Small Claims Procedure

Mandatory Rule #1: You must have subject-matter jurisdiction.

Is it a small claims action?

What is the principal relief sought? Summary Ejectment
Money Owed
Return of Personal Property

Not Coercive Judgment
Not Action to Recover Real Property

In case of a claim for $$ or personal property, what is amount in controversy? Maximum $10,000

Does at least one Δ reside in your county?

Amount in Controversy Rules

~ Amount in controversy is determined as of time case is filed.

~ Claim-splitting is not allowed.

~ In actions for return of personal property, amount in controversy is FMV.

~ In summary ejectment actions in which π seeks only possession, amount in controversy requirement does not apply.

Q: What should the magistrate do if a case does not meet one of these requirements?

A: The magistrate should not hear the case.

- ≈ If the case isn't the type that may be heard in small claims: dismiss.
- ≈ If the amount in controversy too high: may be cured in some cases by amending complaint. Otherwise, dismiss or return to clerk.
- ≈ Δ isn't a resident: dismiss or return to clerk

Q: Where does a corporation "reside"?

A: Corporations that have authority to do business in NC reside in either the county in which the principal office is located or the county in which the corporation maintains a place of business. If neither of these applies to a particular corporation, it resides in any county in which it is regularly conducting business. G.S. 1-79.

Q: What if π has sued more than one Δ, but only one Δ resides in the county?

A: The law requires only that at least one Δ reside in the county.

Mandatory Rule #2: You must have jurisdiction over the Δ: either service of process or voluntary appearance.

Has Δ been served?

Check the file for one of the following: Completed return of service on back of summons
π's affidavit & postal receipt
Δ's written acceptance of service
Δ has filed motion, answer, or counterclaim
OR
Δ is present in court

Q: What should the magistrate do if the summons and complaint have not been served?
A: Continue the case to allow additional time for service. Use AOC Form G-108.

Q: What if π has sued more than one Δ, but only one has been served?
A: π must choose between
- ≈ requesting continuance to pursue service on other Δs, or
- ≈ taking a voluntary dismissal against unserved Δs and going ahead against Δ that has been served.

Service on a Corporate Δ:

≈ Delivering to registered agent, or
≈ Serving officer, director, or managing agent by
Delivering copy
Leaving copy in office with person apparently in charge
Mailing or using delivery service (certified, signed receipt)

Hint: Be careful not to confuse service of process with the rule about at least one Δ residing in the county***.*** They are two separate requirements.

HAVE ANY OTHER DOCUMENTS BEEN FILED WITH THE CLERK?

Check the file for: an answer (which may also contain a counterclaim)
a motion for continuance
a motion to dismiss for
≈ failure to state a claim [Rule 12(b)(6)]
≈ lack of personal jurisdiction
≈ improper venue

Q: What difference does it make if Δ files an answer?

A: It makes very little difference. Quite often, answers are filed in cases in which Δ is represented by an attorney unused to small claims practice who are unaware that answers are not required in small claims court. Filing an answer in a case <u>does</u> constitute a voluntary appearance, though, and so it may be important in an action in which Δ has not been served and is not present in court.

Q: How should I handle a pre-trial motion for a continuance?

A: The law favors, but does not require, granting a continuance if both parties join in the request.

If a request for a continuance is made by only one party, the law requires that party to demonstrate good cause.

If the magistrate grants a continuance, s/he must be certain that the other party receives

notice of the new trial date and time.

In summary ejectment actions, a continuance is permitted only for good cause and for a maximum of 5 business days unless both parties agree to a longer period.

	LOCAL PRACTICE ALERT: Be sure to find out what your county's policy is about the procedure for pre-trial requests for a continuance.	

Q: What should I do if Δ files a Rule 12(b)(6) motion to dismiss the case for failure to state a claim for relief?

A: This motion is not allowed in small claims court. GS 7A-216. Because it is a common motion in general civil actions, this error is usually made by an attorney unused to small claims practice and unfamiliar with the rules of small claims procedure set out in GS Ch. 7A, Art. 19. A magistrate should either instruct the attorney to withdraw the motion or deny it as improperly made.

Q: What if the motion is actually valid in the sense that the complaint is virtually blank or so poorly-stated that it in fact does fail to adequately notify Δ of the underlying basis for the lawsuit sufficient to permit Δ to identify potential defenses?

A: GS 7A-216 authorizes the magistrate to direct the π to amend the complaint to provide adequate details, and to grant whatever continuances may be necessary to allow Δ to respond to the new information.

Q: What should I do if Δ files a motion to dismiss pursuant to GS 1A-1, Rule 12(b)(2) and/or (3), challenging venue or personal jurisdiction?

A: GS 7A-221 provides that assignment to the magistrate is automatically suspended if a Δ files one of these motions. The clerk must schedule the motion for hearing before a district court judge.

NOTE: These objections are waived unless filed in writing prior to trial. A Δ who objects to personal jurisdiction or venue for the first time at trial will not be heard, unless the defect is so severe as to deprive the court of total authority to hear the case. E.g., the

complaint and summons clearly states that Δ is not a resident of the county, thus depriving the small claims court of subject matter jurisdiction.

Before You Hear the Evidence

Complete the *Pre-Trial Checklist*

Determine whether both parties, or their *authorized representatives*, are present.

> Mandatory Rule #3: A party may appear only pro se (on his own behalf) or through an attorney unless an exception applies.

Who is an authorized representative?

- The party's attorney
- An agent
  - SE cases: with personal knowledge
  - Corporate party: officer or employee
- Special cases: estates, guardians (ad litem & otherwise)

Who is NOT an authorized representative? Anyone having only *power of attorney*

If neither party is present, or only Δ is present: Dismiss the case for *failure to prosecute*, using AOC-G-108.

Q: If Δ appears and π does not appear, is it appropriate to continue the case to allow the π another chance to appear?
A: No.

Q: In this situation, should I mark my dismissal as *with* or *without prejudice*?
A: If Δ asks you to dismiss the action, dismissal with prejudice is appropriate unless some special circumstances dictate a different result.

Q: What do these terms actually mean?

A: When a case is dismissed *without prejudice*, the π may refile the same lawsuit. Unless barred by a statute of limitations, the only consequence to the π for failing to appear is paying court costs when the π files again.

When a case is dismissed *with prejudice*, it is a final determination that Δ is not liable for the particular fault alleged in the lawsuit. If π attempts to bring a second lawsuit against the same Δ for the same reason, Δ is entitled to have the second case dismissed. And the fact that Δ is not liable for that wrong may well be binding in future lawsuits involving the same events and circumstances.

Q: If neither party appears, is the dismissal with or without prejudice?

A: GS 1A-1, Rule 41(b) states that a dismissal is with prejudice unless it falls into certain specified exceptions not relevant here, or unless the court specifically indicates to the contrary. The court has authority to so specifically indicate, but in light of the rule's "default setting" the rule seems to contemplate a general rule favoring dismissal with prejudice, with the court having authority to deviate from that when justice so requires.

Local Practice Alert: Not all magistrates follow this practice. Some magistrates dismiss with prejudice if the Δ appears and the plaintiff does not, while others require the Δ to appear AND to request dismissal.

Mandatory Rule #4: If defendant does not appear for trial, the SCRA prohibits the court from entering judgment in the absence of a legally-sufficient affidavit attesting to the defendant's military status.

If the π is present and Δ is not present, verify that the π has provided a legally sufficient SCRA affidavit pertaining to whether Δ is a member of the military. The affidavit must have the general form and contain the same information as AOC-G-250.

Q: What is a legally sufficient affidavit?

A: Plaintiff must have sworn to the truth of the statements before an official authorized to administer oaths and filed the completed document with the clerk. The π must select one of three alternatives:

- ✓ Δ is in the military
- ✓ Δ is not in the military
- ✓ I am unable to determine whether Δ is in the military

If either of the last two alternatives are checked, the affidavit must contain specific facts in support of the selected alternative.

Q: Who determines whether an affidavit is sufficient?

A: The federal requirement applies to the judicial official conducting the trial—not to the π —and it is the judicial official who violates the law by proceeding to trial and entering judgment in the absence of an adequate affidavit. For this reason, it is the small claims magistrate who determines whether an affidavit is sufficient.

Q: Does the law require the π to check the DoD website and supply the results to the court?

A: No. If the π has sufficient information (SS# and/or DOB) to obtain a definitive result from the DoD website, few if any additional facts are likely to be necessary for the affidavit to be accepted by the magistrate. But the website is not a mandatory source of information, and in fact is not helpful in the absence of sufficient identifying information about Δ. The π may rely on other evidence to support a conclusion that Δ is not a servicemember.

Q: What should the magistrate do if the affidavit simply states that the π is unable to determine Δ's military status?

A: This, without more, is an insufficient affidavit. The affidavit should state facts in support of the conclusion that the π is unable to make this determination.

Q: If Δ is in the military, what should the magistrate do?

A: The law requires that an attorney be appointed in this circumstance to contact Δ to make sure Δ knows both of the lawsuit and about Δ's rights to request a stay of proceedings under the SCRA.

	Local Practice Alert: The procedure for appointing an attorney when required by the SCRA is established by each county or judicial district. Because the SCRA applies to all civil cases, clerks and trial judges also encounter this requirement and should be able to answer any questions.	

Mandatory Rule #5: Unless Δ is present and waives a continuance, the magistrate must continue an action in which service of process was not accomplished a minimum time before trial.

Determine whether the statutory requirements for minimum notice to Δ have been satisfied:

- ≈ For summary ejectment cases: GS 42-29 requires sheriff's office to serve T "at least two days prior to the day of trial."
- ≈ All other small claims cases: GS 7A-214 requires a magistrate to continue the case if trial date is less than five days after Δ is served.

Q: What should the magistrate do if Δ is present but the minimum notice requirements have not been met?

A: The magistrate should inform Δ that the law entitles the Δ to additional time to prepare for trial if the Δ wishes. If the Δ waives the right to a continuance, the magistrate should proceed as usual with the case. If the Δ prefers a continuance, the magistrate should continue the case for a time long enough to provide the Δ with the minimum notice period.

AT THE BEGINNING OF TRIAL

Identify the parties present and resolve any issues raised by the Pretrial Checklist.

Deal with any *last-minute developments*. These are perhaps most likely to come up at the beginning of trial, but they sometimes arise as the parties present their evidence.

> Mandatory Rule #6: Every action must be brought in the name of the real party in interest. If the named plaintiff is not the rpii, the court must allow the plaintiff an opportunity to correct the error, continuing the case if necessary.

Real party in interest (rpii) requirement: The law requires that the person bringing a lawsuit be the person who is entitled to the relief sought. If at any point during the trial it becomes clear that someone other than the π is actually the injured party, the magistrate must offer the π an opportunity to add or substitute the "real party in interest," continuing the case if necessary.

The most common instance of a rpii violation occurs when a property management company files a summary ejectment action in its own name, rather than in the name of the property owner.

Plaintiff requests a voluntary dismissal. (Sometimes this happens before trial as well.)

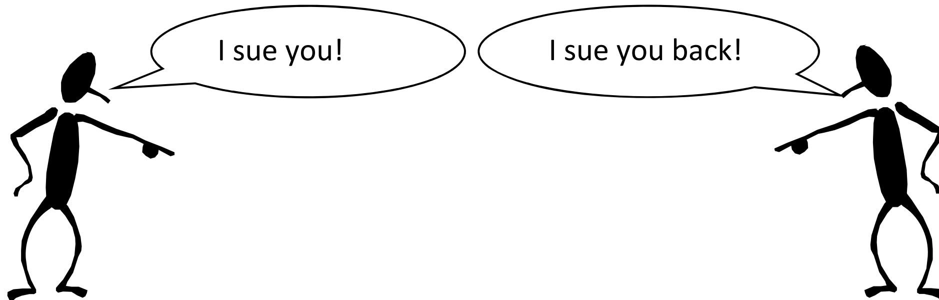
Rule: π can dismiss the case at any point before s/he has finished presented evidence. Use AOC-G-108 to record the dismissal.

Δ has filed (or says she wants to file) a counterclaim.

Q: What's a counterclaim?

A: A counterclaim is simply a document (very similar to a complaint) in which Δ asserts a claim against the π. Generally, a counterclaim is filed as part of an answer, and the document should ideally be titled "Δ's Answer & Counterclaim." Sometimes it may not be completely clear whether a Δ intended to file a counterclaim or merely an answer. A counterclaim is different from an answer because it goes further. Instead of simply defending against π 's claim, a Δ is essentially saying, "Not only do I not owe π money. Plaintiff owes ME money!" A

Δ is required to pay court costs for filing a counterclaim, just as a π is for filing a complaint. Counterclaims will be discussed again in the *Trial* section of this document.



Rules for Counterclaims

Must not exceed $10,000.

Must be in writing.

Must be filed with clerk <u>before</u> the time the trial is scheduled to begin.

Q: What should I do if Δ files the counterclaim at the last minute and then brings a copy to trial, surprising the π?

A: Assuming counterclaim meets above conditions, tell Δ to give π a copy. If π needs time to prepare a defense, grant a continuance.

Q: What if Δ asks to file counterclaim after the time case is set for trial**?**

A: Tell Δ that s/he may file it as a separate action, but has missed the deadline for having the claim heard in this action.

Q: What if counterclaim is for more than $10,000?

A: Δ has two choices:

- ≈ reduce the amount so that the counterclaim can be heard today, or
- ≈ take a voluntary dismissal and refile in district or superior court.

NOTE: Be sure to inform Δ that claim-splitting is not allowed, and that Δ should accurately state all the damages s/he wishes to recover for the alleged wrongful act of the π . Example: Δ can't reduce a $18,000 counterclaim to $10,000 and then bring another action for the $8,000 excess.

Q: What's the procedure if Δ chooses to reduce the amount of damages?

A: This requires Δ to amend her counterclaim. The magistrate need only write something like the following in the *Other* section of the judgment, under *Findings*: "Δ filed a counterclaim in this action in the amount of $18,000" but amended her complaint in open court to reduce the amount claimed to $10,000."

Q: What's the procedure if Δ chooses to take a voluntary dismissal of her counterclaim?
A: Be sure to state that in your judgment.

Q: What happens to Δ's counterclaim if π voluntarily dismisses his case?
A: Verify that π has received notice of the counterclaim, and then hear the counterclaim just as though it had been filed as a small claims action in the first place.

One of the parties requests a continuance.

If both parties are present and agree to a continuance, the law favors—but does not compel—allowing it.

If one party's request for a continuance is opposed by the other party, the party seeking a continuance must show good cause.

> "[T]he trial court must pass on … the question whether the moving party has acted with diligence and good faith. . . . The chief consideration to be weighed in passing on [the request] is whether the grant or denial of a continuance will be in furtherance of substantial justice."
> Shankle v. Shankle, 289 N.C. 473 (1976).

There is reason to believe the Δ has filed for bankruptcy.

Mandatory Rule #7: If Δ files a petition for bankruptcy, the small claims judge must stop the trial, discontinuing the action (using G-108) until the automatic bankruptcy stay is lifted.

When a person files a bankruptcy petition, it triggers an *automatic stay* under federal law which prohibits creditors from attempting to collect debts from the person, including pursuing legal actions against the debtor. The stay goes into immediate effect when the petition is filed, and

any action taken by a state court thereafter is void, assuming the stay is applicable. (Criminal cases, for example, are not actions by a creditor and are not subject to the stay.)

Q: Is the small claims judge subject to the stay even if the Δ takes no action to inform the court that a bankruptcy petition has been filed?

A: Yes. The stay goes into effect automatically, and judgments entered in violation of the stay—whether knowingly or not—are void.

Q: What should a magistrate do upon learning that a bankruptcy petition has been filed?

A: Fill out the bottom portion of AOC-G-108, discontinuing the action until the stay has been lifted. <u>Do not dismiss the action.</u>

Q: Does the stay apply to actions for summary ejectment?

A: Yes, unless judgment was entered prior to Δ's filing the bankruptcy petition. A landlord is not without a remedy in this situation, however; the landlord may ask the bankruptcy court to lift the stay in regard to the tenant's obligation to pay rent.

Hearing the Evidence

Place both parties and any witnesses under oath at the outset.

Explain to both parties that you will make a decision only after hearing from them both. Because the π has the burden of proving the case by the greater weight of the evidence, π must testify first.

If only the π is present, administer the oath to π and any witnesses and hear testimony just as you would if Δ were present. This situation is handled exactly as though Δ were present, but presented no effective defense. Exception: In summary ejectment actions π may request a judgment on the pleadings and thereby avoid the requirement that π prove entitlement to relief.

Mandatory Rule #8: Whether or not Δ is present at trial, π must prove the essential elements of the case by the greater weight of the evidence (subject to one exception).

The degree of formality with which a small claims trial is conducted lies within the discretion of the magistrate. It is appropriate for magistrates to question witnesses and to provide the parties with information about small claims procedure, so long as the magistrate is careful to avoid asking leading questions, advising a party about the best course of action, or acting in a manner showing favoritism to either party.

Trying a Case with a Counterclaim

Recommended: Conduct the trial in two parts, trying the primary claim first and then separately hearing evidence on the counterclaim. After you've heard and decided both cases, calculate the total amount of the judgment, setting off as necessary. Enter one judgment, making clear how you ruled on both cases and what damages were awarded in each case.

Amending the Complaint

The law says that a judge *should freely allow* a π to amend a complaint. Assuming the statute of limitations has not run, there is little reason to deny such a motion. Generally, the only issue of concern is whether fairness requires a continuance so that Δ -- particularly an absent Δ -- can be given notice and make any necessary adjustments to defend against the amended claim.

Amendment to correct name? Allowed, provided that the correct person was served. Not allowed to substitute a different Δ.

Amendment to substitute remedy? Common in actions to recover property where creditor discovers property is no longer in Δ's possession. Creditor should be allowed to amend complaint to request money owed, but take care that Δ has notice of amendment.

Amendment to amount requested? Allowed, but be sure Δ has notice of increased amount.

Amendment to change theory of recovery (aka, checked the wrong box)? Unnecessary, but allowed. Again, issue is notice to Δ.

Q: What is the procedure for amending a complaint?

A: In small claims court a motion to amend is often made during trial. In this circumstance, it is not necessary for the π to physically write the amendment on the complaint. It is preferable for the magistrate to write the amendment on the judgment form.

ENTERING JUDGMENT AND OTHER POST-TRIAL ISSUES

Mandatory Rule #9: The judgment must contain the magistrate's decision about all claims in relation to all parties.

Usually, small claims judgments are announced in open court. If the magistrate prefers, the magistrate may reserve judgment for up to 10 days. Note the exception for summary ejectment cases. GS 7A-221(b) prohibits a magistrate from reserving judgment unless the parties agree or the case is complex. If the magistrate reserves judgment because the case is complex, judgment must be rendered within five business days.

Q: What's the procedure for reserving judgment?

A: The magistrate should inform the parties that they will receive a copy of the written judgment within the next two weeks, and explain the procedure for appeal. The magistrate must complete the section at the bottom of the judgment form labeled *Certification*, have the judgment stamped in by the clerk, and mail a copy to both parties.

Q: Can a magistrate correct a clerical error in a judgment?

A: A magistrate can correct a clerical error at any time, on the magistrate's own motion. Note that a *clerical error* is an error that does not affect the legal rights of the parties. For that reason, notice to the parties is usually not necessary. An example would be misspelling the name of one of the parties. See Small Claims Law p. 41 for details of procedure.

Steps in Entering Judgment

Make a clear division between the close of evidence and your readiness to announce your decision.

Announce your decision, clearly identifying by name the party you're ruling in favor of.

Provide a brief explanation of the legal reason for your decision.

Allow the parties to ask questions about next steps, and inform the losing party of the right to appeal.

Mandatory Rule #10: The judgment in a small claims action is a final judgment and may be changed only by appeal or by an order entered pursuant to Rule 60(b) setting the judgment aside.

Appeal

The remedy for a magistrate's legal error is appeal to district court for trial *de novo*.

Q: What is trial *de novo*?

A: When a small claims judgment is appealed, the district court judge conducts a whole new trial. The parties are not bound by their decisions at the small claims level: they may make new arguments, present new evidence, and even change the remedy they're seeking in the lawsuit.

Q: What is the procedure for appeal?

A*:* A party may give notice of appeal in two ways, either by notifying the small claims judge in open court, or by filing a written notice of appeal with the clerk within 10 days. An appealing party must pay costs of appeal within 20 days, or else appeal is dismissed. Note: costs must be paid within 10 days in summary ejectment actions. A party who cannot afford to pay the costs of appeal may be excused by qualifying as indigent.

Q: What is the effect of the small claims judgment while an appeal is pending in district court?

A: A judgment for money is automatically stayed when a party gives notice of appeal. An judgment awarding possession of real or personal property is not automatically stayed and so may be enforced just as if there were no appeal. In summary ejectment actions a tenant appealing a judgment in favor of a landlord can delay enforcement of the judgment through a procedure in the clerk's office requiring the tenant to pay the undisputed rent in arrears and sign an undertaking to pay rent as it comes due.

Q: What happens after the small claims judgment?

A: A π who wins in small claims court is not permitted to enforce a judgment immediately; first, the 10-day period during which the Δ may give notice of appeal must end. Only then may the π initiate enforcement procedures by going to the clerk. There is an additional cost to

enforce a judgment, which will be added to the costs owed by the losing party. The next steps vary, depending on whether the judgment is for money or recovery of rental or personal property. Some magistrates provide the parties a copy of the handout in the Reference Section titled "What Happens After Small Claims Court."

Motions to Set Aside Judgment under Rule 60(b)

Rule 60(b) sets out six reasons for setting aside a judgment. The first ground is that the judgment should be set aside because of excusable neglect, mistake, or surprise. In small claims, the "excusable neglect" at issue almost always involves a party's failure to appear. When a judgment is set aside under Rule 60(b), the case will be re-tried, usually based on the original complaint with no need to repeat service of process.

Q: What is the procedure for deciding whether to set aside a judgment?

A: Typically, the losing party files a motion to set aside the judgment, specifying the reason. Motions must be filed within a reasonable time, usually within one year. The other party is given notice of the motion, and the court conducts a hearing on whether the motion should be granted.

Q: Who conducts the hearing?

A: A district court judge generally hears Rule 60(b) motions, but some magistrates are authorized by their chief district court judge to hear motions provided that the motion is based on Rule 60(b)(1) (mistake, excusable neglect, inadvertence, or surprise.)

Q: How does a magistrate determine whether the judgment should be set aside?

A: The test is whether the party who made the error gave the case "such attention as a man of ordinary prudence usually gives to important business affairs." If the moving party is Δ, she must also allege that she has a meritorious defense to π's claim. Finally, our appellate courts have repeatedly stated that a motion under Rule 60(b) is not to be used as a substitute for appeal. If the error in question was a legal error made by the magistrate, the judgment will not be set aside (unless the error was so serious that it renders the judgment void).

Q: If a magistrate decides to set aside the judgment, how is this decision implemented?

A: The magistrate enters a written order setting aside the judgment, making appropriate findings about the grounds for doing so and, if the motion was filed by the Δ, the existence of a meritorious defense. The magistrate should then re-calendar the case for trial.