

Credit Card Debt Cases



Special Topic Seminar: Civil District Court

April 11-13, 2018
School of Government, Chapel Hill, NC

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Breach of an Agreement to Pay a Credit Card Debt

- › Breach of Contract action
 - Existence of a valid contract
 - Breach of the terms of the contract



- › But not just any duck

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Breach of an Agreement to Pay a Credit Card Debt: Causes of Action

- › Action on Open Account
 - Action on a verified itemized account (verified pursuant to G.S. 8-45)
 - Action on an unverified account
- › Action on Account Stated

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Action on Open Account

- > "An **open account** results where the parties intend that the individual transactions are to be considered as a connected series rather than as independent of each other, a balance is kept by adjustments of debits and credits, and further dealings between the parties are contemplated." *Hudson v. Game World, Inc.*, 126 N.C. App. 139 (1997)
- > **Elements**
 - > **Action on an Unverified Account:**
 - That the defendant owes the plaintiff money on account; (NCP 635-20; 635-25) and
 - How much, if any, the defendant owes the plaintiff on the account. NCP 635-30
 - > **Action on a Verified Account (verified per G.S. 8-45):**
 - What amount, if any, the defendant owes on the account.
 - > Unlike an action on account stated, the finder of fact may determine that the amount on the statement of account is not accurate.

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Action on Open Account: Proving the Elements – Verified Account

- > **G.S. 8-45** provides that in any action upon an "account for goods sold and delivered, for labor performed, or for services rendered, or upon any oral contract for money loaned, a verified itemized statement of such account **shall be received in evidence** and shall be deemed *prima facie* evidence of its correctness. **(emphasis added)**
- > Itemized statement of account must be **properly verified, actually itemized, and show a balance due.** *Knight v. Taylor*, 131 N.C. 84 (1903)
- > **Property Verified.**
 - > Proper affidavit. Account statement must be accompanied by an affidavit attesting that the statement is a true and accurate statement of the account, and the affiant must be someone competent to testify about the account.
 - > Proper person. Affiant must have **personal knowledge** of the transactions and/or be **familiar with the books and records.**
 - If the affidavit is tendered during a motions hearing, the affiant must state that the affiant has personal knowledge and familiarity with the books and records of the Plaintiff, and the witness can testify as to their personal knowledge/familiarity with the books and records.
 - > Even when the affiant is the business owner or president of the business, the affiant must state "personal knowledge" and "familiarity with the books and records". See *Aud v. Kelly*, 195 N.C. 717 (1935); *Branco Electric Corp. v. Shell*, 31 N.C. App. 717 (1977) for more information.
 - > Affidavit from someone else from others is not sufficient.
 - > In *Aud v. Kelly*, the original creditor sold goods to the Def. Original creditor then assigned the debt to Plt. Plt sued Def. Plt's affidavit outlined the account details but failed to include any allegation as to Plt's personal knowledge or familiarity with the books and records. The court held that the affidavit was not proper because the affidavit was made on information from the original creditor and therefore the affidavit was not admissible.

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Action on Open Account: Proving the Elements – Verified Account

- > **Itemized.**
 - Needs to list individual charges. See *Knight v. Harris, et al.*, 33 N.C. App. 200 (1977)
 - Needs to include description of the charges. A statement simply listing a starting balance followed by entries of debits and credits without a description of the debits is insufficient to constitute an itemized statement of account. *Knight*, 131 N.C. 84
 - DISCUSSION: So what does this mean with a credit card account that has been active for years? Does the creditor have to supply all the statements from the accounts inception to the charge off?
- > **Showing a balance due.**
- > Plt still has to prove the existence of an account. The affidavit is simply *prima facie* evidence of the account's correctness.

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Action on Open Account: Statute of Limitations

- › Three year statute of limitation. G.S. 1-52(1)
- › Cause of action accrues when the debtor makes their last payment on the account, even a partial payment, and a payment begins the statute anew as to the entire amount.

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Action on Account Stated

- › An "account stated" arises where a creditor submits to a debtor a request for an amount to settle an account and the debtor agrees to pay that amount.
- › Once the creditor and debtor agree on the amount of the balance due, the account stated constitutes a new and independent cause of action.
 - If the evidence could support judgment under either "account stated" or "action on an open account" causes of action, the jury must charged on both. *Franklin Grading Co., v. Parham*, 104 N.C. App. 708 (1991)
- › Elements
 - Creditor calculated the balance due;
 - Creditor submitted a statement to the debtor;
 - Debtor "acknowledged" the correctness of that statement; and
 - Debtor made an express or implied promise to pay the balance due or acknowledged receipt of the statement and agreed (expressly or implicitly) to pay it.

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Action on Account Stated: Proving the Elements

- › Proof of calculation of the balance due and submission to debtor may be as simple as Plt sending a statement to the Def
 - Plt (law firm) sending monthly invoices and a letter demanding payment to Def (client) is evidence of the first two elements of cause of action. See *Mast, Mast, Johnson, Wells & Trimyer, P.A. v. Lane*, 228 N.C. App. 294, cert. denied, 367 N.C. 243 (2013).
 - Def's denial of receipt of statement where Plt's evidence is silent on whether Plt prepared a statement and sent it to Def is enough to defeat the claim. E.g. *Brock & Scott Holdings, Inc. v. Bondurant*, 2009 N.C. App. LEXIS (2009) (unpublished)
- › Acknowledging correctness of the statement overlaps with a promise to pay or acknowledging receipt of the statement and agreeing to pay
 - Acknowledgment may be express or implied.
 - Failure to object to the statement within a "reasonable" period of time may be sufficient to show acknowledgment of the account.
 - › Whether Def's retention of the statement (without objection) is an acknowledgement that the statement is correct depends on the nature of the transaction; the relation of the parties; their respective understandings; and the usual course of business between them. *Marshallay v. Codera*, 38 N.C. App. 393 (1978)
 - › "Reasonable" period of time is usually a jury question, but where the parties' agreement provides a time-frame to object, this time period is likely what is "reasonable". E.g. *Mast*, 228 N.C. App 294

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*Action on Account Stated:
Statute of Limitations*

- › Three year statute of limitation. G.S. 1-52(1)
 - An account stated is a new contract to pay the amount due.
 - › Cause of action accrues when:
 - When the debtor makes an express acknowledgment of the correctness of the statement; or
 - When the debtor makes an express promise to pay the balance due; or
 - If no "express" acknowledgment or promise, then the SOL does not begin to run until a reasonable amount of time has expired during which the debtor could have objected. See *Channel Group, LLC v. Cooper*, 210 N.C. App. LEXIS 312 (unpublished)

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Parties, Standing, Burden of Proof, and Other Basics

- **Plaintiff.** An entity that can establish that it has a right to payment of this debt from this defendant can bring the action to recover payment on the debt.
 - Original Creditor
 - Assignee or successor in interest (other than Debt Buyer)
 - Debtor Buyer
 - **Standing to Sue.** For any entity other than the original creditor, a plaintiff must show sufficient proof of the assignment or succession in interest.
 - Can the plaintiff show, by the greater weight of the evidence, that the original creditor has assigned and conveyed all rights, title and interest in defendant's account to plaintiff? Consider:
 - Was any notice of the assignment mailed to debtor?
 - Did the contract anticipate assignment?
 - Did the billing statements after the assignment contain the new creditor's name?
 - Did debtor continue to pay the bill after the assignment was made?
 - Did assignee receive the records from the original creditor?

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Parties, Standing, Burden of Proof, and Other Basics

- › **Defendant.** Any individual who has a legal obligation to pay the debt to the creditor can be a named defendant.
 - **The "Cardholder".** The person who executed the credit card application.
 - › But probably not an "authorized user" unless that person has entered into an agreement with the account holder. **BUT SEE CASE STUDY 'B', pg. 7**
 - **Co-signor:** Any other person who executed the credit card application with the Cardholder.
 - **Guarantor.** Any person who executed a guarantee stating that they will pay the debt if the cardholder doesn't pay. The guarantee agreement defines the extent of the guarantor's liability.

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Parties, Standing, Burden of Proof, and Other Basics

- **Cardholder's Spouse.** Under narrow circumstances, the creditor may be able to prove that the cardholder's spouse has a legal obligation to pay the debt of the cardholder.
 - **Agency** is not presumed from the spousal relationship, but if *Pt can prove that the account holder was incurring the debt as an agent of his/her spouse, then the spouse would be liable on the debt.* *Lee's North Carolina Family Law* 5.14
 - **Doctrine of Necessaries.** The account holder is held liable to merchants, or other third parties who have furnished "necessaries or necessaries" to the spouse of the account holder.
 - Necessities/necessaries are goods/services that are essential for a spouse or for the spouse's health and comfort, according to the parties' standard of living. *Id.* 5.15
 - Creditor has the burden of proof as to whether the debt was a necessity. *Id.*
 - See *Lee's North Carolina Family Law* for explanation of presumptions arising based on the whether the parties are living together or separated.

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- › Those who have read at least one of their agreements were asked to give a one word response about that experience:
 - Only 9% gave a positive response such as "informative"
 - Negative responses included: "lengthy," "long," "wordy" or "verbose;" "confusing" or "unclear;" "boring" and "tedious" or "painful;" and "excruciating," "torture," "hogwash" and "put in the trash." A few respondents uttered **barnyard epithets**.

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“It’s all about the ‘K’”

- What are the terms of the credit card agreement/contract?

- Does the agreement include and/or provide for:

 - Forum selection clause?
 - Choice of law provision?
 - Mandatory binding arbitration?
 - Attorney fees if litigation is pursued?
 - Pre-judgment interest, at what rate?
 - Post-judgment interest, at what rate?
 - Any specific default provisions?
 - Anticipated change in the terms of the contract?
 - Assignment, sale of the debt/account?

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Case Study "B": The "Find" Print Exercise

> *Cardmember Agreement (pages 4 - 16)*

- > Does this 13 page document include all the terms/conditions of the card member agreement?
- > Is interest rate to be charged included in this document?
- > Are Authorized Users allowed on this account; and if so, are they liable on the account?
- > Does Agreement provide for changes to the Agreement?
- > Are attorney fees available for the creditor?
- > Can cardholder's balance become immediately due upon failure to timely make a payment?
- > Can creditor assign account? Can debtor assign account?
- > What law applies to the Agreement?
- > Does Agreement provide for mandatory binding arbitration?
- > What time frame does debtor have to notify creditor of disputes in a statement?

HIGHLIGHT WHAT YOU FIND

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Common Responses to Complaint - a.k.a. Defense or Not?

- > "I'm only an 'authorized user' on this account, so I used this card some, but it's my mom's account."
- > "I co-signed this credit card account for my son, and all of the charges are his."
- > "This account may be in my name, but I didn't open this account. Someone stole my identity."

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Common Responses to Complaint - a.k.a. Defense or Not? (cont'd)

- > "This is my husband's account. He's the only one who uses this charge card."
- > "I've entered into a debt consolidation program."
- > "I've fallen on hard times and only have the ability to pay \$25 per month on this account."
- > "My ex and I have a separation agreement that says my ex is responsible for paying this debt" or, "I've got a court order that says my ex is responsible for paying this debt."

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**Common Responses to Complaint - a.k.a.
Defense or Not? (cont'd)**

- › "The credit card company told me I could make \$50 payments each month and I've been making them regularly."
- › "I made my last payment over three years ago."
- › "I paid this debt off last year."
- › "I never had an account with _____."

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**Common Responses to Complaint - a.k.a.
Defense or Not? (cont'd)**

- › "That debt was discharged in bankruptcy six months ago."
- › "I filed bankruptcy last month."
- › "They sued me 10 years ago on this debt and got a judgment against me."
- › OTHERS?

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CASE STUDY "A":

TD Bank USA, NA
v.
Sallie Smith
99 CVD 3693

No answer is filed, but Def files a motion to dismiss for failure to state a claim (12(b)(6)).

How do you rule?

- › **Rule 12(b)(6) standard: Failure to state a claim**
 - Does complaint state any claim upon which relief can be granted?
- › **Can you consider the attachments to the Complaint?**
- › **What, if any, cause(s) of action are alleged?**
- › **Is the Statute of Limitations a bar in this case?**
- › **Any other concerns?**
- › **How do you rule?**

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<p>CASE STUDY “A”:</p> <p>TD Bank USA, NA</p> <p>v.</p> <p>Sallie Smith</p> <p>99 CVD 3693</p> <p>Assume Sallie is served by publication and no answer is filed. Plt timely files a motion for summary judgment. Sallie doesn’t appear for the SJ hearing. Assume no evidentiary problems with affidavit.</p> <p>Do you grant the motion?</p>	<ul style="list-style-type: none">➤ Rule 56 standard: “No genuine issue of material fact.”<ul style="list-style-type: none">- Does complaint state a claim?- What documents can you consider in determine whether Plt has proved entitlement to Judgment?- Is it a problem that the affidavit is not a “verified, itemized statement of account”?- Is it a problem that the affidavit was an attachment to the complaint and not a independently filed with the court?➤ If you grant the motion, what is in the judgment?
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<p>CASE STUDY “A”:</p> <p>TD Bank USA, NA v. Sallie Smith 99 CVD 3693</p> <p>Assume Sallie is served by publication and no answer is filed. Plt timely files a motion for summary judgment. Sallie doesn’t appear for the SJ hearing. Assume no evidentiary problems with affidavit.</p> <p>Do you grant the motion?</p>	<ul style="list-style-type: none">› If you grant the motion, what is in the judgment?› Overview of Judgment
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The Judgment

- **Compensatory damages.** The amount owed on the account.
 - If action is on an account stated, there is no discretion on the amount of compensatory damages – it is what the parties agreed to.
- **Attorney fees** are recoverable if provided for in the agreement (“other evidence of indebtedness) and the debt was actually collected by/through an attorney. GS 6-21.5
 - **Amount of attorney fees recoverable?**
 - **Specific Percentage** in the Agreement, then Pit may recover the specified percentage (up to 15%) of the outstanding balance. GS. 6-21.2(1)
 - **No Specific Percentage Specified, but “Reasonable” Attorney Fees** in the Agreement, then Pit may recover 15% of the outstanding balance. GS. 6-21.2(2)
 - **Outstanding balance** in these types of cases means the amount of the damage award as determined by the Court.
 - **Mandatory Advance Notice** by Pit to Def that it intends to seek attorney fees if the account is not paid in full within five days of service the notice. G.S. 6-21.2(5).
 - Notice must be in writing and it must advise the debtor of his right to avoid incurring attorney fees by paying debt in full.
 - Service of the complaint on Def is not “notice.”
 - If not proper notice, then no attorney fees in the judgment.
 - If outstanding balance paid within the 5 days, then the debtor is relieved of the contractual obligation to pay attorney fees upon a breach.

The Judgment (cont'd)

- › **Additional Requirements Where Plt is an *Assignee* or *Debt Buyer*.** The following documents must be provided to the Court before attorney fees may be awarded (G.S. 21-2(6))
 - A copy of the contract or other writing evidencing the original debt, which must contain the 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.
 - 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.
 - NOTE: this provision applies to any assignee, while the heightened pleading requirements we talk about later apply only to debt buyers.
- › **Court has discretion** to award a lower amount of attorney fees than the percentage allowed.
- › There must be **findings of fact** to support any award of attorney fees.

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The Judgment (cont'd)

- **Interest.** G.S. 25-5(a) addresses interest in breach of contract action.
 - › Things to remember about G.S. 25-5(a):
 - The judgment bears interest from the date of the breach.
 - The principal amount must be "distinguished" from the interest amount in the judgment.
 - The judgment shall provide that the principal amount bears interest until the judgment is satisfied (but see waiver below).
 - The legal rate of interest applies post-judgment unless the contract provides otherwise.
 - If credit was extended "for personal, family, household, or agricultural purposes", then interest shall be at the lower of the legal rate or the contract rate.
 - › If a pre-judgment interest rate is not included in the Agreement, then pre-judgment interest is at the legal rate.
 - › Plaintiff can waive pre and post judgment interest, but if post-judgment interest is not expressly waived in the judgment it - even if the judgment doesn't address interest - is likely that the Clerk will assess it.
 - › The "legal rate" of interest is 8% (except in condemnation actions) and has been since July 1, 1985.
 - › If the contract specifies the legal rate of interest is to apply, then the legal rate of interest in effect at the time the contract was executed applies for the period of time until the legal rate change, and at the increased rate thereafter.

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The Judgment (cont'd)

- **Court Costs (see 7A-305)** are discretionary, but if awarded they may be taxed to either party or apportioned between the parties. G.S. 6-20.
- **Filing Fee from Demand for Trial de Novo.** Some actions on account are eligible for the mandatory arbitration program in district court.
 - › If there was an arbitration hearing and the party who demanded a trial de novo betters their position at the conclusion of the case, then that party is entitled to a refund of the filing fee for the demand.
 - › The Judge should include "refund" language include in the judgment. Arb. Rules, Rule 9
- **Bond.** If Def served by publication, then the Plt must file a bond to obtain a default judgment. The Court sets the bond in an amount that is sufficient to protect the Def in the event they later obtain relief from the default judgment. Rule 55c
- **Defaulting Defendants.** Is there an SCRA affidavit?

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CASE STUDY "A":

TD Bank USA, NA
v.
Sallie Smith
99 CVD 3693

Assume Sallie is served by publication and no answer is filed. Plt timely files a motion for summary judgment. Sallie doesn't appear for the SJ hearing. Assume no evidentiary problems with affidavit.

So what is in your judgment?

> **Judgment**

- Compensatory damages?
- Attorney fees?
- Interest?
- Court costs?
- Bond?
- Anything else?

> *TIP: don't just grant the motion and be done; you need to enter the judgment.*

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CASE STUDY "A":

TD Bank USA, NA
v.
Sallie Smith
99 CVD 3693

Same facts - Sallie served by publication and no answer is filed. Plt timely files a motion for summary judgment. Sallie appears at the hearing but says nothing in response to the motion. Assume no evidentiary problems with TD's affidavit.

Case is before you on the summary judgment motion.

> Do (or how do) you explain to Sallie why there is a hearing? Do you explain "SJ" to her?

> Sallie then moves to continue the hearing to get an attorney. Do you allow it?

> Assume you deny MTC, and Sallie asks to testify at the hearing.

- > Can you let her? Do you let her?

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CASE STUDY "A":

TD Bank USA, NA
v.
Sallie Smith
99 CVD 3693

Assume you let Sallie testify briefly. Sallie admits owing money on this account, but she says that she owes only \$623.16. Assume no evidentiary problems with TD's affidavit.

> **How do you Rule?**

- Grant SJ motion and enter judgment?
- Deny SJ motion?
- Something else?

> **What if Sallie had testified: "I'm behind on this account, but I don't owe what TD says I owe"?**

- How do you Rule?

> **If you granted Plt's SJ motion and are entering judgment: is the judgment different from the judgment entered when Sallie didn't appear at the hearing?**

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CASE STUDY "C":

Discover Bank
v.
Brenda Buyer,
99 CVD 9876

Brenda is served and files a document with the court (p.15). Plt files a motion for judgment on the pleadings ("JOP"). Assume no evidentiary problems with Plt's affidavit.

- › Judgment on the Pleadings, Rule 12(c)
 - The pleadings must be closed, which means that an answer has been filed.
 - Standard: Does a material issue of fact exist?
 - > Were all material allegations of fact admitted in the answer?
- › At the hearing, Brenda tells you that she didn't file anything with the court; the document in the file was something she sent to Plt's attorney, and the attorney tells you that the "filed" the document with the Court?
- › What if Brenda's document had not been filed with the court, but Plt's attorney received the document and attached the document to Plt's motion for JOP?

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CASE STUDY "C":

Discover Bank
v.
Brenda Buyer,
99 CVD 9876

Brenda is served and files something with the court (p.15). Plt files a motion for JOP. Assume no evidentiary problems with Plt's affidavit.

- › Is Brenda's filing an "answer"?
 - A letter, or in fact any document, that a defendant files with the court that substantively responds to the complaint constitutes an answer, even if it does not comply with the technical requirements of an answer. If the answer neither admits or denies a material allegation in the complaint, it is deemed admitted pursuant to Rule 8(d). However the raising of affirmative defenses must be considered. *Brown v. American Messenger Servs.*, 129 N.C. App. 207, 208

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CASE STUDY "C":

Discover Bank
v.
Brenda Buyer,
99 CVD 9876

Brenda is served and files something with the Court (p.15). Plt files a motion for JOP. Assume no evidentiary problems with Plt's affidavit.

- › Can you let either party put on evidence?
- › How do you rule on the motion?
 - View facts/permisable inferences in the light most favorable to Brenda.
 - Do the pleadings resolve all the factual issues?
- › If you grant the motion, what is in the Judgment
 - Compensatory damages?
 - Attorney fees?
 - Interest?
 - Court costs?
- › Anything else?

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CASE STUDY "B":

Wells Fargo Bank, NA
v.
Jerry Jones,
99 CVD 0011
Jerry is properly served; and no answer is filed. Pt timely files a motion for summary judgment (p.26). Pt files a affidavit in support of motion for SJ (p.27)

- > **Unverified complaint**
 - Incorporates by reference
 - > an "Affidavit" (p.2-3), which references attached documents
 - a Credit Card Agreement (p.4-16),
 - Account statements (p.17-22) and ;
 - Followed by a DOD Manpower Data Center printout
- > **Attorney "Affidavit in Support of Motion for Summary Judgment , p.27**
- > **"Affidavit" p.29-30 (duplicate what was filed with the complaint)**
- > **SCRA Affidavit, p.53-55**
- > **Overview of admissibility.**

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Potential Problems with Admissibility

- > **Admissibility (trial and dispositive motions):** Every document sought to be admitted of considered must:
 - Be properly authenticated;
 - Satisfy the requirements of the "best evidence rule," or one of its exceptions; and
 - If offered for a hearsay purpose, **must fall within one or more of the exceptions to the hearsay rule.** *FCX, Inc. v. Caudill*, 85 N.C. App. 272 (1987)
- > **Authentication.** Is this document what it purports to be? GS 8C-1, Rule 901(a)
 - This can be satisfied by a witness with knowledge who testifies that the document is what it is claimed to be. It doesn't have to be the person who created the document.
- > **The "Best Evidence Rule".** The original of a document is required ... except where it's not. GS 8C-1, Rule 1002
 - Historical perspective: A *writing is the best evidence of its contents.*
 - BE Rule applies when the "content of the document is sought to be proved"
 - > Does it apply if Pt wants to show Def agreed to pay attorney fees?
 - > Does it apply if Pt wants to show Def made charges to and payments on this account?
 - To prove an event happened; not to prove the content of the document.

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Potential Problems with Admissibility (cont'd)

- Even when an original is required under this Rule, a "duplicate" is admissible unless:
 - > A genuine question is raised as to the authenticity of the original; or
 - > In the circumstances it would be unfair to admit the duplicate in lieu of the original.
 - GS 8C-1, Rule 1003
- The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if:
 - > **Originals Lost or Destroyed** unless destroyed in bad faith;
 - > **Original Not Obtainable** by any available judicial process or procedure;
 - > **Original in Possession of Opponent**, and after notice of the need for the document, the opponent does not produce the original at the hearing; or
 - > The writing is related to a **collateral matter**.
 - GS. 8C-1, Rule 1004

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Potential Problems with Admissibility (cont'd)

› Hearsay Exception Rule 803(6): Records of Regularly Conducted Activity (aka "The Business Record Exception")

- Foundation:

- › A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses,
- › made at or near the time
- › by, or from information transmitted by, a person with knowledge, if
 - (i) kept in the course of a regularly conducted business activity and
 - (ii) it was the regular practice of that business activity to make the memorandum, report, record, or data compilation;
- › all as shown by the testimony of the custodian or other qualified witness, or by affidavit ...
- › unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.
- › Authentication of evidence by affidavit shall be confined to the records of nonparties, and the proponent of that evidence shall give advance notice to all other parties of intent to offer the evidence with authentication by affidavit.

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Potential Problems with Admissibility (cont'd)

- The entries in the account statement must have been made in the regular course of business at or near the time of the transaction involved. A witness or affiant doesn't have to have made the entries in this statement, but they must be familiar with the entries and the record keeping system. 2-8 *Brandis and Broun on North Carolina Evidence* § 225
- Trustworthiness is the foundation of this exception; therefore a lack of trustworthiness should cause the exception to disappear. *Id.*

› Hearsay within Hearsay, Rule 805, requires an exception for each layer of hearsay.

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CASE STUDY "B":

› REVIEW PLEADINGS/AFFIDAVITS

Wells Fargo Bank, NA
v.

Jerry Jones,
99 CVD 0011

Jerry is properly served; no answer is filed. Plt timely files a motion for summary judgment (p.26). Plt files an affidavit(s) (p. 27)

How do you rule?

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CASE STUDY “B”:

Wells Fargo Bank, NA
v.

Jerry Jones

99 CVD 0011

Jerry is proposed

Jerry is properly served, and no answer is filed. Plt timely files a motion for summary judgment (p.26) Plt files an affidavit(s) (p. 27)

- > If you granted the motion, what is in the Judgment?
 - Compensatory damages?
 - Attorney fees?
 - Interest?
 - Court costs?
 - > Anything else?
 - What about that "choice of law" provision?

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When the Plaintiff is a Debt Buyer

- **Debt buyer:** 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." G.S. 58-70-15(b)(4)
 - A "debt buyer" is a "collection agency". G.S. 58-70-15(b)(4)
 - "Collection agency" does not include, among other entities: banks, mortgage banking companies, savings and loan associations, and building and loan associations. G.S. 58-70-15(b)(5)
 - Is a bank (or other excluded entity) that otherwise meets the definition of "debt buyer" subject to the heightened pleading requirements and evidentiary obligations provided for in the CEPAT? Maybe not. There is no appellate decision addressing this question.
 - **Consumer:** An individual, aggregation of individuals, corporation, company association, or partnership that has incurred a debt or alleged debt. G.S. 58-70-90(2)
 - **Charge-Off:** A charge off occurs when the creditor no longer thinks that the debtor will pay the debt. It does not mean that the debt is forgotten; and the charge off date has nothing to do with the running of the statute of limitations.
 - A debt buyer often purchases, sometimes for pennies on the dollar, a portfolio of thousands of delinquent accounts deemed uncollectible, and oftentimes an account may be sold and resold.

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When the Plaintiff is a Debt Buyer: Heightened Pleading Requirements

- › A debt buyer plaintiff has the same obligations as a non-debt buyer plaintiff and then more.
 - › **Debt Buyer Plaintiff's Complaint:**
 - Shall allege that the plaintiff is duly licensed under Chapter 58 Article 70; and
 - Shall contain the name and number, if any, of the license and the governmental agency that issued it. G.S. 58-70-145
 - › *"In any cause of action that arises out of the conduct of a business for which a plaintiff must secure a permit pursuant to this Article, the complaint shall allege, for each of the cause of action that the plaintiff is duly licensed under this Article and shall contain, the name and number, if any, of the license and the governmental agency that issued it." G.S. 58-70-145 (emphasis added)*

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When the Plaintiff is a Debt Buyer: Heightened Pleading Requirements

- › Required Attachments to the Complaint. "Complaint of a debt buyer Plaintiff must be accompanied by certain materials"
 - "In addition to the requirements of G.S. 58-70-145, in any cause of action initiated by a debt buyer... all of the following materials **shall** be attached to the complaint or claim:
 - › (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 the 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.

G.S. 58-70-150 (emphasis added)

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When the Plaintiff is a Debt Buyer: Heightened Pleading Requirements

- “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.**
 - So only if there was no writing signed by the defendant can a debt buyer satisfy this pleading requirement by attaching “documents generated when the credit card was actually used.”
 - If Plaintiff doesn’t allege that no such writing ever existed, how will the court know this? Are we to assume/infer simply b/c account statements were attached?
 - Signed writing: Consider also the Uniform Electronic Transactions Act (“UETA”): G.S. 66-311 to 66-339

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When the Plaintiff is a Debt Buyer: Heightened Pleading Requirements

- Uniform Electronic Transactions Act ("UETA"): G.S. 66-311 to 66-339
 - The UETA allows for the use of electronic documents and electronic signatures where the parties to a transaction intend to do so electronically. Whether parties to the transaction intend to conduct a transaction by electronic means is determined from the context and circumstances, including the parties conduct.
 - The UETA applies to electronic signatures relating to transactions regarding business, commercial (including consumer) and governmental matters. G.S. 66-313
 - Under the UETA, an "electronic signature" is defined broadly and include "an electronic sound, symbol, or process attached to, or logically associated with, a record and executed or adopted in a manner prescribed by law." G.S. 66-312. The UETA establishes, to the greatest extent possible, the equivalency of electronic signatures and manual signatures. Therefore the term "signature" has been used to connote and convey that equivalency. G.S. 66-312, Commentary
 - UETA was effective October 1, 2000 and applies to any electronic record or electronic signature created, generated, sent, communicated, received, or stored on or after that date. G.S. 66-314.
 - Either the credit card application was sent snail mail to the original creditor or the application was sent electronically from defendant to original creditor.
 - So I have to ask myself: in light of the UETA, could there ever "no such signed writing?"

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When the Plaintiff is a Debt Buyer: Heightened Pleading Requirements

- › Assuming that Plaintiff has alleged that "no such writing" ever existed, then what documents satisfy the requirement of being "generated when the credit card was actually used"?
 - Receipt generated by the merchant at the point of sale?
 - A credit card statement showing merchant charges?
 - › What if the attached credit card statements do not show merchant charges but only interest and fees assessed by the original creditor?
 - What else?

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When the Plaintiff is a Debt Buyer: Heightened Pleading Requirements

- › ***"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."***
 - Piecemeal approach to building this chain.
 - If the Court has to make inferences to determine that Plaintiff has established an unbroken chain of ownership, has the Plaintiff met its pleading burden?

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CASE STUDY "F":

Midland Funding, LLC
v.
Jon Doe,
99 CVD 1111

Plt is a Debt Buyer. Def filed an answer and asserted counterclaims.
Def also filed a 12(b)(6) motion.
How do you rule?

- › REVIEW COMPLAINT and ATTACHMENTS.
- › What, if any, cause(s) of action are alleged?
- › Is there a statute of limitations concern?
- › Heightened pleading requirements met?

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When the Plaintiff is a Debt Buyer: Heightened Evidentiary Showings for Default or Summary Judgment

- › When a non-DB Plaintiff provides an affidavit from a proper witness alleging the contract, the breach, and the amount due that likely is sufficient for judgment - absent conflicting affidavits.
- › A Debt-Buyer Plaintiff must also file with the court specific evidence "to establish the amount and nature of the debt." And not just any evidence will suffice. G.S. 88-70-155(b)
 - "The only evidence sufficient to establish the amount of nature of the debt shall be properly authenticated business records that satisfy the requirements of Rule 803(6) of the North Carolina Rules of Evidence. The authenticated business records shall include at least all of the following items:
 - > The original account number.
 - > The original creditor.
 - > The amount of the original debt.
 - > An itemization of charges and fees claimed to be owed.
 - > The original charge-off balance, or if the balance has not been charged-off, an explanation of how the claim was settled.
 - > The date of the last payment.
 - Why is this important?
 - > The amount of interest claimed and basis for the interest charged.

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When the Plaintiff is a Debt Buyer: Heightened Evidentiary Showings for Default or Summary Judgment

- › Properly authenticated business records – Rule 901 & Rule 803(6)
- › Rule 805: Need hearsay exception for each layer of hearsay.
 - Does Debt Buyer need to lay a foundation for the original creditor's records?
 - > By an affidavit from the Original Creditor authenticating records and laying the Rule 803(6) foundation?
 - > If no original creditor affidavit, can an employee of the Debt Buyer attest to all the foundational elements for the records of the original creditor?
 - Probably, so long as the affiant can attest to all the foundational requirements for the original creditor's records, then the records can be considered (absent no other objections)

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When the Plaintiff is a Debt Buyer: Heightened Evidentiary Showings for Default or Summary Judgment

- › Our appellate courts do not appear to go behind the foundational testimony to determine how Pt's affiant acquired knowledge about the original creditor's records. If the foundational elements are recited, then it appears that the records are admissible.
 - *Olipoint Fin. Corp. v. Silver*, 2008 N.C. App. LEXIS 2055 (N.C. App., 2008) (unpublished) (where the COA found no error in the admission an affidavit prepared by the assignee's employee where that affidavit laid the foundation for the original creditor's records)
 - *Nall v. Kelly*, 169 N.C. 717 (1915) (where affidavit outlined all the account details, but did not state personal knowledge, the COA found admission of affidavit to be error because it appeared that the affiant had based the affidavit on information acquired from the original creditor)
 - *United States Leasing Corp. v. Everett, Creech, Hancock & Herring*, 88 N.C. App. 100 (1985) (where affidavit recited the affiant had a proper foundation for the business records acquired from the original creditor and further assumed that a proper foundation had been laid since the trial court had allowed the testimony and the transcript was "inaudible" during this part of the trial)

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CASE STUDY "F":

Midland Funding, LLC
v.
Jon Doe,
99 CVD 1111

Plt is a Debt Buyer. Def filed an answer and asserted counterclaims. Plt files a motion for Summary Judgment. How do you rule?

> Assume that the Complaint stated a claim (and satisfied the heightened pleading requirements)

> Do you have properly authenticated business records that satisfy the requirements of Rule 803(6) for all the required DB elements?

> Do you grant the motion?

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CASE STUDY "D":

Portfolio Recovery Associates, LLC
v.
Bobby Buyer

99 CVD 4567693

PRA is a debt buyer. Bobby is served on Nov 13. Plt obtains and entry of default from the clerk on or about September 20. Does PRA have to file a motion for default judgment pursuant to Rule 55(b)(2), which is served the same day on Def.

On November 13, 2017, Def submits proposed order for default judgment to the court.

Do you grant the motion?

> Rule 55 standard: "No issue of material fact."

- Have requirements for default judgment without a hearing - as allowed in Rule 55(b)(2)b - been met?
 - > Notice to Def; 30 day wait period; no response from Def

> Does complaint state a claim?

- Including heightened pleading requirements?

> Is motion supported by 803(6) qualified records showing the "amount and nature of the debt"?

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***When the Plaintiff is a Debt Buyer:
Prohibited Practices***

> Includes any act or practice that a non-debt buyer collection agency is barred from engaging in.

> Also includes:

- Bringing legal action (including arbitration) on time-barred claims
 - > Know or should have known
- Seeking fees and charges (including interest) if not legally entitled to seek these charges
 - Be aware of the Second Circuit's decision in *Madden v. Midland Funding, LLC*, 786 F.3d 246 (2d Cir. 2015). *cert. denied*, U.S. 135 S.Ct. 200 (2015), which holds that a third-party debt buyer was prohibited from charging the same rate of interest that the seller (a nationally chartered bank) was permitted to charge. SCOTUS's refusal to weigh in on this issue led to uncertainties for debt buyers and many put the brakes on seeking both pre- and post-judgment interest.
 - Legislative fix for Madden is in the works, and if H.R. 3299 becomes law, it would clarify that a third-party debt buyer may charge the same rate of interest as a nationally chartered bank may charge.

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When the Plaintiff is a Debt Buyer: Prohibited Practices

- Suing the debtor without “(i) valid documentation that the debt buyer is the owner of the specific debt instrument or account at issue and (ii) reasonable verification of the amount of the debt allegedly owed by the debtor”, then the debt buyer has engaged in an “unfair practice”.
 - › **Reasonable verification** includes “documentation in the name of the original creditor, the name and address of the debtor as appearing on the original creditor’s records, the original consumer account number, a copy of the contract or other document evidencing the consumer debt, and an itemized account of the amount claimed to be owed, including all fees and charges.” G.S. 70-115(5)

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When the Plaintiff is a Debt Buyer: Prohibited Practices

- If the Debt Buyer fails to give timely and proper notice (at least 30 days in advance of filing a complaint) to the debtor that the debt buyer intends to sue the debtor
 - › This notice shall include the name, address and telephone number of the debt buyer, the name and address 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 account of all amounts claimed to be owed. G.S. 58-70-115(6)
- If the Debt Buyer fails to comply with the heightened pleading requirements or the heightened evidentiary showing on a default or summary judgment motion. G.S. 58-70-115(7)
- Engaging in a prohibited practice gives rise to a claim (or counterclaim against) the debt buyer. Violation of G.S. 58-70-95 through 58-70-125 subjects the debt buyer to civil liability to the debtor in an amount equal to the actual damages sustained by the debtor as a result of the violation, plus liability to the debtor for a monetary penalty determined by the Court (\$500 - \$4000) for each violation, in addition to the possibility of punitive damages and other remedies under law.

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