U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, DC 20410-2000

OFFICE OF FAIR HOUSING
AND EQUAL OPPORTUNITY

SPECIAL ATTENTION OF:
HUD Regional and Field Office Directors of Public and Indian Housing (PIH); Housing; Community Planning and Development (CPD); Fair Housing and Equal Opportunity; and Regional Counsel; CPD, PIH, and Housing Program Providers

FHEO Notice: **FHEO-2020-01**
Issued: January 28, 2020
Expires: Effective until Amended, Superseded, or Rescinded.

Subject: Assessing a Person's Request to Have an Animal as a Reasonable Accommodation Under the Fair Housing Act

1. **Purpose:** This notice explains certain obligations of housing providers under the Fair Housing Act (FHA) with respect to animals that individuals with disabilities may request as reasonable accommodations. There are two types of assistance animals: (1) service animals, and (2) other trained or untrained animals that do work, perform tasks, provide assistance, and/or provide therapeutic emotional support for individuals with disabilities (referred to in this guidance as a "support animal"). Persons with disabilities may request a reasonable accommodation for service animals and other types of assistance animals, including support animals, under the FHA. This guidance provides housing providers with a set of best practices for complying with the FHA when assessing requests for reasonable accommodations to keep animals in housing, including the information that a housing provider may need to know from a health care professional about an individual's need for an assistance animal in housing. This guidance replaces HUD's prior guidance, FHEO-2013-01, on housing providers' obligations regarding service animals and assistance animals. In particular, this guidance provides a set of best practices regarding the type and amount of documentation a housing provider may ask an individual with a disability to provide in support of an accommodation request for a support animal, including documentation of a disability (that is, physical or mental impairments that substantially limit at least one major life activity) or a disability-related need for a support animal when the disability or disability-related need for the animal is non-obvious and not known to the housing provider. By providing greater clarity through this guidance, HUD seeks to provide housing providers with a tool they may use to reduce burdens that they may face when they are uncertain about the type and amount of documentation they may need and may be permitted to request when an individual seeks to keep a support animal in housing. Housing providers may be subject to the requirements of several civil rights laws, including but not limited to the FHA, Section 504 of the Rehabilitation Act (Section 504), and the Americans with Disabilities Act (ADA). This guidance does not address how HUD will process complaints against housing providers under Section 504 or the ADA.

2. **Applicability:** This notice applies to all housing providers covered by the FHA.[1]

3. **Organization:** There are two sections to this notice. The first, "Assessing a Person's Request to Have an Animal as a Reasonable Accommodation Under the Fair Housing Act," recommends a set of best practices for complying with the FHA when assessing accommodation requests involving animals to assist housing providers and help them avoid violations of the FHA. The second section to this notice, "Guidance on Documenting an Individual's Need for Assistance Animals in Housing," provides guidance on information that an individual seeking a reasonable accommodation for an assistance animal may need to provide to a housing provider about his or her disability-related need for the requested accommodation, including supporting information from a health care professional.

Questions regarding this notice may be directed to the HUD Office of Fair Housing and Equal Opportunity, Office of the Deputy Assistant Secretary for Enforcement and Programs, or your local HUD Office of Fair Housing and Equal Opportunity.

Anna María Farías, Assistant Secretary for
Fair Housing and Equal Opportunity

[1] The Fair Housing Act covers virtually all types of housing, including privately owned housing and federally assisted housing, with a few limited exceptions.

Assessing a Person's Request to Have an Animal as a Reasonable Accommodation Under the Fair Housing Act[2]

The Fair Housing Act (FHA) makes it unlawful for a housing provider[3] to refuse to make a reasonable accommodation that a person with a disability may need in order to have equal opportunity to enjoy and use a dwelling.[4] One common request housing providers receive is for a reasonable accommodation to providers' pet or no animal policies so that individuals with disabilities are permitted to use assistance animals in housing,[5] including public and common use areas.

Assistance animals are not pets. They are animals that do work, perform tasks, assist, and/or provide therapeutic emotional support for individuals with disabilities.[6] There are two types of assistance animals: (1) service animals, and (2) other animals that do work, perform tasks, provide assistance, and/or provide therapeutic emotional support for individuals with disabilities (referred to in this guidance as a "support animal").[7] An animal that does not qualify as a service animal or other type of assistance animal is a pet for purposes of the FHA and may be treated as a pet for purposes of the lease and the housing provider's rules and policies. A housing provider may exclude or charge a fee or deposit for pets in its discretion and subject to local law but not for service animals or other assistance animals.[8]

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[2] This document is an integral part of U.S. Department of Housing and Urban Development Office of Fair Housing and Equal Opportunity Notice FHEO-2020-01, dated January 28, 2020 (sometimes referred to as the "Assistance Animal Notice").

[3] The term "housing provider" refers to any person or entity engaging in conduct covered by the FHA. Courts have applied the FHA to individuals, corporations, partnerships, associations, property owners, housing managers, homeowners and condominium associations, cooperatives, lenders, insurers, real estate agents, brokerage services, state and local governments, colleges and universities, as well as others involved in the provision of housing, residential lending, and other real estate-related services.

[4] 42 U.S.C. § 3604(f)(3)(B); 24 C.F.R. § 100.204. Unless otherwise specified, all citations refer to those authorities effective as of the date of the publication of this guidance.

[5] For purposes of this guidance, the term "housing" refers to all housing covered by the Fair Housing Act, including apartments, condominiums, cooperatives, single family homes, nursing homes, assisted living facilities, group homes, domestic violence shelters, emergency shelters, homeless shelters, dormitories, and other types of housing covered by the FHA.

[6] *See* 24 C.F.R. § 5.303(a).

[7] Under the FHA, a disability is a physical or mental impairment that substantially limits one or more major life activities. *See* 24 C.F.R. § 100.201.

[8] *See* Joint Statement of the Department of Housing and Urban Development and the Department of Justice, Reasonable Accommodations Under the Fair Housing Act ("Joint Statement"), Q and A 11 (May 17, 2004), at https://www.hud.gov/sites/documents/huddojstatement.pdf; *Fair Hous. of the Dakotas, Inc. v. Goldmark Prop. Mgmt*., 778 F. Supp. 2d 1028 (D.N.D. 2011). HUD views the Joint Statement as well-reasoned guidance on some of the topics addressed in this guidance. The Joint Statement, available to the public since 2004, has been cited from time to time by courts. *See, e.g., Bhogaita v. Altamonte Heights Condo. Ass'n*, 765 F.3d 1277, 1286 (11th Cir. 2014); *Sinisgallo*

As of the date of the issuance of this guidance, FHA complaints concerning denial of reasonable accommodations and disability access comprise almost 60% of all FHA complaints and those involving requests for reasonable accommodations for assistance animals are significantly increasing. In fact, such complaints are one of the most common types of fair housing complaints that HUD receives. In addition, most HUD charges of discrimination against a housing provider following a full investigation involve the denial of a reasonable accommodation to a person who has a physical or mental disability that the housing provider cannot readily observe.[9]

HUD is providing this guidance to help housing providers distinguish between a person with a non-obvious disability who has a legitimate need for an assistance animal and a person without a disability who simply wants to have a pet or avoid the costs and limitations imposed by housing providers' pet policies, such as pet fees or deposits. The guidance may also help persons with a disability who request a reasonable accommodation to use an assistance animal in housing.

While most requests for reasonable accommodations involve one animal, requests sometimes involve more than one animal (for example, a person has a disability-related need for both animals, or two people living together each have a disability-related need for a separate assistance animal). The decision-making process in this guidance can be used for all requests for exceptions or modifications to housing providers' rules, policies, practices, and/or procedures so persons with disabilities can have assistance animals in the housing where they reside.

This guidance is provided as a tool for housing providers and persons with a disability to use at their discretion and provides a set of best practices for addressing requests for reasonable accommodations to keep animals in housing where individuals with disabilities reside or seek to reside. It should be read together with HUD's regulations prohibiting discrimination under the FHA[10] —with which housing providers must comply— and the HUD/Department of Justice (DOJ) Joint Statement on Reasonable Accommodation under the Fair Housing Act, available at https://www.hud.gov/sites/documents/huddojstatement.pdf. A housing provider may also be subject to the Americans with Disabilities Act (ADA) and therefore should also refer to DOJ's regulations implementing Title II and Title III of the ADA at 28 C.F.R. parts 35 and 36 , and DOJ's guidance on service animals, *Frequently Asked Questions about Service Animals and the ADA* at https://www.ada.gov/regs2010/service_animal_qa.html and *ADA Requirements: Service Animals* at https://www.ada.gov/service_animals_2010.htm. This guidance replaces HUD's prior guidance on housing providers' obligations regarding service animals and assistance animals.[11] Housing

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v. Town of Islip Hous. Auth., 865 F. Supp. 2d 307, 336-42 (E.D.N.Y. 2012). However, HUD does not intend to imply that the Joint Statement is independently binding statutory or regulatory authority. HUD understands it to be subject to applicable limitations on the use of guidance. *See* "Treatment as a Guidance Document" on p.5 for a citation of authorities on permissible use of guidance.

[9] *See, e.g.*, *HUD v. Castillo Condominium Ass'n*, No. 12-M-034-FH-9, 2014 HUD ALJ LEXIS 2 (HUD Sec'y, October 02, 2014) aff'd, 821 F.3d 92 (1st Cir. 2016); *HUD v. Riverbay*, No. 11-F-052-FH-18, 2012 HUD ALJ LEXIS 15 (HUD ALJ, May 07, 2012), aff'd, 2012 ALJ LEXIS 19 (HUD Sec'y June 06, 2012).

[10] 24 C.F.R. Part 100.

[11] FHEO-2013-01.

providers should not reassess requests for reasonable accommodations that were granted prior to the issuance of this guidance in compliance with the FHA.

Treatment as a Guidance Document

As a guidance document, this document does not expand or alter housing providers' obligations under the Fair Housing Act or HUD's implementing regulations. It should be construed consistently with Executive Order 13891 of October 9, 2019 entitled "Promoting the Rule of Law Through Improved Agency Guidance Documents," Executive Order 13892 of October 9, 2019 entitled "Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication," the Office of Management and Budget Memorandum M-20-02 entitled "Guidance Implementing Executive Order 13891, Titled 'Promoting the Rule of Law Through Improved Agency Guidance Documents,'" the Department of Justice Memorandum of January 25, 2018 entitled "Limiting Use of Agency Guidance Documents in Affirmative Civil Enforcement Cases," and the Department of Justice Memorandum of November 16, 2017 entitled "Prohibition on Improper Guidance Documents."

Part I: Service Animals

The FHA requires housing providers to modify or make exceptions to policies governing animals when it may be necessary to permit persons with disabilities to utilize animals.[12] Because HUD interprets the FHA to require access for individuals who use service animals, housing providers should initially follow the analysis that DOJ has determined is used for assessing whether an animal is a service animal under the ADA.[13] The Department of Justice's ADA regulations generally require state and local governments and public accommodations to permit the use of service animals by an individual with a disability.[14] For support animals and other assistance animals that may be necessary in housing, although the ADA does not provide for access, housing providers must comply with the FHA, which does provide for access.[15]

[12] 42 U.S.C. § 3604(f)(3)(B); 24 C.F.R. § 100.204. See also Pet Ownership for the Elderly and Persons with Disabilities – Final Rule, 73 Fed. Reg. 63833 (Oct. 27, 2008).
[13] 24 C.F.R. § 100.204(b).
[14] 28 C.F.R. §§ 35.136(g); 36.302(c)(7).
[15] Specifically, under the Fair Housing Act, housing providers are obligated to permit, as a reasonable accommodation, the use of animals that work, provide assistance, or perform tasks that benefit persons with disabilities, or provide emotional support to alleviate a symptom of effect of a disability. Separate regulations govern airlines and other common carriers, which are outside the scope of this guidance.

What is a service animal?

Under the ADA, "*service animal* means any dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability. Other species of animals, whether wild or domestic, trained or untrained, are not service animals for the purposes of this definition. The work or tasks performed by a service animal must be directly related to the individual's disability."[16]

As a best practice, housing providers may use the following questions to help them determine if an animal is a service animal under the ADA:[17]

1. Is the animal a dog?

   - If "yes," proceed to the next question.
   - If "no," the animal is not a service animal but may be another type of assistance animal for which a reasonable accommodation is needed.[18] Proceed to Part II below.

2. Is it readily apparent that the dog is trained to do work or perform tasks for the benefit of an individual with a disability?

   - If "yes," further inquiries are unnecessary and inappropriate because the animal is a service animal.[19]
   - If "no," proceed to the next question.

It is *readily apparent* when the dog is observed:

- guiding an individual who is blind or has low vision
- pulling a wheelchair
- providing assistance with stability or balance to an individual with an observable mobility disability[20]

3. It is advisable for the housing provider to limit its inquiries to the following two questions:

   - The housing provider may ask in substance: (1) "Is the animal required because of a

[16] 28 C.F.R. §§ 35.104; 36.104 (emphasis added).
[17] 28 C.F.R. §§ 35.136; 36.302(c).
[18] Although a miniature horse is not a service animal, DOJ has determined that the same type of analysis is applied to determine whether a miniature horse should be provided access, although additional considerations, beyond the scope of this guidance, apply. *See* 28 C.F.R. §§ 35.136(i); 36.302(c)(9).
[19] 28 C.F.R. §§ 35.136(f); 36.302(c)(6).
[20] 28 C.F.R. §§ 35.136(f); 36.302(c)(6).

disability?" and (2) "What work or task has the animal been trained to perform?"[21] Do not ask about the nature or extent of the person's disability, and do not ask for documentation. A housing provider, at its discretion, may make the truth and accuracy of information provided during the process part of the representations made by the tenant under a lease or similar housing agreement to the extent that the lease or agreement requires the truth and accuracy of other material information.

- If the answer to question (1) is "yes" and work or a task is identified in response to question (2), grant the requested accommodation, if otherwise reasonable, because the animal qualifies as a service animal.
- If the answer to either question is "no" or "none," the animal does not qualify as a service animal under federal law but may be a support animal or other type of assistance animal that needs to be accommodated. HUD offers guidance to housing providers on this in Part II.

Performing "work or tasks" means that the dog is trained to take a specific action when needed to assist the person with a disability.

- If the individual identifies at least one action the dog is trained to take which is helpful to the disability other than emotional support, the dog should be considered a service animal and permitted in housing, including public and common use areas. Housing providers should not make further inquiries.
- If no specific work or task is identified, the dog should not be considered a service animal but may be another type of animal for which a reasonable accommodation may be required. Emotional support, comfort, well-being, and companionship are not a specific work or task for purposes of analysis under the ADA.

For more information, refer to the ADA rules and service animal guidance on DOJ's ADA Home Page at www.ada.gov[22] or call the ADA Information Line at 1-800-514-0301.

Part II: Analysis of reasonable accommodation requests under the Fair Housing Act for assistance animals other than service animals

A **reasonable accommodation** is a change, exception, or adjustment to a rule, policy, practice, or service that may be necessary for a person with a disability to have equal opportunity to use and enjoy a dwelling, including public and common use spaces.

Remember: While it is not necessary to submit a written request or to use the words "reasonable accommodation," "assistance animal," or any other special words to request a reasonable accommodation under the FHA, persons making a request are encouraged to do so in order to avoid

[21] 28 C.F.R. §§ 35.136(f); 36.302(c)(6).
[22] See *Frequently Asked Questions About Service Animals and the ADA* at https://www.ada.gov/regs2010/service_animal_qa.html; *ADA Requirements: Service Animals* at https://www.ada.gov/service_animals_2010.htm.

miscommunication.[23] Persons with disabilities may also want to keep a copy of their reasonable accommodation requests and supporting documentation in case there is a later dispute about when or whether a reasonable accommodation request was made. Likewise, housing providers may find it helpful to have a consistently maintained list of reasonable accommodation requests.[24]

A resident may request a reasonable accommodation either before or after acquiring the assistance animal.[25] An accommodation also may be requested after a housing provider seeks to terminate the resident's lease or tenancy because of the animal's presence, although such timing may create an inference against good faith on the part of the person seeking a reasonable accommodation. However, under the FHA, a person with a disability may make a reasonable accommodation request at any time, and the housing provider must consider the reasonable accommodation request even if the resident made the request after bringing the animal into the housing.[26]

As a best practice, housing providers may use the following questions to help them make a decision when the animal does not meet the definition of service animal.[27]

4. Has the individual requested a reasonable accommodation — that is, asked to get or keep an animal in connection with a physical or mental impairment or disability?

Note: The request for a reasonable accommodation with respect to an assistance animal may be oral or written. It may be made by others on behalf of the individual, including a person legally residing in the unit with the requesting individual or a legal guardian or authorized representative.[28]

- If "yes," proceed to Part III.
- If "no," the housing provider is not required to grant a reasonable accommodation that has not been requested.

Part III: Criteria for assessing whether to grant the requested accommodation

As a best practice, housing providers may use the following questions to help them assess whether

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[23] See Joint Statement, Q and A 12 (May 17, 2004), at https://www.hud.gov/sites/documents/huddojstatement.pdf.
[24] See Joint Statement, Q and A 13 (May 17, 2004), at https://www.hud.gov/sites/documents/huddojstatement.pdf.
[25] *See* Joint Statement, Q and A 12 (May 17, 2004), at https://www.hud.gov/sites/documents/huddojstatement.pdf.
[26] *See* 24 C.F.R. § 100.204(a).
[27] *See Janush v. Charities Hous. Dev. Corp.*, 169 F.Supp.2d 1133, 1136-37 (N.D. Cal., 2000) (rejecting an argument that a definition of "service dog" should be read into the Fair Housing Act to create a rule that accommodation of animals other than service dogs is per se unreasonable, instead finding that "the law imposes on defendants the obligation to consider each request individually and to grant requests that are reasonable.").
[28] *See* Joint Statement, Q and A 12 (May 17, 2004), at https://www.hud.gov/sites/documents/huddojstatement.pdf.

to grant the requested accommodation.

5. Does the person have an observable disability or does the housing provider (or agent making the determination for the housing provider) already have information giving them reason to believe that the person has a disability?

    - If "yes," skip to question #7 to determine if there is a connection between the person's disability and the animal.
    - If "no," continue to the next question.

Observable and Non-Observable Disabilities

Under the FHA, a disability is a physical or mental impairment that substantially limits one or more major life activities. While some impairments may seem invisible, others can be readily observed. Observable impairments include blindness or low vision, deafness or being hard of hearing, mobility limitations, and other types of impairments with observable symptoms or effects, such as intellectual impairments (including some types of autism), neurological impairments (*e.g.*, stroke, Parkinson's disease, cerebral palsy, epilepsy, or brain injury), mental illness, or other diseases or conditions that affect major life activities or bodily functions.[29] Observable impairments generally tend to be obvious and would not be reasonably attributable to non-medical causes by a lay person.

Certain impairments, however, especially including impairments that may form the basis for a request for an emotional support animal, may not be observable. In those instances, a housing provider may request information regarding both the disability and the disability-related need for the animal. Housing providers are not entitled to know an individual's diagnosis.

6. Has the person requesting the accommodation provided information that reasonably supports that the person seeking the accommodation has a disability?[30]

    - If "yes," proceed to question #7. A housing provider, at its discretion, may make the truth and accuracy of information provided during the process part of the representations made by the tenant under a lease or similar housing agreement to the extent that the lease or agreement requires the truth and accuracy of other material information.
    - If "no," the housing provider is not required to grant the accommodation unless this information is provided but may not deny the accommodation on the grounds that the person requesting the accommodation has not provided this information until the requester has been provided a reasonable opportunity to do so.[31] To assist the person requesting the

[29] *See* 24 C.F.R. § 100.201.
[30] *See* Joint Statement, Q and A 17 (May 17, 2004), at https://www.hud.gov/sites/documents/huddojstatement.pdf.
[31] This would not permit the housing provider to require any independent evaluation or diagnosis specifically obtained for the housing provider or for the housing provider to engage in its own direct

accommodation to understand what information the housing provider is seeking, the housing provider is encouraged to direct the requester to the Guidance on Documenting an Individual's Need for Assistance Animals in Housing. Referring the requester to that Guidance will also help ensure that the housing provider receives the disability-related information that is actually needed to make a reasonable accommodation decision.

Information About Disability May Include . . .

- A determination of disability from a federal, state, or local government agency.
- Receipt of disability benefits or services (Social Security Disability Income (SSDI)), Medicare or Supplemental Security Income (SSI) for a person under age 65, veterans' disability benefits, services from a vocational rehabilitation agency, or disability benefits or services from another federal, state, or local agency.
- Eligibility for housing assistance or a housing voucher received because of disability.
- Information confirming disability from a health care professional – *e.g.*, physician, optometrist, psychiatrist, psychologist, physician's assistant, nurse practitioner, or nurse.

Note that a determination that an individual does not qualify as having a disability for purposes of a benefit or other program does not necessarily mean the individual does not have a disability for purposes of the FHA, Section 504, or the ADA.[32]

Disability Determination

Note that under DOJ's regulations implementing the ADA Amendments Act of 2008, which HUD considers instructive when determining whether a person has a disability under the FHA, some types of impairments will, in virtually all cases, be found to impose a substantial limitation on a major life activity resulting in a determination of a disability.[33] Examples include deafness, blindness, intellectual disabilities, partially or completely missing limbs or mobility impairments requiring the use of a wheelchair, autism, cancer, cerebral palsy, diabetes, epilepsy, muscular dystrophy, multiple sclerosis, Human Immunodeficiency Virus (HIV) infection, major depressive disorder, bipolar disorder, post-traumatic stress disorder, traumatic brain injury, obsessive compulsive disorder, and schizophrenia.[34] This does not mean that other conditions are not disabilities. It simply means that in virtually all cases these conditions will be covered as disabilities. While housing providers will be unable to observe or identify some of these impairments, individuals with disabilities sometimes voluntarily provide more details about their disability than the housing provider actually needs to make decisions on accommodation requests. When this information is provided, housing providers should consider it.

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evaluation. *See* Joint Statement, Q and A 17-18 (May 17, 2004), at https://www.hud.gov/sites/documents/huddojstatement.pdf.

[32] *See* Joint Statement, Q and A 18 (May 17, 2004), at https://www.hud.gov/sites/documents/huddojstatement.pdf.

[33] *See* 28 C.F.R. §§ 35.108(d)(2); 36.105(d)(2).

[34] *See* 28 C.F.R. §§ 35.108(d)(2)(iii); 36.105(d)(2)(iii).

Documentation from the Internet

Some websites sell certificates, registrations, and licensing documents for assistance animals to anyone who answers certain questions or participates in a short interview and pays a fee. Under the Fair Housing Act, a housing provider may request reliable documentation when an individual requesting a reasonable accommodation has a disability and disability-related need for an accommodation that are not obvious or otherwise known.[35] In HUD's experience, such documentation from the internet is not, by itself, sufficient to reliably establish that an individual has a non-observable disability or disability-related need for an assistance animal.

By contrast, many legitimate, licensed health care professionals deliver services remotely, including over the internet. One reliable form of documentation is a note from a person's health care professional that confirms a person's disability and/or need for an animal when the provider has personal knowledge of the individual.

7. Has the person requesting the accommodation provided information which reasonably supports that the animal does work, performs tasks, provides assistance, and/or provides therapeutic emotional support with respect to the individual's disability?[36]

   - If "yes," proceed to Part IV. A housing provider, at its discretion, may make the truth and accuracy of information provided during the process part of the representations made by the tenant under a lease or similar housing agreement to the extent that the lease or agreement requires the truth and accuracy of other material information.
   - If "no," the housing provider is not required to grant the accommodation unless this information is provided but may not deny the accommodation on the grounds that the person requesting the accommodation has not provided this information until the requester has been provided a reasonable opportunity to do so. To assist the person requesting the accommodation to understand what information the housing provider is seeking, the housing provider is encouraged to direct the requester to the Guidance on Documenting an Individual's Need for Assistance Animals in Housing. Referring the requester to that Guidance will also help ensure that the housing provider receives the disability-related information that is actually needed to make a reasonable accommodation decision.

[35] *See* Joint Statement, Q and A 18 (May 17, 2004), at https://www.hud.gov/sites/documents/huddojstatement.pdf.

[36] *See Fair Hous. of the Dakotas, Inc. v. Goldmark Prop. Mgmt*., 778 F. Supp. 2d 1028 (D.N.D. 2011) (determining that, in housing, a broader variety of assistance animals may be necessary as a reasonable accommodation, regardless of specific training).

Information Confirming Disability-Related Need for an Assistance Animal. . .

- Reasonably supporting information often consists of information from a licensed health care professional – *e.g.*, physician, optometrist, psychiatrist, psychologist, physician's assistant, nurse practitioner, or nurse – general to the condition but specific as to the individual with a disability and the assistance or therapeutic emotional support provided by the animal.
- A relationship or connection between the disability and the need for the assistance animal must be provided. This is particularly the case where the disability is non-observable, and/or the animal provides therapeutic emotional support.
- For non-observable disabilities and animals that provide therapeutic emotional support, a housing provider may ask for information that is consistent with that identified in the Guidance on Documenting an Individual's Need for Assistance Animals in Housing (*see Questions 6 and 7) in order to conduct an individualized assessment of whether it must provide the accommodation under the Fair Housing Act. The lack of such documentation in many cases may be reasonable grounds for denying a requested accommodation.

Part IV: Type of Animal

8. Is the animal commonly kept in households?

- If "yes," the reasonable accommodation should be provided under the FHA unless the general exceptions described below exist.[37]
- If "no," a reasonable accommodation need not be provided, but note the very rare circumstances described below.

Animals commonly kept in households. If the animal is a dog, cat, small bird, rabbit, hamster, gerbil, other rodent, fish, turtle, or other small, domesticated animal that is traditionally kept in the home for pleasure rather than for commercial purposes, then the reasonable accommodation should be granted because the requestor has provided information confirming that there is a disability-related need for the animal.[38] For purposes of this assessment, reptiles (other than turtles), barnyard animals, monkeys, kangaroos, and other non-domesticated animals are not considered common household animals.

Unique animals. If the individual is requesting to keep a unique type of animal that is not commonly kept in households as described above, then the requestor has the substantial burden of demonstrating a disability-related therapeutic need for the specific animal or the specific type of animal. The individual is encouraged to submit documentation from a health care professional confirming the need for this animal, which includes information of the type set out in the Guidance on Documenting an Individual's Need for Assistance Animals in Housing. While this guidance

[37] *See, e.g.*, *Majors v. Hous. Auth. of the Cnty. of DeKalb Georgia,* 652 F.2d 454, 457 (5th Cir. 1981) (enforcing a "no pets" rule against an individual with a disability who needs an animal as a reasonable accommodation effectively deprives the individual of the benefits of the housing).
[38] *See* 24 C.F.R. § 100.204(a).

does not establish any type of new documentary threshold, the lack of such documentation in many cases may be reasonable grounds for denying a requested accommodation. If the housing provider enforces a "no pets" policy or a policy prohibiting the type of animal the individual seeks to have, the housing provider may take reasonable steps to enforce the policy if the requester obtains the animal before submitting reliable documentation from a health care provider that reasonably supports the requestor's disability-related need for the animal. As a best practice, the housing provider should make a determination promptly, generally within 10 days of receiving documentation.[39]

Reasonable accommodations may be necessary when the need for a unique animal involves unique circumstances …

Examples:

- The animal is individually trained to do work or perform tasks that cannot be performed by a dog.
- Information from a health care professional confirms that:
  - Allergies prevent the person from using a dog; or
  - Without the animal, the symptoms or effects of the person's disability will be significantly increased.
- The individual seeks to keep the animal outdoors at a house with a fenced yard where the animal can be appropriately maintained.

Example: A Unique Type of Support Animal

An individually trained capuchin monkey performs tasks for a person with paralysis caused by a spinal cord injury. The monkey has been trained to retrieve a bottle of water from the refrigerator, unscrew the cap, insert a straw, and place the bottle in a holder so the individual can get a drink of water. The monkey is also trained to switch lights on and off and retrieve requested items from inside cabinets. The individual has a disability-related need for this specific type of animal because the monkey can use its hands to perform manual tasks that a service dog cannot perform.

Part V: General Considerations

- The FHA does not require a dwelling to be made available to an individual whose tenancy would constitute a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others.[40] A housing provider may, therefore, refuse a reasonable accommodation for an assistance animal if the specific animal poses a direct threat that cannot be eliminated or reduced to an acceptable level through actions the individual takes to maintain or control the animal (e.g., keeping the

[39] *See* Joint Statement, Q and A 15 (May 17, 2004), at https://www.hud.gov/sites/documents/huddojstatement.pdf.
[40] *See* 24 C.F.R. § 100.202(d).

animal in a secure enclosure).[41]

- A reasonable accommodation may include a reasonable accommodation to a land use and zoning law, Homeowners Association (HOA) rule, or co-op rule.[42]
- A housing provider may not charge a fee for processing a reasonable accommodation request.[43]
- Pet rules do not apply to service animals and support animals. Thus, housing providers may not limit the breed or size of a dog used as a service animal or support animal just because of the size or breed[44] but can, as noted, limit based on specific issues with the animal's conduct because it poses a direct threat or a fundamental alteration.[45]
- A housing provider may not charge a deposit, fee, or surcharge for an assistance animal. A housing provider, however, may charge a tenant for damage an assistance animal causes if it is the provider's usual practice to charge for damage caused by tenants (or deduct it from the standard security deposits imposed on all tenants).
- A person with a disability is responsible for feeding, maintaining, providing veterinary care, and controlling his or her assistance animal. The individual may do this on his or her own or with the assistance of family, friends, volunteers, or service providers.
- Individuals with disabilities and housing providers may reference the best practices provided in this guidance in making and responding to reasonable accommodation requests within the scope of this guidance for as long as it remains in effect. HUD strongly encourages individuals with disabilities and housing providers to give careful attention to this guidance when making reasonable accommodation requests and decisions relating to animals.
- Failure to adhere to this guidance does not necessarily constitute a violation by housing providers of the FHA or regulations promulgated thereunder.[46]
- Before denying a reasonable accommodation request due to lack of information confirming an individual's disability or disability-related need for an animal, the housing provider is encouraged to engage in a good-faith dialogue with the requestor called the "interactive process."[47] The housing provider may not insist on specific types of evidence if the information which is provided or actually known to the housing provider meets the requirements of this guidance (except as provided above). Disclosure of details about the diagnosis or severity of a disability or medical records or a medical examination cannot be required.

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[41] *See* Joint Statement Q and A 4 (May 17, 2004), at https://www.hud.gov/sites/documents/huddojstatement.pdf.
[42] *See Warren v. Delvista Towers Condo. Ass'n*, 49 F. Supp. 3d 1082 (S.D. Fla. 2014).
[43] *See* Joint Statement, Q and A 11 (May 17, 2004), at https://www.hud.gov/sites/documents/huddojstatement.pdf; *Fair Hous. of the Dakotas, Inc. v. Goldmark Prop. Mgmt*., 778 F. Supp. 2d 1028 (D.N.D. 2011).
[44] *See, e.g.*, *Bhogaita v. Altamonte Heights Condo. Ass'n*, 765 F.3d 1277 (11th Cir. 2014) (reasonable accommodation to a housing provider's rule that all dogs must be under 25 pounds).
[45] *See* 24 C.F.R. § 100.202(d); Joint Statement, Q and A's 5 & 7 (May 17, 2004), at https://www.hud.gov/sites/documents/huddojstatement.pdf.
[46] *See* "Treatment as a Guidance Document" on p.5 for a citation of authorities on permissible use of guidance.
[47] *See* Joint Statement, Q and A 7 (May 17, 2004), at https://www.hud.gov/sites/documents/huddojstatement.pdf.

If a reasonable accommodation request, provided under the framework of this guidance, is denied because it would impose a fundamental alteration to the nature of the provider's operations or impose an undue financial and administrative burden, the housing provider should engage in the interactive process to discuss whether an alternative accommodation may be effective in meeting the individual's disability-related needs.[48]

[48] For guidance on what constitutes a fundamental alteration or an undue financial and administrative burden, refer to the HUD/DOJ Joint Statement on Reasonable Accommodation under the Fair Housing Act, available at https://www.hud.gov/sites/documents/huddojstatement.pdf.

Guidance on Documenting an Individual's Need for Assistance Animals in Housing

This section provides best practices for documenting an individual's need for assistance animals in housing. It offers a summary of information that a housing provider may need to know from a health care professional about an individual's need for an assistance animal in housing. It is intended to help individuals with disabilities explain to their health care professionals the type of information that housing providers may need to help them make sometimes difficult legal decisions under fair housing laws. It also will help an individual with a disability and their health care provider understand what information may be needed to support an accommodation request when the disability or disability-related need for an accommodation is not readily observable or known by the housing provider. Housing providers may not require a health care professional to use a specific form (including this document), to provide notarized statements, to make statements under penalty of perjury, or to provide an individual's diagnosis or other detailed information about a person's physical or mental impairments.[49] Housing providers and the U.S. Department of Housing and Urban Development rely on professionals to provide accurate information to the best of their personal knowledge, consistent with their professional obligations. This document only provides assistance on the type of information that may be needed under the Fair Housing Act (FHA). The contents of this document do not have the force and effect of law and are not meant to bind the public in any way. This document is intended only to provide clarity to the public regarding existing requirements under the law or agency policies. Further, this document does not create any obligation to provide health-care information and does not authorize or solicit the collection of any information not otherwise permitted by the FHA.[50]

The Appendix to this Guide answers some commonly asked questions about terms and issues below. An understanding of the terms and issues is helpful to providing this information.

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When providing this information, health care professionals should use personal knowledge of their patient/client – *i.e.*, the knowledge used to diagnose, advise, counsel, treat, or provide health care or other disability-related services to their patient/client. **Information relating to an individual's disability and health conditions must be kept confidential and cannot be shared with other**

[49] *See* Joint Statement of the Department of Housing and Urban Development and the Department of Justice, Reasonable Accommodations Under the Fair Housing Act ("Joint Statement"), Q and A's 13, 16-18 (May 17, 2004), at https://www.hud.gov/sites/documents/huddojstatement.pdf.

[50] This guidance does not expand on the obligations under the FHA or HUD's regulations and should be construed consistently with Executive Order 13891 of October 9, 2019 entitled "Promoting the Rule of Law Through Improved Agency Guidance Documents," Executive Order 13892 of October 9, 2019 entitled "Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication," the Department of Justice Memorandum of January 25, 2018 entitled "Limiting Use of Agency Guidance Documents in Affirmative Civil Enforcement Cases," and the Department of Justice Memorandum of November 16, 2017 entitled "Prohibition on Improper Guidance Documents."

persons unless the information is needed for evaluating whether to grant or deny a reasonable accommodation request or unless disclosure is required by law.[51]

As a best practice, documentation contemplated in certain circumstances by the Assistance Animals Guidance is recommended to include the following general information:

- The patient's name,
- Whether the health care professional has a professional relationship with that patient/client involving the provision of health care or disability-related services, and
- The type of animal(s) for which the reasonable accommodation is sought (i.e., dog, cat, bird, rabbit, hamster, gerbil, other rodent, fish, turtle, other specified type of domesticated animal, or other specified unique animal).[52]

Disability-related information. A disability for purposes of fair housing laws exists when a person has a physical or mental impairment that substantially limits one or more major life activities.[53] Addiction caused by current, illegal use of a controlled substance does not qualify as a disability.[54] As a best practice, it is recommended that individuals seeking reasonable accommodations for support animals ask health care professionals to provide information related to the following:

- Whether the patient has a physical or mental impairment,
- Whether the patient's impairment(s) substantially limit at least one major life activity or major bodily function, and
- Whether the patient needs the animal(s) (because it does work, provides assistance, or performs at least one task that benefits the patient because of his or her disability, or because it provides therapeutic emotional support to alleviate a symptom or effect of the disability of the patient/client, and not merely as a pet).

Additionally, if the animal is not a dog, cat, small bird, rabbit, hamster, gerbil, other rodent, fish, turtle, or other small, domesticated animal that is traditionally kept in the home for pleasure rather than for commercial purposes, it may be helpful for patients to ask health care professionals to provide the following additional information:

- The date of the last consultation with the patient,
- Any unique circumstances justifying the patient's need for the particular animal (if already owned or identified by the individual) or particular type of animal(s), and
- Whether the health care professional has reliable information about this specific animal or

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[51] *See* Joint Statement, Q and A 18 (May 17, 2004), at https://www.hud.gov/sites/documents/huddojstatement.pdf.

[52] *See, e.g.*, *Janush v. Charities Housing Development Corporation*, 169 F.Supp.2d 1133, 1136-37 (N.D. Cal. 2000) (rejecting an argument that a definition of "service dog" should be read into the Fair Housing Act to create a rule that accommodation of animals other than service dogs is per se unreasonable, finding that "the law imposes on defendants the obligation to consider each request individually and to grant requests that are reasonable.").

[53] 24 C.F.R. § 100.201.

[54] 24 C.F.R. § 100.201.

whether they specifically recommended this type of animal.

It is also recommended that the health care professional sign and date any documentation provided and provide contact information and any professional licensing information.

Appendix

What are assistance animals?

Assistance animals do work, perform tasks, provide assistance, or provide emotional support for a person with a physical or mental impairment that substantially limits at least one major life activity or bodily function.[55]

What are physical or mental impairments?

Physical or mental impairments include: any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; and endocrine; or

Any mental or psychological disorder, such as intellectual disability, organic brain syndrome, emotional or mental illness, and specific learning disability; or

Diseases and conditions such as orthopedic, visual, speech and hearing impairments, cerebral palsy, autism, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, Human Immunodeficiency Virus infection, mental retardation, emotional illness, drug addiction (other than addiction caused by current, illegal use of a controlled substance) and alcoholism.[56]

What are major life activities or major bodily functions?

They are: seeing, hearing, walking, breathing, performing manual tasks, caring for one's self, learning, speaking, and working.[57]

Other impairments – based on specific facts in individual cases -- may also substantially limit at least one major life activity or bodily function.[58]

What are Some Examples of Work, Tasks, Assistance, and Emotional Support?

[55] *See* 24 C.F.R. §§ 5.303; 960.705.
[56] *See* 24 C.F.R. § 100.201.
[57] *See* 24 C.F.R. § 100.201(b).
[58] *See* 24 C.F.R. § 100.201.

Some examples of work and tasks that are commonly performed by service dogs include[59]:

- Assisting individuals who are blind or have low vision with navigation and other tasks,
- Alerting individuals who are deaf or hard of hearing to the presence of people or sounds,
- Providing non-violent protection or rescue work,
- Pulling a wheelchair,
- Alerting a person with epilepsy to an upcoming seizure and assisting the individual during the seizure,
- Alerting individuals to the presence of allergens,
- Retrieving the telephone or summoning emergency assistance, or
- Providing physical support and assistance with balance and stability to individuals with mobility disabilities.

Some other examples of work, tasks or other types of assistance provided by animals include:[60]

- Helping persons with psychiatric and neurological disabilities by preventing or interrupting impulsive or destructive behaviors,
- Reminding a person with mental illness to take prescribed medication,
- Alerting a person with diabetes when blood sugar is high or low,
- Taking an action to calm a person with post-traumatic stress disorder (PTSD) during an anxiety attack,
- Assisting the person in dealing with disability-related stress or pain,
- Assisting a person with mental illness to leave the isolation of home or

to interact with others,

- Enabling a person to deal with the symptoms or effects of major depression by providing a reason to live, or
- Providing emotional support that alleviates at least one identified symptom or effect of a physical or mental impairment.

What are examples of a patient's need for a unique animal or unique circumstances?[61]

- The animal is individually trained to do work or perform tasks that cannot be performed by a dog.
- Information from a health care professional confirms that:
    - Allergies prevent the person from using a dog, or
    - Without the animal, the symptoms or effects of the person's disability will be significantly increased.
- The individual seeks a reasonable accommodation to a land use and zoning law, Homeowners Association (HOA) rule, or condominium or co-op rule.
- The individual seeks to keep the animal outdoors at a house with a fenced yard where the animal can be appropriately maintained.

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[59] *See* 28 C.F.R. §§ 35.136(f); 36.302(c)(6).

[60] *See, e.g.*, *Majors v. Housing Authority of the County of DeKalb Georgia,* 652 F.2d 454, 457 (5th Cir. 1981); *Janush*, 169 F.Supp.2d at 1136-37.

[61] *See, e.g.*, *Anderson v. City of Blue Ash*, 798 F.3d 338, 360-63 (6th Cir. 2015) (seeking a reasonable accommodation to keep a miniature horse as an assistance animal).

FACT SHEET ON HUD'S ASSISTANCE ANIMALS NOTICE

On January 28, 2020, the U.S. Department of Housing and Urban Development (HUD) Office of Fair Housing and Equal Opportunity (FHEO) released Notice FHEO-2020-01, sometimes referred to as the "Assistance Animals Notice." The Notice includes two sections. The first, "Assessing a Person's Request to Have an Animal as a Reasonable Accommodation Under the Fair Housing Act," recommends a set of best practices for complying with the Fair Housing Act (FHA) when assessing a person with a disability's accommodation requests involving animals in housing. This includes information regarding:

- The difference between assistance animals and pets;
- The types of accommodations that a housing provider may need to grant, such as exceptions to no-animal policies, deposits, or fees that are ordinarily charged for animals;
- Assessing whether an animal is a service animal or an assistance animal other than a service animal (sometimes referred to as a support animal);
- Permissible inquiries regarding assistance animals, particularly if the individual's disability or disability-related need for an animal is non-obvious or non-observable, or not otherwise known to the housing provider;
- The type of verification and documentation that a housing provider may request regarding an individual's disability and disability-related need for an assistance animal;
- Descriptions of the typical types of assistance animals, an example of a unique type of animal that provides disability-related assistance and guidance on handling requests involving more than one animal; and
- Other best practices regarding reasonable accommodations for assistance animals.

The second section is "Guidance on Documenting an Individual's Need for Assistance Animals in Housing." It provides guidance on information that an individual seeking a reasonable accommodation for an assistance animal may need to provide to a housing provider about his or her disability-related need for the requested accommodation, including supporting information from a health care professional.

The contents of the Assistance Animal Notice do not have the force and effect of law and are not meant to bind the public in any way. The contents are intended only to provide clarity to the public regarding existing requirements under the law or agency policies.

Background

The Fair Housing Act (FHA) makes it unlawful for a housing provider to refuse to make a reasonable accommodation that a person with a disability may need in order to have equal opportunity to enjoy and use a dwelling. HUD released Notice FHEO-2020-01, the Assistance Animals Notice, to clarify the rights and obligations under the FHA regarding assistance animals. It supersedes HUD's prior guidance, FHEO-2013-01, on assistance animals.

HUD has long recognized the need of some persons with disabilities to keep an assistance animal in their home, and the legal obligation of housing providers to make reasonable accommodations to allow such assistance animals. Persons with various types of disabilities may need an assistance animal in their home to have an equal opportunity to use and enjoy their housing. While some disabilities may be known or obvious to a housing provider, other disabilities may not be.

As the guidance explains, assistance animals are not pets. Assistance animals could be a trained service animal, or they could be other animals that do work, perform tasks, assist, and/or provide therapeutic emotional support for individuals with disabilities that affect major life activities. Due to the unique nature of housing, a person with a disability may need an assistance animal in their home that provides disability-related assistance, even if the animal is not individually trained as a service animal. Assistance animals are generally an animal commonly kept in the household. Housing providers may not exclude or charge a fee or deposit for assistance animals because these animals serve an important function that individuals with disabilities that affect major life activities need in order to have equal opportunity in housing.

HUD's guidance is intended to help housing providers distinguish between a person with a non-obvious disability who has a legitimate need for an assistance animal and a person without a disability that affects a major life activity who simply wants to have a pet or avoid the costs and limitations imposed by housing providers' pet policies, such as pet fees or deposits. The guidance may also help persons with a disability that affects a major life activity who request a reasonable accommodation to use an assistance animal in housing. The guidance also helps housing providers understand the information they may ask a person with a disability to provide when the person's disability and related need for an animal are non-observable or not previously known by the housing provider.

Questions and Answers about the Assistance Animals Notice

Question: Does the Assistance Animals Notice change or restrict the Department's interpretation regarding assistance animals in housing?

No, the Assistance Animals Notice reflects the Department's longstanding interpretation regarding reasonable accommodations for assistance animals. The guidance clarifies the existing law regarding assistance animals and better informs housing providers, individuals with disabilities, and the public of their rights and obligations regarding reasonable accommodations for assistance animals under the FHA. It is intended to provide greater transparency of the Department's established policies on this subject. For decades, the Department has recognized the need for assistance animals in homes, which includes support animals, both trained and untrained, that provide therapeutic emotional support for individuals with disabilities. This is distinct from "service animal" as defined in the Department of Justice's regulations implementing the Americans with Disabilities Act.

Question: Does the Assistance Animals Notice affect my right to bring my assistance animal to restaurants, stores, on public transportation, and to other public places?

The Assistance Animals Notice applies only to housing, including public and common use areas of housing developments and facilities covered by the FHA, including apartments, condominiums, cooperatives, single family homes, nursing homes, assisted living facilities, group homes, and other types of housing covered by the FHA. Some types of short-term temporary shelter are not covered by the FHA. The reasonable accommodation requirements apply to all housing covered by the FHA, regardless of whether the housing is private, public, or receives federal financial assistance. While it does not extend to buildings, vehicles or areas that are not covered by the FHA, these areas may be covered by other laws with other requirements for animals for persons with disabilities, such as the Americans with Disabilities Act or the Air Carrier Access Act. For more information on these requirements, see Department of Justice and Department of Transportation implementing regulations, notices, guidance, and policies.

Question: Who can use the Assistance Animals Notice?

The Assistance Animals Notice provides guidance for housing providers who receive a request for a reasonable accommodation from an individual with a disability to keep an assistance animal in housing. Individuals with disabilities that affect major life activity may also use the guidance to assist them in requesting a reasonable accommodation and to clarify what type of information they may need to give their housing provider to support their request under the FHA. Additionally, it can be used by other members of the public, including healthcare providers who may be asked to provide supporting information for persons who are requesting a reasonable accommodation for a disability.

Question: Why is the Department releasing guidance on Assistance Animals?

FHA complaints concerning denial of reasonable accommodations and disability access comprise almost 60% of all FHA complaints and those involving requests for reasonable accommodations for assistance animals are significantly increasing. In fact, such complaints are one of the most common types of fair housing complaints that HUD receives. Most HUD charges of discrimination against a housing provider following a full investigation involve the denial of a reasonable accommodation to a person who has a physical or mental disability that the housing provider cannot readily observe. In recent years, the practice of the sale and use of so-called "certificates" for assistance animals has also proliferated. In HUD's view, such certificates, issued in the absence of a personal medical relationship, are not meaningful and a waste of money. In some instances, these appear to be employed by persons who do not meet the requirements for a reasonable accommodation, sowing confusion among housing providers. Therefore, the Department has determined that it is helpful to release further guidance on this matter to assist housing providers, individuals with disabilities, and the public to understand when the FHA requires a housing provider to grant a reasonable accommodation to an individual

who has a disability-related need for an assistance animal, including when the need for such an animal is not obvious and the animal does not have individualized training.

Question: As a housing provider, will the Assistance Animals Notice help me to understand the documentation requirements regarding assistance animals for persons with disabilities, including what to do if a tenant provides me with documentation from the internet?

Yes, the guidance provides best practices for housing providers regarding when they can request more information or documentation regarding a disability and disability-related need for an assistance animal. As the Assistance Animals Notice explains, in appropriate instances, housing providers may ask for more information consistent with the Fair Housing Act. The guidance describes the type of information that a housing provider may request when processing a reasonable accommodation request. One reliable form of documentation is a note from a person's health care professional that confirms a person's disability affecting a major life activity and related need for an assistance animal for therapeutic purposes when the health care professional has personal knowledge of the individual. HUD has heard from housing providers, persons with disabilities, and other groups and individuals who are concerned about commercially available documentation from the internet. The guidance explains that, in HUD's experience, documentation from websites that sell certificates, registrations, and licensing documents and animal gear for animals to anyone who answers certain questions or participates in a short interview and pays a fee is not sufficient to reliably establish that an individual has a non-observable disability or disability-related need for an assistance animal. However, in some circumstances, documentation may be reliable where provided by legitimate, licensed health care professionals delivering health care services remotely, including over the internet. The guidance helps housing providers to navigate these questions regarding information and documentation of a disability affecting a major life activity and disability-related need for an assistance animal.

Question: In what circumstances would a person with a disability need an assistance animal in their home?

There are a number of reasons that a person with a disability may need an assistance animal in their home, and assistance animals may perform a variety of tasks or serve a variety of functions. Examples of tasks include guiding an individual who is blind or has low vision, pulling a wheelchair, or providing therapeutic emotional support with respect to an individual's mental disability affecting a major life activity. A common and appropriate example is a veteran returning from combat relying on and using an assistance animal that provides therapeutic support related to post-traumatic stress disorder (PTSD) that limits major life activities, such as holding a job or attending school regularly.

Question: How will the guidance impact HUD investigations and enforcement of complaints of discrimination on the basis of disability because an individual was denied a reasonable accommodation for an assistance animal?

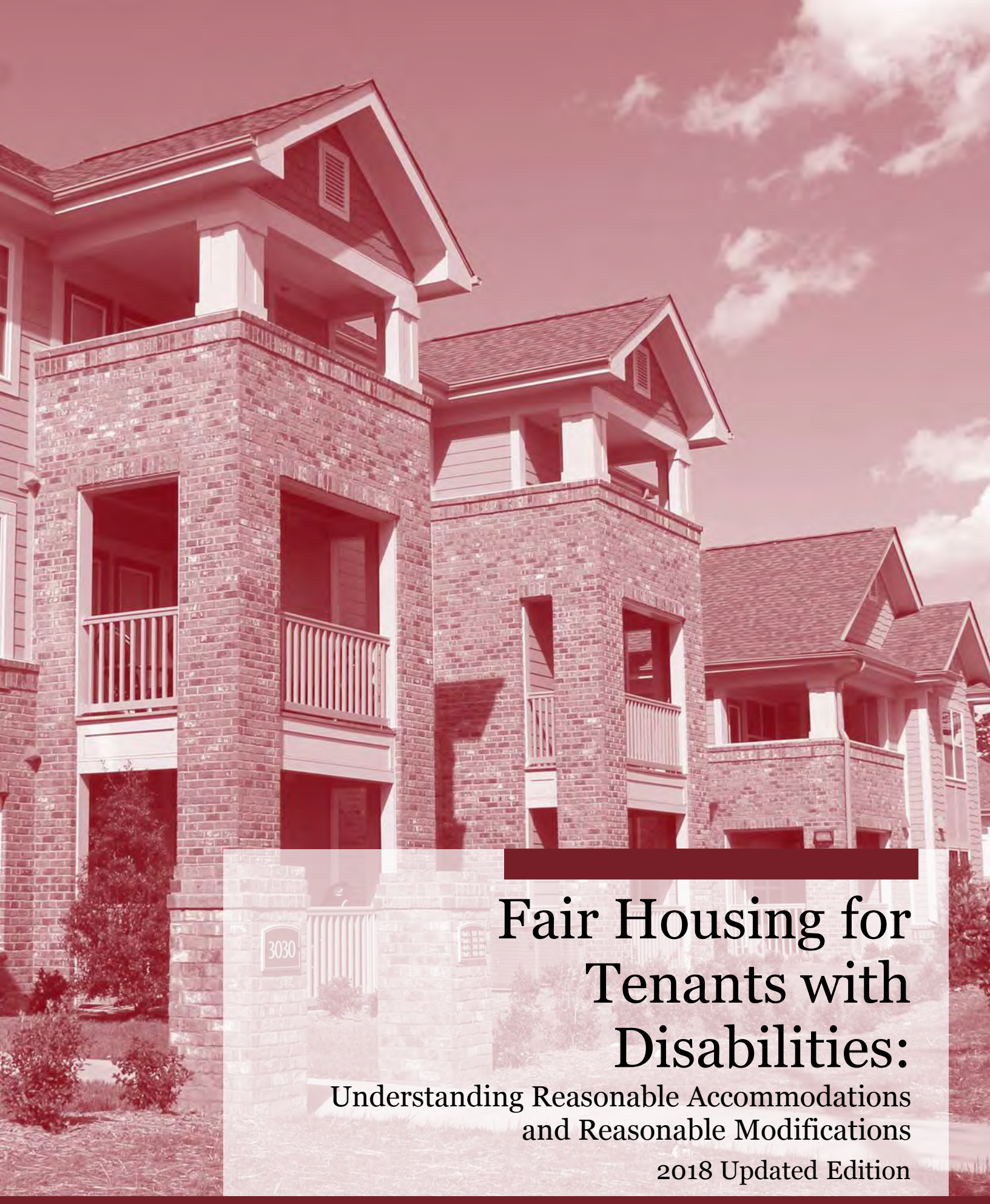
As noted above, complaints of this nature are the most common type of fair housing complaint that FHEO receives. The Department intends for the guidance to proactively assist housing providers and individuals with disabilities affecting a major life activity so that individuals who are entitled to an accommodation receive one and housing providers comply with the FHA. However, the guidance does not change or otherwise affect an individual's right to file a fair housing complaint on this basis with FHEO or the defenses available to housing providers. It does not change FHEO's procedures for investigating such complaints. Individuals who believe they have experienced housing discrimination may file a complaint by contacting FHEO.

Question: If my housing provider has already provided me with a reasonable accommodation for my assistance animal, how does the Assistance Animals Notice affect my housing?

The guidance does not change HUD's interpretation of the FHA and does not affect any already granted reasonable accommodations. Consistent with the requirements of the FHA, housing providers should not re-assess any accommodations they have already granted to individuals with disabilities. The guidance provides clarity for analyzing future requests for reasonable accommodations.

Question: If my housing provider requests documentation of my disability or disability-related need for an assistance animal, consistent with the FHA, do I need to provide it in a specific format, such as the section, "Guidance on Documenting an Individual's Need for Assistance Animals in Housing"?

No, "Guidance on Documenting an Individual's Need for Assistance Animals in Housing" does not require that documentation be provided in a specific format, nor is that document a form that is or may be required. Instead, that section provides guidance on the type of information that may be necessary to provide to a housing provider to document a disability affecting a major life activity and disability-related need for an assistance animal. It is intended to reduce the burden on individuals with disabilities, their healthcare providers, and housing providers by providing guidance on the type of information that is relevant to assessing a reasonable accommodation request under the FHA and to speed the process for making reasonable accommodation decisions.



Fair Housing for Tenants with Disabilities:

Understanding Reasonable Accommodations and Reasonable Modifications

2018 Updated Edition

Special Topics 30

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NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES
NORTH CAROLINA HOUSING FINANCE AGENCY
SCHOOL OF GOVERNMENT AT THE UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL
REASONABLE ACCOMMODATION STUDY GROUP

To request a copy of this publication, contact the N.C. Housing Finance Agency,
P.O. Box 28066, Raleigh, NC 27611-8066. Telephone (919) 877-5700.
The document, along with some of the referenced material,
is also available on the NCHFA website at http://www.nchfa.com.

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DISCLAIMER

Although this Guide contains legal information as well as suggestions for policies and practices, it is intended only as a reference. Landlords must use their best judgment in deciding how to implement reasonable accommodation and modification procedures. Individual cases and circumstances vary widely, and the law is always subject to change through legislative or judicial action. This guide is not intended to serve as a substitute for legal advice or to establish any lawyer-client relationship.

REASONABLE ACCOMMODATIONS STUDY GROUP

The ad hoc Reasonable Accommodations Study Group, sponsored by the Elderly Housing Rights and Consumer Protection Program, developed the original version of this Guide, entitled "Reasonable Accommodation for Residents with Mental Illness or Substance Abuse Problems," in 1995. Membership of the Study Group included housing providers, service providers, attorneys and advocates for persons with mental illness and for low-income tenants.

The Guide's initial purpose was to address issues involved in making reasonable accommodations for tenants and applicants with mental illness or substance use problems. The Study Group believed it was possible to create policies and procedures that satisfy the intent of the law without subjecting either landlords or persons with disabilities to undue burdens.

The 2008 update widened the original scope by making the Guide applicable to tenants with all types of disabilities. It included a new section on reasonable modifications as well as references to relevant court decisions covering the past ten years.

This 2018 update builds on the work of the 2008 version and continues its vision of providing a practical guide for housing providers in how to best serve tenants with disabilities. Along with updating the court cases and citations, this update adds more detailed information on three issues landlords are regularly asked to address: (1) service and assistance animals, (2) credit history and (3) criminal backgrounds. Representatives of the following organizations contributed generously to the development of this edition of the Guide or its 2008 predecessor:

- Apartment Association of North Carolina,
- Center for Universal Design at the College of Design, NC State University,
- Hatch, Little & Bunn, L.L.P.,
- Fair Housing Project of Legal Aid of North Carolina,
- North Carolina Human Relations Commission and
- North Carolina Justice Center.

Numerous other organizations and individuals also provided input and assistance in revising this document. The sponsors of this Guide wish to extend a special appreciation to the North Carolina Justice Center for their role in drafting the original document.

INTRODUCTION

Persons with disabilities face numerous obstacles to securing housing, ranging from architectural barriers to economics and personal circumstances. Fair housing laws recognize these barriers and include important mandates that, if understood and put into practice, expand housing choices and opportunities for persons with disabilities.

Fair housing laws prohibit discrimination against people based on their race, color, religion, national origin, sex, familial status or disability. For persons with disabilities, fair housing laws make it illegal to:

- Fail to make a reasonable accommodation in rules, policies and services to give a person with a disability equal opportunity to occupy and enjoy the full use of the housing; and
- Fail to allow reasonable modification to the premises if the modification is necessary to allow full use of the premises.

Americans know that race-based discrimination is illegal, but almost 30 years after the passage of the Fair Housing Amendments Act just slightly more than half of Americans know that it is illegal for landlords to refuse to make reasonable accommodations for persons with disabilities or to refuse to permit reasonable modification to a housing unit.[1]

Determining what is a reasonable accommodation or a reasonable modification requires a balancing of interests and a case-by-case judgment as to what is "reasonable." This Guide includes numerous examples which illustrate the standards courts have used in determining what is reasonable. In addition, the Guide includes a statewide list of legal, housing, and community resources (see Appendix D) to help tenants and landlords handle issues that arise in assessing and addressing the issue of reasonableness.

[1] Martin D. Abravanel, U.S. Dep't of Hous. and Urban Dev., Do We Know More Now? Trends in Public Knowledge, Support and Use of Fair Housing Law, 11 (2006).

FAIR HOUSING LAW

The Civil Rights Act of 1968, also known as the Fair Housing Act, was passed to address a legacy of segregation and discrimination in housing markets throughout the United States. Together with subsequent amendments and additional laws, it has provided an avenue of redress for housing discrimination based on race, color, national origin, religion, sex, familial status and disability.

Housing providers can be held liable for housing discrimination based primarily on three grounds:

- **Intentional discrimination.** This is discrimination based on a housing provider treating a person differently *because* of his or her membership in a protected class. For example, if a provider refused to rent to a person *because* he or she had AIDS, or if a provider charged a family a higher deposit *because* their child had ADHD or a developmental disability, that would be intentional discrimination based on disability.
- **Discriminatory effect.** This is discrimination a housing provider does not do intentionally, but nonetheless impacts persons of a protected status disproportionately. This type of discrimination is sometimes called "disparate impact" discrimination. For example, if a provider required all prospective tenants to have employment income and would not consider a person's income from disability payments, that would be unlawful discrimination because it would have a disparate impact/discriminatory effect based on disability.
- **Strict liability.** In certain circumstances, a housing provider may be held liable for certain actions that are deemed discriminatory. For example, if a provider makes an oral statement or prints advertising indicating a preference or limitation based on disability (e.g. "I don't allow people on psychiatric medications") or refuses to grant a reasonable accommodation or reasonable modification to a person with a disability, that is a violation of fair housing laws regardless of whether the provider intended to discriminate or not.

The purpose of this Guide is to help landlords, property managers and others understand a very specific part of fair housing law; namely what obligations they have under the law in relation to tenants, prospective tenants, or people with disabilities who are associated with tenants or prospective tenants.

Three federal laws and one North Carolina state law specifically prohibit housing discrimination against rental applicants or tenants because of a disability.

The federal laws are:

1. the Fair Housing Act of 1968 as amended in 1988 ("Fair Housing Act"), which prohibits discrimination based on race, color, religion, national origin, sex, familial status or disability and requires landlords to make reasonable accommodations and modifications for tenants with disabilities;

2. the Americans with Disabilities Act ("ADA"), enacted in 1990, which prohibits discrimination on the basis of disability in government-funded programs, including housing programs (Title II), as well as public accommodations (Title III). Under Title II, certain federally-funded housing providers, including federally-funded homeless shelters must provide reasonable accommodations and modifications. Under Title III, portions of private housing open to the public, such as rental or leasing offices, and other on-site locations used by the public, must be accessible to persons with disabilities; and
3. Section 504 of the Rehabilitation Act of 1973 ("Section 504"), which prohibits discrimination in certain federally-funded housing programs.

The North Carolina law is:

4. the State Fair Housing Act, which is substantially equivalent to the federal Fair Housing Act.

Depending on when a unit of rental housing was built and whether its construction was funded from certain federal sources (see *Box 1* on page 16), some or all of the fair housing laws mentioned above may apply. While other laws and local ordinances may also apply, this Guide is intended to inform readers of the rights provided to tenants with disabilities by these fair housing laws, and their reasonable accommodation and modification mandates.

Figure 1 presents an overview of the laws relating to illegal housing discrimination against persons with disabilities and defines the specific housing types for which each one is applicable.

Figure 1: Federal and State Laws Prohibiting Discrimination in Housing Against People with Disabilities

Law	Housing Covered	Types of Practices Prohibited or Required	Definition of "Person with a Disability (or Handicap)"
Fair Housing Amendments Act 42 U.S.C. § 3601 et seq. (federal)	All types of "dwellings" that are designed or used as a residence, and any land or vacant property that is sold or leased as residential property. Some provisions do not apply to: 1. Rental dwellings of four or less units, when one unit is occupied by the owner. 2. Single family homes sold or rented by the owner without the use of a broker or discriminatory advertising. 3. Housing owned by private clubs or religious organizations that restrict occupancy in housing units to their members.	1. Cannot discriminate in renting, selling, imposing terms and conditions, advertising, asking questions, or blockbusting (implying that people of a designation are entering the community in large numbers). 2. Must provide reasonable accommodations at the landlord's expense. 3. Must allow reasonable modifications at the tenant's expense.	Persons who: 1. Have a physical or mental impairment substantially limiting one or more major life activities, including caring for one's self, walking, seeing, hearing, speaking, breathing, working, performing manual tasks, and learning. 2. Have a history of a physical or mental impairment substantially limiting one or more major life activities. 3. Are regarded as having a physical or mental impairment substantially limiting one or more major life activities.
Chapter 41A of N.C. General Statutes (state)	All housing, including common areas. Some provisions do not apply to: 1. Owner-occupied, "single family" housing (up to 4 units). 2. Owner-occupied boarding houses. 3. Private clubs, operating for commercial purposes.	1. Cannot discriminate in the terms, conditions, or privileges of a real estate transaction or provision of facilities. 2. Cannot refuse to make reasonable accommodations to rules, practices, policies, or services. 3. Cannot refuse to allow the tenant to make reasonable modifications.	Same as above.
Americans with Disabilities Act (federal)	Title II applies to housing provided by state and local governments and their entities, including public housing authorities, regardless of whether they receive federal funds. Title III applies to places of public accommodation, such as commercial facilities and common areas of rental housing and homeless shelters.	Cannot deny qualified individuals the opportunity to participate in or benefit from federally funded programs, services, or other benefits. Cannot deny access to programs (all operations of the housing provider), services, benefits, or opportunities to participate as a result of physical barriers. The housing provider is not required to take steps that it can demonstrate will cause an undue financial or administrative burden or change the fundamental nature of the program.	Same as above.
Section 504 of the Rehabilitation Act 29 U.S.C. § 794 (federal)	Any housing program or activity receiving Federal financial assistance or any housing program or activity conducted by any executive agency of the U.S. government or by the United States Postal Service. See Box 1 on Page 16 for definition of "Federal Financial Assistance".	Same as Title II and III of the ADA. 5% of units must be accessible for persons with mobility impairments and an additional 2% must be accessible for persons with visual or hearing impairments.	Same as above.

Law	Accessibility Requirements	Is Current Illegal Drug Use Covered?	Is a History of Illegal Drug Use Covered?	Are Alcoholics Covered?
Fair Housing Amendments Act 42 U.S.C. § 3601 et seq. (federal) Accessibility Requirements apply to all ground floor or elevator accessed units in all buildings with four or more units built for first occupancy after March 13, 1991.	1. Dwellings shall be designed and constructed to have at least one building entrance on an accessible route, unless it is impractical to do so because of terrain or unusual characteristics of the site. 2. Dwellings with a building entrance on an accessible route shall be designed in such a manner that the public and common use areas are readily accessible to and usable by handicapped persons. 3. Dwellings with a building entrance on an accessible route shall be designed in such a manner that doors are wide enough to allow passage by persons in wheelchairs. 4. Dwellings with a building entrance on an accessible route shall be designed and constructed such that all premises contain an accessible route into and through the unit. 5. Light switches, electrical outlets, thermostats, and other environmental controls must be in accessible locations. 6. Dwellings must contain reinforced walls in bathrooms to allow installation of grab bars around toilet, tub, shower stall, and shower seat, where such facilities are provided. 7. Dwellings must contain usable kitchens and bathrooms such that an individual in a wheelchair can maneuver about the space.	No	Yes	Yes
Chapter 41A of NC General Statutes (state)	Same as above. In addition, NC Building code contains accessibility requirements.[2]	No	Yes	Yes
Americans with Disabilities Act (federal)	To be readily accessible, a facility must be able to be approached, entered, and used by individuals with disabilities. All properties subject to Title II constructed after January 26, 1993, must be in compliance with the Americans with Disabilities Act Accessibility Guidelines or the Uniform Federal Accessibility Standards. Title III requires that the rental office, other common areas and parking be accessible.	No	Yes	Yes
Section 504 of the Rehabilitation Act 29 U.S.C. §794 (federal)	Properties must be “readily accessible” to persons with disabilities. Providers must ensure that individuals with visual, speaking, or hearing impairments can effectively communicate.	No	Yes, a person with a history of drug use who has been successfully rehabilitated, or someone who is participating in a drug rehabilitation program and is not currently using drugs illegally, is protected.	No, if alcoholism prevents an individual from participating in the housing program or poses a threat to the property or safety of others. Yes, otherwise.

[2] For more information, see the North Carolina Department of Insurance: http://www.ncdoi.com.

● Defining "Persons with Disabilities"

While this Guide refers to persons with disabilities, the fair housing laws use the term "handicap." Cases interpreting fair housing laws make clear that the terms have the same meaning. According to the laws, persons with disabilities include those:

- with a physical or mental impairment that substantially limits one or more major life activity;
- with a record of having such an impairment; or
- regarded as having such an impairment whether they have the impairment or not.[3]

The following persons are not included in the definition of disability:

- persons currently engaging in the illegal use of a controlled substance;
- persons convicted of the illegal manufacture or distribution of a controlled substance;
- persons whose sole basis for claiming to be disabled is that the person is a "transvestite";
- persons whose tenancy would constitute a "direct threat" to the health or safety of other individuals or whose tenancy would cause substantial physical damage to the property of others; and
- juvenile offenders and sex offenders, by virtue of their status.[4]

The definition of "disability" under fair housing laws is broader than the disability definition under regulations covering eligibility for federally-subsidized housing programs (such as Section 811) or federal disability benefits (such as SSI).[5]

● Determining Prohibited Conduct

Fair housing laws prohibit the following actions:

1. discrimination in the rental of housing because of the disability of the renter, a household member, or a person associated with the renter;[6]

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[3] For FHA: *see* 42 U.S.C. § 3602(h) (2012); 24 C.F.R. § 100.201 (2016). For Section 504: *see* 29 U.S.C. § 706(7) (2012); 24 C.F.R. § 8.3 (2016). For ADA: *see* 42 U.S.C. §121-2 (2012); 28 C.F.R. 35.104 (2016).
[4] U.S. Dep't of Hous. and Urban Dev. and U.S. Dep't of Justice, Joint Statement of the Department of Housing and Urban Development and Department of Justice: Reasonable Accommodations Under the Fair Housing Act, (2004) [hereinafter *2004 Joint Statement*].
[5] In determining eligibility for federally-assisted housing, a person with a disability is one who: (a) has a disability as defined under the Social Security Act; (b) has a developmental disability as defined by federal law or (c) is determined to have an impairment that: (i) is expected to be of long,continued and indefinite duration; (ii) substantially impedes the individual's ability to live independently and (iii) is of such a nature that the disability could be improved by more suitable housing conditions.
[6] 42 U.S.C. § 3604(f)(1) (2012).

2. discrimination in the terms or conditions of rental, or in the provision of services or facilities, because of a disability of the renter;[7]
3. inquiries to determine whether a tenant or person seeking to rent a dwelling unit has a disability;[8]
4. denying a reasonable accommodation or reasonable modification; and
5. discriminatory advertising.[9]

● The Special Case of Illegal Substance Use and Alcoholism

CURRENT USE OF ILLEGAL DRUGS

Individuals who currently use illegal drugs are explicitly excluded from protection under the federal and state Fair Housing Act.[10]

PAST USE/HISTORY OF ILLEGAL DRUG USE

The Federal and State Fair Housing Acts distinguish between individuals who are *currently* using illegal drugs and individuals who are not currently using illegal drugs but who have a *history* of addiction. Individuals who have a history of illegal drug use but are not currently using are considered to be "disabled" and are protected, by law, from discriminatory conduct. The laws are clear that an individual is protected if he or she is not using illegal drugs and: (1) has successfully completed a rehabilitation program; (2) has otherwise been rehabilitated or (3) is participating in a treatment program or self-help group.[11]

ALCOHOLISM

Persons with alcoholism are treated differently under Section 504 than under the Fair Housing Act and the ADA (see *Figure 1).*

- The Fair Housing Act's definition of disability includes alcoholism as a covered disability but provides a general exclusion for any individual whose tenancy would pose a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others, provided a reasonable accommodation could not eliminate the threat.[12]
- United States Department of Housing and Urban Development (HUD) regulations for Section 504 explicitly exclude from its definition of "individual with handicap" anyone whose current alcohol use prevents that person from participating in federally funded housing programs (which include meeting the terms of the lease) or whose current alcohol abuse would constitute a direct threat to property or the safety of others.[13]

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[7] 42 U.S.C. § 3604(f)(2) (2012).
[8] 24 C.F.R. § 100.202(c) (2016).
[9] 42 U.S.C. § 3604(c) (2012).
[10] *See e.g.*, 42 U.S.C. § 3602(h)(3) (2012).
[11] 29 U.S.C. § 705(20)(C)(ii) (2012). *See U.S. v. Southern Mgmt. Corp.*, 955 F.2d 914, 922 (4th Cir. 1992) (extending the ADA's inclusion of "former" or "recovering" addicts as persons with a handicap to the FHA).
[12] *See* 42 U.S.C. § 3604(f)(9) (2012); Relevant Case #11 *infra* p. 24.
[13] *See* 24 C.F.R. § 8.3 (2016) (defining "individual with handicaps" for Section 504 purposes).

DEFINING REASONABLE ACCOMMODATIONS

A "reasonable accommodation" is a change in the rules, policies, or procedures of a housing provider that is needed by a person with a disability in order to fully use or enjoy the dwelling or common areas. The mandate for making reasonable accommodations is found in both the Fair Housing Act and Section 504 (see *Figure 1*).

The Fair Housing Act requires housing providers to make reasonable accommodations as outlined in 24 C.F.R. 100.204(a), which states:

> It shall be unlawful for any person to refuse to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford a handicapped person equal opportunity to use and enjoy a dwelling unit, including public and common use areas.

The need for a reasonable accommodation may arise at the time person is applying for housing, during the tenancy, or to avoid eviction. It is the responsibility of the person with a disability, or someone acting on his or her behalf, to ask for a specific reasonable accommodation whenever one is needed.

The law does not establish any clear threshold (financial, administrative, or otherwise) for determining what is reasonable, but it does specify that landlords are not required to provide an accommodation if it would impose an "undue burden" or result in a "fundamental alteration" of the nature of the housing program.[14] An undue burden is an unreasonable financial and administrative cost, which is demonstrated by comparing the financial and administrative costs of regular operation, the overall financial resources available to the landlord, and the costs of making the accommodation.[15] A fundamental alteration is an accommodation that would change the basic operation or nature of services provided by significantly modifying, eliminating, or adding to the services that a landlord provides.[16]

● Individuals with Visual, Speaking, or Hearing Impairments

Landlords must ensure that individuals with visual, speaking, or hearing impairments can effectively communicate with them. For example, visually impaired persons may need to have the rental application or other written documents read to them or provided in an electronic format. Landlords should also be familiar with the Telecommunications Relay Service (TRS) which allows a deaf, hard of hearing, deaf-blind, or speech impaired individual to use special equipment to make telephone calls. The internet and cell phones have increased the ways in which persons with disabilities are able to communicate and made more TRS options available to serve users with different needs and circumstances. (For a brief overview of the different TRS methods and services, see Appendix E).

A housing provider or a person with a disability can use TRS by calling the 7-1-1 Relay Center, where a specially trained operator relays messages between the relay user – using a text telephone or an assistive device – and a hearing person using a standard telephone. Note: Some

[14] *See Southeastern Community College v. Davis*, 442 U.S. 397, 412–13 (1979).
[15] *Shapiro v. Cadman Towers, Inc.*, 51 F.3d 328 (2d Cir. 1995).
[16] *See e.g., U.S. v. California. Mobile Home Park*, 29 F.3d 1413, 1416–17 (9th Cir. 1993).

people hang up on TRS calls because they think the CA is a telemarketer. If you hear, "Hello. This is the relay service..." when you pick up the phone, please don't hang up.

● Requests for Reasonable Accommodations

Upon receiving a request for a reasonable accommodation, the landlord should consider taking the following three steps. If a landlord denies a request for a reasonable accommodation, and the requesting individual files a complaint, the landlord's defense will rest upon proving that these steps were taken before the request was denied.

1. In requesting an accommodation, the requesting individual has disclosed that he or she has a disability. If the disability is obvious or otherwise known to the housing provider, no further inquiry should be made into the disability, and the person with a disability should not be required to obtain proof or verification of it. If the disability is not apparent, the landlord may ask for verification that the tenant has a disability as defined by the Fair Housing Act.
2. Establish that the accommodation is necessary. Verify that the requested accommodation will enable the requesting individual to have equal opportunity to use and enjoy a dwelling unit, including public and common use areas.
3. Determine that the accommodation is reasonable. Evaluate whether implementing the accommodation would impose an "undue burden" or result in a "fundamental alteration" of the nature of the housing program.

Once an accommodation is determined to be reasonable, the landlord cannot – directly or indirectly – impose the expense of providing the accommodation onto the tenant. For example, a landlord cannot require a person with a service animal to pay a pet deposit. Expenses incurred in providing reasonable accommodations must be paid by the landlord. It is recommended that requests for reasonable accommodations be made in writing, though this is not required.

● Relevant Cases

#1 Ulah was shown a model apartment and subsequently leased an apartment that was smaller than the model. She began to suffer from claustrophobia. She was prescribed Xanax, but the symptoms persisted. Ulah verbally requested that she be allowed to move into a larger apartment, but management told her that doing so involved "too much paperwork." Ulah submitted a notice of intent to vacate due to illness, and management sued her for unpaid rent. The court determined that because management was given notice of Ulah's disability but made no attempt to make a reasonable accommodation, they violated the Fair Housing Act and had discriminated against Ulah.[17]

#2 Steve, a tenant who had a mental disability, was in a fight with another tenant, and it was unclear which of the tenants provoked the other. After the fight, Steve asked that, in lieu of evicting him, the landlord give him a probationary period during which he would receive more closely monitored treatment as a reasonable accommodation. Steve produced a letter from his therapist explaining that Steve had a disability and that closer treatment would help. The landlord refused to grant Steve's requested accommodation. Because the landlord did not show why the proposed accommodation, or any other accommodation, would not have been reasonable, the court ruled that Steve had shown it was likely that his fair housing rights had been violated.[18]

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[17] *Manor Park Apts. v. Garrison*, 2005-Ohio-1891 (11th Dist. Court of Appeals 2005).
[18] *Sinisgallo v. Town of Islip Hous. Auth.*, 865 F. Supp. 2d 307 (E.D.N.Y. 2012).

#3 Carlo was keeping an emotional support dog in his condo in violation of the Condominium Association's "no pet" policy. When the Association learned of the dog, they sent him a letter informing him that he was in violation of the policy and that if the dog was not removed, Carlo would be fined. Carlo responded by informing the Board of Directors of the Association that the dog was an emotional support animal and that he was allowed to have one under federal law. Carlo included in his letter a note from his treating psychiatrist stating that the emotional support dog helped Carlo with his anxiety and depression. Still, the Association did not waive the "no pet" policy. The conflict led to Carlo selling his condo, after which he brought suit against the Association alleging discrimination in violation of the Fair Housing Act. The court upheld an administrative ruling that the Association has discriminated against Carlo.[19]

#4 Toni suffers from oversensitivity to multiple chemicals, for which she receives Social Security Disability payments. When Toni moved in, her landlord accommodated many requests by removing the carpet, cleaning with specified chemicals, cleaning the air ducts, and repainting. The tenant below Toni used cleaning solutions that irritated her, and Toni asked the landlord to evict that tenant. The court ruled that the rights of the tenant that lived downstairs did not have to be violated as part of a reasonable accommodation.[20]

● Service and Assistance Animals

Permission to have a service or assistance animal live with a tenant is one of the most commonly requested accommodations that landlords receive. For purposes of the Fair Housing Act and Section 504, HUD defines an "assistance animal" as "an animal that works, provides assistance or performs tasks for the benefit of a person with a disability, or provides emotional support that alleviates one or more identified symptoms or effects of a person's disability." Animals *do not* need to have special training in order to qualify as an assistance animal under the Fair Housing Act or Section 504.

A service or assistance animal is not a pet. As a result, "no pets" policies, breed, weight or size restrictions and additional fees or deposits that apply to pets are not applicable to service or assistance animals for people with disabilities. Further, there are many types of assistance animals in addition to more common ones, such as dogs.

Requests for service or assistance animal should be treated like all other requests for reasonable accommodations. While a request may be denied if the *specific animal* in question would pose a direct threat or cause substantial physical damage, a landlord cannot base his or her decision on the breed, size or weight of the animal. Rather, the landlord must base it on objective evidence about the particular animal's actual risk and not on speculation about the animal or prior bad conduct by other animals of the same breed, for example.

Under the ADA, a "service animal" is a more narrowly defined term and refers to a dog or miniature horse that has received special training to assist a person with a disability. In most circumstances, housing providers who follow the assistance animal requirements of the FHA or Section 504 will also be in compliance with ADA rules governing service animals. [21]

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[19] *Castillo Condo. Ass'n v. U.S. Dep't of Hous. And Urban Dev.*, 821 F.3d 92, 95-100 (1st Cir. 2016).
[20] *Temple v. Gunsalus*, 1996 WL 536710 (6th Cir. 1996).
[21] For more information on service and assistance animals *see* U.S. DEP'T OF HOUS. AND URBAN DEV., SERVICE ANIMALS AND ASSISTANCE ANIMALS FOR PEOPLE WITH DISABILITIES IN HOUSING AND HUD-FUNDED PROGRAMS, (2013) *available at* https://portal.hud.gov/hudportal/documents/huddoc?id=servanimals_ntcfheo2013-01.pdf.

● Other Frequent Types of Reasonable Accommodations

While defining "reasonable accommodation" is difficult, examples of past accommodations can help landlords and tenants understand the nature, scope, and type of accommodations that are "reasonable." Below are examples of what a reasonable accommodation might look like:

- A landlord creates a designated parking spot for a tenant with a disability who has difficulty walking long distances.
- A landlord assists a prospective tenant with a mental impairment fill out the application.
- A landlord allows a tenant that needs a live-in home-healthcare aide to add that person to the lease as an additional occupant in the unit.
- A landlord lets a tenant with a mobility impairment move from a third-floor unit to a first-floor unit without the customary fee for moving to a different unit.
- A prospective tenant with no rent history due to an extended stay in a group home or psychiatric facility is allowed to provide a reference from an employer or social worker instead of a previous landlord.
- A tenant is notified by the landlord in advance of painting or pest treatments because of the tenant's chemical sensitivity.[22]

Reasonable accommodations can arise in various contexts for several different conditions. By learning the rules, and being flexible, landlords and tenants can often come to agree on arrangements that make renting and leasing property a pleasant experience for all parties.

[22] BAZELON CENTER FOR MENTAL HEALTH LAW, WHAT "FAIR HOUSING" MEANS FOR PEOPLE WITH DISABILITIES, 15 (2011).

DEFINING REASONABLE MODIFICATIONS

A "reasonable modification" is a change in the physical structure of a dwelling that allows a person with a disability to fully use and enjoy the dwelling. The change can be to the interior of a housing unit or to common or other public spaces, including parking areas, of rental housing covered by the Fair Housing Act. The landlord must allow physical or structural modifications if they are "reasonable" and necessary for the tenant to enjoy and use the premises.[23]

● Requests for Reasonable Modifications

Upon receiving a request for a reasonable modification, the landlord should consider taking the following three steps. If a landlord denies a request for a reasonable modification, and the requesting individual files a complaint, the landlord's defense may rest upon proving that these steps were taken before the request was denied.

1. In requesting a modification, the requesting individual has disclosed that he or she has a disability. If the disability is obvious or otherwise known to the housing provider, no further inquiry should be made into the disability, and the person with a disability should not be required to obtain proof or verification of it. If the disability is not apparent, the landlord may ask for verification that the tenant has a disability as defined by the Fair Housing Act.
2. Establish that the modification is necessary. Verify that the requested modification will enable the requesting individual to have equal opportunity to use and enjoy a dwelling unit, including public and common use areas.
3. Determine that the modification is reasonable. Evaluate whether the modification is structurally possible and will not damage the property or unreasonably interfere with other tenants' use of the building or features.

It is recommended that requests for reasonable modifications be made in writing, though it is not required.

● Who Pays for the Modification?

Three questions should be asked in order to determine who will pay for a reasonable modification:

1. If the property was developed, even in part, with certain types of federal funds (see *Box 1*), the landlord must pay for the modification unless doing so would impose undue financial and administrative burdens on the operation of the housing facility.[24]
2. If a multifamily (4 or more units) building was designed for first occupancy after March 13, 1991, it was required to meet certain accessibility requirements under the Fair Housing Act.[25] If the modification requested is necessary because the building is out of compliance with the Fair Housing Act, the owners are financially responsible for all

[23] 42 U.S.C. § 3604(f)(3)(A) (2012).
[24] 24 C.F.R. § 8.23(b)(1) (2016).
[25] 42 U.S.C. § 3604(f)(3)(C) (2012).

expenses necessary to bring the property into compliance with the law.[26] The fact that a building was approved by a local building inspector and received a Certificate of Occupancy does not prove that it meets Fair Housing Act requirements.[27]

3. If the property did not receive federal financial assistance and meets the minimum accessibility requirements, then the tenant can be required to pay for the modification to the unit.

> FEDERAL FINANCIAL ASSISTANCE DEFINED:
>
> If a housing development is funded, even in part, with federal sources or receives a donation of land from a federal source, Section 504 of the Rehabilitation Act applies. Some common sources of Federal Financial Assistance are:
>
> - HOME
> - Community Development Block Grants (including Section 108 loans)
> - Section 202 and 811 Supportive Housing for the Elderly or Persons with Disabilities
> - McKinney-Vento Supportive Housing (permanent or transitional)
> - USDA Rural Development Section 514, 515, and 538
> - Public Housing Authorities
> - Privately owned developments with federal project-based rental assistance
>
> Most sources of direct or indirect federal funding trigger Section 504. However, there are some that do not. Three common federal programs that *do not* trigger Section 504 regulations are: (1) Low-income Housing Tax Credits, (2) tax-exempt bonds, and (3) properties developed without federal funds that are rented with Housing Choice Vouchers (Section 8), Shelter Plus Care Assistance, or other tenant-based rental assistance.

Box 1: Federal Financial Assistance Defined

● Standards for Modifications

If the tenant is paying for the alteration, the landlord can require that the work be done properly, that it comply with all necessary building and architectural codes, and that the tenant be responsible for obtaining all required permits.[28]

For modifications made inside a tenant's unit, the landlord can also require that at the end of the tenancy the unit be restored to its original condition, but only if the modification will interfere with a future tenant's use of the unit.[29] Modifications made to common areas do not have to be restored by the tenant at the end of his or her tenancy. Many modifications, such as the installation of grab bars or widening doorways, do not interfere with a future tenant's use. If the alterations are substantial and the tenant cannot provide adequate assurances regarding payment for the restoration, the landlord can further require that a tenant pay into an interest-

[26] For guidance on technical compliance with the Fair Housing Act *see* North Carolina Housing Finance Agency, *Fair Housing Act Self-Evaluation Form*, NCHFA (July 21, 2017, 9:39 AM), http://www.nchfa.com/es/rental-housing-partners/rental-developers/fair-housing-act-self-evaluation.
[27] 42 U.S.C. § 3604(f)(6)(B) (2012).
[28] 42 U.S.C. § 3604(f)(3)(A) (2012); 24 C.F.R. § 100.203 (2016).
[29] 24 C.F.R. § 100.203(c) (2016).

bearing escrow account.[30] Any escrow agreement should be described in writing and signed by both the tenant and the landlord.

● Relevant Cases

#5 Todd, who uses a "Section 8" voucher to help pay his rent, has a child who uses a wheelchair. The bathroom door in the apartment was too narrow to permit the wheelchair to pass through it. Todd asked the landlord for permission to widen the doorway at his own expense. The landlord may not refuse to permit Todd to make the modification, but because the tenant-based "Section 8" voucher does not qualify as federal financial assistance, the landlord is not required to incur the costs of the modification. Further, the landlord may not condition permission on Todd paying for the doorway to be narrowed at the end of the lease because the wider doorway will not interfere with the landlord's or next tenant's use and enjoyment of the premises.[31]

#6 The Weiss family lived in a condo near the beach and had a son that required a wheelchair. They requested that a ramp be built that would enable the son to access the beach. The Condominium Association requested that the family provide the plans for the ramp, produce the necessary building permits, and pay for the ramp. Because the family refused to provide plans, produce permits and pay for the ramp, the modification they requested was unreasonable and the Condominium Association did not violate the Fair Housing Act by denying them permission to build it.[32]

[30] 24 C.F.R. § 100.203(a) (2016).
[31] 24 C.F.R. § 100.203(c) (2016).
[32] *Weiss v. 2100 Condo. Ass'n, Inc.*, 941 F. Supp. 2d 1337 (S.D. Fla. 2013).

REASONABLE ACCOMMODATION AND MODIFICATION PROCEDURES

Accommodating tenants with disabilities requires flexibility and the application of good management techniques. The number of possible accommodations or modifications will be as numerous and diverse as the number of residents they assist. Many variations can be made to the suggestions below, and appropriate alternatives should be considered. Landlords should also draw upon outside experts and organizations that provide information and technical assistance (see Appendix D).

The first step, however, is creating an environment that is receptive to change, supportive of people with disabilities, open to a tenant's disclosure of a disability and sensitive to relationships among tenants.

● General Management Practices

All Landlords should:

1. Make sure they understand their obligations under federal and state anti-discrimination laws.
2. Increase their awareness of disability issues. Disabilities come in many forms and affect each person differently. Clearly communicate their expectations to residents, both in writing and orally, at move-in and throughout the term of tenancy. Expectations should be clearly set out in the lease (and rules, if any).
3. Establish a process for handling requests for accommodations and modifications.
4. Prominently display lists of community resources and contacts as well as information from supportive service providers.
5. Not discuss the tenant's disability with other tenants or third parties without the tenant's specific written permission.

Decisions involving denying a request for a reasonable accommodation or modification should generally be made by senior management personnel or the property owner, rather than the site manager.

● Admissions Policies

Landlords may not reject a tenant's application because of his or her disability or factors relating to the disability.[33] Landlords also may not use stereotypes to reject an applicant. A refusal based on concerns about the health and safety risk to others, for instance, should be based on documented past history of the specific applicant or tenant rather than on the landlord's judgment about possible future behavior.[34] Landlords can refuse to rent to someone who either:

- Fails to meet legitimate screening criteria, such as the financial ability to pay the rent, or
- Who would pose a direct threat to the health and safety of other individuals or would result in substantial physical damage to the property of others (see pp. 31-32 for more information).

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[33] *See e.g., Meadowbriar Home for Children, Inc., v. G.B. Gunn*, 81 F.3d 521, 530 (5th Cir. 1996).
[34] *See Hackett v. Comm'n on Human Rights and Opportunities*, 1996 WL 457157 (Conn. Super. 1996).

Poor credit and criminal history are common barriers for many tenants, including persons with disabilities. Landlords may still be required to make reasonable accommodations or modifications for applicants with poor credit or a criminal record if the reason the applicant has poor credit or a criminal record is directly related to their disability.

In considering requests for reasonable accommodations in the screening process, as elsewhere, the landlord must consider individual circumstances and facts. The requested accommodation must be reasonable, i.e. it will not cause an undue financial and administrative burden or result in a fundamental alteration of the nature of the housing program. The landlord does not have to waive the protective policy entirely, but can accommodate an applicant by modifying it for the situation. In the case of a past criminal history, a lease addendum could clearly state that criminal activity in violation of the lease will lead to eviction proceedings.[35] In the case of poor credit, if the period of paying bills on time has been too short to establish a pattern of financial responsibility, the tenant could be asked to have a co-signer for the initial term of their lease until they can demonstrate their ability to pay rent on time.[36]

[35] *See Sinisgallo v. Town of Islip Hous. Auth.*, 865 F. Supp. 2d 307 (E.D.N.Y. 2012). *See also Box 1, infra* p. 16.
[36] *See Giebeler v. M&B Associates*, 343 F.3d 1143 (9th Cir. 2003). *See also Box1*, *infra* p. 16.

CRIMINAL BACKGROUND SCREENING

Many landlords utilize criminal background screening when deciding whether to rent to a particular applicant. While criminal history is not a protected class, landlords must exercise caution in this area, as overbroad screening could result in violations of fair housing laws.

First, if a landlord uses any type of background screening (criminal, credit, immigration, etc.), this should be done consistently for all tenants or prospective tenants, not only ones who "look" suspicious.

Second, landlords should not make decisions based solely on an arrest. Rather, decisions should be based on convictions. If a person has an arrest with pending charges, the housing provider should consider this as part of an individualized assessment. If the housing provider is not able to determine the specifics of the pending charges, the housing provider may deny admission until the charges are resolved. If the housing provider can identify the specifics of the pending charges, they should house the person if a resulting conviction would not change the decision to house. The housing provider may delay the determination until the charge is resolved if a resulting conviction would be grounds for denying the application for housing. If the person has a disability and requests a reasonable accommodation, the provider should determine whether the request is appropriate while criminal charges are pending.

Third, for convictions, the housing provider must consider the nature, seriousness, and time of the conviction. A recent conviction for a serious offense that could indicate the person presents a threat to others' safety or to property can be used to deny tenancy. However, a conviction for a minor offense or one that occurred many years ago should not be used to deny tenancy to an applicant.

Fourth, under some circumstances the Fair Housing Act may require landlords to make reasonable accommodations for people who can demonstrate a direct link between their disability and the behavior underlying their conviction if the proposed accommodation can, with reasonable assurances, prevent the tenant from being a direct threat to the safety of other tenants. One example might be granting an accommodation to approve a tenant who was convicted for disturbing the peace, even though that conviction would normally make them ineligible, if the person's actions were caused by a mental disability and the person has changed his treatment plan to prevent future similar behavior.

Additional reasonable accommodations for applicants with a criminal record might include:

- allowing a tenant who has a drug conviction due to an addiction to rent because she no longer uses drugs, has completed substance abuse treatment, and has not been arrested subsequently, or
- renting to a tenant with a criminal history of vagrancy, trespassing, and assault because the convictions happened while he was homeless due to mental illness and he has not been convicted of a crime since getting into treatment.

Box 2: Criminal Background Screening

TENANTS WITH POOR OR NO CREDIT HISTORY

While landlords may ordinarily consider income and credit history in making rental decisions, refusing to rent to a prospective tenant due to a lack of credit or poor credit history can be a violation of the Fair Housing Act if the person's credit history is associated with his or her disability and the proposed accommodation is reasonable. For example, prospective tenants may have poor credit due to an inability to pay medical bills associated with treating their disability or an inability to work for a period of time because of their disability. Or a person may not have a credit history due because their disability prevented them from working for an extended period of time. A reasonable accommodation might include allowing a prospective tenant to have someone co-sign the lease when ordinarily co-signing is not allowed.

While prospective tenants can ask for reasonable accommodations to address their credit history, landlords can refuse to grant requests that would cause an undue administrative and financial burden. For example, landlords are not required to reduce the rent as an accommodation.

Additional reasonable accommodations for applicants with poor credit history might include:

- accepting an applicant with a bankruptcy on her credit report, if the bankruptcy was due to a serious illness that interrupted her working life and she has paid her bill on time since declaring bankruptcy, or
- approving an applicant who, because of a prior untreated mental illness, had engaged in uncontrolled spending that resulting in poor credit and defaults on loans where the person has since received treatment for his illness and is in compliance with a repayment plan.

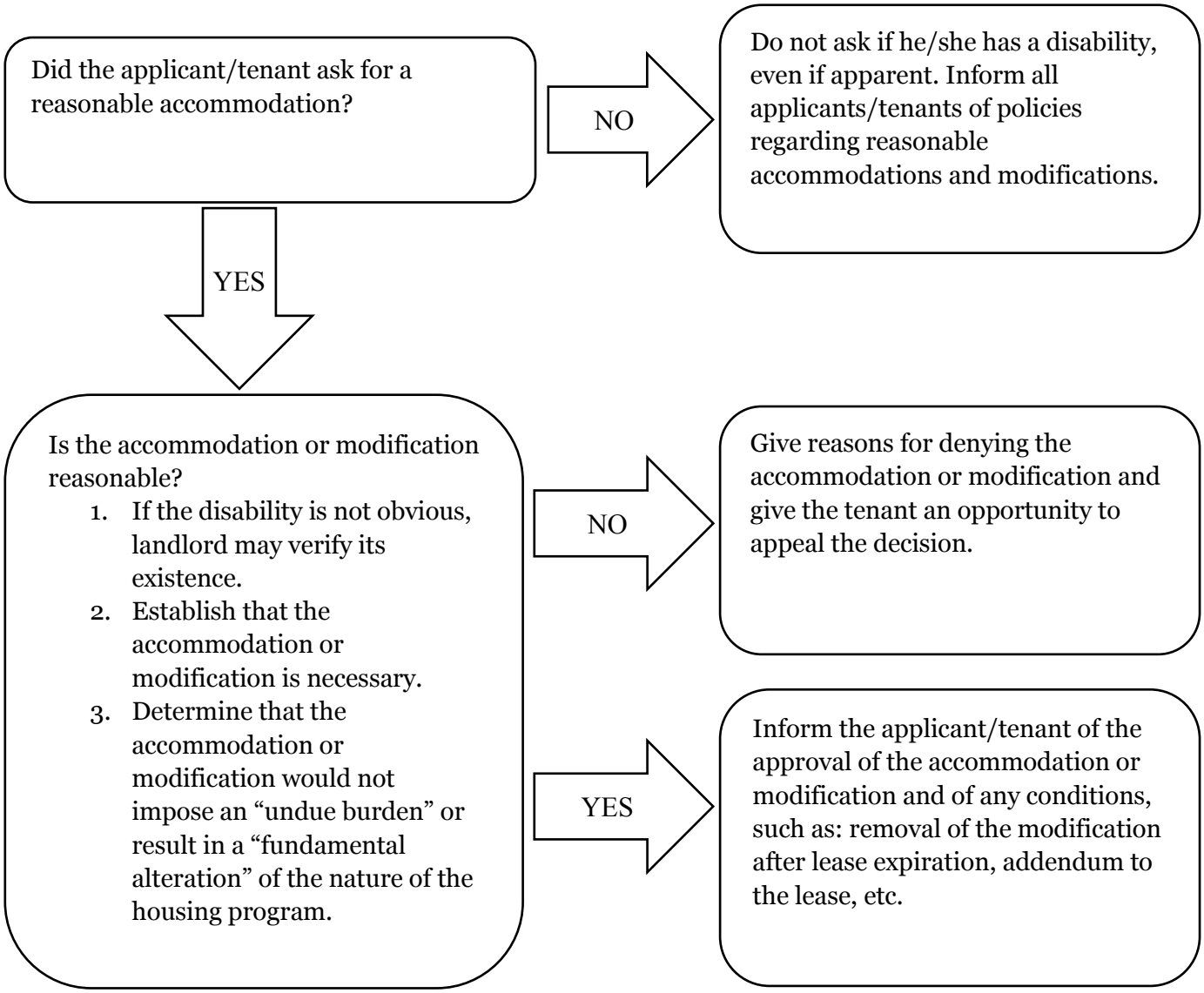
Box 3: Tenants with Poor or No Credit History

Landlords should consider taking the following steps to determine what a reasonable accommodation is regarding the tenant screening process:

1. In requesting an accommodation, the requesting individual has disclosed that he or she has a disability. If the disability is obvious or otherwise known to the housing provider, no further inquiry should be made into the disability, and the person with a disability should not be required to obtain proof or verification of it. If the disability is not apparent, the landlord may ask for verification that the tenant has a disability as defined by the Fair Housing Act.
2. Verify that the requested accommodation will enable the requesting individual to have an equal opportunity to use and enjoy a dwelling unit, including public and common use areas.
3. Determine that the accommodation is reasonable. Evaluate whether implementing the accommodation would impose an "undue burden" or result in a "fundamental alteration" of the nature of the housing program.

No person comes with a guarantee that he/she will be a good tenant, but a thoughtful and well-documented reasonable accommodation process can both protect the landlord from undue risk and allow the tenant with a disability access to housing.

Figure 2: Reasonable Accommodations or Modifications Flow Chart



● Questions During the Application Process

A prospective tenant does not have to disclose a disability unless he or she is seeking a reasonable accommodation or modification.[37] Even if the disability is apparent, the landlord should not ask about it.[38] If the applicant discloses a disability, the landlord may then ask follow-up questions but only to the extent necessary to determine the reasonableness of a particular accommodation or modification.[39]

The landlord must be careful to ask the same questions and apply the same screening criteria to all potential tenants and to ensure that the questions asked do not have the effect of probing for information that relates to a disability.[40] For example, the landlord may not ask whether a person is capable of "living independently."[41] While the question may appear to be neutral, it may have the effect of eliciting information about a disability and is not relevant to whether the prospective tenant will be able to comply with the terms of the lease.

WHAT QUESTIONS ARE LEGAL?

The following are examples of questions that landlords may ask regarding an applicant's ability to follow the terms of the lease:

1. Will the applicant pay rent and other fair charges in a timely manner?
2. Will the applicant care for and avoid damaging the unit and the common areas, use facilities and equipment in a reasonable way, create no health, safety or sanitation hazards and report maintenance needs?
3. Will the applicant avoid interfering with the rights and enjoyment of others and avoid damaging the property of others?
4. Will the applicant avoid criminal activity that threatens the health, safety or rights of other tenants or staff and avoid drug-related criminal activity?
5. Will the applicant comply with necessary and reasonable house rules, program requirements of HUD (if applicable) and health and safety codes?

WHAT QUESTIONS CANNOT BE ASKED?

Generally, it is illegal for landlords to ask:

1. whether an applicant has a disability;
2. whether an applicant has a particular type of disability;
3. questions about an applicant's disability, including its severity;
4. any question, such as "Do you take any medications?" that would require an applicant to disclose his or her disability;
5. whether any member of the applicant's family or any friend or associate has a disability; and

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[37] *See Taylor v. Harbour Pointe Homeowners Ass'n*, 690 F.3d 44, 48–51 (2d Cir. 2012).
[38] 24 C.F.R. § 100.202(c) (2016).
[39] *Jankowski, Lee & Associates v. Cisneros*, 91 F.3d 891 (7th Cir. 1996).
[40] 24 C.F.R. § 100.202(c) (2016).
[41] *See Cason v. Rochester Hous. Auth.*, 748 F. Supp. 1002 (W.D.N.Y. 1990).

6. whether the applicant has the ability to live independently or evacuate the dwelling (see p. 29–30).

Exceptions to the above rules include the following scenarios:

- If an applicant has applied for a housing program designated for individuals with disabilities or with a certain type of disability, the applicant may be asked if he or she has a qualifying disability.[42]
- If a person is applying for housing where a priority or preference is in place for persons with disabilities, the applicant may be asked if he or she qualifies for that priority or preference.[43]
- If an applicant is trying to qualify for an allowance that reduces rent on the basis that he or she has a disability (i.e., in some HUD assisted housing the $400 allowance for elderly, disabled, and handicapped families; the allowance for unreimbursed medical expenses in excess of three percent (3%) of annual income and the handicap assistance allowance), he or she may be asked to verify that he or she has a disability and disability-related expenses when relevant.[44]
- If the applicant requests a reasonable accommodation or modification, the landlord may ask follow-up questions about the disability, but only to the extent necessary to understand (1) that the individual has a disability and (2) the connection between the disability and the accommodation or modification requested.[45]

● Denial of Tenancy or Accommodations

When any application for tenancy is denied, the landlord should indicate that an opportunity to request a reasonable accommodation is available if the applicant believes it would enable him or her to meet the terms of the lease. A landlord could include the following language in a rejection letter: "If you are a person with a disability, and the reason your application is being denied is related to your disability, you may contact us no later than [date, time] to discuss whether a reasonable accommodation by us would make your application acceptable."[46]

If an applicant's request for a reasonable accommodation is denied, the applicant should be told the reason for the denial and given an opportunity to respond. In responding, the applicant could point out that:

- the reason given for the denial is actually the result of a disability;
- that there has been a change in the applicant's ability to be a good resident; or
- that there is a plan that will enable the applicant to be a good resident.

Any one of these outcomes, if applicable, is grounds for reconsideration. If the request is reconsidered, each step of considering the request (see p. 15) should be repeated and documented.[47]

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[42] 24 C.F.R. § 100.202(c)(2) (2016).
[43] 24 C.F.R. § 100.202(c)(3) (2016).
[44] 24 C.F.R. § 5.611 (2016).
[45] *Jankowski, Lee & Associates v. Cisneros*, 91 F.3d 891 (7th Cir. 1996).
[46] THE COMPASS GROUP, FAIR HOUSING: A GUIDEBOOK FOR OWNERS AND MANAGERS OF APARTMENTS (2d ed. 2008).
[47] For sample forms for use with tenants, *see* Appendices A and B.

- Relevant Cases

#7 John applied to rent a one-bedroom apartment. On his application he listed his monthly income at $850 and his occupation as "disabled." John has been unable to work because of complications from AIDS. John has a history of prompt rental payment and no negative credit history. John's application was denied for failing to meet the minimum monthly income requirement, a failure directly related to his disability status. The apartment denied John's mother's attempt to act as a cosigner because of the landlord's strict no-cosigner policy. The court determined that even if an administrative policy seems disability-neutral, the failure to offer or to accept a reasonable accommodation to the administrative policy was a violation of the Fair Housing Act.[48]

#8 Denise had an apartment with a state-sponsored entity that provided housing for persons with severe physical or mental disabilities but that were still capable of "independent living." After she moved in, her health deteriorated, and she required hospitalization for symptoms related to her disability. Once Denise's stay in the hospital ended, she was asked to move out because management believed she was no longer capable of independent living. Further, as part of their application process, the apartment required that applicants submit medical records to verify their ability to live independently. The apartment violated the FHA *both* by requiring submission of medical records and by determining whether prospective tenants were capable of independent living. State-sponsored programs for people with disabilities can verify that applicants are in fact disabled, but they cannot inquire as to the nature or details of the disability. Similarly, housing providers cannot require that a tenant or tenant applicant be able to live "independently" without assistance from friends, family or an in-home aid.[49]

[48] *Giebeler v. M&B Associates*, 343 F.3d 1143 (9th Cir. 2003).
[49] *Laflamme v. New Horizons, Inc.*, 605 F. Supp. 2d 378 (D. Conn. 2009).

LEASE VIOLATIONS AND OTHER TENANCY MATTERS

Residents sometimes fail to follow important parts of the lease or repeatedly break minor rules. Persons with disabilities, like all other residents, may be evicted for failure to comply with the terms of the lease or rules of the property. However, as with initial occupancy, landlords are required to make reasonable accommodations to the extent necessary to allow the residents with disabilities to have an opportunity to comply with the terms of the lease. The following suggestions should help landlords to deal effectively with residents with a disability who violate the lease:

1. Managers must distinguish between behavior that is merely irritating and behavior that is so destructive of the rights of other residents that it violates the lease. Residents do not have a right to be shielded from seeing or interacting with persons with disabilities. However, residents do have a right to be protected from behavior that threatens their quiet enjoyment or safety.
2. Education of residents may be helpful so that problems do not occur or escalate. Ideally, a neutral, expert, third party would provide such education with the goal of increasing the residents' understanding. Local human service organizations offer tapes, workshops, and lectures on disabilities. Advocacy and vocational support groups can also provide assistance (see Appendix D).
3. If a resident violates the lease agreement, the landlord may issue a notice of lease violation or lease termination. This notice should clearly communicate the reason and include information about reasonable accommodations (see Appendix A).
4. All notices of denial, lease violations, and lease terminations should include the opportunity for an informal meeting (see Appendices B and C).
5. Landlords must treat residents with respect, especially when discussing reasonable accommodations.
6. Landlords should offer assistance, such as referrals to social service agencies, to help residents comply with the stated expectations.
7. If a resident violates his or her lease after receiving a reasonable accommodation, the landlord may pursue enforcement options. However, another reasonable accommodation may be appropriate if the previous accommodation did not adequately address the tenant's disability.
8. Landlords should respect an individual's privacy. Not everyone with a disability wants their neighbors to know about their disability. However, if a resident indicates a willingness to discuss his or her condition, the landlord may want to facilitate such a discussion.
9. Landlords should take into account the degree to which the problematic behavior is involuntary. Many disabilities result in behavior that cannot be readily controlled and that some neighbors may consider annoying or disturbing. In some cases, landlords could ask the resident with the disability whether he or she would allow the landlord to provide limited information to specific neighbors that will allay their concerns and help eliminate further conflict. The landlord should not share information without consent.

● Step-by-Step Process for Handling Lease Violations

When confronted with a resident who breaches his or her lease, the landlord can use the steps listed below as a model. Of course, the particular circumstances of each situation will determine which of the steps are warranted or appropriate.

1. When a resident commits a violation that provides sufficient cause for immediate lease termination, the landlord should:
    a. send the resident a termination letter explaining how the resident's action constituted a violation of the lease;
    b. allow the resident an opportunity to discuss his or her termination; and
    c. tell the resident that if a disability caused the violation, he or she may request an accommodation.
2. When a resident commits a violation that does not warrant immediate lease termination, the landlord should:
    a. send the resident a warning letter explaining how the resident's action constituted a violation of the lease;
    b. allow the resident the opportunity to discuss the matter; and
    c. inform the resident that if a disability caused the violation, the resident may request an accommodation.
3. Landlords should provide the opportunity to request a reasonable accommodation for a disability to all residents who violate their lease agreement. Offering such a provision only to those whom the landlord suspects of having a disability may be considered discrimination. During the meeting with the resident to discuss the lease violation, the landlord should:
    a. discuss the matter openly with the resident;
    b. use a copy of the resident's lease as reference when explaining how the resident's action constituted a violation; and
    c. ask the resident if he or she understands everything explained in the warning/lease termination letter. This will give the resident the chance to discuss his or her disability, if any.
4. If the resident discloses a disability and requests an accommodation, the landlord should:
    a. have a healthcare provider or other reliable third person with knowledge verify the disability, if the disability is not readily apparent;
    b. utilize the qualified person that verified the disability as a resource for providing the reasonable accommodation (see Appendix D for a list of available resources); and
    c. follow the steps for "Requests for Reasonable Accommodations" on pp. 12-13.
5. When reviewing a request for a reasonable accommodation, the landlord may consider the following:
    a. whether the accommodation will prevent future violations of the lease; and
    b. whether the accommodation will place an undue financial and administrative burden on the management company or owner, or result in a fundamental alteration in the nature of the housing program. If so, or if the accommodation will not prevent future

violations, the requested accommodation is likely not a "reasonable" accommodation under the FHA and the landlord is not required to make the accommodation.[50]

6. If the manager decides that a reasonable accommodation should be made for the tenant, the manager may prepare a lease addendum that includes this accommodation. The addendum may also include a provision stating that the lease may be terminated if the violation occurs again.
7. If the resident does not disclose a disability or attend a meeting to discuss the violations, the manager should suggest possible sources of support for the resident, e.g. family, friends, or social service agencies. The landlord must respect the tenant's right to privacy. Before involving a third party the landlord should try to resolve the matter with the resident.
    a. If this is not possible, the resident must give written permission before a third party can become involved.
    b. If permission is granted, the landlord should contact the source of assistance informing them that if the resident has a disability, the resident has the right to request an accommodation.
8. If a meeting is successfully arranged between the manager, resident and a third-party support person for the tenant, the manager should encourage an active discussion of the problem between all three parties. To facilitate discussion, the manager should:
    a. try to foster an atmosphere in which the resident may speak freely about his or her problems and disclose a disability, if any, and
    b. allow the tenant's support person to make suggestions that might help prevent future violations and use the support person as a resource if an accommodation is requested.

The resident is not required to participate in any meeting with third parties. If the resident decides not to participate with the third party, the landlord has met its duty by providing the resident the opportunity to request an accommodation or have a request made on the resident's behalf.

If the resident does not disclose a disability and the landlord decides to contact a relative or social service representative, then these steps must be taken for all residents who do not discuss or disclose a disability and not just for those residents thought to have a disability.

● Early Termination of a Lease

A tenant may develop a disability, or an existing disability may become so severe during the term of a lease, that he or she cannot meet the obligations of the lease. In cases in which there is no reasonable accommodation or modification that can remedy the situation, the tenant may have no choice but to find alternative housing. The tenant should request that the landlord permit an early termination of the lease, and the landlord should grant that request, if it is reasonable. Either the tenant or the landlord may offer an alternative accommodation, such as another unit that is more suitable for the tenant.

As with other determinations of reasonableness, a landlord may only refuse to terminate the lease without penalty if the accommodation would result in an undue burden or fundamentally

[50] *See infra* pp. 12–13.

alter the nature of the services provided. In determining reasonableness, the landlord may consider the following:

- likelihood of filling the vacancy given vacancy rates in the same building, complex, or area;
- any particular characteristics of the dwelling that make it desirable or undesirable;
- the amount of time remaining on the lease term;
- the size of the owner's business; and
- the owner's overall resources.

● Relevant Cases

#9 Bruce, who suffers from an undisclosed mental illness, signed a one-year lease with an apartment complex, paying a portion of his rent and supplementing his payment with assistance from HUD. After living in his apartment for three days, his condition worsened, and he was hospitalized. His psychiatrist determined that it would be unsafe for Bruce to continue to live alone in the apartment, and Bruce sought to terminate the lease early. Bruce was assessed for the remaining rent and cleaning charges. The court determined that failure to allow for the early termination of a lease may constitute a failure to provide a reasonable accommodation as required by the Fair Housing Act.[51]

#10 Susan, a tenant with a physical disability, was required to walk a considerable distance from her parking spot to her apartment, causing her pain and difficulty. The apartment complex normally rents reserved parking spaces for a fee, but Susan requested that she be reserved a space for free. None of the available reserved spaces were near Susan's apartment. The complex offered to designate some handicapped spaces, but none near her apartment. The court ruled that the complex would not have been unduly burdened by reserving a previously unreserved space for Susan's use without charge as a reasonable accommodation under the Fair Housing Act. [52]

#11 Gary and his wife rented a unit in a manufactured home park. Gary was diagnosed as having a schizoaffective disorder, but he stopped taking his medication. After Gary was arrested for assaulting his wife and walking to an adjacent public park with a loaded rifle, his wife was informed that they were no longer welcome to rent their unit. Gary was treated for his psychosis and for a chemical dependency that worsened his condition. The park refused a provisional plan outlined by the treatment facility to return Gary to independent living because the park considered him a "direct threat." The court ruled that this constituted a violation of the Fair Housing Act for failing *to attempt to provide* a reasonable accommodation.[53]

#12 Phyllis has AIDS-related, non-Hodgkin lymphoma. Phyllis lives in a rent controlled apartment in New York for most of the year, but she spends the winter months in Florida to improve her health. Having a roommate while absent from the apartment for an extended period was a violation of the lease terms, but Phyllis asked that she be allowed to violate the lease term as a reasonable accommodation to help defray her housing costs. The court ruled that when a reasonable accommodation request is not directly related to a disability, but is based on

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[51] *Samuelson v. Mid-Atlantic Realty Co.*, 947 F. Supp. 756 (D. Del. 1996).
[52] *Hubbard v. Samson Mgmt. Corp.*, 994 F. Supp. 187 (S.D.N.Y 1998).
[53] *Cornwell & Taylor v. Moore*, 2000 WL 1887528 (Minn. Ct. App. 2000).

economic concerns stemming from the disability, the landlord does not have to make an accommodation to allow lease violations.[54]

#13 While a tenant in a mobile home park, Barbara was subject to a lease provision that she be responsible for maintaining the yard around her home. The park sought to evict Barbara for failure to conduct maintenance, and she responded that an illness had prevented her from doing the work. Barbara obtained a caretaker to live rent-free in her home in exchange for doing maintenance. The park again sought to evict her for keeping a roommate not listed on the lease. The court upheld a finding that attempting to evict Barbara instead of allowing the alternative arrangement was a violation of the Fair Housing Act.[55]

#14 Karen, who is wheelchair-bound, and her daughter moved into Cottonwood Apartments and were placed on a top-floor apartment. Karen and her daughter both contacted management and requested to be moved to a lower floor, where a two-bedroom apartment was available. The court determined that where an alternative apartment is available, it is a violation of the Fair Housing Act for an apartment complex to refuse to accommodate a tenant with a disability by not allowing the tenant to transfer to a different apartment.[56]

#15 Linda, suffering from multiple sclerosis, moved into a condominium with a caregiver and two dogs. After one of her dogs died, Linda obtained a puppy to train as a service dog, which was a violation of the Condominium Association's rules. The dog was trained to provide emotional support for Linda and to alert others when she was in need of assistance. The court found that prohibiting Linda from keeping the dog as a service animal was a violation of the Fair Housing Act for failing to provide Linda a reasonable accommodation.[57]

● Protecting the Health and Safety of Other Residents

Landlords may believe that they are protecting the safety of all their residents by excluding persons with disabilities from the tenancy. They may even believe they are under some obligation to do so, based on the possibility that tenants with disabilities could pose a threat to the health or safety of other tenants or their property. In fact, such action by the landlord could constitute illegal conduct.

First, fair housing law does not allow for exclusion of individuals based on fear, speculation, or stereotypes about a particular disability or persons with disabilities in general. A determination that an individual poses a direct threat must rely on an individualized assessment of the facts of the particular situation. Such an individualized assessment should consider:

- the nature, duration, and severity of the risk or injury;
- the probability that injury will occur; and
- whether there are any reasonable accommodations that will eliminate the direct threat.[58]

For example, a tenant with developing Alzheimer's may have a history of causing cooking-related fires, creating a concern for the safety of the resident and other tenants. Reasonable

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[54] *Marks v. BLDG Mgmt. Co., Inc.*, 2002 WL 764473 (S.D.N.Y. 2002).
[55] *Boulder Meadows v. Saville*, 2 P.3d 131 (Colo. Ct. App. 2000).
[56] *Roseborough v. Cottonwood Apartments*, 1996 WL 490717 (N.D. Ill. 1996).
[57] *Fulciniti v. Village of Shadyside Condo. Ass'n*, 1998 U.S. Dist. Lexis 23450 (W.D. Pa. 1998).
[58] *See 2004 Joint Statement*, *supra*.

accommodations, such as removing the stove or making it inoperable, can eliminate this risk. The tenant can have a microwave or receive Meals on Wheels as an alternative.

Second, it is important to note that generally landlords are not liable for the criminal acts of their tenants.[59]

● The Issues of Living Independently and Evacuation

Landlords may be concerned about tenants' ability to take care of themselves generally or to engage in a more specific activity, such as evacuating safely from an upper floor in the event of an emergency. Regardless of the motivation behind such concerns, they are not criteria that landlords may consider for applications or existing tenancies. Landlords should not ask about the tenant's ability to live independently, nor should they ask about the tenant's arrangements for assistance in such matters.[60]

Tenants can make arrangements with relatives, live-in aides, neighbors, or a contract service provider to assist them with daily chores and in the event of an emergency. Similarly, in multi-story buildings, with or without an elevator, tenants with disabilities may not be *required* to live on the first floor. While the landlord cannot make a determination whether or not tenants can evacuate, if a tenant *requests* a move to another floor because of a disability, this would often be a reasonable accommodation.

● Relevant Case

#16 A city housing authority provided a questionnaire and conducted an in-home examination to determine if applicants could live independently. Daisy was denied housing because the authority determined that her inability to walk without a walker, incontinence and use of adult diapers, and her need for ten-hour daily assistance rendered her unable to live independently. The court determined that such a requirement and investigation into an applicant's ability to live independently constitutes unlawful discrimination based on disability.[61]

[59] *See Shepard v. Drucker & Falk*, 63 N.C. App. 667 (1983); *Davenport v. D.M. Rental Properties, Inc.*, 217 N.C. App. 133 (2011).
[60] For more on this, *see supra* text accompanying note 50.
[61] *Cason v. Rochester Hous. Auth.*, 748 F. Supp. 1002 (W.D.N.Y. 1990).

CONSEQUENCES

Failure to comply with fair housing laws can have significant negative consequences for management companies and owners, including:

- actual damages to a tenant, including pain and suffering;
- injunctive relief, which could cover future business activities, such as preventing a company from buying other apartment complexes;
- civil penalties (as of 2017, these could be up to $20,111 for a first offense);[62]
- punitive damages; and
- reasonable attorney's fees and costs.

[62] HUD publishes inflation-adjusted civil penalty amounts periodically, so this number will likely change in the future. Inflation Catch-Up of Civil Monetary Penalty Amounts Final Rule and Adjustment of Civil Monetary Penalty Amounts for 2017, 82 Fed. Reg. 24,521, 24523 (May 30, 2017).

APPENDICES

APPENDIX A: Sample Notice of Rights

APPENDIX B: Sample Tenant Screening Procedures

APPENDIX C: Sample Request and Response Forms

APPENDIX D: Housing Resource Guide

APPENDIX E: Telecommunications Relay Service

APPENDIX A:
Sample Notice of Rights

NOTICE OF RIGHT TO REASONABLE ACCOMMODATION AND MODIFICATION

IF YOU HAVE A DISABILITY and any of the following kinds of changes would help you live here, use the facilities, or take part in programs on-site, you can ask for these kinds of changes, which are called reasonable accommodations:

- A change in the rule or the way we do things
- Repair or modification in your apartment, or a special type of apartment
- A change or repair to some other part of the buildings or grounds
- A change in the way we communicate with you or give you information.

If you can show that you have a disability, and if your request is reasonable, not too expensive or too difficult to arrange, we will try to make the changes you request.

We will give you an answer in _____ days, unless there is a problem getting the information we need or unless you agree to a longer time. We will let you know if we need more information or verification from you or if we would like to talk with you about other ways to meet your needs.

If we turn down your request, we will explain the reasons. You can give us more information if you think it will help us.

If you need help filling out the **Reasonable Accommodation/Modification Request Form**, or if you want to give us your request in some other way, we will help you do so.

You can get a **Reasonable Accommodation/Modification Request Form** in the management office.

This notice can be given to applicants and tenants and/or posted in the management office.

APPENDIX B:
Sample Tenant Screening Procedures

SAMPLE B1:
CRIMINAL BACKGROUND SCREENING PROCEDURE

The management company will conduct a criminal background check on each adult member of an applicant household. An adult means a person 18 or older.

If the criminal background report reveals negative information about a household member and the management company proposes to deny admission due to the negative information, the subject of the record (and the applicant, if different) will be provided notice of the proposed adverse action and an opportunity to dispute the accuracy of the record. The notice will include the name, address, and telephone number of the agency that composed the criminal record report and inform the applicant of his or her right to dispute the accuracy of the criminal record report as well as his or her right to a free copy of the criminal record report.

If the applicant does not contact the management company to dispute the accuracy of the criminal record within 14 calendar days, the management company will send a written notice of ineligibility to the applicant stating the specific reason for denial and advise the applicant of their appeal rights and – if disabled – their right to request a reasonable accommodation, if applicable. If the applicant's criminal conviction was related to his or her disability, the management company will consider a reasonable accommodation.

The management company will not consider an arrest or charge that was resolved without conviction. In addition, the management company will not consider expunged or sealed convictions. If a person has an arrest with pending charges, the housing provider should consider this as part of an individualized assessment. If the housing provider is not able to determine the specifics of the pending charges, the housing provider may deny admission until the charges are resolved. If the housing provider can identify the specifics of the pending charges, they should house the person if a resulting conviction would not change the decision to house. The housing provider may delay the determination until the charge is resolved if a resulting conviction would be grounds for denying the application for housing. If the person has a disability and requests a reasonable accommodation, the provider should determine whether the request is appropriate while criminal charges are pending.

Where the management company considers denying admission to a household based on a criminal conviction or pending criminal charge, the management company will conduct an individualized assessment of the criminal record and its impact on the household's suitability for admission. This individualized assessment will include consideration of the following factors: (1) the seriousness of the criminal offense; (2) the relationship between the criminal offense and the safety and security of residents, staff, or property; (3) the length of time since the offense, with particular weight being given to significant periods of good behavior; (4) the age of the household member at the time of the offense; (5) the number and nature of any other criminal convictions; (6) evidence of rehabilitation, such as employment, participation in a job training program, education, participation in a drug or alcohol treatment program, or recommendations from a parole or probation officer, employer, teacher, social worker, or community leader; and (7) tenancy supports or other risk mitigation services the applicant will be receiving during tenancy.

SAMPLE B2:
CREDIT SCREENING PROCEDURE

Credit reports will be obtained for all applicant household members who are 18 years of age or older. The credit report must demonstrate that the applicant has paid financial obligations as agreed. Monies owed for medical related expenses will be disregarded.

Either the management company or a third-party screening company retrieves credit records and independently assesses an applicant's credit performance, assigning greater weight to activity reported over the most recent 24-month period. An applicant may be rejected if the report demonstrates a history of poor credit with little or no effort made to address the outstanding debts.

An applicant will be denied if the credit report shows:

- Unpaid balance(s) owed to current or previous landlord(s).
- Outstanding debt to a utility company that would prohibit the applicant from establishing utility service in his/her name prior to move-in. Applicants may be re-considered if they provide evidence the debt has been paid and the utility company will provide service.
- A bankruptcy that has not been discharged.

Should the applicant be rejected based on credit, the Landlord will provide the applicant with the name and contact information of the credit reporting agency. All applicants may appeal the rejection and, if disabled, may request a reasonable accommodation. The Landlord will waive a rejection based solely on credit if the negative information can be mitigated to the satisfaction of the Landlord by substantially reducing the financial risk to the Landlord. Such examples of mitigation of risk include an applicant providing an acceptable third-party guarantor of the lease or paying an increased security deposit.

APPENDIX C:
Sample Request and Response Forms

SAMPLE C1:
REASONABLE ACCOMMODATION REQUEST FORM FOR TENANTS

I have a disability. I believe that the problems causing you to reject my application for housing are related to my disability.

1. This is why I think the problem happened as a result of my disability:

2. I think the problem is not likely to happen again because:
   The things described below have changed in my life.

   or

   A reasonable accommodation would solve the problem.
   The accommodation I request is:

3. You can verify that the problem for which I would be rejected from housing was a result of my disability by contacting:

   Name:
   _____
   Phone:
   _____
   Address:
   _____

4. You can verify the reasons that I think the problem is not likely to happen again and that I will be likely to continue doing what I need to do to avoid these problems by contacting:

   Name:
   _____
   Phone:
   _____
   Address:
   _____

5. You can verify that the reasonable accommodation I am requesting is necessary and likely to solve the problem by contacting:

   Name:
   _____
   Phone:
   _____
   Address:
   _____

   _____
   [signature]

SAMPLE C2:
REASONABLE ACCOMMODATION REQUEST FOR CURRENT TENANT

Date: _____

Building Manager's Name: _____

Address: _____

Dear _____,

I live in Apt. #_____ at _____. I have a disability that prevents me from:

I am therefore requesting a reasonable accommodation. I have attached a verification from _____ of my disability and the functional limitation I experience as well as the accommodation(s) I need in order to compensate for my disability. I am asking for this accommodation so that I can have full use and enjoyment of my home.

Please reply to my request in writing within the next ten (10) business days. If you have any questions about my request, please do not hesitate to contact me. I look forward to your response and appreciate your attention to this matter.

Sincerely,

_____
[signature]

SAMPLE C3:
REASONABLE ACCOMMODATION REQUEST FORM FOR TENANTS FACING EVICTION/LEASE TERMINATION

I have a disability. I believe that the problems causing you to send me a lease violation notice or eviction notice are related to my disability.

6. This is why I think the problem happened as a result of my disability:

7. I think the problem is not likely to happen again because:
   The things described below have changed in my life.

   or

   A reasonable accommodation would solve the problem.
   The accommodation I request is:

8. You can verify that the problem for which I would be evicted from housing was a result of my disability by contacting:

   Name:
   _____
   Phone:
   _____
   Address:
   _____

9. You can verify the reasons that I think the problem is not likely to happen again and that I will be likely to continue doing what I need to do to avoid these problems by contacting:

   Name:
   _____
   Phone:
   _____
   Address:
   _____

10. You can verify that the reasonable accommodation I am requesting is necessary and likely to solve the problem by contacting:

Name:

_____

Phone:

_____

Address:

_____

_____

[signature]

SAMPLE C4:
ASSORTED RESPONSE LETTERS FROM LANDLORDS

RESPONSE NO. 1 (requesting confirmation letter from service providers)

Date: _____

Dear _____,

We have received your request for a reasonable accommodation, specifically:

_____

_____.

Please provide us with a letter from your service provider(s) confirming your disability status and need for the accommodation or modification. Once we receive confirmation, we will give prompt consideration to your request.

Sincerely,

_____
[signature]

RESPONSE NO. 2 (outlining accommodation to be made)

Date: _____

Dear _____,

We have received your request for a reasonable accommodation, specifically:

_____

_____,
together with your healthcare provider's letter documenting your disability and need for the accommodation.

We will provide the accommodation as follows: _____

_____

_____.

Sincerely,

_____
[signature]

RESPONSE NO. 3 (asking for clarification of accommodation request)

Date: _____

Dear _____,

We have received your request for a reasonable accommodation. However, we are unclear about your specific needs and would like to meet with you to discuss the accommodation request.

Please contact me as soon as possible so that we can discuss what will best meet your needs.

Sincerely,

_____
[signature]

RESPONSE NO. 4 (outlining reasons for denial of accommodation)

Date: _____

Dear _____,

We have received your request for a reasonable accommodation, specifically: _____

_____.

We have given your request reasonable consideration and have decided to deny your request for the following reason(s): _____

_____.

Under federal and state fair housing laws, we are not required to grant requests that, in our evaluation, are unreasonable. If you feel our determination is incorrect, or if you have suggestions for an alternative accommodation, please do not hesitate to contact us.

Sincerely,

_____
[signature]

SAMPLE C5:
REASONABLE MODIFICATION REQUEST

Date: _____

Building Manager's Name: _____

Address: _____

Dear _____,

I live in Apt. #_____ at

_____.

I have (or a member of my family has) a disability that prevents me from:

_____.

As an accommodation for such a disability, I request your permission to

_____

_____,

at my expense. I intend to hire _____ to do the work.

_____ is willing to discuss the project with you and discuss any concerns you may have. If you wish, I can have any changes removed when I vacate my unit.

Please respond to my request for a reasonable modification in writing with ten (10) business days. I look forward to your response and appreciate your attention in this matter.

Sincerely,

_____
[signature]

SAMPLE C6:
REASONABLE MODIFICATION RESPONSE FROM LANDLORD

Date: _____

Dear _____,

We have received your request for a reasonable modification, specifically, to be allowed to:

_____

_____.

We have spoken to _____, who has assured us that the project will be done in a professional manner to meet building codes.

Your request to make this modification is granted. Please let me know when the work begins and ends.

When you vacate your unit, we request you _____

_____

Sincerely,

_____
[signature]

APPENDIX D:
Housing Resource Guide

Agencies to Contact with Fair Housing Concerns

NC Human Relations Commission
1318 Mail Service Center
Raleigh, NC 27699-1318

1711 New Hope Church Rd.
Raleigh, NC 27609
919-431-3036

Local Human Relations Councils/Commissions with Paid Staff

Charlotte-Mecklenburg Community Relations*
600 E. Trade St.
Charlotte, NC 28202
(704) 735-6121

Durham Human Relations* **
Golden Belt Building, Building 2
807 E. Main St.
Durham, NC 27701
(919) 560-4107

Fayetteville-Cumberland Human Relations
City Hall – 433 Hay St.
Fayetteville, NC 28301
(910) 433-1696

Goldsboro Community Affairs
City Hall - Post-Office Drawer A
214 N. Center St.
Goldsboro, NC 27530
(704) 336-2424

Greensboro Human Relations*
P.O. Box 3136
City-County Complex
1 Government Plaza
Greensboro, NC 27834
(336) 373-2038

Orange Co. Dept. of Human Rights and Relations* **
200 S. Cameron St.
Hillsborough, NC 27278
(919) 245-2487

Raleigh Human Resources Division
P.O. Box 590
Raleigh, NC 27602
(919) 996-6100

Rocky Mount Human Relations
P.O. Box 1180
Rocky Mount, NC 27802
(919) 972-1182

Wilson Human Relations
P.O. Box 10
112 N. Goldsboro St.
Wilson, NC 27893
(252) 399-2308

Winston-Salem Human Relations*
P.O. Box 2511
Winston-Salem, NC 27102
(336) 727-2429

* HUD Substantially Equivalent
** Employment Enforcement

Legal Services

Legal services are available statewide for individuals who cannot afford to hire an attorney and who meet low-income guidelines based on family size. Legal Aid of North Carolina has 20 offices across the state that can offer help in the following areas:

- Housing and public benefits
- Consumer protection
- Employment
- Family or domestic issues.

For more information, see the Legal Aid of North Carolina website at www.legalaidnc.org. You can also call the toll-free Helpline at 1-866-219-5262.

In addition, LANC's Fair Housing Project is available to provide information concerning a person's rights under the federal Fair Housing Act as well as legal representation in certain cases.

● Legal Services Offices

Note: To apply for help, please use the online application at www.legalaidnc.org or call the toll-free Helpline at 1-866-219-5262.

For assistance with fair housing issues, contact the Fair Housing Project at:

Fair Housing Project
Legal Aid of North Carolina
224 S. Dawson St.
Raleigh, NC 27601
(855) 797-3247
www.fairhousingnc.org

Ahoskie Office
Bertie, Camden, Chowan, Currituck, Dare, Gates, Halifax, Hertford, Northampton, Pasquotank, Perquimans

Asheville Office (Senior Law Project)
Buncombe, Henderson, Madison, Polk, Rutherford, Transylvania

Boone Office (Domestic Violence)
Alleghany, Ashe, Avery, Mitchell, Watauga, Wilkes, Yancey

Charlotte Office
Mecklenburg

Concord Office
Cabarrus, Stanly, Union

Durham Office
Caswell, Durham, Franklin, Granville, Person, Vance, Warren

Fayetteville Office
Cumberland, Harnett, Sampson

Gastonia Office
Cleveland, Gaston, Lincoln

Greensboro Office
Davidson, Guilford, Montgomery, Randolph, Rockingham, Rowan

Greenville Office
Beaufort, Carteret, Craven, Hyde, Jones, Martin, Onslow, Pamlico, Pitt, Tyrell, Washington

Hayesville Office
Clay

Morganton Office
Alexander, Avery, Burke, Caldwell, Catawba, McDowell, Mitchell, Watauga, Yancey

Pembroke Office
Hoke, Robeson, Scotland

Pittsboro Office
Alamance, Chatham, Lee, Moore, Orange

Raleigh Office
Johnston, Wake

Sylva Office
Cherokee, Clay, Graham, Haywood, Jackson, Macon, Swain, Qualla Indian Boundary

Wilmington Office
Bladen, Brunswick, Columbus, Duplin, New Hanover, Onslow, Pender

Wilson Office
Edgecombe, Greene, Lenoir, Nash, Wayne, Wilson

Winston-Salem Office
Alleghany, Ashe, Davie, Forsyth, Iredell, Stokes, Surry, Wilkes, Yadkin

Additional Legal Services for Low-Income Clients:

Pisgah Legal Services
Buncombe, Henderson, Madison, Polk, Rutherford, Transylvania
Mailing: P.O. Box 2276
Asheville, NC 28802
Toll-free (800) 489-6144
Offices in: Asheville, Brevard, Hendersonville, Marshall and Rutherfordton
http://www.pisgahlegal.org/

Charlotte Center for Legal Advocacy
Charlotte Metro area, West-central North Carolina
1431 Elizabeth Ave.
Charlotte, N.C. 28204
Local: 704-376-1600
Toll-free: 800-438-1254
En Español: 800-247-1931
http://www.lssp.org/

Disability Rights North Carolina
Statewide
3724 National Dr., Ste. 100
Raleigh, NC 27612
Toll-Free: 877- 235-4210
Local: 919-856-2195
http://www.disabilityrightsnc.org/

Services for Older Adults, Adults with Disabilities, and their Families

The North Carolina Department of Health and Human Services (NC DHHS) division of Aging and Adult Services supports a wide range of home and community-based services by two primary means:

1. Working with sixteen Areas agencies on Aging and numerous public and private local organizations, the array of services, programs, and protections offered to persons aged sixty (60) and older varies from one county to another based on local need and other factors. Services allowing persons to remain in independent living can include but are not limited to:
    - Adult daycare/ day health
    - Congregate nutrition
    - Family caregiver support
    - Home delivered meals
    - Housing and home improvement
    - In-home aide service
    - Legal services
    - Ombudsman services
    - Senior centers
    - Senior employment program
    - Transportation
    - View additional information for area Agencies on Aging at https://www.ncdhhs.gov/divisions/daas.

2. Working with programs and protections for the adult population age eighteen (18) and above with disabilities, and their families. These services, which can vary from one county to another, are intended to enable persons to maintain independent living and can include:
    - Adult protective services
    - At-risk case management
    - Counseling (includes financial management needs)
    - Guardianship
    - In-home special assistance
    - Transportation
    - View more information on Independent Living with disabilities at https://www.ncdhhs.gov/assistance/disability-services/independent-living-for-people-with-disabilities.

Region A
Cherokee, Clay, Graham, Haywood, Jackson, Macon, Swain (EBCI)
Southwestern Commission
Area Agency on Aging
125 Bonnie Ln.
Sylva, NC 28779
Local: (828) 586-1962
Fax: (828) 586-1968
http://www.regiona.org

Region B
Buncombe, Henderson, Madison, Transylvania
Land-of-Sky Regional Council
339 New Leicester Hwy., Ste. 140
Asheville, NC 28806
Local: (828) 251-6622
Fax: (828) 251-6353
http://landofsky.org

Region C
Cleveland, McDowell, Polk, Rutherford
Isothermal Planning and Development Commission
P. O. Box 841
Rutherfordton, NC 28139
Local: (828) 287-2281
Fax: (828) 287-2735
http://www.regionc.org

Region D
Alleghany, Ashe, Avery, Mitchell, Watauga, Wilkes, Yancey
High Country Council of Governments
468 New Market Blvd.
Boone, NC 28607
Local: (828) 265-5434
Fax: (828) 265-5439
http://www.regiond.org

Region E
Alexander, Burke, Caldwell, Catawba
Western Piedmont Council of Governments
P. O. Box 9026
Hickory, NC 28603
Local: (828) 322-9191
Fax: (828) 322-5991
http://www.wpcog.org

Region F
Anson, Cabarrus, Gaston, Iredell, Lincoln, Mecklenburg, Rowan, Stanly, Union
Centralina Council of Governments
525 North Tryon St.
Charlotte, NC 28202
Local: (704) 372-2416
Fax: (704) 347-4710
http://www.centralinaaging.org/

Region G
Alamance, Caswell, Davidson, Guilford, Montgomery, Randolph, Rockingham, Stokes, Surry, Yadkin
Piedmont Triad Regional Council
1398 Carrollton Crossing Dr.
Kernersville, NC 27284
Local: (336) 904-0300
Fax: (336) 904-0302
http://www.ptrc.org

Region J
Chatham, Durham, Johnston, Lee, Moore, Orange, Wake
Triangle J Council of Governments
4307 Emperor Blvd., Ste. 110
Durham, NC 27703
Local: (919) 558-2711
Fax: (919) 549-9390
http://www.tjaaa.org

Region K
Franklin, Granville, Person, Vance, Warren
Kerr Tar Regional
Council of Governments
1724 Graham Ave.
P.O. Box 709
Henderson, NC 27536
Local: (252) 436-2040
Fax: (252) 436-2055
http://www.kerrtarcog.org/aging/

Region L
Edgecombe, Halifax, Nash,
Northampton, Wilson
Upper Coastal Plain Council of
Governments
121 W. Nash St.
P. O. Box 9
Wilson, NC 27893
Local: (252) 234-5952
Fax: (252) 234-5971
http://www.ucpcog.org

Region M
Cumberland, Harnett, Sampson
Mid-Carolina Council of Governments
P. O. Drawer 1510
Fayetteville, NC 28302
Local: (910) 323-4191
Fax: (910) 323-9330
http://www.mccog.org/

Region N
Bladen, Hoke, Richmond,
Robeson, Scotland
Lumber River Council of Governments
30 CJ Walker Rd.
Pembroke, NC 28372
Local: (910) 618-5533
Fax: (910) 521-7556
http://www.lumberrivercog.org/

Region O
Brunswick, Columbus,
New Hanover, Pender
Cape Fear Council of Governments
1480 Harbour Dr.
Wilmington, NC 28401
Local: (910) 395-4553
Fax: (910) 395-2684
http://www.capefearcog.org

Region P
Carteret, Craven, Duplin, Greene,
Jones, Lenoir, Onslow, Pamlico, Wayne
Eastern Carolina Council of Governments
233 Middle St.
P. O. Box 1717
New Bern, NC 28563
Local: (252) 638-3185
Fax: (252) 638-3187
http://www.eccog.org/

Region Q
Beaufort, Bertie, Hertford, Martin, Pitt
Mid-East Commission
1385 John Small Ave.
Washington, NC 27889
Local: (252) 946-8043
Fax: (252) 974-1852
http://www.mecaaa.org

Region R
Camden, Chowan, Currituck,
Dare, Gates, Hyde, Pasquotank,
Perquimans, Tyrrell, Washington
Albemarle Commission
512 South Church St.
Hertford, NC 27944
Local: (252) 426-5753
Fax: (252) 426-8482
www.albemarlecommission.org

Services for Mental Health, Developmental Disabilities and Substance Use Disorders

Services to assist with mental health, developmental disabilities, and substance use problems are available statewide through local management entities (LMEs) and state institutions.

For more information, see the North Carolina Department of Health and human Services – Division of Mental Health Developmental Disabilities and substance Abuse Services website at https://www.ncdhhs.gov/divisions/mhddsas/AdultMentalHealth. For information about which LME/MCO coordinates services for your areas, see the LME/MCO directory here: https://www.ncdhhs.gov/providers/lme-mco-directory

Vaya Health
Alexander, Alleghany, Ashe, Avery, Buncombe, Caldwell, Cherokee, Clay, Graham, Haywood, Henderson, Jackson, Macon, Madison, McDowell, Mitchell, Polk, Rutherford, Swain, Transylvania, Watauga, Wilkes, Yancey
200 Ridgefield Ct., Ste. 206
Asheville, NC 28801
Phone: 828-225-2785
Fax: 828-225-2796
Crisis Line: 800-849-6127

Cardinal Innovations Healthcare Solutions
Alamance, Cabarrus, Caswell, Chatham, Davidson, Davie, Forsyth, Franklin, Granville, Halifax, Mecklenburg, Orange, Rockingham, Person, Rowan, Stanly, Stokes, Union, Vance, Warren
4855 Milestone Ave.
Kannapolis, NC 28081
Phone: 704-939-7700
Fax: 704-939-7907
Crisis Line: 800-939-5911

Partners Behavioral Health Management
Burke, Catawba, Cleveland, Gaston, Iredell, Lincoln, Surry, Yadkin
901 South New Hope Rd.
Gastonia, NC 28054
Phone: 704-884-2501
Fax: 704-884-2713
Crisis Line: 888-235-4673
Counties Served:

Alliance Behavioral Healthcare
Cumberland, Durham, Johnston, Wake
4600 Emperor Blvd.
Durham, NC 27703
Phone: 919-651-8401
Fax: 919-651-8672
Crisis Line: 800-510-9132

Sandhills Center
Anson, Guilford, Harnett, Hoke, Lee, Montgomery, Moore, Randolph, Richmond
1120 Seven Lakes Dr.
West End, NC 27376
Phone: 910-673-9111
Fax: 910-673-6202
Crisis Line: 800-256-2452

Trillium Health Resources Office
Beaufort, Bertie, Brunswick, Camden, Carteret, Chowan, Craven, Currituck, Dare, Gates, Hertford, Hyde, Jones, Martin, Nash, New Hanover, Northampton, Onslow, Pamlico, Pasquotank, Pender, Perquimans, Pitt, Tyrrell, Washington
1708 E. Arlington Blvd.
Greenville, NC 27858-5872
Phone: 866-998-2597
Crisis Line: 877-685-2415

Eastpointe Office
Bladen, Columbus, Duplin, Edgecombe, Greene, Lenoir, Robeson, Sampson, Scotland, Wayne, Wilson
514 East Main St.
Beulaville, NC 28518
Phone: 800-913-6109
Fax: 910-298-7180
Crisis Line: 800-913-6109

Vocational Rehabilitation Independent Living Program

Assisting individuals with significant disabilities in achieving independence is the primary objective of Vocational Rehab's ("VR") Independent living Program.

That means providing services that enable these individuals to live and function in the homes and communities of their choice. Counselors and program participants jointly develop a plan that will provide a viable, cost-effective alternative to institutional living and in many cases help maintain or improve employment opportunities.

For more information, see https://www.ncdhhs.gov/divisions/dvrs/vr-local-offices.

Administrative Office:
2801 Mail Service Center
805 Ruggles Dr.
Raleigh, NC 27699-2801
Phone: (919) 855-3500
Fax: (919) 733-1628

Albemarle Office
Anson, Cabarrus, Montgomery,
Richmond, Rowan, Stanly, Union
702 Henson St.
Albemarle, NC 28801
Phone: (704) 985-1172/982-2568
Fax: (704)983-3797

Asheville Office
Buncombe, Henderson, McDowell,
Madison, Polk, Rutherford, Transylvania
8 Barbetta Dr.
Asheville, NC 28806
Phone: (828) 670-3378
Fax: (828) 298-9330

Boone Office
Alleghany, Ashe, Avery, Mitchell, Watauga,
Wilkes, Yancey
245 Winklers Creek Rd., Ste. A
Boone, NC 28607
Phone: (828) 265-5419
Fax: (828) 265-5359

Charlotte Office
Gaston, Mecklenburg
5501 Executive Center Dr. Ste. 101
Charlotte, NC 28212
Phone:(704)568-8804
Fax: (704)568-8579

Durham Office
Chatham, Durham, Granville, Lee, Orange,
Person
4312 Western Park Pl.
Durham, NC 27705
Phone: (919) 560-6815
Fax: (919) 560-3231

Elizabeth City Office
Bertie, Camden, Chowan, Currituck,
Dare, Gates, Pasquotank, Perquimans,
Tyrrell, Washington
401 S. Griffin St., Ste. 75
Elizabeth City, NC 27909
Phone: (252)338-0175
Fax:(252)338-0179

Fayetteville Office
Bladen, Cumberland, Harnett,
Hoke, Robeson, Sampson,
Moore, Scotland
1200 Fairmont Ct.
Fayetteville, NC 28304
Phone: (910) 486-1717
Fax: (910) 486-0651

Greensboro Office
Alamance, Caswell, Guilford, Randolph
Rockingham
3401-A W. Wendover Ave.
Greensboro, NC 27407
Phone: (336) 852-4523
Fax: (336) 299-9281

Greenville Office
Beaufort, Greene, Hyde,
Lenoir, Pitt, Wayne
P.O. Box 2487
101 Fox Haven Dr.
Greenville, NC 27836
Phone: (252) 830-3471
Fax: (252) 830-6599

Hickory Office
Alexander, Burke, Caldwell, Catawba,
Cleveland, Iredell, Lincoln
2661 Hwy. NC 127 South
Hickory, NC 28602
Phone:(828)294-0338
Fax: (828)294-0255

New Bern Office
Carteret, Craven, Jones,
Onslow, Pamlico
2832 Neuse Blvd.
New Bern, NC 28562
Phone: (252) 514-4806
Fax: (252) 514-4897

Raleigh Office
Franklin, Johnston, Vance, Wake, Warren
2803 Mail Service Center
436 N. Harrington St.
Raleigh, NC 27699-2803
Phone: (919)715-0543
Fax: (919)733-7745

Rocky Mount Office
Edgecombe, Halifax, Hertford, Martin,
Nash, Northampton, Wilson
Station Sq., Ste. 163
Rocky Mount, NC 27804
Phone: (252) 446-0867
Fax: (252) 446-3191

Sylva Office
Cherokee, Clay, Graham, Haywood,
Jackson, Macon, Swain
100 Bonnie Ln., Ste. C
P. O. Box 756
Sylva, NC 28779
Phone:(828)586-3455
Fax: (828)586-2129

Wilmington Office
Brunswick, Columbus, Duplin, New
Hanover, Pender
3340 Jaeckle Dr., Ste. 201
Wilmington, NC 28403-2679
Phone: (910) 251-5810
Fax: (910) 251-2659

Winston-Salem Office
Davidson, Davie, Forsyth, Stokes, Surry,
Yadkin
2201 Brewer Rd.
Winston-Salem, NC 27127
Phone: (336) 784-2700
Fax: (336) 784-2714

APPENDIX E:
Telecommunications Relay Service

● Background

Telecommunications Relay Service is a telephone service that allows persons with hearing or speech disabilities to place and receive telephone calls. TRS is available in all 50 states, the District of Columbia, Puerto Rico and the U.S. territories for local and/or long distance calls. TRS providers – generally telephone companies – are compensated for the costs of providing TRS from either a state or a federal fund. There is no cost to the TRS user.

● How does TRS work?

TRS uses operators, called communications assistants (CAs), to facilitate telephone calls between people with hearing and speech disabilities and other individuals. A TRS call may be initiated by either a person with a hearing or speech disability, or a person without such disability. When a person with a hearing or speech disability initiates a TRS call, the person uses a teletypewriter (TTY) or other text input device to call the TRS relay center, and gives a CA the number of the party that he or she wants to call. The CA places an outbound traditional voice call to that person, then serves as a link for the call, relaying the text of the calling party in voice to the called party, and converting to text what the called party voices back to the calling party.

● 711 Access to TRS

Just as you can call 411 for information, you can dial 711 to connect to certain forms of TRS anywhere in the United States. Dialing 711 makes it easier for travelers to use TRS because they do not have to remember TRS numbers in every state. Because of technological limitations, however, 711 access is not available for the Internet-based forms of TRS (VRS and IP Relay).

● What forms of TRS are available?

There are several forms of TRS, depending on the particular needs of the user and the equipment available:

Text-to-Voice TTY-based TRS is a "traditional" TRS service using a TTY to call the CA at the relay center. TTYs have a keyboard and allow people to type their telephone conversations. The text is read on a display screen and/or a paper printout. A TTY user calls a TRS relay center and types the number of the person he or she wishes to call. The CA at the relay center then makes a voice telephone call to the other party to the call, and relays the call back and forth between the parties by speaking what a text user types, and typing what a voice telephone user speaks.

Voice Carry Over allows a person with a hearing disability, but who wants to use his or her own voice, to speak directly to the called party and receive responses in text from the CA. No typing is required by the calling party. This service is particularly useful to senior citizens who have lost their hearing, but who can still speak. Hearing Carry Over allows a person with a speech disability, but who wants to use his/her own hearing, to listen to the called party and type his/her part of the conversation on a TTY. The CA reads these words to the called party, and the caller hears responses directly from the called party.

Speech-to-Speech Relay Service is used by a person with a speech disability. A CA (who is specially trained in understanding a variety of speech disorders) repeats what the caller says in a manner that makes the caller's words clear and understandable to the called party. No special telephone is needed. For more information, visit the STS Relay Service Consumer Guide.[63]

Shared Non-English Language Relay Services - Due to the large number of Spanish speakers in the United States, the FCC requires interstate TRS providers to offer Spanish-to-Spanish traditional TRS. Although Spanish language relay is not required for intrastate (within a state) TRS, many states with large numbers of Spanish speakers offer this service on a voluntary basis. The FCC also allows TRS providers who voluntarily offer other shared non-English language interstate TRS, such as French-to-French, to be compensated from the federal TRS fund.

Captioned Telephone Service is used by persons with a hearing disability but some residual hearing. It uses a special telephone that has a text screen to display captions of what the other party to the conversation is saying. A captioned telephone allows the user, on one line, to speak to the called party and to simultaneously listen to the other party and read captions of what the other party is saying. There is a "two-line" version of captioned telephone service that offers additional features, such as call-waiting, *69, call forwarding, and direct dialing for 911 emergency service. Unlike traditional TRS (where the CA types what the called party says), the CA repeats or re-voices what the called party says. Speech recognition technology automatically transcribes the CA's voice into text, which is then transmitted directly to the user's captioned telephone text display.

IP Captioned Telephone Service combines elements of captioned telephone service and IP Relay. IP captioned telephone service can be provided in a variety of ways, but uses the Internet – rather than the telephone network – to provide the link and captions between the caller with a hearing disability and the CA. It allows the user to simultaneously both listen to, and read the text of, what the other party in a telephone conversation is saying. IP captioned telephone service can be used with an existing voice telephone and a computer or other Web-enabled device without requiring any specialized equipment. For more information, visit the IP CTS Consumer Guide.[64]

Internet Protocol Relay Service is a text-based form of TRS that uses the Internet, rather than traditional telephone lines, for the leg of the call between the person with a hearing or speech disability and the CA. Otherwise, the call is generally handled just like a TTY-based TRS call. The user may use a computer or other web-enabled device to communicate with the CA. IP Relay is not required by the FCC, but is offered by several TRS providers. For more information, visit the IP Relay Service Consumer Guide.[65]

Video Relay Service (VRS) – This Internet-based form of TRS allows persons whose primary language is American Sign Language to communicate with the CA in ASL using video conferencing equipment. The CA speaks what is signed to the called party, and signs the called party's response back to the caller. VRS is not required by the FCC, but is offered by several TRS

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[63] The STS Relay Service Consumer Guide can be found at https://transition.fcc.gov/cgb/consumerfacts/speechtospeech.pdf.
[64] The IP CTS Consumer Guide can be found at https://www.fcc.gov/consumers/guides/internet-protocol-ip-captioned-telephone-service.
[65] The IP Relay Service Consumer Guide can be found at https://www.fcc.gov/consumers/guides/ip-relay-service.

providers. VRS allows conversations to flow in near real time and in a faster and more natural manner than text-based TRS. Beginning January 1, 2006, TRS providers that offer VRS must provide it 24 hours a day, seven days a week, and must answer incoming calls within a specific period of time so that VRS users do not have to wait for a long time. For more information visit the VRS Consumer Guide.[66]

For more information visit the 711 consumer guide, available at https://www.fcc.gov/consumers/guides/711-telecommunications-relay-service.

● Mandatory minimum standards for TRS

TRS providers must offer service that meets certain mandatory minimum standards set by the FCC. These include:

- The CA answering or placing a TRS call must stay with the call for a minimum of 10 minutes to avoid disruptions to the TRS user (15 minutes for STS calls);
- Most forms of TRS must be available 24 hours a day, seven days a week;
- TRS providers must answer 85 percent of all calls within 10 seconds (but there are different answer speed rules for VRS);
- TRS providers must make best efforts to accommodate a TRS user's requested CA gender;
- CAs are prohibited from intentionally altering or disclosing the content of a relayed conversation and generally must relay all conversation verbatim unless the user specifically requests summarization;
- TRS providers must ensure user confidentiality and CAs (with a limited exception for STS) may not keep records of the contents of any conversation;
- The conversation must be relayed in real time;
- CAs must provide a minimum typing speed for text-based calls and VRS CAs must be qualified interpreters;
- For most forms of TRS, the provider must be able to handle emergency (911) calls and relay them to the appropriate emergency services;
- Emergency call handling procedures have been established for all kinds of TRS.

Users of Voice over Internet Protocol (VoIP) service, also can access relay services by dialing 711.

● Don't hang up!

Some people hang up on TRS calls because they think the CA is a telemarketer. If you hear, "Hello. This is the relay service..." when you pick up the phone, please don't hang up! You are about to talk, through a TRS provider, to a person who is deaf, hard-of-hearing, or has a speech disability.

● For more information

For more information about FCC programs to promote access to telecommunications services for people with disabilities, visit the FCC's Disability Rights Office website at https://www.fcc.gov/general/disability-rights-office.

[66] The VRS Consumer Guide can be found at https://www.fcc.gov/consumers/guides/video-relay-services.

Chapter II

Small Claims Procedure

A special set of statutes governs the trial of small claims before a magistrate. The procedural rules set out in Article 19 of the North Carolina General Statutes, Chapter 7A (hereinafter G.S.) are for the most part simpler than those applied in district and superior court actions. However, when the small claim procedural rules are silent on an issue, the Rules of Civil Procedure applicable in district and superior court cases apply.[1] This chapter discusses the procedures magistrates follow in handling small claims cases as well as issues related to appeal to district court.

Definition of a Small Claim

The statute defines a *small claim* as a civil action in which (1) the amount in controversy does not exceed $10,000; (2) the principal relief sought is money, the recovery of specific personal property, summary ejectment, or any combination of the three; and (3) the plaintiff (the person suing) requests that the action be assigned to a magistrate.[2]

Amount in Controversy

The first requirement—that the amount in controversy cannot exceed $10,000—refers to the monetary value of the case and is determined at the time the complaint is filed. However, the statutory rules that apply to determining that amount often raise more questions than they answer.

When Plaintiff Seeks Monetary Damages

How is the amount in controversy determined in an action seeking monetary damages? One would think this would be easy to answer—the amount in controversy is the dollar amount requested in the complaint. Generally, that is the case. However, in an action for

1. N.C. GEN. STAT. § 1A-1, Rule 1 (hereinafter G.S.) provides that the Rules of Civil Procedure govern the procedure in the district courts in all actions and proceedings of a civil nature. *See* Provident Finance Co. v. Locklear, 89 N.C. App. 535, 366 S.E.2d 599 (1988) (Rule 58 applied to small claim case). Some rules of civil procedure, such as the discovery rules, may not apply because they do not seem applicable to small claims cases because trials are scheduled within thirty days of the complaint's filing date.

2. G.S. 7A-210.

breach of contract the total amount prayed for includes a claim for a specific amount as principal and for prejudgment interest and then also asks for post-judgment interest and court costs, which are added by the clerk. The statute defining the *amount in controversy* provides (1) that the amount in controversy is computed without regard to interest and costs but then states (2) that when monetary relief is prayed, the amount prayed for is in controversy.[3]

> ***Example 1.*** Jordan borrows $10,000 from his friend, Sara Beth. He agrees to pay the money back in six months with interest at the rate of 5 percent per year. The loan repayment was due January 3, but Jordan doesn't pay. Sara Beth files the action at the end of July, one year after she made the loan. She sues for $10,000 principal, $500 interest, for a total amount prayed for of $10,500, plus interest from the date of judgment and costs.

If the first rule of determining the amount in controversy—computing it without regard to interest and costs—is read alone, it would seem that the amount in controversy in Example 1 is $10,000 and that the case can be assigned to a magistrate. But the second rule—in which the amount prayed for is in controversy—would indicate that the total amount prayed for ($10,500) is the amount in controversy, and therefore, that the case should not be assigned to a magistrate. Under the rules of statutory construction, a statute must be "considered as a whole and construed, if possible, so that none of its provisions shall be rendered useless or redundant."[4]

There is, however, a way to read the subsections of the statute to give meaning to both: this way interprets the total amount prayed for as the principal and prejudgment interest already accrued on the debt (in Example 1, the $10,000 principal plus the $500 interest) and excludes the language "interest and costs" from the amount in controversy, reading it instead as postjudgment interest and the court costs that the clerk will add to the judgment. The complaint would thus pray for $10,500, plus interest on the principal from the date of judgment and court costs; the "interest from the date of judgment and costs" are not computed in arriving at the amount in controversy, whereas the prejudgment interest is part of the total amount prayed for in the complaint. This interpretation rests on sounder policy grounds than determining that the amount in controversy is based solely on the principal amount of the debt, as the General Assembly clearly intended to limit the dollar amount of cases heard in small claims court. However, because no appellate decision has interpreted the interest subsection of the amount-in-controversy statute, there is no definitive answer to this question. Until there is, the interpretation of the statute rests with the chief district judge who determines which cases are assigned as small claims in his or her district. A chief district judge can resolve this issue for the district by specifying in an administrative order how the clerk assigning cases to magistrates should determine the amount in controversy.

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3. G.S. 7A-243(1), (2).

4. Porsh Builders, Inc. v. City of Winston-Salem, 302 N.C. 550, 556, 276 S.E.2d 443, 447 (1981). *See also* State v. Bates, 348 N.C. 29, 35, 497 S.E.2d 276, 279 (1998).

A second question about determining the amount in controversy arises when the plaintiff prays for actual damages of a specified amount and then asks for that amount to be trebled because of an unfair and deceptive practice claim.

Example 2. Tenant files a small claims action against landlord for constructive eviction and seeks damages of $5,000 for moving costs. In addition, the complaint alleges a claim for unfair trade practice in which the tenant wants the $5,000 trebled.

The amount-in-controversy statute provides that when a single party asserts two or more properly joined claims, the claims are aggregated (added together) unless they are mutually exclusive and in the alternative (the test is whether the plaintiff can recover on only one of the claims), in which case the highest claim is the amount in controversy.[5] An unfair trade practice claim, like a claim for breach of contract, is a separate claim; but the plaintiff cannot collect damages for both breach of contract and unfair trade practices.[6] Thus the highest claim—the trebled amount of damages—would be the amount in controversy. In this example the amount in controversy would be $15,000 and the case should not be assigned to a magistrate.

When Plaintiff Seeks Return of Personal Property

How is the amount in controversy determined when the plaintiff is suing to recover possession of specific personal property that was either wrongfully taken or listed as collateral in a security agreement that is in default? "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."[7] In an action to recover property as a nonsecured party, the relief would establish the right to recover the property; therefore the amount in controversy is the fair market value of the property the plaintiff is seeking to recover plus any monetary damages sought for loss of use or damage to the property.

Example 3. Acme Rent-All brings an action against James to recover a chain saw it rented to him. The fair market value of the chain saw is $250. Acme also seeks $50 damages for loss of use of the saw, since it was unable to rent the saw to another customer who sought to rent it during the period James wrongfully held the saw. In this case, the plaintiff is seeking to establish the right to recover the chain saw and is seeking monetary damages of $50. The establishment of the right is the value of the right, or $250. Therefore, the amount in controversy in this case is $300.

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5. G.S. 7A-243(4).

6. *See. e.g.,* Britt v. Jones, 123 N.C. App. 108, 112 (1996) (citing Marshall v. Miller, 47 N.C. App. 530, 542, 268 S.E.2d 97, 103 (1980) *modified on other grounds and aff'd*, 302 N.C. 539, 276 S.E.2d 397 (1981)) ("[W]here the same course of conduct gives rise to a traditionally recognized action such as breach of contract as well as a cause of action for unfair trade practices, damages may be recovered for either breach of contract or unfair trade practices, but not both.").

7. G.S. 7A-243(3).

But what if the plaintiff is a secured party and is seeking to recover the specific personal property listed in the security agreement?

> ***Example 4.*** Sears sells a refrigerator, stove, microwave, washing machine, and dryer to Virginia for $4,800. She pays $500 down and Sears finances the remainder. Virginia signs a security agreement listing all the items purchased as security for the extension of credit. One year later, she stops making her monthly payments and Sears brings an action to recover possession of the refrigerator, stove, microwave, washing machine, and dryer. At the time, the personal property Sears is seeking to recover has a fair market value of $4,100, but the total amount owed on the debt is $2,500.

It is not clear whether the plaintiff is establishing the right to possession of the property—in which case the value of the property is the amount in controversy—or whether the relief sought would enforce an underlying obligation—in which case the amount owed on the debt would be the amount in controversy. The standard small claims complaint form used by litigants assumes that the amount in controversy is the value of the property that plaintiff seeks to recover.[8] The better rule may be that the amount in controversy is the underlying obligation. Unlike the action by a nonsecured party, in which the plaintiff recovers property owned by the plaintiff, in an action by a secured party the plaintiff is recovering property owned by the defendant in order to apply it toward payment of the underlying debt owed by the defendant. Any surplus recovered is then returned to the defendant. As a practical matter, however, the determining factor is the value the plaintiff fills in on the complaint form. If the plaintiff indicates the value as $10,000 or less, the clerk will assign the case to the magistrate and the magistrate should hear it. On the other hand, if the plaintiff fills in an amount greater than $10,000, the case should not be assigned to a magistrate.

Actions to Enforce Motor Vehicle Lien

In motor vehicle lien cases in which the garage owner seeks a judgment allowing the lien to be enforced, the amount in controversy is the amount of the lien (the value of the obligation) and not the value of the motor vehicle.[9] The lawsuit authorizes enforcement of a lien on the motor vehicle, which means the garage owner must sell the motor vehicle and apply the proceeds to the amount owed, giving any surplus to the owner of the vehicle.

Principal Relief Sought

The second criterion defines a small claim according to the type of relief sought, not by the subject matter of the lawsuit. As long as no more than $10,000 is sought, a plaintiff can bring a suit in small claims court based on any subject: for example, an unfair trade

8. *See* AOC-CVM-202, "Complaint to Recover Possession of Personal Property."

9. G.S. 7A-243(3), which governs the amount in controversy when the owner of the motor vehicle seeks to recover property on which a motor vehicle lien is asserted, specifies that the amount in controversy is that portion of the asserted lien that is under dispute.

practice, medical malpractice, fraud, or breach of contract. Nor is the plaintiff limited in the kinds of monetary damages allowed. As long as the amount in controversy does not exceed $10,000, the plaintiff is entitled to any kind of monetary damages authorized for the particular type of claim, such as damages for pain and suffering in tort cases, treble damages in unfair trade practice claims, and punitive damages in intentional tort cases.

What matters in determining whether an action may be brought as a small claim is the remedy sought by the plaintiff. Only three remedies are appropriate for small claims court: (1) requests for money, (2) recovery of specific personal property, and (3) summary ejectment. A magistrate cannot grant injunctive relief or specific performance (that is, requiring a party to perform some contractual obligation other than paying money). Nor can a magistrate hear domestic cases (divorce, custody, support, or equitable distribution).

> ***Example 5.*** Buster and Franklin enter into a contract under which Buster agrees to paint Franklin's car. Franklin pays Buster $500 when he picks up the car. One week later, spots appear on the car because it was not properly painted, and Franklin asks Buster to take the car back and get it right. Buster refuses. Franklin sues Buster and seeks to make him repaint the car.
>
> A magistrate cannot hear this lawsuit because the remedy sought—specific performance—is not within the definition of a small claim. If, however, Franklin had taken the car to another place to have it repainted for $500 and then sued Buster for $500, the case could be heard by a magistrate since the relief sought is money.

The only exception to the limitation of small claims cases to those seeking these three types of relief is an action to enforce a motor vehicle mechanic-and-storage lien arising under G.S. 44A-2(d) or G.S. 20-77(d). By specific statute, a magistrate may hear a motor vehicle lien claim seeking the right to enforce such a lien.[10]

Plaintiff Requests Assignment

North Carolina does not require that civil actions for $10,000 or less be heard in small claims court. Even a plaintiff who files a $5 lawsuit may choose to have that case heard in district court. No case may be assigned to a magistrate unless the plaintiff requests that assignment, and, interestingly, only the plaintiff may do so.[11] The defendant can neither object to a case being heard by the magistrate, nor request that it be heard in district court, nor seek to have a case filed in district court moved to the magistrate's court.

The plaintiff need not, however, make a specific formal request to have the matter assigned as a small claim. It is sufficient to file the claim on one of the standard Administrative Office of the Courts (AOC) complaint forms, which specify that the action is being brought in the "district court division−small claims."

10. G.S. 7A-211.1.
11. G.S. 7A-210(3).

Filing a Small Claims Action

A small claims case is initiated when the plaintiff files a complaint with the clerk of superior court. The complaint gives notice to the defendant (the person being sued) of who is suing, the reason for the suit, and what relief the plaintiff wishes to recover. A complaint must be made in writing and signed by the plaintiff or the plaintiff's attorney. In a summary ejectment action or back-rent action, a plaintiff's agent who handles the rental also may sign it.[12] If the plaintiff, plaintiff's attorney, or in a summary ejectment action, the plaintiff's agent fails to sign the complaint, the magistrate should bring the omission to the attention of the party and allow them to sign the complaint in open court, noting same on the judgment form. [13]The complaint should not be dismissed unless it is not promptly signed once the omission is brought to the attention of the party.[14] The complaint should be a simple, brief statement easily grasped by a person of common understanding. No particular form is required, although most plaintiffs use the standard small claims complaint forms prepared by AOC.

Where Action Is Filed

Unlike a district or superior court action, a small claim action must be filed in the county where the defendant resides.[15] If there are multiple defendants who live in different counties, one action against all of them may be filed in a county in which one of them resides. In most cases, the county where a lawsuit is filed (the *venue*) is considered a procedural, not a jurisdictional matter—which means that a defendant who raises no objections before trial waives the matter of venue. The small claims statute, however, is more directive than a typical venue statute. Because the general rule by which most chief district court judges assign cases to magistrates specifies that one defendant must reside in the county, a magistrate who determines that none of the defendants is a county resident may send the case back to the clerk because the case was not assigned by the judge. (See discussion below on "Motion Objecting to Venue or Jurisdiction.")

Residence is the defendant's actual place of abode, whether permanent or temporary.[16] A person may have more than one residence.[17] If the defendant is a domestic corporation (that is, is incorporated in North Carolina), its residence is the registered or principal office of the corporation or wherever the corporation maintains a place of business. If the corporation has neither a principal office nor a place of business, its residence is "any place where the corporation . . . is regularly engaged in carrying on

12. G.S. 7A-216, -223.
13. G.S. 1A-1, Rule 11.
14. *Id.*
15. G.S. 7A-211.
16. Sheffield v. Walker, 231 N.C. 556, 559, 58 S.E.2d 356, 359 (1950).
17. Davis v. Maryland Cas. Co., 76 N.C. App. 102, 106, 331 S.E.2d 744, 746 (1985). *See* Glover v. Farmer, 127 N.C. App. 488, 491, 490 S.E.2d 576, 578 (1997) (Whether a person is a resident of a particular place is not determined by any given formula but rather depends significantly on the facts and circumstances surrounding the particular issue.).

business.”[18] This same rule applies to “foreign corporations” (those incorporated in another state) that have qualified with the North Carolina Secretary of State to transact business in the state.[19]

> ***Example 6.*** Franklin Office Supply Inc., a North Carolina corporation, has its principal office in Forsyth County. It also has a store in Stokes County. Beatrice buys a chair from Franklin Office Supply Inc. and is unhappy because she believes the corporation breached the warranty of merchantability. Beatrice can file a small claims action in either Forsyth County or Stokes County.

If a foreign corporation has not been granted authority to transact business in North Carolina, the statute does not specify how to determine the corporation’s residence. Although the general venue law provides that a corporation may be sued in any county in which it usually does business,[20] its residence apparently is in the state where it is incorporated. Therefore, it appears that a foreign corporation not granted authority to transact business in North Carolina must be sued in district or superior court, not in magistrate’s court.

Residence is determined at the time the complaint is filed.[21] If a case is filed in the county in which the defendant resides and the defendant moves to another county before trial, the magistrate in the county where the case was filed should hear the case.

The one exception to the requirement that a defendant reside in the county where the case is filed is an action to enforce a motor vehicle mechanic-and-storage lien. Such a case must be filed in the county where the claim arose (that is, where the motor vehicle was towed or repaired) rather than in the defendant’s county of residence.[22]

District Judge Assigns Case

If the plaintiff files a complaint requesting assignment to a magistrate, the chief district judge has the discretion to decide whether to assign the case to a magistrate. The assignment may be made by specific order or general rule.[23] No chief district court judge reads every complaint and determines assignment on a case-by-case basis; all make assignments by means of administrative orders to the clerk. Such orders usually authorize the clerk to assign to the magistrate “any case within the magistrate’s jurisdiction for which the plaintiff requests assignment as a small claim” or “any case with an amount in controversy of $10,000 or less for which the plaintiff requests assignment as a small claim.”[24] Based on this administrative or general order, the clerk assigns the case to a magistrate as soon as it is filed.

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18. G.S. 1-79.

19. Hill v. Atlantic Greyhound Corp., 229 N.C. 728, 51 S.E.2d 183 (1949); Moore Golf, Inc. v. Shambley Wrecking Contractors, Inc., 22 N.C. App. 449, 206 S.E.2d 789 (1974).

20. G.S. 1-80.

21. Bass v. Bass, 43 N.C. App. 212, 215, 258 S.E.2d 391, 393 (1979).

22. G.S. 7A-211.1.

23. G.S. 7A-211.

24. A model general rule is attached as [Appendix I] at the end of this chapter.

Although the statute defines a small claims action as having a jurisdictional limit of $10,000, the chief district court judge's administrative order may set a jurisdictional limit that is less than $10,000. In order to know the maximum amount in controversy for which a magistrate has jurisdiction, the magistrate will need to review the administrative or general order of the chief district court judge.

The clerk then issues a *magistrate's summons*, which officially commences the court action.[25] The summons notifies the defendant of the date, time, and location of the trial. After service of the summons, according to the statute, the clerk gives the plaintiff written notice of the assignment.[26] Although some counties follow the statutory procedure, most notify plaintiffs when they file their complaint that the case has been assigned to a magistrate and inform them of the date and time of the trial.

If the complaint does not fall within the chief district judge's general order of assignment, the clerk issues a *civil summons* rather than a magistrate's summons and gives the plaintiff notice of nonassignment. The clerk also informs the plaintiff that the action will be heard in district court and that those court costs must be paid. Even when a case falls within the chief district judge's general rule, a case may not be assigned to a magistrate if the clerk brings to the judge's attention some particular aspect of a complaint filed as a small claim: for example, that a magistrate is a party to the action or that it includes a very unusual claim.

If the judge assigns a case to a magistrate, the magistrate's judgment is valid and is not subject to challenge on the basis that the action was not properly assignable to a magistrate. The sole remedy for improper assignment is appeal.[27] This occurs in the rare case when the chief district court judge's administrative order directs the assignment of cases that are not eligible to be heard in small claims. For example, the chief district court judge's administrative order directs assignment of cases to small claims with an amount in controversy of $12,000 or less. If the clerk calendars a case in small claims with an amount in controversy of $12,000, the case is assigned by the chief district court judge, but the assignment was improper.

However, it is unlikely that a case assigned according to the judge's general order would ever be assigned improperly. Moreover, if a clerk did send a magistrate a case that is not within the judge's order, that case probably would fall under the rule that the magistrate's judgment is invalid because the chief district court judge did not assign the case to the magistrate.[28] In the circumstance where the clerk assigns a case to small claims that is not within the chief district court judge's order, the magistrate may dismiss the case for lack of subject matter jurisdiction. There are practical reasons why the magistrate may not want to choose that option and subject the plaintiff to additional court filing fees for a new action. The magistrate has no statutory authority to transfer the case to district

25. G.S. 7A-213.
26. *Id*.
27. G.S. 7A-212.
28. *Id*.

court, but the magistrate may return the case to the clerk for the clerk to follow the procedure for nonassignment. [29]

Small Claim for More Than $10,000

Occasionally a plaintiff, usually through an attorney, will try to file a claim for more than $10,000 in small claims court. In doing so, the attorney will argue that there is no jurisdictional limitation based on the amount in controversy and that a defendant who objects can move to transfer the case to district court. That analysis would be accurate with regard to cases filed in district or superior court, where there is no jurisdictional limitation based on amount in controversy between those two divisions[30] and where the statute provides for transfers of a case filed in the improper division.[31] However, small claims are unique. First, the magistrate is part of the district court division, so that such a transfer would not be between different divisions.[32] Moreover, because the $10,000 is jurisdictional, any proceeding before the magistrate would be void.[33] Finally, as mentioned above, a small claims action must be assigned to the magistrate by the chief district court judge. Since judges assign cases through an administrative or general order, a case that does not comply with the order but is sent to the magistrate has not been assigned by a judge; the magistrate's judgment would therefore be invalid.[34]

A magistrate who receives a case in which the amount in controversy at the time the complaint is filed exceeds $10,000 should not hear the case but should return it to the clerk, indicating that he or she lacks jurisdiction to hear it. Sometimes the plaintiff may choose to reduce the amount prayed for to $10,000 and forgive the remainder of the amount owed in order to have the case heard in small claims court. In that situation the magistrate may allow the plaintiff to amend the complaint to ask for only $10,000 and proceed with the case. The magistrate can either allow the plaintiff to amend the copy of the complaint in the file by noting the reduced amount prayed for and signing and dating the complaint where the amount is reduced or can orally request the amendment; in the latter case the magistrate should indicate in the "findings" portion of the judgment that the plaintiff in open court reduced the amount prayed for to $10,000.

Splitting Claims to Reduce Amount in Controversy

Occasionally a plaintiff will attempt to divide a claim for more than $10,000 and bring two or more actions, each for $10,000 or less. The general rule is that for the breach of an entire and indivisible contract, more than one action for damages is not sustainable.[35] If a plaintiff tries to split one contract into separate claims, the defendant may raise the

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[29] G.S. 7A-215.

30. G.S. 7A-243 specifies that the district court is the "proper" division for cases of $25,000 or less and the superior court is proper for cases over $25,000.

31. G.S. 7A-257, -258.

32. N.C. CONST. art. IV, § 10.

33. *See* Falk Integrated Technologies, Inc. v. Stack, 132 N.C. App. 807, 513 S.E.2d 572 (1999).

34. G.S. 7A-212.

35. Gaither Corp. v. Skinner, 241 N.C. 532, 536, 85 S.E.2d 909, 912 (1955).

affirmative defense of res judicata (the matter has been adjudicated) to the second or subsequent action and the magistrate will have to dismiss that action. The question for the magistrate is whether the contract was indivisible. Early cases indicate that when an account consists of several items, either for goods sold or services provided at different times, the plaintiff may sue for each transaction separately before a magistrate even though the aggregate amount exceeds $10,000.

However, if the debt is for one item, it cannot be split;[36] nor can it be split if several items were purchased in one continuous shopping spree.[37] Moreover, if the plaintiff has rendered a statement for the entire amount due and the defendant has accepted the account or not responded within a reasonable time, a new contract to pay the entire amount as one debt has been created.[38] Thus, if transactions were originally separate but the plaintiff has sent the defendant a statement for the full amount due to which the defendant has not objected within a reasonable amount of time, the account has become one debt and may not be split.

Time for Trial

The clerk must set the time for trial not more than thirty days after the summons is issued[39] —except that for summary ejectment cases, in which the clerk must set the time of trial within seven business days after the summons is issued.[40] In counties where small claims court is held only once or twice a week, it may be impossible for the clerk to set all summary ejectment cases within that period; in that case, the clerk should schedule the cases for the first small claims court held after seven days.

Service of Process

The magistrate acquires jurisdiction to hear a case when copies of the complaint and summons are served on that defendant. Four methods of subjecting a defendant to the jurisdiction of the court apply in all small claims cases; a fifth applies in summary ejectment cases only; and a sixth applies in motor vehicle lien cases only.

These methods of service are as follows.

1. The sheriff, or in some instances a private process server, serves a defendant by delivering a copy of the summons and complaint to the defendant personally.[41]

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36. Mayo v. Martin, 186 N.C. 1, 118 S.E. 830 (1923); Simpson v. Elwood, 114 N.C. 528, 19 S.E. 598 (1894); Boyle v. Robbins, 71 N.C. 130 (1874).

37. T.J. Magruder & Co. v. W.H. Randolph & Co., 77 N.C. 79 (1877).

38. Copland v. Am. De Wireless Telegraph Co., 136 N.C. 11, 48 S.E. 501 (1904); D. Marks & Son v. Ballance, 113 N.C. 28, 18 S.E. 75 (1893).

39. G.S. 7A-214.

40. G.S. 42-28.

41. Except in actions for summary ejectment, if the sheriff returns a summons unserved the plaintiff may select anyone 21 years of age or older who is not a party to the action and not related by blood or marriage to a party to the action to serve the *alias and pluries* (second or subsequent) *summons*. G.S. 1A-1, Rule 4 (h1).

2. The sheriff, or in some instances a private process server, serves the defendant by leaving a copy of the summons and complaint at the defendant's dwelling with a person of suitable age and discretion who also resides in the dwelling.[42]
3. The plaintiff serves the defendant by mailing a copy of the summons and complaint by certified or registered mail, return receipt requested, addressed to the defendant, and the post office delivers the copies to the addressee.[43]
4. Even if the defendant is not served by one of the first three methods, the court has jurisdiction to proceed against the defendant if he or she signs a written acceptance of service or makes a voluntary appearance in the case.[44]
5. In summary ejectment cases only, the sheriff may serve the defendant by mailing a copy of the summons and complaint to the defendant by first class mail at the premises from which the defendant is to be evicted *and* by posting a copy of the summons and complaint in a conspicuous place on the premises.[45]
6. In motor vehicle lien cases only, a defendant can be served by any method authorized by Rule 4 of the Rules of Civil Procedure. This means that in addition to the first four methods listed above, the defendant may be served by (a) depositing with a designated delivery service copies of the complaint and summons addressed to the defendant, to be delivered to the addressee; (b) mailing a copy, signature confirmation required, via the U.S. Postal Service; or (c) if the defendant cannot with due diligence be served by any of the above methods, by publishing a notice of service of process in a newspaper qualified for legal advertising and circulated in the area where the defendant is believed be located, or in the county where the action was filed. [46]

G.S 7A-217, which sets out methods of service of small claims actions, speaks only to serving defendants who are natural persons. If the defendant is a corporation, G.S. 1A-1, Rule 4 (j)(6) specifies the manner of service. The methods of service for a corporation are as follows:

a. by delivering a copy to an officer, director, or managing agent or leaving a copy at the office of any officer, director, or managing agent with the person who is apparently in charge of the office;

b. by delivering a copy to an agent authorized by appointment or by law to be served or to accept service of process;

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43. G.S. 7A-217(2) and G.S. 1A-1, Rule 4(j)(1)c.

44. G.S. 7A-217(3).

45. G.S. §§ 7A-217(4), 42-29. If service is by posting, no monetary damages may be awarded. See discussion in [Chapter VI, "Landlord–Tenant Law," page 150].

46. G.S. 7A-211.1; G.S. 1A-1, Rule 4(j)(1) and (j1).

c. by mailing a copy by certified mail, return receipt requested, to an officer, director, or agent specified in (a) or (b); or

d. by delivery by a designated delivery service to an officer, director, or agent specified in (a) or (b).

Proof of Service

Service by Sheriff

The sheriff's return of the summons showing the place, time, and manner of service is sufficient to prove service.[47] A sheriff's return is presumed to be correct; therefore, if it indicates that the process was left with a person of suitable age and discretion, the plaintiff need not offer any further proof of service.[48] A defendant who wishes to challenge the service must file a motion objecting to jurisdiction over his or her person. A district court judge, not a magistrate, must hear this and other pretrial motions (which are discussed below on [page 19]).

Service by a Private Process Server

A private process proves service by filing an affidavit (1) showing the place, time, and manner of service; (2) stating the server's qualifications to make service under Rule 4 of the Rules of Civil Procedure; (3) declaring that the server knew the person served to be the defendant and that he or she delivered to and left with the defendant a copy of the summons and complaint; and (4) if the defendant was not personally served, stating when, where, and with whom such copies were left.[49]

Service by Certified Mail

If the plaintiff serves the defendant by certified mail, the plaintiff must file an affidavit showing proof of service and must attach to the affidavit the signed postal return receipt.[50] An *affidavit* is a statement that is sworn to before a person authorized to administer oaths—usually a notary public but sometimes a magistrate. The affidavit must indicate that a copy of the summons and complaint was deposited in the post office for mailing by registered or certified mail, return receipt requested, and that it was in fact received—as evidenced by the attached postal receipt or other evidence of delivery.[51] If the postal receipt is signed by someone other than the defendant, the person signing is

47. Williams v. Burroughs Wellcome Co, 46 N.C. App. 459, 462, 265 S.E.2d 633, 635 (1980).

48. Guthrie v. Ray, 293 N.C. 67, 235 S.E.2d 146 (1977); Harrington v. Rice, 245 N.C. 640, 97 S.E.2d 239 (1957).

49. G.S. 1-75.10(a)(1)b.

50 *See* AOC-CV-105, "Affidavit of Service of Process by Registered Mail/Certified Mail/Designated Delivery Service."

51. G.S. 1-75.10(a)(4).

presumed to be an agent authorized to accept service or a person of suitable age and discretion residing in the house, subject to rebuttal by the defendant.[52]

Written Acceptance of Service

A defendant may also sign a written acceptance of service, which obviates the need to prove proper service by the sheriff or by certified mail.[53] Acceptance of service is rarely used in small claims cases.

Voluntary Appearance

A voluntary appearance dispenses with the need for valid service of process. Voluntary appearance is an appearance "whereby the defendant submits his person to the jurisdiction of the court by invoking the judgment of the court in any manner on any question other than that of the jurisdiction of the court over his person."[54] In other words, a defendant who was not served or was not served properly but makes a voluntary appearance can be treated for all purposes as if he or she were properly served. Generally, in a small claims case the defendant makes a voluntary appearance by appearing at trial. However, a defendant also may make a voluntary appearance by seeking a continuance or filing a motion other than a motion objecting to jurisdiction over the person. To establish that the court had jurisdiction because the defendant made a voluntary appearance, the magistrate should note on the "findings" portion of the judgment form that the defendant was present at trial or, if the defendant makes a voluntary appearance by some other method such as by filing a motion, the magistrate should indicate that fact as a finding on the judgment in the "Other" block.

> ***Example 7.*** Bert Jones sues William Smith for money owed. When the case is called for trial, the magistrate notes that the summons indicates that Smith was not served. Smith is present in the courtroom and participates in the trial. The magistrate may issue a judgment against Smith because he made a voluntary appearance in the case. The same result would occur if Smith were absent at trial but had requested a continuance two weeks before trial.

Service by Publication

Service by publication is not allowed in most small claims cases.[55] If a defendant cannot be served by one of the methods discussed above, the plaintiff cannot go forward with the small claims case. The plaintiff may, however, take a voluntary dismissal in the small claims case and refile the case as a district court case where service by publication is authorized. As mentioned earlier, the one exception to the rule regarding publication in small claims cases is motor vehicle lien cases. In an action to enforce a motor vehicle lien, a plaintiff who after a due and diligent search is unable to serve the defendant by personal

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52. G.S. 1A-1, Rule 4 (j2)(2). If the defendant wishes to challenge service, he or she must file a motion before trial; the motion must be heard by a district court judge.

53. G.S. 7A-217(3) and G.S. 1A-1, Rule 4 (j5).

54. *In re* Blalock, 233 N.C. 493, 504, 64 S.E.2d 848, 856 (1951).

55. G.S. 7A-217, which lists methods of service in small claims cases, does not include publication.

service—including leaving the process with the defendant personally or leaving it at the defendant's dwelling with a proper person—or by certified or registered mail, may serve the defendant by publication.[56] Service by publication is discussed in detail in [Chapter VII, "Motor Vehicle Mechanic and Storage Liens."]

Determining Proper Service

Before hearing a case, the magistrate must determine whether he or she has jurisdiction over the defendant. Fundamental due process requires that a defendant be notified of the lawsuit and date of the trial, and North Carolina courts require strict compliance with the service statutes.[57] The magistrate must (1) see either the sheriff's return of service on the summons indicating that the sheriff served the defendant or the private process server's affidavit that service was carried out; (2) see the plaintiff's affidavit indicating service by registered or certified mail and the postal receipt indicating receipt of service; (3) see the defendant's written acceptance of service; (4) see that the defendant is present at trial or made an earlier voluntary appearance by seeking a continuance or filing a motion other than one challenging jurisdiction over the defendant; or (5) in motor vehicle lien cases when publication is used, see the plaintiff's and publisher's affidavits.

If the defendant has not been served or the magistrate does not have documented evidence of service (for example, the sheriff's return or plaintiff's affidavit of service by certified mail) that the defendant has been served, the magistrate should not hear the case. Rather, the magistrate should continue the case to allow the plaintiff further time to try to serve the defendant. A summons is valid for only sixty days and cannot be served after that time. However, if the defendant is not served within the sixty-day period, the plaintiff may ask the clerk to issue another summons (called an *alias and pluries summons*), which will give plaintiff a new sixty-day period to try to serve the defendant.[58] A plaintiff could have the clerk issue successive alias and pluries summonses indefinitely, thus keeping the lawsuit alive while he or she attempts to locate the defendant. As a practical matter, most plaintiffs give up after two or three unsuccessful attempts at service and take a dismissal of the case. If a summons is unserved and no new alias and pluries summons is issued within ninety days after issuance of the preceding summons, the case is discontinued automatically.[59]

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56. G.S. 7A-211.1.

57. *See* Guthrie v. Ray, 293 N.C. 67, 235 S.E.2d 146 (1977); Roshelli v. Sperry, 57 N.C. App. 305, 291 S.E.2d 355 (1982).

58. G.S. 1A-1, Rule 4(d). Some clerks use a method called "endorsement" instead of issuing an alias and pluries summons. An endorsement is a notation on the original summons giving it a new sixty-day period for service. Endorsements have the same effect as alias and pluries summonses.

59. G.S. 1A-1, Rule 4(e). Under the computerized civil tracking system developed by the Administrative Office of the Courts the case is automatically discontinued and moved to a closed status. A plaintiff can reopen the discontinued case by asking the clerk to issue an alias and pluries summons. However, when an alias and pluries summons is issued after the case has been discontinued, the case is commenced for statute of limitations purposes when the new summons is issued and not when the original summons was issued.

Multiple Defendants and Service

Should a magistrate proceed in a case where there are multiple defendants and at least one but not all of the defendants have been served? If so, against which defendants may the magistrate proceed? The rules regarding service of process apply to each individual defendant; the court has no jurisdiction over a particular defendant unless he or she has been properly served or makes a voluntary appearance. Therefore, if one defendant has been served but another has not, the magistrate cannot hear the case and enter judgment against both defendants.

When some, but not all, of the defendants have been served, the decision whether to proceed to trial rests with the plaintiff. As the magistrate cannot hold separate trials for multiple defendants in the same case, he or she should require the plaintiff to decide whether to proceed against all of the defendants or against only those served. If the plaintiff wishes to proceed against all the defendants, the magistrate should continue the case to give the plaintiff time to attempt to serve the other defendants. When all of the defendants have been served, the trial can be held against all defendants. A plaintiff who chooses to proceed against only those defendants who have been served may file a voluntary dismissal against the unserved defendants. When the only defendants remaining in the lawsuit are those who have been served, the magistrate may proceed to trial against them.

> ***Example 8.*** Watertown Supply sues Ben James and Samuel James on a contract for goods delivered. The trial is scheduled for September 5. At that time the summons indicates that Ben has been served but the sheriff has been unable to locate Sam. As Watertown wants a judgment against both defendants, it can ask for a continuance and then seek an alias and pluries summons from the clerk so that the sheriff can try again to serve Sam (or Watertown can mail the alias and pluries summons by certified mail, return receipt requested). When Sam is served, the trial may be held against both Ben and Sam.

> ***Example 9.*** But suppose that when Watertown Supply comes to court on September 5, the sheriff's return indicates that Ben has been served but Sam has not been served because he has moved to California. Watertown therefore decides it doesn't want to pursue its case against Sam; even if Sam were served and Watertown obtained a judgment against him, it would be too expensive to try to collect the judgment in California. The firm can file a voluntary dismissal against Sam and ask the magistrate to proceed to trial against Ben. The magistrate can proceed because at this point the only defendant in the case is Sam, who has been served.

Defendant's Answer and Counterclaim

Answer

After being served with the plaintiff's complaint and a summons, the defendant may file a written response to the complaint, which is called an *answer*. In district or superior court actions, a defendant must file a written answer to the complaint or a default judgment will be entered against him or her without a trial. The law for small claims cases is very

different. Default judgments are not allowed, and defendants are not required to file written answers, though they may do so. If the defendant does not file an answer, the court assumes that the defendant denies everything the plaintiff says in the complaint.[60] If the defendant chooses to file an answer, it must be written in a manner enabling a person of common understanding to know the nature of the defense and must be filed with the clerk before the time set for the trial. Like a complaint, an answer merely gives the other party notice of what the defense claims; it is not evidence. The defendant must appear at trial to offer any defense he or she might have.

Counterclaim

A defendant might also want to file a counterclaim, initiating a counter suit against the plaintiff. Essentially, a counterclaim requires the magistrate to hear two lawsuits in one case, one in which the plaintiff is suing the defendant, and the other in which the defendant is suing the plaintiff.

There are two types of counterclaims—compulsory and permissive. A *compulsory* counterclaim is one that arises out of the same transaction or occurrence that is the subject matter of the complaint.[61] For example, plaintiff might sue defendant for automobile negligence, and defendant's counterclaim might allege that plaintiff's negligence, not defendant's, caused the accident. A *permissive* counterclaim is any other claim the defendant might have against the plaintiff. If, for example, the plaintiff files a summary ejectment action against the defendant for failure to pay rent, the defendant may file a counterclaim against the plaintiff for failing to repay a loan. Under Rule 13 of the Rules of Civil Procedure, if a compulsory counterclaim is not asserted in a pending action, it is barred from being asserted later in an independent action. However, G.S. 7A-219 and G.S. 7A-220 set out special rules for counterclaims in small claims cases; they make it clear that Rule 13 provisions regarding compulsory counterclaims do not apply in small claims court.

Filing a Counterclaim

A counterclaim is asserted by filing a written answer alleging it. Usually the defendant designates the filing as an "Answer and Counterclaim," although this description is not required. Sometimes a defendant will use a standard AOC complaint form and strike through "complaint" and write in "counterclaim." The only statutory requirements are that a counterclaim must be written and must be filed with the clerk of court before the time set for trial.[62] The Rules of Civil Procedure, on the other hand, require a counterclaim to be served on the plaintiff or the plaintiff's attorney by delivering a copy to one of them

60. G.S. 7A-218.

61. G.S. 1A-1, Rule 13. A counterclaim is compulsory when (1) it is in existence when the defendant serves the answer on the plaintiff; (2) it arises out of the transaction or occurrence that is the subject matter of the plaintiff's claim; and (3) it does not require the presence of third parties over whom the court cannot acquire jurisdiction. Faggart v. Biggers, 18 N.C. App. 366, 370, 197 S.E.2d 75, 78 (1973).

62. G.S. 7A-218.

personally or by mailing a copy by first class mail;[63] the defendant also must file a certificate showing the date and method by which the counterclaim was served on the plaintiff.[64] The small claims procedure statute does not specify that the defendant must serve a copy on the plaintiff.[65] Therefore, if the defendant has filed a counterclaim with the clerk before the time set for trial but has not served a copy on the plaintiff, the counterclaim is properly filed. When calling a case for trial, the magistrate should indicate that the defendant has filed a counterclaim; then, if plaintiff indicates that he or she never received a copy, the magistrate may consider continuing the case (both the claim and counterclaim) to give the plaintiff time to prepare evidence on the subject of the counterclaim. Once the defendant files a counterclaim, no further pleading is allowed and any new claim alleged is deemed denied by the plaintiff.[66]

If the defendant tries to offer a counterclaim at trial, the magistrate should indicate that the counterclaim was not properly asserted in writing before the time for trial and therefore cannot be considered. In that situation, the defendant may file the counterclaim as a separate action.

Counterclaim Amount in Controversy

G.S. 7A-219 provides that "no counterclaim . . . 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." Under this provision, a defendant may file a counterclaim as long as the amount in controversy is not over $10,000. The rules for determining the amount in controversy set out in the amount-in-controversy statute (discussed earlier in this chapter) apply to both a counterclaim and the original claim. The amount in controversy is not determined by adding the amount of the claim and counterclaim together, each is determined separately;[67] if the claim is for $10,000 or less and the counterclaim is for $10,000 or less, both can be heard by the magistrate. If both parties win, the magistrate will offset the claim and counterclaim (reduce the amount of the larger award by the amount of the smaller one if they are not equal), and if only one party wins, the amount awarded will not exceed $10,000.

Counterclaims for more than $10,000 may not be filed in small claims court. G.S. 7A-219 makes it clear that even if the counterclaim is compulsory under the Rules of Civil Procedure, it may not be filed in a small claims case if it is for more than $10,000:

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63. G.S. 1A-1, Rule 5.

64. The defendant usually serves the answer and counterclaim on the plaintiff and then files the answer and counterclaim with the certificate of service attached in the clerk's office. A certificate of service usually includes language like "the undersigned hereby certifies that a copy of the foregoing Answer and Counterclaim was served on the following parties to this action, pursuant to Rule 5 of the Rules of Civil Procedure by depositing a copy in the United States mail, postage prepaid and addressed to Jane Doe, 5402 Jones Street, Apartment 6, Merryville, NC 27777."

65. G.S. 7A-218.

66. G.S. 7A-220.

67. *Cf.* Amey v. Amey, 71 N.C. App. 76, 321 S.E.2d 458 (1984).

> No counterclaim . . . which would make the amount in controversy exceed the jurisdictional amount . . . 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.

Thus the statute clearly allows a counterclaim for more than $10,000 to be filed as a separate action.[68]

G.S. 7A-219 also makes it clear that even a counterclaim for $10,000 or less that would be a compulsory counterclaim under Rule 13 does not need to be filed in a small claim action but may be filed as a separate action in small claims, district, or superior court.[69]

Counterclaim for More Than $10,000

When a defendant in a small claims case files an answer and counterclaim, the clerk's role is merely to file the document, not to determine if the amount is appropriate. Therefore, it is not improbable that a magistrate could find a counterclaim for more than $10,000 in a case file. Magistrates who allow plaintiffs who file cases for more than $10,000 to reduce that amount and proceed in small claims court should allow defendants who counterclaim the same opportunity.

Sometimes the defendant asks that both the claim and counterclaim be removed to district court (or superior court if the counterclaim is for more than $25,000), thinking that the entire matter can be postponed by filing a counterclaim for more than $10,000. In this case, the claim and counterclaim are not removed to district court. Rather, the magistrate should try the claim but not the counterclaim.[70] The magistrate should not dismiss the counterclaim but make a finding that the counterclaim was not heard because it was not within the magistrate's jurisdiction. The defendant may request the district

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68. *See* Chandler v. Cleveland Sav. & Loan Ass'n, 24 N.C. App. 455, 211 S.E.2d 484 (1975). If the small claim action is appealed to district court, a counterclaim for more than $10,000 may be raised at that time, since G.S. 7A-220 provides that "on appeal from the judgment of the magistrate for trial de novo before a district court judge, the judge shall allow appropriate counterclaims."

69. In 2005 the General Assembly amended G.S. 7A-219 to overrule two court of appeals opinions that had required compulsory counterclaims to be raised on appeal of small claims cases to district court. *See* Cloer v. Smith, 132 N.C. App. 569, 512 S.E.2d 779 (1999) (Compulsory counterclaim that cannot be asserted in small claim because of the amount in controversy must be filed as counterclaim in district court if small claim is appealed.); Fickley v. Greystone Enter., Inc., 140 N.C. App. 258, 536 S.E.2d 331 (2000) (barring defendant who does not assert compulsory counterclaim on appeal to district court from asserting it later, thereby placing an affirmative duty on the defendant to appeal the small claim judgment whether an aggrieved party or not).

70. *See* Ervin Co. v. Hunt, 26 N.C. App. 755, 217 S.E.2d 93 (1975) (Court held that magistrate "correctly refused to hear defendant's counterclaim" when magistrate dismissed $300,000 counterclaim.). *But see* Falk Integrated Technologies, Inc. v. Stack, 132 N.C. App. 807, 513 S.E.2d 572 (1999) (As magistrate lacked subject matter jurisdiction over claim for more than the allowable amount, dismissal of claim was void and does not bar subsequent district court action.).

court judge to allow the counterclaim to be filed if the magistrate's ruling on the claim is appealed; otherwise, the defendant may file it as a separate claim.

> ***Example 10.*** Hannah sues Winston for $2,500 for physical damage to the house Winston rented from Hannah. Winston files a counterclaim seeking $3,500 damages for breach of the warranty of habitability. The magistrate should hear the counterclaim as well as the claim because the amount in controversy of the counterclaim—$3,500—is within the allowable jurisdictional amount. If both parties prove they are entitled to the damages they seek, the magistrate will set off the claims and award $1,000 against Hannah. If only Hannah wins, the magistrate will award $2,500 against Winston and if only Winston prevails, the magistrate will award $3,500 against Hannah.
>
> Suppose that Winston files a counterclaim for $11,000. The magistrate should hear Hannah's claim but not Winston's counterclaim. If the magistrate rules in favor of Hannah and Winston decides to appeal, he may seek permission to file the $11,000 counterclaim in district court, or he may file it as a separate action in district court. If Winston is satisfied with the magistrate's decision on Hannah's action, he may accept that decision and then file a new action in district court to assert his claim against Hannah.

Cross Claims and Third Party Claims

Cross claims and third party claims that do not bring the amount in controversy above the jurisdictional amount may be filed in small claims cases.[71] A *cross claim* is a claim by one party against a coparty arising out of the transaction or occurrence that is the subject of the claim or counterclaim. For example, Patty sues Adam and Bob for negligence and Adam files a cross claim against Bob, claiming that Bob's negligence caused Adam's injury. A *third party claim* is one in which the defendant brings a new party (called a *third party defendant*) into the lawsuit, claiming that if the defendant is found liable to the plaintiff the third party is liable to the defendant for all or part of the damages. For example, Henrietta sues Big Bob's Towing Inc. for damaging her automobile while towing it from Harry's property. Big Bob's Towing Inc. files a third party claim against Harry, indicating that Harry had signed a contract indemnifying Big Bob's from any liability incurred while towing the car from his property. Although they are authorized, cross claims and third-party claims are extremely rare in small claims court.

Pretrial Motions

Before the trial a party might file one or more of several different motions as described below.

Motion to Name Real Party in Interest

71. G.S. 7A-219 provides "no counterclaim, crossclaim or third party claim which would make the amount in controversy exceed the jurisdictional limit . . . is permissible in a small claim action assigned to a magistrate" thereby indicating that a claim that is within the limit may be filed.

An action can only be brought by the *real party in interest*. In other words, the person or company named in the complaint as the plaintiff must be the person "who is benefited or injured by the judgment"[72] and the person "who is entitled to receive the fruits of the litigation."[73] In summary ejectment cases the owner of the property (the landlord), not the agent handling the property for the owner, is the real party in interest. Sometimes a defendant files a motion objecting to the fact that the plaintiff listed in the complaint is not the real party in interest. Failure to bring the action in the name of the real party in interest is not, however, a basis for immediate dismissal.[74] The magistrate must give the plaintiff a reasonable amount of time after an objection is raised to file an amended complaint substituting the proper plaintiff; this may also be done in open court. If the plaintiff does not substitute the real party in interest within a reasonable time, the magistrate may dismiss the action.

Motion to Perfect Statement

The defendant may bring a motion, in oral or written form, to perfect the statement of the claim in the complaint because it fails to make clear why he or she is being sued.[75] The magistrate assigned to hear the case, the clerk, or a district court judge may rule on the motion without notice to the plaintiff. If the magistrate (or clerk or judge) determines that the complaint is not clearly enough written to enable a person of common understanding to know what is meant—why the defendant is being sued and what remedy is sought—the magistrate must enter an order requiring the plaintiff to amend the complaint to state these matters in clearer and more specific language. The magistrate also may, on his or her own motion, order a plaintiff to perfect the statement of the claim. In either case, the magistrate must mail a copy of the order to the plaintiff and continue the case to give the plaintiff time to perfect the statement. The plaintiff can perfect the statement by either filing another complaint, entitled, "Amended Complaint," or by merely filing a perfected statement with the clerk of court and mailing a copy to the defendant.

Motion Objecting to Venue or Jurisdiction

At any time before trial, but not after an answer has been filed, a defendant may file a motion objecting that the venue is improper, moving for a change of venue, or objecting to the jurisdiction of the court over him or her.

Venue is the legal term for the location where the lawsuit must be filed and heard. A motion objecting that the venue is "improper" argues that the lawsuit is filed in the wrong county, and a motion to change venue requests that the case be moved to another county. A motion objecting to jurisdiction over the defendant is one that challenges the

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72. Reliance Insur. Co. v. Walker, 33 N.C. App. 15, 18, 234 S.E.2d 206, 209 (1977) (citations omitted).

73. Hood v. Mitchell, 206 N.C. 156, 165, 173 S.E. 61, 66 (1934) (citations omitted); *see also* Goodrich v. Rice, 75 N.C. App. 530, 537, 331 S.E.2d 195, 199 (1985).

74. G.S. 1A-1, Rule 17(a).

75. G.S. 7A-216.

court's personal jurisdiction over the defendant, which usually entails a complicated legal analysis of whether the State of North Carolina can constitutionally exercise jurisdiction over the defendant.

Both of these motions must be made in writing and, because of their complexity, must be heard by either the chief district court judge or another district court judge the chief judge designates by order or rule.[76] The magistrate has no authority to consider the case or make any rulings about the case while any of these motions are pending. Because some parties may not realize that the law requires the chief district court judge to hear such motions, they may fail to schedule the motion to be heard by that judge. Therefore, at trial the magistrate might find the motion in the case file without a ruling by a judge. In that case, the magistrate should continue the case and ask the clerk to calendar the motion before the chief district judge or another designated district court judge.

Questions about appropriate venue generally are procedural, not jurisdictional, which means they are waived if not raised by the defendant before trial.[77] However, there is some question about whether venue in small claims court is strictly procedural. G.S. 7A-221 seems to indicate that it is procedural by stating (1) that the defendant may object to venue by motion before filing an answer or as part of his or her answer and (2) that the objection is waived if not made before the date set for trial. However, G.S. 7A-211 provides that "[T]he chief district court judge may, in his or her discretion, . . . assign to any magistrate of the district any small claim action pending in the district if the defendant [or at least one of the defendants] is a resident of the county in which the magistrate was appointed." As explained above, all chief district judges assign cases by general or administrative order, and their orders usually include a statement that the clerk should assign cases within the jurisdiction of the magistrate when one of the defendants resides in the county where the action is filed. The same issue arises, therefore, as in actions filed as small claims for more than the allowable amount in controversy: a clerk who sends a case to a magistrate when none of the defendants is alleged to live in the county is not complying with the judge's order, and therefore, the case is not properly before the magistrate and any judgment rendered is not valid. The best way to read the two statutes together is that G.S. 7A-221 sets out the procedure for defendants who wish to object to venue—by filing written motions or answers before trial and having them heard by a district court judge—while G.S. 7A-211 indicates that a magistrate who discovers that no defendant resided in his or her county at the time the complaint was filed may consider the case as not assigned by the chief district court judge.

Motion to Transfer to Superior Court Division

Another possible, but extremely rare motion, is a motion to transfer the action to superior court because that is the proper division for it. If the defendant files a motion to transfer the case to superior court before the case is assigned to a magistrate, the case may not

76. G.S. 7A-221.

77. Gardner v. Gardner, 43 N.C. App. 678, 260 S.E.2d 116 (1979), *aff'd* 300 N.C. 715, 268 S.E.2d 468 (1980).

be assigned, and therefore no magistrate will have authority to hear the matter until a superior court judge has ruled on the motion.[78] The statute assumes that a motion to transfer will be filed before the case is assigned to a magistrate, but this is generally not the case, since in most counties small claims are assigned the moment they are filed. The safest practice for a magistrate is not to hear a case until a superior court judge has ruled on the motion for transfer to superior court.

12(b)(6) Motion

Another motion an attorney representing a defendant might file is called a 12(b)(6) motion—a motion to dismiss the case for failure to state a claim.[79] Essentially, this motion states that even if everything in the plaintiff's complaint is true, it does not state a claim for which the court can grant relief. However, 12(b)(6) motions are not allowed in a small claims action; G.S. 7A-216 provides that "demurrers and motions to challenge the legal and formal sufficiency of a complaint shall not be used." *Demurrer* is the term used before the Rules of Civil Procedure were adopted, and a 12(b)(6) motion is the equivalent motion under the current rules. The magistrate should deny the motion because it is not proper and then hear the case. As discussed above, the magistrate may order the plaintiff to perfect the statement of the claim and amend the complaint if it is not clearly enough written to enable a person of common understanding to know what is meant.

Motion for Continuance

The most common motion a magistrate will hear before trial is a motion for a continuance. Any party may move to have the case continued, and the magistrate may grant a continuance "for good cause shown."[80] If all parties consent to change the date and time of the trial, they file a written notice of the change with the clerk. The magistrate may also grant a continuance at the request of one party without getting the consent of or hearing from the other parties.

Nonetheless, "[c]ontinuances are not favored, and the party seeking a continuance has the burden of showing sufficient grounds for it."[81] As the statute does not specify the circumstances that constitute grounds for good cause, the magistrate must determine in each case whether good cause has been met. "In passing on the motion, the trial court must pass on the grounds urged in support of it, and also on the question whether the moving party has acted with diligence and good faith. . . [t]he chief consideration to be weighed in passing upon the application is whether the grant or denial of a continuance will be in furtherance of substantial justice."[82] Common situations in which continuances are granted include the illness of a party or witness[83] or insufficient time for one of the

78. G.S. 7A-258(f)(2). *See* Amey v. Amey, 71 N.C. App. 76, 321 S.E.2d 458 (1984).
79. The motion is set out in G.S. 1A-1, Rule 12(b)(6).
80. G.S. 7A-214.
81. Shankle v. Shankle, 289 N.C. 473, 482, 223 S.E.2d 380, 386 (1976).
82. *Id.* at 483, 223 S.E.2d at 386 (citation omitted).
83. Moon v. Central Bldrs., Inc., 65 N.C. App. 793, 310 S.E.2d 390 (1984).

parties to prepare for trial.[84] Another frequent reason for requesting a continuance is that one of the party's attorneys must appear in another court at the time the small claim is scheduled. Rule 3.1 of the General Rules of Practice for the Superior and District Courts sets out the following priority of attendance for attorneys with court conflicts: appellate courts, superior court, district court, and magistrate's court. However, Rule 2(e) of the general rules also provides that an attorney who cannot be present in one court because of a conflicting court appearance should make available another member of the law firm who is familiar with the case. When hearing a continuance based on a conflict in another court, the magistrate may ask whether another attorney in the firm can present the case. The attorney may also seek to be excused in advance by notifying the opposing party of the conflict and asking the magistrate for a continuance. Rule 2(e) provides that unless the attorney has taken these the steps, the case will not be continued.

Except in summary ejectment cases, there is no limitation on the length of a continuance or the number of continuances a magistrate may grant in a case. Yet, as the purpose of small claims court is to deal with civil cases in an expedient, efficient, and inexpensive manner, it would be contrary to the underlying policy to grant either long continuances or numerous continuances in a case. G.S. 7A-223 governs continuances in summary ejectment actions and provides that the magistrate shall only grant a continuance "only for good cause shown and upon such terms and conditions as justice may require"[85] and shall not continue the matter more than five days or until the next session of small claims court, whichever is longer without consent of both parties.

A motion for a continuance may be made in writing or orally. G.S. 7A-214 specifies that the magistrate to whom the action is assigned may grant the continuance. However, because in many counties the magistrate who will hear the case is not known until the time of trial, in practice any magistrate who hears small claims cases can grant continuances. If a continuance is granted, the magistrate must notify both parties of the new trial date and time.[86] Merely filing a motion for a continuance is not grounds for not appearing at the trial. A party must appear unless the magistrate has granted the continuance.

Dismissal without Trial

Voluntary Dismissal by Plaintiff

Sometimes a case is dismissed without the magistrate ever holding a trial. The most common kind of dismissal is a voluntary dismissal in which plaintiff withdraws the action without approval of the magistrate. As a matter of right, the plaintiff may do so at any time before resting his or her case (that is, completes presenting the evidence).[87] The plaintiff may take a voluntary dismissal by filing a written notice of dismissal before the

84. Benton v. Mintz, 97 N.C. App. 583, 389 S.E.2d 410 (1990).

85 G.S. 1A-1, Rule 40(b).

86. The proper form to use is AOC-G-108, "Order."

87. G.S. 1A-1, Rule 41(a)(1).

trial[88]—in which case the dismissal will be found in the case file—or by giving oral notice of dismissal at the trial. If the plaintiff gives oral notice of voluntary dismissal at the time of trial, the magistrate should complete form AOC-G-108, "Order," indicating that the plaintiff has elected not to prosecute the action and has taken a voluntary dismissal. The plaintiff may take a voluntary dismissal for any reason before resting his or her case, and the magistrate cannot prevent the dismissal.

> ***Example 11.*** Low Cost Furniture Co. sues Susan to recover possession of ten pieces of furniture Susan purchased from the store at various times over a five-year period. At the trial the business manager for Low Cost Furniture Co. begins testifying about the security agreement with Susan. Based on the nature of the magistrate's questions, the business manager believes that the magistrate will not grant him a favorable judgment. Before he finishes his evidence, he tells the magistrate that he is taking a voluntary dismissal. He stops testifying and leaves the courtroom. Even if the magistrate does not believe Low Cost Furniture Co. can win the case, the magistrate cannot prevent the business manager from taking the voluntary dismissal and ending the matter without prejudice at that point.

The most common reason for a voluntary dismissal is that the plaintiff and defendant have settled the case—either the defendant has fully satisfied the plaintiff's claim or the defendant has agreed to make payments satisfactory to the plaintiff.

Without Prejudice

A voluntary dismissal is a dismissal without prejudice unless the plaintiff indicates otherwise. *Without prejudice* means that the plaintiff may refile the lawsuit within one year after dismissal[89], or longer if the statute of limitations has not run by that time. A second voluntary dismissal bars any further lawsuit based on or including the same claim because the second voluntary dismissal without prejudice converts to one with prejudice as a matter of law[90]. For the "two dismissal" rule to apply, (1) the plaintiff must have filed the notices to dismiss under Rule 41(a)(1) since the two dismissal rule does not apply where plaintiff's dismissal is by stipulation or order of the court,[91] and (2) the second suit must have been based on or including the same claim as the first suit.[92]

Voluntary Dismissal by Court Order

After the plaintiff has lost the right to take a voluntary dismissal (that is, has finished his or her presentation of the evidence), the plaintiff may request the magistrate to grant a voluntary dismissal. In this situation, it is in the magistrate's discretion whether to grant the voluntary dismissal; it is no longer the plaintiff's right. The magistrate should grant

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[88] AOC-CV-405, "Notice of Voluntary Dismissal."
[89] *See* Ciesko v. Clark, 92 N.C.App. 290, 374 S.E.2d 456 (1988).
[90] G.S. 1A-1, Rule 41(a)(1).
[91] Parris v. Uzzell, 41 N.C.App. 479, 483-484, 255 S.E.2d 219, 221 (1979).
[92] City of Raleigh v. College Campus Apts., Inc., 94 N.C.App. 280, 282, 380 S.E.2d 163, 165 (1989), aff'd, 326 N.C. 360, 388 S.E.2d 768 (1990).

the voluntary dismissal upon such terms and conditions as justice requires.[93] The purpose of this provision is to allow the magistrate to give the plaintiff another chance to withdraw in hardship cases when the plaintiff is unable to press his or her claim.[94] In exercising discretion, the magistrate should consider the legitimate interests of both the plaintiff and the defendant and the relative prejudice to each.[95] Thus, under the facts of Example 11 above, assume that the business manager does not take a voluntary dismissal while putting on evidence; Susan then begins testifying and indicates that she had paid for most of the items and that Low Cost Furniture was not, therefore, entitled to recover four of the five items claimed. The business manager indicates that he does not have the records with him to show how the payments were allocated and asks the magistrate to grant a voluntary dismissal. The magistrate must determine whether justice is best served by allowing the voluntary dismissal and then either grant or deny the request.

The magistrate deciding to grant a voluntary dismissal must complete form AOC-G-108, "Order," indicating that the magistrate is granting the motion for voluntary dismissal. This type of voluntary dismissal is also without prejudice, which allows the plaintiff to refile the action within one year or until the statute of limitations runs, whichever is longer. If the magistrate denies the request, the magistrate continues to hear evidence and enters judgment.

Involuntary Dismissal

Because the plaintiff initiated the lawsuit, he or she must be present at trial to present evidence or prosecute the case. What happens if the plaintiff (or plaintiff's counsel) is not present when the case is called for trial? "For failure of the plaintiff to prosecute . . . a defendant may move for dismissal of an action . . . against him."[96] Thus, when the plaintiff does not appear but the defendant does appear and asks that the case be dismissed, the magistrate may dismiss the case. The magistrate also may dismiss the case without a motion from the defendant if the failure to prosecute is clear.[97]

With Prejudice

An involuntary dismissal usually is a dismissal *with prejudice*, which means that the plaintiff may not refile the lawsuit. A dismissal with prejudice "ends the lawsuit and precludes subsequent litigation on the same controversy between the parties under the doctrine of *res judicata*."[98] The magistrate, however, has discretion to provide that the dismissal is without prejudice rather than with prejudice and should do so when a judgment with prejudice would defeat the ends of justice.

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93. G.S. 1A-1, Rule 41(a)(2).

94. GRAY WILSON, NORTH CAROLINA CIVIL PROCEDURE § 41-3 (4th ed. 2020).

95. *Id*.

96. G.S. 1A-1, Rule 41(b).

97. WILSON, *supra* note 94, § 41-6.

98. *Id*. at § 41-5. *Res judicata* means "the thing is adjudicated." Under this doctrine a final judgment on its merits is conclusive as to rights, questions, and facts in issue in subsequent actions involving the same parties. Estate of Graham v. Morrison, 168 N.C. App. 63, 66, 607 S.E.2d 295, 298 (2005).

If neither party appears at trial, an involuntary dismissal is appropriate and would generally be with prejudice unless the magistrate, within his or her discretion, indicates that it is without prejudice. The same principle that applies when the defendant appears but the plaintiff does not also applies when neither party appears: It is the plaintiff who has the responsibility to appear and prosecute the case.

Dismissal When Defendant Files a Counterclaim

The rules regarding voluntary and involuntary dismissals of claims also apply to counterclaims, except that for counterclaims it is the defendant's right to dismiss before resting his or her case and it is the defendant's responsibility to appear and prosecute the counterclaim. But is the plaintiff's ability to take a voluntary dismissal affected by defendant's filing of a counterclaim? Under general law if the defendant has filed a compulsory counterclaim, the plaintiff loses the right to take a voluntary dismissal.[99] But if the counterclaim is permissive, the plaintiff may file a voluntary dismissal and the defendant can proceed with the permissive counterclaim.[100] Small claims procedure, however, makes it clear that the distinctions between compulsory and permissive counterclaims do not apply in small claims court and that any counterclaim may be filed as a separate action.[101] It would therefore follow that a plaintiff can always take a voluntary dismissal in a small claims case, even if a counterclaim has been filed, and that the defendant may proceed with the counterclaim after the plaintiff's dismissal of his or her claim.

Judgment on the Pleadings

In one circumstance the law requires the magistrate to enter judgment without hearing evidence from the plaintiff. In summary ejectment cases the magistrate must give a judgment for possession based solely on the filed pleadings if the following five qualifications are met:

1. The pleadings (complaint) allege defendant's failure to pay rent as a breach of the lease for which reentry is allowed[102] (third block under #3 on "Complaint for Summary Ejectment," AOC-CVM-201);
2. The return on the summons indicates the process was served on the defendant;
3. The defendant has not filed an answer;
4. The defendant fails to appear on the day of court; and
5. The plaintiff requests, in open court, a judgment based on the pleadings.[103]

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99. Gardner v. Gardner, 48 N.C. App. 38, 269 S.E.2d 630 (1980).

100. *See* Layell v. Baker, 46 N.C App. 1, 5-6, 264 S.E.2d 406, 409-10 (1980).

101. G.S. 7A-219**.**

102. This language means the summary ejectment action for failure to pay rent must be based on a condition specifically stated in the lease and the lease must include an automatic forfeiture clause for breach of its conditions.

103. G.S. 42-30.

If all conditions are met, the magistrate must give judgment for possession without asking the plaintiff to offer any evidence. However, all five qualifications must be met; even if the first four are met but the plaintiff does not request, in open court, a judgment on the pleadings, the magistrate cannot give a judgment for possession without hearing the evidence.

If the plaintiff asking for a judgment based on the pleadings also is seeking monetary damages for back rent or physical damage to the property, he or she must prove by a preponderance of the evidence that monetary damages are due. Without such evidence, the magistrate will grant only the possession part of the judgment. In cases where service was by first-class mail and posting on the premises, the plaintiff may request that the magistrate sever the claim for monetary damages from the claim for possession to allow the plaintiff to obtain personal service on the defendant and to proceed on the claim for monetary damages at a subsequent court date without having to file a second suit.[104] The magistrate will enter judgment on the claim for possession and indicate the plaintiff's request to sever the claim for monetary damages by checking #5 on the order portion of the "Judgment In Action for Summary Ejectment," AOC-CVM-401.

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)—and in cases for breaches of condition other than failure to pay rent—G.S. 42-30 does not apply, and the plaintiff must present evidence to prove that he or she is entitled to a judgment for possession.

Trial of the Case

A trial before a magistrate is without a jury, which means that the magistrate acts as the judge in determining the law that applies to the case and as the jury in determining whether the facts are proven. The level of courtroom formality depends on the individual magistrate but is certainly less formal than superior court. Research indicates that citizens prefer to come to small claims court rather than to a more traditionally formal court because they feel they can better and more easily tell their story to the magistrate.[105]

No Default Judgment

Perhaps the most important difference in procedure between small claims and other trial courts in North Carolina is that there are no default judgments in a small claims case heard before a magistrate. This means that before judgment may be entered against a defendant, except in the one instance discussed above, the plaintiff must appear at trial and present witnesses who testify, under oath, to all the facts necessary for the plaintiff to prevail. (In most cases the plaintiff is the sole witness.) Even if the defendant does not appear at trial (and often he or she does not), the plaintiff must present the evidence

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[104] G.S. 7A-223(b1).

105. JOHN CONLEY & WILLIAM O'BARR, RULES VERSUS RELATIONSHIPS: THE ETHNOLOGY OF LEGAL DISCOURSE (Chicago: University of Chicago Press, 1990), 36–37; JOHN RUHNKA & STEVEN WELLER, SMALL CLAIMS COURTS: A NATIONAL EXAMINATION (National Center For State Courts, 1978), 21–22.

necessary to win the case. It is not uncommon for a plaintiff to have several cases before a magistrate on the same calendar; nonetheless, for judgments to be entered, the plaintiff must present evidence under oath in each case. The complaint filed by the plaintiff is not evidence. Because oral evidence is usually sufficient and introduction of written documents is not required, it is relatively easy for a plaintiff to prevail when the defendant is not present.

> ***Example 12.*** Landlord Smith sues Tenant Jones for possession and back rent. Jones does not appear at trial. Landlord Smith asks the magistrate to enter judgment. The magistrate may not enter judgment unless Landlord Smith testifies under oath to sufficient facts to be entitled to a judgment.
>
> Assume Landlord Smith testifies that she had an oral lease with Jones; that their only agreement was that Jones was to pay $500 per month rent on the first of each month; that Jones didn't pay the rent on the first of March; and that Smith filed this action on March 12. In this case, the magistrate should find against the plaintiff and dismiss the case (ruling that the plaintiff failed to prove the case by the greater weight of the evidence). The plaintiff didn't prove everything required to win the case because she didn't testify that she had demanded the rent and waited ten days before filing the lawsuit.

Burden of Proof

The burden of proof in civil cases is proof by the greater weight of evidence, sometimes referred to as the *preponderance of the evidence*. That means that the party who bears the burden of proof, usually the plaintiff, must prove, by the greater weight of evidence, the existence of those facts that entitle him or her to a favorable judgment. The greater weight of the evidence does not refer to the quantity of evidence, but rather to its quality and convincing force. The magistrate, after considering all of the evidence, must be persuaded that the facts needed to reach a judgment for the party bearing the burden are more likely than not to exist.[106]

In some rare civil cases a stronger burden of proof applies. The party with the burden of proof must prove each element of the case with evidence that is *clear*, *strong*, and *convincing* as these words are ordinarily understood. *Webster's* defines *clear* as "free from obscurity or ambiguity: easily understood: unmistakable." *Strong* means forceful, persuasive, presented in a way that brings out pertinent and fundamental points. *Convincing* is "having power to convince of the truth, rightness, or reality of something," persuasive or "plausible."[107] This higher burden of proof is required, for example, when a magistrate chooses not to evict a tenant for criminal activity even though the landlord has proved that criminal activity occurred. In that situation the law requires the magistrate to determine by clear and convincing evidence that immediate eviction would be a serious injustice.

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106. A more detailed discussion of burden of proof is found in [Chapter VIII, "Evidence."]

107. *Merriam-Webster's Collegiate Dictionary*, 11th ed. (Springfield, Mass.: Merriam-Webster, Inc., 2003).

Representing the Parties in Court

Either the party or an attorney must appear in a court proceeding to present that party's case. A plaintiff or defendant cannot designate someone who is not a licensed attorney to appear as his or her agent for purposes of presenting his or her case to the court, except in summary ejectment cases, which are discussed below. The person presenting the case can, however, call witnesses to testify. The reason for limiting persons other than attorneys from acting on behalf of a party is that they would be engaging unlawfully in the practice of law.[108]

However, both parties have the right to represent themselves on their own behalf without an attorney (referred to as *pro se representation*). In small claims court a corporation may represent itself pro se through an employee acting as the agent of the corporation.[109] In 2017, the legislature added subsections to G.S. 7A-222 and G.S. 7A-228 that allow all parties, which includes corporations, to represent themselves without obtaining legal representation both in small claims and on appeal for trial de novo in district court without violating the statute prohibiting the unauthorized practice of law. Where previously corporations and other business entities were required to hire counsel to represent them on appeal for trial de novo in district court, these additions to the statutes remove that requirement in both the proceeding before the magistrate in small claims and the trial in district court.

In summary ejectment or back rent cases, an agent of the landlord who has personal knowledge of the facts alleged in the complaint may sign the complaint.[110] The agent must be someone, like a real estate broker, who handles the rental of the premises for the landlord—not a person the landlord appoints as agent solely for the purpose of bringing the summary ejectment action. There are no cases specifically indicating whether an agent authorized to sign the complaint may appear at trial on behalf of the plaintiff instead of an attorney. The most logical reading of the statute, however, is that the agent may appear and present the plaintiff's case because the agent, not the landlord, has actual knowledge of the transaction.

Another prohibition important for the magistrate to understand involves collection agencies. Such agencies are prohibited from engaging in the practice of law and may not appear in court on behalf of a creditor except when summoned by court order or subpoena.[111] A *collection agency* is defined as any person, firm, or corporation directly engaged in soliciting from more than one creditor delinquent claims due the creditor, or asserting, enforcing, or prosecuting these claims. The statute specifically excludes from

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108. G.S. 84-4 makes it unlawful for any person other than a person licensed to practice law in North Carolina to appear as an attorney or counselor-at-law in any action before a judicial body, give legal advice, or prepare legal documents.

109. Lexis-Nexis, Div. of Reed Elsevier, Inc. v. Travishan Corp., 155 N.C. App. 205, 208, 573 S.E.2d 547, 549 (2002); Duke Power Co. v. Daniels, 86 N.C. App. 469, 472, 358 S.E.2d 87, 89 (1987). However, in other civil proceedings a corporation must appear through an attorney. *See* G.S. 84-5 and *Lexis-Nexis* at 209, 573 S.E.2d at 549.

110. G.S. 7A-216; G.S. 7A-223.

111. G.S. 58-70-120.

the definition of collection agency a business that is collecting its own debts, regular employees of a single creditor, a licensed real estate agent when accounts are handled as part of the business, persons who purchase accounts when they are not delinquent, and attorneys. The statute also provides that people who purchase an account from the creditor after it becomes delinquent are categorized as collection agencies and must hire an attorney to represent them at trial. The new owner of an account purchased or assigned before default on the debt could bring an action to collect the debt pro se.

What if an unauthorized person appears before the magistrate on behalf of one of the parties? A pleading filed by someone other than a party or an attorney licensed in North Carolina is not null and void,[112] so that the magistrate may choose whether to hear the case or not. If an improper person appears on behalf of a party, the magistrate has several choices. (1) He or she can ignore the improper representation unless the opposing party makes a motion objecting to the representation; in that case the magistrate should either continue the case until a proper person can appear or, if the party seeking relief is improperly represented, the magistrate can dismiss the case without prejudice. (2) Acting on his or her own motion, the magistrate can continue the case until an appropriate person is present to represent the party or dismiss it. (3) A third option is to notify the North Carolina State Bar that an improper person is appearing on behalf of a party. (4) Finally, if a collection agency appears as a plaintiff without an attorney, the magistrate can notify the North Carolina Department of Insurance, which regulates collection agencies.

Hearing Evidence

Order of Presentation

The formal order of presentation of evidence in a civil case is that the plaintiff, the party with the burden of proof, puts on evidence first. The plaintiff determines the order in which his or her witnesses are called to testify. Before testifying, each witness is sworn or affirmed by the magistrate. After the plaintiff has finished questioning each witness, the defendant has a chance to examine the witness. The magistrate also may put questions to the witness. Then the next witness for the plaintiff testifies and the same procedure is followed. When the plaintiff has finished putting on all of his or her evidence, the magistrate may dismiss the case if the plaintiff has failed to establish a case.[113] If the plaintiff has proved a prima facie case—meaning that if the defendant offers no contrary evidence the plaintiff has proved enough to be given a judgment—the proceedings continue and the defendant presents his or her witnesses. The same procedure is followed with the defendant's witnesses, each of whom is sworn to their testimony beforehand.

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112. Theil v. Detering, 68 N.C. App. 754, 315 S.E.2d 789 (1984). *Cf.* North Carolina Nat'l Bank v. Virginia Carolina Builders, 307 N.C. 563, 299 S.E.2d 629 (1983) (default judgment was improper where defendant's answer was filed by out-of-state attorney; however, plaintiff could move to strike answer as filed by attorney who was not qualified).

113. G.S. 7A-222.

Frequently, however, magistrates do not follow this formal presentation of evidence. In many cases there is no formal witness stand from which the witness testifies, and often the only witnesses are the plaintiff and the defendant. Sometimes it is difficult for the parties to understand the difference between asking questions of the opposing party and testifying themselves. Thus, the defendant tells his or her side of the story when "questioning" the plaintiff; or the parties speak to each other or back and forth to the magistrate about what happened. To deal with this reality, many magistrates swear both parties before beginning any testimony so that all of the evidence can be considered even though it is not presented in an orderly fashion.

If the defendant has filed a counterclaim, the magistrate should first hear all of the evidence from both parties on the plaintiff's claim and then hear all of the evidence on the defendant's counterclaim. On a counterclaim, the defendant has the burden of proof and puts his or her witnesses on first, to be followed by the plaintiff's witnesses.

Oath

The magistrate must administer an oath to every witness in a small claims trial. The witness is required to place his or her hand on the Bible and take the following oath: "You swear that the evidence you shall give to the court in the case of (*name plaintiff)* versus *(name defendant)* shall be the truth, the whole truth, and nothing but the truth; so help you, God."[114] Courts have held that non-Christians may take an oath on their holy book or according to the form of their religion.[115] Although the statute does not specify any method other than placing a hand on the Bible, the custom is to have the witness place his or her left hand on the Bible and raise the right hand while taking the oath. A person who has conscientious scruples against taking an oath may be affirmed.[116] To affirm the witness does not place his or her hand on the Bible but raises his or her right hand and the magistrate gives the same oath except the word "affirm" replaces the word "swear" and the language "so help you, God" is deleted.

Applicability of Evidence Laws

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114. G.S. 11-11.

115. In *Shaw v. Moore*, 49 N.C. 25 (1856), the North Carolina Supreme Court pointed out that under common law Jews could swear upon the Old Testament or Tanach and other non-Christians could swear "according to the form which they hold to be most sacred and obligatory on their consciences." The court then determined that the sole object of the statute requiring swearing on the Holy Scriptures (which means the Christian Bible) was "to prescribe forms, adapted to the religious belief of the general mass of the citizens, for the sake of convenience and uniformity." If, the court said, the legislature's intent in adopting the statute had been to alter the common law so as to exclude persons of other religions, the statute would be void because it would violate the provision in the North Carolina Constitution affirming that "all persons have a natural and inalienable right to worship Almighty God according to the dictates of their own consciences." N.C. CONST. art. I, § 13. Therefore, the court held, the common law still applies in North Carolina. A recent superior court case reaffirmed the law set out in *Shaw* in a case challenging a Guilford County judge's ruling prohibiting a Muslim from swearing on the Quran. American Civil Liberties Union of North Carolina v. North Carolina, Wake County Superior Court 05 CVS 9872, May 24, 2006.

116. G.S. 11-4.

Small claims procedure provides that "the rules of evidence applicable in the trial of civil actions generally are observed."[117] That sentence can be interpreted in two ways depending on whether the word "generally" modifies "civil actions" or "are observed"—the former requiring the rules to be followed and the latter allowing them to be observed generally. As a practical matter, evidence rules are not routinely applied in magistrate's court; however, a chapter covering the evidence rules magistrates are most likely to encounter in small claims cases is included in this book.

Amending the Complaint

G.S. 1A-1, Rule 15 provides that "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 on the calendar, he may so amend it at any time within 30 days after it is served." It is not clear how that rule applies to small claims cases since a responsive pleading is permitted but not required and since cases are "placed on the calendar" immediately upon filing. Presumably, a party may amend his or her pleading at any time before trial and serve a copy of the amended pleading on the other party. However, because the trial is held so soon after the complaint is filed, a party would rarely have a chance to file an amended pleading before trial.

It is more likely that questions about amending the complaint (or the answer and counterclaim) will arise at trial. At that stage a party may amend the pleading with the approval of the magistrate, and the magistrate must freely allow such amendments when justice so requires.[118] More importantly, in many instances, issues not raised in the complaint are brought up at trial and heard without requiring an amended pleading. "When issues not raised by the complaint and answer 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."[119] Thus, as occurs in many instances, when evidence presented at trial relates to a claim not set out in the complaint, the plaintiff may amend the complaint but need not do so. The magistrate may decide the case on the basis of the evidence given at trial. If the defendant is present and objects that such evidence is not within the issues raised by the complaint (or the plaintiff raises the same objection with regard to a counterclaim), the magistrate may allow the party to amend the pleading and, if necessary, may grant a continuance to enable the objecting party to prepare to prepare a response to the new issue.

The defendant's failure to appear at trial sometimes raises an issue about how much the proof at trial can vary from the complaint without requiring the plaintiff to serve an amended complaint on the defendant. It really is a fairness issue. If a defendant who is sued for possession of a refrigerator does not appear at trial, is it fair to allow the plaintiff to recover a monetary judgment instead, without serving an amended complaint on the

117. G.S. 7A-222.

118. G.S. 1A-1, Rule 15(a).

119. G.S. 1A-1, Rule 15(b).

defendant? On the other hand, if a plaintiff brings a summary ejectment action against a defendant based on failure to pay rent but provides evidence at trial that the action is actually based on the defendant's breach of a condition of the lease, the magistrate may go forward with the hearing because the defendant was on notice that the suit was for eviction.

If the plaintiff files an amended complaint, the plaintiff must serve it on the defendant by sending a copy to the defendant by first class mail or by personally delivering a copy.[120]

Sometimes a party wishes to amend a pleading to correct the name of another party. An amendment correcting the name of a party who has been properly served is effective as of the original date the lawsuit was commenced.[121] For example, the plaintiff sues John James but means Johnnie James. As the correct Mr. James was served, no prejudice results in this case from correcting the misnomer. However, if the wrong defendant is named and served, the amended complaint must be served under the regular rules for service on a new defendant and the action commences (for statute of limitations purposes) when the summons for the amended complaint is issued.[122]

> ***Example 13.*** Jeannie Customer talks to Harry Hustler about repairing a driveway. Harry operates Harry's Blacktar Resurfacing Inc. Jeannie is upset about the quality of the work and has to hire another company to repair the driveway properly. She files an action to recover money from Harry Hustler for the amount she had to pay the second company. Although Jeannie had all of her conversations with Harry, it is the business that is liable for the damages, not an employee, officer, or even the owner of a wholly owned corporation. Because a business that is incorporated is a separate legal entity, the corporation is the proper defendant. Jeannie Customer discovers this before trial. She must amend the complaint to name Harry's Blacktar Resurfacing Inc. as the defendant, and the magistrate should continue the case to give her time to serve the amended complaint on the new defendant. For statute of limitations purposes, the lawsuit begins when the summons to Harry's Blacktar Resurfacing Inc. is issued by the clerk.

Asking Questions

The N.C. Rules of Evidence allow for the magistrate to call witnesses and to interrogate witnesses.[123] Although magistrates are not required to ask questions, since parties are rarely represented by attorneys in small claims cases and parties are often unaware of what facts are important, most magistrates do ask questions of the parties to elicit the facts needed to make a decision. Magistrates should treat both plaintiff and defendant fairly and equitably by eliciting important facts from both sides. If a magistrate asks

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120. G.S. 1A-1, Rule 5.

121. *See* Pierce, v. Johnson, 154 N.C. App. 34, 571 S.E.2d 661 (2002) (naming deceased driver instead of personal representative of driver's estate was misnomer and amended pleading related back to date of original complaint); Jones v. Whitaker, 59 N.C. App. 223, 296 S.E.2d 27 (1982) (amending complaint to "Shirley" instead of "Sherrie" when Shirley was served was a misnomer and related back).

122. WILSON, *supra* note 94, § 15-12.

123 G.S. 8C-1, Rule 614.

questions of the plaintiff to find facts that will help the plaintiff's case, he or she should also ask the defendant questions that will obtain facts related to the defense. Also the magistrate's questions should elicit facts rather than conclusions. For example, a magistrate should ask "Tell me what, if anything, you did to make the defendant aware that the rent was overdue," rather than "Did you demand the rent from the tenant at least ten days before the lawsuit was filed?"

Even when the parties are represented by attorneys, the magistrate is free to ask the witnesses questions.

Rendering Judgment

After both parties have presented their evidence and answered all questions, the magistrate renders a decision. The judgment must include findings of fact, specify the party against whom judgment is entered, and specify the relief granted. In small claims cases, detailed findings of fact are not necessary. The only required finding is either that the plaintiff proved the case by the greater weight of evidence or that the plaintiff failed to prove the case by the greater weight of evidence. In summary ejectment cases the magistrate also must make a finding of the amount of rent in arrears that is not in dispute between the parties, and should make a finding whether the defendant is present at trial.

Announcing the Judgment at Trial

Although there is no prescribed form for announcing the judgment to the parties in open court, most magistrates' judgments consist of four parts: notice, judgment, explanation, and advice.[124] The *notice* merely lets the parties know the magistrate is about to render a decision. The *judgment* portion tells the parties of the magistrate's decision (who wins and what is awarded), and the *explanation* segment explains the specific facts and law on which the decision is based. *Advice* is the part of rendering a judgment in which the magistrate answers the parties' questions about the judgment or its effect.

If there is a counterclaim, the magistrate enters one judgment that disposes of both claim and counterclaim. If both parties win, the magistrate should indicate in the judgment that the plaintiff has proved his or her case by the greater weight of the evidence and that the defendant has proved his or her counterclaim by the greater weight of the evidence. The judgment should then identify the relief to which each is entitled and, if both are entitled to money, should offset the two amounts and award the difference to the party entitled to the greater amount.

Signing the Judgment at Trial

If the magistrate announces the judgment at the end of the trial, the magistrate should also reduce the judgment to writing and sign it at that time. If the judgment is signed in open court at the conclusion of the case, the magistrate should check the block on the judgment form so indicating. In that case, the magistrate is not required to mail copies to

124. John M. Conley & William M. O'Barr, *Fundamentals of Jurisprudence: An Ethnology of Judicial Decision Making In Informal Courts,* 66 N.C. L. Rev. 467, 479–81 (1988).

the plaintiff and defendant, even if the defendant is not present at the trial. In addition to announcing the judgment and reducing it to writing, the magistrate should make sure that all parties understand the judgment. He or she should then file the judgment with the clerk of superior court.

Reserving Judgment

In all small claims actions other than those for summary ejectment, the magistrate may decide not to announce and enter judgment at the end of the trial and may reserve judgment for up to ten days.[125] In actions for summary ejectment, the magistrate may only reserve judgment if the case is complex or the parties consent to an extension of time for entering judgment, and the continuance is limited to five business days.[126] Examples of complex summary ejectment cases in the statute include cases brought for criminal activity, breaches other than the nonpayment of rent, evictions involving Section 8 and public housing, and cases with counterclaims.[127] In that instance, the magistrate should announce at the end of the trial that he or she is reserving judgment and will make a decision and enter a written judgment within ten days or five business days in summary ejectment actions. The magistrate may reserve judgment for any reason. Some common reasons for not entering judgment at the end of the trial are that the case is unusual and the magistrate wishes to research the law on the subject or that the trial was hotly contested and the magistrate thought it would exacerbate the parties' anger to announce judgment at that time. The magistrate can reserve judgment for up ten days after the trial; he or she must then reduce the judgment to writing, sign it, mail copies to all parties, certify on the original judgment that copies have been mailed,[128] and file the original judgment with the clerk of superior court.

Effect of Magistrate's Judgment

Once a magistrate's judgment is filed with the clerk, it is treated like any judgment from district or superior court. The clerk records and indexes the judgment, and it becomes a lien on any real property the losing party (the "judgment debtor") owns in the county where judgment is rendered.[129] The judgment is valid for ten years and may be renewed for one additional ten-year period.[130] It can be enforced during the ten-year period by asking the clerk to issue a writ of execution. If the judgment is for money, the execution writ orders the sheriff to seize the defendant's property and sell it to satisfy the judgment.

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125. G.S. 7A-222.

126 G.S. 7A-222(b).

127 *Id.*

128. G.S. 1A-1, Rule 58.

129. G.S. 7A-225.

130. A judgment is renewed by filing a new lawsuit, but the lawsuit's claim is the prior judgment, not the underlying contract or tort in the original action. The amount sued for is the principal amount still owing on the original judgment, plus interest. At trial, the plaintiff must prove the existence of the original judgment (by introducing a certified copy of the judgment) and the amount currently due (by affidavit from the clerk where the original judgment was entered).

If the judgment orders the defendant to return specific personal property to the plaintiff, the execution (called a *writ of possession personal property*) orders the sheriff to take the property from the defendant and turn it over to the plaintiff. If the judgment is for summary ejectment, the execution (called a *writ of possession real property*) orders the sheriff to remove the tenant and the tenant's personal property from the landlord's premises.

Appeal

An aggrieved party may appeal a magistrate's decision for a trial de novo in district court. "An *aggrieved party* is one whose rights have been directly and injuriously affected by the action of the court."[131] A party who prevails in small claims is not an "aggrieved party" and cannot appeal to district court for a trial de novo for the purpose of adjudicating counterclaims that exceed the jurisdictional amount in small claims.[132] The proper course of action is for the prevailing party to bring counterclaims that exceed the jurisdictional amount in small claims in a separate action either in district or superior court.[133] *Trial de novo* means a completely new trial—as if no action whatsoever had been instituted in the court below and the suit was being filed for the first time in district court.[134]

The party appealing must give notice of appeal in one of two ways: (1) by giving oral notice in open court when the magistrate announces the judgment or (2) by filing a written notice of appeal[135] with the clerk within ten days after the judgment is entered. A party who appeals by filing a written notice also must serve a copy of the notice of appeal on all other parties by either giving copies of the notice to the other parties or their attorneys or by mailing copies to the parties or their attorneys by first class mail.[136] The ten-day period for appeal is governed by Rule 58 of the Rules of Civil Procedure, which provides that judgment is entered when it is reduced to writing, signed by the magistrate, and filed with the clerk of court.[137] In counting the ten days, the day the judgment was entered (that is, filed with the clerk) is not counted; and if the tenth day falls on a weekend or on a holiday when the courthouse is not open for business, the party has until the end of the next workday to file the appeal.[138]

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131. Culton v. Culton, 327 N.C. 624, 625, 398 S.E.2d 323, 324 (1990) (emphasis added).

132 J.S. & Assocs., Inc. v. Stevenson, 265 N.C.App. 199, 828 S.E.2d 183 (2019).

133 *Id.*

134. Caswell County v. Hanks, 120 N.C. App. 489, 491, 462 S.E.2d 841, 843 (1995). *See also* First Union Nat'l Bank v. Richards, 90 N.C. App. 650, 369 S.E.2d 620 (1988).

135. AOC-CVM-303, "Notice of Appeal to District Court," is the preprinted form that can be used to give written notice of appeal.

136. G.S. 1A-1, Rule 5. *See* Ball Photo Supply Co. v. McClain, 30 N.C. App. 132, 226 S.E.2d 178 (1976).

137. Provident Fin. Co. v. Locklear, 89 N.C. App. 535, 366 S.E.2d 599 (1988).

138. G.S. 1A-1, Rule 6(a).

In addition to giving oral notice in open court or filing a written notice of appeal, the appellant must pay the court costs for appeal to the clerk within ten days after the entry of the magistrate's judgment in a summary ejectment action and within twenty days after entry of the magistrate's judgment in all other actions.[139] The court costs for appeal are the same amount as the costs for filing a new action in district court.[140] The appeal is perfected upon giving notice but is automatically dismissed if the appellant fails to pay the costs of appeal within ten days for summary ejectment actions and twenty days for all other actions.[141]

If the magistrate does not announce and sign the judgment in open court at the end of the case, the time for appeal is extended until three days after the magistrate mails a copy of the judgment to the parties or a maximum of ninety days after judgment is entered.[142]

Appealing as an Indigent

An appellant who does not have the money to pay the court costs for appeal may file a petition to appeal as an indigent;[143] if petition is granted, he or she may appeal without paying court costs. The petition to appeal as an indigent must be filed within ten days after the magistrate's judgment is entered and is usually considered by a clerk, though it may be handled by a magistrate, district court judge, or superior court judge.[144] A person is indigent if he or she is (1) receiving food stamps, Work First Family Assistance, Supplement Security Income (SSI), or (2) is represented by a legal services organization that has as its primary purpose the furnishing of legal services to indigent persons or by a private attorney working on behalf of a legal services organization.[145] If an appellant meets one of those criteria, the magistrate or clerk must authorize the person to appeal as an indigent. In other cases, a magistrate or clerk must determine whether the particular appellant is unable to pay the costs of appeal by considering all the relevant circumstances, including the party's assets, income, and expenses.

> Reliance solely upon home ownership has been held to be error. . . . It is not required that the litigant deprive himself of the daily necessities of life to qualify to appear in forma pauperis. . . . The courts of North Carolina are not going to require a litigant to become absolutely destitute before being granted permission to appear as a pauper. Such would destroy the dignity of our people.[146]

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139 G.S. 7A-228(b).

140. G.S. 7A-305(b).

141. G.S. 7A-228(b).

142. G.S. 1A-1, Rule 58.

143. G.S. 7A-228(b1). AOC-G-106, "Petition to Sue/Appeal As An Indigent" is the preprinted form used to appeal as an indigent.

144. G.S. 7A-228(b1).

145. G.S. 1-110.

146. Atlantic Ins. & Realty Co. v. Davidson, 320 N.C. 159, 162, 357 S.E.2d 668, 670 (1987) (citations omitted) (finding indigent a sixty-five-year old woman who receives Social Security benefits of $340 per

Stay of Execution Bond

Appealing a case does not necessarily stop enforcement of the trial court's decision. Usually, a defendant who loses at trial and appeals his or her case must sign a bond, called a *stay of execution bond*, to keep the judgment from being enforced while the case is on appeal. The stay of execution bond has a different purpose from the payment of court costs to appeal (appeal costs), which the appellant must pay to have the district court hear the case. The purpose of the stay of execution bond is to protect the plaintiff from the effects of delaying enforcement of the judgment he or she has won. In small claims cases a judgment for money damages is automatically stayed upon appeal until the case is heard in district court.[147] Thus a defendant who receives such a judgment need not post a stay of execution bond.

However, appeal does not stay execution of a judgment for possession of specific personal property or for summary ejectment.[148] To stay execution of a summary ejectment judgment until the case is heard in district court, a defendant must post an undertaking in compliance with G.S. 42-34.[149] To stay execution of a judgment for possession of specific personal property, the defendant must post a bond with the clerk of superior court, executed by one or more sufficient sureties, "to the effect that if judgment be rendered against the appellant the sureties will pay the amount thereof with costs awarded against the appellant." The language of G.S. 7A-227 is odd because judgment against the defendant would require him or her to give the property, not to pay money, to the plaintiff. The bond form, however, correctly specifies that the sureties agree to pay all damages that the plaintiff might sustain by the defendant's failure to comply with the order.[150]

The requirements for appeal of small claims cases may be summarized as follows. (1) In cases where the magistrate has awarded money, the party appealing must post court costs (appeal costs) unless he or she is appealing as an indigent; but the money judgment is automatically stayed and cannot be enforced until the district court judge rules. (2) A plaintiff who appeals a judgment for possession of personal or real property, must pay court costs; but if the defendant appeals the judgment and wishes to keep possession of the property until the district court's decision, he or she must pay court costs and also post the stay of execution bond.

Although an appellant has twenty days (ten days for summary ejectment actions) after the judgment is entered to pay the court costs of appeal, there is no similar provision for posting a stay of execution bond. A defendant who is appealing (*appellant)* must post the bond to stay execution within ten days after the judgment is entered, since the automatic

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month, is unable to work, and has monthly expenses for necessities of $362, a $50 television set, furniture worth $200, her home—valued at $27,150—$10 in cash, and debts amounting to $300).

147. G.S. 7A-227.

148. *Id*.

149. AOC-CVM-304, "Bond to Stay Execution on Appeal of Summary Ejectment Judgment" is the preprinted form available for use. The bond is discussed in detail in [Chapter VI, "Landlord–Tenant Law."]

150. AOC-CVM-906M, "Bond to Stay Execution on Appeal of Judgment to Recover Possession of Personal Property."

stay of execution ceases at that time.[151] But a defendant's failure to post a bond to stay execution does not remove the right to appeal; it merely gives the plaintiff the right to have the clerk issue a writ to enforce the judgment while the case is on appeal. If after ten days the plaintiff has not sought to have the judgment executed, the defendant can post the stay of execution bond. Essentially, after the tenth day it becomes a race to the courthouse between the plaintiff seeking issuance of a writ of possession and the defendant posting a stay of execution bond.

Example 14. William brings an action for summary ejectment and back rent against George. The magistrate announces and signs a judgment in open court on January 16, awarding $450 back rent and possession of the property to William. George states in open court that he wishes to appeal, and the magistrate notes the appeal on the judgment and files the judgment with the clerk that day.

On January 29 William asks the clerk to issue process to enforce the judgment. George has not paid the costs to appeal the case; nor has he signed an undertaking to stay execution of the judgment.

The clerk should not issue a writ of execution for the money judgment since that part of the judgment was automatically stayed when George gave notice of appeal on January 16. The clerk should, however, issue a writ of possession to enforce the possession part of the judgment, since the request was made more than ten days after the judgment was entered and George has not posted a bond to stay execution of the judgment. However, he has twenty days from January 16 to post the costs of appeal with the clerk. If he does so, his appeal will be heard in district court even though he has already been removed from the premises. If George fails to pay the costs of appeal by the end of the day on February 5 (the twentieth day), the appeal is automatically dismissed.

Setting Aside Judgments or Orders

One question frequently asked is whether a magistrate may correct a mistake in an order or judgment. There are several types of mistakes: clerical errors by the magistrate; errors by the parties that are not based on fault; the magistrate's error in hearing a case when the defendant was not served; and errors of law (when the magistrate incorrectly applies the law in the case). The last type of error, a legal error, is not correctable by the magistrate. The purpose of a right to appeal is to correct magistrates' errors of law. Rule 60 of the Rules of Civil Procedure provides a mechanism in certain situations for relief from judgments or orders based on errors other than errors of law. All motions to set aside a judgment must be filed within a reasonable time, and for Rule 60(b)(1) motions (the only type of Rule 60(b) motions magistrates may be authorized to hear) not more than one year after the judgment was entered.[152]

151. G.S. 1A-1, Rule 62(a).

[152] G.S. 1A-1, Rule 60(b).

Clerical Errors

A magistrate may correct clerical mistakes in a judgment or order at any time, on his or her own initiative or on a motion from a party.[153] He or she has the authority to correct a clerical error without giving notice to the parties. Examples of clerical errors in a judgment are a misnomer, an incorrect mathematical computation, and transposition of principal and interest.[154] Rule 60 may not, however, be used to make small but substantive changes that affect the underlying legal rights of the parties.[155] To correct a clerical error the magistrate should enter an order stating that the original judgment or order contained a clerical error and that the magistrate is therefore amending the judgment to correct that error. The magistrate should sign the new judgment, which is marked as an amended judgment, date it as of the date it is signed, mail copies to the parties, and file the order and amended judgment with the clerk.

Excusable Neglect, Mistake, or Surprise

G.S. 1A-1, Rule 60(b) authorizes setting aside judgments and orders on the grounds of excusable neglect, surprise, or mistake; newly discovered evidence; or fraud; or because the judgment is void or has been satisfied, released, or discharged; or for other good cause. Generally, a district court judge must hear a Rule 60(b) motion to set aside a magistrate's judgment. However, G.S. 7A-228 allows the chief district court judge to authorize magistrates to hear Rule 60(b)(1) motions to set aside a magistrate's judgment or order because of a mistake, excusable neglect, or surprise. A motion to set aside a magistrate's judgment or order on other grounds must be heard by a district court judge.

Definitions

Excusable neglect arises when a party does not appear at trial to prosecute the case or defend the case through no fault of his or her own. "[W]hat constitutes excusable neglect depends upon what, under all the surrounding circumstances, may be reasonably expected of a party in paying proper attention to his case."[156] A party in a lawsuit is required to give the case "such attention as a man of ordinary prudence usually gives to his important business affairs."[157] If the party fails to meet that standard, the neglect is not excusable. A party who is without fault may also be relieved of a judgment entered as a result of negligence on the part of the party's attorney. For example, when a defendant has conferred with attorneys and kept in touch about the case, but the

153. G.S. 1A-1, Rule 60(a). Snell v. Washington County Bd. of Educ., 29 N.C. App. 31, 222 S.E.2d 756 (1976).

154. WILSON, *supra* note 94, § 60-1.

155. Food Services Specialists v. Atlas Rest. Mgmt., Inc., 111 N.C. App. 257, 431 S.E.2d 878 (1993) (Changing the date of entry of judgment to date not actual date judgment entered is not correcting a clerical error.).

156. Thomas M. McInnis & Assoc., Inc. v. Hall, 318 N.C. 421, 425, 349 S.E.2d 552, 555 (1986).

157. Norton v. McLaurin, 125 N.C. 185, 190, 34 S.E. 269, 270 (1899) (citation omitted). *See*, *e.g.*, Jones v. Statesville Ice & Fuel Co., 259 N.C. 206, 130 S.E.2d 324 (1963); Norton v. Sawyer, 30 N.C. App. 420, 227 S.E.2d 148 (1976).

attorneys have failed to notify the defendant of the trial date, the party's failure to appear at trial would be excusable neglect.[158] However, a party who hires an attorney and never follows up with the attorney would not meet the standard. Examples of excusable neglect include a case in which a defendant relied on her husband's assurances that he would take care of the defense of a suit against both of them;[159] a case in which the party never received notice of the date and time of the trial;[160] or one in which a defendant did not respond to a complaint because the agent on whom the summons and complaint were served did not give the papers to the defendant.[161] However, parties may not assert excusable neglect because they are preoccupied with business or other duties at the time of the lawsuit[162] or because they are so old that they forgot they had been served.[163]

A *mistake* that warrants relief from a judgment is a mistake of fact not of law. For example, in a partition proceeding, partition of a tract of land was set aside on the grounds of mistake when counsel for plaintiffs used an incorrect land description given to him by a third person and the description referred to a tract already owned solely by petitioner.[164]

A *surprise* is "some condition or situation in which a party is unexpectedly placed to his injury, without any fault or negligence of his own, which ordinary prudence could not have guarded against."[165] It is not surprise when a party has a mistaken view of the law.[166] Examples of surprise are when counsel withdraws from a case when the case is called for trial without telling the client[167] or when plaintiff's counsel is detained in another court but does not notify the court about the conflict.[168]

Hearing a Rule 60(b)(1) Motion

As noted above, the chief district court judge may authorize a magistrate to set aside judgments and orders on the grounds of excusable neglect, surprise, or mistake. A party who wishes to have a magistrate's judgment or order set aside must file a written request with a magistrate—the magistrate who issued the judgment or any other magistrate in the county authorized by the judge to hear Rule 60(b)(1) motions. In an unusual case the magistrate may act to set aside his or her own motion in the interest of justice.[169]

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158. *See* Mayhew Elec. Co. v. Carras, 29 N.C. App. 105, 223 S.E.2d 536 (1976).

159. Hickory White Trucks, Inc. v. Greene, 34 N.C. App. 279, 237 S.E.2d 862 (1977).

160. Callaway v. Freeman, 71 N.C. App. 451, 322 S.E.2d 432 (1984).

161. Townsend v. Carolina Coach Co., 231 N.C. 81, 56 S.E.2d 39 (1949).

162. *E.g.* Johnson v. Sidbury, 225 N.C. 208, 34 S.E.2d 67 (1945); Engines & Equip., Inc. v. Lipscomb, 15 N.C. App. 120, 189 S.E.2d 498 (1972); Rawleigh, Moses & Co. v. Capital City Furniture, Inc., 9 N.C. App. 640, 177 S.E.2d 332 (1970).

163. Pierce v. Eller, 167 N.C. 672, 83 S.E. 758 (1914).

164. Mann v. Hall, 163 N.C. 50, 79 S.E. 437 (1913).

165. Townsend v. Carolina Coach Co., 231 N.C. 81, 85, 56 S.E.2d 39, 42 (1949) (citations omitted). *See* WILSON, *supra* note 94, § 60-6.

166. Crissman v. Palmer, 225 N.C. 472, 35 S.E.2d 422 (1945).

167. Roediger v. Sapos, 217 N.C. 95, 6 S.E.2d 801 (1940). *See* WILSON, *supra* note 94, § 60-6.

168. Endsley v. Wolfe Camera Supply Corp., 44 N.C. App. 308, 261 S.E.2d 36 (1979).

169. WILSON, *supra* note 94, § 60-12.

A motion to set aside a judgment for excusable neglect, mistake, or surprise cannot be heard ex parte.[170] A hearing must be set and the magistrate must give notice of the date and time of the hearing to all parties. At the hearing, the party seeking to set aside the judgment or order must appear and has the burden of showing that there was excusable neglect, mistake, or surprise on his or her part and—if the moving party is the defendant—that there is a meritorious defense. The magistrate must enter a written order either granting the motion to set aside the judgment or denying it. If the judgment or order is set aside, the magistrate, in the written order, should set the date and time for the case to be retried in small claims court.

Meritorious Defense

It would not make sense for the defendant to bring a motion to set aside a judgment or order against the defendant if his or her absence or neglect would have made no difference in the outcome. For that reason, the defendant must show not only that there was excusable neglect, mistake, or surprise but also that the defendant has a meritorious defense. The defendant need not prove the meritorious defense by offering evidence at the hearing as if it were a trial on the merits but must plead that a real or substantial defense on the merits exists.[171]

> ***Example 15.*** The owner of the Acme Store brings an action against a customer, Charles, for money owed on an account, but Charles does not appear at trial. The store owner testifies that Charles owes him $157.30, and the magistrate enters judgment against Charles. Charles moves to set aside the judgment on the basis of excusable neglect. At the hearing, he testifies that he missed the trial because he unexpectedly had to fly to California the night before the trial because his son was involved in an automobile accident and was hospitalized. He says he was so upset, he forgot about the trial and failed to call the court the next day. He brings an affidavit from the hospital emergency physician and a copy of the police accident report to verify his account. The magistrate believes Charles's evidence and finds this to be excusable neglect. However, that evidence is not enough to set aside the judgment. Charles would also have to prove that he had a meritorious defense he could have presented at the trial. If he also testifies that he had paid the store owner two months before the suit was filed, the magistrate could set aside the judgment on the basis of excusable neglect and reschedule the case for trial.

Effect of Bankruptcy

The purpose of bankruptcy is to relieve the honest debtor from the weight of oppressive indebtedness and permit the debtor to start afresh. When a debtor files a petition for bankruptcy, the bankruptcy court takes jurisdiction over all the debts that person owes and all his or her property and handles payment of those debts. For individuals, there are two kinds of bankruptcy. In straight bankruptcy (Chapter 7) the trustee in bankruptcy

170. Doxol Gas of Angier, Inc. v. Barefoot, 10 N.C. App. 703, 704, 179 S.E.2d 890, 892 (1971).

171. Dollar v. Tapp, 103 N.C. App. 162, 165, 404 S.E.2d 482, 484 (1991).

takes possession of the debtor's property, liquidates it, pays off as much of the debt as possible, and discharges the remaining debt. In wage earner or debt adjustment bankruptcy (Chapter 13), the court extends the time allowed for payment of the debt and may reduce the total amount of the debt. Most bankruptcy provisions apply to both Chapter 7 and Chapter 13 bankruptcies, but some special provisions apply only to Chapter 13 bankruptcies. Under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005,[172] individual debtors can no longer choose which kind of bankruptcy to file. Consumers must file under Chapter 13 unless they meet a specific means test set out in the law.

The federal bankruptcy law provides that the filing of a petition for bankruptcy operates to stay

1. the commencement or continuation—including the issuance or employment of process—of a judicial action against a debtor that was or could have been begun before the filing of the bankruptcy petition or an action to recover a claim against a debtor that arose before the filing of the petition.
2. the enforcement against the debtor or property of the estate, of a judgment obtained before the bankruptcy case was filed.
3. any act to obtain possession of property of the estate or to exercise control over property of the estate.
4. any act to create, perfect, or enforce any lien against property of the estate.
5. any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the bankruptcy case.[173]

What this means is that if the defendant in a case filed in small claims court has filed a bankruptcy petition, the magistrate may not hear or enter judgment in the case.

In Chapter 13 bankruptcies the stay also operates to prevent a creditor from commencing or continuing an action to collect all or part of a debt incurred by the debtor primarily for personal, family, or household purposes from any co-debtor unless the co-debtor became liable in the ordinary course of business.[174] A co-debtor is someone who incurred the debt along with the bankrupt debtor or who gave security for the debt. For example, a husband and wife have a joint VISA card, which is in default. The husband files Chapter 13 bankruptcy. The stay applies not only to the husband, but also to his wife.

The general bankruptcy stay remains in effect until the case is closed or dismissed or a discharge is granted or denied; but the specific Chapter 13 stay for co-debtors operates until the bankruptcy case is closed, dismissed, or converted to a Chapter 7 bankruptcy.

A defendant in a small claims case is not required to file any federal court document with the magistrate to prove that he or she has filed a bankruptcy petition; therefore a magistrate should not go forward with the case if told that the defendant has filed for bankruptcy. However, the magistrate can take steps to verify that the petition has actually

172. Pub. Law No. 109-8.

173. 11 U.S.C. § 362.

174. 11 U.S.C. § 1301.

been filed by telephoning the bankruptcy clerk[175] or checking the website;[176] or he or she may continue the case for a couple of days to ask the debtor to bring in some documentation of the filing or to ask the plaintiff to determine whether the defendant has filed for bankruptcy. If the magistrate determines that the stay applies, he or she must enter an order placing the case on inactive status because the defendant has filed for bankruptcy.[177] The magistrate should not, however, dismiss the case because, as discussed below, in some circumstances the bankruptcy court will allow the plaintiff to proceed with the state court action.

There are a several ways in which the state court can continue an action after a bankruptcy petition has been filed, but all require the creditor to seek relief from the bankruptcy court. The most common way is for the creditor to seek to have the bankruptcy court lift the stay as to particular property or a particular claim. In that case the order from the bankruptcy court lifting the stay will allow the creditor to proceed to enforce his or her claim in state court. Also the trustee in a Chapter 7 bankruptcy may abandon (i.e., release) certain property from the bankrupt's estate and allow creditors who have security interests in that property to enforce those interests in state courts; the trustee signs an order abandoning specific property, and the creditor can proceed in state court to satisfy the debt out of that property.

> ***Example 16.*** Sam purchases a refrigerator from Sears and signs a security agreement for the $2,000 extension of credit from Sears to purchase the refrigerator. Six months later Sam files Chapter 7 bankruptcy. At that point, the refrigerator has a fair market value of $1,000, but Sam still owes Sears $1,500 on it. Sears can seek to have the trustee abandon the refrigerator since it has no equity (value in excess of the amount owed under the security agreement) that could be used to pay any of Sam's other debts. Sears can then bring an action in small claims court to repossess the refrigerator as authorized by the security agreement, although it cannot sue Sam for any deficiency remaining after repossessing and selling the refrigerator.

Special Provisions for Residential Leases

Judgment for Possession before Bankruptcy

The new bankruptcy code provides that the filing of a petition does not stay enforcement of an eviction involving residential property on which the debtor resides as a tenant if the landlord has obtained a judgment for possession of the property before the filing date of the bankruptcy petition.[178] This provision applies for thirty days after the bankruptcy

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175. The telephone numbers for the bankruptcy clerks in North Carolina are: Eastern District—(252) 237-0248 (Greenville); (919) 856-4752 (Raleigh); Middle District (336) 333-5647; and Western District (704) 350-7500.

176. Eastern District—www.nceb.uscourts.gov; Middle District—www.ncmb.uscourts.gov; Western District—www.ncwb.uscourts.gov. These websites may require a PACER account and password and may charge a fee for information.

177. Form AOC-G-108, "Order" should be used.

178. 11 U.S.C. § 362(b)(22).

filing. The bankruptcy petition must indicate that a judgment for possession of residential premises was entered against the debtor before the filing of the petition and must list the name and address of the landlord. The debtor then has thirty days after filing the petition to file with the bankruptcy court a certification that would allow the stay to prevent enforcement of the eviction. If the debtor does not file a certification within the allowable time period, the stay is lifted and the clerk may issue a writ of possession.

The landlord can challenge the certification by filing an objection. The bankruptcy court must then hold a hearing to determine whether to authorize relief from the stay.

Evictions for Criminal Activity

The new bankruptcy code[179] also provides an exception to the automatic stay for an eviction action that seeks possession of the residential property in which the debtor resides as a tenant based on endangerment of the property or illegal use of controlled substances on the property. The landlord must file a certification with the bankruptcy court—and serve a copy on the tenant—that a summary ejectment action had been filed at the time the tenant filed bankruptcy or that the conduct justifying the eviction occurred within the thirty days preceding the certification filing. The stay is lifted fifteen days after the landlord files the certification unless the tenant objects to the certification. If there is an objection the bankruptcy court holds a hearing to determine whether the stay applies; that is, whether the situation giving rise to the certification existed or—if it existed—whether it has been remedied.

If the debtor does not file an objection, the bankruptcy clerk must serve upon the tenant and landlord a certified copy of the docket indicating that no certification was filed. The landlord may use that certified copy to prove to the magistrate that the summary ejectment action in the state court may proceed. The bankruptcy act does not define "endangerment of property." Until the bankruptcy court rules on that issue, a landlord who has grounds for bringing an eviction on the basis of criminal activity might qualify for the exception to the automatic stay.

Stays to Other Bankruptcy Actions

The automatic stay provision prohibits any act to obtain possession of property in the bankrupt debtor's estate, and the debtor's leasehold interest is considered property of the estate.[180] Therefore, if a debtor files a bankruptcy petition before a summary ejectment judgment has been entered, the magistrate may not proceed with the case and must handle it like any other small claims case in which the defendant has filed bankruptcy. The landlord must seek relief in the bankruptcy court, and the bankruptcy court is likely to lift the stay and allow the landlord to proceed with the eviction unless the tenant provides adequate assurance of future compliance with the lease. Past rent

179. 11 U.S.C. § 362(b)(23) and (m).

180. Property of the estate includes all legal and equitable interest of the debtor in property as of the commencement of the bankruptcy case (the filing of the petition). 11 U.S.C. § 541.

that was *in arrears* when the judgment was entered will not be collected, but the debtor must pay future rent.

Effect of Bankruptcy on Judgment

What is the effect of the bankruptcy proceeding when it is completed? The most common result of a bankruptcy proceeding is that the debts covered by the proceeding are discharged; in other words, creditors may not continue to collect debts or file legal action against the debtor seeking money owed them before the bankruptcy filing, *with one exception*: if the debtor had signed a security agreement securing the debt and the debtor remains in possession of the secured property after the discharge in bankruptcy, the creditor may bring an action for possession of the secured property[181] but may not sue for a deficiency. Sometimes a bankruptcy case is dismissed without discharge of the debts because the debtor has not complied with the bankruptcy rules. In that case, the creditor may pursue any actions it had against the debtor before the latter filed for bankruptcy.

Procedural Issues in Appeals to District Court

If the appellant fails to appear in district court and prosecute the appeal, the presiding judge may dismiss the appeal; in such a case the magistrate's judgment is affirmed.[182] Because the failure to appear and prosecute applies only if the appeal is docketed and regularly set for trial,[183] the district court judge's order of dismissal should indicate that the case was set for trial and proper notice was given. The statute specifies that the judgment of the magistrate "be affirmed," but since the appeal is dismissed for failing to appear, the magistrate's judgment becomes the final judgment. As a consequence, the judgment may be enforced immediately, since it was entered more than ten days before the appeal was dismissed. The same result would occur if the appellant had withdrawn or dismissed the appeal.[184]

Upon appeal for a de novo trial, a plaintiff may take a voluntary dismissal under G.S. 1A-1, Rule 41(a) and terminate the lawsuit[185] no matter which party appealed. In that situation the magistrate's judgment is not reactivated, because a de novo appeal is, by its nature, a case originally brought in district court—as if the trial in the magistrate's court never happened.

In an unpublished opinion, the Court of Appeals has held that a plaintiff who files a small claims action for $10,000 but actually had a claim in excess of $10,000 and subsequently appeals the small claims judgment to district court may amend the

181. 11 U.S.C § 524(a). *See* Chandler Bank of Lyons v. Ray, 804 F.2d 577 (10th Cir. 1986).

182. G.S. 7A-228(c). *See* Brown v. County of Avery, 164 N.C. App. 704, 596 S.E.2d 334 (2004) (dismissal rule applies even if there was intervening arbitrator's award because award is a nullity if party seeks trial de novo rather than accepting award).

183. Fairchild Properties v. Hall, 122 N.C. App. 286, 468 S.E.2d 605 (1996).

184. First Union Nat'l Bank v. Richards, 90 N.C. App. 650, 369 S.E.2d 620 (1988).

185. *Id.* at 653–54, 369 S.E.2d at 622.

complaint in district court to seek the full amount of the claim.[186] In that case, the complaint filed by plaintiff in small claims did not seek to recover the entire amount due, but instead sought an amount within the jurisdictional limits of the small claims court. Once defendants appealed the small claims court decision to district court, the judge was permitted to allow "repleading or further pleading by some or all of the parties,"[187] including plaintiff. Plaintiff was permitted to amend the complaint to seek the full amount due, because the jurisdictional limits of the magistrate's court were no longer applicable in district court.

When a small claims case is appealed to district court, the district court, on its own motion, may either order the party to replead or may try the case on the pleadings as originally filed;[188] and, upon the request of a party, the judge must allow appropriate counterclaims, cross-claims, third-party claims, and other pleadings.

[186] Blevins Workshop, Inc. v. Williams, 206 N.C. App. 596, 698 S.E.2d 768 (2010).
[187] G.S. 7A-229.

188. G.S. 7A-229 *See* Don Setliff & Assoc., Inc. v. Subway Real Estate Corp., 178 N.C. App. 385, 631 S.E.2d 526 (2006) (Defendant can raise affirmative defense in district court because not required to be pled in small claims court.).

Appendix 1

Model General Order regarding Small Claims Assignments and Magistrates' Authority

(*Language in parentheses is optional. Language in brackets gives alternatives, and only one should be selected.*)

Pursuant to G.S. 7A-211 the undersigned judge issues this general order to the Clerk of Superior Court and the magistrates of _____ County regarding the assignment of cases to small claims court within the county.

The undersigned hereby assigns to small claims court cases which meet all of the following four requirements and requests the Clerk to calendar those cases for the regular small claims court: Cases in which the amount in controversy at the time of the filing of the complaint is $10,000 or less; the plaintiff is seeking monetary damages, recovery of specific personal property, summary ejectment, or any combination of these remedies; the plaintiff requests that the case be assigned to a magistrate; and at least one of the defendants is a resident of the county in which the complaint is filed. The filing of a complaint on a regular AOC-CVM complaint form is a request for assignment to small claims court.

The Clerk is also ordered to assign to the regular small claims court cases in which the plaintiff seeks to enforce a motor vehicle lien pursuant to G.S. 44A-2(d) or 20-77; the amount in controversy is $10,000 or less; the plaintiff requests assignment to a magistrate; and the claim arose in the county in which the complaint is filed.

(Cases filed on small claims complaints but not meeting the criteria set out above are not assigned and should be sent to district court.)

In determining whether the amount in controversy is within the allowable limit, the clerk shall apply the following rules: [In complaints for money owed, the "total amount owed" is the amount in controversy, except if the complaint alleges an unfair trade practice the amount in controversy is triple the total amount owed.] [In complaints for money owed, the "principal amount owed" is the amount in controversy, except if the complaint alleges an unfair trade practice, the amount in controversy is triple the principal amount owed.][189] In summary ejectment cases, the amount in controversy is the "total amount due." In actions to recover possession of personal property, the amount in controversy is the "total value of the property to be recovered" plus the "total amount of

189. The chief district judge must decide which interpretation of the amount-in-controversy statute to follow and choose one of the two bracketed sections as appropriate. G.S. 7A-243(1) specifies that the amount in controversy is computed without regard to interest and costs, while G.S. 7A-243(2) states that where monetary relief is prayed, the amount prayed for is in controversy. In trying to read the two sections together, it raises the question whether "interest and costs" refers to post-judgment interest and costs that are not known at the time of trial and are added by the clerk as opposed to prejudgment interest in a contract case. There are no cases that answer the question so the chief judge must decide for purposes of assignment. One policy argument for the "total amount" reading is that the legislature wished to limit the dollar amount of cases that were heard by magistrates.

damages," if any. In motor vehicle lien cases, the amount in controversy is the "total lien claimed to date."

When complaints for expedited summary ejectment under vacation rental agreements are filed with the clerk, the clerk shall assign the cases to any magistrate in the county who is available. If such an action is filed at a time when the clerk's office is closed, it shall be filed with the criminal magistrate's office and any magistrate who is on duty shall schedule the case for a hearing and issue a summons pursuant to G.S. 42A-24. Any magistrate within the county is hereby authorized to conduct expedited eviction hearings for vacation rental agreements, whether or not regularly assigned to hold small claims court.

(Pursuant to G.S. 7A-228 the undersigned judge authorizes [the following magistrates: (*name magistrates)*] [all magistrates assigned to hold small claims court] to hear motions to set aside an order or judgment entered in small claims court pursuant to G.S. 1A-1, Rule 60(b)(1) and order a new trial before a magistrate.)

Issued the _____ day of _____, 20__. _____

Chief District Judge, _____ District Court District

10 Things You Should Know About Motor Vehicle Law & Small Claims Court

1. The answer to "**who owns this motor vehicle**" depends on why you're asking the question. If the circumstances involve commercial transactions, the UCC governs. According to GS 25-2-401(2), ownership is transferred to the buyer when the seller transfers physical possession of the motor vehicle, even if a document of title will be handed over at some other time and place. For purposes of the tort of conversion, then, a seller who takes back possession of a motor vehicle from the buyer without permission may be liable even though the seller has never handed over the title.

   On the other hand, if ownership is an issue to be determined in relation to a dispute over insurance coverage or automobile negligence cases, the provisions of the North Carolina Motor Vehicle Act apply. Under the provisions of GS Ch. 20, ownership of the vehicle is transferred when the seller gives the buyer the vehicle and "the certificate of title thereto properly endorsed to the purchaser." GS 20-60.

2. What has the seller of a vehicle accomplished by keeping possession of the certificate of title? The law says the seller has retained "at most a **security interest**" in the property. This security interest is enforceable, however, only if the written documents involved in the purchase, taken together, clearly indicate the intention of the parties to create a security interest. Even if the seller has a security interest, his interest will have priority over other lien holders only if the interest is noted on the title and submitted to DMV. GS 20-58.

3. Magistrates are authorized to hear **motor vehicle mechanic and storage liens** cases arising under GS 44A-2(d) and GS 20-77(d). These cases have three unique procedural aspects compared to other small claims actions: (i) the action must be filed in the county in which the action arose; (ii) the defendant may be served by any of the methods set out in GS 1A-1, Rule 4(j) and (j1), including service by publication; and (iii) the remedy sought is actually a legal declaration by the court pertaining to the validity and amount of the lien.

4. Magistrates may be called upon to appoint an **"umpire"** pursuant to GS 20- 279.21(d1) and 7A-292(16) in situations involving a motor vehicle accident in which liability is undisputed and neither the parties nor independent appraisers can reach agreement about the amount of damages. In such a situation, the magistrate contacts the NC Department of Insurance Agent Services Division (919-807-6800 or ASD@ncdoi.gov) to obtain a list of licensed appraisers in the area. The magistrate picks an appraiser at random and contacts that appraiser to see if he or she is willing to accept the appointment. If not, the magistrate selects and contacts another appraiser, and so on, until one agrees to serve.

5. What recourse do citizens have if they believe their vehicle has been unlawfully towed? GS Ch. 20, Art. 7A allows a citizen to request a **post-towing probable cause hearing** if the vehicle was

towed under direction of an LEO (except in cases involving forfeiture, execution, or when the vehicle is seized as evidence in a criminal proceeding). The statute provides little in the way of procedural details, but provides that the citizen should file a written request for a hearing "with the magistrate in the county where the vehicle was towed. . . . " GS 20-219.11(c). The magistrate must conduct the hearing within 72 hours of receiving the request. The sole question for determination is whether probable caused existed for the towing. AOC-CVM-360, "Order in Post-Towing Probable Cause Hearing" is the form the magistrate can use to record the outcome of the hearing.

6. Right to an accurate estimate for repairs: The **NC Motor Vehicle Repair Act** (GS 20-354 – 354.9). This detailed law prohibits automobile repair shops from charging an amount exceeding the written estimate plus 10% in situations governed by the Act. The Act applies only to repairs that exceed $350. The Act also identifies a long list of prohibited practices (including making deceptive statements, charging for unauthorized repairs, refusing to provide a copy of documents signed by the customer, etc.), thereby laying the groundwork for an action for unfair or deceptive practices. Violation of the law may come up as a defense in an action seeking to establish a motor vehicle lien due to the Act's provision that payment of the estimated amount plus 10% compels release of the vehicle to the customer.

7. An owner of a car may be held **vicariously liable** for the negligence of the driver, based on the owner's legal right to control the operation of the vehicle. G.S. 20-71.1 (paraphrased) provides that in all actions for injury to person or property by motor vehicle, proof of ownership is prima facie evidence that the owner authorized driver's actions. Proof of registration is prima facie evidence of ownership as well as that the motor vehicle was being operated by a person for whose conduct the owner is legally responsible.

8. **Family Purpose Doctrine**: Even when the owner of a car is not a passenger at the time of the negligent action, the owner is responsible if

   (1) The driver is a member of the owner's family or household and lives in the owner's home;
   (2) The vehicle is one used for the general "use, pleasure, and convenience of the family," and
   (3) The vehicle was being so used at the time of the accident with the owner's express or implied consent.

9. **Automobile negligence cases and insurance companies**: As a general rule, the proper plaintiff [i.e., the real party in interest pursuant to GS 1A-1, Rule 17(a)] in a motor vehicle negligence case is the person who suffered the injury. The plaintiff's insurance company is a permissible but not necessary party if the company has partially compensated the plaintiff for the injuries. The plaintiff's insurance company is the real party in interest only if the company has fully compensated the plaintiff, including the amount of any deductible.

   As a general rule, the appropriate defendants in an automobile negligence action are the driver and the owner of the vehicle. The defendant's insurance company is not an appropriate party (although the company may provide an attorney for their client/defendant). Insurance

companies are appropriate defendants only in actions brought by the insured in a breach of contract action.

10. The **collateral source rule** is a legal doctrine holding that a defendant will not be excused from fully reimbursing the plaintiff for damages based on payments made to plaintiff by third parties (such as insurance companies, employers, or church groups).

Details, Details, Details. . .

Companion to "Motor Vehicle Liens: A Quick Reference Guide for North Carolina Magistrates"

Dona Lewandowski, School of Government, UNC-at-Chapel Hill, 2015

Stage 1: Before the Hearing

A lien begins when a lienor acquires possession of the vehicle (it's called a possessory lien), and it ends when the lienor voluntarily gives up possession, or when the lienor is paid the full amount owed. No written lien is filed with the Division of Motor Vehicles (DMV) or with the clerk.

A lien terminates if the lienor loses possession. This loss of possession must be with the lienor's consent, however, or because of a judge's order. If the lienor loses possession because the vehicle is taken without his consent, the lien continues to exist. On the other hand, if the lienor lets the debtor take the vehicle because he agrees to pay what he owes, the lien ends. Even if the debtor does not pay, or brings the vehicle back for additional work, the lien is not revived. The former lienholder will have to bring a contract action to recover his charges (although he may assert a new lien if the debtor once again refuses to pay for the new work done).

Payment also ends a lien. Payment may be made by owner, secured party, or legal possessor, and it must be for full amount secured by the lien (NOTE: this is contract amount, not reasonable value) plus reasonable storage fees.

First Steps in Enforcement

The first step a lienor must take to enforce his lien is to file an unclaimed vehicle report with DMV (DMV form LT-260, Rev. 9/12). When this report may be filed depends upon the location of the vehicle. If the vehicle has been unclaimed in a place of business, the report may be filed after 10 days. If the vehicle has been abandoned on a landowner's property, the report may be filed after 30 days. In either case, failure to file this notice within five days after the appropriate date limits the amount of storage charges the lienor can charge. After the five days have passed, if the lienor hasn't notified DMV that he has the vehicle, he can't charge for storage until he DOES notify DMV.

Example: David Debtor takes his car to Eddie's Garage, but can't pay Eddie's bill. Eddie waits ten days (until March 10), as is required, but gets distracted by ACC basketball and forgets to notify DMV that he has the car for 2 months. He remembers and sends in the form on May 10.

Eddie cannot collect storage for the period between March 15 (5 days after the ten-day period is up) and May 15.

The second step a lienor must take to enforce a lien is to file a notice of intent to sell the vehicle. This notice too is filed with DMV (DMV form LT-262). There are special rules regulating when notice may be filed: If the only charges are for towing and storage, the lienor may file this notice when the charges have been unpaid for 10 days. The result is that this notice sometimes may be filed simultaneously with the report to DMV that a vehicle is unclaimed. In all other cases, the lienor must wait to file this notice until charges have been unpaid for 30 days.

DMV takes the next step: When DMV receives notice that the lienor plans to sell the vehicle, it sends out a certified letter, return receipt requested, to all interested parties. Interested parties include the owner of the vehicle, any secured parties, and the person with whom the lienholder contracted, if not the owner.

Contents of notice: This notice contains the following information: name of the lienholder, nature of services performed, amount of the lien claimed, and statement of intent to sell the vehicle to satisfy the lien. This notice also informs the recipient of his or her right to request a judicial hearing to determine whether the lien is valid. If one of the recipients wants a hearing, he must ask for one within ten days by notifying DMV.

After DMV sends out this certified letter, one of three things may happen: (1) all parties receive notice and none request a hearing; (2) not all parties receive notice; or (3) one or more parties request a hearing.

(1) If all parties receive notice and none request a hearing, DMV authorizes the lienor to sell the vehicle and no court proceeding is required. This sale must be conducted according to the rules set out in G.S. 44A. (See **Stage 3,** beginning on p. 13)

(2) If one or more of the parties do not receive notice that the lienor intends to sell the vehicle (i.e., the identity of the owner or other party cannot be determined, or a certified letter is returned to DMV as undeliverable), some further proceeding is required.

If the names and addresses for all parties are known but the certified letter is returned as undeliverable, the lienor may file a special proceeding before the clerk or bring an action in small claims or district court.

If the name of the owner is unknown and the vehicle has a fair market value of less than $800, the lienor may file a special proceeding before the clerk or bring an action in small claims or district court.

Any other case involving inadequate notice must be brought in small claims or district court to establish the lien.

(3) **If any person receiving notice requests a hearing**, the lienor must bring an action in small claims or district court.

Stage 2: The Hearing

Procedure for hearings

Magistrates may hear actions to enforce motor vehicle liens if assigned to do so by the chief district court judge.

Note: These actions **must be filed in county in which claim arose**, not county of defendant's residence.

The **amount in controversy** is the amount of the lien, not the value of the motor vehicle.

Any person with an interest in the motor vehicle should be made a party to this action. This always includes the owner and secured parties. An unknown owner may be sued using description of vehicle. For example, the action may be brought against "unknown owner of white Pontiac Grand Prix, VIN #64532339866678."

Secured parties have an interest in these actions because motor vehicle liens "beat" all other liens. As a result, sale of the motor vehicle will destroy the secured party's lien. The secured party is entitled to any surplus after the expenses of sale and the amount of the motor vehicle lien are subtracted from the sale price. In some cases, however, the secured party may wish to protect its interests by paying off the lien amount.

Service of process

If the defendant is known, the same methods of service apply as usual in small claims cases, with one exception: if the defendant cannot be served by usual methods using "due diligence", service by publication is allowed.

If the defendant is unknown, he is designated by description (see example above, on preceding page) and is served by publication.

There are special rules for service by publication:
- Publication must be in the county where the action is pending.
- Publication must be in a newspaper qualified for legal advertising and circulated in the county where action is pending.
- Publication must occur once a week for 3 successive weeks.

The publication must contain the following information:
- ✓ Court in which action is filed.
- ✓ Must be directed to defendant sought to be served;
- ✓ Must state that a pleading has been filed seeking relief;
- ✓ State the nature of the relief being sought;
- ✓ Require defendant to make defense within 40 days after date stated in notice (i.e., date of first publication);
- ✓ State that failure to respond will result in plaintiff seeking requested relief;
- ✓ Must be subscribed by plaintiff and give his address.

Statutory form for published notice (G.S. 1A-1, Rule 4(j1):
NOTICE OF SERVICE OF PROCESS BY PUBLICATION
STATE OF NORTH CAROLINA _____ COUNTY
In the _____ Court
Title of action
To (Person to Be Served):

Take notice that a pleading seeking relief against you has been filed in the above-entitled action. The nature of the relief being sought in as follows: (State nature.)

You are required to make defense to such pleading not later than (_____ , ____) and upon your failure to do so the party seeking service against you will apply to the court for the relief sought.

This, the _____ day of _____ , _____.

_____(Party)_
_____(Address)

Proof of service by publication: Plaintiff must file two affidavits with the clerk (to be filed in shuck), one explaining why service by publication was required, and the other an affidavit from the publisher of the newspaper showing notice and specifying the first and last dates of publication.

Three kinds of actions (and three kinds of liens)

In the typical case, a lienor appears in small claims court **seeking to establish a motor vehicle lien**. To "win," he must prove two things: that a valid lien exists, and the amount of the lien. The **proof required to demonstrate that a valid lien exists depends on the type of lien involved**, and the first thing a magistrate must do (after checking service of process) is determine what kind of lien is asserted. There are three possibilities:

1) A lien under G.S. 44A-2(d) (sometimes referred to in this material as "**RSTS in OCB**"). This lien is available to persons or businesses who repair, service, tow, or store motor vehicles in the ordinary course of business.

2) A lien under G.S. 20-77(d) (sometimes referred to in this material as "**GRPS for public**"). This lien is available to persons or businesses, who garage, repair, park, or store motor vehicles for the public.

3) A lien asserted by a **landowner** because of an abandoned motor vehicle on his property

Each lien has different elements and requires different evidence. A **lienor who claims to have the lien listed first above ("RSTS in OCB")** must show that he or she repairs, services, tows, or stores motor vehicles in the ordinary course of business. (NOTE: This lien is not available to a person who works on cars as a hobby, or as a favor, for example.) The lienor must also demonstrate that he entered into an express or implied contract for one of these services with the owner or legal possessor of the vehicle. A vehicle's "owner" may be the person with legal title or his agent, a lessee, a secured party, or a debtor entrusted with possession of the vehicle by a secured party. A legal possessor includes anyone in possession with permission of owner, or entitled to possession by operation of law (for example, a law

enforcement officer who acts with statutory authority to have a vehicle towed). The rest of what the lienor must show is simple: that the vehicle is in her possession, that proper notice has been given to DMV, and that the charges for services remain unpaid. Finally, the lienor must introduce evidence in support of the amount of the requested lien: what services were performed, the reasonable cost of these services, and the amount and justification for the additional expense of storage.

What if the lienor claims a lien under G.S. 20-77(d) ("GRPS for public")? The showing he must make is (only slightly) different. This lienor must show that he operates a business garaging, repairing, parking, or storing vehicles "for the public". Additional requirements for the establishment of this sort of lien are that the vehicle has remained unclaimed at the establishment for ten days, that an unclaimed vehicle report was properly filed with DMV, that the lienor has possession, and that the charges have been unpaid. This lien overlaps significantly with that discussed above, and a lienor who has provided repair services will typically use that lien. The G.S. 20-77(d) lien is most often asserted when the lienor is a parking deck or similar business. Again, the lienor must also support his claim of lien in a particular amount by introducing evidence of reasonable charges for the services provided.

What if the lienor is asserting a landowner's lien? The proof for this lien is very straightforward. The lienor must show only that he is the owner of land on which the motor vehicle in question has been abandoned for at least 30 days, and that a proper report has been made to DMV. The amount of the lien is established by evidence of reasonable storage charges. Note that this lien is improperly used by a landlord seeking to recover damages arising out of a rental agreement; the correct lien in that case is a landlord's lien under G.S. 44A-2(e) (commercial lease) or 44A-2(e2) (lease for a mobile home lot).

Speaking of Storage . . .

Storage is a special category of damages because of the danger that unscrupulous plaintiffs might allow a vehicle to remain on their premises for long periods of time in order to pile up charges for storage. To discourage this practice, two special rules apply to this particular item of damages:

Delayed Notice to DMV: Remember that lienors must notify DMV that they are in possession of an unclaimed vehicle after ten days have passed (30 for a landowner lien), and that they have five days to do so. Failure to make timely notification to DMV bars the lienor from asserting storage charges for the period from the fifteenth (or 35th, as the case may be) day of the lien to whenever DMV is properly notified. Note that late notification carries with it the additional requirement that the lienor must use certified mail.

Delay in Filing Action to Enforce the Lien: A lienor must file an action to enforce the lien within 180 days after storage begins or else forfeit the right to collect storage for the period after 180 days.

Note Different Rule in Express Contract for Storage: In a case in which storage is the service contracted for, it makes no sense to start the clock when storage begins. (In a one-year storage contract under this rule, the lienor would lose the right to assert a lien for storage fees halfway through the contract period!) In these cases, the clock begins to run from date of default, and the action must be brought within 120 days thereafter.

If the magistrate determines that a valid lien exists (regardless of which type of lien it is) and determines the reasonable value of the services provided and storage costs, the next step is to enter judgment

authorizing the lienor to enforce the lien and specifying the monetary amount of the lien. Note that this is not a money judgment, despite the fact that the magistrate must determine the amount of the lien. This judgment is, instead, a judicial determination that the lienor has a lien. This determination clears the way for DMV to authorize the lienor to go ahead with the sale, so that he may collect the amount of the lien. In this action to establish a lien, the appropriate AOC form for judgment is CVM-402.

The second kind of action occurs when the vehicle's owner wants his car back. These cases, obviously, do not involve abandoned vehicles and unknown owners, at least not by the time they get to small claims court. Instead, these cases arise when a lienor refuses to hand over a vehicle because of unpaid charges, and the vehicle owner (or other person with an interest in the vehicle) responds by suing to recover his vehicle. In doing so, the owner will necessarily be attacking the validity and/or amount of the lien. As a result, the legal issues that the magistrate must determine are all but identical to those discussed above, even though the parties have switched places.

The owner institutes this action by filing a complaint (CVM-900M), and the procedure follows that of any other small claims case. At trial, the owner has the burden of demonstrating by the greater weight of the evidence that (1) the vehicle is not subject to a valid lien, or (2) that the amount of the lien differs from that asserted by the defendant. As to the first, the magistrate must first determine which kind of lien is at issue, so that s/he may identify the essential elements that apply. In order to defeat the defendant's contention that he holds the vehicle by authority of a lien, the plaintiff must offer evidence negating at least one of these essential elements.

Sometimes the plaintiff more or less concedes the fact that a lien exists but challenges the amount asserted by the lienor. In making this determination, there are two important factors for the magistrate to remember: **First, the amount of the lien is for the reasonable value of services provided, combined with storage.** This amount may or may not be the same as the contract amount, although evidence of the amount agreed to by the parties may be relevant in determining what charges are reasonable. **Second, the amount of the lien is established by the amount set out in the complaint, unless the lienor files a contrary statement within three days of being served.**

The amount of lien eventually ascertained by the magifindstrate may be affected by several legal principles related to the rules set out above. As to "reasonable expenses" of storage, the limitations discussed on p. 8 may operate to decrease the amount a lienor may eventually recover. Also, the rule giving the lienor only three days after service of summons to file a written contest of the amount of lien set out in the complaint requires an unusually rapid response and may catch defendants by surprise. Note that in applying the three-day rule, G.S.1A-1, Rule 6(a) provides that the day the complaint is served is not counted; neither are intervening Saturdays, Sundays, and holidays.

One issue that arises sometimes in disputes about the cost of servicing or repairing motor vehicles involves the **requirement that providers of these services furnish customers with a written estimate. The Motor Vehicle Repair Act** (G.S. 20-354 – 354.9) contains a number of provisions that at first blush appear to be important in resolving cases involving motor vehicle liens. The Act applies to repair and related services involving charges of $350 or more and establishes a right to sue for damages for violation of its provisions. The Act requires covered businesses to furnish a written estimate in advance of providing services, and it prohibits substantial deviation from the estimate as well as a number of other fraudulent or deceptive practices. In addition, the Act prohibits service providers from retaining possession of a vehicle because of unpaid charges when certain conditions are met.

The scope of the Motor Vehicle Repair Act is not as far-reaching as it first appears, however. First, while the Act addresses the situation in which the final bill is significantly higher than the initial estimate (prohibiting the service provider from retaining possession of the vehicle in these cases), it does not apply to the common situation in which no estimate is provided at all. Second, the right to damages caused by a violation of the Act makes little sense in a motor vehicle lien case, in which the amount of the lien is based on the reasonable value of services actually received. In such a case, the plaintiff will have a difficult time indeed showing actual damages caused by the lack of a written estimate. While a magistrate may well be presented with important cases growing out of violations of the Motor Vehicle Repair Act, particularly those involving allegations of unfair trade practices, it is more likely to be a red herring in motor vehicle lien cases.

"I want my car back!"

Cash bonds to the rescue

When a car owner wants to immediately regain possession of the vehicle, he may deposit with the clerk cash equal to the full amount of the lien alleged by the lienor. The clerk will then issue an Order for the Release of Property Held for Lien (CVM-901M), directing the lienor to release the vehicle to the owner. This remedy is available in any case in which a lienholder retains possession of a motor vehicle under claim of lien and is enforceable by the contempt power of the court.

One issue sometimes arises when an owner files a complaint and cash bond at the same time, and the clerk immediately issues an order for release after accepting cash in the amount specified in the complaint. Remember that the law provides the lienor with a three-day period in which to challenge the amount set out in the complaint. Often, the complaint will set out the amount allegedly due for repairs or other services but will not include the additional amount the lienor seeks for storage. The better practice would be for the clerk to delay accepting the cash bond until the lienor has had opportunity to specify the amount of the asserted lien.

The presence or absence of a cash bond has significant effect on the magistrate's judgment, as discussed below.

Entering judgment in actions by the owner to recover possession of a motor vehicle: At the conclusion of the hearing, the magistrate enters judgment on form CVM-902M. The details of the judgment depend on whether the plaintiff has deposited a cash bond.

In cases in which plaintiff has not deposited a cash bond, remember that the lienor has the vehicle and wants to sell it in order to get the money he claims to be owed. In these cases, if the owner proves that no lien exists, the judgment will state that the plaintiff is entitled to possession

of the vehicle and the defendant is not entitled to a lien. If, on the other hand, the owner fails to prove that no lien exists, the judgment will indicate that the defendant is entitled to retain possession of the vehicle and to proceed to enforce his lien in the amount determined by the magistrate, unless the plaintiff forestalls sale by paying defendant the amount of the lien. The last possibility, of course, is that the plaintiff fails to appear, in which case the action is dismissed and the lienor is left in the same position he occupied before the action was filed: in possession of the vehicle and with the remedies accordingly available to him.

In cases in which plaintiff has deposited a cash bond: remember that in this case the plaintiff has the vehicle, and the clerk has the money. The fact that the money has been paid to the clerk has significant implications for the judgment. If the plaintiff prevails, proving that there is no lien, the judgment will indicate that he retains possession of the vehicle and direct the clerk to return the money plaintiff paid in. If the defendant prevails, and the magistrate finds that a valid lien exists, then the judgment will direct the clerk to disburse the amount of the bond based on the amount of the lien as set out in the judgment. The plaintiff, of course, is entitled to retain possession of the vehicle, in light of the fact that the lien has been satisfied. Finally, if the plaintiff fails to appear, the case must be dismissed and the magistrate will direct the clerk to disburse to the defendant the amount of the bond

The third kind of action, less common, arises when the lienholder has lost possession of the vehicle and seeks to recover possession and to enforce the lien. The special element in this case is possession. Remember that being in possession of the motor vehicle is an essential element of all three liens. What is a lienholder to do, then, if the owner or someone connected to him removes the vehicle without his permission? If his loss of possession was indeed involuntary, then the lienor must seek to regain possession in order to successfully assert his claim of a lien.

The action begins when the lienor files a complaint (CVM-903M) asking for return of the vehicle and for a determination of the amount of lien. The amount of lien set out in the complaint will be binding on the parties and the magistrate unless the defendant (generally the owner, as well as secured parties) files a contrary statement within three days of service. (See the discussion above, on pp. 9-10, of legal rules relevant to this.) At trial, the lienholder has the burden of proving the existence of one of the three types of liens by the greater weight of the evidence,

as well as the amount of the lien, assuming the defendant filed a timely statement challenging the amount.

In this action, as in the others, the owner or secured parties may post a cash bond in the amount of the asserted lien and thus retain possession of the vehicle. The presence or absence of a cash bond will be reflected in the judgment eventually entered by the magistrate.

If no cash bond has been posted: If the lienholder demonstrates a valid lien, including the reasonable amount of the charges, the judgment of the magistrate will indicate his right to regain possession of the vehicle and to proceed to enforce the lien in the amount determined by the magistrate (or, if applicable, in the unchallenged amount set out in the complaint). If, on the other hand, the lienholder fails in his proof, the magistrate will enter an order of dismissal, leaving the defendant in possession of the car and preventing further enforcement of the alleged lien.

If a cash bond has been posted: If the lienholder demonstrates a valid lien, the judgment of the magistrate will direct the clerk to disburse the appropriate amount of the cash to the plaintiff and return any surplus to the defendant. (The same issue as to amount is present in this instance as above; the lien will be in the amount set out in the complaint if defendant did not challenge it, and in the amount determined by the magistrate to be reasonable if the complaint amount was challenged by the defendant). The defendant will of course retain possession of the vehicle. If the lienholder fails in his proof, the magistrate will dismiss the action and direct return of the cash bond to the defendant (who also keeps the vehicle, of course).

Stage 3: After the hearing

After filing notice of intent to sell a vehicle pursuant to a lien, and following any judicial hearing that may be required because it is requested or because of notice problems, the lienholder is ready to pursue his remedy. If no judicial hearing was required, the lienor received authorization to conduct a sale from DMV soon after the certified letters containing notice of intent to sell were sent out. If a hearing was required, the lienor must send a certified copy of the judgment to DMV, which will then authorize the lienor to proceed with sale. In either case, the next hurdle for the lienor is to conduct the sale of the motor vehicle in a lawful manner.

The first decision confronting the lienor at this point is whether to hold a private sale or a public sale. The rules for both are set out in G.S. 44A-4, and won't be set out here in detail. The general provisions are as follows:

Public sale

- ✓ A public sale is required on request of any person with an interest in the property.
- ✓ Notice of sale must be sent to DMV and all interested parties at least 20 days beforehand, posted at courthouse door, and published in newspaper (unless vehicle is worth less than $3,500).
- ✓ Notice must specify a number of things, including the date, time, and location of the sale.
- ✓ The sale must be held between 10:00 AM and 4:00 PM, on a day other than Sunday.
- ✓ The lienor is allowed to purchase the property at a public sale (and only at a public sale).

Private sale

- ✓ Private sale must be conducted in "commercially reasonable" manner.
- ✓ Notice of intended sale must be given to DMV at least 20 days beforehand.
- ✓ Notice of intended sale, containing specified information including date, time, and place of sale, must be provided to owner and other interested parties at least 30 days beforehand. (This notice may be combined with initial notice of intent to sale setting out 10-day period for responding and challenging lien.)
- ✓ Private sale is not allowed if any interested party objects, asks for public sale.
- ✓ Lienor may not purchase "directly or indirectly" at private sale, and any such attempted purchase is voidable.

Damages for violation of statute

If a lienor fails substantially to follow the statutory rules for sale of a motor vehicle subject to lien, he is liable to the owner (or any other injured person) for $100, reasonable attorney fees, and any actual damages (defined as difference between fair market value of vehicle at time and place of sale and actual sale amount).

After the sale

The proceeds of sale are applied first to expenses of sale (including reasonable storage fees for period following notice of sale), and then to satisfaction of the lien, with any surplus going to "the person entitled thereto" (i.e., other lienholders, and finally to the debtor). Any purchaser for value at a properly conducted sale takes the property free and clear of any other claims or liens. The same rule applies to a purchaser who buys at a sale that was not properly conducted, assuming that the purchaser had no knowledge (or reasonable way of knowing) of the defect. These rules apply even if the purchaser is the lienor.

File No.

STATE OF NORTH CAROLINA

_____ County

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

COMPLAINT TO ENFORCE POSSESSORY LIEN ON MOTOR VEHICLE

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

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

Attorney Bar No.

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

2a. ☐ I repair, service, tow or store motor vehicles in the ordinary course of business.
b. ☐ I am an operator of a place of business for garaging or parking motor vehicles for the public and the motor vehicle listed below has remained unclaimed for at least 10 days.
c. ☐ I am a landowner on whose property the motor vehicle listed below has been abandoned for at least 30 days. The property was not left by a tenant. [G.S. 42-25.9(g); 44A-2(e2)]

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

Make/Year Of Vehicle

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

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

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

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

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

Date	*Name Of Plaintiff Or Attorney (type or print)*	*Signature Of Plaintiff Or Attorney*

(Over)

INSTRUCTIONS TO PLAINTIFF OR DEFENDANT

THIS FORM IS SUPPLIED IN ORDER TO EXPEDITE THE HANDLING OF SMALL CLAIMS. IT IS DESIGNED TO COVER THE MOST COMMON CLAIMS. QUESTIONS ABOUT THE ADEQUACY OF THIS FORM OR WHETHER IT IS THE APPROPRIATE FORM TO BE USED SHOULD BE ADDRESSED TO AN ATTORNEY.

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

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

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

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

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

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

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

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

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

File No.

Film No.

STATE OF NORTH CAROLINA

_____ County

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

JUDGMENT IN ACTION ON POSSESSORY LIEN ON MOTOR VEHICLE

G.S. 44A-4

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.

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

FINDINGS

The Court finds that:

☐ 1. the plaintiff has failed to prove the case by the greater weight of the evidence.

☐ 2. the plaintiff ☐ repairs, services, tows or stores motor vehicles in the ordinary course of business ☐ is the operator of a place of business for garaging or parking vehicles ☐ is a landowner on whose property the vehicle listed was abandoned and the plaintiff came into possession of the motor vehicle on the date shown below, is still in possession, and has a valid enforceable lien against the motor vehicle for the amount indicated, plus storage at the rate below from the date of this Judgment until the lien is satisfied.

3. the defendant(s) ☐ was ☐ was not present at trial.

4. The lienor has given proper notice to the North Carolina Division of Motor Vehicles that a lien is asserted and sale is proposed for the vehicle.

Make/Year Of Vehicle	Repairs $
	Towing $
ID Number	Storage Cost to Date $
Date Of Possession	Vehicle Rental $
(Plus Storage @ $ Per Day Until Sold)	**Total Lien Claimed To Date** $ 0.00

ORDER

It is ORDERED that:

☐ the plaintiff recover nothing of the defendant and that this action be dismissed with prejudice.

☐ the lien is valid and enforceable by sale and the Division of Motor Vehicles shall transfer title to the person who purchases at the sale upon proof that proper notice of sale has been given.

☐ Judgment Announced And Signed In Open Court

Name Of Party Announcing Appeal In Open Court	*Date*	*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*

File No.

COMPLAINT TO RECOVER MOTOR VEHICLE HELD FOR LIEN AND TO DETERMINE AMOUNT OF LIEN

G.S. 44A-4(a), 20-77(d)

STATE OF NORTH CAROLINA

_____ County

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

The motor vehicle described below is located in the county named above. I am the owner of the motor vehicle or the person who took it to the defendant.

The defendant is holding the personal property described below because the defendant claims a lien as one

- ☐ who repairs, services, tows or stores property.
- ☐ who operates a business for garaging or parking motor vehicles for the public.
- ☐ who is a landowner on whose property the motor vehicle was abandoned.

Description Of Motor Vehicle

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

Attorney Bar No.

The defendant claims that the full amount I owe the defendant is as stated below. *(Attach copy of bill, if available.)* I dispute the amount claimed and state that I owe the amount specified below as the undisputed amount.

Amount Claimed As Lien By Defendant	*Amount Undisputed By Plaintiff (amount I owe)*
$	$

I demand recovery of the property listed above and request the Court to find that I owe the defendant only the amount undisputed by me.

REQUEST FOR ORDER FOR IMMEDIATE POSSESSION

☐ Pursuant to G.S. 44A-4(a), I deposit with the Clerk of Superior Court in cash the full amount claimed as lien by the defendant. I request the Clerk to issue an order to the defendant to relinquish possession of the property to me.

SIGNATURE OF PLAINTIFF OR PLAINTIFF'S ATTORNEY

Date	*Signature Of Plaintiff Or Attorney*

NOTICE TO DEFENDANT: *If the amount of lien the plaintiff stated you claimed is not the correct amount owed, you must within three working days after this Complaint was served on you, file with the Clerk of Superior Court, in the county named above, a statement of the amount actually owed to you. If you do not file such a statement, the amount stated by the plaintiff as your lien will be the amount the magistrate or judge will consider as the lien and you may not assert a larger lien at the trial.*

File No.

COMPLAINT TO RECOVER MOTOR VEHICLE TO ENFORCE POSSESSORY LIEN AND TO ESTABLISH AMOUNT OF LIEN

G.S. 44A-6.1

STATE OF NORTH CAROLINA

_____ County

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

The lien claimed arose in the county named above. I repair, service, tow or store motor vehicles in the ordinary course of business. I came into possession of the motor vehicle described below to repair, service, tow or store it and claim a possessory lien in the vehicle. The amount of possessory lien I claim for repairing, servicing, towing and storing the vehicle is listed below. The first defendant is the owner of the motor vehicle. The second and subsequent defendants are secured parties claiming an interest in the motor vehicle. The first defendant wrongfully seized the motor vehicle from me, and I did not voluntarily relinquish it.

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

Attorney Bar No.

Make/Year Of Vehicle

ID Number

Repairs	$
Towing	$
Storage Costs	$
Vehicle Rental	$
Total Amount Of Lien Claimed	$

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

Date | *Signature Of Plaintiff Or Attorney*

NOTICE TO DEFENDANT: *If the amount of lien claimed by the plaintiff is not the amount owed, you must within three working days after this Complaint was served on you, file with the Clerk of Superior Court, in the county named above, a statement of the amount you believe is owed. If you do not file such a statement, the amount stated by the plaintiff is the amount the magistrate or judge must consider as the lien and you may not assert a smaller lien at the trial. If you wish to retain possession of the motor vehicle, you may pay the amount of the lien claimed by the plaintiff as a cash bond to the Clerk of Superior Court in the county named above.*

File No.

Film No.

STATE OF NORTH CAROLINA

_____ County

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

JUDGMENT TO RECOVER POSSESSION OF MOTOR VEHICLE TO ENFORCE POSSESSORY LIEN AND TO ESTABLISH AMOUNT OF LIEN

G.S. 44A-6.1

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

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.

☐ the plaintiff has failed to prove the case by the greater weight of the evidence.

the defendant(s) ☐ was ☐ was not present at trial.

☐ Other:

ORDER

It is ORDERED that:

☐ the plaintiff is entitled to possession of the motor vehicle described in the complaint and is entitled to the amount listed below as the plaintiff's claim of lien for repairs, services, towing or storage of the vehicle. The Division of Motor Vehicles is ordered to transfer title to the person who purchases at the lien sale upon proof that proper notice of the sale has been given.

☐ since the defendant has deposited in cash the amount claimed as the lien, the plaintiff is not entitled to recover possession of the motor vehicle described in the complaint. The plaintiff is entitled to the amount listed below as the plaintiff's claim of lien for repairs, services, towing or storage of the vehicle. The Clerk is directed to disburse to the plaintiff any portion of the amount of lien listed below that has not previously been disbursed to the plaintiff and to return any remaining amount of the cash bond to defendant who posted it.

☐ this action be dismissed. The Clerk is directed to disburse any amount of the cash bond remaining to the defendant who posted it.

Amount Of Plaintiff's Lien
$

☐ Judgment Announced And Signed In Open Court

Name Of Party Announcing Appeal In Open Court | *Date* | *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*

STATE OF NORTH CAROLINA

_____ County

File No.

In The General Court Of Justice
Superior Court Division
Before The Clerk

Name And Address Of Petitioner

VERSUS

Name Of Respondent(s)

PETITION FOR AUTHORIZATION TO SELL MOTOR VEHICLE UNDER A LIEN

G.S. 20-77(d), 42-25.9(g), 44A-2(e2), 44A-4(b)(1)

I, the undersigned petitioner, petition the Court to issue an order authorizing me to sell the motor vehicle(s) described on the reverse side of this Petition to satisfy my lien(s) against the vehicle(s), and state that the following information is true and accurate:

1. a. ☐ I am a person who repairs, services, tows, or stores motor vehicles in the ordinary course of my business, and I entered into an express or implied contract with the owner(s) or legal possessor(s) of the motor vehicle(s) listed on the reverse side.
   b. ☐ I am an operator of a place of business for garaging or parking vehicles for the public and the motor vehicle(s) listed on the reverse side has/have remained unclaimed for at least 10 days.
   c. ☐ I am a landowner on whose property the motor vehicle(s) listed below have been abandoned for at least 30 days. The property was not left by a tenant. [G.S. 42-25.9(g), 44A-2(e2)]
2. The amount of lien claimed and the services performed are as listed on the reverse side.
3. I attempted to assert my lien in each motor vehicle listed on the reverse side and in each case the Division of Motor Vehicles notified me either (a) that it could not determine the name of the owner of the vehicle, which had fair market value of less than $800 **as determined by the schedule of values adopted by the Commissioner of Motor Vehicles** *(You must contact your local North Carolina license plate registration agency to determine the market value.)*, or (b) that the registered or certified notice has been returned as undeliverable. *(A copy of each notice from the Division of Motor Vehicles is attached.)*
4. I petition to sell the listed vehicle(s) at a ☐ public ☐ private sale at the date, time, and location stated below. I understand that I must comply with the provisions of G.S. 44A-4(c) through (f) in holding a public or private sale.

Date Of Proposed Public Sale	Time Of Proposed Public Sale ☐ AM ☐ PM	Location Of Proposed Sale
Date After Which Private Sale Proposed		

I, the undersigned petitioner, request the Clerk of Superior Court to order a sale of the vehicle(s) listed on the reverse side at the time and location specified above, and, in addition, to allow storage charges from today until the date of sale, at the rate listed on the reverse side, and to recover the costs of the proceeding.

By signing below, I agree that the information in this filing is true to the best of my knowledge, information, or belief. I understand that, in some circumstances, persons who make false filings can be subject to legal penalties or sanctions and, depending on the situation, may be charged with a crime.

Date	Signature Of Petitioner	
Address	City, State, Zip	Telephone No.

NOTE TO PETITIONER: *The Clerk cannot help you fill out this form or give you advice about bringing this proceeding. If you need assistance, you should talk with an attorney. This petition may not include more than ten (10) vehicles pursuant to G.S. 44A-4(b)(1).*

(Over)

VEHICLE NO. 1

Make/Year	
Name Of Registered Owner	*Vehicle ID No.*
Last Known Address	Repairs $
City, State, Zip	Towing $
Name Of Person With Whom Dealt, If Not Owner	Storage Cost To Date $
Address Of Person With Whom Dealt, If Not Owner	Total Lien Claimed To Date $
City, State, Zip	(Plus Storage at $ _____ Per Day Until Sold)

VEHICLE NO. 2

Make/Year	
Name Of Registered Owner	*Vehicle ID No.*
Last Known Address	Repairs $
City, State, Zip	Towing $
Name Of Person With Whom Dealt, If Not Owner	Storage Cost To Date $
Address Of Person With Whom Dealt, If Not Owner	Total Lien Claimed To Date $
City, State, Zip	(Plus Storage at $ _____ Per Day Until Sold)

VEHICLE NO. 3

Make/Year	
Name Of Registered Owner	*Vehicle ID No.*
Last Known Address	Repairs $
City, State, Zip	Towing $
Name Of Person With Whom Dealt, If Not Owner	Storage Cost To Date $
Address Of Person With Whom Dealt, If Not Owner	Total Lien Claimed To Date $
City, State, Zip	(Plus Storage at $ _____ Per Day Until Sold)

VEHICLE NO. 4

Make/Year	
Name Of Registered Owner	*Vehicle ID No.*
Last Known Address	Repairs $
City, State, Zip	Towing $
Name Of Person With Whom Dealt, If Not Owner	Storage Cost To Date $
Address Of Person With Whom Dealt, If Not Owner	Total Lien Claimed To Date $
City, State, Zip	(Plus Storage at $ _____ Per Day Until Sold)

Appointing An Umpire

The Law (GS 20-279.21)

(d1) Such motor vehicle liability policy shall provide an alternative method of determining the amount of property damage to a motor vehicle when liability for coverage for the claim is not in dispute. For a claim for property damage to a motor vehicle against an insurer, the policy shall provide that if:

(1) The claimant and the insurer fail to agree as to the difference in fair market value of the vehicle immediately before the accident and immediately after the accident; and

(2) The difference in the claimant's and the insurer's estimate of the diminution in fair market value is greater than two thousand dollars ($2,000) or twenty-five percent (25%) of the fair market retail value of the vehicle prior to the accident as determined by the latest edition of the National Automobile Dealers Association Pricing Guide Book or other publications approved by the Commissioner of Insurance, whichever is less, then on the written demand of either the claimant or the insurer, each shall select a competent and disinterested appraiser and notify the other of the appraiser selected within 20 days after the demand. The appraisers shall then appraise the loss. Should the appraisers fail to agree, they shall then select a competent and disinterested appraiser to serve as an umpire. *If the appraisers cannot agree upon an umpire within 15 days, either the claimant or the insurer may request that a magistrate resident in the county where the insured motor vehicle is registered or the county where the accident occurred select the umpire.* The appraisers shall then submit their differences to the umpire. The umpire then shall prepare a report determining the amount of the loss and shall file the report with the insurer and the claimant. The agreement of the two appraisers or the report of the umpire, when filed with the insurer and the claimant, shall determine the amount of the damages. In preparing the report, the umpire shall not award damages that are higher or lower than the determinations of the appraisers. In no event shall appraisers or the umpire make any determination as to liability for damages or as to whether the policy provides coverage for claims asserted. The claimant or the insurer shall have 15 days from the filing of the report to reject the report and notify the other party of such rejection. If the report is not rejected within 15 days from the filing of the report, the report shall be binding upon both the claimant and the insurer. Each appraiser shall be paid by the party selecting the appraiser, and the expenses of appraisal and umpire shall be paid by the parties equally. For purposes of this section, "appraiser" and "umpire" shall mean a person who as a part of his or her regular employment is in the business of advising relative to the nature and amount of motor vehicle damage and the fair market value of damaged and undamaged motor vehicles.

Excerpt from email from AOC Counsel Matt Osborne to magistrate inquiring about procedure:

This is a civil matter, so I will copy Amy in case she has had cause to weigh in on these issues, but my thoughts are as follows:

1. As I understand the **background**,

- an automobile insurance claimant and an automobile liability insurance carrier cannot agree on the insurance proceeds amount,
- the appraisers selected by each party similarly could not agree on the amount,

- the appraisers further could not agree on an umpire, and therefore
- one or both the parties has requested that a magistrate appoint an umpire under G.S. 20-279.21(d1) and G.S. 7A-292(16).

2. In terms of the **recordkeeping**, Pete previously advised to set this up as an R file, which means we would collect the G.S. 7A-308(a)(11) document indexing fee. As Dona indicated, the filing presumably would contain (i) a certification that the parties have exhausted the other steps outlined in G.S. 20-279.21(d1) and (ii) a formal request for the appointment of an umpire by a magistrate.

3. In terms of the **selection of the umpire**, Shea Denning recently advised as follows:

> The method for selecting the umpire is not spelled out by statute. I recommend that you ask your chief district court judge for advice on how to proceed. There are a few options.
>
> * Your district could prepare a list of umpires (who must be adjusters or motor vehicle damage appraisers licensed by the NC Department of Insurance, see G.S. 58-33-10, G.S. 58-33-26) and select from this list on a rotating basis. Perhaps the Chamber of Commerce or some similar entity could help in compiling a list of licensed adjusters, and those persons could elect whether to be included on the list.
>
> * Alternatively, you could select one of the umpires proposed by the parties. (Given, however, that the parties came to you because they could not agree on the umpire, one party likely will be displeased with that selection.)
>
> * Finally, you might select an umpire on your own by seeking a recommendation from the Chamber of Commerce, an insurance agent or agents, or some similar entity.
>
> The first option strikes me as the best procedure to follow.

4. With regard to the **payment of the umpire**, G.S. 20-279.21(d1) provides that the umpire "shall be paid by the parties equally."

5. In terms of **what happens after the umpire has issued his or her report**, given that the parties have not been able to agree to this point, it certainly is possible that there will be disagreement from one of the parties regarding the umpire's report. G.S. 20-279.21(d1) provides that the claimant or the insurer has 15 days from the umpire's filing of the report to reject the report and notify the other party of the rejection. (I would think that the rejecting party also would want to file a copy of the notice of objection with the court for attachment to the umpire request in order to memorialize the timeliness of the objection.) If neither party rejects the report, it becomes binding on the parties after the passage of the 15 days. If one of the parties does reject the report, the next procedural step is not entirely clear. We have advised in the past that it appears to us that at this stage the parties would be in a traditional litigation posture. In other words, there is a civil dispute under an insurance agreement, and one of the parties would need to file a civil action or pursue whatever alternate remedies (e.g., arbitration) may be provided for (or required by) the insurance agreement.

Post-Towing Hearing Before Magistrate

Statutory cite: G.S. 20-219.9 to -219.14

What is the purpose of the law?

Due process requires a person whose car has been towed to have a quick court hearing to determine whether probable cause existed for the towing.

When does the law apply?

Applies to towing under the direction of a law enforcement officer.

Does **not** apply to:

Seizure of vehicle as evidence in a criminal proceeding;

Seizure under statutory forfeiture provisions;

Levy under writ of execution; or

Towing under a city or county ordinance for abandoned vehicles when the city or county collects the towing fees (rather than the tower). In that situation the city or county ordinance must specify a procedure for contesting the towing. But does apply to towing when city or county contracts with private towers who collect the fees. [G.S. 160A-303; 153A-132]

To what does the law apply?

G.S. §§ 153A-132 and 160A-303 authorize cities and counties to adopt ordinances authorizing towing of abandoned or junked vehicles.

An abandoned motor vehicle is:

1. Left upon a city street or highway or public grounds or county-owned property in violation of a law or ordinance prohibiting parking; or
2. Left on property owned or operated by the city or county for longer than 24 hours; or
3. Left on private property without the consent of the owner, occupant, or lessee for more than 2 hours; or
4. Left on any public street or highway or grounds for longer than 7 days or is determined by law enforcement to be a hazard to the motoring public. G.S. 160A-303(b1); G.S. 153A-12(b)(1).

A junked motor vehicle:

1. Is partially dismantled or wrecked; or
2. Cannot be self-propelled or moved in the manner in which it was originally intended to move; or

3. Is more than 5 years old and worth less than $100 or is more than 5 years old and worth less than $500 as provided in the city's ordinance, or in the county, is more than 5 years old and appears to be worth less than $100; or
4. Does not display a current license plate. 160A-303(b2); G.S. 153A-12(b)(2).

G.S. 20-161, which prohibits

- parking a vehicle or leaving a vehicle standing upon the paved or main-traveled portion of any highway outside city limits unless the vehicle is disabled.

- parking vehicle upon the shoulder of a public highway outside the city limits unless the vehicle can be clearly seen by approaching drivers from a distance of 200 feet in both directions and does not obstruct the normal movement of traffic.

Officer may have vehicle towed immediately if the vehicle is parked in violation of one of above provisions and if the vehicle is interfering with the regular flow of traffic or otherwise constitutes a hazard.

Officer may have vehicle towed that is parked on right-of-way of highway for period of 48 hours or more.

In other towing situations, officer should indicate to the magistrate the statutory procedure under which he or she had the vehicle towed. Then magistrate must determine whether probable cause exists to tow under that statute.

What is the pre-hearing procedure?

The owner or any other person entitled to claim possession (such as lessee or secured party) may request in writing a hearing to determine if probable cause exists for the towing.

- Request to be filed in county where the vehicle was towed. If more than one magistrate's office, the motion must be filed in the warrant-issuing office in the county seat or in any other office designated by chief judge to receive requests.

- Magistrate must set hearing within 72 hours of receiving request.

- Magistrate must notify the owner, the person who requested the hearing if someone other than the owner, the tower, and the person who authorized the towing (the law enforcement officer) of the time and place of the hearing. Notification should be done by a method to reach party before hearing, which may mean by phone.

What is the hearing procedure?

Person authorizing towing and tower may submit evidence by affidavit instead of personally appearing at hearing.

The issue for the magistrate is whether or not probable cause existed for the towing.

The magistrate should determine if the vehicle was towed under one of the relevant statutes: G.S. 20-161, 115D-21, 116-44.4, 153A-132, 153A-132.2, 160A-303, or 160A-303.2.

Magistrate's judgment

If the magistrate finds probable cause, the magistrate orders that tower's lien continues. The tower has a lien under G.S. Chapter 44A and then begins enforcement under that statute.

If the magistrate finds no probable cause, the magistrate orders that the tower's lien is extinguished; the tower must give possession of the car to the plaintiff; and the agency whose law-enforcement officer ordered towing, must compensate tower.

The magistrate can use AOC-CVM-360, "Order in Post-Towing Probable Cause Hearing" to record the outcome of the hearing.

Either party may appeal the magistrate's decision to district court. [G.S. 20-219.11(f)]

There are no court costs attached to this proceeding. The clerk will assign a "Registration" filing number.

File No.

Scan No.

STATE OF NORTH CAROLINA

_____ County

In The General Court Of Justice
Before The Magistrate

ORDER IN POST-TOWING PROBABLE CAUSE HEARING

G.S. 20-219.11

This action was heard on the date listed below before the undersigned on claimant's written request for a hearing to determine if probable cause existed for the towing of the motor vehicle described herein. All persons entitled to notice of the hearing were present in person or through an attorney except: _____.

Name And Address Of Claimant

Name And Address Of Owner Of Vehicle (if different from Claimant)

Make Of Vehicle

Model Of Vehicle

Year Of Vehicle

License Plate Number | State Issuing Plate

Vehicle Identification Number (VIN)

Name And Address Of Tower

Name Of Person Or Agency Who Authorized Towing

FINDINGS

The Court finds that:

1. Pursuant to G.S. 20-219.11(c), the claimant filed a written request for a hearing to determine whether there was probable cause for the towing of the vehicle described on this form.

☐ 2. The magistrate set the request for hearing within 72 hours of receiving the request.

3. The claimant is the ☐ owner ☐ other person entitled to claim possession of the vehicle.

4. Notice of the time and place of the hearing was provided to the claimant, the owner (if someone other than the claimant), the tower, and the person or agency who authorized the towing.

☐ 5. The vehicle described herein was towed in the above-named county on _____ *(date)* pursuant to G.S. 115D-21, 116-44.4, 116-229, 153A-132, 153A-132.2, 160A-303, or 160A-303.2.

6. Other relevant findings: _____.

CONCLUSIONS OF LAW/ORDER

It is ORDERED that:

☐ Probable cause existed for the towing. The tower's lien continues.

☐ Probable cause did not exist for the towing. The tower's lien is extinguished and the tower shall immediately release the vehicle to the claimant without any payment of towing fees.

☐ Other: _____.

Name Of Party Announcing Appeal In Open Court

☐ Judgment Announced And Signed In Open Court.

Date | Name Of Magistrate | Signature Of Magistrate

NOTE TO CLERK: *This will be a Registration filing with a miscellaneous filing fee. If appealed, it is appealed to civil district court, with civil district fees. See Rule of Recordkeeping 16.1, Comment B.3.*

Automobile Negligence Lawsuits

Who Is Sued?

Driver—the driver is the person whose negligence gives rise to the liability. The person suing must prove that the driver negligently operated the motor vehicle.

Owner of the motor vehicle—the owner of the vehicle is vicariously liable, which means the owner is not liable because of his or her own conduct, but rather because of his relationship to the wrongdoer (i.e., the driver). There are two legal theories by which the driver's negligence is imputed to the owner of the vehicle. Both are based on agency principles, in other words that the driver is the agent of the owner-principal and the principal is liable for the agent's negligence.

- Family purpose doctrine—impute the negligence of the driver to the owner if

  Driver was negligent;

  Driver was a member of owner's family or household and was living in owner's home;

  Vehicle was owned and maintained for general use and convenience of owner's family; and

  Vehicle was being so used by a member of the family at the time of the accident with the express or implied consent of the owner.

- Proof of agency—owner-consent statute.

  G.S. 20-71.1.

  Proof of ownership of a motor vehicle involved in an accident is prima facie evidence that the motor vehicle was being operated with the authority, consent, and knowledge of the owner in the very transaction out of which the lawsuit arose. (Prima facie means that evidence of ownership is sufficient to find agency and hold the owner liable, but that the owner may offer evidence tending to show that no agency existed.)

  Proof of registration in the name of a person is prima facie evidence of ownership.

Person authorized by the owner to drive a vehicle does not have authority to permit another to drive in the absence of express or implied authority by the owner or emergency.

So owner is not responsible for negligent operation of his vehicle by a driver other than his agent.

Exception is that owner is liable if agent had express or implied authority to let others drive or agent confronted with emergency, which made it necessary for him to let other person drive.

Insurance company covering owner's vehicle: proper defendant only when insured is suing own insurer on basis of uninsured coverage because operator or owner of other vehicle cannot be determined (in other words, hit and run accident).

Who sues?

Real party in interest usually is the person injured by accident; that is the person who must be named as a plaintiff. This is true even if the person's insurance company has already paid him.

When is the insurance company a proper plaintiff?

Most of the time, an insurance company does not fully reimburse the insured, who is typically responsible for at least paying the deductible. In such a case, the insurance company, having incurred a loss because of its payment to plaintiff, is a proper plaintiff and *may be joined* as such. *St. Paul Insur. Co. v. Rose Supply Co.*, 19 N.C. App. 302 (1973). The insurance company *is not required to be named as a plaintiff*, however, and generally does not wish to be a formal participant in the action, because having the insurance company as co-plaintiff might prejudice the jury against the plaintiff's case.

If plaintiff collects on judgment against defendant when own insurer has paid part of it, insurance company is entitled to be repaid by plaintiff for amount it paid to plaintiff.

When is the insurance company the real party in interest?

If insurance company has paid the insured the entire damages (meaning no deductible was paid by insured), lawsuit must be brought by insurance company because it then becomes the real party in interest. *Phillips v. Alston*, 257 N.C. 255 (1962).

Relationship between insurer and insured.

Motor vehicle liability policy is merely a contract to pay damages if insured is held liable.

The contract usually includes a provision that the insurance company will provide an attorney for insured.

NC requires motor vehicle liability policies to include *uninsured motorist coverage*, which is a provision under which the insured's own insurance will pay for any damages suffered as a result of an accident with a negligent, uninsured motorist. (G.S. 20-279.21)

- In order to collect against own insurance company under the uninsured portion of the policy, the insured must serve a copy of the complaint and summons against the negligent driver and owner on the insured's own insurance company.
- The insured's own company may end up defending the defendant and trying to prove that the defendant was not negligent.

- Insured may sue own company directly for uninsured coverage when identity of operator or owner of vehicle that caused accident cannot be ascertained.

Many motor vehicle policies also include a separate provision requiring the insurer to pay its insured's medical costs arising out of any accident. This provision is called "*med pay provision.*" Essentially, a "med pay" provision is like health insurance for automobile accidents.

Damages allowed in motor vehicle negligence cases.

Property damage.

- Diminution in Market Value—Measure of damages is the difference between the fair market value of the property immediately before it was damaged and its fair market value immediately after it was damaged. Fair market value is the amount that an owner who wishes to sell—but is not compelled to do so—and a buyer who wishes to buy—but is not compelled to do so—would agree is a fair price.
- Evidence of the fair market value of the property before it was damaged may include records of sales of similar motor vehicles, pricing information from sources such as Kelly Blue Book or the NADA Guides, testimony from the owner of the motor vehicle or expert testimony from someone with experience selling motor vehicles. Evidence of estimates of cost to repair or of the actual cost of repairing the damage to plaintiff's property may be considered in determining the difference in fair market value before and after the damage occurred. *U.S. Fidelity & Guaranty Co. v. P. & F. Motor Express*, 220 N.C. 721, 18 S.E.2d 116 (1942).

Loss of use of the vehicle.

- If the damaged vehicle *can be repaired*, owner entitled to damages for loss of use; measure of damages is cost of renting a similar vehicle during a reasonable period for repairs whether or not owner actually rented a vehicle.
- If vehicle is *damaged beyond repair,* damages are in the amount of the fair market value of the vehicle immediately before the accident. Additional damages for renting a vehicle are available only when a new replacement vehicle is not immediately obtainable; measure of damages is cost of renting a similar vehicle during such period reasonably necessary to acquire the replacement.

Personal injury.

- Medical expenses—all hospital, doctor, chiropractor, or other health care providers, and drug bills reasonably paid or incurred as a consequence of injury.
- Loss of earnings—fair compensation for loss of time from employment or reduced capacity to earn money because of injury. (Although this can get complicated when talking about a loss of earning capacity, for purposes of small claims cases, this measure of damages generally will be proven by loss of work for several days without additional loss of future earning capacity.)

- Pain and suffering—fair compensation for the actual physical pain and mental suffering experienced by the plaintiff because of the injury.

  No fixed formula for evaluating pain and suffering.

  Determine fair compensation by applying logic and common sense to the evidence.

- Other allowable damages include damages for scars and disfigurement, loss of use of part of the body, and permanent injury. However, they are unlikely to arise in a small claims case.

Punitive Damages

Purpose is to punish "egregiously wrongful acts and to deter the defendant and others from committing similar wrongful acts". GS Ch. 1D.

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.

Amount of punitive damages is within discretion of magistrate, based upon consideration of factors set out in G.S. 1D-35:

- the reprehensibility of defendant's motives and conduct;
- the likelihood, at the relevant time, of serious harm;
- the degree of the defendant's awareness of the probable consequences of its conduct;
- the duration of defendant's conduct;
- the actual damages suffered by plaintiff;
- any concealment by defendant of the facts or consequences of its conduct;
- the existence and frequency of any similar past conduct by the defendant;
- whether the defendant profited from the conduct;
- the defendant's ability to pay punitive damages.

Punitive damages **may not** be ordered against a defendant who is liable based solely on *vicarious liability*. G.S. 1D-15(c). So, the owner of a vehicle cannot be required to pay punitive damages awarded against the driver of a vehicle unless the owner is found to have acted negligently as well.

Attorney Fees and Costs

General rule is that parties do not have a right to recover attorney fees.

To award attorney fees, there must be a specific statute that allows the award of fees in a particular case. If there is a statute that allows the award of attorney fees, the party requesting fees must have been represented by the attorney during the case.

G.S. 6-21.1 allows a court to award a reasonable attorney fee in cases involving personal injury or property damage where recovery is less than $25,000, if the court finds there was an unwarranted refusal by the defendant to negotiate or pay the claim and the amount of damages recovered exceeded the highest offer made by the defendant no later than 90 days before the commencement of the trial. However, the statute seems to require that judgment be entered by a court of record. The award of fees is discretionary.

Costs are the fees paid by plaintiff at time action was filed (court filing fee and service of process fee). Costs in a negligence action can be allocated to either party by magistrate. G.S 6-20.

Parties are not allowed to recover for other costs of litigation such as time lost from work to come to court, cost of parking to attend court, or cost of a babysitter while they come to court.

Collateral source rule.

The fact that the medical expenses were paid by the plaintiff's employer, medical insurer, or some other collateral source does not deprive the plaintiff of the right to recover the expenses. (*Cates v. Wilson*, 321 N.C. 1 (1987); *Fisher v. Thompson*, 50 N.C. App. 724 (1981)).

Plaintiff sues for and is entitled to recover the full amount of damages from the defendant.

If the plaintiff's health insurance or his "med pay" policy pays all or part of plaintiff's medical expenses, plaintiff generally is not required to reimburse the insurance company from his recovery.

Bobby's Body Shop v. Arthur Driver

Testimony of Bobby Thomas, Owner of Bobby's Body Shop: On January 4, 2023, Arthur Driver brought his 2019 Mercedes Benz into the shop and asked that I repair damage incurred when his vehicle was struck from behind. I told him that the cost would depend on how difficult it proved to be to get acceptable parts, and on how much time we ended up spending on it. Everything is more expensive these days than it used to be, including car parts and trained mechanics to put them in. He asked about our usual rates, and I told him that we charge $50/hour for labor.

During the next two days, I checked into parts and took a closer look at the Benz. When Arthur called to check on the car, I told him that I figured it would take about $4500 to fix it. He said that he thought that was high, and I told him, if he didn't like it, he could take it elsewhere and just see if he got a better price. He asked when the car would be ready, and I told him we should have it done by January 9th.

On January 9th, Arthur came for the Benz and paid me $2,000, which he said he believed to be a fair price. I told him that the actual total was a little over $4500, but I'm a man of my word, so I would only charge him that much since that's what I quoted him on the phone. When he said he wouldn't pay that much, I told him I couldn't return the car until he did. Arthur left the shop, still owing $2500 for the repairs. I gave him a few days to come around, and then filed the Unclaimed Vehicle Notice on January 20th with the DMV. When I filed the Notice of Intent to Sell, Arthur filed a request for a hearing, and he telephoned once saying that he wanted to work something out. He still isn't willing to pay me the rest of what he owes. The car's been sitting there taking up space ever since. I charge $10 a day, the same as the airport charges to let cars sit in the parking lot there. And by my count it's been 95 days, but I said 80 on the complaint because I filed that 2 weeks ago.

Testimony of Arthur Driver, owner of the Mercedes: I took my car to Bobby's Body Shop on January 4th based on a recommendation from a friend of mine. The first shop I took the car to said it would cost $5100 to fix, and I knew that was way too high. Bobby told me it shouldn't cost nearly that much to fix but couldn't give me a firm price without checking into things further. He said they charge $50 an hour for labor, and that this should be a pretty quick job.

When I called to check on the car, I was informed that the probable price would be in the neighborhood of $4500, but I told her that was too much. If I had time, I could do it myself for $500 easy. I never said $4500 was a fair price. I know they deserve to be paid for labor as well as parts, so I took $2000 in case with me when I went to pick up the car, but Bobby said he wouldn't let me have my car back unless I paid her $4500! In my opinion, he's holding my car for ransom. And these storage costs are ridiculous! It doesn't cost him anything to have my car sitting in the field next to his business. Also, I read on the internet that he was required to give me a written estimate and that since he didn't do that, he's not allowed to keep my car. And I had to pay $480 to rent a car and I think he should have to give that much back to me. I have my receipt for the rental car, and a signed statement from the junkyard showing that the parts Bobby replaced could be purchased for $500.

Timeline:

January 4	Defendant delivers car to Plaintiff
January 9	Defendant refuses to pay full amount of repairs

January 20	Plaintiff files Notice of Unclaimed Vehicle with DMV
February 15	Plaintiff files Notice of Claim of Lien and Intent to Sell
February 23	Defendant requests hearing on lien
March 30	Plaintiff files small claims action
April 15	Case is heard in small claims court

Analysis:

1. What kind of lien is Bobby's Body Shop asserting?
2. Has Bobby introduced evidence of each required element?
3. What about Arthur's claim that he was entitled to a written estimate?
4. Is Bobby entitled to the storage fees he's requested?
5. Is Arthur entitled to be reimbursed for the cost of a rental car?
6. What do you think about the relevance of the statement from the junkyard?

Mike Whiner v. Bubba's Garage

Testimony of Mike Whiner: I let my girlfriend, Sally, drive my Mustang. It's my most prized possession. I should never have let her drive it. She's not my girlfriend anymore. I broke up with her over this. She got some kind of idea that she should surprise me for my birthday with a paint job. I think she was jealous of how much time I spent with my car. She had the Mustang pained red. My vintage '87 black Mustang convertible—she had it painted red! What's worse, she took it to this crook to have the work done, and he did an awful job. He doesn't know anything about vintage cars. I think he just spray-painted it with something bought from Walmart. Paint you'd use on a filing cabinet or something. I don't think I owe him anything. I didn't agree to the work—I don't even like the work. He ruined my car, so there's no reason I should have to pay for it. Let him sue my girlfriend if he wants someone to pay for this shoddy work. It would serve her right to get sued. I have pictures of my beauty before and after if you want to see them.

Testimony of Bubba Clark, Owner of Bubba's Garage: I did the work. I oughta get paid for the work. I'm just charging what I charge for any paint job. Sally didn't say anything about special this or vintage that. She just asked me to use my brightest red paint so she could surprise her boyfriend. She brought it in on May 1st and said she needed it by May 11th, because his birthday is May 12th. When I called her on May 11th, she said she wasn't paying for anything for that deadbeat who loves his car more than his girlfriend. Then, turned out she couldn't pay, and he WOULDN'T pay, so I'm out $1,000 in supplies and labor, and now storage too. I charge $10 per day for cars to take up space on my lot. I don't know if that old car is worth what's owed, but I should get a chance to sell it and find out.

Timeline:

May 1	Defendant obtained possession of the Mustang
May 11	Sally refused to pay
May 15	Mike filed Complaint to Recover Motor Vehicle Held for Lien and to Determine Amount of Lien alleging he owed nothing to Bubba
May 18	Bubba filed Contrary Statement asserting the amount of the lien as $1100
May 19	Mike paid a cash bond to the clerk of $1100 and clerk entered Order for Release of Motor Vehicle Held for Lien
May 21	Mike took possession of the Mustang from Bubba pursuant to clerk's order
June 1	Case heard in small claims court

Analysis:

1. What legal arguments is Mike making to challenge Bubba's lien?
2. Do you need more information to fill out the judgment? If so, what other questions would you like to ask Mike and/or Bubba?
3. Assume you determine that the reasonable cost of the paint job is $500. Complete the judgment form.

File No.

Film No.

STATE OF NORTH CAROLINA

_____ County

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

JUDGMENT TO RECOVER PERSONAL PROPERTY HELD FOR LIEN AND TO DETERMINE AMOUNT OF LIEN

G.S. 44A-4(a)

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. 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. Other:

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 plaintiff is entitled to possession of the personal property described in the complaint and the defendant is entitled to the amount listed below as his/her claim of lien for repairs, services, towing or storage of the property. The Clerk is directed to disburse to the defendant from the cash bond any portion of the amount awarded to the defendant that has not previously been disbursed to him/her and to return any remaining amount of the cash bond to the plaintiff.

☐ 2. the defendant is entitled to possession of the personal property described in the complaint and to assert a claim of lien for the amount specified below. The defendant is entitled to assert his/her lien pursuant to General Statutes Chapter 44A unless the plaintiff pays to the defendant the amount of the lien.

☐ 3. the plaintiff is entitled to possession of the personal property described in the complaint and the defendant is not entitled to a lien on the property. The Clerk is directed to disburse to the plaintiff any amount of the cash bond remaining.

☐ 4. this action be dismissed because the plaintiff failed to prosecute this action. The Clerk is directed to disburse to the defendant any amount of the cash bond remaining.

Amount Of Lien To Which Defendant Entitled
$

☐ Judgment Announced And Signed In Open Court

Name Of Party Announcing Appeal In Open Court | *Date* | *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*

Kegan McDonald v. Jose Ramirez and C&H Site Cleanup, LLC

Testimony of Kegan McDonald: On January 10th around 6:45 a.m. I was driving west on NC Highway 24 which is a two-lane highway. About the same time, I saw Mr. Ramirez coming to the intersection of 24 and Blake Street. He was driving a truck that had C&H Site Cleanup painted on it. The truck was pulling a trailer. He had a stop sign and I had the right of way, so I maintained my speed of 55 because I thought he would stop. I know that's how fast I was going because I set the cruise control every morning. Well, he didn't stop! He just rolled right through the stop sign into my lane. I swerved my car and I hit the rear left corner of the trailer. I suffered pretty bad whiplash, and I had doctor's bills of $1500 which I can show you. I also had to get my car fixed and that cost me $2000. I checked the Blue Book and it's worth $6,000, but I reckon after it's been wrecked, I could only get $4,000 for it.

Attorney for Defendants: Your honor, I move to dismiss plaintiff's claims as to C&H Site Cleanup because it was Mr. Ramirez who was driving, not the owner of the company.

How do you rule on the defense motion to dismiss? What is the legal rule at issue?

Attorney for Defendants: Your honor, I would also move to dismiss plaintiff's claims as to both defendants because plaintiff has admitted to his own contributory negligence because he failed to reduce speed when he approached the intersection and failed to yield the right of way.

Mr. McDonald's Rebuttal: Your honor, I was the one who had the right of way. I shouldn't have had to get into the left lane so he wouldn't pull out and hit me. By the time he was pulling into the intersection, I had no chance to slow down and had to swerve. If I had slammed on brakes, I would've run into the trailer head-on.

How do you rule on the defense motion to dismiss? What are the legal rules at issue?

Assuming you deny the motions, the case goes forward, and Attorney for Defendants examines Mr. McDonald. He asks Mr. McDonald about how much his health insurance through his employer paid for his medical bills. Mr. McDonald does not object and testifies they paid $1000 after he paid his $500 deductible. What weight do you give this evidence? What is the legal doctrine that is at issue?

What additional information, if any, would you like to ask?

How would you rule on Mr. McDonald's negligence claim against the defendants?

S 1

SENATE BILL 553

Short Title:	Landlord-Tenant and HOA Changes.	(Public)
Sponsors:	Senators Perry, Craven, and Moffitt (Primary Sponsors).	
Referred to:	Rules and Operations of the Senate	

April 5, 2023

A BILL TO BE ENTITLED

AN ACT TO PROHIBIT COUNTIES AND CITIES FROM ADOPTING CERTAIN ORDINANCES, RULES, AND REGULATIONS THAT WOULD PROHIBIT LANDLORDS FROM REFUSING TO RENT TO TENANTS BECAUSE A TENANT'S LAWFUL SOURCE OF INCOME TO PAY RENT INCLUDES FUNDING FROM A FEDERAL HOUSING ASSISTANCE PROGRAM; TO REGULATE SUPPORT ANIMALS AND SERVICE ANIMALS IN RESIDENTIAL TENANCIES; TO EXPAND AUTHORIZED LITIGATION COSTS IN SUMMARY EJECTMENT MATTERS; TO MAKE CLARIFYING CHANGES TO LANDLORD-TENANT LAW; AND TO ADJUST THE APPLICABILITY OF HOMEOWNERS' ASSOCIATIONS' DECLARATION AMENDMENTS TO HOMEOWNERS.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 42-14.1 reads as rewritten:

"**§ 42-14.1. ~~Rent control.~~Preemption of local regulations.**

(a) No county or city as defined by G.S. 160A-1 may enact, maintain, or enforce any ordinance or resolution which regulates the amount of rent to be charged for privately owned, single-family or multiple unit residential or commercial rental property. This section shall not be construed as prohibiting any county or city, or any authority created by a county or city for that purpose, from:

(1) Regulating in any way property belonging to that city, county, or ~~authority;~~authority.

(2) Entering into agreements with private persons which regulate the amount of rent charged for subsidized rental ~~properties; or~~properties.

(3) Enacting ordinances or resolutions restricting rent for properties assisted with Community Development Block Grant Funds.

(b) No county or city as defined by G.S. 160A-1 may enact, maintain, or enforce any ordinance or resolution which prohibits an owner, lessee, sublessee, assignee, managing agent, or other person having the right to lease, sublease, or rent a housing accommodation from refusing to lease or rent the housing accommodation to a person because the person's lawful source of income to pay rent includes funding from a federal housing assistance program."

SECTION 2. Article 5 of Chapter 42 of the General Statutes is amended by adding a new section to read:

"**§ 42-47. Support and service animals – nondiscrimination.**

(a) For the purposes of this section, the following definitions apply:

(1) Health service professional. – A person with a therapeutic relationship with a person with a disability. The term does not include a person described in this

subdivision that solely provides written documentation or verification of a person's disability or need for a service animal or support animal for a fee.

(2) Person with a disability. – As defined in G.S. 168A-3(7a).

(3) Service animal. – An animal trained to assist a person with a disability, as described in G.S. 168-4.2.

(4) Support animal. – A companion animal that a health service professional has determined provides a benefit for a person with a disability. The term also includes an assistance animal, as defined in G.S. 14-163.1(a)(1). A support animal shall not be required to be trained or registered under Chapter 168A of the General Statutes.

(5) Therapeutic relationship. – The provision of medical care or services, program care or services, or personal care services, in good faith, for and with personal knowledge of a person's disability and that person's disability-related need for a service animal or support animal by one of the following:

a. A physician or other medical professional.

b. A mental health service provider.

c. A nonmedical service agency or reliable third party who is in a position to know about the person's disability.

The term does not include an entity that issues a certificate, license, or similar document that purports to confirm, without conducting a meaningful assessment of a person's disability or a person's disability-related need for a service animal or support animal, that a person (i) has a disability or (ii) needs a service animal or support animal.

(b) Based, in part, upon a tenant, applicant, or household member's (i) status as a person with a disability or (ii) use of a service animal or a support animal, a landlord shall not do any of the following:

(1) Terminate or fail to renew a tenancy.

(2) Refuse to enter into a rental agreement.

(3) Impose different terms, conditions, or privileges in the rental of a dwelling.

(4) Otherwise make unavailable a dwelling unit or otherwise retaliate in the rental of a dwelling.

(c) A landlord may require that a person with a disability that is not observable or already known who is seeking reasonable accommodation under this section provide written verification from a health service professional of the following:

(1) The person is a person with a disability.

(2) A disability-related need exists for the person to use a service animal or support animal.

(3) The support animal assists the person in managing the person's disability.

A person with a disability that moves from another state may provide written verification from a health service professional licensed or certified in that state, if applicable.

(d) Any person who intentionally or knowingly does any of the following shall be liable to the landlord in a private action:

(1) Misrepresents to a landlord that the person is a person with a disability or that the person has a disability-related need for the use of a service animal or a support animal.

(2) Makes a materially false statement to a health service professional for the purpose of obtaining documentation or verification that the person has a disability-related need for the use of a service animal or a support animal.

(3) Provides a document or verification to a landlord that misrepresents that an animal is a service animal or a support animal.

(4) Fits an animal that is not a service animal or a support animal with an item that would cause a reasonable person to believe that the animal is a service animal or a support animal.

(5) Does any of the following as a health service professional:

a. Verifies a person's disability status and need for a service animal or a support animal without personal knowledge of the person's condition adequate to provide a reliable verification.

b. Charges a fee for providing a written verification for a person's disability status and need for a service animal or a support animal and provides no additional service to the person, unless the health service professional (i) has an ongoing relationship with a person with a disability or (ii) conducts a good-faith consultation with a person with a disability for the purpose of providing a diagnosis and treatment recommendation.

A landlord prevailing in a private action under this subsection shall be entitled to damages in an amount equal to the sum of any actual damages sustained by the landlord as a result of the acts or conduct. The court may also impose civil penalties in an amount not greater than one thousand dollars ($1,000) but not less than five hundred dollars ($500.00) for each violation described in this subsection.

(e) Nothing in this section shall prohibit a landlord from requiring that a person with a disability who uses a service animal or a support animal do the following:

(1) Comply with the terms of the rental agreement and other rules or regulations applicable to the dwelling unit on the same terms as other tenants.

(2) Pay for the cost of repairs that result from any damages to the dwelling unit that are caused by a service animal or a support animal in the same manner as a tenant who possesses an animal that is not a service animal or a support animal in a dwelling unit.

(3) Subject to applicable laws, sign an addendum or other agreement that sets forth the responsibilities of the owner of the service animal or support animal.

(f) Subject to any other federal, State, or local law, a landlord who permits a person with a disability to use a service animal or a support animal in a dwelling unit pursuant to this section shall not be liable for an injury to another person caused by a person's service animal or support animal."

SECTION 3. G.S. 42-53 reads as rewritten:

"**§ 42-53. Pet deposits.**

~~Notwithstanding the provisions of this section, the~~ With the exception of a service animal or support animal in accordance with G.S. 42-47, a landlord may charge a reasonable, nonrefundable fee for pets kept by the tenant on the premises."

SECTION 4. G.S. 42-46 reads as rewritten:

"**§ 42-46. Authorized fees, costs, and expenses.**

(a) Late Fee. – 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 calendar 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) Repealed by Session Laws 2009-279, s. 4, effective October 1, 2009, and applicable to leases entered into on or after that date.

…

(i) Out-of-Pocket Expenses and Litigation Costs. – In addition to the late fees referenced in subsections (a) and (b) of this section and the administrative fees of a landlord referenced in subsections (e) through (g) of this section, a landlord also is permitted to charge and recover from a tenant the following actual out-of-pocket expenses:

(1) Filing fees charged by the court.

(2) Costs for service of process pursuant to G.S. 1A-1, Rule 4 of the North Carolina Rules of Civil Procedure and G.S. 42-29.

(3) Reasonable attorneys' fees actually paid or owed, pursuant to a written lease, not to exceed fifteen percent (15%) of the amount owed by the tenant, or fifteen percent (15%) of the monthly rent stated in the lease if the eviction is based on a default other than the nonpayment of rent.

(4) Reasonable attorneys' fees actually paid or owed, pursuant to a written lease, not to exceed, for small claims hearings, fifteen percent (15%) of the amount owed by the tenant, or fifteen percent (15%) of the monthly rent stated in the lease if the eviction is based on a default other than the nonpayment of rent, and all actual reasonable attorneys' fees paid or owed for any appeals of summary ejectment matters.

…."

SECTION 5. Chapter 47C of the General Statutes is amended by adding a new section to read:

"**§ 47C-2-117.1A. Declaration amendments applicability.**

Amendments made to the declaration pursuant to G.S. 47C-2-117 shall only affect unit owners whose units are conveyed or transferred after the amendment takes effect. For amendments made while a unit owner owns a unit, the amendment has no effect until the unit is conveyed or transferred to another unit owner. A unit owner takes the unit subject to existing rules in the declaration at the time of conveyance or transfer of the unit."

SECTION 6. Chapter 47F of the General Statutes is amended by adding a new section to read:

"**§ 47F-2-117.1. Declaration amendments applicability.**

Amendments made to the declaration pursuant to G.S. 47F-2-117 shall only affect lot owners whose lots are conveyed or transferred after the amendment takes effect. For amendments made while a lot owner owns a lot, the amendment has no effect until the lot is conveyed or transferred to another lot owner. A lot owner takes the lot subject to existing rules in the declaration at the time of conveyance or transfer of the lot."

SECTION 7. Section 3 of this act becomes effective January 1, 2024, and applies to rental agreements or leases entered into on or after that date. Section 4 of this act is effective when it becomes law and is intended to apply retroactively to all pending controversies as of that date. The amendments contained in Section 4 of this act are intended to be clarifying of the General Assembly's intent under previous amendments to this statute. The remainder of this act is effective when it becomes law.

Issues with Assistance Animals in Summary Ejectment Cases

Both federal and state fair housing laws make it unlawful for a housing provider to refuse to make a reasonable accommodation that a person with a disability may need to have an equal opportunity to enjoy and use a dwelling. (42 U.S.C. 3601 et seq., G.S. Ch. 41A.) On January 28, 2020, HUD issued FHEO Notice: 2020-01, hereinafter "the Assistance Animal Notice," to provide guidance to housing providers as well as individuals with disabilities about how to assess a person's request to have an assistance animal as a reasonable accommodation under the Fair Housing Act (FHA). The Assistance Animal Notice was a response to the rising number of complaints concerning the denial of reasonable accommodations for assistance animals and concerns about individuals with disabilities wasting their money on so-called "certificates" for assistance animals sold by websites that are not providing health care services by legitimate, licensed health care professionals to the individuals.

To evaluate assistance animal cases, it is important to understand some definitions:

- Animals Commonly Kept in Households-dog, cat, small bird, rabbit, hamster, gerbil, other rodent, fish, turtle, or other small, domesticated animal that is traditionally kept in the home for pleasure rather than commercial purposes.
- Assistance Animal-service animals as defined by the Americans with Disabilities Act (ADA) or other animals that do work, perform tasks, provide assistance and/or provide therapeutic emotional support (commonly referred to as assistance or support animals).
- Disability (handicap)-physical or mental impairments that substantially limit at least one major life activity, a record of having such impairment, or being regarded as having such impairment.
- Housing-all types of "dwellings" that are designed or used as a residence, and any land or vacant property that is sold or leased as residential property, excluding owner-occupied residences of four units or fewer, owner-occupied boarding houses, and private clubs operating for commercial purposes.
- Major Life Activity-functions, including, but not limited to, caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, eating, sleeping, lifting, bending, standing, breathing, learning, reading, concentrating, thinking, communicating, and working. A major life activity also includes the operation of a major bodily function, including, but not limited to, functions of the immune system, normal cell growth, and digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.
- Reasonable Accommodation-a change in the rules, policies, or procedures of a housing provider that is needed by a person with a disability to fully use or enjoy the dwelling, including public or common areas.
- Unique Animals-reptiles (other than turtles), barnyard animals, monkeys, kangaroos, and other non-domesticated animals.

Magistrates will see this issue arise in the context of summary ejectment when a landlord files an action against a tenant for violating a lease condition that prohibits the tenant from having a pet. The legal requirement of the landlord to accommodate a tenant who has an obvious disability requiring assistance from a service animal or an assistance animal is less difficult than when the tenant does *not* have an obvious disability. For example, a blind person who is assisted by a service dog has an obvious disability, and it is a reasonable accommodation for the landlord to waive any pet-related policies to allow the

tenant to reside in the property with the service dog, unless there is evidence that the service dog poses a direct threat to the health or safety of others that cannot be eliminated or reduced to an acceptable level.

However, the case becomes more difficult when the tenant does not have a readily observable disability. The guidance from HUD in the Assistance Animal Notice attempts to help landlords distinguish between a person with a non-obvious disability who requires an assistance animal from a person without a disability that affects a major life activity who is trying to get around the landlord's pet policies. For example, a military veteran who suffers from PTSD may not have an observable disability, but she may rely on an assistance animal to provide therapeutic support so that she can carry out major life activities. If the veteran requests as a reasonable accommodation that she be allowed to keep her assistance animal on the property, the landlord will comply with the law by allowing her to do so and waiving any pet fees or deposits.

The Assistance Animal Notice sets out a "best practices" framework for landlords to use when assessing a person's request to have a service or assistance animal.

I. Service Animals under the ADA

1. Is the animal a dog? If the animal is not a dog, then it is not a service animal under the ADA, but it may be an assistance animal.
2. Is it readily apparent that the dog is trained to do work or perform tasks for the benefit of an individual with a disability? If the answer is "no," proceed to the next question. If the answer is "yes," then it is likely the housing provider should allow the service animal as a reasonable accommodation.
3. Is the animal required because of a disability? What work has the animal been trained to perform?

II. Assistance Animals Other Than Service Animals

4. Has the individual requested a reasonable accommodation to get or to keep an animal in connection with a physical or mental impairment or disability? If the individual has made the request, continue with the analysis. If the individual has not made a request, then the housing provider is not required to grant an accommodation without a request.

III. Criteria for Assessing Whether to Grant a Reasonable Accommodation

5. Does the person have an observable disability or does the housing provider (or their agent making the determination) already have information giving them reason to believe that the person has a disability? If the answer is "no," proceed to question #6. If the answer is "yes," go to question #7.
6. Has the person requesting the accommodation provided information that reasonably supports that the person seeking the accommodation has a disability? If the answer is "no," the housing provider must allow the individual a reasonable time to provide information to support that the individual has a disability before denying the request and does not have to grant the accommodation if the individual fails to provide documentation. If the answer is "yes," proceed to question #7.
7. Has the person requesting the accommodation provided information which reasonably supports that the animal does work, performs tasks, provides assistance, and/or provides therapeutic emotional support with respect to the individual's disability? If the answer is "no," the housing provider must allow the individual a reasonable time to provide

information to support that the animal assists the individual or provides therapeutic support before denying the request and does not have to grant the accommodation if the individual fails to provide documentation. If the answer is "yes," proceed to question #8.

IV. Type of Animal

8. Is the animal commonly kept in households? If the answer is "no" and the animal requested is a unique animal, the individual has a substantial (but not insurmountable) burden of showing a disability-related therapeutic need for this specific animal or this specific type of animal. If the answer is "yes," then a reasonable accommodation should be provided under the FHA, unless the housing provider can prove one of the following:
    a. the specific animal requested poses a direct threat to the health or safety of others that cannot be eliminated or reduced to an acceptable level, or
    b. the specific animal requested would cause substantial physical damages to the property, or
    c. the requested accommodation would be an undue financial and/or administrative burden, or
    d. the requested accommodation would fundamentally alter the nature of the provider's operations.

If the animal does not meet the definition of a service animal or an assistance animal, then the animal is a pet for purposes of the FHA and may be treated as such with regard to the landlord's rules, policies, fees, or deposits. While the tenant does have to show a disability-related need for the animal, there is no requirement that the tenant provide documentation of specific training or certification of an assistance animal. Since there is no requirement for documentation, the certificates and other paraphernalia sold online have no legal bearing on whether the tenant is entitled to a reasonable accommodation, making them a waste of the tenant's money. Animals that do meet the definition of either a service or an assistance animal are not pets, and it is a reasonable accommodation for the landlord to waive the "no pet" clause in a lease and associated fees. The tenant is still responsible for any damage, beyond normal wear and tear, done to the property by the animal but cannot be charged a "pet fee" or "pet deposit." A landlord cannot limit the breed or size of a dog used as a service or an assistance animal but can deny the accommodation if the landlord has specific instances of conduct by the requested animal that pose a direct threat or a fundamental alteration, as explained above. The limit cannot be based on speculation or stereotypes, but on the actual risk posed by the specific animal.

There are no magic words that a tenant must use when making a request for a reasonable accommodation, and the request can be oral or written. The request can be made either before or after the animal is acquired. The timing of the request can be when the tenant is applying for a tenancy or during the tenancy. The tenant may even make the request for a reasonable accommodation after the landlord has taken actions to terminate the lease, although the timing of such a request after the initiation of summary ejectment proceedings may create an inference of bad faith on the part of the tenant.

Understanding the framework set out in the Assistance Animal Notice can assist magistrates in analyzing whether a tenant can avoid summary ejectment because of the protections offered by the FHA. As stated earlier, this issue is likely to come up in a summary ejectment action for breach of a lease condition for the tenant's alleged violation of the lease's "no pet" clause. First, the magistrate must determine if the property at issue is covered by either the state or federal fair housing statutes. Most

rental housing will be covered, but both statutes exempt owner-occupied residences of four or fewer units, and the federal FHA also exempts single family homes rented by the owner without the use of a broker.

Second, to establish a *prima facie* defense of failure to provide reasonable accommodations under the FHA, the tenant must prove:

1. the tenant is disabled/handicapped within the meaning of the statute,
2. the landlord knew or should reasonably be expected to know of the disability,
3. the requested accommodation may be necessary to afford the disabled/handicapped person an equal opportunity to use and enjoy the dwelling,
4. the accommodation is reasonable, and
5. the landlord refused to make the requested accommodation.

See Dubois v. Association of Apartment Owners of 2987 Kalakaua, 453 F.3d 1175 (9th Cir. 2006).

The landlord may be able to rebut the tenant's claim either by:

1. offering evidence that the tenant is not disabled, or that the requested animal does not meet a disability-related need, or
2. demonstrating one of the following:
    a. the specific animal requested poses a direct threat to the health or safety of others that cannot be eliminated or reduced to an acceptable level, or
    b. the specific animal requested would cause substantial physical damages to the property, or
    c. the requested accommodation would be an undue financial and/or administrative burden, or
    d. the requested accommodation would fundamentally alter the nature of the provider's operations.

The defendant may also raise the defense of retaliatory eviction under G.S. 42-37.1(a) if the tenant argues the eviction is substantially in response to protected activities that took place within the 12 months prior to filing. Protected activities might include a complaint to a government agency, such as the North Carolina Human Rights Commission, regarding the landlord's denial of the tenant's request for a reasonable accommodation or the tenant's good faith attempt to exercise, secure, or enforce his/her rights existing under the state or federal FHA. This defense can apply more broadly to all actions for summary ejectment unlike the above scenario which just dealt with summary ejectment actions based on the tenant's breach of a lease condition.

However, G.S. 42-37.1(c) also provides a way for the landlord to rebut the affirmative defense of retaliatory eviction by showing:

(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.

The consequences of a landlord's failure to comply with federal and state fair housing laws can include actual damages, including pain and suffering, injunctive relief, civil penalties, punitive damages, and reasonable attorney's fees and costs. These types of damages can occur in civil actions filed for violations of the fair housing laws which are unlikely to come before a magistrate in small claims. A magistrate in small claims is much more likely to see the violation raised as a defense to summary ejectment. If the tenant is entitled to keep the assistance animal as a reasonable accommodation and the landlord has wrongfully denied the request, the landlord is not entitled to a judgment for possession based on breach of a lease condition. In actions for summary ejectment based on other grounds, the tenant may be able to successfully prove the affirmative defense of retaliatory eviction, and the landlord would not be entitled to a judgment for possession.