment is entered.

E. Service is pursuant to Rule 5, which requires that the magistrate mail a copy to the parties or their attorneys by first class mail, and must certify that service has been made.

F. If magistrate serves copies of judgment by first class mail, time period for appeal is extended three days. If magistrate fails to serve copies of judgment when law requires service, time for appeal is tolled for period of noncompliance, except time period may not be tolled longer than 90 days from the date the judgment is entered.

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VII. 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.

3. Examples of clerical errors: misspelled names, mathematical computation errors, transposed numbers

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 <u>allege</u> (he does not have to <u>prove</u>, 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.

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CIVIL PROCEDURE PROBLEMS

1. Cindy Larouche has brought an action against Bridal City for breach of contract. She introduces evidence showing that she purchased a wedding dress from defendant in preparation for her wedding. Defendant agreed to have the dress ready by June 25 (the wedding was scheduled for June 26). Cindy called to check on defendant's progress repeatedly, and was assured on each occasion that the dress would be ready in plenty of time. Unfortunately, the store received a huge order for 25 dresses on June 23rd, conditioned on its promise to have the dresses ready by June 24th. There was no time to fill the large order and Cindy's order too. The financially lucrative thing to do was forget all about Cindy's dress, and that's just what the defendant did. The store has refunded Cindy's deposit, but she finds that woefully inadequate. After all, she had to be married in an off-the-rack dress! She is seeking $2000 in punitive damages.

   How do you rule?

   Answer: _____

   _____

2. Easy Credit Finance Company files a small claims action against Mr. Jones seeking recovery of a television listed as security for the extension of credit. Mr. Jones is served and is present at the trial. Mr. Jones indicates that the television quit working and he threw it away. Easy Credit Finance then asks for a money judgment for $1,285, which is the amount that Mr. Jones owes. Would you hear the case? Does Easy Credit have to do anything to change its claim?

   _____

   _____

   Would it make any difference if Mr. Jones were not present at trial?

   _____

   _____

   What if Easy Credit sued for $1,285 and when they came to court they indicated that they had made a mistake and Mr. Jones really owes $2,000?

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3. Mr. Cogburn has brought an action against Home Style Interior for $5,000 in damages allegedly caused by Home Style's negligence in performing work in his home. Home Style has filed an answer denying that it damaged Mr. Cogburn's property; Home Style has also asserted a counterclaim for $800 owed for services rendered pursuant to a contract between plaintiff and defendant. At trial, Cogburn asks that you dismiss defendant's counterclaim, because it raises a possibility that the judgment ultimately entered will exceed $5,000. Cogburn says defendant can raise that issue in district court if it desires, but the amount-in- controversy rule bars defendant from bringing the claim in small claims court.

How do you rule on Cogburn's motion to dismiss?

Answer: _____

Assume that you deny Cogburn's motion and proceed to hear the case. Cogburn introduces evidence that he contracted with defendant to remodel his bathroom. While working on the bathroom, Home Style's workers broke a water line. When they came back to work after the long Memorial Day weekend, they found that the line had leaked thousands of gallons of water into Cogburn's home. (Cogburn didn't discover the leak, because he, too, went away over the weekend.) The water caused structural damage to Cogburn's house. He introduces bills for repair work, evidencing damage in excess of $5,000.

Home Style does not deny that its workers broke the water line, but it argues that they were not negligent in doing so--the leak was only a trickle when they left for the weekend. In support of its counterclaim, Home Style introduces evidence showing that Cogburn agreed to pay $800 for certain work on his bathroom and that this work has in fact been satisfactorily performed.

Problem #1: Assume that you decide Cogburn is not entitled to recover, but Home Style is entitled to recover. Fill out Judgment Form #1.

Problem #2: Assume that you decide both parties are entitled to recover. Fill out Judgment Form #2 (and, if you need it, Judgment Form #3).

-Judgment Form #1

-Judgment Form 2

Judgment Form 3

Last month you heard a case in which a landlord was seeking overdue rent for three months, at $350 per month. Landlord also wanted to recover bad check fees for each month, as well as a late fee of 5%. You were satisfied that landlord was entitled to recover all of these items and announced in open court that you were awarding the sum of $1,147.50 plus costs. When you sat down later to fill out the judgment form, however, you entered judgment for $1,174.50. The plaintiff is an honest man, and he brought the error to your attention. What options do you have now?

Answer: _____

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4. Yesterday you heard a case in which plaintiff-creditor testified that defendant's account balance was $940. You found for plaintiff and announced your ruling in court. This morning you got a frantic phone call from plaintiff. He's just discovered that the actual account balance was $1,350. The records upon which he relied yesterday were inaccurate, and he's going to be in big trouble with his boss if he doesn't get the judgment corrected. You haven't filled out the judgment form yet. What do you tell plaintiff?

Answer: _____

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5. Last week you were scheduled to hear a case in which Smith alleged Jones owed him $400. On the day of trial, Jones showed up, but Smith didn't. You dismissed the case with prejudice. This morning Smith showed up in court. After you'd heard all the other cases, he came up and asked when you were going to call his case. When you explained that his case was calendared for last week, he tells you in an embarrassed manner that he doesn't read very well and that he got confused about the court date. He says he knows the mistake is his fault, and asks you if he can go down to the clerk's office and fill out another complaint. What do you tell him?

Answer: _____

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6. Smith also suggests that you tear up the judgment you rendered the other day. He argues that (1) Jones clearly owes him the money--he can prove it; (2) he made an honest mistake about the court date and shouldn't be penalized for it; and (3) it won't prejudice Jones--he'll be notified of the new hearing, and he'll have another chance to come in and present any defense he has. What do you tell him?

Answer: _____

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7. Two weeks ago you heard a summary ejectment case based on breach of a lease condition (non-payment of rent). Reagan, the defendant, did not appear, but Bush, the landlord, did, and you entered judgment for one month's back rent and ejectment. Reagan has now filed a motion to set aside your judgment for excusable neglect. His evidence shows that he actually paid his rent to the rental agent's secretary, and that his payment was on time. The secretary is present, and sheepishly admits that Reagan paid her at 4:59, the day she was to leave on a two-week vacation. She testifies that she had her mind on her trip to Bermuda, and so just stuck his check in a desk drawer. Reagan testifies that he couldn't take off work to come to court on the day of the hearing, so he called Bush and told him he had paid the rent, and that there must be some mistake in his records. In response to a question, he says that Bush was pleasant but noncommittal in response to his call. Nevertheless, he expected that would be the end of the matter.

Bush testifies that he now believes that Reagan paid his rent on time, and that the whole thing was just a misunderstanding. He opposes the motion to set aside the judgment, however. He points out that Reagan should have come to court and told the whole story. When Reagan called him to say he paid, Bush simply didn't believe him. Just a few days ago, Bush re-rented the apartment, with the lease beginning August 1. What's more, the new tenant has already given notice at his old apartment that he plans to be out by August 1, and is threatening to sue Bush if he tries to back out of the lease agreement.

How do you rule, and what factors do you consider in making your ruling?

Answer: _____

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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 $80 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 one party appeals, there will be a completely new trial before a district court judge. (In some rare 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. 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 $40 to have an execution issued--$25 for the court and $15 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 $15 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 $15. You may be asked to advance the costs of removing the tenant's property and one month's storage costs or you may request the sheriff, in writing, to lock the premises and you will then be responsible for handling the tenant's property in the manner required by the law.

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

Notice to Defendant (Party Being Sued)

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

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

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

File No.

Film No.

Judgment Docket Book And Page No.

JUDGMENT IN ACTION TO RECOVER MONEY OR PERSONAL PROPERTY

G.S. 7A-210(2), 7A-224

Name And Address Of Plaintiff

Rooster Cogburn
1342 Glory Road
Yadhamville, NC 25555

Social Security No./Taxpayer ID No.

County	Telephone No.
Yadhan	(000) 555-1234

VERSUS

Name And Address Of Defendant 1

Home Style Interiors
412 Early American Lane
Yadhamville, NC 25555

County	Telephone No.
Yadham	(000) 555-2345

Name And Address Of Defendant 2

County	Telephone No.

Name And Address Of Plaintiff's Attorney

STATE OF NORTH CAROLINA

_____ County

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

This action was tried before the undersigned on the cause stated in the complaint. The record shows that the defendant was given proper notice of the nature of the action and the date, time and location of trial.

FINDINGS

The Court finds:

- ☐ that the plaintiff has proved the case by the greater weight of the evidence.
- ☐ that the plaintiff has failed to prove the case by the greater weight of the evidence.
- ☐ that the defendant(s) ☐ was ☐ was not present at trial.
- ☐ Other:

ORDER

It is ORDERED that:

- ☐ the plaintiff recover possession of the personal property described in the complaint.
- ☐ the plaintiff recover possession of the personal property listed below:
- ☐ the plaintiff recover nothing of the defendant(s) and that this action be dismissed with prejudice.
- ☐ *(for breach of contract cases)* the plaintiff recover of the defendant(s) the following principal sum and interest accrued to the date of the judgment, plus interest at the legal rate on the principal sum from this day until judgment is satisfied.
- ☐ *(for tort cases)* the plaintiff recover of the defendant(s) the following principal sum, plus interest at the legal rate from the date the action was instituted until judgment is satisfied.
- ☐ Other: *(specify)*

☐ Costs of this action are taxed to the ☐ plaintiff. ☐ defendant.

Principal Sum Of Judgment	$	Name Of Judgment Debtor(s) From Whom Amount Recovered
Amount Of Interest Not Included In Principal	$	☐ Judgment Announced And Signed In Open Court
Attorney's Fees Or Other Damages *(when appropriate)*	$	Date / Signature Of Magistrate
TOTAL AMOUNT	$	Name Of Party Announcing Appeal In Open Court

CERTIFICATION

(**NOTE:** *To be used when magistrate does not announce and sign this Judgment in open court at the conclusion of the trial.*)
I certify that this Judgment has been served on each party named by depositing a copy in a post-paid properly addressed envelope in a post office or official depository under the exclusive care and custody of the United States Postal Service.

Date | Signature Of Magistrate

AOC-CVM-400, Rev. 1/98

File No.

Film No.

Judgment Docket Book And Page No.

JUDGMENT IN ACTION TO RECOVER MONEY OR PERSONAL PROPERTY

G.S. 7A-210(2), 7A-224

Name And Address Of Plaintiff

Social Security No./Taxpayer ID No.

County | Telephone No.

VERSUS

Name And Address Of Defendant 1

County | Telephone No.

Name And Address Of Defendant 2

County | Telephone No.

Name And Address Of Plaintiff's Attorney

STATE OF NORTH CAROLINA

_____ County

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

This action was tried before the undersigned on the cause stated in the complaint. The record shows that the defendant was given proper notice of the nature of the action and the date, time and location of trial.

FINDINGS

The Court finds:

- ☐ that the plaintiff has proved the case by the greater weight of the evidence.
- ☐ that the plaintiff has failed to prove the case by the greater weight of the evidence.
- ☐ that the defendant(s) ☐ was ☐ was not present at trial.
- ☐ Other:

ORDER

It is ORDERED that:

- ☐ the plaintiff recover possession of the personal property described in the complaint.
- ☐ the plaintiff recover possession of the personal property listed below:
- ☐ the plaintiff recover nothing of the defendant(s) and that this action be dismissed with prejudice.
- ☐ *(for breach of contract cases)* the plaintiff recover of the defendant(s) the following principal sum and interest accrued to the date of the judgment, plus interest at the legal rate on the principal sum from this day until judgment is satisfied.
- ☐ *(for tort cases)* the plaintiff recover of the defendant(s) the following principal sum, plus interest at the legal rate from the date the action was instituted until judgment is satisfied.
- ☐ Other: *(specify)*

☐ Costs of this action are taxed to the ☐ plaintiff. ☐ defendant.

Principal Sum Of Judgment	$	Name Of Judgment Debtor(s) From Whom Amount Recovered
Amount Of Interest Not Included In Principal	$	☐ Judgment Announced And Signed In Open Court
Attorney's Fees Or Other Damages *(when appropriate)*	$	Date / Signature Of Magistrate
TOTAL AMOUNT	$ 0.00	Name Of Party Announcing Appeal In Open Court

CERTIFICATION

(**NOTE:** *To be used when magistrate does not announce and sign this Judgment in open court at the conclusion of the trial.*)
I certify that this Judgment has been served on each party named by depositing a copy in a post-paid properly addressed envelope in a post office or official depository under the exclusive care and custody of the United States Postal Service.

Date | Signature Of Magistrate

File No. | Abstract No.

Film No.

Judgment Docket Book And Page No.

STATE OF NORTH CAROLINA

_____ County

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

JUDGMENT IN ACTION FOR SUMMARY EJECTMENT

G.S. 7A-210(2), 7A-224; 42-30

This action was tried before the undersigned on the cause stated in the complaint. The record shows that the defendant was given proper notice of the nature of the action and the date, time and location of trial.

FINDINGS

The Court finds that:

1. ☒ a. the plaintiff has proved the case by the greater weight of the evidence.
   ☐ b. the plaintiff has failed to prove the case by the greater weight of the evidence.
   ☐ c. the plaintiff requested and was entitled to a judgment for possession based on the pleading.
2. the defendant(s) ☒ was ☐ was not present. ☐ The defendant was served by postings.
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 $ 0.00, and this amount is the undisputed amount of rent in arrears.
4. other: That the defendant has proved his counterclaim by the greater weight of the evidence.

Name And Address Of Plaintiff

County | Telephone No.

VERSUS

Name And Address Of Defendant 1

County | Telephone No.

Name And Address Of Defendant 2

County | Telephone No.

Name And Address Of Plaintiff's Attorney

ORDER

It is ORDERED that:

☒ 1. the defendant(s) be removed from and the plaintiff be put in possession of the premises described in the complaint.
☐ 2. this action be dismissed with prejudice.
☐ 3. this action be dismissed with prejudice because the defendant tendered the rent due and the court costs of this action.
☒ 4. the plaintiff recover rent of the defendant(s) in the amount of $1000. ~~and at the rate listed below, plus other damages in the amount indicated.~~ The plaintiff is also entitled to interest on the total principal sum from this date until the judgment is paid.
☒ 5. other: *(specify)*

the defendant recover damages of the plaintiff in the amount of $500 for breach of the warranty of habitability. The two judgments are set off and the defendant owes the plaintiff the amount set out below plus interest at the legal rate from today until the judgment is satisfied.

☒ 6. costs of this action are ~~taxed to the~~ split between ☐ plaintiff. & ☒ defendant.

Rate Of Rent	Amt. Of Rent In Arrears (Owed To Date)
$ 500 per ☒ Mo. ☐ Wk.	$ 1000.00

☐ Judgment Announced And Signed In Open Court

Amount Of Other Damages $ 500.00 owed by π to π

Date | Signature Of Magistrate

TOTAL AMOUNT $ 500.00 ~~0.00~~

Name Of Party Announcing Appeal In Open Court

CERTIFICATION

(**NOTE:** *To be used when magistrate does not announce and sign this Judgment in open court at the conclusion of the trial.)*
I certify that this Judgment has been served on each party named by depositing a copy in a post-paid properly addressed envelope in a post office or official depository under the exclusive care and custody of the United States Postal Service.

Date | Signature Of Magistrate

STATE OF NORTH CAROLINA

File No.

_____ County

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

Plaintiff(s)

VERSUS

Defendant(s)

MAGISTRATE SUMMONS

☐ **ALIAS AND PLURIES SUMMONS**

G.S. 7A-217, -232; 1A-1, Rule 4

Date Original Summons Issued

Date(s) Subsequent Summons(es) Issued

TO:

Name And Address Of Defendant 1

TO:

Name And Address Of Defendant 2

A Small Claim Action Has Been Commenced Against You!

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

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

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

Date of Trial

Time Of Trial ☐ AM ☐ PM

Location Of Court

Name And Address Of Plaintiff Or Plaintiff's Attorney

Date Issued

Signature

☐ *Deputy CSC* ☐ *Assistant CSC* ☐ *Clerk Of Superior Court*

(Over)

RETURN OF SERVICE

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

DEFENDANT 1

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

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

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

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

Name And Address Of Person With Whom Copy Left (If Corporation, Give Title Of Person Copy Left With)

☐ Other manner of service: *(specify).*

☐ Defendant WAS NOT served for the following reason:

DEFENDANT 2

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

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

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

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

Name And Address Of Person With Whom Copy Left (If Corporation, Give Title Of Person Copy Left With)

☐ Other manner of service: *(specify).*

☐ Defendant WAS NOT served for the following reason:

FOR USE IN SUMMARY EJECTMENT CASES ONLY

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

Date Served	*Name(s) Of The Defendant(s) Served By Posting*
Address Of Premises Where Posted	
Service Fee $	*Signature Of Deputy Sheriff Making Return*
Date Received	Name Of Sheriff (Type Or Print)
Date Of Return	*County Of Sheriff*

File No.

COMPLAINT FOR MONEY OWED

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

STATE OF NORTH CAROLINA

_____ County

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

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

Principal Amount Owed	$
Interest Owed *(if any)*	$
Total Amount Owed	$ 0.00

Name And Address Of Plaintiff

County	*Telephone No.*

VERSUS

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

County	*Telephone No.*

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

County	*Telephone No.*

Name And Address Of Plaintiff's Attorney

(check one below)

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

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

☐ For conversion *(describe property)*

☐ Other: *(specify)*

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

Date	*Signature Of Plaintiff Or Attorney*

(Over)

INSTRUCTIONS TO PLAINTIFF OR DEFENDANT

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

2. The PLAINTIFF cannot sue in small claims court for more than $5,000.00 excluding interest and costs.

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

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

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

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

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

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

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

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

File No.

Film No.

Judgment Docket Book And Page No.

JUDGMENT IN ACTION TO RECOVER MONEY OR PERSONAL PROPERTY

G.S. 7A-210(2), 7A-224

Name And Address Of Plaintiff

County	Telephone No.

VERSUS

Name And Address Of Defendant 1

County	Telephone No.

Name And Address Of Defendant 2

County	Telephone No.

Name And Address Of Plaintiff's Attorney

STATE OF NORTH CAROLINA

_____ County

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

This action was tried before the undersigned on the cause stated in the complaint. The record shows that the defendant was given proper notice of the nature of the action and the date, time and location of trial.

FINDINGS

The Court finds:

- ☐ that the plaintiff has proved the case by the greater weight of the evidence.
- ☐ that the plaintiff has failed to prove the case by the greater weight of the evidence.
  that the defendant(s) ☐ was ☐ was not present at trial.
- ☐ Other:

ORDER

It is ORDERED that:

- ☐ the plaintiff recover possession of the personal property described in the complaint.
- ☐ the plaintiff recover possession of the personal property listed below:

- ☐ the plaintiff recover nothing of the defendant(s) and that this action be dismissed with prejudice.
- ☐ *(for breach of contract cases)* the plaintiff recover of the defendant(s) the following principal sum and interest accrued to the date of the judgment, plus interest at the legal rate on the principal sum from this day until judgment is satisfied.
- ☐ *(for tort cases)* the plaintiff recover of the defendant(s) the following principal sum, plus interest at the legal rate from the date the action was instituted until judgment is satisfied.
- ☐ Other: *(specify)*

☐ Costs of this action are taxed to the ☐ plaintiff. ☐ defendant.

Principal Sum Of Judgment	$	Name Of Judgment Debtor(s) From Whom Amount Recovered
Amount Of Interest Not Included In Principal	$	☐ Judgment Announced And Signed In Open Court
Attorney's Fees Or Other Damages *(when appropriate)*	$	Date / Signature Of Magistrate
TOTAL AMOUNT	$ 0.00	Name Of Party Announcing Appeal In Open Court

CERTIFICATION

(NOTE: *To be used when magistrate does not announce and sign this Judgment in open court at the conclusion of the trial.)*
I certify that this Judgment has been served on each party named by depositing a copy in a post-paid properly addressed envelope in a post office or official depository under the exclusive care and custody of the United States Postal Service.

Date	Signature Of Magistrate

STATE OF NORTH CAROLINA

File No.	Abstract No.
Judgment Book And Page No.	

_____ County

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

Name Of Plaintiff
VERSUS
Name Of First Defendant
Name Of Second Defendant

NOTICE OF APPEAL TO DISTRICT COURT

G.S. 7A-228, 7A-230

TO THE CLERK OF SUPERIOR COURT:

As the ☐ plaintiff ☐ defendant in the above captioned action, I hereby give written Notice of Appeal on the judgment entered. This Notice is given within ten (10) days after the date the judgment in this action was entered.

☐ I certify that today I have served copies of this Notice to all parties involved in this action.

I understand that I must pay to the Clerk of Superior Court the court costs for appeal within twenty (20) days after the magistrate rendered judgment, unless I am authorized to appeal as an indigent, or my appeal will be dismissed.

If I am the defendant, I also understand that in certain cases if I wish to stay execution of the judgment, I may be required to sign a bond and that the plaintiff may have an execution issued after ten (10) days if I have not signed the required bond.

Also, I demand that this Appeal be tried before a ☐ judge. ☐ jury.

Date Of Entry Of Judgment	Date Of Appeal	Date Costs Paid	Amount Of Court Costs Paid
			$

Signature Of Appealing Party	Signature Of Appealing Party

NOTICE TO THE APPEALING PARTY

NOTICE OF APPEAL. If you did not give Notice of Appeal to the magistrate in open court at the time the judgment was rendered, you may file this written Notice of Appeal with the clerk within ten (10) days after the judgment is entered. You have a right to request a trial by jury. If you do not ask for a jury trial, you will be given a trial by a judge without a jury. You must mail or deliver copies of this form to all of the other parties. If you mail them before filing this form with the Clerk, check the block in the body of the form indicating you have served the parties and fill out the back of the original of this form. If you mail copies after filing this form with the Clerk, you must file a separate certification of service with the Clerk.

MANDATORY ARBITRATION. Many counties have mandatory arbitration programs in which appeals from small claims court are heard by an arbitrator before they go to a district court trial. You will be notified if your case is assigned for mandatory arbitration and, if so, what you must do.

COURT COSTS. Within twenty (20) days after the magistrate's judgment is entered, you MUST PAY to the clerk, in cash, the court costs for appealing the case, or your appeal will be dismissed. If you cannot afford to pay the appeal costs, you may ask the clerk for the form to appeal as an indigent (AOC-G-106). You must file the form to appeal as an indigent within ten (10) days after the judgment was entered.

STOPPING ENFORCEMENT OF JUDGMENT. Summary ejectment: If you are a tenant appealing from a summary ejectment judgment entered against you and you wish to stay on the premises until the appeal is heard, you must SIGN A BOND that you will pay your rent as it becomes due into the Clerk's office; you must PAY IN CASH the amount of rent in arrears as determined by the magistrate; and if the judgment was entered more than five (5) days before the next rental payment is due, you may also have to PAY IN CASH the prorated amount of rent due from the date the judgment was entered until the next rental payment is due. Ask the clerk for the bond form (AOC-CVM-304) to allow you to stay on the premises. If you have not signed this bond and paid the prorated amount of cash within ten (10) days after the judgment was entered, the landlord can ask to have the sheriff remove you from the premises even though the case is being appealed. **Possession of personal property:** If the magistrate's judgment ordered you to return specific personal property to the other party and you wish to continue to hold that property until the appeal is heard, you must sign a bond, signed by at least one surety, that you and the surety will pay any costs and damages if you do not comply with the judgment of the district court. Ask the clerk for the bond form (AOC-CVM-906M). If you have not signed this bond within ten (10) days after the judgment was entered, the other party can ask to have the sheriff take the property from you even though the case is being appealed. **Money judgment:** If a money judgment has been entered against you, you do not need to sign a bond to stop enforcement. The judgment is automatically stayed until the appeal is heard.

NOTICE TO PARTY NOT APPEALING

If the appealing party has not asked for a jury trial and you wish to have a jury rather than a judge without a jury try your case, you must file a written request for a trial by jury with the clerk within ten (10) days after receiving this Notice and, within the same amount of time, you must mail copies of your written request to the other parties. See section on Mandatory Arbitration above.

(Over)

CERTIFICATE OF SERVICE

I certify that a copy of this Notice of Appeal was served by

☐ depositing a copy enclosed in a postpaid properly addressed envelope in a post office or official depository under the exclusive care and custody of the U.S. Postal Service directed to the ☐ defendant. ☐ defendant's attorney. ☐ plaintiff. ☐ plaintiff's attorney.

☐ delivering a copy personally to the ☐ defendant. ☐ defendant's attorney. ☐ plaintiff. ☐ plaintiff's attorney.

☐ leaving a copy at the ☐ defendant's attorney's office with a partner or employee. ☐ plaintiff's attorney's office with a partner or employee.

☐ Other:

Date Mailed/Delivered	*Signature Of Person Serving Notice Of Appeal*
Name And Address Of Person To Whom Mailed/Delivered	*Name Of Person Serving Notice Of Appeal (Type Or Print)* *Title*

STATE OF NORTH CAROLINA

_____ County

File No.

Film No.

In The General Court Of Justice

☐ District ☐ Superior Court Division ☐ Small Claims

Name Of Plaintiff/Petitioner	**ORDER**
VERSUS	
Name Of Defendant/Respondent	

☐ DISMISSAL ☐ With Prejudice ☐ Without Prejudice

This action is dismissed for the following reason:

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

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

☐ The plaintiff failed to appear on the scheduled trial date; the defendant did appear on that date and has moved to dismiss this action.

☐ Other:

☐ DISCONTINUANCE [G.S. 1A-1, Rule 4(e)]

The defendant has never been served in this action, and more than ninety (90) days have elapsed since the last summons was issued.

☐ CONTINUANCE

The trial of this action is continued to the following date and time on motion of the

☐ Plaintiff

☐ Defendant

☐ Judge or Magistrate

☐ Other: *(specify)*

Date Of New Trial	Time Of New Trial ☐ AM ☐ PM	Location Of New Trial

☐ BANKRUPTCY

It is ordered that this action be removed from the active calendar and placed on inactive status because a petition for bankruptcy has been filed staying this proceeding. This action may be reinstated if the claim is not resolved in the U.S. Bankruptcy or District Courts.

Date	Signature	☐ Judge ☐ Magistrate ☐ Assistant CSC ☐ Clerk Of Superior Court

AOC-G-108, Rev. 11/02

Tab:

Personal Property

PROBLEMS ON RECOVERING POSSESSION OF PERSONAL PROPERTY

1. Womble Furniture Co. instituted a civil action on July 1, 2004 to recover a dining room table, six chairs, one couch, a cocktail table and an upholstered wing chair. At the trial, Womble introduces a written security agreement signed on April 5, 2002 in which defendant agreed that the items listed would be collateral for the extension of credit for their purchase on that day from Womble. Womble indicates that the defendant defaulted on March 1, 2004 and asks for judgment to recover all of the items listed. Defendant does not contest that he defaulted, but states that he only owes $300 and the items Womble seeks to recover are worth more than $300. He wants you to limit your judgment to recover the dining room table and chairs only since they are worth more than $300. How do you rule and give your reasons.

   Judgment for ____ Womble Furniture Co. for what _____. ____ Defendant

   Reason: _____

   _____

   _____.

2. Fantastic Furniture Co. brings an action to recover possession of a dining room suite sold to Samuel and Sarah Sand. At the trial the manager of Fantastic Furniture Co. testifies that he sold the furniture and that the Sands entered into an oral agreement to use furniture as collateral for the debt. He then introduces his account record, which shows a default by the Sands. How do you rule and why?

   Judgment for _____ Fantastic Furniture Co. _____ Sands

   Reason: _____

   _____

   _____.

3. ABC Appliance Co., a secured party, brings an action to recover possession of a refrigerator against Simon Sampler. The magistrate entered a judgment in favor of ABC Appliance Co. Two months later ABC Appliance Co. brings an action to recover deficiency indebtedness under the U.C.C. Simon Sampler counterclaims against ABC Appliance Co. for failure to conduct sale in a commercially reasonable manner. At the trial ABC Appliance Co. proves that upon recovering refrigerator, he sold it to an employee for $150. ABC Appliance proves that $200 was owed on the debt when the refrigerator was repossessed and that the company's expenses in selling the refrigerator was $50. ABC Appliance asks for a judgment of $100.

   Simon Sampler says that ABC Appliance gave him notice by calling him two hours before the sale was to take place and that the sale was not held in a commercially reasonable manner. He asks for $90 damages (10% of the principal amount of the loan

plus the interest charges) for failure to conduct the sale in a commercially reasonable manner.

How do you rule and what factors do you consider on ABC Appliance's claim?

Judgment for _____ ABC Appliance _____ Simon Sampler

How do you rule and why on Simon Sampler's counterclaim.

Judgment for _____ Simon Sampler _____ ABC Appliance Co.

Reason: _____

_____

_____.

4. Fashion Furniture Co. brings an action to recover possession of three household belongings of Mary Jones. At the trial Fashion Furniture introduces a security agreement dated June 20, 2004 and signed by Mary Jones, which describes a "pine couch with orange leather upholstery; 21-inch Sony TV, with mahogany case; and a 21.6 cubic feet, white GE Refrigerator-Freezer unit with door front ice and water dispenser." Fashion Furniture Co. proves that Mary Jones defaulted. Mary Jones argues that she purchased the couch from Fashion Furniture Co. and signed the security agreement as collateral for paying for the couch in twelve installments. She did not buy the other two items from Fashion Furniture Co. and therefore Fashion Furniture Co. should not be allowed to recover those items. How do you rule and on what statute do you base your answer?

Judgment for _____ Fashion Furniture for what _____. _____ Mary Jones

Reason: _____

_____

_____.

5. Would your answer or underlying reason be different if the security agreement was between Mary and Easy Credit Finance Co.?

Judgment for ____ Easy Credit Finance Co. for what _____. ____ Mary Jones

Reason: _____

_____

_____.

6. Abe Barker calls Sam's Heating and Cooling and asks to have them deliver and install a window unit. Sam's Heating and Cooling comes out to his house installs the unit and then sends a bill to Barker for $300, the cost of the unit and installation. Barker does not pay the bill; Sam's Heating and Cooling brings an action to recover possession of the air conditioning unit as a nonsecured plaintiff. At the trial Sam's proves the facts stated above; Barker is not present. How do you rule and why?

Judgment for _____ Sam's Heating and Cooling _____ Abe Barker

Reason: _____

_____

_____.

7. Easy Credit Appliance Co. filed a civil action on July 1, 2004 to recover a refrigerator purchased on June 1, 1998; a clothes dryer purchased on June 1, 1999; a VCR purchased on June 1, 2000; a television set purchased on June 1, 2001, and a washing machine purchase on June 1, 2002. As each item was purchased, the buyer signed a security agreement listing the item just purchased and all the items previously purchased as security for the debt. The buyer defaulted on his payments on March 5, 2004. Easy Credit asked for a judgment to repossess all of the items listed as collateral. The defendant argued that he had been paying $75 on the contract since 1998 and he believed Easy Credit was not entitled to recover all of the items listed since he must have paid off some of the first items purchased. What would you do and what statute would you rely on?

Answer: _____

_____

_____.

8. Blockbuster Video brings an action to recover possession of 2 VCR tapes rented to Brenda Button. In addition to seeking recovery of the tapes, Blockbuster seeks $120 ($2 per tape per day for one month) for loss of use of the tapes. At the trial Blockbuster states that Brenda rented the tapes for a two-day period and failed to return them on May 1 when they were due. The normal rental rate is $2 per day, and as of the date of trial, the tapes are overdue by one and one-half months. Blockbuster now wants $180, plus the tapes. Brenda says she has the tapes and will be glad to return them, but she doesn't think she should have to pay $180, because the tapes would only cost a total of $45 to replace and Blockbuster had not shown that they could have rented the tapes every day had they had them to rent. How would you rule and why?

Judgment for ____ Blockbuster Video for what _____. ___ Brenda Button

Reason: _____

_____

_____

_____

_____.

Joan Brannon
Institute of Government
3/21/2006

ACTIONS TO RECOVER POSSESSION OF PERSONAL PROPERTY

I. Action To Recover Possession of Personal Property When Plaintiff is Not a Secured Party

A. May be brought when personal property is wrongfully taken or retained.

B. Alternative remedy to conversion; plaintiff makes choice of whether to sue for conversion or to recover possession of personal property.

C. Remedy is return of property taken plus a monetary amount for damage to the property and loss of use of the property while it was in defendant's possession.

D. Plaintiff must prove that
   1. He is the owner of property or bailee.
   2. That the property was wrongfully taken from him or wrongfully detained.
   3. That defendant is the person in possession of the property.

E. Statute of limitations is 3 years.

II. Action To Recover Possession When Plaintiff is a Secured Party.

A. Seller who sells goods on credit or lender who lends money may have buyer or borrower sign a written contract called a "security agreement" whereby seller or lender, who is called the "secured party" takes a "security interest" in buyer's or borrower's (referred to as debtor) personal property.

B. Secuirty agreement allows secured party to take possession of secured goods upon debtor's default.

C. Secured party may repossess goods without a court proceeding if he can do so without breach of peace or he may file action to recover possession as a secured party. Secured party may without removal, render equipment inoperable. [G.S. 25-9-609]

D. Security agreement must
   1. Be in writing,
   2. Include a description of the property,
      a) Description of property sufficient if it reasonably identifies what is described.
      b) "All debtor's assets" or "all debtor's personal property" does not reasonably identify what is described. [G.S. 25-9-108]
      c) Insufficient to describe consumer goods only by type. [G.S. 25-9-108(e)]
   3. Be authenticated [signed] by the debtor, and
   4. If seller-buyer contract, be dated.

E. Plaintiff must prove
   1. Existence of valid security agreement;
   2. Security interest was taken in property sought to be recovered; and
   3. Default in payment by debtor.

F. Amount of money owed on debt is not in issue and need not be proved.

G. Person who sells goods to another is not entitled to take goods back unless he has taken a valid security agreement.

H. Remedy sought is possession of secured property; no money damages are sought.

I. Statute of limitations is usually ten years because it is on a sealed instrument; if the security agreement or underlying note is not under seal, the statute of limitations is three years.

J. Once secured party has repossessed goods (either on own or through court proceeding), secured party must follow UCC (G.S. Ch. 25, Article 9) in disposing of property.

1. If less than 60% of debt has been paid, secured party may keep goods in full satisfaction of debt or he may sell goods and then seek a deficiency. [G.S. 25-9-620]
2. If 60% or more of cash price or loan has been paid, secured party must sell consumer goods within 90 days unless debtor authenticates a written statement after default allowing secured party to keep goods in satisfaction of debt. [G.S. 25-9-620]
3. Sale may be at either public or private sale but must proceed in commercially reasonable manner with regard to method, manner, time, place, and other terms.[G.S. 25-9-610]
4. Secured party must give debtor a reasonable authenticated notice before disposition of the security. [G.S. 25-9-611; 25-9-612] Required detailed notice is set out in G.S. 25-9-614.

K. Debtor may redeem goods at any time before sale by paying full amount of debt owed on goods plus expenses and attorney fees reasonably incurred in repossessing, holding and preparing goods for disposal. [G.S. 25-9-623]

L. Secured party disperses proceeds of the sale as follows: [G.S. 25-9-615(a)]

1. Reasonable expenses of retaking and selling goods (may include reasonable repairs of property);
2. Satisfaction of debt due to secured party.
3. Satisfaction of subordinate security agreements if receive authenticated demand.
4. If any proceeds remaining, surplus to debtor.

M. After sale creditor must send debtor notice of how arrived at deficiency or surplus. [G.S. 25-9-616].

N. If debt not fully satisfied by sale, secured party may file for the deficiency (amount still owed after applying sale proceeds to debt). [G.S. 25-9-615(a)]

1. In action to recover deficiency secured party has burden of proving that sale was conducted in commercially reasonable manner; if not held in commercially reasonable manner, presumed secured property worth amount of debt owed. [55 N.C. App. 724 (1982); 38 N.C. App. 120 (1978)]

O. Damages to debtor for seller's failure to dispose of property properly:

1. If secured party fails to comply with statute, debtor has right to recover greater of actual damages proved or without proving any actual damages may recover the finance charge imposed plus 10% of the principal amount of the debt. [G.S. 25-9-625(c)]

2. G.S. 25-9-210 requires a secured party to respond to a request for an accounting or list of collateral from debtor and debtor may recover damages and $500 from secured party that, without reasonable cause, fails to comply with a request. [G.S. 25-9-625(f)]

RETAIL INSTALLMENT SALES ACT (G.S. CH. 25A)

I. Coverage of RISA.

A. Scope of act— applies to all consumer credit sales. Does not apply to bona fide direct loan in which lender makes direct loan to borrower and lender not regularly engaged in sale of goods or services (e.g., buyer borrows $500 from Financial Credit and uses money to buy TV from Acme Appliance Co.). Does not apply to sale in which buyer purchases goods or services by a credit card issued by someone other than seller (e.g., purchaser using Master Charge card).

B. Definitions

1. Consumer credit sale.
   a) Sale of goods or services in which
      (1) seller who in ordinary course of business regularly extends or arranges for extension of credit;
      (2) buyer is a natural person;
      (3) goods or services purchased primarily for personal, family, household or agricultural purpose;
      (4) debt representing the price is payable in four or more installments or a finance charge is imposed; and
      (5) amount financed not more than $25,000.
   b) Sale includes some rent to own contracts.
2. Finance charge.
   a) Sum of all charges payable directly or indirectly by buyer and imposed by seller as incident to extension of credit.
   b) Includes interest, time-price differential, service or carrying charge, loan fee, fee for credit report.
   c) Does not including some insurance charges.

II. Terms of Consumer Credit Contracts

A. Maximum finance charge rates.

1. 24% per annum where amount financed less than $1,500;
2. 22% where amount financed $1,500 to $1,999;
3. 20% where amount financed $2,000 to $2,999;
4. 18% where amount financed $3,000 to $25,000;
5. 1 1/2% per month for revolving charge accounts.

B. Consumer credit installment sale contract must be in writing, dated and signed by buyer.

C. Seller may take security interest (collateral) only in following:

1. Property sold;
2. Property previously sold by seller to buyer and in which seller still has security interest;
3. Personal property to which property sold is installed if amount financed more than $300;
4. Real property to which property sold affixed, if amount financed more than $1,000;

5. Motor vehicle to which repairs made, if amount financed more than $100.
6. Any property used for agricultural purposes, if the property sold is to be used in the operation of an agricultural business.

D. Security interest taken in other property void and not enforceable.

E. Application of payments when seller makes a subsequent sale to buyer and takes a security agreements in goods previously sold or consolidates two or more consumer credit contracts--payments made after second or subsequent purchase applied first to finance charges, then to oldest item purchased; when that item is paid for payments applied to next oldest item purchased and so forth. (Called first-in, first-out method).

F. Default charges—if installment past due for at least 10 days default charge of not more than 5% of payment due or $6 whichever is less may be imposed. Can be imposed only one time for each default. Waived unless within 45 days of default, charge collected or written notice of charge sent buyer.

G. Contract must provide for complete payment within 42 months if amount financed less than $1,500 or 64 months if amount financed $1,500 to $2,499.

H. Referral sales of any kind are void. (E.g., where price or rebate conditional on procurement of prospective customers or of additional sales.)

III. Remedies and penalties

A. If contract requires payment of finance charge not more than two times in excess of permissible charge, seller not permitted to recover any finance charge and seller liable to buyer in amount twice that of finance charge actually received by seller and reasonably attorney's fees incurred by buyer. However, if excess charge results from accidental or good faith error, seller liable only for amount by which finance charge exceeds permissible rate.

B. If contract requires payment of finance charge more than two times that permitted, contract is void. Buyer may retain goods without any liability and seller not entitled to recover anything under contract.

OUTLINE ON PRIORITIES AMONG VARIOUS SECURITY AGREEMENTS

I. Attachment.

A. Point at which agreement is enforceable against debtor with respect to collateral.

B. Occurs when debtor signed security agreement or collateral is in possession of creditor; value is given; and debtor has rights in the collateral. [G.S. 25-9-203]

1. A person gives value if he acquires rights in return for binding commitment to extend credit or in return for any consideration sufficient to support a contract. [G.S. 25-1-201.

II. Perfection.

A. Point at which agreement is enforceable against persons other than debtor, generally other creditors, purchasers, lienors, or judgment creditors.

B. Generally, security agreement is perfected if it has attached and creditors has filed financing statement with the Sec'y of State. [G.S. 25-9-310; 25-9-501]

C. Exceptions to when filing of financing statement is required for perfection:

1. If creditor takes possession of the collateral. [G.S. 25-9-313(a)]
2. If purchase-money security interest in consumer goods, but if motor vehicle must register with DMV. [G.S. 25-9-309(1); 25-9-311(a)(2)]

III. RULES ON PRIORITY BETWEEN INTERESTS. [G.S. 25-9-317 TO 25-9-325]

A. Between conflicting security agreements

1. Purchase money security interest takes priority over other security interests if perfected at time debtor receives possession or within 20 days thereafter.
2. Conflicting security interests rank according to perfection.
3. Unperfected security interest is subordinate to the rights of perfected security agreement or lien creditor.

B. Buyer in ordinary course of business takes free of security interest even though perfected if he buys without knowledge of security interest, for value, and for his own personal, family, or household purposes unless secured party has filed a financing statement.

File No.

COMPLAINT TO RECOVER POSSESSION OF PERSONAL PROPERTY

☐ PLAINTIFF A SECURED PARTY
☐ PLAINTIFF NOT A SECURED PARTY

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

Name And Address Of Plaintiff

Rooster Cogburn
1342 Glory Road
Yadhamville, NC 25555

Social Security No./Taxpayer ID No.

County | *Telephone No.*

VERSUS

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

Home Style Interiors
412 Early American Lane
Yadhamville, NC 25555

County | *Telephone No.*

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

County | *Telephone No.*

Name And Address Of Plaintiff's Attorney

STATE OF NORTH CAROLINA

_____ County

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

WHEN PLAINTIFF IS A SECURED PARTY

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

Description Of Personal Property In Which You Have a Secured Interest (Attach Copy Of Security Agreement) | *Total Value Of Property To Be Recovered* $

Date | *Signature Of Plaintiff Or Attorney*

WHEN PLAINTIFF IS NOT A SECURED PARTY

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

Description Of Personal Property You Own Which Is In Possession Of Defendant | *Total Value Of Property To Be Recovered* $

Date Defendant Wrongfully Took Or Kept Property

Damage Due For Loss Of Use	$
Physical Damage To Property	$
Total Amount Of Damages	$ 0.00

Date | *Signature Of Plaintiff Or Attorney*

Original-File Copy-Each Defendant Copy-Attorney/Plaintiff
(Over)

INSTRUCTIONS TO PLAINTIFF OR DEFENDANT

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

2. The PLAINTIFF cannot sue to recover property worth more than $5,000.00.

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

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

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

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

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

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

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

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

File No.

Film No.

Judgment Docket Book And Page No.

JUDGMENT IN ACTION TO RECOVER MONEY OR PERSONAL PROPERTY

G.S. 7A-210(2), 7A-224

Name And Address Of Plaintiff

County | Telephone No.

VERSUS

Name And Address Of Defendant 1

County | Telephone No.

Name And Address Of Defendant 2

County | Telephone No.

Name And Address Of Plaintiff's Attorney

STATE OF NORTH CAROLINA

_____ County

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

This action was tried before the undersigned on the cause stated in the complaint. The record shows that the defendant was given proper notice of the nature of the action and the date, time and location of trial.

FINDINGS

The Court finds:

- ☐ that the plaintiff has proved the case by the greater weight of the evidence.
- ☐ that the plaintiff has failed to prove the case by the greater weight of the evidence.
- that the defendant(s) ☐ was ☐ was not present at trial.
- ☐ Other:

ORDER

It is ORDERED that:

- ☐ the plaintiff recover possession of the personal property described in the complaint.
- ☐ the plaintiff recover possession of the personal property listed below:
- ☐ the plaintiff recover nothing of the defendant(s) and that this action be dismissed with prejudice.
- ☐ *(for breach of contract cases)* the plaintiff recover of the defendant(s) the following principal sum and interest accrued to the date of the judgment, plus interest at the legal rate on the principal sum from this day until judgment is satisfied.
- ☐ *(for tort cases)* the plaintiff recover of the defendant(s) the following principal sum, plus interest at the legal rate from the date the action was instituted until judgment is satisfied.
- ☐ Other: *(specify)*

☐ Costs of this action are taxed to the ☐ plaintiff. ☐ defendant.

Principal Sum Of Judgment	$	Name Of Judgment Debtor(s) From Whom Amount Recovered
Amount Of Interest Not Included In Principal	$	☐ Judgment Announced And Signed In Open Court
Attorney's Fees Or Other Damages *(when appropriate)*	$	Date / Signature Of Magistrate
TOTAL AMOUNT	$ 0.00	Name Of Party Announcing Appeal In Open Court

CERTIFICATION

(**NOTE:** *To be used when magistrate does not announce and sign this Judgment in open court at the conclusion of the trial.*)
I certify that this Judgment has been served on each party named by depositing a copy in a post-paid properly addressed envelope in a post office or official depository under the exclusive care and custody of the United States Postal Service.

Date | Signature Of Magistrate

STATE OF NORTH CAROLINA

File No.

_____ County

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

Name And Address Of Plaintiff	**BOND TO STAY EXECUTION ON APPEAL OF JUDGMENT TO RECOVER POSSESSION OF PERSONAL PROPERTY**
VERSUS	
Name And Address Of Defendant	G.S. 7A-227

BOND

Judgment to recover possession of personal property has been entered by the magistrate against the defendant and in favor of the plaintiff. The defendant has appealed the case to district court.

I, the undersigned surety, do acknowledge myself bound to the plaintiff in the amount specified below. The condition of this Bond is that if judgment is rendered against the appellant, I will pay all costs that may be awarded to the plaintiff and all damages that the plaintiff might sustain by the appellant's failure to comply with the order, provided that my liability shall be limited to the amount of this Bond.

Amount Of Bond	Signature Of Surety
$	
Signature Of Additional Surety, If Used	Name And Address Of Surety
Name And Address Of Additional Surety, If Used	

JUSTIFICATION (OPTIONAL)

I, the undersigned surety, being duly sworn, am a resident of the State of North Carolina and am worth the amount of the bond, over and above all liabilities and exemptions allowed by law.

SWORN AND SUBSCRIBED TO BEFORE ME	Date
Date / Signature	Signature Of Surety
☐ Deputy CSC ☐ Assistant CSC ☐ Clerk Of Superior Court	Signature Of Additional Surety, If Used

ORDER

It is ORDERED that execution on the judgment entered in this action is stayed until the action is disposed of on appeal in the district court.

Date	Signature
	☐ Assistant CSC ☐ Clerk Of Superior Court

AOC-CVM-906M, New 11/92

Tab:

Torts

Joan Brannon
Institute of Government
4/5/00

TORTS

I. Intentional Tort--Assault and Battery

A. Assault: Plaintiff must prove

1. Defendant threatened or attempted to do some injury to another.
2. By force and violence.
    a) Mere words are not sufficient.
    b) But shaking fist under someone's face is sufficient.
3. Defendant apparently had present ability to do injury; and
4. The conduct created a reasonable apprehension of injury in the plaintiff.

B. Battery: Plaintiff must prove

1. Defendant touched or struck plaintiff in rude or angry manner;
2. Without plaintiff's consent; and
3. The act was done intentionally.
    a) Intent is not necessarily hostile intent; rather intent to bring about a result which will invade the interests of another in a way that the law will not sanction.
    b) Playing a practical joke on someone could be sufficient intent.

C. Assault and battery usually go together with battery being the consummation of the assault, but could have one without the other.

NOTES:

_____

_____

_____

_____

D. Defenses.

1. Affray-defense to assault and battery when one engages in fight willingly; enter voluntarily if uses conduct or abusive language which, considering all the circumstances, is calculated and intended to bring on a fight.

2. Self-defense-exercise of right of self protection; justified in using force in self-defense and not liable if the circumstances, at the time the defendant acted, were such as would create in the mind of a person of ordinary firmness a reasonable belief that such action was necessary to protect himself from bodily harm or offensive physical contact, and the circumstances did create such belief in the defendant's mind.

    a) Force can't be excessive; only that which reasonably appeared to him to be necessary under circumstances to protect self.

    b) Only allowed as defense if defendant himself was not the aggressor; voluntarily entering fight makes him aggressor.

3. Defense of family member-same as self defense, except come to aid of family member who was entitled to use self-defense.

4. Defense of third party from felonious assault-defendant must show that it appeared to him and he believed it to be necessary to assault plaintiff in order to save third party from death or serious bodily harm. Circumstances as they appeared to defendant at time he acted were sufficient to create such a belief in the mind of a person of ordinary prudence. Defendant not aggressor in fight, and defendant did not use excessive force.

5. Defense of property-person in possession of property as owner or agent of owner may use reasonable force to defend and protect property from aggression or harm if circumstances at time acted were such as would create in the mind of person of ordinary firmness a reasonable belief that action was necessary to protect property, and circumstances did create such belief in defendant's mind.

NOTES:

ASSAULT AND BATTERY PROBLEMS

1. Jones and his wife were in a bar on Friday night. Smith walked up and asked Jones's wife if she would like to dance. Jones took offense and stood up and punched Smith in the mouth. Smith had to have two stitches taken in his lip. Smith sued Jones for damages.

   Judgment for __ Smith ___ Jones

   Reason: _____

   _____

   _____.

2. What if Smith had pulled Jones' wife out of the chair, against her will, to dance and Jones had then punched Smith after asking him to let her go?

   Judgment for __ Smith __ Jones

   Reason: _____

   _____

   _____.

3. Jim is walking down the street when Bill steps out from behind a tree and makes one hand into a fist and hits his fist into his other hand, all the while looking at Jim. Jim, being afraid of Bill, runs across to the other side of the street to continue on his way. He trips and twists his ankle but doesn't have any serious injury. Jim decides he doesn't want to be bullied by Bill so he files a small claims action against Bill. Bill says he did not touch Jim.

   Judgment for __ Jim __ Bill

   Reason: _____

   _____

   _____.

II. Negligence.

A. Elements.

1. Defendant must owe plaintiff a duty of reasonable care.

a) Relationship must be such that defendant would be expected to act with reasonable care toward the plaintiff so as not to harm him.

b) Generally, no duty to act to help another unless at fault in causing situation from which person now needs help.

2. Defendant must have failed to meet the standard of reasonable or ordinary care.

a) Care which a reasonably prudent person would use under the same or similar circumstances.

3. Defendant's negligence must be a proximate (legal) cause of plaintiff's injury.

a) Proximate cause is a cause, without which the injury would not have occurred and one which a reasonably careful and prudent person could foresee would probably produce such injury or a similar one.

b) Don't need to prove sole cause.

4. Plaintiff must have suffered actual damage.

B. Negligence per se (by itself) by violating a safety statute.

1. When person violates statute enacted for safety purposes, that violation is negligence; do not look to see whether reasonable man would have acted similarly under circumstances; by declaring certain conduct impermissible as a safety violation, the legislature has decided what a reasonable man would do. Violation of the statute is negligence and second element of negligence action is met by showing violation of statute.

C. Defenses.

1. Contributory negligence.

a) If plaintiff's own negligence contributed to the injury, then plaintiff is contributorily negligence.

b) When find plaintiff is contributorily negligent, not entitled to any damages.

D. Children and negligence.

1. Children under the age of 7 are incapable of negligence.

2. Children between the ages of 7 and 14 are presumed to be incapable of negligence but that presumption may be rebutted (overcome) by plaintiff's evidence that defendant child did not exercise the degree of care for the safety of others that a reasonably careful child of the

same age, discretion, knowledge, experience and capacity ordinarily would exercise under the same or similar circumstances.

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PROBLEMS ON NEGLIGENCE

1. Sam is walking down the street when he hears screams from a yard; he peeks over the fence and sees a five year old child who cannot keep afloat in a swimming pool. Sam teaches swimming lessons at the local club. He just stands there and watches and does not try to help the child. The child's parents sue Sam for negligently failing to come to the child's aid.

   Judgment for __ Parents __ Sam

   Reason: _____

   _____

   _____.

2. Bill Jones files a small claim against Nancy Nothing. Bill says he was driving his motorcycle down the street when Nancy was driving her car in front of him. Suddenly, Nancy stopped to take a left turn, without giving a signal. Bill hit Nancy from behind. He claims Nancy was negligent in failing to give a proper signal. He asks for damages to repair his motorcycle and for the injury to his knee. Nancy says Bill was negligent in that he failed to keep a proper lookout when driving and was following too closely. She says she thinks she gave a proper turn signal, but even if she didn't, the accident happened in the middle of the day on a clear day. Bill certainly should have seen her stop to make the turn.

   Judgment for __ Bill Jones __ Nancy Nothing

   Reason: _____

   _____

   _____.

3. John decides to drive down to the grocery store to pick up some milk for his children. He is thinking about the television program he was watching and he forgets to stop at a stop sign. He scrapes Joan's car because she swerved to avoid him when he pulled out. It will cost $200 to repair Joan's car. John says he won't pay because daydreaming is a common and usual habit; and therefore, he was acting like a reasonable and prudent man would act.

   Judgment for __ Joan __ John

   Reason: _____

   _____

   _____.

III. Damages.

A. Actual-always granted in tort actions.

1. Entitled to recover, in lump sum, present worth of all damages-present, past and prospective, which naturally and proximately result from the negligence.

2. Personal injury.

a) Kinds of damages

(1) medical expenses

(2) loss of earnings

(3) pain and suffering

(4) scars or disfigurement

(5) loss of future earnings

b) Where future damages, determine life expectancy and what is fair compensation during plaintiff's life; then reduce to present worth.

3. Property damage.

a) Actual damage to property.

(1) difference between fair market value of damaged property immediately before damaged and fair market value immediately after damaged; or

(2) cost of repair and repair estimates may be considered as an aid in arriving at the measure of damages described above.

(3) where property destroyed are personal items such as clothing or home furnishings or items have no market value, in determining the property's actual value, court may consider original cost, age of property, degree to which it has been used, condition before destroyed, cost of replacing property taking into account the degree to which it had been worn out, and the opinion of owner as to value.

b) Other damages suffered because of damage to property.

B. Nominal damages-in intentional tort cases even if no injury, plaintiff is entitled to nominal damages, i.e. $1.

C. Punitive (punishment damages): G.S. 1D - Purpose is to punish "egregiously wrongful acts and to deter the defendant and others from committing similar wrongful acts."

1. Punitive damages can be awarded only when defendant is liable for actual damages and plaintiff proves by clear and convincing evidence that defendant acted with fraud, malice, or willful or

wanton conduct. GS 1D-15.

a) Malice: personal ill will toward plaintiff that activated or incited the defendant to perform the act or undertake the conduct that resulted in harm to plaintiff. [G.S. 1D-5(5)]

b) Willful or wanton conduct: the conscious and intentional disregard of and indifference to the rights and safety of others, which the defendant knows or reasonable should know is reasonable likely to result in injury, damage, or other harm. Willful or wanton conduct means more than gross negligence. [G.S. 1D-5(6)]

2. Punitive damages may not be awarded solely for breach of contract. G.S. 1D-15(d).

3. In determining amount of punitive damages, judge shall consider the purposes of punitive damages and only the following: [G.S. 1D-35]

a) the reprehensibility of defendant's motives and conduct;

b) the likelihood, at the relevant time, of serious harm;

c) the degree of the defendant's awareness of the probable consequences of its conduct;

d) the duration of defendant's conduct;

e) the actual damages suffered by plaintiff;

f) any concealment by defendant of the facts or consequences of its conduct;

g) the existence and frequency of any similar past conduct by the defendant;

h) whether the defendant profited from the conduct;

i) the defendant's ability to pay punitive damages.

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PROBLEMS ON DAMAGES

1. Sam Speeder was not paying attention while driving his car and ran through a red light. Unfortunately Sweet Old Lady was driving through the intersection when Sam ran the red light. Sam hit Old Lady's car. Old Lady was knocked into the windshield. She cut her head and broke her wrist. Sam just laughs and says "Well, I guess I did it again" and then Old Lady sued Sam Speeder for the following items: $250 hospital bill (she gives you a copy of the bill); $500 for pain and suffering (she testifies about the pain she suffered for two weeks after the accident); $700 to repair her 1978 Buick; and $550 for punitive damages (she testifies that she is entitled to punitive damages because Sam ran a red light; that he had a bad driving record--two previous speeding convictions--and that his attitude at the accident indicated a disregard for safety of others.)

Sam says you cannot award the $250 hospital bill because Old Lady's insurance company has paid that already. Old Lady admits the bill was paid by insurance but says she is still entitled to recover. Sam says you can't award the $500 pain and suffering damages because Old Lady did not prove she was entitled to any such damages. Sam brings the current "NADA book" for motor vehicles which indicates that a 1978 Buick like Old Lady's has a blue book value of $100. Therefore, he argues that only $100 may be awarded for damage to the Buick. Finally, he says you don't have the authority to award punitive damages.

Judgment for _____Old Lady _____ Sam Speeder

Amount of damages awarded, if any: _____

Reason: _____

_____

_____.

IV. Parent's Liability for Minor's Damages.

A. G.S. 1-538.1--parent is liable for malicious or willful injury or destruction of property by minor child (vicarious liability)

1. Plaintiff must prove:

a) defendant's child was under the age of 18;

b) that the child maliciously or willfully injured plaintiff or destroyed plaintiff's property;

c) the actual damages suffered.

2. Under statute, parent liable for actual damages in an amount up to $2,000.

3. Defendant parent has a defense to the action and may defeat lawsuit by proving that his or her custody and control of minor have been removed by court or by contract before the act complained of occurred.

B. Parents liability other than under G.S. 1-538.1.

1. Parents might be liable for their own negligence with regard to their children. In this situation, the parent would not be liable for the child's negligent or intentional act, but only for the parent's own independent negligent act. This negligence liability would not be limited to $2,000.

2. A parent has a duty to use ordinary care to control or supervise the behavior of a minor child which he knows or should know is dangerous so as to protect others from injury.

3. The plaintiff must prove:

a) defendant's child engaged in behavior causing injury or damage to plaintiff;

b) the defendant knew or should have known, the child was engaging in or previously engaged in conduct which is likely to endanger others;

c) the defendant had the ability and opportunity to control the child;

d) in the exercise of ordinary care under the same or similar circumstances, a reasonable parent would have exercised sufficient control over child to prevent the behavior,

e) the defendant failed to exercise sufficient control or supervision over the behavior of the child, and that such failure was a proximate cause of the injury. [Moore v. Crumpton, 306 N.C. 618 (1982)]

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PROBLEMS ON DAMAGE BY CHILDREN

1. Dennis Menace is a seven-year old child who, for one reason or another, is in trouble all the time. Dennis' next-door neighbor, Mr. Wilson, has frequently complained to Dennis' parents about his behavior, but they can't do a thing with him. Mr. Wilson's complaints made Dennis angry, and he decided to get even. Consequently, he snuck out a window in his bedroom (he was being punished by his parents who had told him he couldn't leave his room), climbed in a window at the Wilson's house one weekend when the Wilsons were out of town and turned on the faucet in the upstairs bathroom, full force. When the Wilsons arrived home, they discovered severe water damage to the second-story floor/first story ceiling. It cost $3,000 to repair the damage. The Wilson's filed an action in small claims court against Dennis' parents, seeking $3000 damages. Mr. and Mrs. Menace don't dispute the facts about the damage, but say that <u>they</u> didn't turn on the water, and that it's not fair to hold them responsible.

   Judgment for __ Wilsons __ Dennis's parents

   How much? _____.

   Reason: _____

   _____

   _____.

V. Bailments.

A. Created when one person delivers possession of personal property with the exclusive right to control to another who accepts possession.

1. Owner is bailor; party acquiring possession is bailee.

B. Kinds of bailment.

1. Bailment for hire is for mutual benefit of both parties.

2. Gratuitous bailment is solely for benefit of bailor--person giving up possession of the property.

C. Liability

1. Bailee for hire is not insurer; but is under duty to exercise due care to protect property from loss, damage, or destruction, and to return the property to bailor in as good condition as when he received it.

a) Bailee liable for negligent failure to perform this duty.

b) Negligence is established prima facie by showing that bailee received the property in good condition and failed to return it or returned it in a damaged condition. [Pennington v. Styron, 270 N.C. 80 (1967)]

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PROBLEMS ON BAILMENTS

1. Tonya Trusting takes her brand new, twice-worn sweater to the dry cleaners to have it cleaned. She picks the sweater up and the next day, she puts it on to wear to work. Lo and behold the sweater now fits her 6 year old sister rather than her. Tonya goes back to the dry cleaners; the manager tells her they won't pay for a new sweater--accidents happen and that is just her tough luck. Tonya sues the dry cleaners. At the trial the dry cleaners says Tonya has the burden of proving negligence and just saying the sweater was shrunk is not enough.

   Judgment for __ Tonya __ Dry Cleaners

   Reason:
   _____

   _____

   _____.

2. Randy takes his car to the Oldsmobile dealer to have it repaired. Two days later when Randy returns, the Oldsmobile dealer returns his car with several large dents on the hood. Randy sues the dealer. At the trial the Dealer testifies that cars brought in for repairs are kept in a fenced, locked lot. While Randy's car had been outside, there was a very bad hail storm and the hail damaged his car. Randy says he doesn't care what caused the damage, the Oldsmobile dealer is required to return the car in the same condition as it was given to him. Render your judgment.

   Judgment for __ Randy __ Oldsmobile Dealer

   Reason: _____

   _____

   _____.

VI. Insurance Companies and Negligence Actions.

A. When sue person who was negligent (called tortfeasor), he is defendant; can't name his insurance company as defendant.

1. Insurance is merely a contract to pay damages if insured is held liable and usually includes contractual agreement that company will provide insured an attorney.

B. Person who is insured sues tortfeasor for total damages arising out of automobile accident even if insured has been paid by his own company for most of the claim. [St. Paul Insur. Co. v. Rose Supply Co., 19 N.C. App. 302 (1973)]

1. Insured is a necessary party (which means he must be named as plaintiff).

2. Insurer is a proper party and may be joined as a plaintiff at the court's discretion.

3. Generally, reason for not joining insurance company as a plaintiff when they have already paid the insured for part of the costs is that having the insurance company as a co-plaintiff might prejudice the jury against the plaintiff's case.

4. If plaintiff receives a judgment from defendant, insurance company is entitled to be repaid by plaintiff for amount it paid to plaintiff.

C. But if insurer has paid the insured the entire damages (no deductible), the lawsuit must be brought by the insurance company who is the real party in interest. Phillips v. Altson, 257 N.C. 255 (1962)]

1. Insured may be joined as proper but not necessary party.

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Tab:

Videotaping

VIDEOTAPE EXERCISE

All participants in the small claims school will participate in a videotape exercise. During the exercise, each student will act out the role of a small claims court magistrate for about 15 minutes. The only people who will be in the room while you are being videotaped will be Dona or Cheryl and one other SOG employee who will be playing the role of plaintiff and defendant in the case being tried. Each participant will be asked to do the following things during the exercise: (1) open court and call the first case; (2) hear the evidence, just as you would do in any case; and (3) enter judgment.

After all students are videotaped, each magistrate will have a scheduled time to review their videotape with Dona or Cheryl. This review will last about twenty minutes. No one except Dona, Cheryl, and the magistrate will see the tape. The tape will be destroyed at the end of the school.

The purpose of the exercise is to provide you with a rare opportunity--a chance to see yourself, if only for a moment, as others see you. The idea is not only to test your knowledge of the law, but more importantly, to allow you to learn something about yourself: to observe those small but important characteristics that go to make up JUDICIAL DEMEANOR. Along the way, you'll also get feedback about some effective ways to enter judgments.

Many people are nervous at the idea of being videotaped. The participants in the most recent small claims school reported that they dreaded the experience, and many reported "stage fright" immediately before it was their turn to be taped. Almost always, however, people report that the experience is not so bad after all--in fact, many people say that the experience is a good one, and that they feel much more confident in court after having seen themselves on tape! When we asked the magistrates in the last school what they thought, they said that while they felt nervous at first, they were glad they participated in this part of the school. So, as much as you can, try not to worry about the videotape exercise.

When you arrive at the school, you will be given schedules for the initial taping on Wednesday and Thursday and the review session on Friday. Because we have so many people to tape, only fifteen minutes are allotted for each performance, **so please be sure to be on time and ready to perform when your name is called.** In fact, it would be a good idea to show up a few minutes early.

We are also enclosing a copy of the summons and complaint in the case which you will hear while being videotaped. You may want to look over this information beforehand, just as you normally would. If you like, feel free to make notes, use check-lists, or otherwise do what you can to prepare to hear the case.

STATE OF NORTH CAROLINA

File No.

Wake County

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

Plaintiff(s)

Joanna O'Gorman

VERSUS

Defendant(s)

Patricia Sanderford

MAGISTRATE SUMMONS

☐ ALIAS AND PLURIES SUMMONS

G.S. 7A-217, -232; 1A-1, Rule 4

Date Original Summons Issued

05-11-2008

Date(s) Subsequent Summons(es) Issued

TO:

Name And Address Of Defendant 1

Patricia Sanderford
1022 Sandlebrook Court
Raleigh, NC 27602

TO:

Name And Address Of Defendant 2

A Small Claim Action Has Been Commenced Against You!

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

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

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

Date of Trial	*Time Of Trial*			*Location Of Court*
05-22-2008	2:00	☐ AM	☒ PM	Wake County Courthouse

Name And Address Of Plaintiff Or Plaintiff's Attorney

Joanna O'Gorman
1312 Hickory Hollow Lane
Raleigh, NC 27610

Date Issued

05-11-2008

Signature

Maria Craven

☒ *Deputy CSC* ☐ *Assistant CSC* ☐ *Clerk Of Superior Court*

(Over)

RETURN OF SERVICE

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

DEFENDANT 1

Date Served	Time Served	Name Of Defendant
5-14-08	9:00 ☒ AM ☐ PM	Patricia Sanderford

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

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

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

Name And Address Of Person With Whom Copy Left (If Corporation, Give Title Of Person Copy Left With)

☐ Other manner of service: *(specify).*

☐ Defendant WAS NOT served for the following reason:

DEFENDANT 2

Date Served	Time Served	Name Of Defendant
	☐ AM ☐ PM	

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

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

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

Name And Address Of Person With Whom Copy Left (If Corporation, Give Title Of Person Copy Left With)

☐ Other manner of service: *(specify).*

☐ Defendant WAS NOT served for the following reason:

FOR USE IN SUMMARY EJECTMENT CASES ONLY

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

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

Address Of Premises Where Posted

Service Fee	Signature Of Deputy Sheriff Making Return
$ 15.00	Hannah Langdon
Date Received 5-12-08	Name Of Sheriff (Type Or Print) Donnie Harrison
Date Of Return 5-15-08	County Of Sheriff Wake

AOC-CVM-100, Side Two, Rev. 4/01

File No.

COMPLAINT IN SUMMARY EJECTMENT

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

STATE OF NORTH CAROLINA

Wake County

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

Name And Address Of Plaintiff

Joanna O'Gorman
1312 Hickory Hollow Lane
Raleigh, NC 27610

County	Telephone No.
Wake	919-231-6329

VERSUS

Name And Address Of Defendant 1 ☒ Individual ☐ Corporation

Patricia Sanderford
1022 Sandlebrook Ct.
Raleigh, NC 27602

County	Telephone No.
Wake	919-652-1454

Name And Address Of Defendant 2 ☐ Individual ☐ Corporation

County	Telephone No.

Name And Address Of Plaintiff's Attorney Or Agent

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

Description Of Premises (Include Location)				
1022 Sandlebrook Ct. Raleigh, NC				☒ Conventional ☐ Public Housing ☐ Section 8
Rate Of Rent	☒ Month ☐ Week	**Date Rent Due**	**Date Lease Ended**	**Type Of Lease**
$ 750.00 per		04-01-2008		☒ Oral ☐ Written

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

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

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

Description Of Any Property Damage

Amount Of Damage (If Known)	Amount Of Rent Past Due	Total Amount Due
$	$ 1,500.00	$ 1,500.00

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	Signature Of Plaintiff/Attorney/Agent
5-11-08	Joanna O'Gorman

CERTIFICATION WHEN COMPLAINT SIGNED BY AGENT OF PLAINTIFF

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

Date	Signature

(Over)

Per

INSTRUCTIONS TO PLAINTIFF OR DEFENDANT

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

2. The PLAINTIFF cannot sue in small claims court for more than $5,000.00 excluding interest and costs.

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

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

5. In filling out number 3 in the complaint, if the landlord is seeking to remove the tenant for failure to pay rent when there is no written lease, the first block should be checked. (Defendant failed to pay the rent due on the above date and the plaintiff made demand for the rent and waited the ten (10) day grace period before filing the complaint.) If the landlord is seeking to remove the tenant for failure to pay rent when there is a written lease with an automatic forfeiture clause, the third block should be checked. (The defendant breached the condition of the lease described below for which re-entry is specified.) And "failure to pay rent" should be placed in the space for description of the breach. If the landlord is seeking to evict tenant for violating some other condition in the lease, the third block should also be checked. If the landlord is claiming that the term of the lease has ended and the tenant refuses to leave, the second block should be checked. If the landlord is claiming that criminal activity occurred, the fourth block should be checked and the conduct must be described in space provided.

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

7. The PLAINTIFF must appear before the magistrate to prove his/her claim.

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

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

10. If the defendant appeals and wishes to remain on the premises the defendant must also post a stay of execution bond within ten (10) days after the judgment is entered.

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

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

Tab:

Summary Ejectment

Lewandowski
Institute of Government
April 28, 2007

OUTLINE ON LAW OF SUMMARY EJECTMENT

I. Definition and Grounds for Bringing Action.

A. Summary ejectment is the legal procedure that a landlord uses to oust a tenant.

B. May be used to oust from dwelling, commercial building, mobile home or mobile home space.

C. May be used when

1. Tenant violated a provision of lease for which eviction is specified.
2. Tenant failed to pay rent even if lease fails to specify this.
3. Lease has expired and tenant refuses to leave.
4. Tenant or other person has engaged in criminal activity on the premises. (this provision applies to residential leases only).

D. Remedy is always possession of property to landlord and sometimes money judgment also.

II. Who must bring suit.

A. Real party in interest who is landlord.

1. Agent or attorney may not sue in own name
2. But don't dismiss for failure to list landlord as plaintiff; allow plaintiff to amend complaint listing proper plaintiff.

B. Agent may sign complaint in summary ejectment case, if landlord is plaintiff and agent has actual knowledge of facts.

III. Service of process.

A. Sheriff may serve defendant

1. personally,
2. by leaving at defendant's dwelling with person of suitable age and discretion, or
3. by mailing a copy first class mail to defendant and posting the summons and complaint on the premises from which he is being evicted.

B. Plaintiff may serve defendant by certified mail return receipt requested.

C. Jurisdiction is also established by defendant's voluntary appearance.

IV. Grounds for summary ejectment: proof required of plaintiff.

A. **Violating a condition in the lease**. Landlord must prove the following four things and may prove the fifth.

1. That he is landlord and that defendant is tenant.

2. Lease provision seeking to enforce (for example, rent due on first day of month or no pets allowed).

3. That lease specifically provides that lease forfeited and landlord may reenter and evict for breach of the lease condition involved.

   a) If written lease, must see provision in lease.

   b) If oral lease, landlord must testify that he and tenant agreed when entering into lease that if condition not met, landlord could reenter and evict.

4. Provision breached (for example, tenant did not pay rent on time or tenant kept a dog on premises).

5. Any damages due.

   a) unpaid rent.

   b) damages for occupancy from end of lease period to date of judgment.

   c) special damages for physical injury to property (damages beyond normal wear and tear).

6. Tender not allowed to stop judgment from being entered.

B. **Action brought for failure to pay rent.** Landlord must prove first four things and may prove fifth.

1. That he is landlord and that defendant is his tenant.

2. Terms of lease regarding amount of rent due and when due that he is seeking to enforce.

3. Breach of lease by tenant (i.e. tenant did not pay rent on first of month).

4. That landlord made demand from tenant for rent at least 10 days before filing lawsuit. This statute (G.S. 42-3) was enacted to protect landlords who have not provided in their lease for automatic forfeiture with a right to reenter and evict for failure to pay rent. Essentially, it provides that if there is no automatic forfeiture clause so that the landlord cannot sue under A. above, forfeiture of the lease occurs ten days after a demand for payment is made.

5. Any damages due (same as for breach of condition of lease).

6. Tender available to defendant until judgment rendered. Magistrate must dismiss the lawsuit if defendant tenders to plaintiff full amount of rent due plus court costs

C. **Action brought for holding over after end of lease period.** Landlord must prove the following four things and may prove fifth.

1. That he is landlord and that defendant is his tenant.

2. Terms of lease regarding length (i.e. lease is for one year or lease is month-to-month).

3. Breach of lease (i.e., term of lease has ended and tenant has not left).

4. That landlord has given defendant notice to end the term.

   a) If written lease, whatever notice (if any) lease requires.

   b) If tenancy for years (which means for a definite period of time) and no lease requirement for notice, no notice is required.

   c) If periodic tenancy, proper notice given to terminate lease.

      (1) Year to year–one month before end of year.

      (2) Month to month–one week.

      (3) Week to week–two days.

      (4) Mobile home space–60 days.

5. Any damages due (same as for breach of condition of lease).

6. Tender does not stop lawsuit.

D. **Action brought for unlawful criminal activity**.

1. Landlord must prove <u>one</u> of the following things.

   a) Criminal activity occurred on or within the individual rental unit leased to the tenant.

      (1) Criminal activity means activity that would constitute a drug violation under G.S. 90-95 (except possession of a controlled substance); any activity that would constitute conspiracy to commit a drug offense; or any other criminal activity that threatens the health, safety, or right of peaceful enjoyment of premises by other residents or employees of the landlord.

      (2) Tenant is defined as person who is signatory on lease.

   b) Individual rental unit was used in any way in furtherance of or to promote criminal activity.

   c) Tenant, any member of tenant's household, or tenant's guest engaged in criminal activity on or in immediate vicinity of any portion of entire premises.

   d) Tenant gave permission to or invited person to return to or reenter property after that person was removed and barred from the entire premises.

   e) 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 unit.

2. Tenant may prove as an affirmative defense one of the following four things.

   a) Tenant did not know or have reason to know that criminal activity was taking place within the individual unit.

   b) Tenant did not know or have reason to know that individual unit was being used in furtherance of criminal activity.

c) Tenant did not know or have reason to know that member of household or guest engaged in criminal activity on or in the immediate vicinity of the premises.

d) Tenant had done everything that reasonably could have been expected under the circumstances to prevent the commission of criminal activity.

3. Affirmative defense cannot be successfully used if eviction is second or subsequent proceeding against tenant unless 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.

4. Exemption from eviction—court may choose not to evict if, taking into account the circumstances of the criminal activity and the condition of the tenant, the court finds by clear, cogent, and convincing evidence that immediate eviction 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.

5. Court may issue conditional eviction order against a tenant when

a) Member of tenant's household or tenant's guest engaged in criminal activity and that person is not a party, or

b) Someone other than tenant committed offense for which eviction is specified and court denied eviction of the tenant.

c) Conditional order is enforced by motion in the cause.

6. Court may issue partial eviction order against person who engaged in criminal activity on premises, but who is not the tenant.

a) Partial eviction orders that person removed and barred from the premises, but lease tenant remains in possession.

b) Provision covers adult or minor member of tenant's household.

V. Tenant's Defense: Waiver of Breach

A. Landlord waives breach if accepts rent after breach with knowledge of breach.

B. Defendant must prove that

1. The plaintiff accepted rent from the defendant rent after the breach of the lease.

2. The rent accepted was rent that came due after the breach (ie.future, not past due, rent), and

3. When accepting the rent, the plaintiff knew of the breach.

C. If defendant proves waiver, plaintiff is not entitled to a judgment for possession.

D. Defense of waiver of breach does not apply when eviction is for engaging in criminal activity on the premises (G.S. 42-73). Nor does it apply when the plaintiff is a public

housing authority unless the PHA has taken no action against the tenant for the violation within 120 days (G.S. 157-29).

VI. Judgment of Magistrate (AOC-CVM-401).

A. In all cases in which the magistrate's judgment is that defendant be evicted (whether or not a money judgment will be entered), the magistrate must make a finding as to the undisputed amount of rent in arrears. The sole purpose of requiring this finding is to allow the clerk's to sett the stay of execution bond if the defendant appeals and wants to remain on the premises until the case is heard in district court. See Section IX below.

B. If plaintiff proves his case and defendant was served by some method other than posting and first class mail or if defendant was served by posting but defendant was present at trial, plaintiff entitled to:

1. Judgment for possession.
2. Rent due until <u>date of judgment.</u>
3. Other damages proved.

C. If plaintiff served by posting and defendant is present at trial, magistrate should make sure to check block that defendant was present at trial.

D. If plaintiff proves case and defendant served by posting and has not made a voluntary appearance (usually not present at trial), there is no definitive case on whether plaintiff is entitled to judgment for possession only or both possession and monetary damages. Problem is first whether statutory provision on posting applies only to possession remedy or both and second whether service by posting constitutional for personal jurisdiction. One case (Housing Authority of Atlanta v. Hudson, 296 S.E.2d 558 (Ga. 1982) that decided question said not constitutional. Also a recent Attorney General's opinion indicates that only a judgment for possession may be given. (Opinion to Hon. Thomas N. Hix, February 26, 1992) Therefore, the best answer seems to be that plaintiff is entitled to possession only and not a money judgment.

E. If plaintiff fails to prove his case, enter judgment that plaintiff failed to prove case and action dismissed.

F. Judgment on the pleadings.

1. In one instance the magistrate must enter judgment without any testimony from the plaintiff. The judgment is based solely on the pleadings (i.e. the complaint).
2. The magistrate shall give judgment for possession based solely on the filed pleadings if the following four qualifications are met:
   a) The pleadings allege defendant's failure to pay rent as a breach of the lease for which reentry is allowed (block number 3 under #3 on AOC-CVM-201, Complaint in Summary Ejectment);
   b) The defendant has not filed an answer;
   c) The defendant fails to appear on the day of court; **and**
   d) The plaintiff requests, in open court, a judgment based on the pleadings.
3. If the plaintiff is seeking possession based on failure to pay rent (first block under #3 on complaint form), holding over after the end of the

lease (second block) or criminal activity (fourth block), this law does not apply. Under oath, plaintiff must prove that he or she is entitled to a judgment for possession. The same is true is plaintiff is seeking possession for breach of a condition of the lease for which reentry is specified based on a condition other than failure to pay rent.

4. If the plaintiff also is seeking monetary damages for back rent or physical damage to the property in an action based on defendant's failure to pay rent as a breach of the lease for which reentry is allowed, the plaintiff must prove by a preponderance of the evidence any monetary damages that are due. Only the possession part of the judgment is granted without evidence.

VII. Kinds of Leases.

A. Tenancy for years–

1. Lease for specific period or definite period of time.
2. Can be for a fraction of a year up to several years, but it has a specific ending date.
3. No notice to vacate at the end of the tenancy required, since the parties are aware of the ending date but lease may specify notice.
4. Holding over and paying/accepting rent after end of lease period may result in creation of a tenancy from period to period.

B. Tenancy from period to period–

1. Lease for an indefinite, nonfixed term that is renewable from one period of time to the next, such as month to month, week to week.
2. Notice must be given to terminate lease at end of the period. Unless lease provides otherwise:
   a) one month, if from year to year
   b) one week, if from month to month
   c) two days, if from week to week
   d) 60 days no matter what the term of the periodic tenancy if terminating lease of a mobile home space.

C. Tenancy at will–

1. Rare type of lease that is created if no agreement has been reached between landlord and tenant or if the lease is void or time uncertain
2. Terminable by either party upon giving reasonable notice

VIII. Written leases.

A. If lease exceeds 3 years from date of making, must be in writing and signed by party against whom lease being enforced; otherwise it is voidable and unenforceable.

B. However, if have oral lease that is required to be written, landlord may recover reasonable rental for period of occupancy.

C. If lease exceeds 3 years, must also be recorded with Register of Deeds to be valid against third-party lien creditors or purchasers for value from lessor

D. Landlord may sell premises, but buyer takes subject to lease if it is an unrecorded lease for 3 years or less or a recorded lease for more than 3 years.

IX. Appeal.

A. Must either give oral notice of appeal in open court which magistrate notes on the judgment or must give notice in writing to clerk within 10 days after judgment rendered and mail notice to other parties and must pay $80 appeal costs to clerk within 20 days after judgment rendered

B. To stay (stop) execution of judgment for possession while case is on appeal, defendant (1) must sign undertaking within 10 days after judgment is entered that he will pay future rent into the court as it becomes due; (2) must pay in cash amount of undisputed rent in arrears and (3) must pay in cash the prorated rent from date of judgment until next rental payment is due if judgment entered more than 5 working days before day next rent will be due. Magistrate must make a finding on the judgment of the amount of rent in arrears.

1. If defendant appeals as an indigent, defendant does not have to post rent in arrears, but does have to post in cash pro-rated rent from date of judgment until next rent is due and sign undertaking to pay all future rent as it becomes due.

C. If defendant doesn't put up stay bond, landlord can have tenant removed from premises, but tenant will still have appeal heard.

X. Security deposit law. [G.S. 42-51]

A. Landlord allowed to take security deposit equal to

1. two weeks' rent if week-to-week tenancy.
2. 1 ½ months' rent if month-to-month tenancy.
3. two months' rent if longer tenancy.

B. Landlord may also charge reasonable, nonrefundable fee for pets.

C. May use security deposit for nonpayment of rent, costs of water and sewer if furnished under GS 62-110(g), damage to premises beyond ordinary wear and tear, nonfulfillment of rental period, costs of re-renting after tenant's breach, court costs for bringing summary ejectment action, and costs of eviction proceeding.

D. Landlord must itemize damages and deliver list together with balance of deposit due, if any, within 30 days after tenancy ends.

E. Tenant may bring action to require landlord to account for and refund balance of security deposit; if landlord's noncompliance was willful, magistrate may award reasonable attorney's fees to tenant.

XI. Late payment fees.

A. G.S. 42-46 provides that in residential rental agreements in which definite time for payment of rent is fixed late fee may be charged if:

1. The parties may agree to the late fee;

2. If the rent is paid monthly, the late fee cannot to exceed greater of $15 or 5% of rental payment and if the rent is paid weekly, the late fee cannot exceed the greater of $4 or 5% of the rental payment.

3. The agreement is that the fee is to be charged only if rental payment is 5 days or more late

B. If the rental payment is for subsidized housing, the late fee is calculated on the tenant's share of the contract rent only.

C. Late fee may be charged only one time for each late payment.

1. Can not charge late payment for second month if caused by deducting late fee for earlier month's late payment from second month's rent payment.

D. Residential lease provision contrary to these provisions is against public policy of state and void and unenforceable, which means landlord gets no late fee rather than one reduced to lawful amount. [*Friday v. United Dominion Realty Trust, Inc*, 155 N.C. App. 671, 575 S.E.2d 532 (2003)]

E. Lease provision for administrative fee that would be charged if legal papers are filed against tenant is enforceable and is not a late fee. [*Friday v. United Dominion Realty Trust, Inc*, 155 N.C. App. 671, 575 S.E.2d 532 (2003)]

F. In commercial lease parties may contract to whatever late fee is agreeable.

XII. Impact of Servicemembers' Civil Relief Act (SCRA) on Summary Ejectment Proceedings

A. The SCRA is a federal law that came into effect in December, 2003. Its purpose is to protect individuals serving in the military from being forced to divide their energy and attention between defending our Country on the one hand and responding to various legal proceedings (enumerated in the Act) on the other. The SCRA is a complex piece of legislation and will only be dealt with briefly in this outline. If you encounter a case in which the SCRA is involved, be sure to seek assistance from the SOG or AOC if you are uncertain about how the law impacts the particular fact situation before you.

B. Basic provisions:

1. The SCRA applies to all servicemembers (SMs) on active duty (including members of the National Guard and Reserve ordered to report). Some sections of the Act also apply to family members of a SM.

2. If a SM or a SM's dependent seeks a stay in a summary ejectment proceeding, the court must grant a stay of the proceedings "for a period of 90 days, unless in the opinion of the court, justice and equity require a longer or shorter period of time." 50 U.S.C. app. Sec. 531. This provision applies, however, only if the tenant's ability to pay the rent is "materially affected" by the SM's military service.

3. Federal law also provides that the magistrate may "adjust the obligation under the lease to preserve the interest of all parties."

4. The SCRA also allows a SM to terminate a lease if:

   The SM entered into the lease before entering active duty, *or*
   The SM entered into the lease after entering active duty and subsequently received orders for a permanent change of station or deployment for at least 90 days, *and*

   The premises had been occupied by the SM or his or her dependents.

   a. Termination must be in writing and accompanied by a copy of military orders.
   b. Effective date of termination is 30 days after the first date on which the next rent is due after notice is given. For example, John gives notice on April 15, and his rent is due on the first of each month. Termination is effective on May 31.
   c. The landlord is not entitled to retain the security deposit because of early termination.

C. In addition to the SCRA, which is federal law, North Carolina has also addressed the issue of providing protection to members of the military in the landlord-tenant context. That legislation is contained in G.S. 42-45 and -46. When federal and state law each regulate the same subject, the rule is that state law cannot restrict the rights created by federal law, but state law may add to or expand those rights. Consequently, the two statutes must be considered together. For the most part, the SCRA is the governing law, but in one circumstance, North Carolina law provides protection not found in federal law: members of the military who are "prematurely or involuntarily discharged or released from active duty" are entitled to early termination of leases under G.S. 42-45.

SUMMARY EJECTMENT PROBLEMS
(MORNING SESSION--SMALL CLAIMS SCHOOL)

1. Landlord and tenant enter into a month-to-month tenancy. The only agreement between the two is that the tenant is to pay $300 per month rent, due the first day of each month. On April 1, tenant fails to pay his rent. On April 2, landlord demands the rent, and when it is not paid, files a summary ejectment action on April 13. Tenant comes to trial and says he tried to tender all the back rent and costs, but landlord wouldn't accept it. He says he is prepared to pay now. Landlord says he does not have to accept tender because the lease terminated when tenant failed to pay rent; this action is brought for holding over after the end of the lease; and tenant is not allowed to cut off the lawsuit by tender when it is brought for holding over.

Judgment for: _____ Landlord _____ Tenant

Reason: _____

_____

_____

_____.

2. A summary ejectment action is brought for failing to pay rent. Tenant was renting a mobile home space from landlord. Tenant failed to pay his $100 monthly rent on June 1. Landlord demanded payment of rent on June 5, and filed his small claims action fifteen days after making the demand. At the trial on June 30, tenant appears and states that the landlord did not give him 30 days notice to quit the tenancy.

Judgment for: _____ Landlord _____ Tenant

Reason: _____

_____

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_____.

3. Landlord and tenant sign a written lease for one year. One condition of the lease is that rent is due on the first of each month. The lease provides for automatic forfeiture and the right to reenter and evict for breach of any listed condition. Tenant fails to pay monthly rent of $400 on the first of July. Landlord files his lawsuit on July 3.

a. At trial on July 15, tenant claims the action must be dismissed because the landlord did not demand the rent and wait ten days before filing his lawsuit.

Judgment for: _____ Landlord _____ Tenant

Reason: _____

_____

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_____.

b. Tenant does not appear at the trial, and landlord asks for a judgment without entering evidence. What would you do?

Judgment for: _____ Landlord _____ Tenant

Reason: _____

_____

_____

_____.

4. Landlord and tenant have week-to-week tenancy with the rent due on Mondays. Tenant is usually late in paying his rent. One week when tenant comes in to pay the rent on Wednesday, landlord takes the money and tells tenant that the tenancy is ending at the end of the week and that the tenant must be out by the end of Sunday. On Monday, tenant is still on the premises. Landlord files his summary ejectment action. Tenant comes to court and says that he cannot be evicted because he paid his rent; not only that, landlord did not wait until 10 days after the rent was due before bringing his lawsuit.

Judgment for: _____ Landlord _____ Tenant

Reason: _____

_____

_____

_____.

5. Landlord and tenant have an oral month-to-month tenancy with the only items agreed upon being that rent is at the rate of $250 per month; rent is due on the first of the month; that there will be a late fee of $20 if the rent is paid late, and that there will be an administrative fee of $50 if landlord has to file a summary ejectment action. Tenant does not pay his rent due on June 1. Landlord made a demand for the rent on June 2 and then brought suit on June 15. At the trial on July 15, landlord proves failure to pay rent, that he demanded the rent on June 2, and that the amount of the back rent owed is $375. He asks for $375 back rent, $40 in late fees (two months at $20 per month), and administrative fee of $50, and possession. Tenant says the landlord cannot eject him because landlord did not give a week's notice to vacate the premises. And even if he can be ejected, he should not have to pay the late fee or administrative fee.

Judgment for: _____ Landlord for $ _____ _____ Tenant

Reason: _____

_____

_____

_____.

6. Landlord and tenant have a lease for a year. Tenant fails to pay rent on the first of April. At trial on May 15, landlord proves that they had an oral one-year lease, that tenant had agreed to pay rent at the rate of $300 per month, due on the first of the month. Landlord proves that when tenant did not pay, he demanded the rent and waited 10 days before filing his lawsuit. Tenant says she has $600, plus court costs, to pay the landlord. What would you do?

Judgment for: _____ Landlord _____ Tenant

Reason: _____

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_____.

7. Plaintiff, Mr. Jones, trustee of trust for minor child Isaac Swain, brings a summary ejectment action against Mrs. Kimberly Swain (Isaac's mother). At the trial, Mr. Jones explains that Isaac's father had died. His will had left the property involved in this action to his son Isaac and provided that until his son reached 30 years of age, Mr. Jones was appointed trustee of a trust for Isaac. Mr. Jones introduced a letter he had sent to Mrs. Swain, giving her 30 days notice to vacate the dwelling. Mr. Jones says Mrs. Swain has resided in the house about one year and has not paid rent during this period nor has any been requested from her. She is residing in the premises under no lease. Mr. Jones asks for a judgment for possession. Mrs. Swain doesn't offer any evidence.

Judgment for: _____ Landlord _____ Tenant

Reason: _____

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_____.

8. Landlord and tenant had a month-to-month lease with rent of $350 per month. Tenant failed to pay rent on June 1. Tenant called landlord about rent on June 10, and landlord said he wanted to get all this business settled. Tenant still hadn't paid rent by June 26, so landlord filed suit for back rent and possession. Tenant was served by posting and first-class mail. The trial is held on July 15.

At the trial landlord explains what happened and asks for possession and back rent of $525.

a. Tenant is present and says landlord did not demand the rent and wait ten days before bringing his action. Tenant also says if the magistrate will not rule against him, he is prepared to tender the $525, plus court costs now.

Judgment for: _____ Landlord _____ Tenant

Reason: _____

_____

_____

_____.

b. Assume you find that the landlord has proved his case, what if tenant says that if she owes the $525, landlord is holding a security deposit of $350. She asks that you subtract the award by the security deposit.

Judgment for: _____ Landlord for $ _____ _____ Tenant

Reason: _____

_____

_____

_____.

9. Tenant, John Jones, has a month-to-month tenancy on a house. He falls madly in love with Susie Smith and asks her to move in with him. Susie pays no rent, but does share the cleaning and cooking duties. After 6 months of bliss, John decides Susie really isn't the girl for him. He asks her to leave. Susie says, "Forget it, this is just as much my house as yours." John files a summary ejectment against Susie asking for possession only.

Judgment for: _____ Landlord _____ Tenant

Reason: _____

_____

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_____.

10. Landlord files an action to recover back rent. At the trial on July 20, he testifies that he rented a mobile home to Roger Able for one year, beginning January 1, 1994. Rent is $250 per month. On May 31, landlord received a letter from Mr. Able stating that he would be leaving on June 30. He had received orders (a copy was attached) from the U.S. Army

headquarters transferring him from Ft. Bragg to Ft. Lee, Virginia. Landlord immediately began trying to re-rent the premises and was able to sign a new lease with another tenant beginning August 1 for $200 per month. Landlord asks for damages of $500 ($250 for July and $50 per month for August through December). Defendant is not present.

Judgment for: _____ Landlord for $ _____ _____ Tenant

Reason: _____

_____

_____

_____.

Tenant's Rights

I. Residential Rental Agreements Act (G.S. 42-38 to -44). Specifies duties of landlord and tenant regarding rental property.

A. Landlord is obligated to:

1. Comply with building and housing codes.

2. Keep premises in fit and habitable condition.

a. Ask: would a reasonable person find the dwelling wholly or partially uninhabitable due to defects?
b. What notice required? Statute doesn't address. Oral notice is sufficient (*Surratt v. Newton*); no notice may be required if conditions existed prior to rental.
c. Consider following factors:
1) Compliance with housing and sanitary codes
2) Does defect affect vital facility?
3) Length of time defect persisted
4) Age of dwelling
5) Did tenant cause defect?

3. Keep common areas in safe condition.

4. Maintain and promptly repair electrical, plumbing, heating, and other supplied facilities and appliances.

a. Unless it's an emergency, written notice to landlord is required.
b. Landlord has reasonable time to repair.

5. Install smoke detector and keep in good repair.

B. Tenant's Remedies

1. G.S. 42-40(1) provides that tenant may enforce rights under this Chapter by civil action, including "recoupment, counterclaim, defense, set-off, and other proceeding including an action for possession." This claim is sometimes referred to as claim or action for rent abatement.

2. Tenant may enforce remedy against landlord, rental management company, or any other person with actual or apparent authority to perform statutory duties.

3. Damages calculated by determining difference between FRV as warranted and FRV as is, plus any special damages, but total may not exceed more than has been paid to landlord.

a. Proof of damages as warranted: not necessarily contract rate, but contract rate is good evidence on the point.

b. Proof of damages as is: in addition to usual types of evidence, magistrate may use his or her own life experience to assess FRV in light of actual condition of property.

4. Important points to note:

a. Landlord's obligations may not waived by tenant, either explicitly or implicitly (for example, by agreeing to rent with knowledge of uninhabitable condition).
b. Statute allows landlord and tenant to enter contract *after* the lease is signed in which landlord agrees to compensate tenant for working on premises. This compensation must be something other than reduced rent.

C. Tenant is obligated to:

1. Keep premises clean and safe.

2. Dispose of garbage in clean, safe manner.

3. Keep plumbing fixtures as clean as condition permits.

4. Not damage or destroy premises or smoke detector.

5. Be responsible for all damages other than that caused by normal wear and tear.

6. Notify landlord if smoke detector needs to be repaired.

D. Dueling provisions:

Tenant's obligation to pay rent and comply with statute and landlord's obligation to comply with statute are mutually dependent.

vs.

Tenant may not unilaterally withhold rent before a judge determines his or her right to do so.

1. North Carolina appellate courts have interpreted these provisions to mean that a tenant is not excused from paying rent by landlord's violation of RRAA, but must instead seek to recover damages, either by a separate action or by raising it as a counterclaim, in court. *Note:* The statute of limitations for an action for rent abatement is three years.

2. Can a tenant repair and deduct? The law is not clear. In my opinion the better argument would allow the tenant to pay for the cost of repairs and deduct that amount from the rent. This is especially true in cases in which (1) the landlord has a clear obligation to repair; (2) the landlord had proper notice but failed to repair within a reasonable time; and (3) the amount of money involved is relatively small. The argument becomes harder to make if any of these three factors is absent.

II. Retaliatory Eviction (G.S. 42-37.1 to -37.3): Statute that asserts State's public policy protecting tenants who exercise their rights to safe, decent, and sanitary housing.

A. Landlord may not evict a tenant in response to tenant's participation in protected activities or other listed events (but tenant's actions must be in good faith):

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

B. How it works procedurally:

1. In action for summary ejectment, retaliatory eviction is affirmative defense which tenant must raise and prove (by greater weight of the evidence).

2. Tenant must prove that ejectment is "substantially in response" to occurence within prior 12 months of one of protected acts or events.

3. Landlord may rebut defense by demonstrating:

a. Tenant failed to pay rent.
b. Tenant is holding over after termination of lease for definite period with no option to renew.
c. Violations were caused by willful or negligent act of tenant.
d. Displacement of tenant is required in order to comply with housing code.
e. Landlord had given tenant a good-faith notice of termination before protected conduct occurred.
f. Landlord plans in good faith to do one of the following after terminating tenancy:
   1) Live there himself;
   2) Demolish the premises, or make major alterations;
   3) Terminate use of premises as a dwelling for at least 6 months.

C. Remedies for retaliatory eviction:

1. If tenant demonstrates retaliatory eviction, magistrate must deny landlord's claim for possession, but may still enter money judgment awarding back rent.

2. Tenant may also have action for unfair trade practices or action for damages if wrongfully evicted.

III. Self-help eviction (G.S. 42-25.6 to -25.9)

A. <u>In residential leases</u> self-help eviction is prohibited by statute. (Note that this is not the case in commercial lease situations.)

1. This applies to actual eviction (e.g., padlocking the property) as well as to constructive eviction (causing conditions to be so unpleasant as to

force the tenant to leave—by turning off the water or electricity, for example).

2. The statute also prohibits landlords from seizing the tenant's property as a means of extorting the payment of rent.

B. Remedies for landlord's use of self-help:

1. Tenant is entitled to recover possession of premises.
2. Tenant may choose to terminate lease instead.
3. Landlord is responsible for damages caused by removal.
4. While punitive damages are not permitted, the courts have said that an action for unfair trade practice (which carries treble damages) is permitted.
5. In the case of property, tenant may bring action for conversion.

SUMMARY EJECTMENT PROBLEMS
(Afternoon Session-Small Claims School)

1. Mr. Jones rented a house from Mr. Barnes. He signed a one-year lease, with rent at the rate of $250 per month due the first of each month. Jones moves in and finds the following problems with the house: There are two bad leaks in the roof that result in puddles of water in the living room and one bedroom whenever it rains. Several windows are missing screens and others have badly torn ones. The wooden floor on the front porch is rotten. Upon moving into the house, Mr. Jones immediately telephoned Mr. Barnes and asked that these items be repaired. Two weeks later when no repairs had been made, Mr. Jones moved out. Three months later Mr. Barnes sued Mr. Jones for $1400 rent for eleven months of the one year lease for which rent had not been paid. Mr. Barnes says the house was uninhabited for two months after Mr. Jones left and then was re-rented but at a monthly rental rate of $150 per month. He is seeking $250 for two months and $100 per month for the remaining nine months. Mr. Barnes says that Mr. Jones breached the one year lease. Mr. Jones says Mr. Barnes breached the warranty of habitability; he claimed the premises were uninhabitable, and therefore, he was entitled to leave. Mr. Barnes exclaimed that Mr. Jones knew the house was in bad condition when they negotiated the lease; that is why the rent was only $250; Mr. Jones had agreed to the conditions by signing the lease. Not only that, but Mr. Jones never gave him written notice of needed repairs. Therefore, Mr. Barnes says he has not breached any provisions of law.

   a. What about the claim that the warranty of habitability was breached?

   b. How do you rule on the issue of notice of needed repairs?

   c. Did Mr. Jones have a right to move out?

   d. Render your judgment.

2. Ms. Marks signs a lease to rent an apartment from TR Realty on a month-to-month basis with rent of $400 per month due at the first of the month. The lease has an automatic forfeiture clause for breach of any condition of the lease; one condition is that the rent be paid on the first of each month. The apartment is furnished with a dishwasher. In January, the dishwasher broke. On January 11, Ms. Marks called TR Realty to ask that the dishwasher be repaired. Two weeks later (Jan. 25) after no repairs had been made, Ms. Marks wrote a letter to TR Realty demanding that they repair the dishwasher. On February 1, the dishwasher had not yet been repaired. Ms. Marks did not pay her rent. On February 2 TR Realty called Ms. Marks and demanded the rent; she stated that she would pay it when the dishwasher was repaired. TR Realty filed a summary ejectment action on February 3, asking for possession and back rent. The trial is held on February 20. Ms. Marks says she did not think she had to pay the rent when the landlord breached the requirement to repair. She argues that you should dismiss the case. TR Realty says proper notice of the needed repair

was only given on Jan. 25, and they were not given sufficient time to make the repairs. Even if they had had a duty to make the repairs, the tenant had no right to unilaterally withhold the rent because repairs were not made. TR argues that you should grant them possession and back rent of $286 (20 days rent).

a. What about TR's argument that proper notice was not given?

b. What about Ms. Mark's withholding the rent?

c. Render your judgment.

3. Use the same fact situation as above except Ms. Marks had not withheld her February rent. However, on February 20 when she had not heard anything further from TR Realty, Ms. Marks called the GE repairman to fix the appliance. The bill was $50, which she paid. On March 1, she paid only $350 for her monthly rent payment notifying TR Realty that she had paid a repairman $50 to fix the dishwasher and was subtracting the amount TR owed her from her rental payment. TR Realty sues for possession and unpaid rent of $50.

a. Render your judgment.

c. Could Ms. Marks have moved out because the repairs were not made?

3. 3. Mr. Bannister rents a mobile home from Country Road Trailer Park. He agrees to pay monthly rent at the rate of $200 per month. The sixth month of his tenancy, the hot water heater develops a problem and Mr. Bannister has no hot water. He immediately calls the manager and tells him of the problem. Mr. Bannister continues to pay rent, and the hot water heater is finally repaired three months and two weeks after notice was given. About two years later Mr. Bannister moves to another mobile home park and at that time he files a small claims action against Country Road Trailer Park to recover $450 rent abatement. At the trial, Mr. Bannister states that he thought it would have been reasonable for Country Road to have repaired the hot water heater within two weeks; so he was asking for damages for the three months after reasonable time to repair before repairs were made. He stated that, in his opinion, a mobile home without hot water had a fair rental value of only $100 per month. He also says that the fair rental value of the mobile home with hot water was $250. All other mobile homes in the park identical to his had been renting for $250 per month. He had been given a cheaper rate than the fair rental rate because he was single and led a quiet life. He therefore asks that you render a judgment in his favor for $450 ($150 per month for three months) to repay him for the landlord's breach of his duty to repair.

a. Country Road argues that Mr. Bannister waited to long to sue. He asks that you dismiss the action. How do you rule with regard to this argument?

b. Next, Country Road Trailer Park argues that Mr. Bannister is not entitled to any recovery of rent. Once he pays the rent without any protest, he cannot recover part of it. How do you rule with regard to this argument?

c. Country Road then argues that if it is required to pay damages for failure to repair, the plaintiff must offer some evidence by an expert witness as to the fair rental value of the mobile home without hot water. How do you rule?

d. Finally, Country Road argues that it should only be required to pay the difference between the fair rental value of the premises without hot water and the contract rate of $200 per month. Therefore, the award, if any, should only be for $300. How do you rule?

5. Landlord and tenant entered into a month-to-month tenancy, with rent of $250 per month due the first of the month. After a couple of months tenant began paying rent late. Finally, one month tenant did not pay rent, landlord demanded the rent. Ten days later tenant had not yet paid the rent. Landlord padlocked the house while the tenant was at work. Tenant has to move into another apartment that costs $50 per month more; additionally, it cost $200 to move all her personal property from the padlocked apartment. Tenant sues landlord for $300 (she has been living in the second apartment for two months). She also sues for unfair trade practice and asks that the actual damages be trebled. Render your judgment.

6. Assume the same facts as above except when tenant returns home that evening to find her apartment padlocked. She asks landlord to give her back her property. Landlord says I'll give you the property when you give me the rent you owe me. Tenant sues to recover possession of her personal property. Render your judgment.

7. Landlord and tenant sign a one year lease. Tenant begins having loud parties and bothering other nearby tenants. Landlord asks tenant to stop making so much noise, but tenant doesn't. Landlord talks to his lawyer about evicting the tenant and is told that his lease does not include a provision for automatic forfeiture for loud parties. Landlord decides he is sick and tired of all the complaints he is getting, so he turns off the water to the apartment. Tenant then moves out of the apartment. Landlord is unable to re-rent it for two months so he sues tenant for two months rent and the advertising expenses for rerenting. Tenant says he is not liable because landlord breached the lease. Discuss the issues and render your judgment.

8. Landlord rents a garage apartment to Mr. Ron Young under an oral lease. The terms of the lease are that the tenant has a month-to-month periodic tenancy and pays $95 per month rent. Tenant notified plaintiff that the hot water heater did not work, the door of the apartment does not lock, and the water pipes freeze during very cold days. (Notice of the frozen water pipes had been given to the landlord periodically during the winter when they actually froze.) Two weeks after sending the letter to the landlord, tenant reported the defects to the local building inspector. The building inspector contacted the landlord and informed him that the defects were in violation of the Housing Code and that the water heater and door lock would have to be repaired immediately. The water pipes would have to be corrected eventually. One day after the housing inspector called the landlord, Mr. Young received notice from the landlord to quit the premises at the end of the month. At the trial Mr. Young argues that you should dismiss the case because the eviction is retaliatory. Discuss the issues and render your judgment.

9. Assume the same facts as above except that tenant did not pay his rent on February 1, called the housing inspector on February 2 and complained, landlord demanded the rent on Feb. 3 and filed his lawsuit to evict on Feb. 14. Discuss the issues and render your judgment.

10. Landlord and tenant enter into a one year lease beginning Jan. 1, 1988 to lease a house. On Jan. 3, 1989 landlord files a summary ejectment action against tenant based on holding over after the end of the lease. Tenant asserts that the eviction is retaliatory because it is substantially in response to tenant's complaint within the last 12 months about the premises. Tenant relates that on June 15 he had telephoned landlord to complain that the house was in an uninhabitable condition--screens were missing from the windows, two electrical sockets were exposed, the land in the back yard where the septic tank is located was soft, wet and smells bad. When landlord failed to make any repairs, tenant wrote him a letter on July 10 demanding that the repairs be made. Tenant shows you a copy of the letter. Finally, in October, three months after receiving the letter, landlord made the repairs, saying that he sure didn't like troublesome, complaining tenants. Tenant says he has always paid his rent on time and should not be evicted. Discuss the issues and render your judgment.

11. Landlord and tenant have a month-to-month tenancy for a house. Tenant complains to the housing inspector about the condition of the house and the housing inspector notifies the landlord that he is in violation of the Housing Code. Landlord gives tenant notice July 5 that the tenancy will end on July 31. On August 1 when tenant has not left, landlord brings his summary ejectment action. Tenant argues that the eviction is retaliatory so the case must be dismissed. Landlord testifies that in order to comply with the housing code, he must remodel the house and cannot do that work with tenant living there. Discuss the issues and render your judgment.

12. Assume the same fact situation as above, but your lawsuit is brought by the tenant against the landlord for money damages four months after tenant was evicted. Tenant testifies that only very minor repairs were made to the house, and landlord rerented the premises to someone else two weeks after tenant was removed. Tenant asks for the following actual damages: $300 for cost of moving to another apartment (he gives you a copy of the bill he received from the moving company), $200 because his monthly rental for the last four months at the new apartment was $50 per month more than before. Tenant also states that the landlord's action was an unfair trade practice under G.S. 75-1.1, -16 and that he is entitled to have the $500 trebled. Therefore, he asks you to award a judgment for $1500. Discuss the issues and render your judgment.

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.

Appendix A: Outline On Rights Regarding Tenant's Property

I. Residential Leases-Property Other Than Mobile Home and Contents.

A. 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

1. The need for the landlord to deal with property remaining will arise only if the landlord selects the padlocking method of execution.

B. 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.

1. 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.

a) During the ten-day period the landlord may remove the property and store it or may leave the property on the premises.

b) 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.

c) 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.

(1) 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.

(2) 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.

(3) 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.)

(4) The landlord may apply the proceeds of sale to unpaid rent, other damages, storage fees, and sale costs.

(a) Any surplus must be disbursed to the tenant, upon request, within ten days of the sale.

(b) 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.

2. If the total value all of the personal property left on the premises is less than $100, 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.

   a) 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.

3. If a tenant abandons personal property with a total value of $500 or less 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.

   a) The nonprofit organization must agree to identify and separately store the tenant's property for thirty days.

   b) It must release the property to the tenant at no charge if the tenant requests release during the thirty-day period.

   c) Landlord must give notice to tenant of name and address of organization to which the tenant's property was delivered by

      (1) posting notice at the rented premises

      (2) posting notice at the place where the rent is received, and

      (3) mailing copy of notice by first-class mail to the tenant's last known address.

II. Residential Leases-Mobile Home and Contents.

A. If the tenant rents a mobile home space so that the tenant brings a mobile home on the landlord's lot, separate rules apply.

B. 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.

1. The landlord determines the value of the mobile home.

2. Because a mobile home is a motor vehicle, the landlord must notify DMV if the landlord wishes to sell the mobile home.

3. The landlord must get permission of the local tax collectors before moving the mobile home.

C. 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).

1. 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.

2. The landlord must get a judgment for possession and must have a writ of possession issued to enforce the judgment.

3. After the writ has been executed, the landlord may immediately remove the property from the land and store it.

4. 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.

5. 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.

6. The landlord must dispose of the property by selling it at a public auction pursuant to G.S. 44A-4.

   a) The statute requires the landlord to post the notice of sale at the courthouse and to advertise in a newspaper in certain instances.

   b) The landlord must give notice of the sale to the tenant.

   c) 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.

   d) The purchaser may not move the mobile home without first getting permission from the local tax collector.

III. Commercial Leases.

A. The old landlord's possessory lien statute, G.S. 44A-2(e), continues to apply to commercial leases.

B. Landlord may sell property.

1. 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.

2. 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.

3. Notice must be given and property must be sold at public sale under provisions of G.S. 44A-4.

4. If at any time before the expiration of the 21-day period tenant requests his property, landlord must turn it over to tenant.

5. Lien does not have priority over any prior perfected security interests.

C. Landlord may store property.

1. 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.

2. Property placed in storage belongs to the tenant.

a) Property can be recovered from storage by tenant.

b) 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.)

D. Landlord may donate property to charity.

1. 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.

File No.

COMPLAINT IN SUMMARY EJECTMENT

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

Name And Address Of Plaintiff

County | Telephone No.

VERSUS

Name And Address Of Defendant 1 ☐ Individual ☐ Corporation

County | Telephone No.

Name And Address Of Defendant 2 ☐ Individual ☐ Corporation

County | Telephone No.

Name And Address Of Plaintiff's Attorney Or Agent

STATE OF NORTH CAROLINA

_____ County

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

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

Description Of Premises (Include Location) | ☐ Conventional ☐ Public Housing ☐ Section 8

Rate Of Rent $ per ☐ Month ☐ Week | Date Rent Due | Date Lease Ended | Type Of Lease ☐ Oral ☐ Written

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

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

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

Description Of Any Property Damage

Amount Of Damage (If Known) $ | Amount Of Rent Past Due $ | Total Amount Due $ 0.00

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 | Signature Of Plaintiff/Attorney/Agent

CERTIFICATION WHEN COMPLAINT SIGNED BY AGENT OF PLAINTIFF

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

Date | Signature

(Over)

INSTRUCTIONS TO PLAINTIFF OR DEFENDANT

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

2. The PLAINTIFF cannot sue in small claims court for more than $5,000.00 excluding interest and costs.

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

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

5. In filling out number 3 in the complaint, if the landlord is seeking to remove the tenant for failure to pay rent when there is no written lease, the first block should be checked. (Defendant failed to pay the rent due on the above date and the plaintiff made demand for the rent and waited the ten (10) day grace period before filing the complaint.) If the landlord is seeking to remove the tenant for failure to pay rent when there is a written lease with an automatic forfeiture clause, the third block should be checked. (The defendant breached the condition of the lease described below for which re-entry is specified.) And "failure to pay rent" should be placed in the space for description of the breach. If the landlord is seeking to evict tenant for violating some other condition in the lease, the third block should also be checked. If the landlord is claiming that the term of the lease has ended and the tenant refuses to leave, the second block should be checked. If the landlord is claiming that criminal activity occurred, the fourth block should be checked and the conduct must be described in space provided.

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

7. The PLAINTIFF must appear before the magistrate to prove his/her claim.

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

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

10. If the defendant appeals and wishes to remain on the premises the defendant must also post a stay of execution bond within ten (10) days after the judgment is entered.

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

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

File No. | Abstract No.

Film No.

Judgment Docket Book And Page No.

JUDGMENT IN ACTION FOR SUMMARY EJECTMENT

G.S. 7A-210(2), 7A-224; 42-30

Name And Address Of Plaintiff

County | Telephone No.

VERSUS

Name And Address Of Defendant 1

County | Telephone No.

Name And Address Of Defendant 2

County | Telephone No.

Name And Address Of Plaintiff's Attorney

STATE OF NORTH CAROLINA

_____ County

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

This action was tried before the undersigned on the cause stated in the complaint. The record shows that the defendant was given proper notice of the nature of the action and the date, time and location of trial.

FINDINGS

The Court finds that:

1. ☐ a. the plaintiff has proved the case by the greater weight of the evidence.
   ☐ b. the plaintiff has failed to prove the case by the greater weight of the evidence.
   ☐ c. the plaintiff requested and was entitled to a judgment for possession based on the pleading.
2. the defendant(s) ☐ was ☐ was not present. ☐ The defendant was served by postings.
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.
4. other:

ORDER

It is ORDERED that:

☐ 1. the defendant(s) be removed from and the plaintiff be put in possession of the premises described in the complaint.
☐ 2. this action be dismissed with prejudice.
☐ 3. this action be dismissed with prejudice because the defendant tendered the rent due and the court costs of this action.
☐ 4. the plaintiff recover rent of the defendant(s) in the amount and at the rate listed below, plus other damages in the amount indicated. The plaintiff is also entitled to interest on the total principal sum from this date until the judgment is paid.
☐ 5. other: *(specify)*

☐ 6. costs of this action are taxed to the ☐ plaintiff. ☐ defendant.

Rate Of Rent	Amt. Of Rent In Arrears (Owed To Date)
$ per ☐ Mo. ☐ Wk.	$

☐ Judgment Announced And Signed In Open Court

Amount Of Other Damages $

Date | Signature Of Magistrate

TOTAL AMOUNT $ 0.00

Name Of Party Announcing Appeal In Open Court

CERTIFICATION

(**NOTE:** *To be used when magistrate does not announce and sign this Judgment in open court at the conclusion of the trial.)*
I certify that this Judgment has been served on each party named by depositing a copy in a post-paid properly addressed envelope in a post office or official depository under the exclusive care and custody of the United States Postal Service.

Date | Signature Of Magistrate

STATE OF NORTH CAROLINA

File No.

_____ County

In The General Court Of Justice
District Court Division

Name Of Plaintiff

VERSUS

Name Of Defendant

BOND TO STAY EXECUTION ON APPEAL OF SUMMARY EJECTMENT JUDGMENT

G.S. 42-34

BOND

Judgment for summary ejectment was entered by the magistrate against the defendant and in favor of the plaintiff on the date listed below. The defendant has given notice of appeal to district court.

Under the terms of the lease between the plaintiff and defendant, the defendant is obligated to pay rent in the amount and at the times specified below.

Date Of Judgment	Amount Of Rent	☐ Per Month ☐ Per Week	Day Of Month/Week Rent Due
	$		

I, the undersigned defendant, agree to pay into the office of the Clerk of Superior Court the amount of the rent when due as specified above and request the Court to stay execution of the judgment for summary ejectment until this matter is disposed of by the district court. I understand that if I fail to make the payments required by this bond within five (5) days after due, the stay of execution will dissolve and the sheriff may remove me from the premises.

Date	Signature Of Defendant

ADDITIONAL CASH BOND

I, the undersigned defendant, in addition to the bond signed above, now deposit in cash with the Clerk the amount listed below, which is the amount of rent in arrears as determined by the magistrate in the judgment (or, if different, the undisputed amount of arrears as determined by the magistrate in the judgment) and, if the judgment was entered more than five (5) working days before the next rental payment is due, the prorated rent for the days between the day that the judgment was entered and the next day when the rent will be due under the lease.

Amount Of Undisputed Rent In Arrears	$	Date Of Deposit
Amount Of Prorated Rent	$	Signature Of Defendant
Total Amount Of Undisputed Rent And Prorated Rent Deposited With Clerk	$ 0.00	

ORDER

Upon execution of the above bond(s), execution on the judgment entered in this action is stayed until the action is disposed of on appeal in the district court; or, if the defendant fails to make any rental payment to the Clerk's office within five (5) days of the due date, the stay of execution dissolves.

Date	Signature	☐ Assistant CSC ☐ Clerk Of Superior Court ☐ Magistrate ☐ Judge

NOTE: *There are three requirements to stay execution of a summary ejectment judgment. First, all defendants who appeal summary ejectments to district court must sign the bond set out in this form if they wish to remain on the premises. That bond is a promise to pay to the Clerk's office future rent as it becomes due. Second, defendants must post in cash with the Clerk of Superior Court the amount of rent in arrears as determined by the magistrate. If the amount of rent in arrears is disputed, the defendant must post only the undisputed amount of rent in arrears as determined by the magistrate. And third, if the landlord's action was based on nonpayment of rent and the magistrate's judgment was entered more than five (5) working days before the date the next rental payment is due, the defendant must post in cash with the Clerk of Superior Court the prorated amount of rent for the days between the day the judgment was entered and the next day when the rent will be due under the lease. A* ***defendant who appeals as an indigent*** *does not have to post in cash the amount of undisputed rent in arrears as determined by the magistrate, but must post in cash the prorated amount of rent for the days between the day the judgment was entered and the next day rent will be due under the lease and must sign the bond to pay to the Clerk's office future rent as it becomes due.*

If a defendant who is required to sign the bond and deposit cash for the additional bond fails to do both, the execution of the magistrate's judgment is not stayed while the case is being appealed to a district court judge. If the defendant signs the bond and posts the cash bond due, but then fails to pay the rent within five (5) days after it becomes due, the stay of execution dissolves; if the landlord requests execution and pays the proper fees, the Clerk must issue a Writ Of Possession Real Property (AOC-CV-401) to remove the tenant from the premises.

AOC-CVM-304, Rev. 10/2000

File No.

JUDGMENT IN ACTION FOR SUMMARY EJECTMENT CRIMINAL ACTIVITY

G.S. 42-63

Name And Address Of Plaintiff

County | Telephone No.

VERSUS

Name And Address Of First Defendant

County | Telephone No.

Name And Address Of Second Defendant

County | Telephone No.

Name And Address Of Plaintiff's Attorney Or Agent

STATE OF NORTH CAROLINA

_____ County

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

This action was tried before the undersigned on the cause stated in the complaint. The record shows that the defendant was given proper notice of the nature of the action and the date, time and location of the trial.

FINDINGS

The Court finds that:

☐ 1. the plaintiff has proved the case by the greater weight of the evidence.
☐ 2. the plaintiff has failed to prove the case by the greater weight of the evidence.
3. the defendant(s) ☐ was ☐ was not present at trial.
☐ 4. the tenant proved an affirmative defense under G.S. 42-64.
☐ 5. Other: _____

ORDER

It is ORDERED that:

☐ *(eviction)* the defendant(s) named below be removed from and the plaintiff be put in possession of the premises described in the complaint.

Name Of Defendant(s) Ordered Removed

☐ *(partial eviction)* the defendant(s) named below immediately vacate the premises described below, and the defendant(s) named below is barred from returning to the premises described in the complaint as well as the entire complex of buildings or the mobile home park and all real property used in connection therewith, including streets, sidewalks and common area that make up the entire premises owned by the plaintiff. Failure to comply with this Order may subject the defendant(s) named below to contempt or to a charge of a criminal violation.

Name Of Defendant(s) Barred From Premises | Description Of Premises (include location)

☐ *(conditional eviction)* as an express condition of the lease between the landlord and tenant, the defendant/tenant, shall not give permission to or invite the person named below to return to or reenter any portion of the entire premises owned by the landlord and if the person named below returns to the defendant's individual rental unit, the defendant/tenant shall notify law enforcement or the landlord immediately upon learning of the return or reentry. The defendant/tenant shall *(state other conditions, if any)*

Name Of Person Barred From Premises *(may be person named above or someone barred by rules of publicly assisted landlord)*

The defendant/tenant shall sign the acknowledgment below.

☐ this action be dismissed with prejudice. ☐ Other: _____

☐ Costs of the action are taxed to the ☐ plaintiff. ☐ defendant.

☐ Judgment Announced And Signed In Open Court | Date

Name Of Party Announcing Appeal In Open Court | Signature Of Magistrate

CERTIFICATION

(NOTE: *To be used when magistrate does not announce and sign this Judgment in open court at the conclusion of the trial.)*

I certify that this Judgment has been served on each party named by depositing a copy in a post-paid properly addressed envelope in a post office or official depository under the exclusive care and custody of the United States Postal service.

Date | Signature Of Magistrate

ACKNOWLEDGMENT BY DEFENDANT/TENANT

I understand the terms of the conditional eviction against me stated above.

I understand that my failure to comply with the Court's order will result in the termination of my lease, and that I will be evicted.

Date | Signature Of Tenant

Tab:

Break-Out Group Material

Getting Organized for Small Claims Court

Your courtroom is not just a room where you happen to work. As a judge, it is important to remember that this is **your** courtroom. It's your responsibility to organize yourself, your courtroom, and the litigants who appear in front of you in a way that allows you to hear cases efficiently, reach correct decisions, and presents an impression of the judicial system that is professional and competent.

Your Bench Book: In preparing to hold small claims court, you should develop a Bench Book containing a variety of resources. The materials that you will select will vary, depending upon the kinds of cases you most often hear. A resource that comes in handy in one county might be of very little use in another. The following list is offered to help you think about some resources that might be helpful to you—if not these, then perhaps these will remind you of others:

1. Copies of statutes governing the limits of your jurisdiction
2. Emergency plans: names and contact information of courthouse staff trained to deliver emergency medical services, directions to the courthouse, contact information for emergency personnel, and emergency evacuation plans.
3. Information relating to contempt powers: a copy of the statute, a checklist of the steps required to hold someone in direct criminal contempt, contact information for law enforcement in case security concerns arise during small claims court, and an order form for contempt.
4. Information and forms necessary to appoint a guardian ad litem.
5. A current copy of commonly used AOC small claims forms, as well as a table of current court costs and filing fees.
6. Current city and county maps, as well as a current city directory for telephone numbers and street addresses.
7. Calendars for the last six years
8. Measurements of the courtroom to assist witnesses in estimating distances
9. Calculator
10. Written information about resources that may be used when parties who do not speak English who appear for a case.
11. Contact information for Legal Services, local family services, charitable organizations, emergency shelters, Bar Association resources for pro bono counsel, and School of Government and AOC lawyers.
12. Copies of handout: "What Happens After Small Claims Court"
13. Checklists, decision-trees, and other job aids to assist in legal analysis.

Discussion questions for group:
How many of your members already have a Small Claims Bench Book? _____
What materials other than those listed above are included?

Notes _____

_____

What new materials might you include as a result of this discussion?

_____

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Organizing Your Courtroom: While *Court TV* has given many a small claims judge a headache and cause for bitter complaint, it does offer one good idea. Throw out the furniture. Consider removing the chairs from the front of the courtroom, substituting instead one podium in the middle directly before your bench. When you call the case, have the parties and their witnesses come and stand around the podium. Make it clear to the parties that only the person standing at the podium has permission to speak, and that that person should direct all remarks to the judge, rather than to the other parties. Give this a try. You may be surprised at the increased control you have over the proceedings, and the increased speed with which you are able to dispose of cases while nevertheless allowing parties a full opportunity to be heard.

Discussion questions for group: How is your courtroom set up? Does the plaintiff always sit in the same place? What do you think would happen if you tried the idea described above?

Notes_____

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The American Disabilities Act requires that public facilities be fully accessible to individuals suffering from disability. This federal law applies to your courtroom. It requires, among other things, that your courtroom is fully wheelchair-accessible, and that persons who have difficulty hearing or seeing are provided with accommodations allowing them to fully participate in small claims proceedings. Your notebook contains an information sheet from the AOC website directed at persons with disabilities, containing useful explanations and contact information. Have a plan and know who to call *before* you are faced with a situation that might subject a citizen to inconvenience and yourself to a complaint alleging violation of federal law.

Discussion questions for group: Is your courtroom wheelchair-accessible? Have you ever had the issue come up of needing to accommodate an individual's needs arising out of a disability? Do you know what you would do if that DID come up?

Notes_____

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You may be surprised at the extent to which environmental factors affect the experience of litigants in your courtroom. With a friend or a fellow magistrate, take a moment to check the acoustics in your courtroom. If you speak in your normal tone of voice, can your friend hear you from the back of the room? Evaluate the lighting in the courtroom as well as visual obstructions from various points in the room in. Check the temperature in the room: if litigants often wait a substantial time before their cases are called for trial, be sure the courtroom is comfortable. In addition, consider your courtroom from a security standpoint. Do you have a readily accessible way to communicate with the outside world? Would you know what to do if a litigant became belligerent or seemed about to lose control?

Discussion questions for group:

On average, what is the longest time a litigant must wait in your courtroom before his case is called? _____

Do you have any information about the physical set-up of your courtroom? Is it comfortable? How are the acoustics? The lighting? Do you think these factors are important in the individual circumstances of your county?

Notes_____

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What is the security like in your courtroom? Have you ever been concerned that a litigant's behavior—toward you or someone else—might become a problem? What steps, if any, have you taken to deal with the situation, if it comes up?

Notes_____

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Remember that your first communication with litigants is visual. When they enter your courtroom, they immediately get a sense of the formality of their environment. The formality of small claims court varies greatly from one courtroom to another across the

State, but in even the most informal courtroom, it is important that litigants feel that their case is being heard and decided by an impartial decision-maker who is a trained professional.

Discussion questions for group:

Would you describe your courtroom as formal, informal, or somewhere in-between? What steps have you taken to set the tone? (Examples: wearing a robe, having flags in the room, having a State Seal on the front of the desk, dressing professionally, having a nametag identifying you as "Judge So-and-So", etc. Do you think it's more important that litigants feel at home and are unintimidated, or that they perceive the courtroom as a place in which serious decisions are made in a rule-governed, formal atmosphere?

Notes_____

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Organizing Your Litigants

One of the challenges of holding small claims court is that the participants often don't know what to expect, or what the rules are. Many small claims judges make an opening statement at the beginning of court that helps the parties know what to expect. In some counties, however, cases are calendared individually, requiring that an opening statement, if given, be repeated for each case. In some counties, written materials are either posted or distributed as a way of dealing with the problem of educating the litigants.

Discussion questions for group: Do you give an opening statement in your court? If so, what do you usually say? Do you have your statement written out? Is it the same each time you give it?

Notes_____

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Do you (or the clerk's office) have written material informing the parties about what to expect in small claims court? If so, do you believe most parties understand the material and

find it helpful? If not, how do you deal with parties who don't understand what's going on?

Notes_____

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Sometimes it's hard to remember how confusing it can be for a person to be served with civil process. A plaintiff has at least made a decision to become involved with the court system and has negotiated the system enough to have filed a complaint. A defendant, on the other hand, may be surprised to find a deputy in his driveway with papers summoning him to court. He may confuse being sued with criminal proceedings, have difficulty finding the courthouse and courtroom, and have no idea what to do when he gets there.

Discussion question for group:

Is it easy for a person who's never been to small claims court before to find where he's supposed to go in your county? Is it clear to the parties when they arrive whether they should wait outside or enter the courtroom? Are there any special procedures you observe as a response to the fact that parties may be lost, confused, or unprepared for trial? (For example, do you have a policy about how long you wait for a party to arrive before deciding the case against them? Are you more lenient with granting a continuance, a voluntary dismissal, or a Rule 60(b) motion setting aside a judgment when the moving party is an inexperienced litigant?)

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Dealing With Problems in Small Claims Court

If you asked most magistrates to identify the biggest problem they face in holding small claims court, I venture to guess that some of them would say dealing with attorneys. Ironically, this is the opposite of a typical district court judge's reaction. If you were to ask that judge to choose between cases in which the parties are represented by attorneys and those in which litigants represent themselves, the judge wouldn't even have to think about it. Cases involving attorneys would win hands down. It's instructive to take a minute to ask why.

In a case involving attorneys, the role played by the judge is somewhat analogous to a referee. The attorneys make decisions about what evidence to present, and how it should be presented. They are, of course, familiar with the law, which means they know what essential elements must be established by the evidence, and what defenses might be raised in opposition to those elements. Many of our procedural rules (such as that putting the burden of raising an affirmative defense such as the statute of limitations on the defendant, for example) are based on the assumption that the attorneys are aware of the law. An attorney's decision not to raise a defense is presumed to be a deliberate strategic choice. In this situation, a trial judge has a more passive role: as long as the lawyers don't go out of bounds, the judge can sit back and watch the game.

But small claims court is an entirely different game, with different procedural rules. Even in cases in which both parties are represented, the magistrate must contend with two challenges unique to small claims court: first, attorneys are frequently not well-versed in (and oftentimes completely unaware of) small claims procedure. The second challenge is that attorneys frequently have little respect for the small claims judge and small claims court in general. To add insult to injury, this lack of respect may lead them to resist efforts by the small claims magistrate to educate them about procedure!

Topic for discussion: What experiences have you had with cases in which both parties are represented by attorneys? Do you make a point of exploring the possibility of settlement in this circumstance? Have you ever met with the attorneys before beginning the case to discuss your expectations and explain

how you run your court? Is there anything you've tried that worked well—or didn't—that you can share with your group?

Probably the most difficult case from the magistrate's point of view is that in which both parties are present, but only one is represented by an attorney. This raises a number of perplexing issues.

The first springs from a built-in contradiction: on one hand, small claims court is specifically designed for litigants to use easily without the assistance of an attorney. On the other hand, attorneys who have been hired to represent clients in small claims court may feel that they must demonstrate to their clients that their investment is worthwhile. This pressure can make it difficult for an attorney to sit quietly. Indeed, many litigants do expect their attorneys to make numerous objections and impassioned arguments on their behalf, and to raise both technical points of law and procedure in a manner that advantages them. The stage is set for problems.

A second issue is inherent in the imbalance between the parties, especially troublesome in light of the almost sacred ideal that parties in a court of law essentially meet on a level playing field. For example, an attorney may support an argument with case or statutory law in a manner that seems compelling; there is of course no attorney on the other side to point out the shortcomings of his argument or raise questions about the applicability of the cited law. A represented party not only enjoys the considerable advantage of superior legal expertise, but also benefits from the fact that the other party—and sometimes the magistrate—may be intimidated by the attorney. Attorneys are not oblivious to this effect and sometimes work to

heighten it, by making frequent objections to the admission of evidence or in any number of other ways.

Topic for discussion: This situation sharply presents the question many magistrates find most troublesome about small claims court in general: what is your role? What is your judicial philosophy? How much assistance, if any, should you give the parties, and when is it appropriate to give it? Should you be more active in a case such as that above, in order to level the playing field for the unrepresented party? *Should* a small claims judge behave like a district court judge, sitting back for the most part and allowing the parties to do what they will (assuming they don't cross the line), or is small claims court a different animal, requiring a different, more active, judge?

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All magistrates who hold small claims court must eventually find their own personal approach to dealing with the attorneys in their courtroom. As in so many other areas, it may make a big difference whether you are holding court in a small rural county in which you are personally acquainted with the lawyers, or whether you work in a larger, more urban district, in which those personal relationships did not exist. Here are some off the suggestions magistrates have made for dealing with attorneys:

1. Before you begin to hear the case, either provide attorneys with a written statement of the guidelines for their behavior in your court, or make an announcement setting out those guidelines. Typically, these guidelines would include a reference to the fact that small claims court is different

from other trial courts; it is a much more informal court, in which the trial, obviously, is before the judge without a jury. Accordingly, evidence is leniently admitted, with its weight to be determined by the trier of fact-- the judge. Repeated objections to the admission of evidence only serve to prolong the hearing. The magistrate might also point out that civil procedure in small claims court is set out in G.S. 7A, Art. 19, and does differ from that the attorney might be accustomed to. Among other things, the order of presentation is often more informal and less structured. While all parties do indeed have an opportunity to be heard, and to question other witnesses, the judge often takes a more active role in eliciting the information that is necessary for him or her to arrive at a just decision.

2. Many small claims judges actually welcome the presence of attorneys in the courtroom because they may provide valuable legal assistance to the magistrate. Whenever an attorney makes an argument based on case law or a statute, the magistrate should request a copy of the case or statute. If the lawyer's argument is difficult to understand, or appears to be inconsistent with the plain language of the law, do not hesitate to ask the attorney to explain further. As you probably know, lawyers may advance their arguments in a very confident manner, but that confidence should not be misunderstood to indicate that the argument is correct, or even soundly based on the law.

3. Above all, magistrates should relax, and remember that it is they -- and not the attorney -- who is in charge of the courtroom. Declare a recess if you need time to examine materials provided by the attorney; be ready to ask the attorney to define terms or explain more clearly what his argument is; and resist the temptation to believe that the attorney is necessarily better able to evaluate the merits of the pending case then is the magistrate before whom he appears.

Topic for discussion: What suggestions would you add to this list? If you were advising a new magistrate, what is the most important piece of advice you would give about the situation in which one of the parties is represented by an attorney?

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Probably the most frequent objection made by attorneys in small claims court concerns evidence: is it admissible? Is it hearsay? Is it relevant? Must exhibits be properly authenticated? Etc. Most commentators suggest that a small claims judge—who is, of course, sitting as the trier of fact in the absence of a jury—simply inform the parties that rules of evidence are "generally observed" in small claims court, and that the court will determine what weight to give to evidence of questionable admissibility. In other words, just because you hear it doesn't mean you have to believe it. If a party wants to introduce a written statement by a witness not in court, the judge may accept the statement. He may or may not choose to tell the parties that the weight he gives the statement is significantly lessened by the fact that the witness is not present in court to testify or be questioned.

Topic for discussion: What practices do you have in your court about admitting evidence? Do you follow a different rule when an attorney is present and makes an objection? Do you believe it is proper for a judge to educate parties who appear frequently in small claims court concerning the form of evidence they should be prepared to provide? (Example: You might not require every landlord to provide a copy of a written lease, but you might want the manager of an apartment complex who frequently appears before you to make a habit of providing copies of leases.)

No discussion of problems particular to small claims court would be complete without the mention of ex parte contact. While judges who function in the more rarified atmosphere of higher trial and appellate courts find the possibility shocking, small claims magistrates in rural areas frequently confront this situation. Sometimes a party has sought advice from a magistrate about how to deal with a particular circumstance ("My girlfriend won't return my iPod. How do I make her give it back?"). Sometimes a magistrate has heard about a case because it's being discussed in the community. Sometimes the magistrate may merely have answered the phone, only to recognize the facts after beginning to hear the case, weeks or months later.

Topic for discussion: A magistrate who has information about a case received from an out-of-court source is confronted with two questions: 1) Is it possible that you have been influenced by that information; and 2) Is it possible that others will believe you may have been influenced? (i.e., the appearance of impropriety). Disclosing the ex parte contact and asking both parties if they will consent to your hearing the case addresses only #2. Have you ever had a case in which the first question was a serious issue? How did you deal with it?

A final problem area for some magistrates relates to "repeat plaintiffs," -- property managers and other creditors who frequently appear in small claims court.

These plaintiffs are in a unique position in a number of ways. First, magistrates may over time come to know and have opinions, either favorable or unfavorable, about these individuals. Furthermore, repeat plaintiffs develop expectations based on past experiences in your court. While this offers magistrates an opportunity to increase efficiency and establish certain baseline expectations for the quality of evidence required, that same predictability can cause problems in two ways. First, repeat plaintiffs will "magistrate-shop" if that works to their advantage. Second, a magistrate who wishes to modify a procedure or who realizes that he or she has been making an error of law and wishes to correct it, can expect to face resistance and sometimes anger on the part of plaintiffs who have come to know what to expect. Finally, magistrates face an ethical quandry if the plaintiff who appears frequently in their court is repeatedly successful because of the defendants' ignorance about the law. One example arose in a small town in which the plaintiff had purchased a hardware store, including its accounts receivable, which had been in business in the county for many years. The new owner brought numerous small claims actions against customers for money owed, which were in fact barred by the statute of limitations. While the magistrate was aware of this, the string of customers who appeared before him were not and thus did not raise the affirmative defense. The small claims philosophy of this magistrate was such that he typically did not raise affirmative defenses on behalf of defendants appearing in cases before him. He became less comfortable with this philosophy as the plaintiff prevailed, some would say unfairly, in case after case.

Issues for discussion: What are the issues that arise for you in connection with repeat plaintiffs? Are there ways in which you treat repeat plaintiffs differently from other litigants that appear in your court? Is magistrate-shopping an issue in your county? Have you ever been troubled by the appearance of impropriety that may arise when a defendant realizes that you and the plaintiff are acquaintances? Have you ever been concerned that your liking for, or dislike of, a repeat plaintiff might influence your decisions?

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Tab:

Relating Statues

INSTITUTE OF GOVERNMENT

The University of North Carolina at Chapel Hill

SELECTED STATUTES RELATING TO SMALL CLAIMS

March 2006

CHAPTER 1A. RULES OF CIVIL PROCEDURE.
ARTICLE 2. COMMENCEMENT OF ACTION; SERVICE OF PROCESS, PLEADINGS, MOTIONS, AND ORDERS

Rule 4. Process.--(a) Summons--issuance; who may serve.--Upon the filing of the complaint, summons shall be issued forthwith, and in any event within five days. The complaint and summons shall be delivered to some proper person for service. In this State, such proper person shall be the sheriff of the county where service is to be made or some other person duly authorized by law to serve summons. Outside this State, such proper person shall be anyone who is not a party and is not less than 21 years of age or anyone duly authorized to serve summons by the law of the place where service is to be made. Upon request of the plaintiff separate or additional summons shall be issued against any defendants. A summons is issued when, after being filled out and dated, it is signed by the officer having authority to do so. The date the summons bears shall be prima facie evidence of the date of issue.

(b) Summons--contents.--The summons shall run in the name of the State and be dated and signed by the clerk, assistant clerk, or deputy clerk of the court in the county in which the action is commenced. It shall contain the title of the cause and the name of the court and county wherein the action has been commenced. It shall be directed to the defendant or defendants and shall notify each defendant to appear and answer within 30 days after its service upon him and further that if he fails so to appear, the plaintiff will apply to the court for the relief demanded in the complaint. It shall set forth the name and address of plaintiff's attorney, or if there be none, the name and address of plaintiff. If a request for admission is served with the summons, the summons shall so state.

(c) Summons—return. —Personal service or substituted personal service of summons as prescribed by Rule 4(j)(1) a and b must be made within 60 days after the date of the issuance of summons. When a summons has been served upon every party named in the summons, it shall be returned immediately to the clerk who issued it, with notation thereon of its service.

Failure to make service within the time allowed or failure to return a summons to the clerk after it has been served on every party named in the summons shall not invalidate the summons. If the summons is not served within the time allowed upon every party named in the summons, it shall be returned immediately upon the expiration of such time by the officer to the clerk of the court who issued it with notation thereon of its nonservice and the reasons therefor as to every such party not served, but failure to comply with this requirement shall not invalidate the summons.

(d) Summons--extension; endorsement, alias and pluries.--When any defendant in a civil action is not served within the time allowed for service, the action may be continued in existence as to such defendant by either of the following methods of extension:

(1) The plaintiff may secure an endorsement upon the original summons for an extension of time within which to complete service of process. Return of the summons so endorsed shall be in the same manner as the original process. Such endorsement may be secured within 90 days after the issuance of summons or the date of the last prior endorsement, or

(2) The plaintiff may sue out an alias or pluries summons returnable in the same manner as the original process. Such alias or pluries summons may be sued out at any time within 90 days after the date of issue of the last preceding summons in the chain of summonses or within 90 days of the last prior endorsement.

…

(e) Summons--discontinuance.--When there is neither endorsement by the clerk nor issuance of alias or pluries summons within the time specified in Rule 4(d), the action is discontinued as to any defendant not theretofore served with summons within the time allowed. Thereafter, alias or pluries summons may issue, or an extension be endorsed by the clerk, but, as to such defendant, the action shall be deemed to have commenced on the date of such issuance or endorsement.

(f) Summons--date of multiple summonses.--If the plaintiff shall cause separate or additional summonses to be issued as provided in Rule 4(a), the date of issuance of such separate or additional

summonses shall be considered the same as that of the original summons for purposes of endorsement or alias summons under Rule 4(d).

(g) Summons--docketing by clerk.--The clerk shall keep a record in which he shall note the day and hour of issuance of every summons, whether original, alias, pluries, or endorsement thereon. When the summons is returned, the clerk shall note on the record the date of the return and the fact as to service or non-service.

(h) Summons--when proper officer not available.--If at any time there is not in a county a proper officer, capable of executing process, to whom summons or other process can be delivered for service, or if a proper officer refuses or neglects to execute such process, or if such officer is a party to or otherwise interested in the action or proceeding, the clerk of the issuing court, upon the facts being verified before him by written affidavit of the plaintiff or his agent or attorney, shall appoint some suitable person who, after he accepts such process for service, shall execute such process in the same manner, with like effect, and subject to the same liabilities, as if such person were a proper officer regularly serving process in that county.

(h1) Summons.--When process returned unexecuted.--If a proper officer returns a summons or other process unexecuted, the plaintiff or his agent or attorney may cause service to be made by anyone who is not less than 21 years of age, who is not a party to the action, and who is not related by blood or marriage to a party to the action or to a person upon whom service is to be made. This subsection shall not apply to executions pursuant to Article 28 of Chapter 1 or summary ejectment pursuant to Article 3 of Chapter 42 of the General Statutes.

(i) Summons--amendment.--At any time, before or after judgment, in its discretion and upon such terms as it deems just, the court may allow any process or proof of service thereof to be amended, unless it clearly appears that material prejudice would result to substantial rights of the party against whom the process issued.

(j) Process--manner of service to exercise personal jurisdiction.--In any action commenced in a court of this State having jurisdiction of the subject matter and grounds for personal jurisdiction as provided in G.S. 1-75.4, the manner of service of process within or without the State shall be as follows:

(1) Natural Person.--Except as provided in subsection (2) below, upon a natural person:
   a. By delivering a copy of the summons and of the complaint to the natural person or by leaving copies thereof at the defendant's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein; or
   b. By delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to be served or to accept service of process or by serving process upon such agent or the party in a manner specified by any statute.
   c. By mailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested, addressed to the party to be served, and delivering to the addressee.
   d. By depositing with a designated delivery service authorized pursuant to 26 U.S.C. § 7502(f)(2) a copy of the summons and complaint, addressed to the party to be served, delivering to the addressee, and obtaining a delivery receipt.
   e. By mailing a copy of the summons and of the complaint by signature confirmation as provided by the United States Postal Service, addressed to the party to be served, and delivering to the addressee. Nothing in this sub-subdivision authorizes the use of electronic mailing for service on the party to be served.

(2) Natural Person under Disability.--Upon a natural person under disability by serving process in any manner prescribed in this section (j) for service upon a natural person and, in addition, where required by paragraph a or b below, upon a person therein designated.
   a. Where the person under disability is a minor, process shall be served separately in any manner prescribed for service upon a natural person upon a parent or guardian having custody of the child, or if there be none, upon any other person

having the care and control of the child. If there is no parent, guardian, or other person having care and control of the child when service is made upon the child, then service of process must also be made upon a guardian ad litem who has been appointed pursuant to Rule 17.

b. If the plaintiff actually knows that a person under disability is under guardianship of any kind, process shall be served separately upon his guardian in any manner applicable and appropriate under this section (j). If the plaintiff does not actually know that a guardian has been appointed when service is made upon a person known to him to be incompetent to have charge of his affairs, then service of process must be made upon a guardian ad litem who has been appointed pursuant to Rule 17.

…

(6) Domestic or Foreign Corporation.--Upon a domestic or foreign corporation:

a. By delivering a copy of the summons and of the complaint to an officer, director, or managing agent of the corporation or by leaving copies thereof in the office of such officer, director, or managing agent with the person who is apparently in charge of the office; or

b. By delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to be served or to accept service or [of] process or by serving process upon such agent or the party in a manner specified by any statute.

c. By mailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested, addressed to the officer, director or agent to be served as specified in paragraphs a and b.

d. By depositing with a designated delivery service authorized pursuant to 26 U.S.C. § 7502(f)(2) a copy of the summons and complaint, addressed to the officer, director, or agent to be served as specified in paragraphs a. and b., delivering to the addressee, and obtaining a delivery receipt.

(7) Partnerships.--Upon a general or limited partnership:

a. By delivering a copy of the summons and of the complaint to any general partner, or to any attorney-in-fact or agent authorized by appointment or by law to be served or to accept service of process in its behalf, or by mailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested, addressed to any general partner, or to any attorney-in-fact or agent authorized by appointment or by law to be served or to accept service of process in its behalf, or by leaving copies thereof in the office of such general partner, attorney-in-fact or agent with the person who is apparently in charge of the office; or by depositing with a designated delivery service authorized pursuant to 26 U.S.C. § 7502(f)(2) a copy of the summons and complaint, addressed to any general partner or to any attorney-in-fact or agent authorized by appointment or by law to be served or to accept service of process in its behalf, delivering to the addressee, and obtaining a delivery receipt; or by leaving copies thereof in the office of such general partner, attorney-in-fact or agent with the person who is apparently in charge of the office..

b. If relief is sought against a partner specifically, a copy of the summons and of the complaint must be served on such partner as provided in this section (j).

(8) Other Unincorporated Associations and Their Officers.--Upon any unincorporated association, organization, or society other than a partnership:

a. By delivering a copy of the summons and of the complaint to an officer, director, managing agent or member of the governing body of the unincorporated association, organization or society, or by leaving copies thereof in the office of such officer, director, managing agent or member of the governing body with the person who is apparently in charge of the office; or

b. By delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to be served or to accept service of process or by serving process upon such agent or the party in a manner specified by any statute.

c. By mailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested, addressed to the officer, director, agent or member of the governing body to be served as specified in paragraphs a and b.

d. By depositing with a designated delivery service authorized pursuant to 26 U.S.C. § 7502(f)(2) a copy of the summons and complaint, addressed to the officer, director, agent, or member of the governing body to be served as specified in paragraphs a. and b., delivering to the addressee, and obtaining a delivery receipt.

(9) Service upon a foreign state or a political subdivision, agency, or instrumentality thereof shall be effected pursuant to 28 U.S.C. § 1608.

(j1) Service by publication on party that cannot otherwise be served.—*(Not available in small claims court)*

(j5) Personal jurisdiction by acceptance of service.--Any party personally, or through the persons provided in Rule 4(j), may accept service of process by notation of acceptance of service together with the signature of the party accepting service and the date thereof on an original or copy of a summons, and such acceptance shall have the same force and effect as would exist had the process been served by delivery of copy and summons and complaint to the person signing said acceptance.

(k) Process--manner of service to exercise jurisdiction in rem or quasi in rem.--In any action commenced in a court of this State having jurisdiction of the subject matter and grounds for the exercise of jurisdiction in rem or quasi in rem as provided in G.S. 1-75.8, the manner of service of process shall be as follows:

(1) Defendant Known.--If the defendant is known, he may be served in the appropriate manner prescribed for service of process in section (j).

(2) Defendant Unknown.--If the defendant is unknown, he may be designated by description and process may be served by publication in the manner provided in section (j).

§ G.S. 1A-1, Rule 15. Amended and supplemental pleadings. (a) Amendments. - A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 30 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within 30 days after service of the amended pleading, unless the court otherwise orders.

(b) Amendments to conform to the evidence. - When issues not raised by the pleadings are tried by the express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, either before or after judgment, but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues raised by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be served thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

(c) Relation back of amendments. - A claim asserted in an amended pleading is deemed to have been interposed at the time the claim in the original pleading was interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading.

(d) Supplemental pleadings. - Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or

occurrences or events which may have happened since the date of the pleading sought to be supplemented, whether or not the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead thereto, it shall so order, specifying the time therefor.

ARTICLE 4. PARTIES.

§ 1A-1, Rule 17. Parties plaintiff and defendant; capacity. (a) Real party in interest. - Every claim shall be prosecuted in the name of the real party in interest; but an executor, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought; and when a statute of the State so provides, an action for the use or benefit of another shall be brought in the name of the State of North Carolina. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

(b) Infants, incompetents, etc. -

(1) Infants, etc., Sue by Guardian or Guardian Ad Litem. - In actions or special proceedings when any of the parties plaintiff are infants or incompetent persons, whether residents or nonresidents of this State, they must appear by general or testamentary guardian, if they have any within the State or by guardian ad litem appointed as hereinafter provided; but if the action or proceeding is against such guardian, or if there is no such known guardian, then such persons may appear by guardian ad litem.

(2) Infants, etc., Defend by Guardian Ad Litem. - In actions or special proceedings when any of the defendants are infants or incompetent persons, whether residents or nonresidents of this State, they must defend by general or testamentary guardian, if they have any within this State or by guardian ad litem appointed as hereinafter provided; and if they have no known general or testamentary guardian in the State, and any of them have been summoned, the court in which said action or special proceeding is pending, upon motion of any of the parties, may appoint some discreet person to act as guardian ad litem, to defend in behalf of such infants, or incompetent persons, and fix and tax his fee as part of the costs. The guardian so appointed shall, if the cause is a civil action, file his answer to the complaint within the time required for other defendants, unless the time is extended by the court; and if the cause is a special proceeding, a copy of the complaint, with the summons, must be served on him. After 20 days' notice of the summons and complaint in the special proceeding, and after answer filed as above prescribed in the civil action, the court may proceed to final judgment as effectually and in the same manner as if there had been personal service upon the said infant or incompetent persons or defendants.

All orders or final judgments duly entered in any action or special proceeding prior to April 8, 1974, when any of the defendants were infants or incompetent persons, whether residents or nonresidents of this State, and were defended therein by a general or testamentary guardian or guardian ad litem, and summons and complaint or petition in said action or special proceeding were duly served upon the guardian or guardian ad litem and answer duly filed by said guardian or guardian ad litem, shall be good and valid notwithstanding that said order or final judgment was entered less than 20 days after notice of the summons and complaint served upon said guardian or guardian ad litem.

(3) Appointment of Guardian Ad Litem Notwithstanding the Existence of a General or Testamentary Guardian. - Notwithstanding the provisions of subsections (b)(1) and (b)(2), a guardian ad litem for an infant or incompetent person may be appointed in any case when it is deemed by the court in which the action is pending expedient to have the nfant, or insane or incompetent person so represented, notwithstanding such person may have a general or testamentary guardian.

(4) Appointment of Guardian Ad Litem for Unborn Persons. - In all actions in rem and quasi in rem and in all actions and special proceedings which involve the construction of wills, trusts and contracts or any instrument in writing, or which involve the determination of the ownership of property or the distribution of property, if there is a possibility that some person may thereafter be born who, if then living, would be a necessary or proper party to such action or special proceeding, the court in which said action or special proceeding is pending, upon motion of any of the parties or upon its own motion, may appoint some discreet person guardian ad litem to defend on behalf of such unborn person. Service upon the guardian ad litem appointed for such unborn person shall have the same force and effect as service upon such unborn person would have had if such person had been living. All proceedings by and against the said guardian ad litem after appointment shall be governed by all provisions of the law applicable to guardians ad litem for living persons.

(5) Appointment of Guardian Ad Litem for Corporations, Trusts, or Other Entities Not in Existence. - In all actions which involve the construction of wills, trusts, contracts or written instruments, or the determination of the ownership of property or the disposition or distribution of property pursuant to the provisions of a will, trust, contract or written instrument, if such will, trust, contract or written instrument provides benefits for disposition or distribution of property to a corporation, a trust, or an entity thereafter to be formed for the purpose of carrying into effect some provision of the said will, trust, contract or written instrument, the court in which said action or special proceeding is pending, upon motion of any of the parties or upon its own motion, may appoint some discreet person guardian ad litem for such corporation, trust or other entity. Service upon the guardian ad litem appointed for such corporation, trust or other entity shall have the same force and effect as service upon such corporation, trust or entity would have had if such corporation, trust or other entity had been in existence. All proceedings by and against the said guardian ad litem after appointment shall be governed by all provisions of the law applicable to guardians ad litem for living persons.

(6) [Note: Repealed by Sessions Laws 1981, c. 599, s. 1.]

(7) Miscellaneous Provisions. - The provisions of this rule are in addition to any other remedies or procedures authorized or permitted by law, and it shall not be construed to repeal or to limit the doctrine of virtual representation or any other law or rule of law by which unborn persons or nonexistent corporations, trusts or other entities may be represented in or bound by any judgment or order entered in any action or special proceeding. This rule shall apply to all pending actions and special proceedings to which it may be constitutionally applicable. All judgments and orders heretofore entered in any action in which a guardian or guardians ad litem have been appointed for any unborn person or persons or any nonexistent corporations, trusts or other entities, are hereby validated as of the several dates of entry thereof in the same manner and to the full extent that they would have been valid if this rule had been in effect at the time of the appointment of such guardians ad litem; provided, however, that the provisions of this sentence shall be applicable only in such cases and to the extent to which the application thereof shall not be prevented by any constitutional limitation.

(c) Guardian ad litem for infants, insane or incompetent persons; appointment procedure. - When a guardian ad litem is appointed to represent an infant or insane or incompetent person, he must be appointed as follows:

(1) When an infant or insane or incompetent person is plaintiff, the appointment shall be made at any time prior to or at the time of the commencement of the action, upon the written application of any relative or friend of said infant or insane or incompetent person or by the court on its own motion.

(2) When an infant is defendant and service under Rule 4(j)(1)a is made upon him the appointment may be made upon the written application of any relative or friend of said infant, or, if no such application is made within 10 days after service of summons, upon

the written application of any other party to the action or, at any time by the court on its own motion.

(3) When an infant or insane or incompetent person is defendant and service can be made upon him only by publication, the appointment may be made upon the written application of any relative or friend of said infant, or upon the written application of any other party to the action, or by the court on its own motion, before completion of publication, whereupon service of the summons with copy of the complaint shall be made forthwith upon said guardian so appointed requiring him to make defense at the same time that the defendant is required to make defense in the notice of publication.

(4) When an insane or incompetent person is defendant and service by publication is not required, the appointment may be made upon the written application of any relative or friend of said defendant, or upon the written application of any other party to the action, or by the court on its own motion, prior to or at the time of the commencement of the action, and service upon the insane or incompetent defendant may thereupon be dispensed with by order of the court making such appointment.

…

(e) Duty of guardian ad litem; effect of judgment or decree where party represented by guardian ad litem. - Any guardian ad litem appointed for any party pursuant to any of the provisions of this rule shall file and serve such pleadings as may be required within the times specified by these rules, unless extension of time is obtained. After the appointment of a guardian ad litem under any provision of this rule and after the service and filing of such pleadings as may be required by such guardian ad litem, the court may proceed to final judgment, order or decree against any party so represented as effectually and in the same manner as if said party had been under no legal disability, had been ascertained and in being, and had been present in court after legal notice in the action in which such final judgment, order or decree is entered.

ARTICLE 6. TRIALS.

§ 1A-1, Rule 41. Dismissal of actions. (a) Voluntary dismissal; effect thereof.--

(1) By Plaintiff; by Stipulation.--Subject to the provisions of Rule 23(c) and of any statute of this State, an action or any claim therein may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before the plaintiff rests his case, or; (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of this or any other state or of the United States, an action based on or including the same claim. If an action commenced within the time prescribed therefor, or any claim therein, is dismissed without prejudice under this subsection, a new action based on the same claim may be commenced within one year after such dismissal unless a stipulation filed under (ii) of this subsection shall specify a shorter time.

(2) By Order of Judge.--Except as provided in subsection (1) of this section, an action or any claim therein shall not be dismissed at the plaintiff's instance save upon order of the judge and upon such terms and conditions as justice requires. Unless otherwise specified in the order, a dismissal under this subsection is without prejudice. If an action commenced within the time prescribed therefor, or any claim therein, is dismissed without prejudice under this subsection, a new action based on the same claim may be commenced within one year after such dismissal unless the judge shall specify in his order a shorter time.

(b) Involuntary dismissal; effect thereof.--For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim therein against him. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the

motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this section and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a necessary party, operates as an adjudication upon the merits. If the court specifies that the dismissal of an action commenced within the time prescribed therefor, or any claim therein, is without prejudice, it may also specify in its order that a new action based on the same claim may be commenced within one year or less after such dismissal.

(c) Dismissal of counterclaim; crossclaim, or third-party claim.--The provisions of this rule apply to the dismissal of any counterclaim, crossclaim, or third-party claim.

(d) Costs.--A plaintiff who dismisses an action or claim under section (a) of this rule shall be taxed with the costs of the action unless the action was brought in forma pauperis. If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant before the payment of the costs of the action previously dismissed, unless such previous action was brought in forma pauperis, the court, upon motion of the defendant, shall make an order for the payment of such costs by the plaintiff within 30 days and shall stay the proceedings in the action until the plaintiff has complied with the order. If the plaintiff does not comply with the order, the court shall dismiss the action.

ARTICLE 7. JUDGMENT.

§ 1A-1, Rule 58. Entry of judgment. Subject to the provisions of Rule 54(b), a judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court. The party designated by the judge or, if the judge does not otherwise designate, the party who prepares the judgment, shall serve a copy of the judgment upon all other parties within three days after the judgment is entered. Service and proof of service shall be in accordance with Rule 5. If service is by mail, three days shall be added to the time periods prescribed by Rule 50(b), Rule 52(b), and Rule 59. All time periods within which a party may further act pursuant to Rule 50(b), Rule 52(b), or Rule 59 shall be tolled for the duration of any period of noncompliance with this service requirement, provided however that no time period under Rule 50(b), Rule 52(b), or Rule 59 shall be tolled longer than 90 days from the date the judgment is entered. Consent for the signing and entry of a judgment out of term, session, county, and district shall be deemed to have been given unless an express objection to such action was made on the record prior to the end of the term or session at which the matter was heard.

Notwithstanding any other law to the contrary, any judgment entered by a magistrate in a small claims action pursuant to Article 19 of Chapter 7A shall be entered in accordance with this Rule except judgments announced and signed in open court at the conclusion of a trial are considered to be served on the parties, and copies of any judgment not announced and signed in open court at the conclusion of a trial shall be served by the magistrate on all parties in accordance with this Rule, within three days after the judgment is entered. If service is by mail, three days shall be added to the time periods prescribed by G.S. 7A-228. All time periods within which a party may further act pursuant to G.S. 7A-228 shall be tolled for the duration of any period of noncompliance of this service requirement, provided that no time period shall be tolled longer than 90 days from the date judgment is entered.

§ 1A-1, Rule 60. Relief from judgment or order. (a) Clerical mistakes.--Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the judge at any time on his own initiative or on the motion of any party and after such notice, if any, as the judge orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate division, and thereafter while the appeal is pending may be so corrected with leave of the appellate division.

(b) Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc.--On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

(1) Mistake, inadvertence, surprise, or excusable neglect;
(2) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);
(3) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
(4) The judgment is void;
(5) The judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or
(6) Any other reason justifying relief from the operation of the judgment.

The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this section does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment, order, or proceeding shall be by motion as prescribed in these rules or by an independent action.

(c) Judgments rendered by the clerk.--The clerk may, in respect of judgments rendered by himself, exercise the same powers authorized in sections (a) and (b). The judge has like powers in respect of such judgments. Where such powers are exercised by the clerk, appeals may be had to the judge in the manner provided by law.

§ 1A-1, Rule 62. Stay of proceedings to enforce a judgment. (a) Automatic stay; exceptions--Injunctions and receiverships.--Except as otherwise stated herein, no execution shall issue upon a judgment nor shall proceedings be taken for its enforcement until the expiration of the time provided in the controlling statute or rule of appellate procedure for giving notice of appeal from the judgment. Unless otherwise ordered by the court, an interlocutory or final judgment in an action for an injunction or in a receivership action shall not be stayed during the period after its entry and until an appeal is taken or during the pendency of an appeal. The provisions of section (c) govern the suspending, modifying, restoring, or granting of an injunction during the pendency of an appeal.

(b) Stay on motion for new trial or for judgment.--In its discretion and on such conditions for the security of the adverse party as are proper, the court may stay the execution of or any proceedings to enforce a judgment pending the disposition of a motion for a new trial or to alter or amend a judgment made pursuant to Rule 59, or of a motion for relief from a judgment or order made pursuant to Rule 60, or of a motion for judgment made pursuant to Rule 50, or of a motion for amendment to the findings or for additional findings made pursuant to Rule 52(b). If the time provided in the controlling statute or rule of appellate procedure for giving notice of appeal from the judgment had not expired before a stay under this subsection was entered, that time shall begin to run immediately upon the expiration of any stay under this section, and no execution shall issue nor shall proceedings be taken for enforcement of the judgment until the expiration of that time.

…

(d) Stay upon appeal.--When an appeal is taken, the appellant may obtain a stay of execution, subject to the exceptions contained in section (a), by proceeding in accordance with and subject to the conditions of G.S. 1-289, G.S. 1-290, G.S. 1-291, G.S. 1-292, G.S. 1-293, G.S. 1-294, and G.S. 1-295.

When stay is had by giving supersedeas bond, the bond may be given at or after the time of filing the notice of appeal or of procuring the order allowing the appeal as the case may be, and stay is then effective when the supersedeas bond is approved by the court.

…

(g) Stay of judgment as to multiple claims or multiple parties.--When a court has ordered a final judgment under the conditions stated in Rule 54(b), the court may stay enforcement of that judgment until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered.

CHAPTER 1D. PUNITIVE DAMAGES

§ 1D-1. Purpose of punitive damages. Punitive damages may be awarded, in an appropriate case and subject to the provisions of this Chapter, to punish a defendant for egregiously wrongful acts and to deter the defendant and others from committing similar wrongful acts.

§ 1D-5. Definitions. As used in this Chapter:

(1) "Claimant" means a party, including a plaintiff, counterclaimant, cross-claimant, or third-party plaintiff, seeking recovery of punitive damages. In a claim for relief in which a party seeks recovery of punitive damages related to injury to another person, damage to the property of another person, death of another person, or other harm to another person, "claimant" includes any party seeking recovery of punitive damages.

(2) "Compensatory damages" includes nominal damages.

(3) "Defendant" means a party, including a counterdefendant, cross-defendant, or third-party defendant, from whom a claimant seeks relief with respect to punitive damages.

(4) "Fraud" does not include constructive fraud unless an element of intent is present.

(5) "Malice" means a sense of personal ill will toward the claimant that activated or incited the defendant to perform the act or undertake the conduct that resulted in harm to the claimant.

(6) "Punitive damages" means extracompensatory damages awarded for the purposes set forth in > G.S. 1D-1.

(7) "Willful or wanton conduct" means the conscious and intentional disregard of and indifference to the rights and safety of others, which the defendant knows or should know is reasonably likely to result in injury, damage, or other harm. "Willful or wanton conduct" means more than gross negligence.

§ 1D-10. Scope of the Chapter. This Chapter applies to every claim for punitive damages, regardless of whether the claim for relief is based on a statutory or a common-law right of action or based in equity. In an action subject to this Chapter, in whole or in part, the provisions of this Chapter prevail over any other law to the contrary.

§ 1D-15. Standards for recovery of punitive damages.

(a) Punitive damages may be awarded only if the claimant proves that the defendant is liable for compensatory damages and that one of the following aggravating factors was present and was related to the injury for which compensatory damages were awarded:
  (1) Fraud.
  (2) Malice.
  (3) Willful or wanton conduct.

(b) The claimant must prove the existence of an aggravating factor by clear and convincing evidence.

(c) Punitive damages shall not be awarded against a person solely on the basis of vicarious liability for the acts or omissions of another. Punitive damages may be awarded against a person only if that person participated in the conduct constituting the aggravating factor giving rise to the punitive damages, or if, in the case of a corporation, the officers, directors, or managers of the corporation participated in or condoned the conduct constituting the aggravating factor giving rise to punitive damages.

(d) Punitive damages shall not be awarded against a person solely for breach of contract.

§ 1D-20. Election of extracompensatory remedies. A claimant must elect, prior to judgment, between punitive damages and any other remedy pursuant to another statute that provides for multiple damages.

§ 1D-25. Limitation of amount of recovery.

(a) In all actions seeking an award of punitive damages, the trier of fact shall determine the amount of punitive damages separately from the amount of compensation for all other damages.

(b) Punitive damages awarded against a defendant shall not exceed three times the amount of compensatory damages or two hundred fifty thousand dollars ($250,000), whichever is greater. If a trier of fact returns a verdict for punitive damages in excess of the maximum amount specified

under this subsection, the trial court shall reduce the award and enter judgment for punitive damages in the maximum amount.

(c) The provisions of subsection (b) of this section shall not be made known to the trier of fact through any means, including voir dire, the introduction into evidence, argument, or instructions to the jury.

§ 1D-26. Driving while impaired; exemption from cap. G.S. 1D-25(b) shall not apply to a claim for punitive damages for injury or harm arising from a defendant's operation of a motor vehicle if the actions of the defendant in operating the motor vehicle would give rise to an offense of driving while impaired under G.S. 20-138.1, 20-138.2, or 20-138.5.

§ 1D-35. Punitive damages awards. In determining the amount of punitive damages, if any, to be awarded, the trier of fact:

(1) Shall consider the purposes of punitive damages set forth in > G.S. 1D-1; and

(2) May consider only that evidence that relates to the following:

a. The reprehensibility of the defendant's motives and conduct.

b. The likelihood, at the relevant time, of serious harm.

c. The degree of the defendant's awareness of the probable consequences of its conduct.

d. The duration of the defendant's conduct.

e. The actual damages suffered by the claimant.

f. Any concealment by the defendant of the facts or consequences of its conduct.

g. The existence and frequency of any similar past conduct by the defendant.

h. Whether the defendant profited from the conduct.

i. The defendant's ability to pay punitive damages, as evidenced by its revenues or net worth.

§ 1D-45. Frivolous or malicious actions; attorneys' fees. The court shall award reasonable attorneys' fees, resulting from the defense against the punitive damages claim, against a claimant who files a claim for punitive damages that the claimant knows or should have known to be frivolous or malicious. The court shall award reasonable attorney fees against a defendant who asserts a defense in a punitive damages claim that the defendant knows or should have known to be frivolous or malicious.

CHAPTER 7A. JUDICIAL DEPARTMENT.
SUBCHAPTER IV. DISTRICT COURT DIVISION OF THE GENERAL COURT OF JUSTICE.
ARTICLE 19. SMALL CLAIM ACTIONS IN DISTRICT COURT.

§ 7A-210. Small claim action defined. For purposes of this Article a small claim action is a civil action wherein:

(1) The amount in controversy, computed in accordance with G.S. 7A-243, does not exceed three thousand dollars ($5,000); and

(2) The only principal relief prayed is monetary, or the recovery of specific personal property, or summary ejectment, or any combination of the foregoing in properly joined claims; and

(3) The plaintiff has requested assignment to a magistrate in the manner provided in this Article.

The seeking of the ancillary remedy of claim and delivery or an order from the clerk of superior court for the relinquishment of property subject to a lien pursuant to G.S 44A-4(a) does not prevent an action otherwise qualifying as a small claim under this Article from so qualifying.

§ 7A-211. Small claim actions assignable to magistrates. In the interest of speedy and convenient determination, the chief district judge may, in his discretion, by specific order or general rule, assign to any magistrate of his district any small claim action pending in his district if the defendant is a resident of the county in which the magistrate resides. If there is more than one defendant, at least one of them must be a bona fide resident of the county in which the magistrate resides.

§ 7A-212. Judgment of magistrate in civil action improperly assigned or not assigned. No judgment of the district court rendered by a magistrate in a civil action assigned to him by the chief district judge is void, voidable, or irregular for the reason that the action is not one properly assignable to the magistrate under this article. The sole remedy for improper assignment is appeal for trial de novo before a district judge in the manner provided in this article. No judgment rendered by a magistrate in a civil action is valid when the action was not assigned to him by the chief district judge.

§ 7A-213. Procedure for commencement of action; request for and notice of assignment. The plaintiff files his complaint in a small claim action in the office of the clerk of superior court of the county wherein the defendant, or one of the defendants resides. The designation "Small Claim" on the face of the complaint is a request for assignment. If, pursuant to order or rule, the action is assigned to a magistrate, the clerk issues a magistrate summons substantially in the form prescribed in this Article as soon as practicable after the assignment is made. The issuance of a magistrate summons commences the action. After service of the magistrate summons on the defendant, the clerk gives written notice of the assignment to the plaintiff. The notice of assignment identifies the action, designates the magistrate to whom assignment is made, and specifies the time, date and place of trial. By any convenient means the clerk notifies the magistrate of the assignment and the setting.

§ 7A-214. Time within which trial is set. The time for trial of a small claim action is set not later than 30 days after the action is commenced. By consent of all parties the time for trial may be changed from the time set. For good cause shown, the magistrate to whom the action is assigned may grant continuances from time to time.

§ 7A-215. Procedure upon nonassignment of small claim action. Failure of the chief district judge to assign a claim within five days after filing of a complaint requesting its assignment constitutes nonassignment. The chief district judge may sooner order nonassignment. Upon nonassignment, the clerk immediately issues summons in the manner and form provided for commencement of civil actions generally, whereupon process is served, return made, and pleadings are required to be filed in the manner provided for civil actions generally. Upon issuing civil summons, the clerk gives written notice of nonassignment to the plaintiff. The plaintiff within five days after notice of nonassignment, and the defendant before or with the filing of his answer, may request a jury trial. Failure within the times so limited to request a jury trial constitutes a waiver of the right thereto. Upon the joining of issue, the clerk places the action upon the civil issue docket for trial in the district court division.

§ 7A-216. Form of complaint. The complaint in a small claim action shall be in writing, signed by the party or his attorney, except the complaint in an action for summary ejectment may be signed by an agent for the plaintiff. It need be in no particular form, but is sufficient if in a form which enables a person of common understanding to know what is meant. In any event, the forms prescribed in this Article are sufficient under this requirement, and are intended to indicate the simplicity and brevity of statement contemplated. Demurrers and motions to challenge the legal and formal sufficiency of a complaint in an assigned small claim action shall not be used. But at any time after its filing, the clerk, the chief district judge, or the magistrate to whom such an action is assigned may, on oral or written ex parte motion of the defendant, or on his own motion, order the plaintiff to perfect the statement of his claim before proceeding to its determination, and shall grant extensions of time to plead and continuances of trial pending any perfecting of statement ordered.

§ 7A-217. Methods of subjecting person of defendant to jurisdiction.

When by order or rule a small claim action is assigned to a magistrate, the defendant may be subjected to the jurisdiction of the court over his person by the following methods:

(1) By delivering a copy of the summons and of the complaint to him or by leaving copies thereof at the defendant's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. When the defendant is

under any legal disability, he may be subject to personal jurisdiction only by personal service of process in the manner provided by law.

(2) When the defendant is not under any legal disability, he may be served by registered or certified mail as provided in G.S. 1A-1, Rule 4(j). Proof of service is as provided in G.S. 1A-1, Rule 4(j2).

(3) When the defendant is under no legal disability, he may be subjected to the jurisdiction of the court over his person by his written acceptance of service, or by his voluntary appearance.

(4) In summary ejectment cases only, service as provided in G.S. 42-29 is also authorized.

§ 7A-218. Answer of defendant. At any time prior to the time set for trial, the defendant may file a written answer admitting or denying all or any of the allegations in the complaint, or pleading new matter in avoidance. No particular form is required, but it is sufficient if in a form to enable a person of common understanding to know the nature of the defense intended. A general denial of all the allegations of the complaint is permissible.

Failure of defendant to file a written answer after being subjected to the jurisdiction of the court over his person constitutes a general denial.

§ 7A-219. Certain counterclaims; cross claims; third-party claims not permissible. No counterclaim, cross claim or third-party claim which would make the amount in controversy exceed the jurisdictional amount established by G.S. 7A-210(1) is permissible in a small claim action assigned to a magistrate. No determination of fact or law in an assigned small claim action estops a party thereto in any subsequent action which, except for this section, might have been asserted under the Code of Civil Procedure as a counterclaim in the small claim action. Notwithstanding G.S. 1A-1, Rule 13, failure by a defendant to file a counterclaim in a small claims action assigned to a magistrate, or failure by a defendant to appeal a judgment in a small claims action to district court, shall not bar such claims in a separate action.

§ 7A-220. No required pleadings other than complaint. There are no required pleadings in assigned small claim actions other than the complaint. Answers and counterclaims may be filed by the defendant in accordance with G.S. 7A-218 and G.S. 7A-219. Any new matter pleaded in avoidance in the answer is deemed denied or avoided. On appeal from the judgment of the magistrate for trial de novo before a district judge, the judge shall allow appropriate counterclaims, cross claims, third party claims, replies, and answers to cross claims, in accordance with G.S. 1A-1, et seq.

§ 7A-221. Objections to venue and jurisdiction over person. By motion prior to filing answer, or in the answer, the defendant may object that the venue is improper, or move for change of venue, or object to the jurisdiction of the court over his person. These motions or objections are heard on notice by the chief district judge or a district judge designated by order or rule of the chief district judge. Assignment to the magistrate is suspended pending determination of the objection, and the clerk gives notice of the suspension by any convenient means to the magistrate to whom the action has been assigned. All these objections are waived if not made prior to the date set for trial. If venue is determined to be improper, or is ordered changed, the action is transferred to the district court of the new venue, and is not thereafter assigned to a magistrate, but proceeds as in the case of civil actions generally.

§ 7A-222. General trial practice and procedure. Trial of a small claim action before a magistrate is without a jury. The rules of evidence applicable in the trial of civil actions generally are observed. At the conclusion of plaintiff's evidence the magistrate may render judgment of dismissal if plaintiff has failed to establish a prima facie case. If a judgment of dismissal is not rendered the defendant may introduce evidence. At the conclusion of all the evidence the magistrate may render judgment or may in his discretion reserve judgment for a period not in excess of 10 days.

§ 7A-223. Practice and procedure in small claim actions for summary ejectment. In any small claim action demanding summary ejectment or past due rent, or both, the complaint may be signed by an agent acting for the plaintiff who has actual knowledge of the facts alleged in the complaint. If a small claim action demanding summary ejectment is assigned to a magistrate, the practice and procedure prescribed for commencement, form and service of process, assignment, pleadings, and trial in small claim actions generally are observed, except that if the defendant by written answer denies the title of the plaintiff, the action is placed on the civil issue docket of the district court division for trial before a district judge. In such event, the clerk withdraws assignment of the action from the magistrate and immediately gives written notice of withdrawal, by any convenient means, to the plaintiff and the magistrate to whom the action has been assigned. The plaintiff, within five days after receipt of the notice, and the defendant, in his answer, may request trial by jury. Failure to request jury trial within the time limited is a waiver of the right to trial by jury.

§ 7A-224. Rendition and entry of judgment. Judgment in a small claim action is rendered in writing and signed by the magistrate. The judgment so rendered is a judgment of the district court, and is recorded and indexed as are judgments of the district and superior court generally. Entry is made as soon as practicable after rendition.

§ 7A-225. Lien and execution of judgment. From the time of docketing, the judgment rendered by a magistrate in a small claim action constitutes a lien and is subject to execution in the manner provided in Chapter 1, Article 28, of the General Statutes.

§ 7A-226. Priority of judgment when appeal taken. When appeal is taken from a judgment in a small claim action, the lien acquired by docketing merges into any judgment rendered after trial de novo on appeal, continues as a lien from the first docketing, and has priority over any judgment docketed subsequent to the first docketing.

§ 7A-227. Stay of execution on appeal. Appeal from judgment of a magistrate does not stay execution if the judgment is for recovery of specific property. Such execution may be stayed by order of the clerk of superior court upon petition by the appellant accompanied by undertaking in writing, executed by one or more sufficient sureties approved by the clerk, to the effect that if judgment be rendered against appellant the sureties will pay the amount thereof with costs awarded against the appellant. Appeal from judgment of a magistrate does stay execution if the judgment is for money damages. This section shall not require any undertaking of appellants in summary ejectment actions other than those imposed by Chapter 42 of the General Statutes.

§ 7A-228. New trial before magistrate; appeal for trial de novo; how appeal perfected; oral notice; dismissal. (a) The chief district court judge may authorize magistrates to hear motions to set aside an order or judgment pursuant to G.S. 1A-1, Rule 60(b)(1) and order a new trial before a magistrate. The exercise of the authority of the chief district court judge in allowing magistrates to hear Rule 60(b)(1) motions shall not be construed to limit the authority of the district court to hear motions pursuant to Rule 60(b)(1) through (6) of the Rules of Civil Procedure for relief from a judgment or order entered by a magistrate and, if granted, to order a new trial before a magistrate. After final disposition before the magistrate, the sole remedy for an aggrieved party is appeal for trial de novo before a district court judge or a jury. Notice of appeal may be given orally in open court upon announcement or after entry of judgment. If not announced in open court, written notice of appeal must be filed in the office of the clerk of superior court within 10 days after entry of judgment. The appeal must be perfected in the manner set out in subsection (b). Upon announcement of the appeal in open court or upon receipt of the written notice of appeal, the appeal shall be noted upon the judgment. If the judgment was mailed to the parties, then the time computations for appeal of such judgment shall be pursuant to G.S. 1A-1, Rule 6.

(b) The appeal shall be perfected by (1) oral announcement of appeal in open court; or (2) by filing notice of appeal in the office of the clerk of superior court within 10 days after entry of judgment,

pursuant to subsection (a), and by serving a copy of the notice of appeal on all parties pursuant to G.S. 1A-1, Rule 5. Failure to pay the costs of court to appeal within 20 days after entry of judgment shall result in the automatic dismissal of the appeal. The failure to demand a trial by jury in district court by the appealing party before the time to perfect the appeal has expired is a waiver of the right thereto.

(b1) A person desiring to appeal as an indigent shall, within 10 days of entry of judgment by the magistrate, file an affidavit that he or she is unable by reason of poverty to pay the costs of appeal. Within 20 days after entry of judgment, a superior or district court judge, magistrate, or the clerk of the superior court may authorize a person to appeal to district court as an indigent if the person is unable to pay the costs of appeal. The clerk of superior court shall authorize a person to appeal as an indigent if the person files the required affidavit and meets one or more of the criteria listed in G.S. 1-110. A superior or district court judge, a magistrate, or the clerk of the superior court may authorize a person who does not meet any of the criteria listed in G.S. 1-110 to appeal as an indigent if the person cannot pay the costs of appeal.

The district court may dismiss an appeal and require the person filing the appeal to pay the court costs advanced if the allegations contained in the affidavit are determined to be untrue or if the court is satisfied that the action is frivolous or malicious. If the court dismisses the appeal, the court shall affirm the judgment of the magistrate.

(c) Whenever such appeal is docketed and is regularly set for trial, and the appellant fails to appear and prosecute his appeal, the presiding judge may have the appellant called and the appeal dismissed; and in such case the judgment of the magistrate shall be affirmed.

§ 7A-229. Trial de novo on appeal. Upon appeal noted, the clerk of superior court places the action upon the civil issue docket of the district court division. The district judge before whom the action is tried may order repleading or further pleading by some or all of the parties; may try the action on stipulation as to the issue; or may try it on the pleadings as filed.

§ 7A-230. Jury trial on appeal. The appellant in his written notice of appeal may demand a jury on the trial de novo. Within 10 days after receipt of the notice of appeal stating that the costs of the appeal have been paid, any appellee by written notice served on all parties and on the clerk of superior court may demand a jury on the trial de novo.

§ 7A-231. Provisional and incidental remedies. The provisional and incidental remedies of claim and delivery, subpoena duces tecum, production of documents and orders for the relinquishment of property subject to a possessory lien pursuant to G.S. 44A-4(a) are obtainable in small claims actions. The practice and procedure provided therefor in respect of civil actions generally is observed, conformed as may be required. No other provisional or incidental remedies are obtainable while the action is pending before the magistrate.

SUBCHAPTER V. JURISDICTION AND POWERS OF THE TRIAL DIVISIONS OF THE GENERAL COURT OF JUSTICE.

ARTICLE 20. ORIGINAL CIVIL JURISDICTION OF THE TRIAL DIVISIONS.

§ 7A-243. Proper division for trial of civil actions generally determined by amount in controversy. Except as otherwise provided in this Article, the district court division is the proper division for the trial of all civil actions in which the amount in controversy is ten thousand dollars ($10,000) or less; and the superior court division is the proper division for the trial of all civil actions in which the amount in controversy exceeds ten thousand dollars ($10,000).

For purposes of determining the amount in controversy, the following rules apply whether the relief prayed is monetary or nonmonetary, or both, and with respect to claims asserted by complaint, counterclaim, cross-complaint or third-party complaint:

(1) The amount in controversy is computed without regard to interest and costs.

(2) Where monetary relief is prayed, the amount prayed for is in controversy unless the pleading in question shows to a legal certainty that the amount claimed cannot be

recovered under the applicable measure of damages. The value of any property seized in attachment, claim and delivery, or other ancillary proceeding, is not in controversy and is not considered in determining the amount in controversy.

(3) Where no monetary relief is sought, but the relief sought would establish, enforce, or avoid an obligation, right or title, the value of the obligation, right, or title is in controversy. Where the owner or legal possessor of property seeks recovery of property on which a lien is asserted pursuant to G.S. 44A-4(a) the amount in controversy is that portion of the asserted lien which is disputed. The judge may require by rule or order that parties make a good faith estimate of the value of any nonmonetary relief sought.

(4) a. Except as provided in subparagraph c of this subdivision, where a single party asserts two or more properly joined claims, the claims are aggregated in computing the amount in controversy.

b. Except as provided in subparagraph c, where there are two or more parties properly joined in an action and their interests are aligned, their claims are aggregated in computing the amount in controversy.

c. No claims are aggregated which are mutually exclusive and in the alternative, or which are successive, in the sense that satisfaction of one claim will bar recovery upon the other.

d. Where there are two or more claims not subject to aggregation the highest claim is the amount in controversy.

(5) Where the value of the relief to a claimant differs from the cost thereof to an opposing party, the higher amount is used in determining the amount in controversy.

CHAPTER 24. INTEREST.
ARTICLE 1. GENERAL PROVISIONS.

§ 24-5. Interest on judgments. — (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. For purposes of this section, after judgment means after the date of entry of judgment under G.S. 1A-1, Rule 58.

(a1) Actions on Penal Bonds. - In an action on a penal bond, the amount of the judgment, except the costs, shall bear interest at the legal rate from the date of entry of judgment under G.S. 1A-1, Rule 58, until the judgment is satisfied.

(b) 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.

CHAPTER 25. UNIFORM COMMERCIAL CODE.
ARTICLE 9. SECURED TRANSACTIONS;
PART 1. GENERAL PROVISIONS
SUBPART 1. SHORT TITLE, DEFINITIONS, AND GENERAL CONCEPTS

§ 25-9-103. Purchase-money security interest; application of payments; burden of establishing.

(b) Purchase-money security interest in goods. --A security interest in goods is a purchase-money security interest:

(1) To the extent that the goods are purchase-money collateral with respect to that security interest;

(2) If the security interest is in inventory that is or was purchase-money collateral, also to the extent that the security interest secures a purchase-money obligation incurred with respect to other inventory in which the secured party holds or held a purchase-money security interest; and

(3) Also to the extent that the security interest secures a purchase-money obligation incurred with respect to software in which the secured party holds or held a purchase-money security interest.

PART 2. EFFECTIVENESS OF SECURITY AGREEMENT; ATTACHMENT OF SECURITY INTEREST; RIGHTS OF PARTIES TO SECURITY AGREEMENT
SUBPART 1. EFFECTIVENESS AND ATTACHMENT

§ 25-9-201. General effectiveness of security agreement.

(a) General effectiveness. --Except as otherwise provided in this Chapter, a security agreement is effective according to its terms between the parties, against purchasers of the collateral, and against creditors.

(b) Applicable consumer laws and other law. --A transaction subject to this Article is subject to any applicable rule of law which establishes a different rule for consumers, to any other statute, rule, or regulation of this State that regulates the rates, charges, agreements, and practices for loans, credit sales, or other extensions of credit, and to any consumer-protection statute, rule, or regulation of this State,

including Chapter 24 of the General Statutes, the Retail Installment Sales Act (Chapter 25A of the General Statutes), the North Carolina Consumer Finance Act (Article 15 of Chapter 53 of the General Statutes), and the Pawnbrokers Modernization Act of 1989 (Chapter 91A of the General Statutes).

(c) Other applicable law controls. --In case of conflict between this Article and a rule of law, statute, or regulation described in subsection (b) of this section, the rule of law, statute, or regulation controls. Failure to comply with a statute or regulation described in subsection (b) of this section has only the effect the statute or regulation specifies.

§ 25-9-203. Attachment and enforceability of security interest; proceeds; supporting obligations; formal requisites

(a) Attachment. --A security interest attaches to collateral when it becomes enforceable against the debtor with respect to the collateral, unless an agreement expressly postpones the time of attachment.

(b) Enforceability. --Except as otherwise provided in subsections (c) through (i) of this section, a security interest is enforceable against the debtor and third parties with respect to the collateral only if:

(1) Value has been given;

(2) The debtor has rights in the collateral or the power to transfer rights in the collateral to a secured party; and

(3) One of the following conditions is met:

a. The debtor has authenticated a security agreement that provides a description of the collateral and, if the security interest covers timber to be cut, a description of the land concerned;

b. The collateral is not a certificated security and is in the possession of the secured party under G.S. 25-9-313 pursuant to the debtor's security agreement;

c. The collateral is a certificated security in registered form and the security certificate has been delivered to the secured party under G.S. 25-8-301 pursuant to the debtor's security agreement; or

d. The collateral is deposit accounts, electronic chattel paper, investment property, or letter-of-credit rights, and the secured party has control under G.S. 25-9-104, 25-9-105, 25-9-106, or 25-9-107 pursuant to the debtor's security agreement.

PART 3. PERFECTION AND PRIORITY

SUBPART 2. PERFECTION

§ 25-9-309. Security interest perfected upon attachment. The following security interests are perfected when they attach:

(1) A purchase-money security interest in consumer goods, except as otherwise provided in G.S. 25-9-311(b) with respect to consumer goods that are subject to a statute or treaty described in G.S. 25-9-311(a);

§ 25-9-310. When filing required to perfect security interest or agricultural lien; security interests and agricultural liens to which filing provisions do not apply.

(a) General rule: perfection by filing. --Except as otherwise provided in subsection (b) of this section and G.S. 25-9-312(b), a financing statement must be filed to perfect all security interests and agricultural liens.

(b) Exceptions: filing not necessary. - The filing of a financing statement is not necessary to perfect a security interest:

(1) That is perfected under G.S. 25-9-308(d), (e), or (g);

(2) That is perfected under G.S. 25-9-309 when it attaches;

(3) In property subject to a statute, regulation, or treaty described in G.S. 25-9-311(a);

(4) In goods in possession of a bailee which is perfected under G.S. 25-9- 312(d)(1) or (2);

(5) In certificated securities, documents, goods, or instruments which is perfected without filing or possession under G.S. 25-9-312(e), (f), or (g);

(6) In collateral in the secured party's possession under G.S. 25-9-313;

(7) In a certificated security which is perfected by delivery of the security certificate to the secured party under G.S. 25-9-313;
(8) In deposit accounts, electronic chattel paper, investment property, or letter-of-credit rights which is perfected by control under G.S. 25-9- 314;
(9) In proceeds which is perfected under G.S. 25-9-315; or
(10) That is perfected under G.S. 25-9-316.
(11) Repealed by S.L. 2001-218, § 3, eff. July 1, 2001.

(c) Assignment of perfected security interest. --If a secured party assigns a perfected security interest or agricultural lien, a filing under this Article is not required to continue the perfected status of the security interest against creditors of and transferees from the original debtor.

§ 25-9-311. Perfection of security interests in property subject to certain statutes, regulations, and treaties.

(a) Security interest subject to other law. --Except as otherwise provided in subsection (d) of this section, the filing of a financing statement is not necessary or effective to perfect a security interest in property subject to:

(1) A statute, regulation, or treaty of the United States whose requirements for a security interest's obtaining priority over the rights of a lien creditor with respect to the property preempt G.S. 25-9-310(a);
(2) A certificate-of-title statute of this State covering automobiles or other goods that provides for a security interest to be indicated on the certificate as a condition to or result of perfection of the security interest, including G.S. 20-58 and G.S. 75A-41.

§ 25-9-313. When possession by or delivery to secured party perfects security interest without filing.

(a) Perfection by possession or delivery. --Except as otherwise provided in subsection (b) of this section, a secured party may perfect a security interest in negotiable documents, goods, instruments, money, or tangible chattel paper by taking possession of the collateral. A secured party may perfect a security interest in certificated securities by taking delivery of the certificated securities under G.S. 25-8-301.

(b) Goods covered by certificate of title. --With respect to goods covered by a certificate of title issued by this State, a secured party may perfect a security interest in the goods by taking possession of the goods only in the circumstances described in G.S. 25-9-316(d).

(c) Collateral in possession of person other than debtor. --With respect to collateral other than certificated securities and goods covered by a document, a secured party takes possession of collateral in the possession of a person other than the debtor, the secured party, or a lessee of the collateral from the debtor in the ordinary course of the debtor's business, when:

(1) The person in possession authenticates a record acknowledging that it holds possession of the collateral for the secured party's benefit; or
(2) The person takes possession of the collateral after having authenticated a record acknowledging that it will hold possession of collateral for the secured party's benefit.
(d) Time of perfection by possession; continuation of perfection. --If perfection of a security interest depends upon possession of the collateral by a secured party, perfection occurs no earlier than the time the secured party takes possession and continues only while the secured party retains possession.

(e) Time of perfection by delivery; continuation of perfection. --A security interest in a certificated security in registered form is perfected by delivery when delivery of the certificated security occurs under G.S. 25-8-301 and remains perfected by delivery until the debtor obtains possession of the security certificate.

(f) Acknowledgment not required. --A person in possession of collateral is not required to acknowledge that it holds possession for a secured party's benefit.

(g) Effectiveness of acknowledgment; no duties or confirmation. --If a person acknowledges that it holds possession for the secured party's benefit:

(1) The acknowledgment is effective under subsection (c) of this section or G.S. 25-8-301(a), even if the acknowledgment violates the rights of a debtor; and

(2) Unless the person otherwise agrees or law other than this Article otherwise provides, the person does not owe any duty to the secured party and is not required to confirm the acknowledgment to another person.

(h) Secured party's delivery to person other than debtor. --A secured party having possession of collateral does not relinquish possession by delivering the collateral to a person other than the debtor or a lessee of the collateral from the debtor in the ordinary course of the debtor's business if the person was instructed before the delivery or is instructed contemporaneously with the delivery:

(1) To hold possession of the collateral for the secured party's benefit; or

(2) To redeliver the collateral to the secured party.

(i) Effect of delivery under subsection (h); no duties or confirmation. --A secured party does not relinquish possession, even if a delivery under subsection (h) of this section violates the rights of a debtor. A person to which collateral is delivered under subsection (h) of this section does not owe any duty to the secured party and is not required to confirm the delivery to another person unless the person otherwise agrees or law other than this Article otherwise provides.

PART 3. PERFECTION AND PRIORITY
SUBPART 3. PRIORITY

§ 25-9-317. Interests that take priority over or take free of security interest or agricultural lien.

(a) Conflicting security interests and rights of lien creditors. --A security interest or agricultural lien is subordinate to the rights of:

(1) A person entitled to priority under G.S. 25-9-322; and

(2) Except as otherwise provided in subsection (e) of this section, a person that becomes a lien creditor before the earlier of the time:

a. The security interest or agricultural lien is perfected; or

b. One of the conditions specified in G.S. 25-9-203(b)(3) is met and a financing statement covering the collateral is filed.

(b) Buyers that receive delivery. --Except as otherwise provided in subsection (e) of this section, a buyer, other than a secured party, of tangible chattel paper, documents, goods, instruments, or a security certificate takes free of a security interest or agricultural lien if the buyer gives value and receives delivery of the collateral without knowledge of the security interest or agricultural lien and before it is perfected.

(c) Lessees that receive delivery. --Except as otherwise provided in subsection (e) of this section, a lessee of goods takes free of a security interest or agricultural lien if the lessee gives value and receives delivery of the collateral without knowledge of the security interest or agricultural lien and before it is perfected.

(d) Licensees and buyers of certain collateral. --A licensee of a general intangible or a buyer, other than a secured party, of accounts, electronic chattel paper, general intangibles, or investment property other than a certificated security takes free of a security interest if the licensee or buyer gives value without knowledge of the security interest and before it is perfected.

(e) Purchase-money security interest. --Except as otherwise provided in G.S. 25-9-320 and G.S. 25-9-321, if a person files a financing statement with respect to a purchase-money security interest before or within 20 days after the debtor receives delivery of the collateral, the security interest takes priority over the rights of a buyer, lessee, or lien creditor which arise between the time the security interest attaches and the time of filing.

§ 25-9-320. Buyer of goods.

(a) Buyer in ordinary course of business. --Except as otherwise provided in subsection (e) of this section, a buyer in ordinary course of business, other than a person buying farm products from a person engaged in farming operations, takes free of a security interest created by the buyer's seller, even if the security interest is perfected and the buyer knows of its existence.

(b) Buyer of consumer goods. --Except as otherwise provided in subsection (e) of this section, a buyer of goods from a person who used or bought the goods for use primarily for personal, family, or household purposes takes free of a security interest, even if perfected, if the buyer buys:

(1) Without knowledge of the security interest;

(2) For value;

(3) Primarily for the buyer's personal, family, or household purposes; and

(4) Before the filing of a financing statement covering the goods.

(c) Effectiveness of filing for subsection (b). --To the extent that it affects the priority of a security interest over a buyer of goods under subsection (b) of this section, the period of effectiveness of a filing made in the jurisdiction in which the seller is located is governed by G.S. 25-9- 316(a) and (b).

(d) Buyer in ordinary course of business at wellhead or minehead. --A buyer in ordinary course of business buying oil, gas, or other minerals at the wellhead or minehead or after extraction takes free of an interest arising out of an encumbrance.

(e) Possessory security interest not affected. --Subsections (a) and (b) of this section do not affect a security interest in goods in the possession of the secured party under G.S. 25-9-313.

§ 25-9-322. Priorities among conflicting security interests in and agricultural liens on same collateral.

(a) General priority rules. --Except as otherwise provided in this section, priority among conflicting security interests and agricultural liens in the same collateral is determined according to the following rules:

(1) Conflicting perfected security interests and agricultural liens rank according to priority in time of filing or perfection. Priority dates from the earlier of the time a filing covering the collateral is first made or the security interest or agricultural lien is first perfected, if there is no period thereafter when there is neither filing nor perfection.

(2) A perfected security interest or agricultural lien has priority over a conflicting unperfected security interest or agricultural lien.

(3) The first security interest or agricultural lien to attach or become effective has priority if conflicting security interests and agricultural liens are unperfected.

(b) Time of perfection: proceeds and supporting obligations. --For the purposes of subdivision (a)(1) of this section:

(1) The time of filing or perfection as to a security interest in collateral is also the time of filing or perfection as to a security interest in proceeds; and

(2) The time of filing or perfection as to a security interest in collateral supported by a supporting obligation is also the time of filing or perfection as to a security interest in the supporting obligation.

(c) Special priority rules: proceeds and supporting obligations. --Except as otherwise provided in subsection (f) of this section, a security interest in collateral which qualifies for priority over a conflicting security interest under G.S. 25-9-327, 25-9-328, 25-9-329, 25-9-330, or 25-9-331 also has priority over a conflicting security interest in:

(1) Any supporting obligation for the collateral; and

(2) Proceeds of the collateral if:

a. The security interest in proceeds is perfected;

b. The proceeds are cash proceeds or of the same type as the collateral; and

c. In the case of proceeds that are proceeds of proceeds, all intervening proceeds are cash proceeds, proceeds of the same type as the collateral, or an account relating to the collateral.

(d) First-to-file priority rule for certain collateral. --Subject to subsection (e) of this section and except as otherwise provided in subsection (f) of this section, if a security interest in chattel paper, deposit accounts, negotiable documents, instruments, investment property, or letter-of-credit rights is perfected by a method other than filing, conflicting perfected security interests in proceeds of the collateral rank according to priority in time of filing.

(e) Applicability of subsection (d). --Subsection (d) of this section applies only if the proceeds of the collateral are not cash proceeds, chattel paper, negotiable documents, instruments, investment property, or letter-of-credit rights.

(f) Limitations on subsections (a) through (e). --Subsections (a) through (e) of this section are subject to:

(1) Subsection (g) of this section and the other provisions of this Part;
(2) G.S. 25-4-208 with respect to a security interest of a collecting bank;
(3) G.S. 25-5-118 with respect to a security interest of an issuer or nominated person; and
(4) G.S. 25-9-110 with respect to a security interest arising under Article 2 or 2A

of this Chapter.

(g) Priority under agricultural lien statute. --A perfected agricultural lien on collateral has priority over a conflicting security interest in or agricultural lien on the same collateral if the statute creating the agricultural lien so provides.

§ 25-9-324. Priority of purchase-money security interests.

(a) General rule: purchase-money priority. --Except as otherwise provided in subsection (g) of this section, a perfected purchase-money security interest in goods other than inventory or livestock has priority over a conflicting security interest in the same goods, and, except as otherwise provided in G.S. 25-9-327, a perfected security interest in its identifiable proceeds also has priority, if the purchase-money security interest is perfected when the debtor receives possession of the collateral or within 20 days thereafter.

(b) Inventory purchase-money priority. --Subject to subsection (c) of this section and except as otherwise provided in subsection (g) of this section, a perfected purchase-money security interest in inventory has priority over a conflicting security interest in the same inventory, has priority over a conflicting security interest in chattel paper or an instrument constituting proceeds of the inventory and in proceeds of the chattel paper, if so provided in G.S. 25-9-330, and, except as otherwise provided in G.S. 25-9-327, also has priority in identifiable cash proceeds of the inventory to the extent the identifiable cash proceeds are received on or before the delivery of the inventory to a buyer, if:

(1) The purchase-money security interest is perfected when the debtor receives possession of the inventory;
(2) The purchase-money secured party sends an authenticated notification to the holder of the conflicting security interest;
(3) The holder of the conflicting security interest receives the notification within five years before the debtor receives possession of the inventory; and
(4) The notification states that the person sending the notification has or expects to acquire a purchase-money security interest in inventory of the debtor and describes the inventory.

(c) Holders of conflicting inventory security interests to be notified. -- Subdivisions (b)(2) through (b)(4) of this section apply only if the holder of the conflicting security interest had filed a financing statement covering the same types of inventory:

(1) If the purchase-money security interest is perfected by filing, before the date of the filing; or
(2) If the purchase-money security interest is temporarily perfected without filing or possession under G.S. 25-9-312(f), before the beginning of the 20-day period thereunder.

(d) Livestock purchase-money priority. --Subject to subsection (e) of this section and except as otherwise provided in subsection (g) of this section, a perfected purchase-money security interest in livestock that are farm products has priority over a conflicting security interest in the same livestock, and, except as otherwise provided in G.S. 25-9-327, a perfected security interest in their identifiable proceeds and identifiable products in their unmanufactured states also has priority, if:

(1) The purchase-money security interest is perfected when the debtor receives possession of the livestock; (2) The purchase-money secured party sends an authenticated notification to the holder of the conflicting security interest;

(3) The holder of the conflicting security interest receives the notification within six months before the debtor receives possession of the livestock; and

(4) The notification states that the person sending the notification has or expects to acquire a purchase-money security interest in livestock of the debtor and describes the livestock.

(e) Holders of conflicting livestock security interests to be notified. -- Subdivisions (d)(2) through (d)(4) of this section apply only if the holder of the conflicting security interest had filed a financing statement covering the same types of livestock:

(1) If the purchase-money security interest is perfected by filing, before the date of the filing; or

(2) If the purchase-money security interest is temporarily perfected without filing or possession under G.S. 25-9-312(f), before the beginning of the 20-day period thereunder.

PART 6. DEFAULT
SUBPART 1. DEFAULT AND ENFORCEMENT OF SECURITY INTEREST

§ 25-9-609. Secured party's right to take possession after default

(a) Possession; rendering equipment unusable; disposition on debtor's premises. --After default, a secured party:

(1) May take possession of the collateral; and

(2) Without removal, may render equipment unusable and dispose of collateral on a debtor's premises under G.S. 25-9-610.

(b) Judicial and nonjudicial process. --A secured party may proceed under subsection (a) of this section:

(1) Pursuant to judicial process; or

(2) Without judicial process, if it proceeds without breach of the peace.

(c) Assembly of collateral. --If so agreed, and in any event after default, a secured party may require the debtor to assemble the collateral and make it available to the secured party at a place to be designated by the secured party which is reasonably convenient to both parties.

§ 25-9-610. Disposition of collateral after default.

(a) Disposition after default. --After default, a secured party may sell, lease, license, or otherwise dispose of any or all of the collateral in its present condition or following any commercially reasonable preparation or processing.

(b) Commercially reasonable disposition. --Every aspect of a disposition of collateral, including the method, manner, time, place, and other terms, must be commercially reasonable. If commercially reasonable, a secured party may dispose of collateral by public or private proceedings, by one or more contracts, as a unit or in parcels, and at any time and place and on any terms.

(c) Purchase by secured party. --A secured party may purchase collateral:

(1) At a public disposition; or

(2) At a private disposition only if the collateral is of a kind that is customarily sold on a recognized market or the subject of widely distributed standard price quotations.

(d) Warranties on disposition. --A contract for sale, lease, license, or other disposition includes the warranties relating to title, possession, quiet enjoyment, and the like which by operation of law accompany a voluntary disposition of property of the kind subject to the contract.

(e) Disclaimer of warranties. --A secured party may disclaim or modify warranties under subsection (d) of this section:

(1) In a manner that would be effective to disclaim or modify the warranties in a voluntary disposition of property of the kind subject to the contract of disposition; or

(2) By communicating to the purchaser a record evidencing the contract for disposition and including an express disclaimer or modification of the warranties.

(f) Record sufficient to disclaim warranties. --A record is sufficient to disclaim warranties under subsection (e) of this section if it indicates "There is no warranty relating to title, possession, quiet enjoyment, or the like in this disposition" or uses words of similar import.

§ 25-9-611. Notification before disposition of collateral.

(a) "Notification date." --In this section, "notification date" means the earlier of the date on which:

(1) A secured party sends to the debtor and any secondary obligor an authenticated notification of disposition; or

(2) The debtor and any secondary obligor waive the right to notification.

(b) Notification of disposition required. --Except as otherwise provided in subsection (d) of this section, a secured party that disposes of collateral under G.S. 25-9-610 shall send to the persons specified in subsection (c) of this section a reasonable authenticated notification of disposition.

(c) Persons to be notified. --To comply with subsection (b) of this section, the secured party shall send an authenticated notification of disposition to:

(1) The debtor;

(2) Any secondary obligor; and

(3) If the collateral is other than consumer goods:

a. Any other person from which the secured party has received, before the notification date, an authenticated notification of a claim of an interest in the collateral;

b. Any other secured party or lienholder that, 10 days before the notification date, held a security interest in or other lien on the collateral perfected by the filing of a financing statement that:

1. Identified the collateral;

2. Was indexed under the debtor's name as of that date; and

3. Was filed in the office in which to file a financing statement against the debtor covering the collateral as of that date; and

c. Any other secured party that, 10 days before the notification date, held a security interest in the collateral perfected by compliance with a statute, regulation, or treaty described in G.S. 25-9-311(a).

(d) Subsection (b) inapplicable: perishable collateral; recognized market. --Subsection (b) of this section does not apply if the collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market.

(e) Compliance with sub-subdivision (c)(3)b. --A secured party complies with the requirement for notification prescribed by sub-subdivision (c)(3)b. of this section if:

(1) Not later than 20 days or earlier than 30 days before the notification date, the secured party requests, in a commercially reasonable manner, information concerning financing statements indexed under the debtor's name in the office indicated in sub-subdivision (c)(3)b. of this section; and

(2) Before the notification date, the secured party:

a. Did not receive a response to the request for information; or

b. Received a response to the request for information and sent an authenticated notification of disposition to each secured party or other lienholder named in that response whose financing statement covered the collateral.

§ 25-9-612. Timeliness of notification before disposition of collateral.

(a) Reasonable time is question of fact. --Except as otherwise provided in subsection (b) of this section, whether a notification is sent within a reasonable time is a question of fact.

(b) Ten-day period sufficient in nonconsumer transaction. --In a transaction other than a consumer transaction, a notification of disposition sent after default and 10 days or more before the earliest time of disposition set forth in the notification is sent within a reasonable time before the disposition.

§ 25-9-613. Contents and form of notification before disposition of collateral: general.
Except in a consumer-goods transaction, the following rules apply:

(1) The contents of a notification of disposition are sufficient if the notification:

a. Describes the debtor and the secured party;
b. Describes the collateral that is the subject of the intended disposition;
c. States the method of intended disposition;
d. States that the debtor is entitled to an accounting of the unpaid indebtedness and states the charge, if any, for an accounting; and
e. States the time and place of a public disposition or the time after which any other disposition is to be made.

§ 25-9-614. Contents and form of notification before disposition of collateral: consumer-goods transaction.
In a consumer-goods transaction, the following rules apply:

(1) A notification of disposition must provide the following information:

a. The information specified in G.S. 25-9-613(1);
b. A description of any liability for a deficiency of the person to which the notification is sent;
c. A telephone number from which the amount that must be paid to the secured party to redeem the collateral under G.S. 25-9-623 is available; and
d. A telephone number or mailing address from which additional information concerning the disposition and the obligation secured is available.

(2) A particular phrasing of the notification is not required.

(3) The following form of notification, when completed, provides sufficient information:

___[Name and address of secured party]___
___[Date]___
NOTICE OF OUR PLAN TO SELL PROPERTY

___[Name and address of any obligor who is also a debtor]%Y(3) 6D
Subject: ___[Identification of Transaction]___

We have your [describe collateral], because you broke promises in our agreement.
[For a public disposition:] We will sell [describe collateral] at public sale. A sale could include a lease or license. The sale will be held as follows:
Date: _____
Time: _____
Place: _____
You may attend the sale and bring bidders if you want.
[For a private disposition:] We will sell [describe collateral] at private sale sometime after [date]. A sale could include a lease or license.
The money that we get from the sale (after paying our costs) will reduce the amount you owe. If we get less money than you owe, you [will or will not, as applicable] still owe us the difference. If we get more money than you owe, you will get the extra money, unless we must pay it to someone else.
You can get the property back at any time before we sell it by paying us the full amount you owe (not just the past due payments), including our expenses. To learn the exact amount you must pay, call us at [telephone number].
If you want us to explain to you in writing how we have figured the amount that you owe us, you may call us at [telephone number] [or write us at [secured party's address]] and request a written explanation. [We will charge you $_____ for the explanation if we sent you another written explanation of the amount you owe us within the last six months.]
If you need more information about the sale call us at [telephone number] [or write us at [secured party's address].

We are sending this notice to the following other people who have an interest in [describe collateral] or who owe money under your agreement: [Names of all other debtors and obligors, if any]

(4) A notification in the form of subdivision (3) of this section is sufficient, even if additional information appears at the end of the form.

(5) A notification in the form of subdivision (3) of this section is sufficient, even if it includes errors in information not required by subdivision (1) of this section, unless the error is misleading with respect to rights arising under this Article.

(6) If a notification under this section is not in the form of subdivision (3) of this section, law other than this Article determines the effect of including information not required by subdivision (1) of this section.

§ 25-9-615. Application of proceeds of disposition; liability for deficiency and right to surplus.

(a) Application of proceeds. --A secured party shall apply or pay over for application the cash proceeds of disposition under G.S. 25-9-610 in the following order to:

(1) The reasonable expenses of retaking, holding, preparing for disposition, processing, and disposing, and, to the extent provided for by agreement and not prohibited by law, reasonable attorney's fees and legal expenses incurred by the secured party;

(2) The satisfaction of obligations secured by the security interest or agricultural lien under which the disposition is made;

(3) The satisfaction of obligations secured by any subordinate security interest in or other subordinate lien on the collateral if:

a. The secured party receives from the holder of the subordinate security interest or other lien an authenticated demand for proceeds before distribution of the proceeds is completed; and

b. In a case in which a consignor has an interest in the collateral, the subordinate security interest or other lien is senior to the interest of the consignor; and

(4) A secured party that is a consignor of the collateral if the secured party receives from the consignor an authenticated demand for proceeds before distribution of the proceeds is completed.

(b) Proof of subordinate interest. --If requested by a secured party, a holder of a subordinate security interest or other lien shall furnish reasonable proof of the interest or lien within a reasonable time. Unless the holder does so, the secured party need not comply with the holder's demand under subdivision (a)(3) of this section.

(c) Application of noncash proceeds. --A secured party need not apply or pay over for application noncash proceeds of disposition under G.S. 25-9-610 unless the failure to do so would be commercially unreasonable. A secured party that applies or pays over for application noncash proceeds shall do so in a commercially reasonable manner.

(d) Surplus or deficiency if obligation secured. --If the security interest under which a disposition is made secures payment or performance of an obligation, after making the payments and applications required by subsection (a) of this section and permitted by subsection (c) of this section:

(1) Unless subdivision (a)(4) of this section requires the secured party to apply or pay over cash proceeds to a consignor, the secured party shall account to and pay a debtor for any surplus; and

(2) The obligor is liable for any deficiency.

(e) No surplus or deficiency in sales of certain rights to payment. --If the underlying transaction is a sale of accounts, chattel paper, payment intangibles, or promissory notes:

(1) The debtor is not entitled to any surplus; and

(2) The obligor is not liable for any deficiency.

(f) Calculation of surplus or deficiency in disposition to person related to secured party. --The surplus or deficiency following a disposition is calculated based on the amount of proceeds that would have been realized in a disposition complying with this Part to a transferee other than the secured party, a person related to the secured party, or a secondary obligor if:

(1) The transferee in the disposition is the secured party, a person related to the secured party, or a secondary obligor; and
(2) The amount of proceeds of the disposition is significantly below the range of proceeds that a complying disposition to a person other than the secured party, a person related to the secured party, or a secondary obligor would have brought.

(g) Cash proceeds received by junior secured party. --A secured party that receives cash proceeds of a disposition in good faith and without knowledge that the receipt violates the rights of the holder of a security interest or other lien that is not subordinate to the security interest or agricultural lien under which the disposition is made:

(1) Takes the cash proceeds free of the security interest or other lien;
(2) Is not obligated to apply the proceeds of the disposition to the satisfaction of obligations secured by the security interest or other lien; and
(3) Is not obligated to account to or pay the holder of the security interest or other lien for any surplus.

§ 25-9-616. Explanation of calculation of surplus or deficiency.

(a) Definitions. --In this section:

(1) "Explanation" means a writing that:
   a. States the amount of the surplus or deficiency;
   b. Provides an explanation in accordance with subsection (c) of this section of how the secured party calculated the surplus or deficiency;
   c. States, if applicable, that future debits, credits, charges, including additional credit service charges or interest, rebates, and expenses may affect the amount of the surplus or deficiency; and
   d. Provides a telephone number or mailing address from which additional information concerning the transaction is available.
(2) "Request" means a record:
   a. Authenticated by a debtor or consumer obligor;
   b. Requesting that the recipient provide an explanation; and
   c. Sent after disposition of the collateral under G.S. 25-9-610.

(b) Explanation of calculation. --In a consumer-goods transaction in which the debtor is entitled to a surplus or a consumer obligor is liable for a deficiency under G.S. 25-9-615, the secured party shall:

(1) Send an explanation to the debtor or consumer obligor, as applicable, after the disposition and:
   a. Before or when the secured party accounts to the debtor and pays any surplus or first makes written demand on the consumer obligor after the disposition for payment of the deficiency; and
   b. Within 14 days after receipt of a request; or
(2) In the case of a consumer obligor who is liable for a deficiency, within 14 days after receipt of a request, send to the consumer obligor a record waiving the secured party's right to a deficiency.

(c) Required information. --To comply with sub-subdivision (a)(1)b. of this section, a writing must provide the following information in the following order

(1) The aggregate amount of obligations secured by the security interest under which the disposition was made, and, if the amount reflects a rebate of unearned interest or credit service charge, an indication of that fact, calculated as of a specified date:
   a. If the secured party takes or receives possession of the collateral after default, not more than 35 days before the secured party takes or receives possession; or
   b. If the secured party takes or receives possession of the collateral before default or does not take possession of the collateral, not more than 35 days before the disposition;
(2) The amount of proceeds of the disposition;

(3) The aggregate amount of the obligations after deducting the amount of proceeds;
(4) The amount, in the aggregate or by type, and types of expenses, including expenses of retaking, holding, preparing for disposition, processing, and disposing of the collateral, and attorney's fees secured by the collateral which are known to the secured party and relate to the current disposition;
(5) The amount, in the aggregate or by type, and types of credits, including rebates of interest or credit service charges, to which the obligor is known to be entitled and which are not reflected in the amount in subdivision (1) of this subsection; and
(6) The amount of the surplus or deficiency.

(d) Substantial compliance. --A particular phrasing of the explanation is not required. An explanation complying substantially with the requirements of subsection (a) of this section is sufficient, even if it includes minor errors that are not seriously misleading.

(e) Charges for responses. --A debtor or consumer obligor is entitled without charge to one response to a request under this section during any six-month period in which the secured party did not send to the debtor or consumer obligor an explanation pursuant to subdivision (b)(1) of this section. The secured party may require payment of a charge not exceeding twenty-five dollars ($25.00) for each additional response.

§ 25-9-617. Rights of transferee of collateral.

(a) Effects of disposition. --A secured party's disposition of collateral after default:
(1) Transfers to a transferee for value all of the debtor's rights in the collateral;
(2) Discharges the security interest under which the disposition is made; and
(3) Discharges any subordinate security interest or other subordinate lien.

(b) Rights of good-faith transferee. --A transferee that acts in good faith takes free of the rights and interests described in subsection (a) of this section, even if the secured party fails to comply with this Article or the requirements of any judicial proceeding.

(c) Rights of other transferee. --If a transferee does not take free of the rights and interests described in subsection (a) of this section, the transferee takes the collateral subject to:
(1) The debtor's rights in the collateral;
(2) The security interest or agricultural lien under which the disposition is made; and
(3) Any other security interest or other lien.

§ 25-9-620. Acceptance of collateral in full or partial satisfaction of obligation; compulsory disposition of collateral.

(a) Conditions to acceptance in satisfaction. --Except as otherwise provided in subsection (g) of this section, a secured party may accept collateral in full or partial satisfaction of the obligation it secures only if:
(1) The debtor consents to the acceptance under subsection (c) of this section;
(2) The secured party does not receive, within the time set forth in subsection (d) of this section, a notification of objection to the proposal authenticated by:
a. A person to which the secured party was required to send a proposal under G.S. 25-9-621; or
b. Any other person, other than the debtor, holding an interest in the collateral subordinate to the security interest that is the subject of the proposal;
(3) If the collateral is consumer goods, the collateral is not in the possession of the debtor when the debtor consents to the acceptance; and
(4) Subsection (e) of this section does not require the secured party to dispose of the collateral or the debtor waives the requirement pursuant to G.S. 25-9-624.

(b) Purported acceptance ineffective. --A purported or apparent acceptance of collateral under this section is ineffective unless:
(1) The secured party consents to the acceptance in an authenticated record or sends a proposal to the debtor; and

(2) The conditions of subsection (a) of this section are met.

(c) Debtor's consent. --For purposes of this section:

(1) A debtor consents to an acceptance of collateral in partial satisfaction of the obligation it secures only if the debtor agrees to the terms of the acceptance in a record authenticated after default; and

(2) A debtor consents to an acceptance of collateral in full satisfaction of the obligation it secures only if the debtor agrees to the terms of the acceptance in a record authenticated after default or the secured party:

a. Sends to the debtor after default a proposal that is unconditional or subject only to a condition that collateral not in the possession of the secured party be preserved or maintained;

b. In the proposal, proposes to accept collateral in full satisfaction of the obligation it secures; and

c. Does not receive a notification of objection authenticated by the debtor within 20 days after the proposal is sent.

(d) Effectiveness of notification. --To be effective under subdivision (a)(2) of this section, a notification of objection must be received by the secured party:

(1) In the case of a person to which the proposal was sent pursuant to G.S. 25-9-621, within 20 days after notification was sent to that person; and

(2) In other cases:

a. Within 20 days after the last notification was sent pursuant to G.S. 25-9-621; or

b. If a notification was not sent, before the debtor consents to the acceptance under subsection (c) of this section.

(e) Mandatory disposition of consumer goods. --A secured party that has taken possession of collateral shall dispose of the collateral pursuant to G .S. 25-9-610 within the time specified in subsection (f) of this section if:

(1) Sixty percent (60%) of the cash price has been paid in the case of a purchase-money security interest in consumer goods; or

(2) Sixty percent (60%) of the principal amount of the obligation secured has been paid in the case of a non-purchase-money security interest in consumer goods.

(f) Compliance with mandatory disposition requirement. --To comply with subsection (e) of this section, the secured party shall dispose of the collateral:

(1) Within 90 days after taking possession; or

(2) Within any longer period to which the debtor and all secondary obligors have agreed in an agreement to that effect entered into and authenticated after default.

(g) No partial satisfaction in consumer transaction. --In a consumer transaction, a secured party may not accept collateral in partial satisfaction of the obligation it secures.

§ 25-9-622. Effect of acceptance of collateral.

(a) Effect of acceptance. --A secured party's acceptance of collateral in full or partial satisfaction of the obligation it secures:

(1) Discharges the obligation to the extent consented to by the debtor;

(2) Transfers to the secured party all of a debtor's rights in the collateral;

(3) Discharges the security interest or agricultural lien that is the subject of the debtor's consent and any subordinate security interest or other subordinate lien; and

(4) Terminates any other subordinate interest.

(b) Discharge of subordinate interest notwithstanding noncompliance. --A subordinate interest is discharged or terminated under subsection (a) of this section, even if the secured party fails to comply with this Article.

§ 25-9-623. Right to redeem collateral.

(a) Persons that may redeem. --A debtor, any secondary obligor, or any other secured party or lienholder may redeem collateral.

(b) Requirements for redemption. --To redeem collateral, a person shall tender:

(1) Fulfillment of all obligations secured by the collateral; and

(2) The reasonable expenses and attorney's fees described in G.S. 25-9-615(a)(1).

(c) When redemption may occur. --A redemption may occur at any time before a secured party:

(1) Has collected collateral under G.S. 25-9-607;

(2) Has disposed of collateral or entered into a contract for its disposition under G.S. 25-9-610; or

(3) Has accepted collateral in full or partial satisfaction of the obligation it secures under G.S. 25-9-622.

§ 25-9-624. Waiver.

(a) Waiver of disposition notification. --A debtor or secondary obligor may waive the right to notification of disposition of collateral under G.S. 25- 9-611 only by an agreement to that effect entered into and authenticated after default.

(b) Waiver of mandatory disposition. --A debtor may waive the right to require disposition of collateral under G.S. 25-9-620(e) only by an agreement to that effect entered into and authenticated after default.

(c) Waiver of redemption right. --Except in a consumer-goods transaction, a debtor or secondary obligor may waive the right to redeem collateral under G.S. 25-9-623 only by an agreement to that effect entered into and authenticated after default.

PART 6. DEFAULT
SUBPART 2. NONCOMPLIANCE WITH ARTICLE

§ 25-9-625. Remedies for secured party's failure to comply with Article.

(a) Judicial orders concerning noncompliance. --If it is established that a secured party is not proceeding in accordance with this Article, a court may order or restrain collection, enforcement, or disposition of collateral on appropriate terms and conditions.

(b) Damages for noncompliance. --Subject to subsections (c), (d), and (f) of this section, a person is liable for damages in the amount of any loss caused by a failure to comply with this Article. Loss caused by a failure to comply may include loss resulting from the debtor's inability to obtain, or increased costs of, alternative financing.

(c) Persons entitled to recover damages; statutory damages in consumer-goods transaction. --Except as otherwise provided in G.S. 25-9-628:

(1) A person that, at the time of the failure, was a debtor, was an obligor, or held a security interest in or other lien on the collateral may recover damages under subsection (b) of this section for its loss; and

(2) If the collateral is consumer goods, a person that was a debtor or a secondary obligor at the time a secured party failed to comply with this Part may recover for that failure in any event an amount not less than the credit service charge plus ten percent (10%) of the principal amount of the obligation or the time-price differential plus ten percent (10%) of the cash price.

(d) Recovery when deficiency eliminated or reduced. --A debtor whose deficiency is eliminated under G.S. 25-9-626 may recover damages for the loss of any surplus. However, a debtor or secondary obligor whose deficiency is eliminated or reduced under G.S. 25-9-626 may not otherwise recover under subsection (b) of this section for noncompliance with the provisions of this Part relating to collection, enforcement, disposition, or acceptance.

§ 25-9-626. Action in which deficiency or surplus is in issue.

(a) Applicable rules if amount of deficiency or surplus in issue. --In an action arising from a transaction, other than a consumer transaction, in which the amount of a deficiency or surplus is in issue, the following rules apply:

(1) A secured party need not prove compliance with the provisions of this Part relating to collection, enforcement, disposition, or acceptance unless the debtor or a secondary obligor places the secured party's compliance in issue.

(2) If the secured party's compliance is placed in issue, the secured party has the burden of establishing that the collection, enforcement, disposition, or acceptance was conducted in accordance with this Part.

(3) Except as otherwise provided in G.S. 25-9-628, if a secured party fails to prove that the collection, enforcement, disposition, or acceptance was conducted in accordance with the provisions of this Part relating to collection, enforcement, disposition, or acceptance, the liability of a debtor or a secondary obligor for a deficiency is limited to an amount by which the sum of the secured obligation, expenses, and attorney' s fees exceeds the greater of:

a. The proceeds of the collection, enforcement, disposition, or acceptance; or

b. The amount of proceeds that would have been realized had the noncomplying secured party proceeded in accordance with the provisions of this Part relating to collection, enforcement, disposition, or acceptance.

(4) For purposes of sub-subdivision (a)(3)b. of this section, the amount of proceeds that would have been realized is equal to the sum of the secured obligation, expenses, and attorney's fees unless the secured party proves that the amount is less than that sum.

(5) If a deficiency or surplus is calculated under G.S. 25-9-615(f), the debtor or obligor has the burden of establishing that the amount of proceeds of the disposition is significantly below the range of prices that a complying disposition to a person other than the secured party, a person related to the secured party, or a secondary obligor would have brought.

(b) Nonconsumer transactions; no inference. --The limitation of the rules in subsection (a) of this section to transactions other than consumer transactions is intended to leave to the court the determination of the proper rules in consumer transactions. The court may not infer from that limitation the nature of the proper rule in consumer transactions and may continue to apply established approaches.

§ 25-9-627. Determination of whether conduct was commercially reasonable.

(a) Greater amount obtainable under other circumstances; no preclusion of commercial reasonableness. --The fact that a greater amount could have been obtained by a collection, enforcement, disposition, or acceptance at a different time or in a different method from that selected by the secured party is not of itself sufficient to preclude the secured party from establishing that the collection, enforcement, disposition, or acceptance was made in a commercially reasonable manner.

(b) Dispositions that are commercially reasonable. --A disposition of collateral is made in a commercially reasonable manner if the disposition is made:

(1) In the usual manner on any recognized market;

(2) At the price current in any recognized market at the time of the disposition; or

(3) Otherwise in conformity with reasonable commercial practices among dealers in the type of property that was the subject of the disposition.

(c) Approval by court or on behalf of creditors. --A collection, enforcement, disposition, or acceptance is commercially reasonable if it has been approved:

(1) In a judicial proceeding;

(2) By a bona fide creditors' committee;

(3) By a representative of creditors; or

(4) By an assignee for the benefit of creditors.

(d) Approval under subsection (c) of this section not necessary; absence of approval has no effect. --Approval under subsection (c) of this section need not be obtained, and lack of approval does not mean that the collection, enforcement, disposition, or acceptance is not commercially reasonable.

CHAPTER 25A. RETAIL INSTALLMENT SALES ACT.

§ 25A-1. Scope of act. This Chapter applies only to consumer credit sales as hereinafter defined, except that G.S. 25A-37, referral sales, applies to all sales of goods or services as provided therein. This Chapter does not apply to a bona fide direct loan transaction in which a lender makes a direct loan to a borrower, and such lender is not regularly engaged, directly or indirectly, in the sale of goods or the furnishing of services as defined in this Chapter.

Except for G.S. 25A-37, referral sales, those sales defined in G.S. 25A- 2(b), and those sales with amounts financed in excess of twenty-five thousand dollars ($25,000) under G.S. 25A-2(a)(5), this Chapter does not apply to any party or transaction that is not also subject to the provisions of the Consumer Credit Protection Act (Federal Truth-in-Lending Act)..

§ 25A-2. "Consumer credit sale" defined. (a) Except as provided in subsection (c) of this section, a "consumer credit sale" is a sale of goods or services in which

(1) The seller is one who in the ordinary course of business regularly extends or arranges for the extension of consumer credit, or offers to extend or arrange for the extension of such credit,
(2) The buyer is a natural person,
(3) The goods or services are purchased primarily for a personal, family, household or agricultural purpose,
(4) Either the debt representing the price of the goods or services is payable in installments or a finance charge is imposed, and
(5) The amount financed does not exceed seventy-five thousand dollars ($75,000) or, in the case of a debt secured by real property or a manufactured home as defined in G.S. 143-145(7), regardless of the amount financed.

(b) "Sale" includes but is not limited to any contract in the form of a bailment or lease if the bailee or lessee contracts to pay as compensation for use a sum substantially equivalent to or in excess of the aggregate value of the goods and services involved, and it is agreed that the bailee or lessee will become, or for no other or for a nominal consideration, has the option to become, the owner of the goods and services upon full compliance with his obligations under such contract.

The term also includes a contract in the form of a terminable bailment or lease of goods or services in which the bailee or lessee can renew the bailment or lease contract periodically by making the payment or payments specified in the contract if:

(1) The contract obligates the bailor or lessor to transfer ownership of the property to the bailee or lessee for no other or a nominal consideration (no more than ten percent (10%) of the cash price of the property at the time the bailor or lessor initially enters into the contract with the bailee or lessee) upon the making of a specified number of payments by the bailee or lessee; and
(2) The dollar total of the specified number of payments necessary to exercise the purchase option is more than ten percent (10%) in excess of the aggregate value of the property and services involved. For the purposes of this subsection, the value of goods shall be the average cash retail value of the goods. The value of services shall be the average retail value, if any, of such services, as determined by substantial cash sales of such services. If a contract is found to be a sale under this subsection, these values shall be used to determine the amount financed for purposes of G.S. 25A-15.

(c) A sale in which the seller allows the buyer to purchase goods or services pursuant to a credit card issued by someone other than a seller that is engaged in part or entirely in the business of selling goods or services or similar arrangement is not a consumer credit sale. A sale in which the seller allows the buyer to purchase goods or services pursuant to a credit card issued by the seller, a subsidiary or a parent corporation of the seller, a principal supplier of the seller or any corporation having shareholders in common with the seller holding over twenty-five percent (25%) of the voting stock in each corporation is a consumer credit sale within the terms of this Chapter.

(d) For the purposes of this Chapter, a consumer credit sale shall be deemed to have been made in this State, and therefore subject to the provisions of this Chapter, if the seller offers or agrees in this State to

sell to a buyer who is a resident of this State, or if such buyer accepts or makes the offer in this State to buy, regardless of the situs of the contract as specified therein.

Any solicitation or communication to sell, oral or written, originating outside of this State, but forwarded to and received in this State by a buyer who is a resident of this State, shall be deemed to be an offer or agreement to sell in this State.

Any solicitation or communication to buy, oral or written, originating within this State, from a buyer who is a resident of this State, but forwarded to and received by a retail seller outside of this State, shall be deemed to be an acceptance or offer to buy in this State.

(e) If an advertisement for a terminable bailment or lease defined as a sale in subsection (b) above states the amount of any payment, the advertisement must also clearly and conspicuously state the following items, as applicable:

(1) A statement that the transaction advertised is a lease;
(2) The total amount of periodic payments necessary to acquire ownership or a statement that the consumer has the option to purchase the property and at what time;
(3) That the consumer acquires no ownership rights if either the property is not leased for the term required for ownership to transfer or the terms of purchase are not otherwise satisfied.

If an advertisement for a terminable bailment or lease defined as a sale in subsection (b) above refers to the right to acquire ownership, the advertisement must clearly and conspicuously state whether or not the consumer may terminate the lease at any time without penalty and that the consumer acquires no ownership rights if either the property is not leased for the term required for ownership to transfer or the terms of purchase are not otherwise satisfied.

No one shall advertise in connection with any terminable bailment or lease defined as a sale in subsection (b) above the ownership option as a means of deceiving any lessee into believing that he is purchasing the item of personal property.

§ 25A-3. "Payable in installments" defined. A debt is "payable in installments" when the buyer is required or permitted by agreement to make payment in more than four installments, excluding a down payment, and whether or not a finance charge is imposed by the seller.

§ 25A-4. "Goods" defined. (a) "Goods" means all things which are moveable at the time of the sale or at the time the buyer takes possession, including goods not in existence at the time the transaction is entered into and goods which are furnished or used at the time of sale or subsequently in modernization, rehabilitation, repair, alteration, improvement or construction on real property so as to become a part thereof whether or not they are severable therefrom. "Goods" also includes merchandise certificates.

(b) "Merchandise certificate" means a writing issued by a seller not redeemable in cash and usable in its face amount in lieu of cash in exchange for goods and services.

§ 25A-5. "Services" defined. (a) "Services" includes:

(1) Work, labor, and other personal services; and
(2) Privileges with respect to transportation, hotel and restaurant accommodations, education, entertainment, recreation, physical culture, hospital accommodations, funerals and other similar services.

(b) "Services" does not include:

(1) Services for which the cost is by law fixed or approved by or filed with or subject to approval or disapproval by the United States or the State of North Carolina or any agency, instrumentality or subdivision thereof;
(2) Insurance premiums financing covered by G.S. 58-55 through G.S. 58-61.2; or
(3) Insurance provided by an insurer that is licensed to do business in this State.

§ 25A-6. "Seller" defined. "Seller" means one regularly engaged in the business of selling goods or services. Unless otherwise provided, "seller" also means and includes an assignee of the seller's right to payment but use of the term does not itself impose on an assignee any obligation of the seller with respect to events occurring before the assignment.

§ 25A-7. "Cash price" defined. "Cash price" of goods and services means the price at which the goods or services are offered for sale by the seller to cash buyers in the ordinary course of business and may include:

(1) Applicable sales, use, and excise and documentary stamp taxes; and
(2) The cash price of accessories or related services such as installation, delivery, servicing, repairs or alterations.

§ 25A-8. Finance charge" defined. (a) "Finance charge" means the sum of all charges payable directly or indirectly by the buyer and imposed by the seller as an incident to the extension of credit, including any of the following types of charges which are applicable:

(1) Interest, time price differential, service, carrying or other similar charge however denominated;
(2) Premium or other charges for any guarantee or insurance protecting the seller against the buyer's default or other credit loss;
(3) Loan fee, finder's fee or similar charge; and
(4) Fee for an appraisal, investigation or credit report.

(b) Finance charge does not include transfer of equity fees, substitution of collateral fees, default or deferment charges, or additional charges for insurance as permitted by G.S. 25A-17 or charges for insurance excluded by Section 226.4(a) of Regulation Z promulgated pursuant to section 105 of the Consumer Credit Protection Act.

(c) With respect to a transaction in which the seller acquires a security interest in real property, finance charge does not include charges excluded by section 226.4(e) of Regulation Z promulgated pursuant to section 105 of the Consumer Credit Protection Act.

§ 25A-9. "Amount financed" defined. (a) "Amount financed" means the total of the following to the extent that payment is deferred by the seller:

(1) The cash price of the goods or services less the amount of any down payment whether made in cash or property traded in,
(2) The amount actually paid or to be paid by the seller pursuant to an agreement with the buyer to discharge a security interest or lien on property traded in,
(3) Additional charges for insurance described in G.S. 25A-8(b) and charges referred to in G.S. 25A-8(c), and
(4) Official fees as described in G.S. 25A-10, to the extent they are itemized and disclosed to the buyer.

(b) If not included in the cash price, the amount financed includes any applicable sales, use or documentary stamp taxes and any amount actually paid or to be paid by the seller for registration, certificate of title or license fees.

§ 25A-10. "Official fees" defined. "Official fees" means:

(1) Fees and charges prescribed by law which actually are or will be paid to public officials for determining the existence of or for perfecting, releasing, or satisfying a security interest related to a consumer credit sale; or
(2) Premiums payable for insurance in lieu of perfecting a security interest otherwise required by the seller in connection with a consumer credit sale if the premium does not exceed the fees or charges described in subdivision (1) of this section which would otherwise be payable.

§ 25A-11. "Revolving charge account contract" defined. "Revolving charge account contract" means an agreement or understanding between a seller and a buyer under which consumer credit sales may be made from time to time, under the terms of which a finance charge or service charge is to be computed in relation to the buyer's unpaid balance from time to time, and under which the buyer has the privilege of paying the balance in full or in installments. This definition shall not affect the meaning of the term "revolving charge account" appearing in G.S. 24-11(a).

§ 25A-12. "Consumer credit installment sale contract" defined. "Consumer credit installment sale contract" means the agreement between a buyer and a seller in a consumer credit sale other than a sale made pursuant to a revolving charge account.

§ 25A-13. "Consumer Credit Protection Act" defined. "Consumer Credit Protection Act" means the Consumer Credit Protection Act, an act of Congress of May 29, 1968, as amended (Public Law 90-321; 82 Stat. 146; 15 U.S.C. 1601 et seq.), and regulations and rulings promulgated thereunder.

§ 25A-14. Finance charge rates and service charge for revolving charge account contracts. (a) The finance-charge rate and either the annual charge or the monthly service charge for a consumer credit sale made under a revolving charge account contract may not exceed the rates and charge provided for revolving credit by G.S. 24-11.

(b) In the event the revolving charge account contract is secured in whole or in part by a security interest in real property, then the finance-charge rate shall not exceed the rate set out in G.S. 25A-15(d).

(c) No default or deferral charge shall be imposed by the seller in connection with a revolving charge-account contract, except as specifically provided for in G.S. 24-11(d1).

§ 25A-15. Finance charge rates for consumer credit installment sale contracts. (a) With respect to a consumer credit installment sale contract, a seller may contract for and receive a finance charge not exceeding that permitted by this section. For the purposes of this section, the finance charge rates are the rates that are required to be disclosed by the Consumer Credit Protection Act.

(b) Except as hereinafter provided, the finance charge rate for a consumer credit installment sales contract may not exceed:

(1) Twenty-four percent (24%) per annum where the amount financed is less than one thousand five hundred dollars ($1,500);
(2) Twenty-two percent (22%) per annum where the amount financed is one thousand five hundred dollars ($1,500) or greater, but less than two thousand dollars ($2,000);
(3) Twenty percent (20%) where the amount financed is two thousand ($2,000) or greater, but less than three thousand dollars ($3,000);
(4) Eighteen percent (18%) per annum where the amount financed is three thousand dollars ($3,000) or greater,

except that a minimum finance charge of five dollars ($5.00) may be imposed.

(c) A finance charge rate not to exceed the higher of the rate established in subsection (b) or the rate set forth below may be imposed in a consumer credit installment sale contract repayable in not less than six installments for a self-propelled motor vehicle:

(1) Eighteen percent (18%) per annum for vehicles one and two model years old;
(2) Twenty percent (20%) per annum for vehicles three model years old;
(3) Twenty-two percent (22%) per annum for vehicles four model years old; and
(4) Twenty-nine percent (29%) per annum for vehicles five model years old and older.

A motor vehicle is one model year old on January 1 of the year following the designated year model of the vehicle.

(d) Notwithstanding the provisions of subsections (b) and (c), above, in the event that the amount financed in a consumer credit sale contract is secured in whole or in part by a security interest in real property, the finance charge rate may not exceed sixteen percent (16%) per annum.

(e) A seller may not divide a single credit sale transaction into two or more sales to avoid the limitations as to maximum finance charges imposed by this section.

(f) Notwithstanding the provisions of subsections (b) or (d), the parties to a consumer credit installment sale contract for the sale of a residential manufactured home which is secured by a first lien on that home or on the land on which such home is located may contract in writing for the payment of a finance charge as agreed upon by the parties. Provided, this subsection shall only apply if the parties would have been entitled to so contract by the provisions of section 501 of United States Public Law 96-221, and have complied with the regulations promulgated thereto.

For the purposes of this subsection (f), a "residential manufactured home" means a mobile home as defined in G.S. 143-145(7) which is used as a dwelling.

§ 25A-16. Transfer of equity.

If a buyer voluntarily transfers his rights in collateral pursuant to G.S. 25-9-311 and the seller agrees, the seller may impose a transfer fee not to exceed ten percent (10%) of the unpaid balance of the debt or thirty-five dollars ($35.00), whichever is less.

§ 25A-17. Additional charges for insurance.

(a) As to revolving charge account contracts defined in G.S. 25A-11, in addition to the finance charges permitted in G.S. 24-11(a), a seller in a consumer credit sale may contract for and receive additional charges or premiums (i) for insurance written in connection with any consumer credit sale, against loss of or damage to property securing the debt pursuant to G.S. 25A-23, provided a clear, conspicuous and specific statement in writing is furnished by the seller to the buyer setting forth the cost of the insurance if obtained from or through the seller and stating that the buyer may choose the insurer through which the insurance is obtained; (ii) for credit life, credit accident and health, or credit unemployment insurance, written in connection with any consumer credit sale, provided the insurance coverage is not required by the seller and this fact is clearly disclosed to the buyer, and any buyer desiring such insurance coverage gives affirmative indication of such desire after disclosure of the cost of such insurance.

(b) As to revolving charge account contracts defined in G.S. 25A-11, insurance that is required by a seller and is not an additional charge permitted by subsection (a) of this section, shall be included in the finance charge as computed according to G.S. 24-11(a).

(c) As to consumer credit installment sale contracts defined in G.S. 25A-12, in addition to the finance charges permitted in G.S. 25A-15, a seller in a consumer credit sale may contract for and receive additional charges or premiums (i) for insurance written in connection with any consumer credit sale, for loss of or damage to property or against liability arising out of the ownership or use of property, provided a clear, conspicuous and specific statement in writing is furnished by the seller to the buyer setting forth the cost of the insurance if obtained from or through the seller and stating that the buyer may choose the person through which the insurance is to be obtained; (ii) for credit life, credit accident and health, or credit unemployment insurance, written in connection with any consumer credit sale, provided the insurance coverage is not required by the seller and this fact is clearly and conspicuously disclosed in writing to the buyer; and any buyer desiring such insurance coverage gives specific dated and separately signed affirmative written indication of such desire after receiving written disclosure to him of the cost of such insurance.

§ 25A-18. Confession of judgment. A buyer may not authorize any person to confess judgment on a claim arising out of a consumer credit sale. An authorization in violation of this section is void.

§ 25A-19. Acceleration. With respect to a consumer credit sale, the agreement may not provide for repossession of any goods or acceleration of the time when any part or all of the time balance becomes payable other than for breach by the buyer of any promise or condition clearly set forth in the agreement.

§ 25A-20. Disclaimer of warranty. With respect to any consumer credit sale, the agreement may not contain any provision limiting, excluding, modifying or in any manner altering the terms of any express warranty given by any seller (excluding assignees) to any buyer and made a part of the basis of the bargain between the original parties.

§ 25A-21. Attorneys' fees. With respect to a consumer credit sale:

(1) In the event that the seller institutes a suit and prevails in the litigation and obtains a money judgment, the presiding judge shall allow a reasonable attorney's fee to the duly licensed attorney representing the seller in such suit, said attorney's fee to be taxed to the buyer as part of the court costs.

(2) In the event that a seller instituting suit does not prevail in the litigation, the presiding judge shall allow a reasonable attorney's fee to the duly licensed attorney

representing the buyer in such suit, said attorney's fee to be taxed to the seller as a part of the court costs.

§ 25A-22. Receipts for payments; return of title documents upon full payment. (a) When any payment is made under any consumer credit sale transaction, the person receiving such payment shall, if the payment is made in cash, give the buyer a written receipt therefor. If the buyer specifies that the payment is made on one of several obligations, the receipt shall so state.

(b) Upon the payment of all sums for which the buyer is obligated under a consumer credit sale, the seller shall promptly release any security interest in accordance with the terms of G.S. 25-9-404 or G.S. 20-58.4, whichever is applicable. In the event a security interest in real property is involved, the seller shall take such action as is necessary to enable the lien to be discharged of record under the provisions of G.S. 45-37.

§ 25A-23. Collateral taken by the seller. (a) The seller in a consumer credit sale may take a security interest only in the following property of the buyer to secure the debt arising from the sale:

(1) The property sold,
(2) Property previously sold by the seller to the buyer and in which the seller has an existing security interest,
(3) Personal property to which the property sold is installed, if the amount financed is more than three hundred dollars ($300.00),
(4) Real property to which the property sold is affixed, if the amount financed is more than one thousand dollars ($1,000), and
(5) A self-propelled motor vehicle to which repairs are made, if the amount financed exceeds one hundred dollars ($100.00).
(6) Any property which is used for agricultural purposes, if the property sold is to be used in the operation of an agricultural business.

(b) A security interest taken in property other than that permitted in subsection (a) of this section shall be void and not enforceable.

(c) Nothing in this section shall affect any right or liens granted by Chapter 44A of the General Statutes.

(d) The provisions of G.S. 24-11(a), limiting the taking of a security interest in property under an open end credit or similar plan, shall not apply to revolving charge account contracts regulated by this Chapter; provided, however, the application of payments rule set out in G.S. 25A-27 shall apply to such contracts; provided further, that in any action initiated by the seller for the possession of such property, a judgment for the possession thereof shall be restricted to commercial units (as defined in G.S. 25-2-105(6)) for which the cash price was one hundred dollars ($100.00) or more.

§ 25A-24. Identification of instruments of indebtedness. With respect to consumer credit sales, each instrument of indebtedness shall be identified on the face of the instrument as a consumer credit document, or otherwise clearly indicate on its face that it arises out of a consumer credit sale, provided, that such designation of an instrument of indebtedness regarding as sale which is not by definition a "consumer credit sale," shall not solely because of such designation cause the transaction to be a consumer credit sale.

§ 25A-25. Preservation of consumers' claims and defenses. (a) In a consumer credit sale, a buyer may assert against the seller, assignee of the seller, or other holder of the instrument or instruments of indebtedness, any claims or defenses available against the original seller, and the buyer may not waive the right to assert these claims or defenses in connection with a consumer credit sales transaction. Affirmative recovery by the buyer on a claim asserted against an assignee of the seller or other holder of the instrument of indebtedness shall not exceed amounts paid by the buyer under the contract.

(b) Every consumer credit sale contract shall contain the following provision in at least ten-point boldface type:

NOTICE

ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER.

(c) Compliance with the requirements of the Federal Trade Commission rule on preservation of consumer claims and defenses is considered full compliance with this act.

§ 25A-26. Substitution of collateral. Subject to the provisions of G.S. 25A-23, if all involved parties agree, there may be a substitution of collateral under a security instrument in a consumer credit sale. For such substitution, the seller may impose a fee not to exceed ten percent (10%) of the unpaid balance of the debt or fifteen dollars ($15.00), whichever is less.

§ 25A-27. Application of payments. (a) Where a seller in a consumer credit sale makes a subsequent sale to a buyer and takes a security interest pursuant to G.S. 25A-23 in goods previously purchased by the buyer from the seller, the seller shall make application of payments received, for the purpose of determining the amount of the debt secured by the various security interests, as follows:

(1) The entire amount of all payments made prior to such subsequent purchase shall be deemed to have been applied to the previous purchases, and

(2) Unless otherwise designated by the buyer, the amount of down payment on such subsequent purchase shall be applied to the subsequent purchase, and

(3) All subsequent payments shall be applied first to finance charges and then to principal. The application of payments to principal shall be applied to the various purchases on the basis that the first sums paid in shall be deemed applied to the oldest purchase or obligation assumed to satisfy the original debt secured by the purchase money security interest until payment is received in full and other payments shall be applied accordingly to all other purchases in the order that each obligation is assumed. At the time any original debt would have been satisfied by subsequent payments, the purchase money security interest in said purchase shall be extinguished.

(b) Where a seller and a buyer agree to consolidate two or more consumer credit installment sale contracts pursuant to G.S. 25A-31, the seller shall apply payments received, for the purpose of determining the amount of the debt secured by the various security interests, as follows:

(1) The entire amount of all payments received prior to the consolidation shall be applied to the respective contracts under which the payments were made, and

(2) All subsequent payments shall be applied first to finance charges and then to principal. The application of payments to principal shall be applied to the various purchases on the basis that the first sums paid in shall be deemed applied to the oldest purchase or obligation assumed to satisfy the original debt secured by the purchase money security interest until payment is received in full and other payments shall be applied accordingly to all other purchases in the order that each obligation is assumed. At the time any original debt would have been satisfied by subsequent payments, the purchase money security interest in said purchase shall be extinguished.

(c) For payments received by a seller on or after October 1, 1988, but before October 1, 1993, a seller may elect to apply the provisions of this section as the section read October 1, 1993, or as the section read September 30, 1993. A seller made this election when the seller determined, and disclosed to the buyer, how payments received on a consumer credit sale would be applied: either on a proportional basis or on a "first in - first out" basis with the payments applied first to finance charges and then to principal in the order that each obligation is assumed.

(d) The exclusive remedy for failure of a seller to apply payments of a buyer as required by subdivision (a)(3) or (b)(2) of this section during the period October 1, 1993, through October 1, 1996, is an order that the seller apply the payments as required by those provisions.

§ 25A-28. Form of consumer credit installment sale contract. Every consumer credit installment sale contract shall be in writing, dated and signed by the buyer.

§ 25A-29. Default charges. If any installment is past due for 10 days or more according to the original terms of the consumer credit installment sale contract, a default charge may be made in an amount not to exceed five percent (5%) of the installment past due or six dollars ($6.00), whichever is the lesser. A default charge may be imposed only one time for each default.

If a default charge is deducted from a payment made on the contract and such deduction results in a subsequent default on a subsequent payment, no default charge may be imposed for such default.

If a default charge has been once imposed with respect to a particular default in payment, no default charge shall be imposed with respect to any future payments which would not have been in default except for the previous default.

A default charge for any particular default shall be deemed to have been waived by the seller unless, within 45 days following the default, (i) the charge is collected or (ii) written notice of the charge is sent to the buyer.

§ 25A-30. Deferral charges. (a) A seller may, by agreement with the buyer, defer the due date of all or any part of one or more installments under an existing consumer credit installment sale contract.

(b) Except as provided by subsections (e) and (f) of this section, a deferral agreement must be in writing, dated and signed by the parties.

(c) A deferral agreement may provide for a deferral charge not to exceed the rate of one and one-half percent (11/2%) of each installment for each month from the date which such installment or part thereof would otherwise have been payable to the date when such installment or part thereof is made payable under the deferral agreement.

(d) If a deferral charge is made pursuant to a deferral agreement, a default charge provided in G.S. 25A-29 may be imposed only if the installment as deferred is not paid when due and no new deferral agreement is entered into with respect to that installment.

(e) If the deferral agreement extends the due date of only one installment, the agreement need not be in writing.

(f) A deferral agreement for which no charge is made shall not be subject to subsections (b), (c) or (d) of this section.

§ 25A-31. Consolidation and refinancing. (a) A seller and a buyer may agree at any time to refinance an existing consumer credit installment sale contract or to consolidate into a single debt repayable on a single schedule of payments, two or more consumer credit installment sale contracts.

(b) A refinancing or consolidation agreement must be in writing, dated and signed by the parties.

(c) The refinancing or consolidation agreement may provide for a finance charge which shall not exceed the rates provided in G.S. 25A-15, with the amount financed being the unpaid time balance of the contract or contracts refinanced or consolidated, less the rebate provided by G.S. 25A-32. In computing the rebate to be credited to the previous time balances for purposes of this section, no prepayment charge shall be imposed.

§ 25A-32. Rebates on prepayment. Notwithstanding any provision in a consumer credit installment sale contract to the contrary, any buyer may satisfy the debt in full at any time before maturity, and in so satisfying such debt, shall receive a rebate, the amount of which shall be computed under the "rule of 78's," as follows:

"The amount of such rebate shall represent as great a proportion of the finance charge (less a prepayment charge of ten percent (10%) of the unpaid balance, not to exceed twenty-five dollars ($25.00)) as the sum of the periodical time balances after the date of prepayment in full bears to the sum

of all the periodical time balances under the schedule of payments in the original contract." No rebate is required if the amount thereof is less than one dollar ($1.00).

If the prepayment is made otherwise than on the due date of an installment, it shall be deemed to have been made on the installment due date nearest in time to the actual date of payment.

If a seller obtains a judgment on a debt arising out of a consumer credit installment sale or the seller repossesses the collateral securing the debt, the seller shall credit the buyer with a rebate as if the payment in full had been made on the date the judgment was obtained or 15 days after the repossession occurred. If the seller obtains a judgment and repossesses the collateral, the seller shall credit the buyer with a rebate as if payment in full had been made on the date of the judgment or 15 days after the repossession, whichever occurs earlier.

§ 25A-33. Terms of payments. A consumer credit installment sale contract shall provide for complete payment of all charges due under the contract, including the amount financed, the finance charge, and additional insurance charges, if any, within a period from the time of the sale of

(1) Forty-two months, if the amount financed is less than one thousand five hundred dollars ($1,500), or
(2) Sixty-four months, if the amount financed is one thousand five hundred dollars ($1,500) or greater, but less than two thousand five hundred dollars ($2,500), or
(3) One hundred and twenty-two months, if the amount financed is two thousand five hundred dollars ($2,500) or greater, but less than five thousand dollars ($5,000), or
(4) One hundred and eighty-two months, if the amount financed is five thousand dollars ($5,000) or greater, but less than ten thousand dollars ($10,000), or
(5) As the contract provides, if the amount financed is ten thousand dollars ($10,000) or greater.

The provisions of this section shall not apply to a consumer credit installment sale contract executed in connection with any financing which is insured under regulations of the Federal Housing Administration or the Veterans Administration.

§ 25A-34. Balloon payments. With respect to a consumer credit sale, other than one pursuant to a revolving charge account, no scheduled payment may be more than ten percent (10%) (except the final payment may be twenty-five percent (25%)) larger than the average of earlier scheduled payments. This provision does not apply when the payment schedule is adjusted to the seasonal or irregular income of the buyer.

§ 25A-35. Statement of account. (a) One time during each 12-month period following execution of a consumer credit installment sale contract and when the buyer repays the debt early, the buyer shall be entitled upon request and without charge to a statement of account from the seller. The statement of account shall contain the following information identified as such in the statement:

(1) The itemized amounts paid by or on behalf of the buyer to the date of the statement of account, except that upon early termination of the contract by prepayment or otherwise, the statement shall include itemized charges for expenses of repossession, storage and legal expenses;
(2) The itemized amounts, if any, which have become due but remain unpaid, including any charges for defaults, expenses of repossession and deferral charges;
(3) The number of installment payments and the dollar amount of each installment not due but still to be paid and the remaining period the contract is to run.

(b) The buyer may request and shall be entitled to additional statements of account but for such additional statements the seller may impose a charge of one dollar ($1.00).

(c) If the buyer requests information for income tax purposes as to the amount of the finance charges, the seller shall provide such information within 30 days without charge but only once in each calendar year.

§ 25A-36. Certificates of insurance and rebates. (a) Within 45 days following the purchase of insurance by the buyer from or through the seller, the seller shall deliver, send or cause to be sent to the

buyer a policy or policies of such insurance or a certificate or certificates thereof. If such insurance is cancelled, or the premium adjusted, any rebate received by the seller shall be promptly applied to the purchase of other similar insurance, credited to the buyer's account, or rebated to the buyer. Unless otherwise required by law or the provisions of the policy, rebates of cancelled insurance shall be computed under the rule of 78's, without the deduction of a prepayment charge.

(b) In those cases where the insurance premium is added in the contract, and the buyer did not actually pay the premium, the return premium plus unearned finance charge on the amount of returned premium (at the same rate as used in the contract) shall be credited to the unpaid balance of the contract. If the required insurance premium is adjusted upward by the insurance company or is added in accordance with the contract, the buyer, after 10 days' notice,

(1) May pay the additional premium, or

(2) Have the additional premium plus finance charge (at the same rate as used in the contract) added to the unpaid balance and spread equally over the remaining installments unpaid, provided, the seller may require a buyer who wishes to finance such additional premium to be financed by the seller in accordance with North Carolina insurance regulations.

§ 25A-37. Referral sales. The advertisement for sale or the actual sale of any goods or services (whether or not a consumer credit sale) at a price or with a rebate or payment or other consideration to the purchaser that is contingent upon the procurement of prospective customers provided by the purchaser, or the procurement of sales to persons suggested by the purchaser, is declared to be unlawful. Any obligation of a buyer arising under such a sale shall be void and a nullity and a buyer shall be entitled to recover from the seller any consideration paid to the seller upon tender to the seller of any tangible consumer goods made the basis of the sale.

§ 25A-38. "Home-solicitation sale" defined. "Home-solicitation sale" means a consumer credit sale of goods or services in which the seller or a person acting for him engages in a personal solicitation of the sale at a residence of the buyer and the buyer's agreement or offer to purchase is there given to the seller or a person acting for him. It does not include

(1) A sale made to a buyer who has previously engaged in a similar business transaction with the seller;

(2) A sale made pursuant to a preexisting revolving charge account;

(3) A sale made pursuant to negotiations between the parties on the premises of a business establishment at a fixed location where such goods or services are offered or exhibited for sale;

(4) A sale which is regulated by the provisions of Section 226.9 of Regulation Z promulgated pursuant to Section 105 of the Consumer Credit Protection Act; or

(5) Sales of personal wearing apparel, motor vehicles defined in G.S. 20-286(10), farm equipment and goods and services to be utilized within 10 days in connection with funeral services.

§ 25A-39. Buyer's right to cancel. (a) Except as provided in subsection (e) of this section, in addition to any right otherwise to revoke an offer, the buyer has the right to cancel a home-solicitation sale until midnight of the third business day after the day on which the buyer signs an agreement or offer to purchase which complies with G.S. 25A-40, or which complies with the requirements of the Federal Trade Commission Trade Regulation Rule Concerning a Cooling-Off Period for Door-to-Door Sales.

(b) Cancellation occurs when the buyer gives written notice of cancellation to the seller at the address stated in the agreement or offer to purchase.

(c) Notice of cancellation, if given by mail, is given when it is deposited in the United States mail properly addressed and postage prepaid.

(d) Unless the seller complies with G.S. 25A-40(b), notice of cancellation given by the buyer need not take a particular form and is sufficient if it indicates by any form of written expression the intention of the buyer not to be bound by the home-solicitation sale.

(e) The buyer may not cancel a home-solicitation sale if the buyer requests the seller in a separate writing to provide goods or services without delay because of an urgency or an emergency, and

(1) The seller in good faith makes a substantial beginning of performance of the contract before the buyer gives notification of cancellation,

(2) In the case of goods, the goods cannot be returned to the seller in substantially as good condition as when received by the buyer, and

(3) Unless the buyer returns the goods, if any, to the seller at his expense.

(f) A buyer, who has not received delivery of the goods and services from the seller in a home-solicitation sale within 30 days following the execution of the contract (and such delay is the fault of the seller), shall have the right at any time thereafter before acceptance of the goods and services to rescind the contract and to receive a refund of all payments made and to a return of all goods traded in to the seller on account of or in contemplation of such contract, or if the goods traded in cannot or are not returned to the buyer within 10 days after cancellation, the buyer may elect to recover an amount equal to the trade-in allowance stated in the contract. By written agreement, the buyer may agree to a later time for the delivery of goods and services.

§ 25A-40. Form of agreement or offer; statement of buyer's rights. (a) In a home-solicitation sale the seller must present to the buyer and obtain his signature to a fully completed written agreement or offer to purchase which is in the same language as that principally used in the oral sales presentation and which designates as the date of the transaction the date on which the buyer actually signs and which contains the name and address of the seller, and which contains in immediate proximity to the space reserved for the signature of the buyer in bold face type of a minimum size of 10 points, a statement in substantially the following form:

"You, the buyer, may cancel this transaction at any time prior to midnight of the third business day after the date of this transaction. See the attached Notice of Cancellation form for an explanation of this right."

(b) The seller must, in addition to furnishing the buyer with a copy of the contract or offer to purchase, furnish to the buyer at the time he signs the home-solicitation sale contract or otherwise agrees to buy consumer goods or services from the seller, a completed form in duplicate, captioned "Notice of Cancellation," which shall be attached to the contract and easily detachable, and which shall contain in 10 point bold face type the following information and statements in the same language as that used in the contract:

"Notice of Cancellation

(enter date of transaction)

_____

(date)

You may cancel this transaction, without any penalty or obligation, within three business days from the above date.

If you cancel, any property traded in, and payments made by you under the contract or sale, and any negotiable instrument executed by you will be returned within 10 business days following receipt by the seller of your cancellation notice, and any security interest arising out of the transaction will be canceled.

If you cancel, you must make available to the seller at your residence, in substantially as good condition as when received, any goods delivered to you under this contract or sale; or you may, if you wish, comply with the instructions of the seller regarding the return shipment of the goods at the seller's expense and risk.

If you do make the goods available to the seller and the seller does not pick them up within 20 days of the date of your notice of cancellation, you may retain or dispose of the goods without an further obligation. If you fail to make the goods available to the seller, or if you agree to return the goods to the seller and fail to do so, then you remain liable for performance of all obligations under the contract.

To cancel this transaction, mail or deliver a signed and dated copy of this cancellation notice or any other written notice, or send a telegram to _____,

(name of seller)

at _____,

(address of seller's place of business)
not later than midnight of _____.
(date)
I hereby cancel this transaction. _____
(date)
_____
(Buyer's Signature)"

§ 25A-41. Restoration of down payment; retention of goods. (a) Except as provided in this section, within 10 business days after a home-solicitation sale has been canceled or an offer to purchase revoked in accordance with G.S. 25A-40, the seller must tender to the buyer any payments made by the buyer and any note or other evidence of indebtedness.

(b) If the down payment includes goods traded in, the goods must be tendered at the buyer's residence in substantially as good condition as when received by the seller. If the seller fails to tender the goods as provided by this section, the buyer may elect to recover an amount equal to the trade-in allowance stated in the agreement.

(c) Repealed by Session Laws 1975, c. 805, s. 3, effective July 1, 1975.

(d) Until the seller has complied with the obligations imposed by this section, the buyer may retain possession of goods delivered to him by the seller and has a lien on the goods in his possession or control for any recovery to which he is entitled.

§ 25A-42. Duties as to care and return of goods; no compensation for services prior to cancellation. (a) Except as provided by the provisions on retention of goods by the buyer (G.S. 25A-41(d)), within a reasonable time after a home-solicitation sale has been canceled, the buyer must make available to the seller at the buyer's residence in substantially as good condition as received, any goods delivered under the contract or sale, or in the alternative, the buyer may comply with the instructions of the seller regarding the return shipment of the goods at the seller's expense and risk. The seller shall within 10 business days of receipt of the buyer's notice of cancellation notify the buyer whether the seller intends to repossess or to abandon any shipped or delivered goods. If the buyer makes the goods available to the seller and the seller does not pick them up within 20 days of the date of the notice of cancellation, the buyer may retain or dispose of the goods without any further obligation. If the buyer fails to make the goods available to the seller, or agrees to return the goods to the seller and fails to do so, then the buyer shall remain liable for performance of all obligations under the contract.

(b) The buyer has the duty of a bailee to take reasonable care of the goods in his possession before cancellation or revocation and for a reasonable time thereafter, during which time the goods are otherwise at the seller's risk.

(c) If the seller has performed any services pursuant to a home-solicitation sale prior to its cancellation, the seller is entitled to no compensation therefor.

(d) The seller shall not negotiate, transfer, sell, or assign any note, contract, or other evidence of indebtedness arising out of a home-solicitation sale to a finance company or other third party prior to midnight of the fifth business day following the day the contract was signed or the goods or services were purchased.

CHAPTER 42. LANDLORD AND TENANT.
ARTICLE 1. GENERAL PROVISIONS.

§ 42-3. Term forfeited for nonpayment of rent. In all verbal or written leases of real property of any kind in which is fixed a definite time for the payment of the rent reserved therein, there shall be implied a forfeiture of the term upon failure to pay the rent within 10 days after a demand is made by the lessor or his agent on said lessee for all past-due rent, and the lessor may forthwith enter and dispossess the tenant without having declared such forfeiture or reserved the right of reentry in the lease.

§ 42-14. Notice to quit in certain tenancies. A tenancy from year to year may be terminated by a notice to quit given one month or more before the end of the current year of the tenancy; a tenancy from month to month by a like notice of seven days; a tenancy from week to week, of two days. Provided,

however, where the tenancy involves only the rental of a space for a manufactured home as defined in G.S. 143-143.9(6), a notice to quit must be given at least 60 days before the end of the current rental period, regardless of the term of the tenancy.

ARTICLE 2A. EJECTMENT OF RESIDENTIAL TENANTS.

§ 42-25.6. Manner of ejectment of residential tenants. It is the public policy of the State of North Carolina, in order to maintain the public peace, that a residential tenant shall be evicted, dispossessed or otherwise constructively or actually removed from his dwelling unit only in accordance with the procedure prescribed in Article 3 of this Chapter.

§ 42-25.7. Distress and distraint not permitted. It is the public policy of the State of North Carolina that distress and distraint are prohibited and that landlords of residential rental property shall have security interests or liens on the personal property of their residential tenants only in accordance with G.S. 44A-2(e).

§ 42-25.8. Contrary lease provisions. Any lease or contract provision contrary to this Article shall be void as against public policy.

§ 42-25.9. Remedies. (1) If any lessor, landlord, or agent removes or attempts to remove a tenant from a dwelling unit in any manner contrary to this Article, the tenant shall be entitled to recover possession or to terminate his lease and the lessor, landlord or agent shall be liable to the tenant for damages caused by the tenant's removal or attempted removal. Damages in any action brought by a tenant under this Article shall be limited to actual damages as in an action for trespass or conversion and shall not include punitive damages, treble damages or damages for emotional distress.

(b) If any lessor, landlord, or agent seizes possession of or interferes with a tenant's access to a tenant's or household member's personal property in any manner not in accordance with G.S. 42-25.9(d), 42-25.9(g), 42-25.9(h), or 42-36.2 the tenant or household member shall be entitled to recover possession of his personal property or compensation for the value of the personal property, and, in any action brought by a tenant or household member under this Article, the landlord shall be liable to the tenant or household member for actual damages, but not including punitive damages, treble damages or damages for emotional distress.

(c) The remedies created by this section are supplementary to all existing common-law and statutory rights and remedies.

(d) If any tenant abandons personal property of five hundred dollar ($500.00) value or less in the demised premises, or fails to remove such property at the time of execution of a writ of possession in an action for summary ejectment, the landlord may, as an alternative to the procedures provided in G.S.42-25.9(g), 42-25.9(h), or 42-36.2, deliver the property into the custody of a nonprofit organization regularly providing free or at a nominal price clothing and household furnishings to people in need, upon that organization agreeing to identify and separately store the property for 30 days and to release the property to the tenant at no charge within the 30-day period. A landlord electing to use this procedure shall immediately post at the demised premises a notice containing the name and address of the property recipient, post the same notice for 30 days or more at the place where rent is received, and send the same notice by first-class mail to the tenant at the tenant's last known address. Provided, however, that the notice shall not include a description of the property.

(e) For purposes of subsection (d), personal property shall be deemed abandoned if the landlord finds evidence that clearly shows the premises has been voluntarily vacated after the paid rental period has expired and the landlord has no notice of a disability that caused the vacancy. A presumption of abandonment shall arise 10 or more days after the landlord has posted conspicuously a notice of suspected abandonment both inside and outside the premises and has received no response from the tenant.

(f) Any nonprofit organization agreeing to receive personal property under subsection (d) shall not be liable to the owner for a disposition of such property provided that the property has been separately identified and stored for release to the owner for a period of 30 days.

(g) Ten days after being placed in lawful possession by execution of a writ of possession, a landlord may throw away, dispose of, or sell all items of personal property remaining on the premises, except that in the case of the lease of a space for a manufactured home as defined in G.S. 143-143.9(6), G.S. 44A-2(e2) shall apply to the disposition of a manufactured home with a current value in excess of five hundred dollars ($500.00) and its contents by a landlord after being placed in lawful possession by execution of a writ of possession. During the 10-day period after being placed in lawful possession by execution of a writ of possession, a landlord may move for storage purposes, but shall not throw away, dispose of, or sell any items of personal property remaining on the premises unless otherwise provided for in this Chapter. Upon the tenant's request prior to the expiration of the 10-day period, the landlord shall release possession of the property to the tenant during regular business hours or at a time agreed upon. If the landlord elects to sell the property at public or private sale, the landlord shall give written notice to the tenant by first-class mail to the tenant's last known address at least seven days prior to the day of the sale. The seven-day notice of sale may run concurrently with the 10-day period which allows the tenant to request possession of the property. The written notice shall state the date, time, and place of the sale, and that any surplus of proceeds from the sale, after payment of unpaid rents, damages, storage fees, and sale costs, shall be disbursed to the tenant, upon request, within 10 days after the sale, and will thereafter be delivered to the government of the county in which the rental property is located. Upon the tenant's request prior to the day of sale, the landlord shall release possession of the property to the tenant during regular business hours or at a time agreed upon. The landlord may apply the proceeds of the sale to the unpaid rents, damages, storage fees, and sale costs. Any surplus from the sale shall be disbursed to the tenant, upon request, within 10 days of the sale and shall thereafter be delivered to the government of the county in which the rental property is located.

(h) If the total value of all property remaining on the premises at the time of execution of a writ of possession in an action for summary ejectment is less than one hundred dollars ($100.00), then the property shall be deemed abandoned five days after the time of execution, and the landlord may throw away or dispose of the property. Upon the tenant's request prior to the expiration of the five-day period, the landlord shall release possession of the property to the tenant during regular business hours or at a time agreed upon.

ARTICLE 3. SUMMARY EJECTMENT.

§ 42-26. Tenant holding over may be dispossessed in certain cases. (a) Any tenant or lessee of any house or land, and the assigns under the tenant or legal representatives of such tenant or lessee, who holds over and continues in the possession of the demised premises, or any part thereof, without the permission of the landlord, and after demand made for its surrender, may be removed from such premises in the manner hereinafter prescribed in any of the following cases:

(1) When a tenant in possession of real estate holds over after his term has expired.

(2) When the tenant or lessee, or other person under him, has done or omitted any act by which, according to the stipulations of the lease, his estate has ceased.

(3) When any tenant or lessee of lands or tenements, who is in arrear for rent or has agreed to cultivate the demised premises and to pay a part of the crop to be made thereon as rent, or who has given to the lessor a lien on such crop as a security for the rent, deserts the demised premises, and leaves them unoccupied and uncultivated.

(b) An arrearage in costs owed by a tenant for water or sewer services pursuant to G.S. 62-110(g) shall not be used as a basis for termination of a lease under this Chapter. Any payment to the landlord shall be applied first to the rent owed and then to charges for water or sewer service, unless otherwise designated by the tenant.

§ 42-28. Summons issued by clerk. When the lessor or his assignee files a complaint pursuant to G.S. 42-26 or 42-27, and asks to be put in possession of the leased premises, the clerk of superior court shall issue a summons requiring the defendant to appear at a certain time and place not to exceed seven days from the issuance of the summons, excluding weekends and legal holidays, to answer the complaint. The plaintiff may claim rent in arrears, and damages for the occupation of the premises since the cessation of the estate of the lessee, not to exceed the jurisdictional amount established by G.S. 7A-210(1), but if he omits to make such claim, he shall not be prejudiced thereby in any other action for their recovery.

§ 42-29. Service of summons. The officer receiving the summons shall mail a copy of the summons and complaint to the defendant no later than the end of the next business day or as soon as practicable at the defendant's last known address in a stamped addressed envelope provided by the plaintiff to the action. The officer may, within five days of the issuance of the summons, attempt to telephone the defendant requesting that the defendant either personally visit the officer to accept service, or schedule an appointment for the defendant to receive delivery of service from the officer. If the officer does not attempt to telephone the defendant or the attempt is unsuccessful or does not result in service to the defendant, the officer shall make at least one visit to the place of abode of the defendant within five days of the issuance of the summons at a time reasonably calculated to find the defendant at the place of abode to attempt personal delivery of service. He then shall deliver a copy of the summons together with a copy of the complaint to the defendant, or leave copies thereof at the defendant's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. If such service cannot be made the officer shall affix copies to some conspicuous part of the premises claimed and make due return showing compliance with this section.

§ 42-30. Judgment by confession or where plaintiff has proved case. The summons shall be returned according to its tenor, and if on its return it appears to have been duly served, and if (i) the plaintiff proves his case by a preponderance of the evidence, (ii) the defendant admits the allegations of the complaint, or (iii) the defendant fails to appear on the day of court, and the plaintiff requests in open court a judgment for possession based solely on the filed pleadings where the pleadings allege defendant's failure to pay rent as a breach of the lease for which reentry is allowed and the defendant has not filed a responsive pleading, the magistrate shall give judgment that the defendant be removed from, and the plaintiff be put in possession of, the demised premises; and if any rent or damages for the occupation of the premises after the cessation of the estate of the lessee, not exceeding the jurisdictional amount established by G.S. 7A-210(1), be claimed in the oath of the plaintiff as due and unpaid, the magistrate shall inquire thereof, and if supported by a preponderance of the evidence, give judgment as he may find the fact to be.

§ 42-31. Trial by magistrate. If the defendant by his answer denies any material allegation in the oath of the plaintiff, the magistrate shall hear the evidence and give judgment as he shall find the facts to be.

§ 42-33. Rent and costs tendered by tenant. If, in any action brought to recover the possession of demised premises upon a forfeiture for the nonpayment of rent, the tenant, before judgment given in such action, pays or tenders the rent due and the costs of the action, all further proceedings in such action shall cease. If the plaintiff further prosecutes his action, and the defendant pays into court for the use of the plaintiff a sum equal to that which shall be found to be due, and the costs, to the time of such payment, or to the time of a tender and refusal, if one has occurred, the defendant shall recover from the plaintiff all subsequent costs; the plaintiff shall be allowed to receive the sum paid into court for his use, and the proceedings shall be stayed.

§ 42-34. Undertaking on appeal and order staying execution. (a) Upon appeal to the district court, either party may demand that the case be tried at the first session of the court after the appeal is docketed, but the presiding judge, in his discretion, may first try any pending case in which the rights of the parties or the public demand it. If the case has not been previously continued in district court, the court shall continue the case for an appropriate period of time if any party initiates discovery or files a motion to allow further pleadings pursuant to G.S. 7A-220 or G.S. 7A-229, or for summary judgment pursuant to Rule 56 of the Rules of Civil Procedure.

(b) During appeal to district court, it shall be sufficient to stay execution of a judgment for ejectment that the defendant appellant pays to the clerk of superior court any rent in arrears as determined by the magistrate and signs an undertaking that he or she will pay into the office of the clerk of superior court the amount of the tenant’s share of the contract rent as it becomes due periodically after the judgment was entered and, where applicable, comply with subdivision (c) below. Provided however, when the magistrate makes a finding in the record, based on evidence presented in court, that there is an actual

dispute as to the amount of rent in arrears that is due and the magistrate specifies the specific amount of rent in arrears in dispute, in order to stay execution of a judgment for ejectment, the defendant appeallant shall not be required to pay the clerk of superior court the amount of rent in arrears found by the magistrate to be in dispute, even if the magistrate's judgment includes this amount in the amount of rent found to be in arrears. If a defendant appellant appeared at the hearing before the magistrate and the magistrate found an amount of rent in arrears that was not in dispute, and if an attorney representing the defendant appellant on appeal to the district court signs a pleading stating that there is evidence of an actual dispute as to the amount of rent in arrears, then the defendant appellant shall not be required to pay the rent in arrears alleged to be in dispute to stay execution of a a judgment for ejectment pending appeal. Any magistrate, clerk, or district court judge shall order stay of execution upon the defendant appellant's paying the undisputed rent in arrears to the clerk and signing the undertaking. If either party disputes the amount of the payment or the due date in such undertaking, the aggrieved party may move for modification of the terms of the undertaking before the clerk of superior court or the district court. Upon such motion and upon notice to all interested parties, the clerk or court shall hold a hearing within 10 calendar days of the date the motion is filed and determine what modifications, if any, are appropriate.

(c) In an ejectment action based upon alleged nonpayment of rent where the judgment is entered more than five working days before the day when the next rent will be due under the lease, the appellant shall make an additional undertaking to stay execution pending appeal. Such additional undertaking shall be the payment of the prorated rent for the days between the day that the judgment was entered and the next day when the rent will be due under the lease.

(c1) Notwithstanding the provisions of subsection (b) of this section, an indigent defendant appellant, as set forth in G.S. 1-100, who prosecutes his or her appeal as an indigent and who meets the requirement of G.S. 1-288 shall pay the amount of the contract rent as it becomes periodically due as set forth in subsection (b) of this section, but shall not be required to pay rent in arrears as set forth in subsection (b) of this section in order to stay execution pending appeal.

(d) The undertaking by the appellant and the order staying execution may be substantially in the following form:

"State of North Carolina,
"County of _____
"_____, Plaintiff
vs. Bond to
"_____, Defendant Stay Execution
On Appeal to
District Court

"Now comes the defendant in the above entitled action and respectfully shows the court that judgment for summary ejectment was entered against the defendant and for the plaintiff on the _____ day of_____, 19____, by the Magistrate. Defendant has appealed the judgment to the District Court.

"Pursuant to the terms of the lease between plaintiff and defendant, defendant is obligated to pay rent in the amount of $_____ per _____, due on the _____ day of each _____

"Where the payment of rent in arrears or an additional undertaking is required by G.S. 42-34, the defendant hereby tenders $_____ to the Court as required.

"Defendant hereby undertakes to pay the periodic rent hereinafter due according to the aforesaid terms of the lease and moves the Court to stay execution on the judgment for summary ejectment until this matter is heard on appeal by the District Court.

"This the _____ day of_____, 19_____.

_____
Defendant

"Upon execution of the above bond, execution on said judgment for summary ejectment is hereby stayed until the action is heard on appeal in the District Court. If defendant fails to make any rental payment to the clerk's office within five days of the due date, upon application of the plaintiff, the stay of execution shall dissolve and the sheriff may dispossess the defendant.

"This _____ day of _____, 19____.

Assistant Clerk of Superior Court."

(e) Upon application of the plaintiff, the clerk of superior court shall pay to the plaintiff any amount of the rental payments paid by the defendant into the clerk's office which are not claimed by the defendant in any pleadings.

(f) If the defendant fails to make a payment within five days of the due date according to the undertaking and order staying execution, the clerk, upon application of the plaintiff, shall issue execution on the judgment for possession.

(g) When it appears by stipulation executed by all of the parties or by final order of the court that the appeal has been resolved, the clerk of court shall disburse any accrued moneys of the undertaking remaining in the clerk's office according to the terms of the stipulation or order.

§ 42-34.1. Rent pending execution of judgment; post bond pending appeal.

(a) If the judgment in district court is against the defendant appellant and the defendant appellant does not appeal the judgment, the defendant appellant shall pay rent to the plaintiff for the time the defendant appellant remains in possession of the premises after the judgment is given. Rent shall be prorated if the judgment is executed before the day rent would become due under the terms of the lease. The clerk of court shall disperse any rent in arrears paid by the defendant appellant in accordance with a stipulation executed by all parties or, if there is no stipulation, in accordance with the judge’s order.

(b) If the judgment in district court is against the defendant appellant and the defendant appellant appeals the judgment, it shall be sufficient to stay execution of the judgment if the defendant appellant posts a bond as provided in G.S. 42-34(b). If the defendant appellant fails to perfect the appeal or the appellate court upholds the judgment of the district court, the execution of the judgment shall proceed. The clerk of court shall not disperse any rent in arrears paid by the defendant appellant until all appeals have been resolved.

§ 42-36.1. Lease or rental of manufactured homes. The provisions of this Article shall apply to the lease or rental of manufactured homes, as defined in G.S. 143-145.

§ 42-36.1A. Judgments for possession more than 30 days old. Prior to obtaining execution of a judgment that has been entered for more than 30 days for possession of demised premises, a landlord shall sign an affidavit stating that the landlord has neither entered into a formal lease with the defendant nor accepted rental money from the defendant for any period of time after entry of the judgment.

§ 42-36.2. Notice to tenant of execution of writ for possession of property; storage of evicted tenant's personal property. (a) When Sheriff May Remove Property. - Before removing a tenant's personal property from demised premises pursuant to a writ for possession of real property or an order, the sheriff shall give the tenant notice of the approximate time the writ will be executed. The time within which the sheriff shall have to execute the writ shall be no more than seven days from the sheriff's receipt thereof. The sheriff shall remove the tenant's property, as provided in the writ, no earlier than the time specified in the notice, unless:

(1) The landlord, or his authorized agent, signs a statement saying that the tenant's property can remain on the premises, in which case the sheriff shall simply lock the premises; or

(2) The landlord, or his authorized agent, signs a statement saying that the landlord does not want to eject the tenant because the tenant has paid all court costs charged to him and has satisfied his indebtedness to the landlord.

Upon receipt of either statement by the landlord, the sheriff shall return the writ unexecuted to the issuing clerk of court and shall make a notation on the writ of his reasons. The sheriff shall attach a copy of the landlord's statement to the writ. If the writ is returned unexecuted because the landlord signed a statement described in subdivision (2) of this subsection, the clerk shall make an entry of satisfaction on

the judgment docket. If the sheriff padlocks, the costs of the proceeding shall be charged as part of the court costs.

(b) Sheriff May Store Property.-When the sheriff removes the personal property of an evicted tenant from demised premises pursuant to a writ or order the tenant shall take possession of his property. If the tenant fails or refuses to take possession of his property, the sheriff may deliver the property to any storage warehouse in the county, or in an adjoining county if no storage warehouse is located in that county, for storage. The sheriff may require the landlord to advance the cost of delivering the property to a storage warehouse plus the cost of one month's storage before delivering the property to a storage warehouse. If a landlord refuses to advance these costs when requested to do so by the sheriff, the sheriff shall not remove the tenant's property, but shall return the writ unexecuted to the issuing clerk of court with a notation thereon of his reason for not executing the writ. Except for the disposition of manufactured homes and their contents as provided in G.S. 42-25.9(g) and G.S. 44A-2(e2), within 10 days of the landlord's being placed in lawful possession by execution of a writ of possession and upon the tenant's request within that 10-day period, the landlord shall release possession of the property to the tenant during regular business hours or at a time agreed upon. During the 10-day period after being placed in lawful possession by execution of a writ of possession, a landlord may move for storage purposes, but shall not throw away, dispose of, or sell any items of personal property remaining on the premises unless otherwise provided for in this Chapter. After the expiration of the 10-day period, the landlord may throw away, dispose of, or sell the property in accordance with the provisions of G.S. 42-25.9(g). If the tenant does not request release of the property within 10 days, all costs of summary ejectment, execution and storage proceedings shall be charged to the tenant as court costs and shall constitute a lien against the stored property or a claim against any remaining balance of the proceeds of a warehouseman's lien sale.

(c) Liability of the Sheriff.--A sheriff who stores a tenant's property pursuant to this section and any person acting under the sheriff's direction, control, or employment shall be liable for any claims arising out of the willful or wanton negligence in storing the tenant's property.

(d) Notice.--The notice required by subsection (a) shall, except in actions involving the lease of a space for a manufactured home as defined in G.S. 143-143.9(6), inform the tenant that failure to request possession of any property on the premises within 10 days of execution may result in the property being thrown away, disposed of, or sold. Notice shall be made by one of the following methods:

(1) By delivering a copy of the notice to the tenant or his authorized agent at least two days before the time stated in the notice for serving the writ;

(2) By leaving a copy of the notice at the tenant's dwelling or usual place of abode with a person of suitable age and discretion who resides there at least two days before the time stated in the notice for serving the writ; or

(3) By mailing a copy of the notice by first-class mail to the tenant at his last known address at least five days before the time stated in the notice for serving the writ.

ARTICLE 4A. RETALIATORY EVICTION.

§ 42-37.1. Defense of retaliatory eviction. (a) It is the public policy of the State of North Carolina to protect tenants and other persons whose residence in the household is explicitly or implicitly known to the landlord, who seek to exercise their rights to decent, safe, and sanitary housing. Therefore, the following activities of such persons are protected by law:

(1) A good faith complaint or request for repairs to the landlord, his employee, or his agent about conditions or defects in the premises that the landlord is obligated to repair under G.S. 42-42;

(2) A good faith complaint to a government agency about a landlord's alleged violation of any health or safety law, or any regulation, code, ordinance, or State or federal law that regulates premises used for dwelling purposes;

(3) A government authority's issuance of a formal complaint to a landlord concerning premises rented by a tenant;

(4) A good faith attempt to exercise, secure or enforce any rights existing under a valid lease or rental agreement or under State or federal law; or

(5) A good faith attempt to organize, join, or become otherwise involved with, any organization promoting or enforcing tenants' rights.

(b) In an action for summary ejectment pursuant to G.S. 42-26, a tenant may raise the affirmative defense of retaliatory eviction and may present evidence that the landlord's action is substantially in response to the occurrence within 12 months of the filing of such action of one or more of the protected acts described in subsection (a) of this section.

(c) Notwithstanding subsections (a) and (b) of this section, a landlord may prevail in an action for summary ejectment if:

(1) The tenant breached the covenant to pay rent or any other substantial covenant of the lease for which the tenant may be evicted, and such breach is the reason for the eviction; or

(2) In a case of a tenancy for a definite period of time where the tenant has no option to renew the lease, the tenant holds over after expiration of the term; or

(3) The violation of G.S. 42-42 complained of was caused primarily by the willful or negligent conduct of the tenant, member of the tenant's household, or their guests or invitees; or

(4) Compliance with the applicable building or housing code requires demolition or major alteration or remodeling that cannot be accomplished without completely displacing the tenant's household; or

(5) The landlord seeks to recover possession on the basis of a good faith notice to quit the premises, which notice was delivered prior to the occurrence of any of the activities protected by subsections (a) and (b) of this section; or

(6) The landlord seeks in good faith to recover possession at the end of the tenant's term for use as the landlord's own abode, to demolish or make major alterations or remodeling of the dwelling unit in a manner that requires the complete displacement of the tenant's household, or to terminate for at least six months the use of the property as a rental dwelling unit.

§ 42-37.2. Remedies. (a) If the court finds that an ejectment action is retaliatory, as defined by this Article, it shall deny the request for ejectment; provided, that a dismissal of the request for ejectment shall not prevent the landlord from receiving payments for rent due or any other appropriate judgment.

(b) The rights and remedies created by this Article are supplementary to all existing common law and statutory rights and remedies.

§ 42-37.3. Waiver. Any waiver by a tenant or a member of his household of the rights and remedies created by this Article is void as contrary to public policy.

ARTICLE 5. RESIDENTIAL RENTAL AGREEMENTS.

§ 42-38. Application. This Article determines the rights, obligations, and remedies under a rental agreement for a dwelling unit within this State.

§ 42-39. Exclusions. (a) The provisions of this Article shall not apply to transient occupancy in a hotel, motel, or similar lodging subject to regulation by the Commission for Health Services.

(b) Nothing in this Article shall apply to any dwelling furnished without charge or rent.

§ 42-40. Definitions. For the purpose of this Article, the following definitions shall apply:

(1) "Action" includes recoupment, counterclaim, defense, setoff, and any other proceeding including an action for possession.

(2) "Premises" means a dwelling unit, including mobile homes or mobile home spaces, and the structure of which it is a part and facilities and appurtenances therein and grounds, areas, and facilities normally held out for the use of residential tenants who are using the dwelling unit as their primary residence.

(3) "Landlord" means any owner and any rental management company, rental agency, or any other person having the actual or apparent authority of an agent to perform the duties imposed by this Article.
(4) "Protected tenant" means a tenant or household member who is a victim of domestic violence under Chapter 50B of the General Statutes or sexual assault or stalking under Chapter 14 of the General Statutes.

§ 42-41. Mutuality of obligations. The tenant's obligation to pay rent under the rental agreement or assignment and to comply with G.S. 42-43 and the landlord's obligation to comply with G.S. 42-42(a) shall be mutually dependent.

§ 42-42. Landlord to provide fit premises. (a) The landlord shall:
(1) Comply with the applicable building and housing codes, whether enacted before or after October 1, 1977, to the extent required by the operation of such codes; no new requirement is imposed by this subdivision (a)(1) if a structure is exempt from a current building code.
(2) Make all repairs and do whatever is necessary to put and keep the premises in a fit and habitable condition.
(3) Keep all common areas of the premises in safe condition.
(4) Maintain in good and safe working order and promptly repair all electrical, plumbing, sanitary, heating, ventilating, air conditioning, and other facilities and appliances supplied or required to be supplied by him provided that notification of needed repairs is made to the landlord in writing by the tenant except in emergency situations.
(5) Provide operable smoke detectors, either battery-operated or electrical, having an Underwriters' Laboratories, Inc. listing or other equivalent national testing laboratory approval, and install the smoke detectors in accordance with either the standards of the National Fire Protection Association or the minimum protection desgnated in the manufacturer's instructions, which the landlord shall retain or provide as proof of compliance. The landlord shall replace or repair the smoke detectors within 15 days of receipt of notification if the landlord is notified of needed replacement or repairs in writing by the tenant. The landlord shall ensure that a smoke detector is operable and in good repair at the beginning of each tenancy. Unless the landlord and tenant have a written agreement to the contrary, the landlord shall place new batteries in a battery-operated smoke detector at the beginning of a tenancy and the tenant shall replace the batteries as needed during the tenancy. Failure of the tenant to replace the batteries as needed shall not be considered as negligence on the part of the tenant or the landlord.
(6) If the landlord is charging for the cost of providing water or sewer service pursuant to G.S. 42-42.1 and has actual knowledge from either the supplying water system or other reliable source that water being supplied to tenants within the landlord's property exceeds a maximum contaminant level established pursuant to Article 10 of Chapter 130A of the General Statutes, provide notice that water being supplied exceeds a maximum contaminant level.

(b) The landlord is not released of his obligations under any part of this section by the tenant's explicit or implicit acceptance of the landlord's failure to provide premises complying with this section, whether done before the lease was made, when it was made, or after it was made, unless a governmental subdivision imposes an impediment to repair for a specific period of time not to exceed six months. Notwithstanding the provisions of this subsection, the landlord and tenant are not prohibited from making a subsequent written contract wherein the tenant agrees to perform specified work on the premises, provided that said contract is supported by adequate consideration other than the letting of the premises and is not made with the purpose or effect of evading the landlord's obligations under this Article.

§ 42-42.1. Water Conservation. (a) For the purpose of encouraging water conservation, pursuant to a written rental agreement, a landlord may charge for the cost of providing water or sewer service to tenants who occupy the same contiguous premises pursuant to G.S. 62-110(g).

(b) The landlord may not disconnect or terminate the tenant's water or sewer services due to the tenant's nonpayment of the amount due for water or sewer services.

§ 42-42.2. Victim protection – nondiscrimination. A landlord shall not terminate a tenancy, fail to renew a tenancy, refuse to enter into a rental agreement, or otherwise retaliate in the rental of a dwelling based substantially on: (i) the tenant, applicant, or a household member's status as a victim of domestic violence, sexual assault, or stalking; or (ii) the tenant or applicant having terminated a rental agreement under G.S. 42-45.1. Evidence provided to the landlord of domestic violence, sexual assault, or stalking may include any of the following:

(1) Law enforcement, court, or federal agency records or files.
(2) Documentation from a domestic violence or sexual assault program.
(3) Documentation from a religious, medical, or other professional.

§ 42-42.3. Victim protection -- change locks. (a) If the perpetrator of domestic violence, sexual assault, or stalking is not a tenant in the same dwelling unit as the protected tenant, a tenant of a dwelling may give oral or written notice to the landlord that a protected tenant is a victim of domestic violence, sexual assault, or stalking and may request that the locks to the dwelling unit be changed. A protected tenant is not required to provide documentation of the domestic violence, sexual assault, or stalking to initiate the changing of the locks, pursuant to this subsection. A landlord who receives a request under this subsection shall change the locks to the protected tenant's dwelling unit or give the protected tenant permission to change the locks within 48 hours.

(b) If the perpetrator of the domestic violence, sexual assault, or stalking is a tenant in the same dwelling unit as the victim, any tenant or protected tenant of a dwelling unit may give oral or written notice to the landlord that a protected tenant is a victim of domestic violence, sexual assault, or stalking and may request that the locks to the dwelling unit be changed. In these circumstances, the following shall apply:

(1) Before the landlord or tenant changes the locks under this subsection, the tenant must provide the landlord with a copy of an order issued by a court that orders the perpetrator to stay away from the dwelling unit.
(2) Unless a court order allows the perpetrator to return to the dwelling to retrieve personal belongings, the landlord has no duty under the rental agreement or by law to allow the perpetrator access to the dwelling unit, to provide keys to the perpetrator, or to provide the perpetrator access to the perpetrator's personal property within the dwelling unit once the landlord has been provided with a court order requiring the perpetrator to stay away from the dwelling. If a landlord complies with this section, the landlord is not liable for civil damages, to a perpetrator excluded from the dwelling unit, for loss of use of the dwelling unit or loss of use or damage to the perpetrator's personal property.
(3) The perpetrator who has been excluded from the dwelling unit under this subsection remains liable under the lease with any other tenant of the dwelling unit for rent or damages to the dwelling unit.

A landlord who receives a request under this subsection shall change the locks to the protected tenant's dwelling unit or give the protected tenant permission to change the locks within 72 hours.

(c) The protected tenant shall bear the expense of changing the locks. If a landlord fails to act within the required time, the protected tenant may change the locks without the landlord's permission. If the protected tenant changes the locks, the protected tenant shall give a key to the new locks to the landlord within 48 hours of the locks being changed.

§ 42-43. Tenant to maintain dwelling unit. (a) The tenant shall:

(1) Keep that part of the premises which he occupies and uses as clean and safe as the conditions of the premises permit and cause no unsafe or unsanitary conditions in the common areas and remainder of the premises which he uses.
(2) Dispose of all ashes, rubbish, garbage, and other waste in a clean and safe manner.
(3) Keep all plumbing fixtures in the dwelling unit or used by the tenant as clean as their condition permits.
(4) Not deliberately or negligently destroy, deface, damage, or remove any part of the premises or knowingly permit any person to do so.
(5) Comply with any and all obligations imposed upon the tenant by current applicable building and housing codes.
(6) Be responsible for all damage, defacement, or removal of any property inside a dwelling unit in his exclusive control unless said damage, defacement or removal was due to ordinary wear and tear, acts of the landlord or his agent, defective products supplied or repairs authorized by the landlord, acts of third parties not invitees of the tenant, or natural forces.

(b) The landlord shall notify the tenant in writing of any breaches of the tenant's obligations under this section except in emergency situations.

§ 42-44. General remedies and limitations. (a) Any right or obligation declared by this Chapter is enforceable by civil action, in addition to other remedies of law and in equity.

(b) Repealed by Session Laws 1979, c. 820, s. 8.

(c) The tenant may not unilaterally withhold rent prior to a judicial determination of a right to do so.

(d) A violation of this Article shall not constitute negligence per se.

§ 42-45. Early termination of rental agreement by military personnel. (a) Any member of the United States Armed Forces who (i) is required to move pursuant to permanent change of station orders to depart 50 miles or more from the location of the dwelling unit, or (ii) is prematurely or involuntarily discharged or released from active duty with the United States Armed Forces, may terminate his rental agreement for a dwelling unit by providing the landlord with a written notice of termination to be effective on a date stated in the notice that is at least 30 days after the landlord's receipt of the notice. The notice to the landlord must be accompanied by either a copy of the official military orders or a written verification signed by the member's commanding officer.

(a1) Any member of the United States Armed Forces who is deployed with a military unit for a period of not less than 90 days may terminate his rental agreement for a dwelling unit by providing the landlord with a written notice of termination. The notice to the landlord must be accompanied by either a copy of the official military orders or a written verification signed by the member's commanding officer. Termination of a lease pursuant to this subsection is effective 30 days after the first date on which the next rental payment is due or 45 days after the landlord's receipt of the notice, whichever is shorter, and payable after the date on which the notice of termination is delivered.

(a2) Upon termination of a rental agreement under this section, the tenant is liable for the rent due under the rental agreement prorated to the effective date of the termination payable at such time as would have otherwise been required by the terms of the rental agreement. The tenant is not liable for any other rent or damages due to the early termination of the tenancy except the liquidated damages provided in subsection (b) of this section. If a member terminates the rental agreement pursuant to this section 14 or more days prior to occupancy, no damages or penalties of any kind shall be due.

(b) In consideration of early termination of the rental agreement, the tenant is liable to the landlord for liquidated damages provided the tenant has completed less than nine months of the tenancy and the landlord has suffered actual damages due to loss of the tenancy. The liquidated damages shall be in an amount no greater than one month's rent if the tenant has completed less than six months of the tenancy as of the effective date of termination, or one-half of one month's rent if the tenant has completed at least six but less than nine months of the tenancy as of the effective date of termination.

(c) The provisions of this section may not be waived or modified by the agreement of the parties under any circumstances. Nothing in this section shall affect the rights established by G.S. 42-3.

§ 42-45.1. Early termination of rental agreement by victims of domestic violence, sexual assault, or stalking. (a) Any protected tenant may terminate his or her rental agreement for a dwelling unit by providing the landlord with a written notice of termination to be effective on a date stated in the notice that is at least 30 days after the landlord's receipt of the notice. The notice to the landlord shall be accompanied by either: (i) a copy of a valid order of protection issued by a court pursuant to Chapter 50B or 50C of the General Statutes, other than an ex parte order, (ii) a criminal order that restrains a person from contact with a protected tenant, or (iii) a valid Address Confidentiality Program card issued pursuant to G.S. 15C-4 to the victim or a minor member of the tenant's household. A victim of domestic violence or sexual assault must submit a copy of a safety plan with the notice to terminate. The safety plan, dated during the term of the tenancy to be terminated, must be provided by a domestic violence or sexual assault program which substantially complies with the requirements set forth in G.S. 50B-9 and must recommend relocation of the protected tenant.

(b) Upon termination of a rental agreement under this section, the tenant who is released from the rental agreement pursuant to subsection (a) of this section is liable for the rent due under the rental agreement prorated to the effective date of the termination and payable at the time that would have been required by the terms of the rental agreement. The tenant is not liable for any other rent or fees due only to the early termination of the tenancy. If, pursuant to this section, a tenant terminates the rental agreement 14 days or more before occupancy, the tenant is not subject to any damages or penalties.

(c) Notwithstanding the release of a protected tenant from a rental agreement under subsection (a) of this section, or the exclusion of a perpetrator of domestic violence, sexual assault, or stalking by court order, if there are any remaining tenants residing in the dwelling unit, the tenancy shall continue for those tenants. The perpetrator who has been excluded from the dwelling unit under court order remains liable under the lease with any other tenant of the dwelling unit for rent or damages to the dwelling unit.

(d) The provisions of this section may not be waived or modified by agreement of the parties.

§ 42-46. Late fees(a) In all residential rental agreements in which a definite time for the payment of the rent is fixed, the parties may agree to a late fee not inconsistent with the provisions of this subsection, to be chargeable only if any rental payment is five days or more late. If the rent:

(1) Is due in monthly installments, a landlord may charge a late fee not to exceed fifteen dollars ($15.00) or five percent (5%) of the monthly rent, whichever is greater.

(2) Is due in weekly installments, a landlord may charge a late fee not to exceed four dollars ($4.00) or five percent (5%) of the weekly rent, whichever is greater.

(3) Is subsidized by the United States Department of Housing and Urban Development, by the United States Department of Agriculture, by a State agency, by a public housing authority, or by a local government, any late fee shall be calculated in accordance with subdivisions (1) and (2) of this subsection on the tenant's share of the contract rent only, and the rent subsidy shall not be included.

(b) A late fee under this section may be imposed only one time for each late rental payment. A late fee for a specific late rental payment may not be deducted from a subsequent rental payment so as to cause the subsequent rental payment to be in default.

(c) Any provision of a residential rental agreement contrary to the provisions of this section is against the public policy of this State and therefore void and unenforceable.

(d) A lessor shall not charge a late fee to a lessee because of the lessee's failure to pay additional rent for water and sewer services provided pursuant to G.S. 62-110(g).

ARTICLE 6. TENANT SECURITY DEPOSIT ACT.

§ 42-50. Deposits from the tenant. Security deposits from the tenant in residential dwelling units shall be deposited in a trust account with a licensed and insured bank or savings institution located in the State of North Carolina or the landlord may, at his option, furnish a bond from an insurance company licensed to do business in North Carolina. The security deposits from the tenant may be held in a trust account outside of the State of North Carolina only if the landlord provides the tenant with an adequate bond in the amount of said deposits. The landlord or his agent shall notify the tenant within 30 days after the beginning of the lease term of the name and address of the bank or institution where his deposit is currently located or the name of the insurance company providing the bond.

§ 42-51. Permitted uses of the deposit. Security deposits for residential dwelling units shall be permitted only for the tenant's possible nonpayment of rent and costs for water or sewer services provided pursuant to G.S. 62-110(g), damage to the premises, nonfulfillment of rental period, any unpaid bills that become a lien against the demised property due to the tenant's occupancy, costs of re-renting the premises after breach by the tenant, costs of removal and storage of tenant's property after a summary ejectment proceeding or court costs in connection with terminating a tenancy. The security deposit shall not exceed an amount equal to two weeks' rent if a tenancy is week to week, one and one-half months' rent if a tenancy is month to month, and two months' rent for terms greater than month to month. These deposits must be fully accounted for by the landlord as set forth in G.S. 42-52.

§ 42-52. Landlord's obligations. Upon termination of the tenancy, money held by the landlord as security may be applied as permitted in G.S. 42-51 or, if not so applied, shall be refunded to the tenant. In either case the landlord in writing shall itemize any damage and mail or deliver same to the tenant, together with the balance of the security deposit, no later than 30 days after termination of the tenancy and delivery of possession by the tenant. If the tenant's address is unknown the landlord shall apply the deposit as permitted in G.S. 42-51 after a period of 30 days and the landlord shall hold the balance of the deposit for collection by the tenant for at least six months. The landlord may not withhold as damages part of the security deposit for conditions that are due to normal wear and tear nor may the landlord retain an amount from the security deposit which exceeds his actual damages.

§ 42-53. Pet deposits. Notwithstanding the provisions of this section, the landlord may charge a reasonable, nonrefundable fee for pets kept by the tenant on the premises.

§ 42-54. Transfer of dwelling units. Upon termination of the landlord's interest in the dwelling unit in question, whether by sale, assignment, death, appointment of receiver or otherwise, the landlord or his agent shall, within 30 days, do one of the following acts, either of which shall relieve him of further liability with respect to such payment or deposit:

(1) Transfer the portion of such payment or deposit remaining after any lawful deductions made under this section to the landlord's successor in interest and thereafter notify the tenant by mail of such transfer and of the transferee's name and address; or

(2) Return the portion of such payment or deposit remaining after any lawful deductions made under this section to the tenant.

§ 42-55. Remedies. If the landlord or the landlord's successor in interest fails to account for and refund the balance of the tenant's security deposit as required by this Article, the tenant may institute a civil action to require the accounting of and the recovery of the balance of the deposit. In addition to other remedies at law and equity, the tenant may recover damages resulting from noncompliance by the landlord; and upon a finding by the court that the party against whom judgment is rendered was in willful noncompliance with this Article, the court may, in its discretion, allow a reasonable attorney's fee to the duly licensed attorney representing the prevailing party, such attorney's fee to be taxed as part of the cost of court.

§ 42-56. Application of Article. The provisions of this Article shall apply to all persons, firms, or corporations engaged in the business of renting or managing residential dwelling units, excluding single rooms, on a weekly, monthly or annual basis.

ARTICLE 7. EXPEDITED EVICTION OF DRUG TRAFFICKERS AND OTHER CRIMINALS.

§ 42-59. Definitions. As used in this Article:

(1) "Complete eviction" means the eviction and removal of a tenant and all members of the tenant's household.

(2) "Criminal activity" means (i) activity that would constitute a violation of G.S. 90-95 other than a violation of G.S. 90-95(a)(3), or a conspiracy to violate any provision of G.S. 90-95 other than G.S. 90-95(a)(3); or (ii) other criminal activity that threatens the health, safety, or right of peaceful enjoyment of the entire premises by other residents or employees of the landlord.

(3) "Entire premises" or "leased residential premises" means a house, building, mobile home, or apartment, whether publicly or privately owned, which is leased for residential purposes. These terms include the entire building or complex of buildings or mobile home park and all real property of any nature appurtenant thereto and used in connection therewith, including all individual rental units, streets, sidewalks, and common areas. These terms do not include a hotel, motel, or other guest house or part thereof rented to a transient guest.

(4) "Felony" means a criminal offense that constitutes a felony under North Carolina law.

(5) "Guest" means any natural person who has been given express or implied permission by a tenant, a member of the tenant's household, or another guest of the tenant to enter an individual rental unit or any portion of the entire premises.

(6) "Individual rental unit" means an apartment or individual dwelling or accommodation which is leased to a particular tenant, whether or not it is used or occupied or intended to be used or occupied by a single family or household.

(7) "Landlord" means a person, entity, corporation, or governmental authority or agency who or which owns, operates, or manages any leased residential premises.

(8) "Partial eviction" means the eviction and removal of specified persons from a leased residential premises.

(9) "Resident" means any natural person who lawfully resides in a leased residential premises who is not a signatory to a lease or otherwise has no contractual relationship to a landlord. The term includes members of the household of a tenant.

(10) "Tenant" means any natural person or entity who is a named party or signatory to a lease or rental agreement, and who occupies, resides in, or has a legal right to possess and use an individual rental unit.

§ 42-59.1. Statement of Public Policy. The General Assembly recognizes that the residents of this State have the right to the peaceful, safe, and quiet enjoyment of their homes. The General Assembly further recognizes that these rights, as well as the health, safety, and welfare of residents, are often jeopardized by the criminal activity of other residents of rented residential property, but that landlords are often unable to remove those residents engaged in criminal activity. In order to ensure that residents of this State can have the peaceful, safe, and quiet enjoyment of their homes, the provisions of this Article are deemed to apply to all residential rental agreements in this State.

§ 42-60. Nature of actions and jurisdiction. The causes of action established in this Article are civil actions to remove tenants or other persons from leased residential premises. These actions shall be brought in the district court of the county where the individual rental unit is located. If the plaintiff files the complaint as a small claim, the parties shall not be entitled to discovery from the magistrate. However, if such a case is filed originally in the district court or is appealed from the judgment of a magistrate for a new trial in the district court, all of the procedures and remedies in this Article shall be applicable.

§ 42-61. Standard of proof. The civil causes of action established in this Article shall be proved by a preponderance of the evidence, except as otherwise expressly provided in G.S. 42-64.

§ 42-62. Parties. (a) Who May Bring Action. - A civil action pursuant to this Article may be brought by the landlord of a leased residential premises, or the landlord's agent, as provided for in G.S. 1-57 of the General Statutes and in Article 3 of this Chapter.

(b) Defendants to the Action. - A civil action pursuant to this Article may be brought against any person within the jurisdiction of the court, including a tenant, adult or minor member of the tenant's household, guest, or resident of the leased residential premises. If any defendant's true name is unknown to the plaintiff, process may issue against the defendant under a fictitious name, stating it to be fictitious and adding an appropriate description sufficient to identify him or her.

(c) Notice to Defendants. - A complaint initiating an action pursuant to this Article shall be served in the same manner as serving complaints in civil actions pursuant to G.S. 1A-1, Rule 4 and G.S. 42-29.

§ 42-63. Remedies and judicial orders. (a) Grounds for Complete Eviction. - Subject to the provisions of G.S. 42-64 and pursuant to G.S 42-68, the court shall order the immediate eviction of a tenant and all other residents of the tenant's individual unit where it finds that:

(1) Criminal activity has occurred on or within the individual rental unit leased to the tenant; or

(2) The individual rental unit leased to the tenant was used in any way in furtherance of or to promote criminal activity; or

(3) The tenant, any member of the tenant's household, or any guest has engaged in criminal activity on or in the immediate vicinity of any portion of the entire premises; or

(4) The tenant has given permission to or invited a person to return or reenter any portion of the entire premises, knowing that the person has been removed and barred from the entire premises pursuant to this Article or the reasonable rules and regulations of a publicly assisted landlord; or

(5) The tenant has failed to notify law enforcement or the landlord immediately upon learning that a person who has been removed and barred from the tenant's individual rental unit pursuant to this Article has returned to or reentered the tenant's individual rental unit.

(b) Grounds for Partial Eviction and Issuance of Removal Orders. - The court shall, subject to the provisions of G.S. 42- 64, order the immediate removal from the entire premises of any person other than the tenant, including an adult or minor member of the tenant's household, where the court finds that such person has engaged in criminal activity on or in the immediate vicinity of any portion of the leased residential premises. Persons removed pursuant to this section shall be barred from returning to or reentering any portion of the entire premises.

(c) Conditional Eviction Orders Directed Against the Tenant. - Where the court finds that a member of the tenant's household or a guest of the tenant has engaged in criminal activity on or in the immediate vicinity of any portion of the leased residential premises, but such person has not been named as a party defendant, has not appeared in the action or otherwise has not been subjected to the jurisdiction of the court, a conditional eviction order issued pursuant to subsection (b) of this section shall be directed against the tenant, and shall provide that as an express condition of the tenancy, the tenant shall not give permission to or invite the barred person or persons to return to or reenter any portion of the entire premises. The tenant shall acknowledge in writing that the tenant understands the terms of the court's order, and that the tenant further understands that the failure to comply with the court's order will result in the mandatory termination of the tenancy pursuant to G.S. 42-68.

§ 42-64. Affirmative defense or exemption to a complete eviction. (a) Affirmative Defense. - The court shall refrain from ordering the complete eviction of a tenant pursuant to G.S. 42- 63(a) where the tenant has established that the tenant was not involved in the criminal activity and that:

(1) The tenant did not know or have reason to know that criminal activity was occurring 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 has engaged in criminal activity on or in the immediate vicinity of any portion of the entire premises; or

(2) The tenant had done everything that could reasonably be expected under the circumstances to prevent the commission of the 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.
Notwithstanding the court's denial of eviction of the tenant, if the plaintiff has proven that an evictable offense under G.S. 42- 63 was committed by someone other than the tenant, the court shall order such other relief as the court deems appropriate to protect the interests of the landlord and neighbors of the tenant, including the partial eviction of the culpable household members pursuant to G.S. 42-63(b) and conditional eviction orders under G.S. 42-63(c).

(b) Subsequent Affirmative Defense to a Complete Eviction. - The affirmative defense set forth in subsection (a) of this section shall not be available to a tenant in a subsequent action brought pursuant to this Article unless the tenant can establish 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 criminal activity.

(c) Exemption. - Where the grounds for a complete eviction have been established, the court shall order the eviction of the tenant unless, taking into account the circumstances of the criminal activity and the condition of the tenant, the court is clearly convinced 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. The burden of proof for the exemption set forth shall be by clear and convincing evidence.

§ 42-65. Obstructing the execution or enforcement of a removal or eviction order. Any person who knowingly violates any order issued pursuant to this Article or who knowingly interferes with, obstructs, impairs, or prevents any law enforcement officer from enforcing or executing any order issued pursuant to this Article, shall be subject to criminal contempt under Article 1 of Chapter 5A of the General Statutes. Nothing in this section shall be construed in any way to preclude or preempt prosecution for any other criminal offense.

§ 42-66. Motion to enforce eviction and removal orders. (a) A motion to enforce an eviction or removal order issued pursuant to G.S. 42-63(b) or (c) shall be heard on an expedited basis and within 15 days of the service of the motion.

(b) Mandatory Eviction. - The court shall order the immediate eviction of the tenant where it finds that:

(1) The tenant has given permission to or invited any person removed or barred from the leased residential premises pursuant to this Article to return to or reenter any portion of the premises; or

(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 pursuant to this Article has returned to or reentered the tenant's individual rental unit; or

(3) The tenant has otherwise knowingly violated an express term or condition of any order issued by court pursuant to this Article.

§ 42-67. Impermissible defense. It shall not be a defense to an action brought pursuant to this Article that the criminal activity was an isolated incident or otherwise has not recurred. Nor is it a defense that the person who actually engaged in the criminal activity no longer resides in the tenant's individual rental unit. However, evidence of such facts may be admissible if offered to support affirmative defenses or grounds for an exemption pursuant to G.S. 42-64.

§ 42-68. Expedited proceedings. Where the complaint is filed as a small claim, the expedited process for summary ejectment, as provided in Article 3 of this Chapter and Chapter 7A of the General Statutes, applies. Where the complaint is filed initially in the district court or a judgment by the magistrate is appealed to the district court, the procedure in G.S. 42-34(b) through (g), if applicable, and the following procedures apply:

(1) Expedited Hearing. - When a complaint is filed initiating an action pursuant to this Article, the court shall set the matter for a hearing which shall be held on an expedited basis and within the first term of court falling after 30 days from the service of the complaint on all defendants or from service of notice of appeal from a magistrate's judgment, unless either party obtains a continuance. However, where a defendant files a counterclaim, the court shall reset the trial for the first term of court falling after 30 days from the defendant's service of the counterclaim.

(2) Standards for Continuances. - The court shall not grant a continuance, nor shall it stay the civil proceedings pending the disposition of any related criminal proceedings, except as required to complete permitted discovery, to have the plaintiff reply to a counterclaim, or for compelling and extraordinary reasons or on application of the district attorney for good cause shown.

(3) When Presented. - The defendant in an action brought in district court pursuant to this Article shall serve an answer within 20 days after service of the summons and complaint, or within 20 days after service of the appeal to district court when the action was initially brought in small claims court. The plaintiff shall serve a reply to a counterclaim in the answer within 20 days after service of the answer.

(4) Extensions of Time for Filing. - The parties to an action brought pursuant to this Article shall not be entitled to an extension of time for completing an act required by subdivision (3) of this section, except for compelling and extraordinary reasons.

(5) Default. - A party to an action brought pursuant to this Article who fails to plead in accordance with the time periods in subdivision (3) of this section shall be subject to the provisions of G.S. 1A-1, Rule 55.

(6) Rules of Civil Procedure. - Unless otherwise provided for in this Article, G.S. 1A-1, the Rules of Civil Procedure, shall apply in the district court to all actions brought pursuant to this Article.

§ 42-69. Relation to criminal proceedings. (a) Criminal Proceedings, Conviction, or Adjudication Not Required. - The fact that a criminal prosecution involving the criminal activity is not commenced or, if commenced, has not yet been concluded or has terminated without a conviction or adjudication of delinquency shall not preclude a civil action or the issuance of any order pursuant to this Article.

(b) Effect of Conviction or Adjudication. - Where a criminal prosecution involving the criminal activity results in a final criminal conviction or adjudication of delinquency, such adjudication or conviction shall be considered in the civil action as conclusive proof that the criminal activity occurred.

(c) Admissibility of Criminal Trial Recordings or Transcripts. - Any evidence or testimony admitted in the criminal proceeding, including recordings or transcripts of the adult or juvenile criminal proceedings, whether or not they have been transcribed, may be admitted in the civil action initiated pursuant to this Article.

(d) Use of Sealed Criminal Proceeding Records. - In the event that the evidence or records of a criminal proceeding which did not result in a conviction or adjudication of delinquency have been sealed by court order, the court in a civil action brought pursuant to this Article may order such evidence or records, whether or not they have been transcribed, to be unsealed if the court finds that such evidence or records would be relevant to the fair disposition of the civil action.

§ 42-70. Discovery. (a) The parties to an action brought pursuant to this Article shall be entitled to conduct discovery, if the action is filed originally in or appealed to the district court, only in accordance with this section.

(b) Any defendant must initiate all discovery within the time allowed by this Article for the filing of an answer or counterclaim.

(c) The plaintiff must initiate all discovery within 20 days of service of an answer or counterclaim by a defendant.

(d) All parties served with interrogatories, requests for production of documents, and requests for admissions under G.S. 1A-1, Rules 33, 34, and 36 shall serve their responses within 20 days.

(e) Upon application by the plaintiff, or agreement of the parties, the court shall issue a preliminary injunction against all alleged illegal activity by the defendant or other identified parties who are residents of the individual rental unit or guests of defendants, pending the completion of discovery and any other wait before the trial has occurred.

§ 42-71. Protection of threatened witnesses or affiants. If proof necessary to establish the grounds for eviction depends, in whole or in part, upon the affidavits or testimony of witnesses who are not peace officers, the court may, upon a showing of prior threats of violence or acts of violence by any defendant or any other person, issue orders to protect those witnesses, including the nondisclosure of the name, address, or any other information which may identify those witnesses.

§ 42-72. Availability of law enforcement resources to plaintiffs or potential plaintiffs. A law enforcement agency may make available to any person or entity authorized to bring an action pursuant to this Article any police report or edited portion thereof, or forensic laboratory report or edited portion thereof, concerning criminal activity committed on or in the immediate vicinity of the leased residential premises. A law enforcement agency may also make any officer or officers available to testify as a fact witness or expert witness in a civil action brought pursuant to this Article. The agency shall not disclose such information where, in the agency's opinion, such disclosure would jeopardize an investigation, prosecution, or other proceeding, or where such disclosure would violate any federal or State statute.

§ 42-73. Collection of rent. A landlord shall be entitled to collect rent due and owing with knowledge of any illegal acts that violate the provisions of this act without such collection constituting a waiver of the alleged defaults.

§ 42-74. Preliminary or emergency relief. The district court shall have the authority at any time to issue a temporary restraining order, grant a preliminary injunction, or take such other actions as the court deems necessary to enjoin or prevent the commission of criminal activity on or in the immediate vicinity of leased residential premises, or otherwise to protect the rights and interests of all tenants and residents. A violation of any such duly issued order or preliminary relief shall subject the violator to civil or criminal contempt.

§ 42-75. Cumulative remedies. The causes of action and remedies authorized by this Article shall be cumulative with each other and shall be in addition to, not in lieu of, any other causes of action or remedies which may be available at law or equity, including causes of action and remedies based on express provisions of the lease not contrary to this Article.

§ 42-76. Civil immunity. Any person or organization who, in good faith, institutes, participates in, or encourages a person or entity to institute or participate in a civil action brought pursuant to this Article, or who in good faith provides any information relied upon by any person or entity in instituting or participating in a civil action pursuant to this Article shall have immunity from any civil liability that might otherwise be incurred or imposed. Any such person or organization shall have the same immunity from civil liability with respect to testimony given in any judicial proceeding conducted pursuant to this Article.

CHAPTER 42A. VACATION RENTAL ACT
ARTICLE 1. VACATION RENTALS

§ 42A-1. Title. This Chapter shall be known as the North Carolina Vacation Rental Act.

§ 42A-2. Purpose and scope of act. The General Assembly finds that the growth of the tourism industry in North Carolina has led to a greatly expanded market of privately owned residences that are rented to tourists for vacation, leisure, and recreational purposes. Rental transactions conducted by the owners of these residences or licensed real estate brokers acting on their behalf present unique situations not normally found in the rental of primary residences for long terms, and therefore make it necessary for the General Assembly to enact laws regulating the competing interests of landlords, real estate brokers, and tenants.

§ 42A-3. Application; exemptions.–(a) The provisions of this Chapter shall apply to any person, partnership, corporation, limited liability company, association, or other business entity who acts as a landlord or real estate broker engaged in the rental or management of residential property for vacation rental as defined in this Chapter.

(b) The provisions of this Chapter shall not apply to:

(1) Lodging provided by hotels, motels, tourist camps, and other places subject to regulation under Chapter 72 of the General Statutes.

(2) Rentals to persons temporarily renting a dwelling unit when traveling away from their primary residence for business or employment purposes.

(3) Rentals to persons having no other place of primary residence.

(4) Rentals for which no more than nominal consideration is given.

§ 42A-4. Definitions.–The following definitions apply in this Chapter:

(1) Real estate broker.--A real estate broker as defined in G.S. 93A-2(a).

(2) Residential property.--An apartment, condominium, single-family home, townhouse, cottage, or other property that is devoted to residential use or occupancy by one or more persons for a definite or indefinite period.

(3) Vacation rental.--The rental of residential property for vacation, leisure, or recreation purposes for fewer than 90 days by a person who has a place of permanent residence to which he or she intends to return.

(4) Vacation rental agreement.--A written agreement between a landlord or his or her real estate broker and a tenant in which the tenant agrees to rent residential property belonging to the landlord for a vacation rental.

§§ 42A-5 to 42A-9. Reserved

ARTICLE 2. VACATION RENTAL AGREEMENTS

§ 42A-10. Written agreement required.–(a) A landlord or real estate broker and tenant shall execute a vacation rental agreement for all vacation rentals subject to the provisions of this Chapter. No vacation rental agreement shall be valid and enforceable unless the tenant has accepted the agreement as evidenced by one of the following:

(1) The tenant's signature on the agreement.

(2) The tenant's payment of any monies to the landlord or real estate broker after the tenant's receipt of the agreement.

(3) The tenant's taking possession of the property after the tenant's receipt of the agreement.

(b) Any real estate broker who executes a vacation rental agreement that does not conform to the provisions of this Chapter or fails to execute a vacation

rental agreement shall be guilty of an unfair trade practice in violation of G.S. 75-1.1, and shall be prohibited from commencing an expedited eviction proceeding as provided in Article 4 of this Chapter.

§ 42A-11. Vacation rental agreements.–(a) A vacation rental agreement executed under this Chapter shall contain the following notice on its face which shall be set forth in a clear and conspicuous manner that distinguishes it from other provisions of the agreement: "THIS IS A VACATION RENTAL AGREEMENT UNDER THE NORTH CAROLINA VACATION RENTAL ACT. THE RIGHTS AND OBLIGATIONS OF THE PARTIES TO THIS AGREEMENT ARE DEFINED BY LAW AND INCLUDE UNIQUE PROVISIONS PERMITTING THE DISBURSEMENT OF RENT PRIOR TO TENANCY AND EXPEDITED EVICTION OF TENANTS. YOUR SIGNATURE ON THIS AGREEMENT, OR PAYMENT OF MONEY OR TAKING POSSESSION OF THE PROPERTY

AFTER RECEIPT OF THE AGREEMENT, IS EVIDENCE OF YOUR ACCEPTANCE OF THE AGREEMENT AND YOUR INTENT TO USE THIS PROPERTY FOR A VACATION RENTAL."

(b) The vacation rental agreement shall contain provisions separate from the requirements of subsection (a) of this section which shall describe the following as permitted or required by this Chapter:

(1) The manner in which funds shall be received, deposited, and disbursed in advance of the tenant's occupancy of the property.

(2) Any processing fees permitted under G.S. 42A-17(c).

(3) The rights and obligations of the landlord and tenant under G.S. 42A- 17(b).

(4) The applicability of expedited eviction procedures.

(5) The rights and obligations of the landlord or real estate broker and the tenant upon the transfer of the property.

(6) The rights and obligations of the landlord or real estate broker and the tenant under G.S. 42A-36.

(7) Any other obligations of the landlord and tenant.

ARTICLE 3. HANDLING AND ACCOUNTING OF FUNDS

§ 42A-15. Trust account uses.–A landlord or real estate broker may require a tenant to pay all or part of any required rent, security deposit, or other fees permitted by law in advance of the commencement of a tenancy under this Chapter if these payments are expressly authorized in the vacation rental agreement. If the tenant is required to make any advance payments, other than a security deposit, whether the payment is denominated as rent or otherwise, the landlord or real estate broker shall deposit these payments in a trust account in an insured bank or savings and loan association in North Carolina no later than three banking days after the receipt of the these payments. These payments deposited in a trust account shall not earn interest unless the landlord and tenant agree in the vacation rental agreement that the payments may be deposited in an interest-bearing account. The landlord and tenant shall also provide in the agreement to whom the accrued interest shall be disbursed.

§ 42A-16. Advance payments uses..–(a) A landlord or real estate broker shall not disburse prior to the occupancy of the property by the tenant an amount greater than fifty percent (50%) of the total rent except as permitted pursuant to this subsection. A landlord or real estate broker may disburse prior to the occupancy of the property by the tenant any fees owed to third parties to pay for goods, services, or benefits procured by the landlord or real estate broker for the benefit of the tenant, including administrative fees permitted by G.S. 42A-17(c), if the disbursement is expressly authorized in the vacation rental agreement. The funds remaining after any disbursement permitted under this subsection shall remain in the trust account and may not be disbursed until the occurrence of one of the following:

(1) The commencement of the tenancy, at which time the remaining funds may be disbursed in accordance with the terms of the agreement.

(2) The tenant commits a material breach, at which time the landlord may retain an amount sufficient to defray the actual damages suffered by the landlord as a

result of the breach.

(3) The landlord or real estate broker refunds the money to the tenant.

(4) The funds in the trust account are transferred in accordance with G.S. 42A-19(b) upon the termination of the landlord's interest in the property.

(b) Funds collected for sales or occupancy taxes and tenant security deposits shall not be disbursed from the trust account prior to termination of the tenancy or material breach of the agreement by the tenant, except as a refund to the tenant.

(c) The tenant's execution of a vacation rental agreement in which he or she agrees to the advance disbursement of payments shall not constitute a waiver or loss of any of the tenant's rights to reimbursement of such payments if the tenant is lawfully entitled to reimbursement.

§ 42A-17. Accounting; reimbursement.–(a) A vacation rental agreement shall identify the name and address of the bank or savings and loan association in which the tenant's security deposit and other advance payments are held in a trust account, and the landlord and real estate broker shall provide the tenant with an accounting of such deposit and payments if the tenant makes a reasonable request for an accounting prior to the tenant's occupancy of the property.

(b) Except as provided in G.S. 42A-36, if, at the time the tenant is to begin occupancy of the property, the landlord or real estate broker cannot provide the property in a fit and habitable condition or substitute a reasonably comparable property in such condition, the landlord and real estate broker shall refund to the tenant all payments made by the tenant.

(c) A vacation rental agreement may include administrative fees, the amounts of

which shall be provided in the agreement, reasonably calculated to cover the costs of processing the tenant's reservation, transfer, or cancellation of a vacation rental.

§ 42A-18. Applicability of the Residential Tenant Security Deposit Act.–(a) Except as may otherwise be provided in this Chapter, all funds collected from a tenant and not identified in the vacation rental agreement as occupancy or sales taxes, fees, or rent payments shall be considered a tenant security deposit and shall be subject to the provisions of the Residential Tenant Security Deposit Act, as codified in Article 6 of Chapter 42 of the General Statutes. Funds collected as a tenant security deposit in connection with a vacation rental shall be deposited into a trust account as required by G.S. 42-50. The landlord or real estate broker shall not have the option of obtaining a bond in lieu of maintaining security deposit funds in a trust account. In addition to the permitted uses of tenant security deposit monies as provided in G.S. 42-51, a landlord or real estate broker may, after the termination of a tenancy under this Chapter, deduct from any tenant security deposit the amount of any long distance or per call telephone charges and cable television charges that are the obligation of the tenant under the vacation rental agreement and are left unpaid by the tenant at the conclusion of the tenancy. The landlord or real estate broker shall apply, account for, or refund tenant security deposit monies as provided in G.S. 42-51 within 45 days following the conclusion of the tenancy.

(b) A vacation rental agreement shall not contain language compelling or permitting the automatic forfeiture of all or part of a tenant security deposit in case of breach of contract by the tenant, and no such forfeiture shall be allowed. The vacation rental agreement shall provide that a tenant security deposit may be applied to actual damages caused by the tenant as permitted under Article 6 of Chapter 42 of the General Statutes.

§ 42A-19. Transfer of property subject to a vacation rental agreement.–(a) The grantee of residential property voluntarily transferred by a landlord who has entered into a vacation rental agreement for the use of the property shall take title to the property subject to the vacation rental agreement if the vacation rental is to end not later than 180 days after the grantee's interest in the property is recorded in the office of the register of deeds. If the vacation rental is to end more than 180 days after the recording of the grantee's interest, the tenant shall have no right to enforce the terms of the agreement unless the grantee has agreed in writing to honor those terms, but the tenant shall be entitled to a refund of payments made by him or her, as provided in subsection (b) of this section.:

(1) Notify each tenant in writing of the property transfer, the grantee's name and address, and the date the grantee's interest was recorded.
(2) Advise each tenant whether he or she has the right to occupy the property subject to the terms of the vacation rental agreement and the provisions of this section.
(3) Advise each tenant of whether he or she has the right to receive a refund of any payments made by him or her.

(b) Except as otherwise provided in this subsection, upon termination of the landlord's interest in the residential property subject to a vacation rental agreement, whether by sale, assignment, death,

appointment of receiver or otherwise, the landlord or the landlord's agent, or the real estate broker, shall, within 30 days, transfer all advance rent paid by the tenant, and the portion of any fees remaining after any lawful deductions made under G.S. 42A-16, to the landlord's successor in interest and thereafter notify the tenant by mail of such transfer and of the transferee's name and address. For vacation rentals that end more than 180 days after the recording of the interest of the landlord's successor in interest, unless the landlord's successor in interest has agreed in writing to honor the vacation rental agreement, the landlord or the landlord's agent, or the real estate broker, shall, within 30 days, transfer all advance rent paid by the tenant, and the portion of any fees remaining after any lawful deductions made under G.S. 42A-16, to the tenant. Compliance with this subsection shall relieve the landlord or real estate broker of further liability with respect to any payment of rent or fees. Funds held as a security deposit shall be disbursed in accordance with G.S. 42A-18.

(c) Deleted by S.L. 2000-140, § 41, eff. July 21, 2000.

(d) The failure of a landlord to comply with the provisions of this section shall constitute an unfair trade practice in violation of G.S. 75-1.1. A landlord who complies with the requirements of this section shall have no further obligations to the tenant.

ARTICLE 4. EXPEDITED EVICTION PROCEEDINGS

§ 42A-23. Grounds for eviction.–(a) Any tenant who leases residential property subject to a vacation rental agreement under this Chapter for 30 days or less may be evicted and removed from the property in an expedited eviction proceeding brought by the landlord, or real estate broker as agent for the landlord, as provided in this Article if the tenant does one of the following:

(1) Holds over possession after his or her tenancy has expired.

(2) Has committed a material breach of the terms of the vacation rental agreement that, according to the terms of the agreement, results in the termination of his or her tenancy.

(3) Fails to pay rent as required by the agreement.

(4) Has obtained possession of the property by fraud or misrepresentation.

(b) Only the right to possession shall be relevant in an expedited eviction proceeding. All other issues related to the rental of the residential property shall be presented in a separate civil action.

§ 42A-24. Expedited eviction.–(a) Before commencing an expedited eviction proceeding, the landlord or real estate broker shall give the tenant at least four hours' notice, either orally or in writing, to quit the premises. If reasonable efforts to personally give oral or written notice have failed, written notice may be given by posting the notice on the front door of the property.

(b) An expedited eviction proceeding shall commence with the filing of a complaint and issuance of summons in the county where the property is located. If the office of the clerk of superior court is closed, the complaint shall be filed with, and the summons issued by, a magistrate. The service of the summons and complaint for expedited eviction shall be made by a sworn law enforcement officer on the tenant personally or by posting a copy of the summons and complaint on the front door of the property. The officer, upon service, shall promptly file a return therefor. A hearing on the expedited eviction shall be held before a magistrate in the county where the property is located not sooner than 12 hours after service upon the tenant and no later than 48 hours after such service. To the extent that the provisions of this Article are in conflict with the Rules of Civil Procedure, Chapter 1A of the General Statutes, with respect to the commencement of an action or service of process, this Article controls.

(c) The complaint for expedited eviction shall allege and the landlord or real estate broker shall prove the following at the hearing:

(1) The vacation rental is for a term of 30 days or less.

(2) The tenant entered into and accepted a vacation rental agreement that conforms to the provisions of this Chapter.

(3) The tenant committed one or more of the acts listed in G.S. 42A-23(a) as grounds for eviction.
(4) The landlord or real estate broker has given notice to the tenant to vacate as a result of the breach as provided in subsection (a) of this section.

The rules of evidence shall not apply in an expedited eviction proceeding, and the court shall allow any reasonably reliable and material statements, documents, or other exhibits to be admitted as evidence. The provisions of G.S. 7A-218, 7A-219, and 7A-220, except any provisions regarding amount in controversy, shall apply to an expedited eviction proceeding held before the magistrate. These provisions shall not be construed to broaden the scope of an expedited eviction proceeding to issues other than the right to possession.

(d) If the court finds for the landlord or real estate broker, the court shall immediately enter a written order granting the landlord or real estate broker possession and stating the time when the tenant shall vacate the property. In no case shall this time be less than 2 hours or more than 8 hours after service of the order on the tenant. The court's order shall be served on the tenant at the hearing. If the tenant does not appear at the hearing or leaves before the order is served, the order shall be served by delivering the order to the tenant or by posting the order on the front door of the property by any sworn law enforcement officer. The officer, upon service, shall file a return therefor.

If the court finds for the landlord or real estate broker, the court shall determine the amount of the appeal bond that the tenant shall be required to post should the tenant seek to appeal the court order. The amount of the bond shall be an estimate of the rent that will become due while the tenant is prosecuting the appeal and reasonable damages that the landlord may suffer, including damage to property and damages arising from the inability of the landlord or real estate broker to honor other vacation rental agreements due to the tenant's possession of the property.

§ 42A-25. Appeal.–A tenant or landlord may appeal a court order issued pursuant to G.S. 42A- 24(d) to district court for a trial de novo. A tenant may petition the district court to stay the eviction order and shall post a cash or secured bond with the court in the amount determined by the court pursuant to G.S. 42A- 24(d).

§ 42A-26. Violation of court order.–If a tenant fails to remove personal property from a residential property subject to a vacation rental after the court has entered an order of eviction, the landlord or real estate broker shall have the same rights as provided in G.S. 42-36.2(b) as if the sheriff had not removed the tenant's property. The failure of a tenant or the guest of a tenant to vacate a residential property in accordance with a court order issued pursuant to G.S. 42A-24(d) shall constitute a criminal trespass under G.S. 14-159.13

§ 42A-27. Penalties for abuse.–A landlord or real estate broker shall undertake to evict a tenant pursuant to an expedited eviction proceeding only when he or she has a good faith belief that grounds for eviction exists under the provisions of this Chapter. Otherwise, the landlord or real estate broker shall be guilty of an unfair trade practice under G.S. 75-1.1 and a Class 1 misdemeanor.

ARTICLE 5. LANDLORD AND TENANT DUTIES

§ 42A-31. Landlord to provide fit premises.–A landlord of a residential property used for a vacation rental shall:

(1) Comply with all current applicable building and housing codes.
(2) Make all repairs and do whatever is reasonably necessary to put and keep the property in a fit and habitable condition.
(3) Keep all common areas of the property in safe condition.

(4) Maintain in good and safe working order and reasonably and promptly repair all electrical, plumbing, sanitary, heating, ventilating, and other facilities and major appliances supplied by him or her upon written notification from the tenant that repairs are needed.

(5) Provide operable smoke detectors. The landlord shall replace or repair the smoke detectors if the landlord is notified by the tenant in writing that replacement or repair is needed. The landlord shall annually place new batteries in a battery-operated smoke detector, and the tenant shall replace the batteries as needed during the tenancy. Failure of the tenant to replace the batteries as needed shall not be considered negligence on the part of the tenant or landlord.

These duties shall not be waived; however, the landlord and tenant may make additional covenants not inconsistent herewith in the vacation rental agreement.

§ 42A-32. Tenant to maintain dwelling unit.–The tenant of a residential property used for a vacation rental shall:

(1) Keep that part of the property which he or she occupies and uses as clean and safe as the conditions of the property permit and cause no unsafe or unsanitary conditions in the common areas and remainder of the property that he or she uses.

(2) Dispose of all ashes, rubbish, garbage, and other waste in a clean and safe manner.

(3) Keep all plumbing fixtures in the property or used by the tenant as clean as their condition permits.

(4) Not deliberately or negligently destroy, deface, damage, or remove any part of the property or render inoperable the smoke detector provided by the landlord or knowingly permit any person to do so.

(5) Comply with all obligations imposed upon the tenant by current applicable building and housing codes.

(6) Be responsible for all damage, defacement, or removal of any property

inside the property that is in his or her exclusive control unless the damage, defacement, or removal was due to ordinary wear and tear, acts of the landlord or his or her agent, defective products supplied or repairs authorized by the landlord, acts of third parties not invitees of the tenant, or natural forces.

(7) Notify the landlord of the need for replacement of or repairs to a smoke detector. The landlord shall annually place new batteries in a battery- operated smoke detector, and the tenant shall replace the batteries as needed during the tenancy. Failure of the tenant to replace the batteries as needed shall not be considered negligence on the part of the tenant or the landlord.

These duties shall not be waived; however, the landlord and tenant may make additional covenants not inconsistent herewith in the vacation rental agreement.

ARTICLE 6. GENERAL PROVISIONS

§ 42A-36. Mandatory evacuations.– If State or local authorities, acting pursuant to Article 36A of Chapter 14 or Article 1 of Chapter 166A of the General Statutes, order a mandatory evacuation of an area that includes the residential property subject to a vacation rental, the tenant under the vacation rental agreement, whether in possession of the property or not, shall comply with the evacuation order. Upon compliance, the tenant shall be entitled to a refund from the landlord of the prorated rent for each night that the tenant is unable to occupy the property because of the mandatory evacuation order. The tenant shall not be entitled to a refund if: (i) prior to the tenant taking possession of the property, the tenant refused insurance offered by the landlord or real estate broker that would have compensated the tenant for losses or damages resulting from loss of use of the property due to a mandatory evacuation order; or (ii) the tenant purchased insurance offered by the landlord or real estate broker. The insurance offered shall be provided by an insurance company duly authorized by the North Carolina Department of Insurance, and the cost of the insurance shall not exceed eight percent (8%) of the total rent charged for the vacation rental to the tenant.

CHAPTER 44A. STATUTORY LIENS AND CHARGES.

ARTICLE 1. POSSESSORY LIENS ON PERSONAL PROPERTY.

§ 44A-1. Definitions. As used in this Article:

(1) "Legal possessor" means
  (a) Any person entrusted with possession of personal property by an owner thereof, or
  (b) Any person in possession of personal property and entitled thereto by operation of law.

(2) "Lienor" means any person entitled to a lien under this Article.

(2a) "Motor Vehicle" has the meaning provided in G.S. 20-4.01.

(3) "Owner" means
  (a) Any person having legal title to the property, or
  (b) A lessee of the person having legal title, or
  (c) A debtor entrusted with possession of the property by a secured party, or
  (d) A secured party entitled to possession, or
  (e) Any person entrusted with possession of the property by his employer or principal who is an owner under any of the above.

(4) "Secured party" means a person holding a security interest.

(5) "Security interest" means any interest in personal property which interest is subject to the provisions of Article 9 of the Uniform Commercial Code, or any other interest intended to create security in real or personal property.

(6) "Vessel" has the meaning provided in G.S. 75A-2.

§ 44A-2. Persons entitled to lien on personal property.--(a) Any person who tows, alters, repairs, stores, services, treats, or improves personal property other than a motor vehicle in the ordinary course of his business pursuant to an express or implied contract with an owner or legal possessor of the personal property has a lien upon the property. The amount of the lien shall be the lesser of

(1) The reasonable charges for the services and materials; or
(2) The contract price; or
(3) One hundred dollars ($100.00) if the lienor has dealt with a legal possessor who is not an owner.

This lien shall have priority over perfected and unperfected security interests.

(b) Any person engaged in the business of operating a hotel, motel, or boardinghouse has a lien upon all baggage, vehicles and other personal property brought upon his premises by a guest or boarder who is an owner thereof to the extent of reasonable charges for the room, accommodations and other items or

services furnished at the request of the guest or boarder. This lien shall not have priority over any security interest in the property which is perfected at the time the guest or boarder brings the property to said hotel, motel or boardinghouse.

(c) Any person engaged in the business of boarding animals has a lien on the animals boarded for reasonable charges for such boarding which are contracted for with an owner or legal possessor of the animal. This lien shall have priority over perfected and unperfected security interests.

(d) Any person who repairs, services, tows, or stores motor vehicles in the ordinary course of his business pursuant to an express or implied contract with an owner or legal possessor of the motor vehicle has a lien upon the motor vehicle for reasonable charges for such repairs, servicing, towing, or storing. This lien shall have priority over perfected and unperfected security interests.

(e) Any lessor of nonresidential demised premises has a lien on all furniture, furnishings, trade fixtures, equipment and other personal property to which the tenant has legal title and which remains on the demised premises if (i) the tenant has vacated the premises for 21 or more days after the paid rental period has expired, and (ii) the lessor has a lawful claim for damages against the tenant. If the tenant has vacated the premises for 21 or more days after the expiration of the paid rental period, or if the lessor has received a judgment for possession of the premises which is executable and the tenant has vacated the premises, then all property remaining on the premises may be removed and placed in storage. If the total value of all property remaining on the premises is less than one hundred dollars ($100.00), then it shall be deemed abandoned five days after the tenant has vacated the premises, and the lessor may remove it and may donate it to any charitable institution or organization. Provided, the lessor shall not have a lien if there is an agreement between the lessor or his agent and the tenant that the lessor shall not have a lien. This lien shall be for the amount of any rents which were due the lessor at the time the tenant vacated the premises and for the time, up to 60 days, from the vacating of the premises to the date of sale; and for any sums necessary to repair damages to the premises caused by the tenant, normal wear and tear excepted; and for reasonable costs and expenses of sale. The lien created by this subsection shall be enforced by sale at public sale pursuant to the provisions of G.S. 44A-4(e). This lien shall not have priority over any security interest in the property which is perfected at the time the lessor acquires this lien.

(e1) This Article shall not apply to liens created by storage of personal property at a self-service storage facility.

(e2) Any lessor of a space for a manufactured home as defined in G.S. 143-143.9(6) has a lien on all furniture, furnishings, and other personal property including the manufactured home titled in the name of the tenant if (i) the manufactured home remains on the demised premises 21 days after the lessor is placed in lawful possession by writ of possession and (ii) the lessor has a lawful claim for damages against the tenant. If the lessor has received a judgment for possession of the premises which has been executed, then all property remaining on the premises may be removed and placed in storage. Prior to the expiration of the 21-day period, the landlord shall release possession of the personal property and manufactured home to the tenant during regular business hours or at a time mutually agreed upon. This lien shall be for the amount of any rents which were due the lessor at the time the tenant vacated the premises and for the time, up to 60 days, from the vacating of the premises to the date of sale; and for any sums necessary to repair damages to the premises caused by the tenant, normal wear and tear excepted; and for reasonable costs and expenses of the sale. The lien created by this subsection shall be enforced by public sale under G.S. 44A-4(e). The landlord may begin the advertisement for sale process immediately upon execution of the writ of possession by the sheriff, but may not conduct the sale until the lien has attached. This lien shall not have any priority over any security interest in the property that is perfected at the time the lessor acquires this lien. The lessor shall not have a lien under this subsection if there is an agreement between the lessor or the lessor's agent and the tenant that the lessor shall not have a lien.

(f) Any person who improves any textile goods in the ordinary course of his business pursuant to an express or implied contract with the owner or legal possessor of such goods shall have a lien upon all goods of such owner or possessor in his possession for improvement. The amount of such lien shall be for the entire unpaid contracted charges owed such person for improvement of said goods including any amount owed for improvement of goods, the possession of which may have been relinquished, and such lien shall have priority over perfected and unperfected security interests. "Goods" as used herein includes any textile goods, yarns or products of natural or man-made fibers or combination thereof. "Improve" as

used herein shall be construed to include processing, fabricating or treating by throwing, spinning, knitting, dyeing, finishing, fabricating or otherwise.

§ 44A-4. Enforcement of lien by sale.--(a) Enforcement by Sale.--If the charges for which the lien is claimed under this Article remain unpaid or unsatisfied for 30 days or, in the case of towing and storage charges on a motor vehicle, 10 days following the maturity of the obligation to pay any such charges, the lienor may enforce the lien by public or private sale as provided in this section. The lienor may bring an action on the debt in any court of competent jurisdiction at any time following maturity of the obligation. Failure of the lienor to bring such action within a 180-day period following the commencement of storage shall constitute a waiver of any right to collect storage charges which accrue after such period. Provided that when property is placed in storage pursuant to an express contract of storage, the lien shall continue and the lienor may bring an action to collect storage charges and enforce his lien at any time within 120 days following default on the obligation to pay storage charges.

The owner or person with whom the lienor dealt may at any time following the maturity of the obligation bring an action in any court of competent jurisdiction as by law provided. If in any such action the owner or other party requests immediate possession of the property and pays the amount of the lien asserted into the clerk of the court in which such action is pending, the clerk shall issue an order to the lienor to relinquish possession of the property to the owner or other party. The request for immediate possession may be made in the complaint, which shall also set forth the amount of the asserted lien and the portion thereof which is not in dispute, if any. If within three days after service of the summons and complaint, as the number of days is computed in G.S. 1A-1, Rule 6, the lienor does not file a contrary statement of the amount of the lien at the time of the filing of the complaint, the amount set forth in the complaint shall be deemed to be the amount of the asserted lien. The clerk may at any time disburse to the lienor that portion of the cash bond, which the plaintiff says in his complaint is not in dispute, upon application of the lienor. The magistrate or judge shall direct appropriate disbursement of the disputed or undisbursed portion of the bond in the judgment of the court. In the event an action by the owner pursuant to this section is heard in district or superior court, the substantially prevailing party in such court may be awarded a reasonable attorney's fee in the discretion of the judge.

(b) Notice and Hearings.--

(1) If the property upon which the lien is claimed is a motor vehicle that is required to be registered, the lienor following the expiration of the relevant time period provided by subsection (a) shall give notice to the Division of Motor Vehicles that a lien is asserted and sale is proposed and shall remit to the Division a fee of ten dollars ($10.00). The Division of Motor Vehicles shall issue notice by registered or certified mail, return receipt requested, to the person having legal title to the property, if reasonably ascertainable, to the person with whom the lienor dealt if different, and to each secured party and other person claiming an interest in the property who is actually known to the Division or who can be reasonably ascertained. The notice shall state that a lien has been asserted against specific property and shall identify the lienor, the date that the lien arose, the general nature of the services performed and materials used or sold for which the lien is asserted, the amount of the lien, and that the lienor intends to sell the property in satisfaction of the lien. The notice shall inform the recipient that the recipient has the right to a judicial hearing at which time a determination will be made as to the validity of the lien prior to a sale taking place. The notice shall further state that the recipient has a period of 10 days from the date of receipt in which to notify the Division by registered or certified mail, return receipt requested, that a hearing is desired and that if the recipient wishes to contest the sale of his property pursuant to such lien, the recipient should notify the Division that a hearing is desired. The notice shall state the required information in simplified terms and shall contain a form whereby the recipient may notify the Division that a hearing is desired by the return of such form to the Division. The Division shall notify the lienor whether such notice is timely received by the Division. In lieu of the notice by the lienor to the Division and the notices issued by the Division described above, the lienor may issue notice on a form approved by the Division pursuant to the

notice requirements above. If notice is issued by the lienor, the recipient shall return the form requesting a hearing to the lienor, and not the Division, within 10 days from the date the recipient receives the notice if a judicial hearing is requested. If the registered or certified mail notice has been returned as undeliverable and the notice of a right to a judicial hearing has been given to the owner of the motor vehicle in accordance with G.S. 20-28.4, no further notice is required. Failure of the recipient to notify the Division or lienor, as specified in the notice, within 10 days of the receipt of such notice that a hearing is desired shall be deemed a waiver of the right to a hearing prior to the sale of the property against which the lien is asserted, and the lienor may proceed to enforce the lien by public or private sale as provided in this section and the Division shall transfer title to the property pursuant to such sale. If the Division or lienor, as specified in the notice, is notified within the 10-day period provided above that a hearing is desired prior to sale, the lien may be enforced by sale as provided in this section and the Division will transfer title only pursuant to the order of a court of competent jurisdiction.

If the registered or certified mail notice has been returned as undeliverable, or if the name of the person having legal title to the vehicle cannot reasonably be ascertained and the fair market value of the vehicle is less than eight hundred dollars ($800.00), the lienor may institute a special proceeding in the county where the vehicle is being held, for authorization to sell that vehicle. Market value shall be determined by the schedule of values adopted by the Commissioner under G.S. 105-187.3.

In such a proceeding a lienor may include more than one vehicle, but the proceeds of the sale of each shall be subject only to valid claims against that vehicle, and any excess proceeds of the sale shall be paid immediately to the Treasurer for disposition pursuant to Chapter 116B of the General Statutes.

The application to the clerk in such a special proceeding shall contain the notice of sale information set out in subsection (f) hereof. If the application is in proper form the clerk shall enter an order authorizing the sale on a date not less than 14 days therefrom, and the lienor shall cause the application and order to be sent immediately by first-class mail pursuant to G.S. 1A-1, Rule 5, to each person to whom notice was mailed pursuant to this subsection. Following the authorized sale the lienor shall file with the clerk a report in the form of an affidavit, stating that the lienor has complied with the public or private sale provisions of G.S. 44A-4, the name, address, and bid of the high bidder or person buying at a private sale, and a statement of the disposition of the sale proceeds. The clerk then shall enter an order directing the Division to transfer title accordingly.

If prior to the sale the owner or legal possessor contests the sale or lien in a writing filed with the clerk, the proceeding shall be handled in accordance with G.S. 1-301.2.

(2) If the property upon which the lien is claimed is other than a motor vehicle required to be registered, the lienor following the expiration of the 30-day period provided by subsection (a) shall issue notice to the person having legal title to the property, if reasonably ascertainable, and to the person with whom the lienor dealt if different by registered or certified mail, return receipt requested. Such notice shall state that a lien has been asserted against specific property and shall identify the lienor, the date that the lien arose, the general nature of the services performed and materials used or sold for which the lien is asserted, the amount of the lien, and that the lienor intends to sell the property in satisfaction of the lien. The notice shall inform the recipient that the recipient has the right to a judicial hearing at which time a determination will be made as to the validity of the lien prior to a sale taking place. The notice shall further state that the recipient has a period of 10 days from the date of receipt in which to

notify the lienor by registered or certified mail, return receipt requested, that a hearing is desired and that if the recipient wishes to contest the sale of his property pursuant to such lien, the recipient should notify the lienor that a hearing is desired. The notice shall state the required information in simplified terms and shall contain a form whereby the recipient may notify the lienor that a hearing is desired by the return of such form to the lienor. Failure of the recipient to notify the lienor within 10 days of the receipt of such notice that a hearing is desired shall be deemed a waiver of the right to a hearing prior to sale of the property against which the lien is asserted and the lienor may proceed to enforce the lien by public or private sale as provided in this section. If the lienor is notified within the 10-day period provided above that a hearing is desired prior to sale, the lien may be enforced by sale as provided in this section only pursuant to the order of a court of competent jurisdiction.

(c) Private Sale.--Sale by private sale may be made in any manner that is commercially reasonable. If the property upon which the lien is claimed is a motor vehicle, the sale may not be made until notice is given to the Commissioner of Motor Vehicles pursuant to G.S. 20-114(c). Not less than 30 days prior to the date of the proposed private sale, the lienor shall cause notice to be mailed, as provided in subsection (f) hereof, to the person having legal title to the property, if reasonably ascertainable, to the person with whom the lienor dealt if different, and to each secured party or other person claiming an interest in the property who is actually known to the lienor or can be reasonably ascertained. Notices provided pursuant to subsection (b) hereof shall be sufficient for these purposes if such notices contain the information required by subsection (f) hereof. The lienor shall not purchase, directly or indirectly, the property at private sale and such a sale to the lienor shall be voidable.

(d) Request for Public Sale.--If an owner, the person with whom the lienor dealt, any secured party, or other person claiming an interest in the property notifies the lienor prior to the date upon or after which the sale by private sale is proposed to be made, that public sale is requested, sale by private sale shall not be made. After request for public sale is received, notice of public sale must be given as if no notice of sale by private sale had been given.

(e) Public Sale.--

(1) Not less than 20 days prior to sale by public sale the lienor:

a. Shall notify the Commissioner of Motor Vehicles as provided in G.S. 20-114(c) if the property upon which the lien is claimed is a motor vehicle; and

a1. Shall cause notice to be mailed to the person having legal title to the property if reasonably ascertainable, to the person with whom the lienor dealt if different, and to each secured party or other person claiming an interest in the property who is actually known to the lienor or can be reasonably ascertained, provided that notices provided pursuant to subsection (b) hereof shall be sufficient for these purposes if such notices contain the information required by subsection (f) hereof; and

b. Shall advertise the sale by posting a copy of the notice of sale at the courthouse door in the county where the sale is to be held; and shall publish notice of sale once a week for two consecutive weeks in a newspaper of general circulation in the same county, the date of the last publication being not less than five days prior to the sale. The notice of sale need not be published if the vehicle has a market value of less than three thousand five hundred dollars ($3,500), as determined by the schedule of values adopted by the Commissioner under G.S. 105-187.3.

(2) A public sale must be held on a day other than Sunday and between the hours of 10:00 A.M. and 4:00 P.M.:

a. In any county where any part of the contract giving rise to the lien was performed, or

b. In the county where the obligation secured by the lien was contracted for.

(3) A lienor may purchase at public sale.

(f) Notice of Sale.--The notice of sale shall include:

(1) The name and address of the lienor;

(2) The name of the person having legal title to the property if such person can be reasonably ascertained and the name of the person with whom the lienor dealt;
(3) A description of the property;
(4) The amount due for which the lien is claimed;
(5) The place of the sale;
(6) If a private sale the date upon or after which the sale is proposed to be made, or if a public sale the date and hour when the sale is to be held.

(g) Damages for Noncompliance.--If the lienor fails to comply substantially with any of the provisions of this section, the lienor shall be liable to the person having legal title to the property or any other party injured by such noncompliance in the sum of one hundred dollars ($100.00), together with a reasonable attorney's fee as awarded by the court. Damages provided by this section shall be in addition to actual damages to which any party is otherwise entitled.

§ 44A-5. Proceeds of sale. The proceeds of the sale shall be applied as follows:
(1) Payment of reasonable expenses incurred in connection with the sale. Expenses of sale include but are not limited to reasonable storage and boarding expenses after giving notice of sale.
(2) Payment of the obligation secured by the lien.
(3) Any surplus shall be paid to the person entitled thereto; but when such person cannot be found, the surplus shall be paid to the clerk of superior court of the county in which the sale took place, to be held by the clerk for the person entitled thereto.

§ 44A-6. Title of purchaser. A purchaser for value at a properly conducted sale, and a purchaser for value without constructive notice of a defect in the sale who is not the lienor or an agent of the lienor, acquires title to the property free of any interests over which the lienor was entitled to priority.

§ 44A-6.1. Action to regain possession of a motor vehicle or vessel.

(a) When the lienor involuntarily relinquishes possession of the property and the property upon which the lien is claimed is a motor vehicle or vessel, the lienor may institute an action to regain possession of the motor vehicle or vessel in small claims court any time following the lienor's involuntary loss of possession and following maturity of the obligation to pay charges. The lienor shall serve a copy of the summons and the complaint pursuant to G.S. 1A-1, Rule 4, on each secured party claiming an interest in the vehicle or vessel. For purposes of this section, involuntary relinquishment of possession includes only those situations where the owner or other party takes possession of the motor vehicle or vessel without the lienor's permission or without judicial process. If in the court action the owner or other party retains possession of the motor vehicle or vessel, the owner or other party shall pay the amount of the lien asserted as bond into the clerk of the court in which the action is pending.

If within three days after service of the summons and complaint, as the number of days is computed in G.S. 1A-1, Rule 6, neither the defendant nor a secured party claiming an interest in the vehicle or vessel files a contrary statement of the amount of the lien at the time of the filing of the complaint, the amount set forth in the complaint shall be deemed to be the amount of the asserted lien. The clerk may at any time disburse to the lienor that portion of the cash bond which is not in dispute, upon application of the lienor. The magistrate shall:
(1) Direct appropriate disbursement of the disputed or undisbursed portion of the bond; and
(2) Direct appropriate possession of the motor vehicle or vessel if, in the judgement of the court, the plaintiff has a valid right to a lien.
(b) Either party to an action pursuant to subsection (a) of this section may appeal to district court for a trial de novo.

CHAPTER 53. BANKS.
ARTICLE 15. NORTH CAROLINA CONSUMER FINANCE ACT.

§ 53-166. Scope of Article; evasions; penalties; loans in violation of Article void. (a) Scope.--No person shall engage in the business of lending in amounts of ten thousand dollars ($10,000) or less and contract for, exact, or receive, directly or indirectly, on or in connection with any such loan, any charges whether for interest, compensation, consideration, or expense, or any other purpose whatsoever, which in the aggregate are greater than permitted by Chapter 24, except as provided in and authorized by this Article, and without first having obtained a license from the Commissioner: Provided further, no person shall in the course of any business service individually or in conjunction or cooperation with any bank or other lender process or accept for delivery to any bank or other lender any loan application, or receive or accept for delivery any loan proceed checks or in any manner facilitate the extension of credit the purpose of which is to fund a loan in anticipation of any sums of money due by reason of a tax refund without first having obtained a license from the Commissioner. The word "lending" as used in this section, shall include, but shall not be limited to, endorsing or otherwise securing loans or contracts for the repayment of loans.

(b) Evasions.--The provisions of subsection (a) of this section shall apply to any person who seeks to avoid its application by any device, subterfuge or pretense whatsoever.

(c) Penalties; Commissioner to Provide and Testify as to Facts in His Possession.--Any person not exempt from this Article, or any officer, agent, employee or representative thereof, who fails to comply with or who otherwise violates any of the provisions of this Article, or any regulation of the Banking Commission adopted pursuant to this Article, shall be guilty of a Class1 misdemeanor. Each such violation shall be considered a separate offense. It shall be the duty of the Commissioner of Banks to provide the district attorney of the court having jurisdiction of any such offense with all facts and evidence in his actual or constructive possession, and to testify as to such facts upon the trial of any person for any such offense.

(d) Additional Penalties.--Any contract of loan, the making or collecting of which violates any provision of this Article, or regulation thereunder, except as a result of accidental or bona fide error of computation shall be void and the licensee or any other party in violation shall have no right to collect, receive or retain any principal or charges whatsoever with respect to such loan. If an affiliate operating in the same office or subsidiary operating in the same office of a licensee makes a loan in violation of G.S. 53-180(i) such affiliate or subsidiary may recover only its principal on such loan.

§ 53-180. Limitations and prohibitions on practices and agreements. (a) Time and Payment Limitation.--Except as otherwise provided in this Article, no licensee making a loan pursuant to G.S. 53-173 shall enter into any contract of loan under this Article providing for any scheduled repayment of principal more than 25 months from the date of making the contract if the cash advance is six hundred dollars ($600.00) or less; more than 37 months from the date of making the contract if the cash advance is in excess of six hundred dollars ($600.00) but not in excess of fifteen hundred dollars ($1,500); more than 49 months from the date of making the contract if the cash advance is in excess of fifteen hundred dollars ($1,500) but not in excess of two thousand five hundred dollars ($2,500); or more than 61 months if the cash advance is in excess of two thousand five hundred dollars ($2,500). Every loan contract shall provide for repayment of the amount loaned in substantially equal installments, either of principal or of principal and charges in the aggregate, at approximately equal periodic intervals of time. Nothing contained herein shall prevent a loan being considered a new loan because the proceeds of the loan are used to pay an existing contract.

(b) No Assignment of Earnings.--A licensee may not take an assignment of earnings of the borrower for payment or as security for payment of a loan. An assignment of earnings in violation of this section is unenforceable by the assignee of the earnings and is revocable by the borrower. A sale of unpaid earnings made in consideration of the payment of money to or for the account of the seller of the earnings is deemed to be a loan to the seller by an assignment of earnings.

(c) Limitation on Default Provisions.--An agreement between a licensee and a borrower pursuant to a loan under this Article with respect to default by the borrower is enforceable only to the extent that (i) the borrower fails to make a payment as required by the agreement, or (ii) the prospect of payment,

performance, or realization of collateral is significantly endangered or impaired, the burden of establishing the prospect of a significant endangerment or impairment being on the licensee.

(d) Prohibitions on Discrimination.--No licensee shall deny any extension of credit or discriminate in the fixing of the amount, duration, application procedures or other terms or conditions of such extension of credit because of the race, color, religion, national origin, sex or marital status of the applicant or any other person connected with the transaction.

(e) Limitation on Attorney's Fees.--With respect to a loan made pursuant to the provisions of G.S. 53-173, the agreement may not provide for payment by the borrower of attorney fees.

(f) No Real Property as Security.--No licensee shall make any loan within this State which shall in any way be secured by real property.

(g) Deceptive Acts or Practices.--No licensee shall engage in any unfair method of competition or unfair or deceptive trade practices in the conduct of making loans to borrowers pursuant to this Article or in collecting or attempting to collect any money alleged to be due and owing by a borrower.

(h) Limitations on Home Loans.--No affiliate operating in the same office or subsidiary operating in the same office of a licensee shall make any home loan as defined in G.S. 24-1.1A(e) in a principal amount of less than three thousand dollars ($3,000).

(i) Limitation on Conditions to Making Loans.--A licensee or an affiliate operating in the same office or subsidiary operating in the same office of a licensee shall not make as a condition of any loan the refinancing of a borrower's home loan as defined in G.S. 24-1.1A(e) which is not currently in default.

(j) No Solicitation of Deposits.--No licensee may directly or indirectly solicit from any borrower funds to be held on deposit in any bank; provided, however, a borrower may at his option, by way of a military allotment or other such program, designate a depository to receive and disburse funds for a designated purpose.

CHAPTER 62. PUBLIC UTILITIES
ARTICLE 6.THE UTILITY FRANCHISE.

§ 62-110. Certificate of convenience and necessity.

(g) In addition to the authority to issue a certificate of public convenience and necessity and establish rates otherwise granted in this Chapter, for the purpose of encouraging water conservation, the Commission may, consistent with the public interest, adopt procedures that allow a lessor to charge for the costs of providing water or sewer service to persons who occupy the same contiguous premises. The following provisions shall apply:

(1) All charges for water or sewer service shall be based on the user's metered consumption of water, which shall be determined by metered measurement of all water consumed and not by any partial measurement of water consumption, unless specifically authorized by the Commission. The rate charged by the lessor shall not exceed the unit consumption rate charged by the supplier of the service.
(2) The lessor may charge a reasonable administrative fee for providing water or sewer service not to exceed the maximum administrative fee authorized by the Commission.
(3) The Commission shall issue rules to define contiguous premises and to implement this subsection. In issuing the rule to define contiguous premises, the Commission shall consider contiguous premises where manufactured homes, as defined in G.S. 143-145(7), or spaces for manufactured homes are rented.
(4) The Commission shall develop an application that lessors must submit for authority to charge for water or sewer service. The form shall include all of the following:
    a. A description of the applicant and the property to be served.
    b. A description of the proposed billing method and billing statements.
    c. The schedule of rates charged to the applicant by the supplier.
    d. The schedule of rates the applicant proposes to charge the applicant's customers.

e. The administrative fee proposed to be charged by the applicant.
f. The name of and contact information for the applicant and its agents.
g. The name of and contact information for the supplying water or sewer system.
h. Any additional information that the Commission may require.

(5) The Commission shall approve or disapprove an application within 30 days of the filing of a completed application with the Commission. If the Commission has not issued an order disapproving a completed application within 30 days, the application shall be deemed approved.

(6) A provider of water or sewer service under this subsection may increase the rate for service so long as the rate does not exceed the unit consumption rate charged by the supplier of the service. A provider of water or sewer service under this subsection may change the administrative fee so long as the administrative fee does not exceed the maximum administrative fee authorized by the Commission. In order to change the rate or administrative fee, the provider shall file a notice of revised schedule of rates and fees with the Commission. The Commission may prescribe the form by which the provider files a notice of a revised schedule of rates and fees under this subsection. The form shall include all of the following:
a. The current schedule of the unit consumption rates charged by the provider.
b. The schedule of rates charged by the supplier to the provider that the provider proposes to pass through to the provider's customers.
c. The schedule of the unit consumption rates proposed to be charged by the provider.
d. The current administrative fee charged by the provider, if applicable.
e. The administrative fee proposed to be charged by the provider.

(7) A notification of revised schedule of rates and fees shall be presumed valid and shall be allowed to become effective upon 14 days notice to the Commission, unless otherwise suspended or disapproved by order issued within 14 days after filing.

(8) Notwithstanding any other provision of this Chapter, the Commission shall determine the extent to which the services shall be regulated and, to the extent necessary to protect the public interest, regulate the terms, conditions, and rates that may be charged for the services. Nothing in this subsection shall be construed to alter the rights, obligations, or remedies of persons providing water or sewer services and their customers under any other provision of law.

(9) A provider of water or sewer service under this subsection shall not be required to file annual reports pursuant to G.S. 62-36 or to furnish a bond pursuant to G.S. 62-110.3.

CHAPTER 67. DOGS
ARTICLE 1A. DANGEROUS DOGS

§ 67-4.1. Definitions and procedures.

(a) As used in this Article, unless the context clearly requires otherwise and except as modified in subsection (b) of this section, the term:

(1) "Dangerous dog" means
a. A dog that:
1. Without provocation has killed or inflicted severe injury on a person; or
2. Is determined by the person or Board designated by the county or municipal authority responsible for animal control to be potentially dangerous because the dog has engaged in

one or more of the behaviors listed in subdivision (2) of this subsection.

b. Any dog owned or harbored primarily or in part for the purpose of dog fighting, or any dog trained for dog fighting.

(2) "Potentially dangerous dog" means a dog that the person or Board designated by the county or municipal authority responsible for animal control determines to have:

a. Inflicted a bite on a person that resulted in broken bones or disfiguring lacerations or required cosmetic surgery or hospitalization; or

b. Killed or inflicted severe injury upon a domestic animal when not on the owner's real property; or

c. Approached a person when not on the owner's property in a vicious or terrorizing manner in an apparent attitude of attack.

(3) "Owner" means any person or legal entity that has a possessory property right in a dog.

(4) "Owner's real property" means any real property owned or leased by the owner of the dog, but does not include any public right-of-way or a common area of a condominium, apartment complex, or townhouse development.

(5) "Severe injury" means any physical injury that results in broken bones or disfiguring lacerations or required cosmetic surgery or hospitalization.

(b) The provisions of this Article do not apply to:

(1) A dog being used by a law enforcement officer to carry out the law enforcement officer's official duties;

(2) A dog being used in a lawful hunt;

(3) A dog where the injury or damage inflicted by the dog was sustained by a domestic animal while the dog was working as a hunting dog, herding dog, or predator control dog on the property of, or under the control of, its owner or keeper, and the damage or injury was to a species or type of domestic animal appropriate to the work of the dog; or

(4) A dog where the injury inflicted by the dog was sustained by a person who, at the time of the injury, was committing a willful trespass or other tort, was tormenting, abusing, or assaulting the dog, had tormented, abused, or assaulted the dog, or was committing or attempting to commit a crime.

(c) The county or municipal authority responsible for animal control shall designate a person or a Board to be responsible for determining when a dog is a "potentially dangerous dog" and shall designate a separate Board to hear any appeal. The person or Board making the determination that a dog is a "potentially dangerous dog" must notify the owner in writing, giving the reasons for the determination, before the dog may be considered potentially dangerous under this Article. The owner may appeal the determination by filing written objections with the appellate Board within three days. The appellate Board shall schedule a hearing within 10 days of the filing of the objections. Any appeal from the final decision of such appellate Board shall be taken to the superior court by filing notice of appeal and a petition for review within 10 days of the final decision of the appellate Board. Appeals from rulings of the appellate Board shall be heard in the superior court division. The appeal shall be heard de novo before a superior court judge sitting in the county in which the appellate Board whose ruling is being appealed is located. (1989 (Reg. Sess., 1990), c. 1023, s. 1.)

§ 67-4.2. Precautions against attacks by dangerous dogs.

(a) It is unlawful for an owner to:

(1) Leave a dangerous dog unattended on the owner's real property unless the dog is confined indoors, in a securely enclosed and locked pen, or in another structure designed to restrain the dog;

(2) Permit a dangerous dog to go beyond the owner's real property unless the dog is leashed and muzzled or is otherwise securely restrained and muzzled.

(b) If the owner of a dangerous dog transfers ownership or possession of the dog to another person (as defined in G.S. 12-3(6)), the owner shall provide written notice to:

(1) The authority that made the determination under this Article, stating the name and address of the new owner or possessor of the dog; and

(2) The person taking ownership or possession of the dog, specifying the dog's dangerous behavior and the authority's determination.

(c) Violation of this section is a Class 3 misdemeanor. (1989 (Reg. Sess., 1990), c. 1023, s. 1; 1993, c. 539, s. 532; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 67-4.3. Penalty for attacks by dangerous dogs.

The owner of a dangerous dog that attacks a person and causes physical injuries requiring medical treatment in excess of one hundred dollars ($100.00) shall be guilty of a Class 1 misdemeanor. (1989 (Reg. Sess., 1990), c. 1023, s. 1; 1993, c. 539, s. 533; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 67-4.4. Strict liability.

The owner of a dangerous dog shall be strictly liable in civil damages for any injuries or property damage the dog inflicts upon a person, his property, or another animal. (1989 (Reg. Sess., 1990), c. 1023, s. 1.)

§ 67-4.5. Local ordinances.

Nothing in this Article shall be construed to prevent a city or county from adopting or enforcing its own program for control of dangerous dogs. (1989 (Reg. Sess., 1990), c. 1023, s. 1.)

§ 67-12. Permitting dogs to run at large at night; penalty; liability for damage.

No person shall allow his dog over six months old to run at large in the nighttime unaccompanied by the owner or by some member of the owner's family, or some other person by the owner's permission. Any person intentionally, knowingly, and willfully violating this section shall be guilty of a Class 3 misdemeanor, and shall also be liable in damages to any person injured or suffering loss to his property or chattels. (1919, c. 116, s. 5; C.S., s. 1680; 1993, c. 539, s. 534; 1994, Ex. Sess., c. 24, s. 14(c).)

FEDERAL REGULATIONS ON SECURITY INTERESTS IN HOUSEHOLD GOODS
Title 16. CHAPTER I SUBCHAPTER D PART 444

§ 444.1 Definitions.

(a) Lender. A person who engages in the business of lending money to consumers within the jurisdiction of the Federal Trade Commission.

(b) Retail installment seller. A person who sells goods or services to consumers on a deferred payment basis or pursuant to a lease-purchase arrangement within the jurisdiction of the Federal Trade Commission.

(c) Person. An individual, corporation, or other business organization.

(d) Consumer. A natural person who seeks or acquires goods, services, or money for personal, family, or household use.

(e) Obligation. An agreement between a consumer and a lender or retail installment seller.

(f) Creditor. A lender or a retail installment seller.

(g) Debt. Money that is due or alleged to be due from one to another.

(h) Earnings. Compensation paid or payable to an individual or for his or her account for personal services rendered or to be rendered by him or her, whether denominated as wages, salary, commission, bonus, or otherwise, including periodic payments pursuant to a pension, retirement, or disability program.

(i) Household goods. Clothing, furniture, appliances, one radio and one television, linens, china, crockery, kitchenware, and personal effects (including wedding rings) of the consumer and his or her dependents, provided that the following are not included within the scope of the term 'household goods':

(1) Works of art;

(2) Electronic entertainment equipment (except one television and one radio);

(3) Items acquired as antiques; and

(4) Jewelry (except wedding rings).

(j) Antique. Any item over one hundred years of age, including such items that have been repaired or renovated without changing their original form or character.

(k) Cosigner. A natural person who renders himself or herself liable for the obligation of another person without compensation. The term shall include any person whose signature is requested as a condition to granting credit to another person, or as a condition for forbearance on collection of another person's obligation that is in default. The term shall not include a spouse whose signature is required on a credit obligation to perfect a security interest pursuant to State law. A person who does not receive goods, services, or money in return for a credit obligation does not receive compensation within the meaning of this definition. A person is a cosigner within the meaning of this definition whether or not he or she is designated as such on a credit obligation.

§.444.2 Unfair credit practices.

(a) In connection with the extension of credit to consumers in or affecting commerce, as commerce is defined in the Federal Trade Commission Act, it is an unfair act or practice within the meaning of Section 5 of that Act for a lender or retail installment seller directly or indirectly to take or receive from a consumer an obligation that:

(1) Constitutes or contains a cognovit or confession of judgment (for purposes other than executory process in the State of Louisiana), warrant of attorney, or other waiver of the right to notice and the opportunity to be heard in the event of suit or process thereon.

(2) Constitutes or contains an executory waiver or a limitation of exemption from attachment, execution, or other process on real or personal property held, owned by, or due to the consumer, unless the waiver applies solely to property subject to a security interest executed in connection with the obligation.

(3) Constitutes or contains an assignment of wages or other earnings unless:

(i) The assignment by its terms is revocable at the will of the debtor, or

(ii) The assignment is a payroll deduction plan or preauthorized payment plan, commencing at the time of the transaction, in which the consumer authorizes a series of wage deductions as a method of making each payment, or

(iii) The assignment applies only to wages or other earnings already earned at the time of the assignment.

(4) Constitutes or contains a nonpossessory security interest in household goods other than a purchase money security interest.

§ 444.3. Unfair or deceptive cosigner practices.

(a) In connection with the extension of credit to consumers in or affecting commerce, as commerce is defined in the Federal Trade Commission Act, it is:

(1) A deceptive act or practice within the meaning of section 5 of that Act for a lender or retail installment seller, directly or indirectly, to misrepresent the nature or extent of cosigner liability to any person.

(2) An unfair act or practice within the meaning of section 5 of that Act for a lender or retail installment seller, directly or indirectly, to obligate a cosigner unless the cosigner is informed prior to becoming obligated, which in the case of open end credit shall mean prior to the time that the agreement creating the cosigner's liability for future charges is executed, of the nature of his or her liability as cosigner.

(b) Any lender or retail installment seller who complies with the preventive requirements in paragraph (c) of this section does not violate paragraph (a) of this section.

(c) To prevent these unfair or deceptive acts or practices, a disclosure, consisting of a separate document that shall contain the following statement and no other, shall be given to the cosigner prior to becoming obligated, which in the case of open end credit shall mean prior to the time that the agreement creating the cosigner's liability for future charges is executed:

NOTICE TO COSIGNER

You are being asked to guarantee this debt. Think carefully before you do. If the borrower doesn't pay the debt, you will have to. Be sure you can afford to pay if you have to, and that you want to accept this responsibility.

You may have to pay up to the full amount of the debt if the borrower does not pay. You may also have to pay late fees or collection costs, which increase this amount. The creditor can collect this debt from you without first trying to collect from the borrower. The creditor can use the same collection methods against you that can be used against the borrower, such as suing you, garnishing your wages, etc. If this debt is ever in default, that fact may become a part of your credit record.

This notice is not the contract that makes you liable for the debt.

§ 444.4 Late charges.

(a) In connection with collecting a debt arising out of an extension of credit to a consumer in or affecting commerce, as commerce is defined in the Federal Trade Commission Act, it is an unfair act or practice within the meaning of section 5 of that Act for a creditor, directly or indirectly, to levy or collect any deliquency charge on a payment, which payment is otherwise a full payment for the applicable period and is paid on its due date or within an applicable grace period, when the only delinquency is attributable to late fee(s) or delinquency charge(s) assessed on earlier installment(s).

(b) For purposes of this section, 'collecting a debt' means any activity other than the use of judicial process that is intended to bring about or does bring about repayment of all or part of a consumer debt.

§ 444.5 State exemptions.

(a) If, upon application to the Federal Trade Commission by an appropriate State agency, the Federal Trade Commission determines that:

(1) There is a State requirement or prohibition in effect that applies to any transaction to which a provision of this rule applies; and

(2) The State requirement or prohibition affords a level of protection to consumers that is substantially equivalent to, or greater than, the protection afforded by this rule;

Then that provision of the rule will not be in effect in that State to the extent specified by the Federal Trade Commission in its determination, for as long as the State administers and enforces the State requirement or prohibition effectively.

Tab:

Guide to Small Claims

Legal Aid of North Carolina, 224 S Dawson St, Raleigh NC 27601; 919.856.2564

A Guide to Small Claims Court

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INTRODUCTION

Anyone 18 or over has the right to start a lawsuit in the North Carolina court system. If the lawsuit is for a claim of $5,000 or less, it can be brought into Small Claims Court, which is available in every county. A person usually does not need a lawyer in Small Claims Court, whether that person is bringing the suit or defending against the suit. In some cases, though, you might need a lawyer, especially involving possible eviction by a landlord.

This booklet is a guide to help you handle your own case in Small Claims Court. It tells you how to fill out the right forms, prepare for trial, handle the trial, and follow through on the judge's decision. This booklet discusses the main situations that arise. An appendix at the end includes more details on certain issues, including where to go for more help.

Legal Aid of North Carolina, Inc. has prepared this booklet as a public service. Legal Aid of North Carolina is a statewide, nonprofit law firm that provides free legal services in civil matters to low-income people in North Carolina, so that they will have equal access to justice and to economic opportunity. However, there still is not enough funding to provide legal services for all the needs of poor people in North Carolina. Hopefully this booklet can help some of those seeking Legal Aid of North Carolina to help themselves.

For more information, please contact the Legal Aid of North Carolina office in your area [Click here to view list of offices.].

This booklet applies to statutes and forms current as of September 2005. Since laws apply differently in different situations and may change from time to time, you should consult a lawyer for special advice on your case. Some counties may still be using old forms, which differ from some of the ones in this booklet; or may be using an earlier version of this booklet.

This booklet should be available in every county, at the office of the Clerk of Superior Court. Be aware, however, that the people who work in these offices cannot help you fill out any forms or give any legal advice. It is against the law for them to do this.

We appreciate the help of the following attorneys, all familiar with Small Claims Court: Rob Schofield and Bill Rowe of the NC Justice & Community Development Center, and Celia Pistols of Legal Aid of North Carolina. They reviewed this version of the booklet to assure publication of the most current information.

Special thanks go to the Administrative Office of the Courts and its director, whose support made possible the distribution of this booklet to the offices of the Clerk of Superior Court throughout the state.

William Finger, former Legal Services of NC Public Affairs Coordinator, and Carol Spruill, former Legal Services of NC Deputy Director, co-authored the first version of this booklet in 1990. Graphic design by Carol Majors of Publications Unlimited.

Disclaimer

The materials contained on this website are for information and educational purposes only and do not constitute legal advice. Please contact your Legal Aid of North Carolina office or a private attorney if you need to speak to an attorney regarding your particular situation. See our complete disclaimer.

Mission Statement

Legal Aid of North Carolina is a statewide, nonprofit law firm that provides free legal services in civil matters to low-income people in order to ensure equal access to justice and to remove legal barriers to economic opportunity.

Chapter 1 - What is Small Claims Court?

Small Claims Court is part of the North Carolina court system where people settle disputes regarding property or money worth $5,000 or less. Every county in North Carolina has a Small Claims Court, which is sometimes called Magistrate's Court.

The judge, called a magistrate, may or may not be a lawyer. There is no jury. The trial is quick and informal, usually lasting no more than 15 or 30 minutes. You don't have to have a lawyer to represent you in Small Claims Court, but you may have a lawyer. The person who starts the lawsuit is the plaintiff. The person being sued is called the defendant.

In the three (3) cases below, you would be the plaintiff:

1. A repairman came to fix your refrigerator and in the process knocked a hole in your kitchen wall. The repair shop won't pay for the damages, so you sue the shop for your loss
2. Someone dents your car but refuses to pay for the damage, so you sue that person
3. Your landlord refuses to make your home or apartment meet housing codes, and you sue for damages, repairs, or lower rent.

You would be the defendant in these three cases:

1. Your landlord tries to evict you from your apartment and collect back rent.
2. A finance company sues you for money it claims you owe on a loan.
3. A finance company sues you for possession of property, which you pledged as collateral for a loan.

What You Cannot Do in Small Claims Court

This court is not used for criminal offenses, traffic tickets, or disagreements over child support, among other things. You have to be 18 years old to use Small Claims Court. For more information about age and guardian issues, see "Age" in the appendix.

Do You Need a Lawyer?

Before you decide to handle your own case in Small Claims Court, you need to think about whether you need a lawyer. If you are facing eviction by your landlord or being sued by a finance company, you may need a lawyer.

If your income is no more than 125 percent of the poverty level, you may be eligible to get free legal assistance from the Legal Services office nearest you. You may want to call a Legal Aid office to find out if a lawyer can help you with your case.

The Costs of Small Claims Court

Suing someone in Small Claims Court costs money. For each lawsuit, the plaintiff must pay a $75 filing fee to the clerk of court. You pay an additional $15 fee for each defendant to cover the cost of the sheriff getting the proper legal forms to the defendant. The plaintiff can choose to mail the papers directly to the defendant, as explained in Chapter 2 but this is more difficult and not much cheaper. If you win your case, the court may add these fees to the amount that the defendant is supposed to pay you.

If you cannot afford to pay the fees, you may not have to pay them. You have to fill out a form called "Petition to Sue/Appeal as an Indigent" form shown referenced below. You get the form from the clerk. You fill out the top part of this form and sign it before a notary public.

If you receive food stamps, Temporary Assistance to Needy Families (TANF) or Supplemental Social Security (SSI), then the Clerk will automatically allow you to bring the lawsuit without paying any fees. If you do not receive any of those benefits, then the Clerk may ask for additional financial information to determine whether you can afford to pay the costs.

There can be additional fees if you ask the sheriff's department to enforce the judge's order or want to appeal a judge's ruling. These situations are explained in Chapter 6 and Chapter 7.

FORM: Petition to Sue/Appeal as an Indigent

Chapter 2 - If You Are the Plaintiff - How to File Your Claim

To start a lawsuit, you mail or deliver a complaint and a summons to the Office of the Clerk of Superior Court at a county courthouse. This part of the booklet explains where to sue;-which complaint form to use, how to fill in the proper legal forms, how to file the claim, and how to get the forms to the defendant.

Where to Sue

If you are suing someone who lives in your own county, start the lawsuit there. If you are suing someone in a different county, you must start the lawsuit in that county. This means mailing or taking the forms and fees to the clerk of court in the other county.

Your trial will be held in the county where the defendant lives. If you are suing more than one defendant and they live in different counties, pick a county where one of them lives and sue them all in that county. For instance, if one of the defendants lives in your county but another defendant does not, you can sue both defendants in your county.

Choosing A Complaint Form

Before you file your lawsuit, you must fill out a complaint form. The clerk of court has different complaint forms for different kinds of problems. The three most commonly used forms are:

- < Complaint for Money Owed (discussed below)
- < Complaint to Recover Possession of Personal Property
- < Complaint in Summary Ejectment (used by landlords).

If you want to get back some property which is in dispute, you should use the Complaint to Recover Possession of Personal Property. On that form, you as the plaintiff must say if you are a "secured party" or not. A secured party is usually a finance company or other institution of some sort rather than an individual. If you have a written statement that you may repossess property if payments are not made according to an agreed upon schedule, then you are a secured party.

Landlords use the Complaint in Summary Ejectment form to collect back rent or evict tenants. This form is fairly complicated to understand both for landlords (the plaintiffs) and tenants (the defendants).

If none of the standard forms suits your exact situation, you may write your own complaint. Be sure to state what your claim is and include the type of information.

How to Fill Out Complaint for Money Owed FORM

Step 1. If you are filing the suit, put your correct full name as plaintiff, with your address and telephone number, if any. You must include the name of your county.

Step 2. Put the person's full name being sued as defendant, with the address and telephone number, if any, and the county where the person lives.

If you are suing a business, you must find out if it is a corporation or not. If the business is a corporation, you list the correct name of the corporation as the defendant. Your complaint and summons must go to the "registered agent" of the corporation, or to an officer, director, or managing agent of the corporation. If the business is not a corporation, you list the owners of the business as the defendants. For more explanation of businesses as defendants, see the appendix.

Step 3. List the name and address of your attorney, if you have one. If you don't have an attorney, leave this blank.

Step 4. List the county where you are bringing this lawsuit.

Step 5. After "Principal Amount Owed," put the exact amount of money which you claim the defendant owes you. If you are claiming interest on this money, put that amount on the next line. Add the two figures to get the "Total Amount Owed."

Step 6. In the sample complaint form, note the choices of boxes the plaintiff may use. You can check a box and fill in the information on the line next to the box. Or you can check "other" and describe the purpose of your suit.

Step 7. Sign and date the complaint. If you have a lawyer, he or she may sign it.

FORM: Complaint for Money Owed

How to Fill Out The Summons and Assignment Card

You must also fill out a summons, which is available from the clerk's office. This notice of the lawsuit goes to each defendant. See the blank summons on the next page. You fill out the top part of the form. Write the county where you are suing, your name as the plaintiff, the name of the defendant, and under "TO:" the name and address of each defendant. If you are suing a corporation, list it as the defendant, and under "TO:" put the name and address of the registered agent, an officer, director, or

managing agent of the corporation (for more, see "Businesses As Defendants" in the appendix).

The clerk will fill in the rest of the form, sign it, and set the date and time for the trial. This tells the defendant when to come to court. The date will be no later than 30 days from the day you file your complaint.

The clerk may also ask you to fill out a Notice of Assignment/Service card (This NCR postcard-size form is available only from the Clerk of Superior Court) . Put your name on the back, so that it is like a postcard addressed to yourself. The clerk of court mails this card to you when your case is scheduled. It lets you know when your case will be heard and whether the defendant received the summons and complaint.

How to File the Lawsuit

Make a copy of the complaint and summons for yourself and a copy for each defendant you are suing. Give all the copies to the clerk of court, who stamps the date and time on them. When you file the complaint, you will need to pay the $75 court cost or file as an indigent, as explained in Chapter 1.

For the filing of the lawsuit to be completed, a copy of the complaint and summons must then be delivered to each defendant. You can have this done through the sheriff's office, or you can do it yourself through a complicated procedure explained in the next section. If you choose to use the sheriff's office, you must pay a $15 service fee for each defendant. Sometimes, you pay this $15 fee directly to the sheriff; sometimes the clerk gives the forms to the sheriff and takes the fee for you. If you filed as an indigent, you do not need to pay the $15 fee.

FORM: Magistrate Summons
(back of form is used only by the sheriff)

FORM: Notice of Assignment/Service
(This NCR postcard-size form is available only from the Clerk of Superior Court)

When filing by mail, use either a money order or cashier's check. Make separate checks for the $75 filing fee, to the Clerk of Superior Court, and for the $15 service fee for each defendant, to the sheriff of that county. Do not send cash or a personal check.

Getting the Legal Papers to the Defendant

You can get the complaint and summons to the defendant using the sheriff, the mail, or other means. The sheriff's office is much simpler than other methods. Here's why.

By Sheriff. Often, a clerk's office will take your papers and your $15 fee over to the sheriff's office. Sometimes, however, you must take the forms stamped by the clerk from the clerk's office to the sheriff's office. In either case, keep a copy of the stamped complaint and summons for your records.

The sheriff's deputy keeps a copy of the summons and fills out the back telling how the complaint and summons were delivered to the defendant. The deputy will then file this information with the clerk of court.

If you use the sheriff, you should receive the assignment card from the clerk telling you whether the defendant received these papers and the date of your trial. If you do not receive the assignment card in several weeks, check with the clerk directly. The case cannot be heard in court if the defendant has not been notified.

By Mail. You may prefer to send the complaint and the summons to the defendant by registered or certified mail, but this is more difficult. You must do this yourself at the post office and ask for return receipt requested. You then have to write a statement and get it certified by a notary public that you followed the right steps in this process. Next, you have to file that statement with the clerk of court, along with the post card which the post office mails back to you showing that the defendant got what you mailed. The clerk must get this certified statement from you before completing the Notice of Assignment/Service card.

By Other Means. If you cannot get the complaint and summons to the defendant using these instructions, there are other ways to try to serve the defendant. For instance, you can start over with a new summons form, which you can get from the clerk. Or you can use what's called "service by publication," which is giving notice to a defendant through a newspaper. You may need a lawyer to help you do this.

Chapter 3 - If You Are the Defendant - What to Expect

If you are being sued, you will get a copy of the summons and a copy of the complaint from the sheriff or by registered or certified mail. Read both sides of the complaint and summons carefully. These court papers will tell you what the case is about and when you have to be in court.

If you think you will need a lawyer's help to defend your case, talk to one right away. Don't wait until the last minute to contact a lawyer. This is especially important if a landlord is trying to evict you.

If you are a tenant, there are several ways you can be notified of a proposed eviction. Besides receiving a complaint and summons from the sheriff or by certified mail, these forms can be posted on your home. Legal papers posted on your door are important! Pay attention to them and see a lawyer or decide immediately what you are going to do.

You may, if you wish, mail a formal answer to the clerk of court about the complaint or take this written answer to court. But you can also just wait and tell your side of the story at the trial.

You may have a complaint against the person who is suing you. If you want to file what's called a counterclaim, you will probably need to contact a lawyer. For more on counterclaims, see the Appendix.

Chapter 4 - How to Prepare for the Trial

Remember: The "Plaintiff" is the one. who is suing someone.
The "Defendant" is the one who is being sued.

If you are the plaintiff, you must prove in court:

- < Why the defendant owes you money and the amount owed;
- < Why the defendant should return certain property to you, which property should be returned, and in some cases, the value of the property (an issue when the defendant claims that the disputed property is worth more than the $5,000, the highest amount allowed to be settled in this court); and
- < If you are the landlord seeking a summary ejectment action, why you are entitled to an order requiring the defendant to move out.

If you are the defendant:

- < You try to show that you do not owe the money or should not have to return the property, or that you owe less than the plaintiff says you owe; or
- < In a summary ejectment case, you need to show why you should not be required to move out, or that the landlord owes you money because of the landlord's failure to maintain your home in a livable condition.

Steps To Prepare for the Trial

1. **1. Gather your evidence.** Get together any materials you have that will help you prove your side of the story, including receipts, letters, photos, leases, cancelled checks, contracts, or ledgers. Bring them with you when you come to court.
2. **2. Witnesses.** Anyone who has first-hand knowledge about the case can be a witness - friends, family members, strangers, even a child. If they can help you prove your side of the story, they can help you in your trial. But they have to come to court to tell the judge themselves about what they saw or know. Be sure and tell your witnesses when and where the case will be heard. If a witness won't come to court, or can't get off work for the trial, you might want to force the witness to come to court by having the sheriff deliver a subpoena to that witness (see Appendix for more on subpoenas).
3. **3. Practice what you are going to say.** Before you go to court, practice. Think about what questions the other side and the judge may ask you in court. Think about how you should answer them. The magistrate may not give you much time to tell your story, so you have to be able to list the most important points briefly and clearly. But be sure you say everything important to your case.
4. 4. **Visit the Court.** If you have time, go to Small Claims Court to see what it's like. This can be especially helpful if you've never been in court. Small Claims Court is much more informal than other courtrooms.

Settling Out of Court

You may decide to settle out of court, whether you are the plaintiff or the defendant. If you do reach such an agreement, get it in writing. You may need a written agreement later if the other party does not follow through.

If you are the defendant, don't settle just to keep from going to court. If you think you don't owe what the plaintiff says you owe, then you should present your case to the magistrate.

If you can reach an agreement with the other side before the court hearing, you do not need to go to the trial. When a case is settled out of court, the plaintiff should notify the clerk of court so that the case is dismissed. If you are the defendant, check with the clerk of court before your trial date to be sure that the plaintiff has really

dismissed the case. If the case is settled out of court, the plaintiff will not get back the court costs that were paid, unless the defendant agrees to pay them as part of the settlement.

Check List for Trial

Use this space to make your own list of evidence and witnesses, and to be sure you're ready for trial.

Evidence

- _____
- _____
- _____
- _____

Witnesses

- _____
- _____
- _____

Date and Time of Trial _____

Chapter 5 - The Small Claims Court Trial

Be On Time

Go to court ten minutes early! It is very important not to be late. If you are the plaintiff and not there when the magistrate calls your case, he or she can dismiss the case. If you are the defendant and not there when the magistrate gets to your case, the plaintiff still must prove the case. But the plaintiff will have a much easier job if you aren't there to tell your side of the story.

If you cannot make it to court on the day of your trial, call the magistrate ahead of time and ask for a later court date. The magistrate may or may not give you another court date. But if you are the plaintiff and don't call and don't show up at court, the magistrate will dismiss your case.* If you are the defendant and don't call or show up, you are likely to lose.

* [If your case is dismissed "without prejudice" and you still want a hearing, you may either appeal the case to District Court or

you will have to start all over, filing new forms and paying the fee again. If your case is just dismissed, it is considered "with prejudice" and cannot be filed again. However, you could still appeal the case to District Court. See Chapter 7 for an explanation of how to appeal the case to District Court.]

The Events at the Trial

When it is your turn to speak, tell your story simply and truthfully. Focus on the facts, not your opinion. You should not try to act or sound like a lawyer. Just be yourself. Show the magistrate any evidence you have. After you have testified, your witnesses can testify and you can ask them questions.

The magistrate or the other side may ask questions of you and of your witnesses. Remember that you and your witnesses only have to answer questions about the facts. You do not have to answer questions about the kind of person you are or anything else that is not an issue in the case. Tell the magistrate if you do not want to answer, and why. It does not help your case to argue with the other side. The magistrate will tell you if you must answer a question. Here's the usual order of events at the trial.

The Oath. All those giving evidence or testimony during the trial must swear or affirm that they will tell the truth. This includes plaintiff, defendant, and witnesses. You do not have to swear on a Bible; you can affirm to tell the truth.

The Plaintiff's Case. The magistrate asks the plaintiff to present his or her case first, including any evidence and witnesses. The defendant gets to ask questions of the plaintiff and each of the plaintiff's witnesses after each one testifies.

The Defendant's Side. The defendant then presents that side of the case, with any evidence and witnesses. The plaintiff gets to ask questions of the defendant and each of the defendant's witnesses after each testifies.

The Magistrate Reaches a Judgment. The magistrate reviews the evidence and reaches a decision, which is called a judgment and explained in detail in the next section. No more evidence can be given to the magistrate after the trial.

The Magistrate's Judgment

The magistrate can make a decision at the trial or may wait up to 10 days to issue the judgment. In the judgment, the magistrate may:

< **Dismiss the case**, if the plaintiff has not proved the case;

< **Order the defendant to pay** either the full amount claimed by the plaintiff or part of that amount, including the plaintiffs filing fees;

< **Order the defendant to return property** to the plaintiff; or

< **In summary ejectment cases**, order the defendant to vacate the premises and/or pay rent or damages that are due.

If the magistrate makes a decision which you do not understand, ask the magistrate to explain it to you before you leave the court. If the magistrate makes the judgment during the 10 days after the trial, you can call or go to the clerk of Superior Court later to find out the judgment. Be sure to have the case file number with you.

Landlords and Tenants

Small Claims Trial Required Before Eviction

For.a landlord to evict a tenant legally, North Carolina law requires that the landlord file an action in Small Claims Court called a "summary ejectment. " The landlord cannot just lock you out of your home or try to force you to move through such actions as cutting off your electricity. If you are a tenant and your landlord is trying to evict you (have you put out of your house or apartment), you have other legal protections and rights which are not covered in this booklet. For more information on evictions, contact your local Legal Aid of North Carolina office.

Chapter 6 - After the Trial

At the end of the trial, or up to 10 days after the trial, the magistrate will sign a written decision called a judgment. The magistrate gives this to the plaintiff, the defendant, and the clerk's office. The clerk files the judgment in the official court records, which are available to the public. These records include the losing person's name, the amount and nature of the judgment, and whether the judgment has been paid. Creditors use these records for credit checks.

The Plaintiff - Getting What is Owed You

If you are the plaintiff and have won your case, the defendant may pay you directly or give the money owed you to the clerk of court, who will then give it to you. The defendant must do this within 10 days after the judgment or appeal to District Court, which is explained in the next chapter (Chapter 7).

If the defendant pays you directly, you must tell the clerk's office and then note this payment in the official records. Do this within 60 days or the defendant can sue you to make you do this. In such a suit, you pay the defendant's attorney and court costs.

If the defendant has not paid or appealed in the 10-day period, you can have the clerk issue an order to the sheriff called an execution. This gives the sheriff the power to demand payment of your judgment from the defendant. If the defendant does not pay, the sheriff can then seize any cash, vehicles, goods or other property of the defendant, sell them, and use the money to pay the judgment. The sheriff turns over any money collected in this way to the clerk, who notes payment in the official records and gives the money to you.

Property Which the Sheriff Cannot Take - "Exempt" Property

The law lets the defendant keep some property, which is called "exempt" property. Therefore, before the clerk can issue the execution order, you must get two new forms from the clerk, called Notice of Right to Have Exemptions Designated and Motion to Claim Exempt Property. You must fill out portions of these forms, have the clerk sign the Notice and then have both forms served on the losing party. You can do this using the sheriff or the mail, as you did with the summons and complaint (Chapter 2).

After receiving these forms, the defendant has 20 days to fill out the Motion to Claim Exempt Property, mail or deliver it to the clerk's office, and send you a copy. If the defendant does not return the form in the 20-day period or returns the form showing there is property to take, you can then ask the clerk to issue the execution to

the sheriff. If the defendant returns the form but lists property as exempt that you believe should not have been listed, then you can ask for a hearing before a District Court judge. At that hearing, you and/or the judge can ask the defendant questions about the property listed on the Motion to Claim Exempt Property or any other property which you believe that the defendant may own but did not list on the Motion.

If the defendant denies owning certain property, then you will need to prove that the defendant is wrong. The Judge will then make a decision about what property the defendant can keep. After that decision is made, then you can ask the clerk of court to issue the execution to the sheriff.

The clerk's fee for issuing this execution order is $25. The fee to the sheriff's office for trying to collect the judgment is $15. Sometimes, the defendant may give the sheriff the money that is owed on the judgment. If the defendant does not pay, then the sheriff will need to locate property that can be taken to pay the judgment, then there will be additional costs involved in taking the property and selling it. You will be required to post a bond before the sheriff will take the property and sell it to pay the judgment. You will be reimbursed for these costs from the money collected from the sale of the property.

Do not attempt to take the execution to the other party yourself. Only the sheriff can deliver an execution and collect the money. After an execution is in force, do not accept any money or property from the other party.

The execution papers are good for 90 days. If the sheriff cannot locate the defendant to deliver the execution or cannot locate property that can be taken to pay the judgment within that 90 day period, then he will lose his authority to try and collect the judgment for you. After the 90 days, the sheriff will return the papers back to the clerk of court with a written statement about why the papers are being returned. If you still want to try and collect the judgment, then you will need to pay additional fees and ask the clerk to issue another execution. There is no limit on the number of executions that the clerk can issue. However, you are required to give the defendant a new Notice of Right to Have Exemptions Designated and Motion to Claim Exempt Property before any new executions are issued.

If The Magistrate Rules Against You

If the magistrate orders you to pay money to the other side, and you decide not to appeal, you can either pay through the clerk of court or directly to the other side. Be sure to get a receipt when you pay, and be sure the clerk marks the judgment as "paid." If you pay to the other side, get that party to go to the clerk's office to have

the official records marked "paid." The plaintiff must do this within 60 days or you can sue to have it done, with the other side paying your attorney and court fees. To avoid such a problem, it is much safer to pay through the clerk of court.

If the magistrate orders you to return property to the return it to the other side, and you decide not to appeal, return the property directly to the plaintiff. Be sure to get a receipt from the plaintiff or plaintiff's lawyer when you turn over the property.

Until the judgment is paid in full, the records in the clerk's office will show that the judgment is "outstanding." This could hurt your credit rating.

If You Lose and Can't Afford to Pay

If you get a judgment against you and do not pay it, the other side may ask the sheriff to enforce the judgment. Your car or other property could be sold by the sheriff to satisfy the judgment. However, before any property is taken by the sheriff, you can claim some of your property to be "exempt property" - that is, property that is protected from being collected. You may be able to keep your car, house, household property, or other property.

Before your property is taken for a debt, you must receive a Notice of Right to Have Exemptions Designated and a Motion to Claim Exempt Property. You must fill out the Motion to Claim Exempt Property, return it to the clerk of court, and send a copy to the plaintiff or plaintiff's attorney within 20 days OR YOU COULD LOSE EVERYTHING YOU OWN!

If you do not fill out the form or do not claim property as exempt, the plaintiff can then ask the sheriff to start the execution. The sheriff can then come to your home or place of work to collect the money or seize property to sell in order to pay the judgment.

The sheriff can check at your house from time to time to see if you have gotten any property that is not exempt or given away any that you claimed. For more information on exempt property, contact your local Legal Services office.

The sheriff will not put you in jail because you cannot pay the judgment. The judgment stays on your record for at least 10 years or until you pay it.

What Property Can Be Protected:

The exemption law lists different types of property, and sets limits for the amount of each type of property that can be exempt. The amounts listed below are effective January 1, 2006 and apply to judgments filed on or after that date. These amounts

may be lower when a judgment was filed before January 1, 2006. In addition to the exemptions described here, there are other state and federal exemptions that you may be entitled to claim, such as 60 days worth of Social Security benefits, unemployment benefits, workers' compensation benefits, and earnings for your personal services.

Exemption limits are based on the "equity value" of your interest in each item of property. To determine your equity value in an item, follow these steps:

- < Determine the fair market value of your interest in the item. "Fair market value" means what you could sell the item for (at the flea market, for example). If you co-own the item with someone else, only the fair market value of your share of the property is counted.
- < Determine the amount owed (pay-off) to each creditor who has a security interest in the item.
- < Subtract #2 from #1.

Following is a list of the types of property that can be exempted, with the "equity value" exemption limits for each type of property.

Each debtor can exempt:

- < up to $18,500 in land, house, mobile home or other property used as a residence, or burial plots. (Additional protections may apply to real property or mobile homes owned by married persons and unmarried persons who are 65 years of age or older.)
- < up to $5,000 in any property (this amount is reduced by the amount of exemption claimed for residence or burial plot).
- < up to $3,000 in one automobile.
- < up to $5,000 in clothes, household furnishings and goods, appliances, books, animals, crops, and musical instruments which are used primarily for personal, family, or household use. (This amount increases $1,000 for each dependent of the debtor up to a maximum of four (4) dependents.)
- < up to $2,000 in books, tools, or other implements used in the trade of a debtor or dependent of the debtor.
  life insurance policies listing a spouse and/or children as beneficiaries.
- < items of health care aid necessary for you or your dependents to work or sustain health.
- < compensation for personal injury or for the death of a person upon whom you depend for support (unless the judgment is for services related to the compensated injury).
- < Individual retirement accounts, including individual retirement annuities and Roth retirement accounts.
- < Funds up to $25,000 in college savings plans under certain conditions.

- < Other state or governmental retirement accounts.
- < Alimony, support, separate maintenance, and child support payments necessary for your support.

What Property Is Not Protected?

Exemptions don't apply to the following:

- < all of your property, if you fail to claim your exemptions on time!
- < the value of property in excess of the exemption amounts allowed.
- < personal property purchased less than 90 days before the judgment collection proceedings begin.
- < claims of the Federal government or its agencies, to the extent that federal law so provides.
- < claims of the State or its subdivisions for taxes, appearance bonds, or fiduciary bonds.
- < claims for liens placed by law against specific property.
- < if a creditor takes a security interest in connection with the purchase of an item, the item is not exempt from a judgment for the, property by that creditor.
- < orders for child support, alimony, or property distribution related to divorce or alimony.
- < property owned by debtors who do not reside in North Carolina. judgments against corporations.

Tips For Protecting Your Exemption Rights

1. Notify the Clerk of Court and judgment creditor(s) if you change addresses after a judgment is entered. If you cannot be located for personal service by the Sheriff or by certified mail, service of the exemption notice can be made by regular mail to your "last known" address, whether or not you actually receive it.

2. Carefully read all mail and Court notices you receive. Your 20-day time limit for claiming exemptions begins on the day after you are served with the exemption notice.

3. Read and follow the instructions stated on the Motion form. Complete each section of the Motion. Make sure you list all of your property, including your share of property owned with others. You can attach additional pages if necessary. Values should be based on what you reasonably believe you could sell the item for, at a flea market, for example. If an item has no equity value (see above), you should list the item with a "$0" value.

4. Make sure to follow instructions at the end of the Motion for signing, dating, and serving your Motion. One copy of the Motion must be filed with the Court, and a copy must also be sent to the creditor - all within the 20 day time limit.

5. If you need help completing the exemption motion, if you own property in excess of exemption limits, or if the creditor objects to your exemptions, promptly contact an attorney or your local Legal Aid of North Carolina office for assistance.

Chapter 7 - Appeals to District Court

After the judgment in Small Claims Court, either side can appeal to get a new trial in District Court. To appeal, you must either tell the magistrate at the trial after the decision is made or file a written Notice of Appeal to District Court form with the clerk within 10 days from the date of the judgment. If you file a written notice, you must mail a copy of it to the other side within 10 days of the judgment. A sample appeals form is below. If you cannot get such a form from the clerk in your county, you may write your own appeal, using this form as a guide.

Cost

To appeal your case you must pay a fee of $89 to the clerk of court within 20 days after the judgment. If you cannot afford to pay this fee, ask the clerk for the "Petition to Sue/Appeal as an Indigent" form and file it within 10 days after the magistrate issues the judgment. (See Chapter 1 for more about this form.)

The clerk, magistrate, or judge will probably decide at the time you file the form whether you have to pay the fee. However, he or she may take up to 20 days after the judgment to decide this. If you don't get a decision right away, you will have to keep checking with the clerk of court throughout this 20-day period to find out if you can appeal as an indigent. If you are not allowed to appeal as an indigent, you must pay your $75 fee before the 20-day period is up in order for your appeal to go forward in the courts.

FORM: Notice of Appeal to District Court

Waiting for the Appeal To Be Heard

If you appeal a judgment made against you in Small Claims Court, you do not have to pay that judgment until the District Court decides the case. If the judgment requires you to deliver property to the other side, however, you may have to turn the property over, or post bond in order to keep the property during the appeal. Instead of a bond, the clerk might ask you to put up cash or other security to keep the property.

If you are a tenant and want to continue living in your residence while appealing the case, you must sign a statement agreeing to pay your rent to the court during the appeal process. Some of this rent may be due at the time you appeal.

District Court

When a case is appealed by either party, a new trial date is set for District Court. It is handled as if the case has never been tried before. This means you will have to present your evidence and witnesses again. Either side may ask to have a jury to decide the facts, but this request must be made at the time the notice of appeal is filed. If neither side chooses to have a jury, the judge will decide the case. The procedure in District Court is more formal and takes more time. Legal papers that you may want to file are not available as forms from the clerk. Most people find they need a lawyer to take a case to district court. This is especially true if you are a tenant appealing an eviction.

Appendix

Age.

A person under age 18 can have a claim filed by a guardian ad litem ("GAL") who has been appointed by a clerk of court. A guardian ad litem must be over 18 and can be a parent, relative or friend. If the person you wish to sue is under age 18 or under any legal disability, such as mental incompetence, you should ask a lawyer for help.

Businesses as Defendants.

If you are suing a business, you must first find out whether it is a corporation or not. To find this out, along with the name and address of the corporation's registered agent, call the N.C. Secretary of State, Corporations Division (919) 807-2225 (or visit its website, www.secretary.state.nc.us/corporations). If the business is a corporation, the Corporation Division will tell you the county, city, and street address of the corporation's registered office and principal place of business, which could be in different counties. You may sue this corporation in either county where it does business.

If there is no record of that business as a corporation, then go to the Register of Deeds office in the county where the business has its main office. The Register of Deeds, which is in the courthouse, has the name of owners of businesses in its county. Write the business owner's name on the court papers as the defendant. If the Register of Deeds office does not have information about the owners or their addresses or about any registered office, you may sue the business in any county where it does business.

Counterclaims.

If you are the defendant and have a claim against the person who sues you, you can sue that person as part of the same case. You do this by filing a "counterclaim," also in Small Claims Court. For example, an appliance store may be suing for a repair bill you didn't pay. But you don't want to pay because the repairman knocked a hole in your wall, which you paid to have repaired. You want the appliance company to pay for that damage before you pay its repair bill. Your counterclaim cannot be more than $5,000.

To file a counterclaim, you need to write an answer to the complaint you get. Write what you r claim is and your answer to what the plaintiff says under the heading "Answer and Counterclaim." Take the written answer and counterclaim to the clerk

of court on or before the day of your trial. Include with the answer and counterclaim a signed statement of how you will give these papers to the defendant, which you can do in person or by regular mail. All of this must be done before the time set for the trial.

If you are the defendant and have filed a counterclaim against the plaintiff, the magistrate may order the plaintiff to pay part or all of your claim, or may order the property returned to you.

If you win your counterclaim you can collect on it the same way that plaintiff collects on a judgment, as discussed in Chapter 6.

Subpoena.

If a person cannot get time off from work to come to court or is unwilling to come, you can get a subpoena from the clerk of court. This is a legal notice, which requires the witness to come to court. You will have to pay a $15 fee for the sheriff to deliver the subpoena to the witness. Each witness who is subpoenaed can collect a small daily fee and, if the witness is from outside the county, travel expenses from the court, after the judgment is collected. These fees then added to the court costs, which are paid by the person who loses, if the judgment is collected.

Suits Over $5,000.

The limit of $5,000 on suits in Small Claims Court does not include interest or court costs. If you have a claim over $5,000, you can either file your claim in District Court, where you will probably need a lawyer to represent you. Or; you can lower your claim to $5,000 and file it in Small Claims Court; if you do this you lose the right to any of the amount over $5,000.

Wrong Person is Sued.

If you are being sued and think someone else is at fault in the cause, you can use a legal procedure to have this person appear in court as another party to the lawsuit. This person is called a "third party defendant." In a situation like this, you will need a lawyer to be sure that your rights are protected.