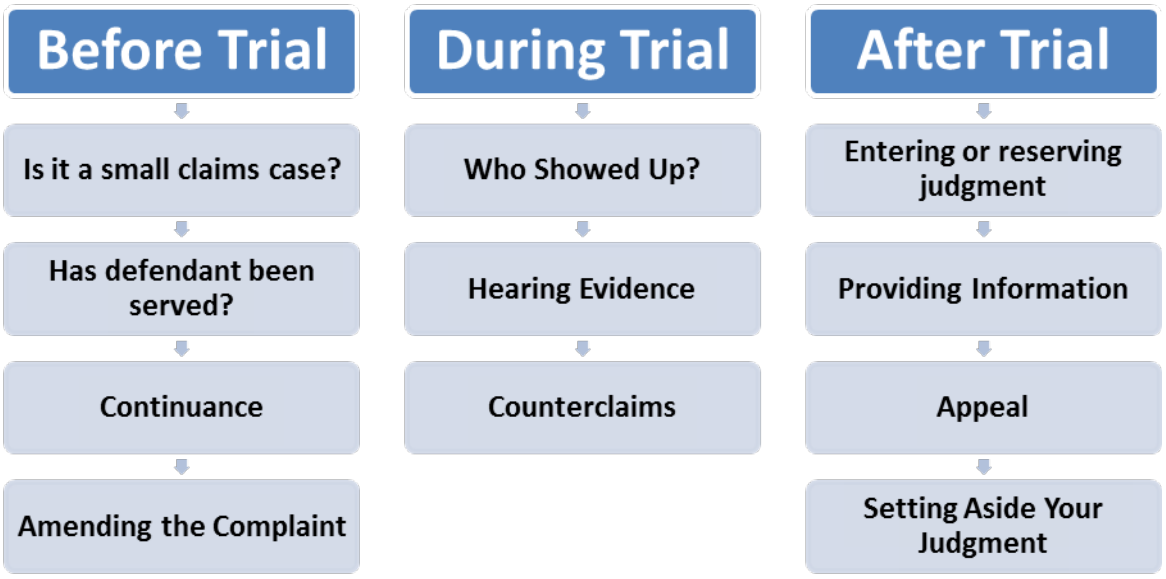
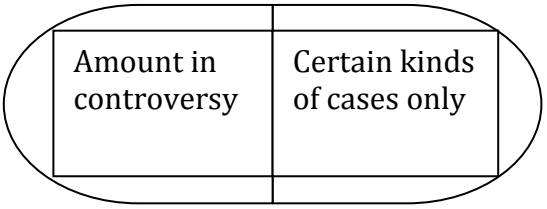
SMALL CLAIMS PROCEDURE I



IS IT A SMALL CLAIMS CASE?

The law authorizes **you** to decide

small claims cases



assigned by your **chief district court judge**.

The law authorizes your chief district court judge to assign a case to small claims court if it otherwise meets the definition of a small claims case and if at least one defendant lives in the county.

AMOUNT IN CONTROVERSY RULES

1. If the plaintiff is asking for money, the amount must be $_____ or less.

2. The amount in controversy is determined as of the time _____

   _____

3. The plaintiff must ask for _____ of the amount he's entitled to for this particular claim. In other words, _____.

4. If the plaintiff is asking for return of personal property, the amount in controversy is _____.

5. In summary ejectment actions in which the landlord is seeking only possession, the amount in controversy requirement _____.

EXERCISE: IS IT A SMALL CLAIMS ACTION?

1. The Credit Union has brought an action alleging that defendant defaulted on a loan agreement and asking that you issue an order authorizing the CU to recover the amount owed from the defendant's other accounts. Small claims action? _____

2. Joe's Garage is prepared to sell a car to recover money owed under a storage lien, but the defendant refuses to turn over the key to the vehicle, and Mercedes won't provide a new key to anyone but the title owner. Joe anticipates problems selling the vehicle without being able to start the car, and asks that you order either the defendant to turn over the key, or DMV to transfer title. Small claims action? _____

3. Landlord Larry filed an action for summary ejectment and back rent in the amount of $5000. By the time the case gets to trial, the amount of unpaid back rent has increased to $5700. Small claims action? _____

4. Carl Creditor filed an action on a promissory note, which required Danny Debtor to repay a $5000 loan along with $750 in interest. Carl points out the amount in controversy statute contains language specifying that the amount is to be determined "exclusive of interest." Small claims action? _____

5. Landlord Larry has filed an action in summary ejectment based on a rent-to-own contract providing that Barney Buyer would make monthly installment payments on a home, but if Barney misses a payment, the contract converts to a standard lease agreement and Larry will seek eviction based on failure to pay rent. Small claims action? _____

6. Graceful Greta tripped over an out-of-place lawnmower at Sears and has filed an action in your county against the store. Small claims action? _____

7. Nancy Newlywed and her husband Nick signed a contract to buy a lot of furniture from Happy Homes Furniture. Six months later, Nick's moved to Nebraska, and Happy Homes has filed an action against Nancy and Nick for the amount unpaid ($5000). Small claims action? _____

HAS DEFENDANT BEEN SERVED?

-Service (or a legal substitute) is required before a judge has authority to decide a case. [1]

-If the summons indicates the defendant was served, the presumption is that service was accomplished.

-If defendant files a motion before trial challenging personal jurisdiction, a district court judge must rule on that motion before the magistrate may proceed with the case.

-Service is not required if defendant makes a voluntary appearance, either by filing an answer or motion in the case, or if the defendant appears at trial.

-Special rule for service in summary ejectment actions: service by posting is sufficient to accomplish service of process allowing entry of judgment awarding possession only. Service by posting is NOT sufficient for award of money damages.

Problem: When you call a case for trial, you notice that defendant has not been served. Plaintiff is present in court, but defendant is not present. What should you do?

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[1] *For small claims cases filed on or after October 1, 2011, GS 7A-217 has been amended as follows:* "When the defendant is not under any legal disability, the defendant may be served by registered or certified mail, signature confirmation, or designated delivery service as provided in G.S. 1A–1, Rule 4(j). Proof of service is as provided in G.S. 1A–1, Rule 4(j2)." S.L. 2011-332 (S.B. 300).

Same facts, but defendant is present. What should you do?

CONTINUANCES

EXERCISE:

When a judge grants a continuance, s/he is agreeing that the trial will be delayed. Assume that the judge in each situation below acted correctly. What legal rules about continuances can you deduce?

Situation 1: The judge discovers a written motion in the shuck, signed by both parties, asking that the case be continued for 1 week so that the parties may attempt to negotiate a settlement. The judge allows the motion.

Rule: _____

Situation 2: Both parties appear in court and join in an oral motion asking that the court grant a one-week continuance so that they may attempt to reach a settlement. The judge allows the motion.

Rule: _____

Situation 3: One party files a written motion asking for a continuance because the demands of his business are too pressing for him to have time to come to court. The judge denies the motion.

Rule: _____

Situation 4: The defendant appears in court and agrees that he owes the plaintiff money. The defendant asks for a continuance, over the objection of the plaintiff, to allow him time to obtain the money he needs to pay. The judge denies the motion.

Rule: _____

Situation 5: The defendant appears in an action for money owed and explains that he was served with the action yesterday. He asks for a continuance to give him more time to get ready for trial. The judge allows the motion.

Rule: _____

Situation 6: The plaintiff in an action for money owed is surprised to learn that the court will not accept into evidence a letter from his mechanic containing an opinion about the work done by the defendant on the car, and asks for a continuance to bring his mechanic to court. Some judges allow the motion, while some don't.

Rule: _____

Situation 7: In an action for money owed, the defendant agrees to pay the plaintiff what he owes by next week, and the plaintiff asks that you continue the case to see if the defendant actually comes up with the money. Some judges allow the motion, while some don't.

Rule: _____

Situation 8: In a summary ejectment action held Wednesday morning, the magistrate notes that service by posting occurred yesterday. The defendant is not present in court. The magistrate continues the case to Friday on his own motion.

Rule: _____

Based on these examples, answer the following questions:

1. Does the law require that a motion for a continuance be made in writing? _____
2. If the parties agree to a continuance, is the judge required to grant it? _____
3. What are some good reasons for granting a continuance?

   _____
   _____
   _____
   _____

4. What are some bad reasons for granting a continuance?

   _____
   _____
   _____

RULE: A CONTINUANCE MAY BE GRANTED ON REQUEST OF A PARTY OR UPON THE JUDGE'S OWN MOTION. EXCEPT FOR THE RARE CASE IN WHICH A CONTINUANCE IS

MANDATORY, IT SHOULD BE GRANTED ONLY FOR GOOD CAUSE SHOWN. WHETHER GOOD CAUSE EXISTS LIES WITHIN THE SOUND DISCRETION OF THE JUDGE.

NOTE: In 2009 the General Assembly amended the law governing small claims procedure to establish a minimum time period between the time a defendant is served and the time of trial. Two different rules apply, depending upon whether the action is for summary ejectment or for another remedy. Because the amendment became effective after Brannon's book, Small Claims Law, was published, the book is not up-to-date in this one regard. For a memo explaining the amendments and recommending specific applications of the new law depending upon various factual circumstances, see the Appendix section at the end of this handout. While the issue is somewhat complicated, the basic rules established by the new laws are:

New Law

In a summary ejectment action, summons must be served at least two days prior to trial, excluding legal holidays.
In an action seeking a remedy other than summary ejectment, a continuance is mandatory if service of process occurred less than five days before trial.

APPENDIX: SERVICE OF CIVIL PROCESS: 2009 LEGISLATION

The 2009 General Assembly enacted into law two bills governing service of process in small claims cases, each of them in apparent response to the fact that defendants in these cases sometimes have little time to prepare for trial.

SERVICE OF PROCESS IN SUMMARY EJECTMENT ACTIONS

The first new law, SL 2009-246, amends GS 42-29, governing service of summons in summary ejectment actions. As many of you know, small claims procedure in these cases is geared toward minimizing the time a landlord must wait for trial on the landlord's claim for possession of rental property. Existing law requires a law enforcement officer who receives a summons for service to mail a copy of the summons and complaint to the tenant "no later than the end of the next business day or as soon as practicable." GS 42-29 goes on to state that the office may attempt to telephone the defendant within five days after summons is issued, to arrange for service. In cases in which tenants are not served in this manner, the law requires the officer—before the end of this five-day period-- to go to the defendant's home to attempt service. S.L. 2009-246 adds to this provision a requirement that the officer's visit occur at least two days prior to trial (excluding legal holidays). If service is not accomplished at the time the officer visits, existing law directs the officer to "affix copies to some conspicuous part of the premises claimed" (service by posting).

This law imposes a requirement on law enforcement officers charged with serving civil process, rather than on magistrates who hear small claims cases. Further, the new law does not address the consequences of non-compliance. As a result, questions have arisen about what *a magistrate* should do when a summary ejectment action appears on the small claims docket and the defendant was served less than two days before trial. The question may come up in any of several contexts. First, the magistrate may call the case and learn that both parties are present in court. Because the General Assembly's intention was to provide tenants with additional time to prepare for trial, it is clear that the magistrate must grant the defendant's request for a continuance, for at least as long as necessary to allow for two days notice. The law provides that in calculating time periods, the first day is not to be counted. Accordingly, if the defendant is served on Monday, the magistrate must grant a defendant's request for a continuance if the trial is held on Tuesday. The case may be heard, however, on Wednesday (two days after service), and a magistrate may choose to grant an even longer continuance if that seems appropriate.

A second question arises on these facts if the tenant does not request a continuance (which is likely to happen in cases in which the tenant is unaware of the new two-day rule). The answer to this question is not specified in the statute. In light of clearly expressed legislative intent, however, the magistrate should, at a minimum, inform the defendant that she or he is entitled to two days notice before being forced to appear in court and defend against

the lawsuit. If the tenant expresses a clear affirmative desire to proceed with the hearing, a magistrate may consider that as a valid waiver of the tenant's rights and hear the case that day. In the absence of a knowing waiver, however, I do not believe the magistrate should hear the case, given clear legislative intent to the contrary. If a magistrate hears the case that day after finding waiver by the defendant, the best practice would be to note the waiver in the judgment. By doing this, the magistrate will preserve for the record the fact that the tenant's right to minimum notice was observed.

The next question arises when the plaintiff is present in court, but the defendant is not. If service was made sooner than two days prior to trial, my opinion is that the magistrate should continue the case on the magistrate's own motion. Given that the purpose of the amendment is to allow adequate time for a defendant to receive notice of an upcoming trial, it is of particular concern that the defendant may not appear for trial *because* of inadequate notice. This is particularly true in cases in which service is accomplished in some substituted manner, such as by handing a copy to defendant's spouse or by posting. In these cases, there is a real possibility that defendant may be completely unaware that a trial is scheduled. Even when service is made directly on defendant, however, the notice may have been inadequate to permit the defendant to arrange to attend court the next morning. Magistrates may want to confer with their clerks about the mechanism for notifying both the clerk's office and the parties when a case is continued for this reason.

A harder question arises when neither party appears for trial. In the typical case, of course, a magistrate dismisses the plaintiff's lawsuit with prejudice for failure to prosecute. But what if the plaintiff has called to inquire about service and has been informed that service was accomplished later than was required by law? A plaintiff might decide that an appearance is unnecessary because the trial is certain to be postponed. One might argue that in this situation the plaintiff had no intention of "failing to prosecute." On the other hand, the justice system has long taken the position that when a case is scheduled for trial, a plaintiff must either appear for trial or seek a continuance. A plaintiff who does neither has no legal right to object if the case is dismissed. (And if a defendant does appear and waives the right to a continuance, a magistrate should strongly consider dismissing the action with prejudice, given the effort the defendant has made to comply with the demands of the summons.) Absent legislative or appellate court guidance, a magistrate is left to consult with colleagues and perhaps the chief district court judge about how such cases should be handled.

SERVICE OF PROCESS IN NON-SUMMARY EJECTMENT SMALL CLAIMS CASES

The second legislative amendment related to service of process in small claims cases also raises questions. S.L. 2009-629 amends GS 7A-214, the statue governing the time within which a small claims action must be heard. That statute provides that small claims actions are to be scheduled for trial no later than 30 days after the complaint is filed. The new law inserts a sentence stating that the magistrate "shall order a continuance" in small claims actions other than summary ejectment actions when service is accomplished less than five days before trial. GS 7A-214 goes on to say that the time set for trial may be changed if all parties agree. The statute concludes with the familiar sentence authorizing a magistrate to grant continuances "for good cause shown."

Again, legislative concern that defendants have adequate time in which to prepare for trial is apparent in this amendment. The law prior to amendment allowed a defendant to be served on Monday afternoon and the trial to be held at 9:00 AM on Tuesday. In this situation, the defendant was left to hope that the plaintiff would agree to a continuance or, failing that, that the magistrate might find such short notice "good cause" for a continuance. In fact, many magistrates might have reasoned that no good cause existed as a matter of law, given that all statutory time limits and procedural rules had been observed. With this background, the General Assembly's desire to guarantee defendants at least five days notice is certainly understandable. The new time limit is consistent with the existing rule applicable to motions filed in district and superior court: GS 1A-1, Rule 6(d) requires that in all such motions, the other party must be given at least 5 days notice before the matter is heard.

The questions that arise with this law relate to the mandatory aspect of the statutory language. When both parties appear for trial and the defendant seeks a continuance, the way is clear: a magistrate is required to grant a continuance. The same is true if the plaintiff appears and the defendant does not; again, the defendant's very absence tends to support the concern that she or he may not have received adequate notice that a trial date was looming. The mandatory language of the statute makes clear that the defendant is not required to ask for a continuance—the "default setting," so to speak, is a continuance whenever the defendant has not received the required notice. The statute does not indicate how long the continuance should be, but the underlying legislative intent suggests that the continuance should be long enough to allow the defendant at least five days to prepare for trial.

As we discussed in reference to the new law applicable to summary ejectment actions, a more challenging legal question is presented by the situation in which the defendant appears and asks to waive his or her statutory right to a continuance. It is common for parties to a lawsuit to waive various rights in the course of trial, and there is generally no obstacle to them doing so, provided that the waiver is made knowingly. It is easy to imagine that many defendants, aware that they have no defense to the plaintiff's claims, might wish to dispose of the case quickly, rather than be forced to travel twice to the courthouse. Indeed, it is difficult to imagine a good reason for denying defendants the right to make this choice. This question is made difficult only by the mandatory language of the statute: "the magistrate shall order a continuance." When one considers the absurdity of ordering a continuance in the face of objections from--and to the detriment of--both parties, however, it seems reasonable to read this language as requiring a continuance unless waived by the defendant. The same reasoning arguably applies to the situation in which the plaintiff fails to appear and the defendant appears. Because the right to a continuance—and the ability to waive that right—belongs to the defendant, it seems entirely justified to expect plaintiffs to either attend court or risk losing their case in the event the defendant appears and waives continuance.

Once again, the most perplexing aspect of the new law is presented when neither party appears. Should the magistrate dismiss the action with prejudice based on plaintiff's failure to prosecute? On the one hand, it makes little sense to continue a case out of concern for a defendant having adequate time to prepare when the result without the protective amendment would be to dismiss the action entirely—a result likely to be welcomed even more enthusiastically by defendants. On the other hand, the statutory language is mandatory, and the defendant is not present to make a knowing waiver of his or her right to a continuance. It seems likely that different counties—and different magistrates—will adopt different policies about the proper way to handle this situation. Whatever the policy, though, it should be one

that is applied consistently, so that all parties are able to make decisions about their actions based on legal consequences that are predictable.

COUNTING TIME

A final issue raised by both new laws concerns calculating time. GS 1A-1, Rule 6, sets out the general rule for calculating time in civil matters. That provision states that the first day of the time period is not included, and the last day is included (unless it is a Saturday, Sunday, or legal holiday, in which case the time period runs over to the next day when the courthouse is open and doing business). **In cases in which the time period is less than seven days,** however, Saturdays, Sundays, and legal holidays are not included. The result is that small claims actions, other than those for summary ejectment, may be heard no earlier than one week after service of process (i.e., if service is accomplished on Monday, the case may be heard no sooner than the following Monday). The new law applicable to summary ejectment actions specifically requires that service be accomplished "at least two days prior to the day the defendant is required to appear to answer the complaint, excluding legal holidays." Previous versions of the bill had excluded "weekends and legal holidays", but the reference to "weekends" was deleted from the final bill. The result is an exception to the general rule set out in GS 1A-1, Rule 6, with weekend days counted toward satisfaction of the two-day requirement. Consequently, service on Friday would allow a case to be heard on Monday, since Monday is the third day following service.

CAVEAT AND SUMMARY

As we have seen, the proper application of these two amendments is unclear in some situations and likely to remain so until further guidance is provided by the General Assembly and/or the appellate courts. This memo has attempted to set out a rationale in support of one possible resolution of these issues, but whether the appellate courts will answer the questions addressed in the manner as the author necessarily remains uncertain. For purposes of clarity and ease of reference, the author's recommendations are summarized below, but magistrates are as always reminded that the suggestions herein are just that—suggestions—and should not be regarded as dispositive of the questions addressed.

Obviously, the language of the two amendments is not identical, and thus the legal issues presented are somewhat different. Nevertheless, the author's suggestions about how to dispose of cases in which inadequate notice is present are the same, and are as follows:
If both parties appear, the magistrate should continue the case unless the defendant makes a knowing waiver.
If only the plaintiff appears, the magistrate should continue the case.
If only the defendant appears, the magistrate should continue the case unless the defendant makes a knowing waiver. If the defendant waives the right to a continuance, the case should be dismissed for failure to prosecute.
If neither party appears, the author makes no recommendation other than to suggest that the magistrates in each county discuss the question and adopt a consistent policy for responding to these cases.

If you have questions or concerns or would like to discuss the contents of this memo further, please don't hesitate to call or email me:

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