

**COMMON SCENARIOS  
IN CREDITOR/DEBTOR  
CASES**

NC District Court Judges' 2013  
Summer Conference

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**Creditor/Debtor Law Tool Kit** 

- Rule 55 Default 
- Rule 56 Summary Judgment 
- Rule 12(c) Motion for Judgment on Pleadings 
- Rule 15 Amended and Supplemental Pleadings 
- Rule 60 & 60(b) Relief from Judgment 
- Rule 43(e) Evidence on Motions 
- NCGS 6-21.2 Attorneys' Fees in notes, etc. 
- NCGS 8-45 Itemized and Verified Accounts 
- NCGS 24-5 Interest on Judgments 
- NCGS 1C-1603 Setting Aside Exempt Property 
- NCGS 1-352 et seq, Supplemental Proceedings 



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**Rule 55 Default**

55(b)(1)

- Clerk typically handles Entry of Default
- Clerk handles Motions for Default Judgment if Complaint is for sum certain and no appearance by defendant

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## Rule 55 Default

55(b)(2)

- Judge handles all other Motions for Default Judgment either:
  - ❖ via hearing with at least 3 days notice IF defendant has “appeared” in case; otherwise, notice not required prior to hearing; or
  - ❖ by entering Default Judgment without hearing pursuant to 55(b)(2)b where plaintiff’s motion notifies defendant that judgment can be entered w/o hearing if defendant fails to respond within 30 days of receiving motion

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## Rule 55 Default - Servicemembers Civil Relief Act (“SCRA”)

### Remember...

If D has made no appearance, do not enter Default Judgment UNLESS Plaintiff has filed affidavit with attached printout from Department of Defense website attesting to D’s nonmilitary status pursuant to the Servicemembers Civil Relief Act, 50 USC App. Section 501 et seq.

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## Default Hypo

- You call up Creditor’s “C’s” Motion for Default Judgment for hearing
- Entry of Default previously entered by clerk
- Defendant Debtor “D” appears pro se, having filed no pleading
- C’s counsel presents Motion & supporting affidavit which, on its face, entitles C to relief
- You then allow D to respond and D says,  
*“Your honor, I was out of the country because my mother who lives in Mexico was dying. That’s when the complaint was served at my home and was accepted by my son who was home from college. My son never informed me.”*

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## How do you, the judge, proceed?

1. You inform D that clerk entered default against him which means everything in C's Complaint is deemed true; that he failed to file Motion to Set Aside Entry of Default so you cannot consider his oral testimony; and then you grant C's Motion for Default Judgment.
2. You state that D has raised oral Motion to set Aside Entry of Default. You allow C's counsel to respond. If you find good cause, you set aside Entry of Default, and inform D of deadline for filing Answer. If you do not find good cause, you deny request to Set Aside Entry of Default and grant Default Judgment in favor of C.

SELECT (1) OR (2)

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## Setting Aside Default

- Rule 55(d) provides "**For good cause shown the court may set aside an entry of default, and, if a judgment by default has been entered, the judge may set it aside in accordance with Rule 60 (b).**"
- Rule 55(d) does not explicitly require a written motion to set aside entry of default.

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## Determining Whether to Set Aside Entry of Default is a balancing act



Judgments by default not favored especially where, as in creditor-debtor cases, there is often minimal supporting documentation of debt at the entry of default stage.

vs.

Rules that require responsive pleadings with time limits assist in efficient administration of justice; parties should not be allowed to flout them with impunity.

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**Setting Aside Entry of Default is within Court's discretion**

The defaulting party has the burden of demonstrating **some adequate basis, some valid reason** to warrant the Court to set aside entry of default and to allow him to file answer to complaint.

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**Setting Aside Default/Summary Judgment per Rule 60(b) within Court's discretion**

**Defendant has burden to show:**

- EXCUSABLE NEGLIGENCE (or mistake, inadvertence, etc.)

**PLUS**

- MERITORIOUS DEFENSE

In creditor-debtor cases, excusable neglect is the primary reason cited in Rule 60(b) motions and such a motion must be filed within one year of entry of Default/Summary Judgment.

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**Excusable neglect for failing to respond to complaint under Rule 60(b)**

Is probably NOT equal to:

- Defendant too busy or under physical and mental strain; or
- Defendant not believing that plaintiff would prevail; or
- Defendant lacking education with no knowledge of court system but took no steps to obtain assistance from other sources; or
- Defendant claiming she was never served without more of a showing where summons was signed by deputy, verifying service on defendant or on some person of legal age and discretion residing in home

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### Finding of Excusable neglect under Rule 60(b)

- Has been upheld in situations where defendant failed to file answer because:
- Defendant's mental ability was substantially impaired due to depression and being under influence of medications to treat it; or
  - Of negligence of counsel, where defendant was otherwise diligent; or
  - Complaint was deficient in alleging any contractual relationship between plaintiff & defendant and complaint did not make clear what was at stake; or
  - Wife reasonably relied upon husband co-defendant's assurances that he would defend against credit card action when husband was previously sued on credit card account and had paid that judgment; or
  - Where husband was out-of-state due to serious illness of wife

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### Cautionary Note

Default judgments are viewed with disfavor and judges have discretion to set them aside **but where defaulting party fails to show meritorious defense, it is error to set aside default judgment.**

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### Meritorious Defenses in Creditor/Debtor cases may include:

- Debt falls outside statute of limitations;
- Debtor was enrolled in credit card insurance plan to cover inability to make monthly payments due to unemployment and credit card company failed to provide agreed-upon coverage;
- Inadequate documentation that debt was actually assigned to debt collector bringing suit;
- Credit card or bank fraud (i.e. identity theft)

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## Motion for Judgment on the Pleadings Rule 12(c)

After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

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## Motion for Summary Judgment Rule 56 Hypo

- C files Motion for Summary Judgment
- Supported by affidavit of custodian of records verifying attached business records, the default date and outstanding balance on account;
  - Attached to affidavit are stack of monthly statements issued over history of account, with final statement reflecting unpaid balance that C is seeking.
- D filed Answer with general denial
- D appears at summary judgment hearing and states, under oath, "I don't owe that much."

Do you GRANT or DENY Creditor's Motion for Summary Judgment?

- GRANT
- DENY

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## NC Rule of Civil Procedure 56

**Rule 56(e)** "...When a motion for summary judgment is made and supported as provided in this rule, **an adverse party may not rest upon the mere allegations or denials of his pleading, but his response**, by affidavits or as otherwise provided in this rule, **must set forth specific facts showing that this is a genuine issue for trial.** If he does not so respond, summary judgment, if appropriate, shall be entered against him."

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Burden-shifting under Summary Judgment Rule 56



- Once moving party has satisfied burden of forecasting sufficient evidence to warrant judgment in their favor, the burden shifts to nonmoving party who cannot simply rely on same allegations made in complaint or answer.
- Purpose of summary judgment is to go beyond the pleadings to allow one party to force their opponent to produce a forecast of evidence that is available at trial to support their claim or defense.

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Lexington State Bank v Miller, et al, 137 NC App 748, 529 S.E.2d 454 (2000)

- In support of motion for summary judgment, C presented affidavit attesting to two loans & security agreements executed by Ds and attesting to the outstanding balance sought on each loan after offset from foreclosure along with supporting documentation;
- Ds filed an affidavit attesting to the following: "***We strongly contest the amount which Lexington State Bank seeks to recover in this lawsuit. There were payments made toward these loans prior to my husband's death which have not been accounted for or credited by Lexington State Bank.***"

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Lexington State Bank v Miller

**HELD: D's affidavit failed to raise genuine issue of material fact in dispute; affidavit contained only general allegations and conclusions; no specific facts are provided such as dates of any uncredited payments or their amounts.**

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## Do You Know the Answers?

? Which Associate Justice of the U.S. Supreme Court, who was also a signatory to the Declaration of Independence, spent time in debtors' prison while on the court?

? What colony was started to keep the Spanish from moving north and to help people escape debtor's prison?



? Where did Henry Lee III, who was a Revolutionary War general and the father of Robert E. Lee, write "Memoirs of the War"?

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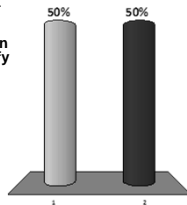
## Summary Judgment Hypo

▪ Call case up on C's Motion for Summary Judgment. C's attorney presents affidavit & credit card statements in support of summary judgment; states that D has not filed a responsive affidavit and that C is entitled to judgment as a matter of law.

▪ D has not filed a responsive affidavit and filed an Answer generally denying the amount of the debt. D wants to respond at the hearing to C's affidavit.

Do you swear D in at the hearing on C's motion for summary judgment, allowing them to testify in response to C's showing?

1. Yes
2. No



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## Summary Judgment Rule 56

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party may serve opposing affidavits at least two days before the hearing. ***"If the opposing affidavit is not served on the other parties at least two days before the hearing on the motion, the court may continue the matter for a reasonable period to allow the responding party to prepare a response, proceed with the matter without considering the untimely served affidavit, or take such other action as the ends of justice require..."***

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## Rule 43 Evidence

(e) Evidence on Motions. When a motion is based on facts not appearing of record, the court may hear the matter on affidavits presented by the respective parties, **but the court may direct that the matter be heard wholly or partly on oral testimony** or depositions.

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## Summary Judgment Hearing Hypo

You swear D in to respond to C's Motion & supporting documentation.

- D says, "This debt is too old for them to be able to collect on it any longer."
- You look at statements from account submitted by C and last payment was made July 2008; no further activity on account; Complaint was not filed until September 2012; applicable statute of limitations is three (3) years
- C argues that D failed to raise statute of limitations defense in his answer and since it is an affirmative defense, that defense has been waived

**How do you respond?**

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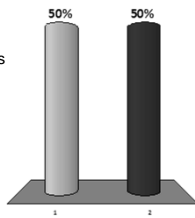
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## Summary Judgment Hearing Hypo Response:

1. You tell D that he failed to raise statute of limitations defense in his Answer and as such, it has been waived. You enter Summary Judgment for C.
2. You ask D whether he is raising the statute of limitations defense at the summary judgment proceeding. If D responds, "Yes," then you ask C's counsel whether counsel wants to respond to the statute of limitations defense or request a continuance to give counsel time to investigate, and then respond to the newly raised defense.



**SELECT (1) OR (2)**

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## County of Rutherford Child Support Enforcement Agency v Whitener

(100 NC App 70, 73-74, 394 S.E.2d 263, 265 (1990))

- Cites *Dickens v Puryear*, 302 NC 437,442, 276 S.E.2d 325, 329 (1981) for proposition that where responsive pleadings are not yet due, a party may raise an affirmative defense in a motion for summary judgment.
- Recognizes as unsettled the issue of whether a party can assert an affirmative defense in a summary judgment motion after filing an answer in which no affirmative defense was alleged.

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## County of Rutherford v Whitener (cont'd)

- Holds, "***To avoid a decision based on a pleading technicality, we now hold that 'absent prejudice to plaintiff, an affirmative defense may be raised by a motion for summary judgment regardless of whether it was pleaded in the answer or not.'***"
- Still unanswered - can a party raise an affirmative defense orally at hearing in response to other party's motion for summary judgment where affirmative defense was not raised in answer?

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## Rule 15. Amended and Supplemental Pleadings

(c) Amendments to conform to the evidence...

***If evidence is objected to at the trial on the ground that it is not within the issues raised by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be served thereby*** and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

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**NCGS 6-21.2 Attorney's fees  
in notes, etc. \$\$\$**



Obligations to pay attorneys' fees upon note, contract, credit card agreement or other evidence of indebtedness shall be enforceable as follows:

- if provision provides for attorney fees in some specific percentage of outstanding balance, such provision is enforceable up to 15% of balance
- if provision provides for payment of reasonable attorney fees, without specifying a percentage, such provision shall be construed to mean 15% of outstanding balance
- "outstanding balance" = principal plus interest owing at time suit is instituted

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**NCGS 6-21.2 Attorney fees, cont'd**

If plaintiff is "debt buyer," attorney fee provision enforceable only if debt buyer provides:

- a) copy of signed contract evidencing original debt
- b) or if credit card, then copies or original contractual documents providing for attorney fees & statements generated when credit card was actually being used; and
- c) copy of assignment(s) establishing unbroken chain of ownership

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**NCGS 6-21.2 Attorney fees;  
Notice Required**

For attorney fee provision to be enforceable in creditor-debtor cases, C must notice D that D can avoid attorney fees if D pays off outstanding balance within 5 days of receipt of notice & D must fail to do same; EXCEPT no notice required if D refused to surrender collateral securing debt and secured party was required to institute ancillary claim to secure possession.

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## NCGS 6-21.2 Attorney fees, cont'd

### ATTORNEY FEE HYPO

C appears on motion for Default Judgment for loan agreement in amount of \$60,000; loan agreement provides for "reasonable" attorney fees; C hands up proposed Order seeking outstanding balance of debt, plus accrued interest, plus 15% of outstanding balance for attorney fees in amount of \$9000.

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## NCGS 6-21.2 Attorney fees, cont'd

### ATTORNEY FEE HYPO, cont'd

You review file and find a one-page complaint with one-page affidavit verifying balance along with copy of executed loan agreement; a summons that shows service; a motion for entry of default and entry of default entered by clerk; a non-service members affidavit; and the motion for default judgment with a one-page proposed Order; hearing takes less than 5 minutes; attorney's regular hourly rate is \$250 an hour.

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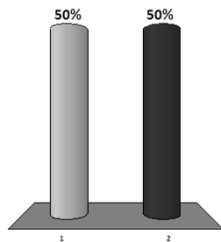
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Is \$9,000 a "reasonable" attorney fee?

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2. No



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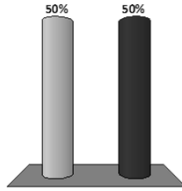
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## NCGS 6-21.2 Attorney fees, cont'd

### ATTORNEY FEE HYPO cont'd

Does it matter whether the judge finds the \$9,000 attorney fee award to be "reasonable" given text of 6-21.2, which states that where attorney fee provision provides for payment of "reasonable" attorney fees, without specifying percentage, "such provision shall be construed to mean fifteen (15%) of the 'outstanding balance'...?"



1. Yes
2. No

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## NCGS 6-21.2 Attorney fees, cont'd

**An attorney fee award in amount of 15% of outstanding balance** where contract calls for "reasonable" attorney fees and otherwise meets all the requirements of 6-21.2 **will not be overturned on appeal.**

**But query whether judge nonetheless has discretion to weigh reasonableness of attorney fee where 15% fee is excessive on its face.**

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## NCGS 6-21.2 Attorney fees, cont'd

**Bombardier Capital Inc. v Lake Hickory Watercraft Inc et al**, 178 NC App 535, 540-41, 632 S.E.2d 192, 196-97 (2006)

Appeal from attorney fee award, among other issues, in an action for breach of a sales contract, which provided for payment of reasonable attorney fees.

Instead of awarding attorney fees in the amount of 15% per NCGS 6-21.2, the trial judge took testimony from the attorney, reviewed the attorney fee affidavits and billing statements and awarded attorney fees in an amount less than 15% of the outstanding balance.

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## NCGS 6-21.2 Attorney fees, cont'd

### **Bombardier Capital Inc., (cont'd)**

**HELD:** The Court of Appeals held that when the trial court determines attorney fees are appropriate under NCGS 6-21.2, "**the amount of attorney fees awarded lies within the discretion of the trial court,**" citing *Coastal prod. Credit Ass'n v. Goodson Farms, Inc.*, 70 NC App 221, 226, 319 S.E.2d 650, 655, *dis.rev.denied*, 312 NC 621, 323 S.E. 2D 922 (1984); Court held that the trial court did not abuse its discretion & properly awarded attorney fees pursuant to the contract.

**CAVEAT:** this case is not exactly on point because the issue on appeal was whether attorney fees should have been awarded at all; not whether the trial court erred in awarding less than 15% of the outstanding balance.

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## Interest on Judgments, NCGS 24-5

Interest runs at contract rate from "date of breach" to entry of judgment.

### **Date of breach =**

- a) first due date where payment was not made; or
- b) if installment contract, the date when creditor declared note in default and accelerates balance; or
- c) if credit card agreement, the date of charge-off, which is 180 days after default by federal law

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## Interest on Judgments, NCGS 24-5, Judgment specifies

- Judgment must distinguish "principal" on date of breach from "interest" that accrues at contract rate up to entry of judgment; i.e. DO NOT combine principal with interest;
- Judgment must further specify that "principal" amount continues to bear interest post-judgment until judgment is satisfied

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### Interest on Judgments, NCGS 24-5, Post Judgment Interest

Judgment should specify rate of post-judgment interest as follows:

- Post Judgment interest should run at contract rate IF contract so provides & contract is not for personal, family, household or agricultural purposes;
- If contract is for personal, family, household or agricultural purposes OR if contract is silent as to post-judgment interest, then interest runs at lower of legal rate or contract rate after judgment.

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### USURY? USUALLY NOT

Debtors frequently allege that credit card interest rates are usurious and prohibited by N.C. law where pre-judgment interest rates can range up to 29% or more.

If creditor is a national bank, then the National Bank Act, 12 U.S.C. 85, dictates what interest rates can be charged. A number of court decisions including Marquette National Bank of Minneapolis v First of Omaha Service Corp., 439 U.S.299 (1978) & Smiley v Citibank (South Dakota) 517 U.S. 735 (1996) hold that a national bank can export the interest rates from the state where it is located, even if that interest rate would be usurious in the state where judgment is entered.

**Ever wonder why Citibank, N.A. set up headquarters in South Dakota? South Dakota has no maximum or usury restrictions on interest rates.**

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