CONSUMER DEBT COLLECTION DEFENSE: OVERVIEW

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I. Initial Case Review

A. Who is the Plaintiff?

- **Original creditor**: In general, original creditors are more likely to have documentation of some sort of agreement with the consumer and of the consumer’s liability under the agreement. They are also less likely to bring actions on stale or time-barred claims.

- **Assignee**: In general, Plaintiffs claiming to be assignees of debts are less likely to have documentation to support the existence of a valid debt. They may also have difficulty proving ownership of the right to bring an action on the debt. There are special state regulations governing assignees who fall under the statutory definition of a “debt buyer,” as discussed further below.

Counterclaims that the consumer had against the original creditor are usually only available against an assignee to the extent that they set off the amounts claimed. Under N.C.G.S. § 1-57, a defendant may assert against the assignee plaintiff any defense or setoff that was in existence on or before the date of assignment.¹ Overton v. Tarkington, 249 N.C. 340, 106 S.E.2d 717 (1959).

Similarly, in an action on a debt arising from a consumer credit sale, a consumer can bring against an assignee any claims or defenses applicable to the original seller, up to the value of the amounts the consumer has paid under the contract. N.C.G.S. § 25A-25. The state law mirrors the so-called “FTC Holder Rule” for consumer credit sales codified at 16 C.F.R. § 433.2.

B. Who is the Consumer?

- **Contractual or implied contractual debtor**: Has signed or ratified the terms of a contract or has engaged in conduct that may imply liability in quantum meruit.

- **Co-signor**: Usually has same liability as the contractual debtor.

¹ The setoffs and defenses do not apply, however, to assignee of “a negotiable promissory note or bill of exchange, transferred in good faith, upon good consideration, and before maturity.” N.C.G.S. § 1-57.
A common scenario is a co-signor on a spouse’s debt where the spouses have since divorced, with a divorce settlement requiring the other spouse to pay the debt. The other spouse fails to do so, however, and the co-signor is left facing liability. The divorce settlement is not a defense, unfortunately. It means only that the co-signor can move to bring in the other spouse as a necessary party or third-party defendant, or can seek to move for enforcement of the obligation to pay in the divorce action.

Also common is the situation where the co-signor consumer is an elderly relative. Look for signs of fraud in the inducement, duress, undue influence, or lack of capacity on the part of the co-signor.

- **Identity theft victim**: Some collection defendants are victims of identity theft or credit card theft. The Truth in Lending Act at 15 U.S.C. § 1643 limits a cardholder’s liability for unauthorized use of a credit card to fifty dollars ($50) or less.

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

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

**II. Special Rules Governing Debt Buyers**

North Carolina was the first state in the nation to enact legislation to protect consumers against the abusive practices of debt buyers. The Prohibited Practices by Collection Agencies at N.C.G.S. Chapter 58, Article 70, governs debt collection agencies operating in North Carolina. As of October 1, 2009, this Chapter also governs the activities of “debt buyers” operating in the state.

A. **Who is a “debt buyer”?** N.C.G.S. § 58-70-15(b)(4) categorizes a “debt buyer” as a type of collection agency, meaning that it must comply with the same regulations as collection agencies under Chapter 58:

> **A “debt buyer.”** As used in this subdivision, the term "debt buyer" means a person or entity that is engaged in the business of purchasing delinquent or charged-off consumer loans or consumer credit accounts, or other delinquent consumer debt for collection purposes, whether it collects the debt itself or hires a third party for collection or an attorney-at-law for litigation in order to collect such debt.
Examples of some debt buyers currently filing lawsuits in North Carolina courts are Portfolio Recovery Associates, LLC; Main Street Acquisitions Corp.; Gemini Capital Group, LLC; Credigy Receivables, Inc.; and Unifund CCR Partners

B. Why Do We Care about the Conduct of Debt Buyers?


Case law documents instances where junk debt buyers have sued North Carolinians who merely had a similar name as the actual debtor on the account. See, e.g., Johnson v. Bullhead Investments, LLC, No. 1:09-CV-639, 2010 U.S. Dist. LEXIS 2382 (M.D.N.C. Jan. 11, 2010)). Debt buyers have also sued persons who were the victims of identity theft on identity theft accounts. See Credigy Receivables, Inc. v. Whittington, 202 N.C. App. 646, 654, 689 S.E.2d 889, 895 (2010)).

Such wrongful lawsuits occur because debt buyers purchase accounts for pennies on the dollar, often with little or no documentation of actual amounts owed, the terms of account agreements, or meaningful identification of account holders: “The problems resulting from this overall lack of proof or accuracy are myriad, leading to thousands of dubious judgments entered by default.” Peter Holland, “Defending Junk Debt Buyer Lawsuits,” Clearinghouse Review, Vol. 46, No. 1-2, May-June 2012.

C. Pre-Suit Notice Requirement for Debt Buyers: The Prohibited Practices by Collection Agencies at N.C.G.S. § 58-70-115 provides the following with respect to complaints filed by debt buyers to collection of debts from consumers:


No collection agency shall collect or attempt to collect any debt by use of any unfair practices. Such practices include, but are not limited to, the following:

[...]

(6) When the collection agency is a debt buyer or acting on behalf of a debt buyer, bringing suit or initiating an arbitration proceeding against the debtor to collect on a debt without first giving the debtor written notice of the intent to file a legal action at least 30 days in advance of filing. The written notice shall include the name, address, and telephone number of the debt buyer, the name of the original creditor and the debtor’s original account number, a copy of the contract or other document evidencing the
consumer debt, and an itemized accounting of all amounts claimed to be owed.

This means that, at least with respect to an account that an original creditor has sold to a debt buyer, the consumer should receive some advance notice of the intended lawsuit, together with a preview of the debt buyer’s evidence. This gives the consumer the opportunity to contact the debt buyer and dispute misinformation and, perhaps, forestall a wrongful collection suit.

D. **Complaint Requirements for Debt Buyers:** Unfortunately, many consumers may not receive the required pre-suit notice or may mistake it for just another collection letter on an account that they do not believe they owe. Therefore, the PPCA also subjects debt buyers to heightened pleading requirements. N.C.G.S. § 58-70-150.

This standard addresses the public policy concern that a debt buyer should show prior to obtaining a default judgment that it is the rightful owner of the account in question and that the amount claimed due is accurate in terms of actual charges incurred, as well as late fees, overlimit fees, interest accrued, attorney’s fees owed, and the like.

Under the PPCA, a debt buyer must attach certain materials to any complaint that it files:

1. A copy of the contract or other writing evidencing the original debt, which must contain a **signature of the defendant.** If a claim is based on credit card debt and no such signed writing evidencing the original debt ever **existed,** then copies of documents generated when the credit card was actually used must be attached.

2. A copy of the assignment or other writing establishing that the plaintiff is the owner of the debt. If the debt has been assigned more than once, then each assignment or other writing evidencing transfer of ownership must be attached to establish an unbroken chain of ownership. Each assignment or other writing evidencing transfer of ownership must contain the original account number of the debt purchased and must clearly show the debtor’s name associated with that account number.

N.C.G.S. § 58-70-150(1)(2013) (emphasis added). These pleading standards are similar to the heightened standards required in other specialized types of lawsuits, such as N.C. R. Civ. P. 9(j), which governs standards for complaints in medical malpractice actions, or by N.C.G.S. § 45-21.16, which sets forth requirements for foreclosure filings under power of sale. In each situation, the legislature has determined that public policy demands that a plaintiff provide information beyond normal notice pleading.
Carefully review each debt buyer complaint to ensure it complies with the statute. If there is a document with the consumer’s signature attached, is it really a document “evidencing the original debt”? If there is no such document, does the complaint contain an allegation that no signed writing evidencing the original debt ever existed?

An example of a document generated “when” a credit card is “actually used” would be the charge slip generated by the merchant at the point of sale and signed by the card user at the point of sale. These indications of assent to actual transaction charges are significant. A customer’s signature on a charge slip is persuasive evidence that a charge transaction occurred on the identified account with the original creditor, and that the consumer defendant the junk debt buyer now sues did, in fact, effect a transaction on the subject credit card account.

While there is no case law on this point, monthly credit card statements are clearly not sufficient to satisfy this requirement. Such statements are merely indications of what the original creditor believed to have been the usage and charges accrued on the account for a name and an address. They are not documents or records authenticated by the consumer’s signature or other mark of assent.

Review the “chain of ownership” information closely. Who are the sellers and buyers on each bill of sale? Do they match up to the allegations in the complaint and to the plaintiff’s documentation of the contract and/or documents generated when the card was actually used?

For example, it is common to see a debt buyer complaint allege that the predecessor in interest was “HSBC,” while the attached bill of sale documents reference “HSBC Card Services” or “HSBC Bank Nevada, N.A.” “HSBC” is a trademark, not an actual company, and “HSBC Card Services” is a credit card servicing entity, not an issuer of credit cards. If the identities of the supposed predecessors in interest do not match up between the complaint and the supporting documents, or if the alleged predecessor in interest does not appear to have ever been an existing entity, then the purported chain of ownership documentation is defective.

If a debt buyer does not attach materials that comply with the statute to the complaint, then the complaint probably does not state a claim upon which relief may be granted, and a Rule 12(b)(6) motion would be appropriate.

E. Summary Judgment Requirements for Debt Buyers: N.C.G.S. § 58-70-155 requires that a debt buyer provide “evidence with the court to establish the amount and nature of the debt” in order to obtain a default judgment or summary judgment. This evidence must be in the form of “authenticated business records” including all of the following items:

- Original account number
• Original creditor’s name
• Amount of original debt
• Itemization of fees and charges
• Original charge-off balance (or, if no charge-off, an explanation of how the balance was calculated
• Itemization of post-charge off additions
• Date of last payment
• Amount of interest claimed and basis for interest charged.

Carefully scrutinize any business records that the Plaintiff attempts to introduce into evidence. Do they meet the stringent requirements of N.C. R. Evid. 803(6) for admission into evidence as a hearsay exception?

The Rule requires that a person who is a “custodian or other qualified witness” testify that such a record was “made at or near the time” of the event documented; that it was “kept in the course of regularly conducted business activity”; and that it was produced as a consequence of “the regular practice of that business activity” to make such a record. See id. Furthermore, the record may not be entered into evidence if “the source of information or the method or circumstances of preparation indicate lack of trustworthiness.”

By way of example, if the plaintiff is a debt buyer, it should not be allowed to use testimony of the debt buyer’s own custodian of records to introduce the records of the original creditor.

Under North Carolina law, an affidavit must be made on personal knowledge and show affirmatively that the affiant is competent to testify to the matters stated therein. Unifund CCR Partners v. Dover, 198 N.C. App. 406, 681 S.E.2d 565, 2009 N.C. App. LEXIS 1055 (July 21, 2009) (attached to Defendant’s Motion to Dismiss as Exhibit “B”). In Unifund, a junk debt buyer attempted to use its own employee’s affidavit to verify an invoice regarding an alleged debt. The North Carolina Court of Appeals noted: “There is no evidence that the affiant was in any way connected to the establishment or maintenance of the alleged credit card account with [the bank] or the alleged acquisition of the account by Plaintiff from [the bank] […] Accordingly, there is no showing of the affiant's competency to testify to anything further than Plaintiff’s acquisition of accounts from [the bank], as noted by the bill of sale.” Id. at * 9.


III. Defenses and Counterclaims in Collection Lawsuits

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

Under N.C. R. Civ. P. 4(e), if the Defendant is not properly served within 90 days of issuance or endorsement of the Summons, and the Plaintiff fails to get an extension or alias and pluries summons within the 90 days, the action is discontinued. A new summons may be issued, but the action will be deemed to have commenced as of the date of the issuance of the new summons. *Dozier v. Crandall*, 105 N.C. App. 74, 411 S.E.2d 635, *disc. rev. denied as improvidently allowed*, 332 N.C. 480, 420 S.E.2d 826 (1992). In some cases, the statute of limitations will have run before the new summons is issued, and the consumer will thereupon have a complete defense to the action.

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

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

• **Division:** Under N.C.G.S. § 7A-243, the proper division is generally determined by amount in controversy. Superior Court is the proper division for cases involving amounts greater than $10,000 (not including interest and costs). See id.

Small claims actions are limited to amounts of $5,000 or less, and objections to the small claims venue are permitted under N.C.G.S. § 7A-221.

• **Standing/Real Party in Interest:** Under N.C. R. Civ. P. 17, every claim must be brought in the name of a real party in interest. Upon the filing of a motion to dismiss under this Rule, N.C. R. Civ. P. 17(a) provides “a reasonable time” for the Plaintiff to rectify the situation, either by getting the ratification of an existing entity that claims to be a real party in interest, or by joining or substituting such

You should always question whether a debt buyer plaintiff is truly an assignee of the original creditor. When a plaintiff is able to prove its status as an
assignee, review the assignment documents closely to determine whether the debt buyer has the right to all of the relief prayed for in its complaint. A debt buyer who has purchased the right to “accounts receivable” (money owed) may not have purchased contract rights (the right to future accrual of interest, for example).

Additionally, just as mortgage loans are securitized and pooled in mortgage trusts, many consumer credit card receivables are also securitized and pooled in trusts. There is no case law in North Carolina regarding the right of a credit card’s original issuer to bring a collection action after securitization of the credit card receivable. Nevertheless, where a collection suit is brought by a credit card issuer, then you may want to question whether the issuer is a real party in interest, whether the trust that holds the receivable is a necessary party, and the like.

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

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

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

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

**B. Standard Contract Defenses:**

- **Payment:** Consumer has record of debt payoff, such as a canceled check or a letter confirming payoff.

- **Accord and Satisfaction:** Consumer has record of debt settlement, such as a settlement offer letter, a canceled check that meets the terms of the settlement offer, and/or a letter confirming settlement payoff.

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

- **Discharge in Bankruptcy:** Consumer has documentation of a bankruptcy filing which included the debt and of obtaining a discharge in that bankruptcy.
• **Fraud:** Fraud in the inducement renders a contract void. See *Clifford v. River Bend Plantation, Inc.*, 312 N.C. 460, 464, 323 S.E.2d 23, 25 (1984). Fraud in the factum also renders a contract void. See *Creasman v. First Federal Savings & Loan Assoc.*, 279 N.C. 361, 369, 183 S.E.2d 115, 120 (1971). Be particularly vigilant about both types of fraud when the consumer is an elderly person who has allegedly co-signed on a debt for someone else.

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

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

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

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

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

The standard mental capacity needed to contract is that a person “knows what he is about ...” The measure of capacity is the ability to understand the nature
of the act in which he is engaged and its scope and effect, or its nature and consequences ...” Sprinkle v. Wellborn, 140 N.C. 163, 181, 52 S.E. 666, ___ (1905). Where a court has not previously adjudicated a person incompetent, he has the burden of proof as to whether he was mentally ill when he entered into the contract he seeks to avoid. Ridings v. Ridings, 55 N.C. App. 630, 286 S.E.2d 614, disc. rev. denied, 305 N.C. 586, 292 S.E.2d 571 (1982). The burden then shifts to the Plaintiff to show, among other things, that it had no knowledge of the incapacity and did not take advantage of the consumer. See Chesson.

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

Affidavits of account are not necessarily accurate as to amounts owed. Of late, the news has been full of stories about “robo-signing” of affidavits, including in the context of credit card debts. See, e.g., Jeff Horwitz, “OCC Probing JP Morgan Chase Credit Card Collections,” American Banker, March 12, 2012. Accessed at http://www.americanbanker.com/issues/177_49/chase-credit-cards-collections-occ-probe-linda-almonte-1047437-1.html?zkPrintable=true on September 27, 2012. A collection defendant may serve discovery regarding the identities and job roles and duties of the affiants and notaries of any affidavit plaintiff proposes to submit in support of its case to determine if the account review to which the affiant has sworn was accurate and if the notarization of the affidavit was proper.

For example, the volume of accounts and affidavits reviewed each day by the affiant may be relevant information, as well as specifics as to what documentation the affiant reviewed in making his or her determination as to the identity of the consumer debtor, that the account is in default, and the amounts owed.

**C. Counterclaims.**

- **Declaratory Judgment Counterclaim under N.C.G.S. 1-253 et seq.:** Both credit agreements and assignments of credit agreements are types of contracts. Section 1-254 of the Declaratory Judgment Act provides that “Any person […] whose rights, status or other legal relations are affected by a […] contract may have determined any question of construction or validity arising under the […] contract […] and obtain a declaration of rights, status, or other legal relations thereunder.” In addition, the Court of Appeals has stated that a trial court “certainly may determine the validity and enforceability of a contract under the Declaratory Judgment Act. To interpret this Act otherwise would

Plaintiff creditor may move to strike the declaratory judgment counterclaim or have it dismissed under Rule 12(b)(6). Under Elliott v. Ballentine, however, a declaratory judgment action is appropriate in any case where there are “genuine controversies” between adverse parties as to “rights, status, or other legal relations.” 7 N.C.App. 682, 685, 173 S.E.2d 552, 554 (1970). If a debt is appearing on the consumer’s credit report, for example, and the consumer disputes liability for the debt or the amount of the debt, then a counterclaim for declaratory judgment as to the status or amount of the debt should be appropriate.

  
  o Applies to “debt collectors” collecting on “debts” from “consumers.”
    
    ▪ Consumer: Any natural person obligated or allegedly obligated to pay on a debt (15 U.S.C. § 1692a(3)).
    
    ▪ Debt: Any obligation or alleged obligation of a consumer to pay money related to transactions for personal, family, or household purposes (15 U.S.C. § 1692a(5)).
    
    ▪ Debt collector: May be a collection agency or a debt buyer who purchased an account in default, but not an original creditor (15 U.S.C. § 1692a(6)).

  o Prohibitions:
    
    ▪ Of key interest are prohibitions against repetitive phone calls and phone calls to place of employment, prohibitions against publicizing information about debts to third parties, and the right to ask the collector to cease and desist communication (15 U.S.C. § 1692c(a)-(c)).
    
- The law also requires that debt collectors disclose certain information to consumers upon initial contact, and validate disputed debts upon request (15 U.S.C. § 1692g).

  o Remedies:

    ▪ Up to $1,000 in statutory damages (15 U.S.C. § 1692k(a)(2)(A)).
    ▪ Actual damages, including emotional distress damages (15 U.S.C. § 1692k(a)(1)).
    ▪ Attorney’s fees (15 U.S.C. § 1692k(a)(3)).

- **State unfair debt collection statutes (PPCA/PADC)**

  o N.C.G.S. § 58-70-90, et seq. governs actions of collection agencies and junk debt buyers.

    ▪ Applies to collection of debts from “consumers,” who may be natural persons, entities, or groups of people (N.C.G.S. § 58-70-90(2)). This is broader than the plaintiff pool for FDCPA. Also, there is no restriction that the debts have arisen from personal, family or household purposes, so business debts are included.
    ▪ Prohibitions are similar to those in the FDCPA.
    ▪ Counterclaims are available if a debt buyer does not comply with the pleading requirements for complaints and summary judgment motions discussed hereinabove. N.C.G.S. § 58-70-115(5) also makes clear that any debt buyer taking any collection action, including filing a lawsuit, must have “an itemized accounting of the amount being owed, including all fees and charges.” Again, while there is no case law on this point, to be useful, logically, this itemization should go back to the last point that the account was at a zero balance.

  o N.C.G.S. § 75-50, et seq. governs actions of original creditors.

    ▪ Applies only to collection of debts from consumers, meaning natural persons who have incurred debts or alleged debts for “personal, family, household, or agricultural purposes.” (N.C.G.S. § 75-50(1)).
    ▪ Prohibitions are similar to those in the FDCPA.

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

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

• Attorney’s fees upon showing that Defendant “has willfully engaged in the act or practice, and there was an unwarranted refusal by such party to fully resolve the matter” (N.C.G.S. § 75-16.1).

• **Fair Credit Reporting Act (15 U.S.C. 1681, et seq.):** Counterclaims under this federal statute are seen where a consumer has disputed wrongful credit reporting by the creditor or junk debt buyer, which has in turn wrongfully verified that the incorrect information is correct to the credit bureau.

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

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

• **Violation of Public Records laws (N.C.G.S. § 132-1.10(d) and (h)):** The Public Records Act at N.C.G.S. § 132-1.10(d) prohibits the filing of unredacted entire credit card numbers, Social Security numbers, driver’s license numbers, and the like in the public record. As with other such prohibitions, the purpose of this provision of the Act appears to be to prevent identity theft. Unfortunately, plaintiffs in collection actions routinely ignore this statute and file complaints containing information or exhibits that contain unredacted personal information.

A defendant may move to strike or redact pleadings in such a circumstance. The Court in granting such a motion can also order the offending plaintiff to pay a fine of up to $500 for violation of the Act.

In such a circumstance, a defendant may also make counterclaims for damages under the North Carolina Identity Theft Protection Act, N.C.G.S. § 75-62 and § 75-66.

• **Breach of settlement agreement:** This counterclaim may be seen in conjunction with the defenses of payment or of accord and satisfaction and is appropriate where the consumer alleges fulfillment of the terms of an offer to settle the debt that is the subject of the lawsuit.
D. Special Topic: Car Repo Deficiency Cases. A creditor who repossesses a vehicle, and then re-sells it, has the right to bring an action against the consumer for any amount remaining on the debt (the “deficiency” amount) after the sale.

- **UCC Counterclaims**: N.C.G.S. § 25-9-601 et seq. details the repossession process that a creditor must follow, and provides for counterclaims on multiple bases. A consumer may bring counterclaims for, among other violations, repossession of vehicle without a valid security interest; breach of the peace during repossession; repossession despite lack of default; improper notice of sale of the repossessed vehicle; failure to sell repossessed vehicle in a commercially reasonable manner; failure to send notice of deficiency or surplus post-sale; and failure to respond to various information requests from the consumer about his or her account. Actual damages may include, but are not limited to, the loss of the value of the vehicle, pursuant to N.C.G.S. § 25-9-625(b) and (c)(1). There are also small statutory damage amounts applicable to some counterclaims. See, e.g., N.C.G.S. § 25-9-625(e)(5).

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

- **N.C. Retail Installment Sales Act Counterclaims**: Chapter 25A of the North Carolina General Statutes applies to consumer credit sales. Consumers may have counterclaims against a Plaintiff seller related to, among other things, illegal late fee charges and improper finance charges. Under N.C.G.S. § 25A-44(3), a seller who fails within ten days of a demand to refund rebate improper charges is liable for three times the sum of all improper charges. A seller’s knowing and willful violations of the Retail Installment Sales Act are deemed unfair and deceptive trade practices, meaning that a consumer can bring a claim for treble damages under N.C.G.S. 75-1.1. N.C.G.S. § 25A-44(4). In addition, if the seller files suit and loses, the court “shall allow a reasonable attorney’s fee” to the consumer’s attorney. N.C.G.S. § 25A-15(2).

- **State Tort Counterclaims**: The circumstances of the repossession itself may give rise to counterclaims for conversion, assault, battery, false imprisonment, intentional infliction of emotional distress. For example, if
consumer was not in default on the car loan, or if there was not a valid security agreement designating the vehicle as collateral, repossession constitutes conversion. Particularly with dealer-financed used car purchases, the consumer may have claims for fraud, misrepresentation, unfair/deceptive trade practices, and/or breach of express warranty, as well.

- **Third-party Defendants:** The Plaintiff in an auto deficiency action will be a finance company, a dealer/financer, or a debt buyer who has purchased the right to sue on the deficiency. A consumer who has claims against non-parties, such as the original finance company, the seller, or a repossession company, may join them as third-party defendants.

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

**E. Special Topic: Medical Debt Cases.**

- **Quantum Meruit as a Basis for Liability:** Even if there is not a valid contract for medical services, a consumer may be held liable in quantum meruit for the reasonable value of services rendered. Forsyth County Hosp. Authority, Inc. v. Sales, 82 N.C. App. 265, 346 S.E.2d 212 (1986), rev. denied, 318 N.C. 415, 349 S.E.2d 594 (1986). A contract may obligate the consumer to pay other than the reasonable value. See Shelton v. Duke Univ. Health Sys., Inc., 179 N.C. App. 120, 633 S.E.2d 113 (2006), rev. denied, 643 S.E.2d 591 (N.C. Feb 15, 2007).

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

- **Reduction in Balance Due through Dispute of Specific Charges:** Consumer may seek to strike charges for goods/services that were not medically necessary; charges for goods/services that were necessary only
because of medical care provider’s own negligence or error; double-billed charges; charges for goods/services not actually provided; and overcharges resulting from incorrect diagnostic coding.

- **Doctrine of Necessaries:** One is liable for the reasonable value of medical care received by his or her spouse. *Forsyth Memorial Hospital v. Chisholm*, 342 N.C. 616, 621, 467 S.E.2d 88, 90-91 (1996); *N.C. Baptist Hospitals v. Harris*, 319 N.C. 347, 353, 354 S.E.2d 471, 474 (1987). While there is no case law to this effect, logically, consumer should *not* be liable for interest, late charges, attorney fees, or collection costs accruing on unpaid medical debts of the spouse.

- **Negligence/Malpractice counterclaims:** Particularly if some of the consumer’s debt accrued as a result of treatment for illness or injuries that arose due to medical error, the consumer may benefit from bringing medical malpractice claims against appropriate defendants.

In addition, where a medical professional terminates an ongoing course of treatment due to nonpayment of medical bills, the conduct may constitute negligence, and the consumer should file a complaint with the appropriate licensing board. See *Watkins v. North Carolina State Bd. of Dental Examiners*, 358 N.C. 190, 593 S.E.2d 764 (2004).

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

If a facility requires such an agreement, that agreement should be illegal and unenforceable. It should also be subject to a defense of assent under duress, and failure due to lack of consideration. A consumer who was induced to sign such an agreement may also have counterclaims under Chapter 75 for unfair and deceptive trade practices and unfair debt collection practices.

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

- **Insurers:** If part of the consumer’s defense is the failure of an insurer to pay, third-party claims against the insurer for misrepresentation, breach of contract, etc. may be appropriate.