

GUIDE TO CLAIM AND DELIVERY CASES BY FINANCE COMPANIES

Susan Ingles
Consumer Law Unit Head
S.C. Legal Services
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I. INTRODUCTION

The claim and delivery procedure is used by finance companies in South Carolina Summary Court to augment their debt collection* efforts. The typical contract documents include a combination note and security agreement. This document provides for an unperfected**, non purchase money*** security interest in a consumer's household goods which have little economic value.

.*The Summary Court Bench Book emphasizes that “It is essential that magistrate understand that claim and delivery is not proper in general sales contracts in which no reservation of title is retained by the seller (where no specific property is used as collateral), NOR MAY IT PROPERLY BE USED TO COLLECT A DEBT or an unpaid portion of a sales agreement

.**Not perfected by being a purchase money security interest or by filing a UCC-1 Financing Statement

*** The loan money was not used to purchase the goods

1. Claim and Delivery Defined

An action to recover the possession of specific personal property wrongfully taken or wrongfully withheld. This remedy is available only “in action to recover the possession of personal property.”

United Fabrics Corporation v. Delaney, 1
28 S.E.2d 11

Note:

In an action arising out of a non-purchase money, non-possessory security interest in household goods, there can be no wrongful withholding until creditor demands possession of the property.

18 S.C. Law Quarterly 240 at 244
Byrd v. O'Hanlin, 1 Mill. Const. 401 (S.C. 1817)



Claim and Delivery Defined (continued)

- ▶ The SC Bench Book for Magistrates and Municipal Court Judges defines the action of claim and delivery as “an action for the recovery of specific personal property wrongfully taken or withheld from its rightful owner, with recovery of any damages resulting from the taking or possession of property.”
- ▶ In a claim and delivery action, the primary relief sought is for the return of possession of the specific property and only where the property is not recoverable, may the value of the specific property be awarded or recovered.
 - Wilkins v. Willimon et al., 128 S.C. 509, 122 S.E. 503 (S.C. 1924)

Right to Possession Founded on Security Interest

- ▶ When the right to the possession is based on an obligation to secure the payment of a debt, then the right to the possession depends upon the *existence* of a debt, but not its *amount*.
- ▶ The judgment in such cases is for the possession of the chattels (personal property) and damages for the wrongful taking or withholding of possession.
- ▶ Until the right was given by the statute, the trial court was not authorized to determine the amount due between the parties.
- ▶ The form of the judgment was prescribed by the statute and it was not in contemplation of law that the liability of the sureties should exceed the scope of the action--the enforcement of the right of possession and damages for the unlawful taking or withholding.
 - Wilkins v. Willimon et al., 128 S.C. 509, 122 S.E. 503 (S.C. 1924)

2. Types of Claim and Delivery

4 Basic Actions described in the Summary Court Bench Book

1. Claim and delivery upon showing of danger of destruction or concealment (§ 22-3-1380);

upon a determination by magistrate, based upon affidavit, property may be immediately seized and held by officer (this is true immediate dispossession)

2. Claim and delivery upon showing of a knowing written waiver (§ 22-3-1360);

upon showing of knowing and voluntary waiver by person in possession; shown by claimant by affidavit, magistrate may order delivery of property to plaintiff-claimant. (this is the only true situation of immediate delivery to plaintiff – this will normally be based on a waiver clause in a written contract)

4 actions (continued)

3. Claim and delivery for immediate dispossession
(§ 22-3-1330);

Defendant in possession is given a notice of right to a preseizure hearing which must be requested within 5 days of date of service or at the end of the 5 days he may be immediately dispossessed of the property which is held by the officer; the ultimate ownership of the property is determined at a trial held at a date set from 5 to 20 days after service of summons.

4. Claim and delivery for possession
(§ 22-3-1310);

where immediate dispossession is not desired; dispossession and ultimate possession are determined at hearing, date set by summons from 5 to 20 days after service thereof.

Requirements

(S.C. Summary Court Bench Book)

- ▶ All 4 types of Claim and Delivery Actions require:
 - 1) Affidavit in conformity with 22-3-1320 (“the Affidavit”)
 - 2) A summons requiring the defendant to appear before the magistrate at a date set not less than 5 nor more than 20 days from date of service and seizure* for the purpose of determining permanent possession (22-3-1330(c)) – also include notice that if the defendant fails to appear at the designated date and time then the plaintiff will receive a judgment for possession of the property described in the affidavit with the costs and disbursements of the action (“the Summons”)

* Only where immediate possession is sought pending trial and granted with proper surety bond in place.

Additional Requirements for Each Specific Type of Claim and Delivery Action (S.C. Summary Court Bench Book)

- ▶ **Claim and Delivery Upon Showing of Danger of Destruction and Concealment also requires:**
 - 3) An Affidavit containing facts sufficient to show that it is probable to believe that the property at issue is in immediate danger of being destroyed or concealed by the possessor of such property and particularly describing such property and its location (22-3-1380) (“**Affidavit of Danger**”)
 - 4) A written undertaking in double the value of such property (22-3-1330(a)) (“**Surety**”)
 - 5) A notice of an opportunity for a hearing for repossession which must be requested within 5 days of the service of all papers and the seizure (22-3-1330(b)) (“**Notice of Right to Repossession Hearing**”)*

Additional Requirements

(S.C. Court Bench Book)

- ▶ Claim and Delivery Upon Showing of Waiver also requires:
 - 3) An Affidavit which shows that the defendant has in writing by contract or separate written instrument voluntarily, intelligently, and knowingly waived his right to a hearing prior to repossession of the (22-3-1360) (“**Affidavit of Danger/Waiver**”)
 - If included in contract, the waiver must be conspicuously displayed in the contract and includes the wording “waiver of hearing prior to immediate possession”
 - 4) A written undertaking in double the value of such property (22-3-1330(a)) (“**Surety**”)
 - 5) A notice of an opportunity for a hearing for repossession which must be requested within 5 days of the service of all papers and the seizure (22-3-1330(b)) – if defendant fails to make timely demand for pre-seizure hearing, then the constable will be directed to take the property described in the affidavit (“**Notice of Right to Repossession Hearing**”)

Additional Requirements

(S.C. Court Bench Book)

- ▶ Claim and Delivery for Immediate Dispossession also requires:
 - 3) A written undertaking in double the value of such property (22-3-1330(a)) (“**Surety**”)
 - 4) A notice of an opportunity for a hearing for repossession which must be requested within 5 days of the service of all papers and the seizure (22-3-1330(b)) – if defendant fails to make timely demand for preseizure hearing, then the constable will be directed to take the property described in the affidavit (“**Notice of Right to Preseizure Hearing**”)*
 - 5) An order restraining the defendant from damaging, concealing, or removing property (22-3-1370) (“**Order Restraining Damage or Removal**”)

- ▶ Claim and Delivery for Possession also requires:
 - 3) An order restraining the defendant from damaging, concealing, or removing property (22-3-1370) (“**Order Restraining Damage or Removal**”)

3. The Basic Legal Framework

- 1) Plaintiff Creditor demands possession of the property from the Defendant (§ 22-3-1320) prior to filing case *
- 2) Files affidavit in conformity with (§ 22-3-1320)

If seeking possession prior to trial...

- 3) A written undertaking by SUFFICIENT sureties (to be approved by magistrate) in double the value of the property (§ 22-3-1330 (a))
- 4) Right to pre-seizure hearing notice to defendant within 5 days of service or may be dispossessed of property at the end of 5 days (§ 22-3-1330 (b))

*This is a question of fact to be determined. Usually the only action taken by the company is repeated, harassing demands for payment.

Judgment in Claim and Delivery

- ▶ SECTION 15-69-210. Judgment.
- ▶ In an action to recover the possession of personal property, judgment for the plaintiff may be for the *possession*, for the *recovery of possession* or for the *value* thereof in case a delivery cannot be had and for damages, both punitive and actual, for the detention.
- ▶ If the property has been delivered to the plaintiff and the defendant claims a return thereof, judgment for the defendant may be for a return of the property, or the value thereof, in case a return cannot be had, and damages, both actual and punitive, for taking and withholding the property.
- ▶ But when either party gives bond for the property, as provided by law, no punitive damages shall be allowed for anything occurring after the giving of the bond.

Immediate delivery (Affidavit)—a subsidiary proceeding
Ultimate delivery (Complaint)—cannot seek immediate delivery without it

A complaint is required in an action for claim and delivery and must state facts sufficient to constitute a cause of action. The right to the ultimate delivery is tested by the sufficiency of the complaint and the right to immediate delivery is tested by the sufficiency of the affidavit.

It must be borne in mind that the reason for the complaint and the affidavit in claim and delivery are entirely separate and distinct. The complaint states the cause of action; the affidavit is in no sense a part of the complaint, and need not be executed at all, unless the plaintiff desires to claim the immediate delivery of the property, which may be done at the time the summons is issued or at any time thereafter; it is essentially a subsidiary proceeding.

An objection to the sufficiency of the complaint is in no sense an objection to the sufficiency of the affidavit. If the defendant should desire to contest the right of the plaintiff to claim the immediate delivery of the property, by reason of the omission of some essential element in the affidavit required by the Code, he should move to set aside the proceedings so far as the immediate delivery of the property is concerned.

ADEIMY v. DLEYKAN ET AL. 107 S.E. 35 (S.C. 1921) 116 S.C. 159

II. Analyzing the Affidavit

Requirement of Magistrate Before Non Lawyer Signs Affidavit

Before the magistrate allows the filing of the affidavit, the first step required in the claim and delivery procedure should be an inquiry by the magistrate as to whether the Plaintiff Creditor actually demanded possession of the property from the Defendant.

- S.C. Summary Court Bench Book
Claim and Delivery Section K (6)

What Is Required of Affiant

- ▶ Statements of fact, not conclusions or vague statements such as “unkown” or value of property is “balance of loan”.
- ▶ Personal knowledge of the facts contained in the Affidavit
- ▶ Signature notarized in the presence of the notary
- ▶ The Affidavit must contain statements that are admissable under the Rules of Evidence

1. Statutory Requirements of Affidavit by Creditor

Required by § 22-3-1320 and must state:

1. Plaintiff (Creditor) is OWNER of the property claimed (particularly describing it) OR is entitled to the possession of the property therein (specifically setting forth the facts that reflect this and should have copy of contract attached)
2. Property is WRONGFULLY DETAINED by Defendant (this is why it is necessary for Plaintiff to demand possession—not payment prior to filing action)
3. State the ALLEGED cause of the detention (e.g., creditor has demanded possession of the property and it has been refused)**
4. Property has not been seized for tax, assessment, fine
5. The ACTUAL value of the property (the only remedy, other than possession, available in C & D if possession cannot be had)

2.Sufficient Affidavit by Creditor

Required by § 22-3-1320

Where finance company seeks immediate possession

- ▶ The Plaintiff Creditor must also attach a notice of the defendant's right to a pre-seizure hearing to the affidavit, that was sent to notify them of their right to demand a hearing
- ▶ The notice must state that the defendant has the right to send a demand for a hearing to the clerk of court in writing so that they may present evidence regarding the plaintiff's claim for possession.

Note: If there is no evidence of demand for possession, immediate possession should be denied.

Issue Spotting Exercise



Is this affidavit sufficient according to the statute?

Example 1 Analysis

S.C. Code Section 22-3-1320

- ▶ **Item 1:** while the description of property appears to comply, the Plaintiff failed to state facts or provide documentation that it is the owner* or is entitled to immediate possession of the property listed
- ▶ **Item 2:** did not fill in
- ▶ **Item 3:** failure to pay a secured debt/ default does not equate to wrongful detention – what Plaintiff needs to say is that they have demanded possession of the property and the demand has been refused and be prepared to prove it
- ▶ **Item 5:** need to provide a list and state the value for each piece of the personal property

*Note: Remember finance company is not the OWNER, only potentially a secured creditor (depending on their documentation).

Demand must be made for property, not money.

Example 2

1. The plaintiff is the owner, or is entitled to possession of the property described below: (Give detailed description of each item):
2. 2. The property described above is being wrongfully withheld by the defendant, [REDACTED]
3. To the best knowledge of the plaintiff, the property is being withheld by the defendant because: NON PAYMENT
a _____ f
a _____ f

4. The property was not/was taken from the ownership or possession of the plaintiff due to any tax, fine or assessment (and if so seized, it should not have been seized by virtue of its exempt status).

The actual value of the above described property is: (Itemize and give total if more than one item involved.) 1015.00 – 52" SONY FLAT SCREEN TV 63.44, SONY DVD PLAYER 63.44, SONY DIGITAL CAMERA 63.44, LAPTOP COMPUTER 63.44, CAMCORDER 63.44, XBOX 360 GAME SYSTEM 63.44, CORDLESS DRILL 63.44, (3) XBOX GAMES 63.44, BLACK & DECKER SAW 63.44, DIAMOND RING 63.44, TIGER RING 63.44, BATTERY CHARGER 63.44, STEP LADDER 63.44, TIGER EYE RING 63.44, ELECTRIC SAW 63.44, DIAMOND NECKLACE 63.44

5. That a right to cure as specified in Section 37-5-110 and Section 37-5-111 (has been given on (5/02/13) not required.

Example 2 Analysis

- ▶ Item 1 and 4: not filled out
- ▶ Item 3: failure to pay a secured debt does not equate to wrongful detention of property – Plaintiff failed to state that they have demanded possession of the property and it has been refused
- ▶ Item 5: description of property in #4 complies – however, each piece of property is valued at \$63.44 and when you divide \$1,015.00 by 16, you get \$63.44. Therefore, this valuation evidences a lack of good faith and foundation.

Note: Lack of attention to detail reflects that affiant is treating this like a form to fill out rather than a statement under oath of which he/she must have personal knowledge. Also shows they don't understand the nature of the oath and the consequences if not truthful.

Example 3

Plaintiff, personally appearing before me, who being duly sworn, states the following:

1. The plaintiff is the owner, or is entitled to possession, of the property described below. (Give detailed description of each item):

See Contract

2. The property described above is being wrongfully withheld by the defendant,
3. To the best knowledge of the plaintiff, the property is being withheld by the defendant because:

Non payment

4. The property was not taken from the ownership or possession of the plaintiff due to any tax, fine or assessment (and if so seized, it should not have been by virtue of its exempt status).
5. The actual value of the above described property is: (Itemize and give total if more than one item involved.)

TOTAL \$8550

That this amount has been determined in the following manner, to wit:

See contract

6. That the Notice of Right to Cure as required by Section 37-5-110 and Section 37-5-111, Code of laws of South Carolina, 1976, as amended, has been given on _____ (is not required).

Example 3 Analysis

- ▶ **Item 1:** “See Contract” all Plaintiff had to do was just recopy the information on the contract and attach the contract for proof
- ▶ **Item 2:** failed to even write in the Defendant’s name
- ▶ **Item 3:** needed to put that Plaintiff has demanded possession of the property and it has been denied – “non payment” does not comply
- ▶ **Item 4:** To be verified by inquiry at hearing
- ▶ **Item 5:** failed to list and itemize each piece of property or even provide how this amount has been determined

Example 4

Plaintiff, _____, personally appearing before me, who being duly sworn, states the following:

1. The plaintiff is the owner, or is entitled to possession of the property described below: (Give detailed description of each item):

2002 Dodge Dakota (Blue) VIN: 2B7GL42X42S625855

2. The property described above is being wrongfully withheld by the defendant. [REDACTED]

3. To the best knowledge of the plaintiff, the property is being withheld by the defendant because: [REDACTED] has defaulted on her title loan

4. The property was ~~not~~ was taken from the ownership or possession of the plaintiff due to any tax, fine or assessment (and if so seized, it should not have been seized by virtue of its exempt status).

5. The actual value of the above described property is: (Itemize and give total if more than one item involved.)

TOTAL \$ 1702.⁰⁰/₁₀₀

Principle amount \$1044.²² plus \$5.⁷² per day interest since 11/20/13

6. That a right to cure as specified in Section 37-5-110 and Section 37-5-111 (has been given on 2/27/13) (is not required).

Example 4 Analysis

- ▶ Item 3: Plaintiff failed to provide that they have demanded possession of the property and it has been refused
- ▶ Item 5: principal amount is not what the claim and delivery action is for – claim and delivery actions are brought in order to recover the actual property that has been pledged as collateral—or its value if possession cannot be had.

Item 6 of the Affidavit Form: Notice of Right to Cure

- ▶ S.C. Consumer Protection Code Sections 37-5-110 (this section provides what is required in a Notice of Right to Cure sent by the finance company to the consumer) and 37-5-111.
- ▶ Must give 20 days notice per 12 months. HOWEVER, if the contract was renewed/refinanced there must be a new default and a new Notice of Right to Cure.

Finance company is required to send a Notice of Right to Cure

- ▶ If the creditor states that the Notice is not required for Item 6, that is a reason for dismissal—even though they may have actually sent one.
- ▶ They need to state when the Notice was sent and the date should be
 - 1) within a year of the first default, and
 - 2) indicate that the consumer did not refinance the loan after the Notice had been sent

3. Sufficient Description of Collateral in the Affidavit (and in the security agreement)

- ▶ Creditor must disclose a description or identification of the type of any security interest held or to be retained or acquired by the creditor in connection with the extension of credit and a clear identification of the property to which the security interest relates.

Jones v. Allied Loans, Inc. 447 F.Supp. 1121 (DSC 1977)

- ▶ Also see S.C. Code 36-9-108(e)(2) which provides that in a consumer transaction:

A description only by type of collateral is an insufficient description of consumer goods.

Sufficient Description of Collateral

- ▶ According to the South Carolina Bench Book for Summary Court Judges: “The description should be detailed enough to allow the constable or sheriff to distinguish that piece of property from other such items;”
- ▶ For example, “a description of “one 19” television” is probably not sufficient and a claim and delivery action should not be instituted on the basis of such a vague description.”

Issue Spotting Exercise



Is the description of goods contained in the affidavit sufficient?

Exhibit A

Collateral listed below verbally given by customer Outside Appraisal Performed on Security Outlined Below
Name and Type Required/ In South Carolina and Select Georgia Counties Serial Numbers Are Also Required

Television, Video & Camera Equipment

Flat Panel LCD TV(s) 32" LCD TV #09253F

Flat Panel Plasma TV(s)

Projection Screen TV(s)

Stereo Music Video Game Equipment

Stereo Receiver(s) → Radio HT 1811HV 03301

Compact Disc Player(s)

Home Stereo Speakers:

Rowe
Air C
Gene

Other Collateral Items

Ping Pong/Pool Table(s)

Jewelry (Except Wedding rings)

Musical Instrument(s)

Gas BBQ Grill(s)/ Smoker(s)

Bicycle(s)

Butane Tank(s)

14 KT gold

Butane Tank(s)

1

Additional Equipment

Galaxy phone C881081102

Additional Items of Collateral:

Galaxy phone A0000039D918D1

4. Other Affidavit Issues

The affidavit may be insufficient according to the § 22-3-1320 because...

- ▶ The writing on the form is difficult to read
- ▶ The items are not specifically described
- ▶ Plaintiff Creditor has not established its entitlement to possession by specifically stating the facts and providing basis of claim (e.g. copy of the contract)
- ▶ Creditor has not established that the items exist and are being wrongfully detained by the defendant
- ▶ Creditor has not shown that they have demanded possession and that the demand has been refused
- ▶ Creditor has not properly addressed the notice of right to cure

IV. Analyzing the Surety Bond

3c. Sufficient Surety Provided by Creditor

“Sufficient Surety”

- Written undertaking executed by one or more different sureties
- Must be approved by the magistrate, to the effect that they are bound in double the value of the property until final adjudication of the action
- They must guarantee the payment to the defendant of any sum awarded to the defendant against the plaintiff

§ 22-3-1330 (a)



Responsibility of Surety in Claim and Delivery

- ▶ In *Duc v. Seel*, the property was worthless when trial was had, and plaintiff had a verdict for \$1,000, the alleged value of the property at the time of the commencement of the action.
- ▶ It was held that plaintiff elected, by such verdict, to release the defendant's surety—by waiving his right to a verdict for a return of the property.

Duc v. Seel, 134 S.C. 10, at page 17, 131 S.E. 778;
Moore v. Sanders and *Wilkins v. Willimon*

Responsibility of Surety in Claim and Delivery

- ▶ What is a surety? What is it for?
- ▶ The surety cannot be held responsible for fraud practiced on the defendant by their principal (finance company) long before the action is brought.
- ▶ The obligation of the sureties upon a plaintiff's undertaking in claim and delivery is simply to indemnify the defendant against any loss he might suffer by being compelled to surrender possession of the property pending the trial of the action.

Whisenhunt v. Sandel, 177 S.C. 207, 181 S.E. 61 (S.C. 1935)

Sureties in a Nutshell



- ▶ The sureties say to the defendant, in effect:

"You shall not suffer by reason of the seizure of the property in dispute under our bond; if the Court decides that such seizure, though pursuant to judicial process, is wrongful, and that you are entitled to the possession of such property, we will see that it is returned to you, or its value paid to you, in the event a return cannot be made; and we will also pay you such damages as you suffer by reason of the seizure and detention of your property."

Whisenhunt v. Sandel, 177 S.C. 207, 181 S.E. 61 (S.C. 1935)

Analyzing Sufficiency of Surety

- ▶ The defendant may make written exception to the sureties at any time at least two days before the return day of the summons whereupon the Plaintiff Creditor must give further proof of surety.

(§ 22-3-1340)

Note: Employees of the Plaintiff Finance Company are not a sufficient surety. They have a conflict of interest and likely don't know they are signing for personal liability.

Sureties according to the Bench Book

- ▶ “The requisites of the bond undertaking are set out in 22–3–1330(a).* It must be a written undertaking, executed by one or more different sureties, to the effect that they are bound in double the value of the personal property as stated in the affidavit, until final adjudication of the action, and they do guarantee the return of property to the defendant if judgment be for the defendant. The sureties also guarantee the payment to the defendant of any sum awarded to the defendant against the plaintiff. The undertaking should be approved by the magistrate by signature. The defendant may make written exception to the sureties at any time at least two days before the return day of the summons pursuant to the terms of 22–3–1340**, whereupon the plaintiff must give further proof of surety.”

Issue Spotting Exercise



Finance Company X located at 123 Augusta Rd, Sumter, SC lists a surety for a claim and delivery action against Debtor Y.

The surety names are Maria Jessup and Jane Franklin and each list their address as 123 Augusta Rd, Sumter SC.

Is the creditor's surety sufficient? Why or why not?

Issue Spotting Exercise

6. Surety (Name): Marcia Jessup
a. Business Address and Phone
123 Augusta Rd.
Sumter, SC
225-3113

7. I declare under penalty of perjury that the foregoing is true and correct, and that this declaration is executed on 24 day of June, 2014 by Marcia Jessup as surety.

Marcia Jessup
Signature

6. Surety (Name): Jane Franklin
a. Business Address and Phone
123 Augusta Rd
Sumter, SC
225-3113

7. I declare under penalty of perjury that the foregoing is true and correct, and that this declaration is executed on 24 day of June, 2014 by Jane Franklin as surety.

Jane Franklin
Signature

APPROVAL

The above Undertaking by Surety is hereby approved by this Court.

Dated: 7/1/14

[Signature]
MAGISTRATE

V. Real Party in Interest

Real Party in Interest (RPI) SCRCRCP Rule 17

- ▶ **Every action shall be prosecuted in the name of the real party in interest.** An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought; and when a statute so provides, an action for the use or benefit of another shall be brought in the name of the State.
- ▶ **No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed, after objection, for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.**

Raising RPI Issue –Why does it matter?

- ▶ This matters as a corporate employee should know the name of the employer they are authorized to represent and the pleadings—especially the Non Lawyer Authorization—should reflect the proper entity.
- ▶ If the consumer defendant asserts counterclaims and is successful in getting a judgment, the real party in interest bears on the enforceability of the judgment.

“This Court [the Supreme Court of South Carolina] has held [that] where lack of capacity to sue is not timely raised by demurrer or answer, it is waived.”

- H&H Glass Company, Inc. v. Wynne, 289 S.C. 389, 346 S.E.2d 523 (S.C. 1986)

Real Party In Interest (continued)

- ▶ In Glenn v. E.I. DuPont De Nemours & Co., Inc., 254 S.C. 128, 174 S.E.2d 155 (S.C. 1970), the Court stated the general rule is: “A civil action may be maintained only in the name of a person in law, an entity, which the law of the forum may recognize as capable of processing and asserting a cause of action. . .

A suit brought in a name which is not a legal entity is a nullity and the action fails.”

Legal Nullity Example 1

- ▶ Fon Du Loans #6 vs. Client
- ▶ The address provided was 2247 Shackley Rd., Anderson, SC 29627
- ▶ However, the company's legal name is CFC Investments, Inc. d/b/a Fon Du Title Loans
- ▶ Therefore, the action fails because Fon Du Loans #6 is a legal nullity

Legal Nullity Example 2

- ▶ **ABC Finance v. Client**
- ▶ ABC Finance is a sole proprietorship owned by John Smith
- ▶ In South Carolina, ABC Finance, as a sole proprietorship, cannot sue or be sued because it is not considered a legal entity and the suit must be brought in the name of the owner dba ABC Finance, i.e., John Smith dba ABC Finance
- ▶ Therefore, the action fails because ABC Finance is not properly named by indicating the name of the individual who is the sole proprietor

Misnomer

- ▶ In Commercial & Savings Bank of Lake City v. Ward, 146 S.C. 77, 143 S.E.2d 546, the Court explained that “an action in which a legally existing plaintiff has been misnamed is still a true action, to which the court can give full effect, subject only to defendant’s right to object at the threshold for misnomer.”
- ▶ Pursuant to Rule 17(a): “No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed, after objection, for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.”

How to Determine if Real Party in Interest is properly named

- ▶ Does the name in the case caption contain “Inc.” or “LLC”?
- ▶ Does the Non Lawyer Authorization contain a different corporate name?

This has consequences for both parties as to enforceability of judgments.

How to Determine Whether the Plaintiff as Named Is the RPI?

1. Licensee Lookup at S.C. Department of Consumer Affairs www.consumer.sc.gov
2. Corporation Search at S.C. Secretary of State www.scsos.com

Or just Google it!

VI. Notice of Right to Cure

Notice Provisions

- ▶ Has creditor complied with Notice of Right to Cure provisions of code? (See § 37-5-110 and § 37-5-111)
- ▶ The statutory penalty is evidence of the legislature's recognition that the small amount of damages that may be proven in a consumer goods repossession and sale would be insufficient to ensure creditor compliance with the Code's provisions. Hence the importance of compliance with notice provisions.

Crane v. Citicorp National Services, Inc. 437 S.E. 2d 50 (1993)

VI. Requirement of Notice of Right to Cure

- ▶ **The creditor is only required to give 1 Notice of Right to Cure per 12 months**
 - For example, if client receives first notice after falling behind in payments but then is able to catch up, the next time the client falls behind, the creditor does not have to send another Notice
- ▶ **If the client refinances the debt with the same creditor, then client is entitled to a new Notice of Right to Cure if they miss payments. It is a new and separate contract that establishes the consumer's contract rights anew.**

S.C. Consumer Protection Code Section 37-5-111

- ▶ (1) With respect to a secured or unsecured consumer credit transaction payable in two or more installments, except as provided in subsection (2), after a default consisting only of the consumer's failure to make a required payment, a creditor, because of that default, may neither accelerate maturity of the unpaid balance of the obligation, nor take possession of or otherwise enforce a security interest in goods that are collateral until twenty days after a notice of the consumer's right to cure (Section 37-5-110) is given. Until expiration of the minimum applicable period after the notice is given, the consumer may cure all defaults consisting of a failure to make the required payment by tendering the amount of all unpaid sums due at the time of the tender, without acceleration, plus any unpaid delinquency or deferral charges. Cure restores the consumer to his rights under the agreement as though the defaults had not occurred.



S.C. Consumer Protection Code Section 37-5-111

- ▶ (2) With respect to defaults on the same obligation and subject to subsection (1), after a creditor has once given notice of consumer's right to cure (Section 37-5-110), this section gives the consumer no right to cure and imposes no limitation on the creditor's right to proceed against the consumer or goods that are collateral or which are rented or the lessor's right to recover the property. For the purpose of this section, in credit extended pursuant to a revolving charge or revolving loan account, the obligation is the unpaid balance of the account and there is no right to cure and no limitation on the creditor's rights with respect to a default that occurs within twelve months after an earlier default as to which a creditor has given a notice of consumer's right to cure (Section 37-5-110).

VII. Threat of Criminal Penalties

Handle with Care – Most Finance Company Security Agreements do not fall within the statutes

- ▶ There are two statutes which deal with the disposition of property subject to a security interest/ under a lien and criminal penalties: S.C. Code Ann. §36-9-410 and § 29-1-30.

Can a party go to jail for failure to pay or for getting rid of the collateral pledged?

- ▶ For failure to pay on a note and security agreement – NO
- ▶ For getting rid of collateral without paying secured party – NO (unless they did so with intent to defraud the secured parties)
- ▶ Nevertheless, creditors, debt collectors, and even magistrates will threaten clients about going to jail
- ▶ This cannot be done as part of a civil action, nor can it be done by a creditor or judge sua sponte. Creditor would have to bring criminal charges itself.

SECTION 36-9-410. Unlawful sale or disposal of personal property subject to security interest; exceptions; penalties.

- ▶ (A) Notwithstanding Section 36-9-401, a person who **intentionally or willfully sells or disposes of personal property** that is subject to a **perfected security interest, with the intent to defraud** the secured party, **without the written consent** of the secured party and **without paying the debt** secured by the perfected security interest within ten days after sale or disposal or, in that time, depositing the amount of the debt with the clerk of the court of common pleas for the county in which the secured party resides, is in violation of this section.
- ▶ (B) **This section does not apply:**
 - ▶ (1) if the sale is made without the knowledge of or notice of the perfected security interest to the purchaser by the person selling the property;
 - ▶ (2) to the granting of subsequent security interests;
 - ▶ (3) *if the loan secured by the personal property includes a charge for nonfiling insurance*; or
 - ▶ (4) to personal property titled by the Department of Public Safety or the Law Enforcement Division of the South Carolina Department of Natural Resources.

- ▶ In order for this statute to be applicable:
 - 1) The personal property is subject to a security interest; AND
 - 2) The security interest is perfected*; AND
 - 3) The person intentionally or willfully sells or disposes of the personal property; AND
 - 4) With the intent to defraud the secured party; AND
 - 5) Without written consent of the secured party; AND
 - 6) Without paying the debt secured by the perfected security interest within 10 days after sale or disposal

However, the exclusion for non filing transactions under 36-9-410(A)(3) eliminates finance company liens. This means they are unperfected also.

Typical Clause in Security Agreement

- ▶ **Disclosure regarding non-recording fee*:**

If I have been charged an amount for non-recording insurance, I understand that this charge is for the cost to the Lender of non-recording insurance policies, which the Lender purchases to protect the Lender from losses in the event of a default. I understand and agree that the Lender may, at the Lender's option, purchase such insurance policies in lieu of perfecting a SI under state law. I represent to the Lender that I understand that I am not purchasing an insurance policy and the Lender's insurance policy is not for my benefit or use. I have the right to pay cash for the amount charged to the Lender for non-recording insurance premiums. If I do not pay cash, I agree that the Lender's non-recording insurance will be added to the amount financed.

Practice Tip

- ▶ If a consumer is threatened with going to jail for nonpayment, take note of the Disclosure Regarding Non-Recording Fee clause in the security agreement because that likely shows that the security interest is unperfected and therefore Section 36-9-410 does not apply
- ▶ Furthermore, to threaten the consumer with going to jail for non-payment of a loan secured by an unperfected security interest in household goods would entitle the consumer to an action for violation of the debt collection provisions of the S.C. Consumer Protection Code as well as abuse of process.

SECTION 29-1-30. Willful sale of property on which lien exists.

- ▶ Any person who shall **willfully and knowingly sell and convey** any real or personal property **on which any lien exists without first giving notice of such lien** to the **purchaser** of such real or personal property shall be deemed guilty of a misdemeanor and upon conviction thereof, shall be imprisoned for a term of not less than ten days nor more than three years and be fined not less than ten dollars nor more than five thousand dollars, either or both in the discretion of the court. But the penalties enumerated in this section shall not apply to public officers in the discharge of their official duties. When the value of such property is less than fifty dollars the offense may be triable in the magistrate's court and the punishment shall be not more than is permitted by law without presentment or indictment of the grand jury. When the case is within the jurisdiction of the magistrate's court, the court of general sessions shall have concurrent jurisdiction with the magistrate's court.

Consider whether the property (of little economic value at the outset) simply deteriorated and was disposed. This is the risk the finance company takes of accepting collateral of little or no value.

- ▶ In order for this statute to be applicable:
 - 1) The real or personal property at issue must be under a lien;
 - 2) The party willfully and knowingly sold or conveyed the property at issue;
 - 3) The party did not provide the purchaser with **notice** of the lien prior to the sale or conveyance

Note: There is another entire set of facts to be determined that is not part of the claim and delivery process and the consumer is innocent until proven guilty.

VIII. Non-Lawyer Authorization

Non-Lawyer Authorization (NLA)

- ▶ In magistrate court, business entities may be represented by a non-lawyer as long as there is a proper non-lawyer authorization provided

If this issue is not raised at the start of the case, it is essentially waived and is not grounds for an appeal since it is viewed as a collateral matter, unrelated to the merits of the case. So it is appropriate for the defendant to insist on a copy prior to proceeding to determine that this prerequisite has been met by the Judge.

- The Roof Doctor, Inc. v. Birchwood Holdings, Ltd., 366 S.C. 637, 622 S.E.2d 746 (S.C. App. 2005)

Unauthorized Practice of Law

- ▶ In 1992, the South Carolina Supreme Court in In re Unauthorized Practice of Law, 309 S.C. 304, 422 S.E.2d 123 (S.C. 1992), modified the ruling in State ex rel. Daniel v. Wells*, and held that a non-lawyer representative may be allowed to represent a business entity in magistrate's court but not without written authorization from the entity's president, chairperson, general partner, owner or CEO, before permitting such representation
- ▶ The holding of the South Carolina Supreme Court was subsequently codified in S.C. Code of Laws Section 33-1-103 and Magistrate Court Rule 21 aka "Non-Lawyer Authorization"

Non-Lawyer Authorization

S.C. Code 33-1-103

- ▶ **SECTION 33-1-103.** Designation of representation on magistrate's court; unauthorized practice of law.
- ▶ A business, as defined by S.C. Code Ann. § 33-1-103, may be represented in a civil magistrates court proceeding by a non-lawyer officer, agent, or employee, including attorneys licensed in other jurisdictions and those possessing Limited Certificate of Admission pursuant to Rule 405, SCACR. The representation may be compensated and shall be undertaken at the business's option and with the understanding that the business assumes the risk of any problems incurred as the result of the representation. **The court shall require a written authorization from the entity's president, chairperson, general partner, owner, or chief executive officer, or in the case of a person possessing a Limited Certificate, a copy that certificate, *before permitting the representation.***

Magistrate Court Rule 21

Business Representation

- ▶ “A business, as defined by S.C. Code Ann. Section 33-1-103, may be represented in a civil magistrates court proceeding by a non-lawyer officer, agent, or employee, including the attorneys licensed in other jurisdictions and those possessing Limited Certificates of Admission pursuant to Rule 405, SCACR. The representation may be compensated and shall be undertaken at the business’s option and with the understanding that the business assumes the risk of any problems incurred as the result of the representation. The court shall require a written authorization from the entity’s president, chairperson, general partner, owner, or chief executive office, or in the case of a person possessing a Limited Certificate, a copy of that certificate, before permitting representation.”

Other Issues with NLA

- ▶ If appropriate position of entity is provided, be sure to check that the person who signed it is actually in the position they claim they are. (Note: The branch manager cannot sign the NLA)
- ▶ Be sure to check that the individual named as non lawyer representative under the NLA is the person actually handling the case
- ▶ Check the date on the notary, because many times the NLAs on file are a couple of years old
 - For example, the person signing the NLA was in Columbia, however, the magistrate's court clerk signed the notary and was located in Greenville.

Locating the NLA

- ▶ If a copy of the NLA is not served with the pleadings, the consumer has the right to see it and, where appropriate, object to it and require a proper one be filed.
- ▶ Do not proceed without a proper NLA

IX. In the Final Analysis

5. Relief to be Obtained

CREDITOR (Plaintiff)	DEBTOR (Defendant)
Judgment for continued possession of the property (if seized), recovery of possession, or recovery of the <u>value</u> of the property 15-69-210.	If seizure taken place then defendant can claim a return or the value if the return is not possible, plus damages (22-3-1460)
Judgment can include damages resulting from the debtor's withholding the property (22-3-1460)	Entitled To 20 days to answer and a Jury Trial <i>First Palmetto State Bank and Trust Co. v. Boyles</i> , 302 S.C. 136, 394 S.E.2d 313 (S.C. 1990)

Practice Tip

- ▶ The only money damages in claim and delivery is for damages for the wrongful detention of the property (not for the amount owed on the debt)

First Palmetto State Bank and Trust Co. v. Boyles, 302 S.C. 136, 394 S.E.2d 313 (S.C. 1990)

Tittle v. Kennedy, 71 S.C. 1, 50 S.E. 544 (S.C. 1905)

Right to Jury Trial

- ▶ Absent a waiver, the issues are triable by a jury.

Johnson v. South Carolina National Bank, [292 S.C. 51](#), [354 S.E.2d 895](#) (1987).

- ▶ If the issues are complicated, a case may be referred to a master for the limited purpose of making factual findings to be received by the circuit court as evidence only.
- ▶ Additionally, the right to a jury trial in an action to recover specific personal property is expressly preserved by SCRPC 38(a). This Rule states:

The right of trial by jury as declared by Constitution or as given by a statute of South Carolina shall be preserved to the parties inviolate. Issues of fact in an action for the recovery of money only or of specific real or personal property must be tried by a jury, unless a jury trial be waived.

When Closed End Credit Finance Companies Choose Claim and Delivery as Remedy, Consider these Issues

- ▶ Are pleadings sufficient? (as outlined above)
- ▶ Has contract and/or other evidence of right to possession been provided with pleadings?
- ▶ Are sureties legitimate and sufficient?
- ▶ Is value claimed the exact amount owed or a legitimate value?

Common Defenses

- 1) Breach of Contract
- 2) Consumer Protection Code
- 3) South Carolina Unfair Trade Practices Act
- 4) Truth in Lending Act
 - For example, TILA violations as affirmative defense by recoupment (U.S. Life Credit Corporation v. James, 279 S.E.2d 367 (1981)) even where no counterclaim available after one year.

6. Frequently Asked Question #1

- ▶ **What if debtor is no longer in possession of the property?**



Answer FAQ #1

- ▶ If property is no longer available, the judge/jury, can assess the value of the property at the final hearing and enter judgment for that amount.
- ▶ It is up to the creditor to claim in the lawsuit papers and prove at trial if there was wrongful activity by client.
- ▶ Household goods cannot be expected to be retained as it is usually property that loses its value or usefulness quickly. It is of little economic value.
- ▶ Note: Transferring of property under lien doesn't apply

Frequently Asked Question #2

- ▶ **Can a creditor be found liable for violating notice provisions?**

Answer FAQ #2

- ▶ Yes. Creditors are obligated to disclose information to a consumer entitled to the information.
- ▶ If not, they can be found liable for twice the amount of the transaction plus costs as determined by the court.
- ▶ (See 37-5-203)

37-5-203 Civil liability for violation of disclosure provisions

- ▶ (1) Except as otherwise provided in this section, a creditor who, in violation of the provisions of the Federal Truth in Lending Act or Section 37-2-309 or 37-3-308, fails to disclose information to a person entitled to the information pursuant to this title is liable to that person in an amount equal to the sum of:
 - (a) twice the amount of the finance charge in connection with the transaction, but the liability pursuant to this item must be not less than one hundred dollars or more than one thousand dollars; and
 - (b) in the case of a successful action to enforce the liability pursuant to item (a), the costs of the action together with reasonable attorney's fees as determined by the court.
- (2) With respect to disclosures required by Section 37-2-301 or 37-3-301, a creditor has no liability pursuant to this section if, within sixty days after discovering an error, and before the institution of an action pursuant to this section or the receipt of written notice of the error, the creditor notifies the person of the error and makes necessary adjustments in the appropriate account to assure that the person is not required to pay a finance charge in excess of the amount of percentage rate actually disclosed. With respect to disclosures required by Section 37-2-309 or 37-3-308, a creditor has the liability stated in subsection (1)(a) if:
 - (a) the creditor fails to give the disclosures required by Section 37-2-309 or 37-3-308; or
 - (b) the disclosures required by Section 37-2-309(C) or 37-3-308(C) are provided but vary from the disclosures given at consummation pursuant to Section 37-2-301 or 37-3-301; if the cure or correction provisions of this subsection do not apply to those violations; and except that a lender is not liable unless the credit sale or loan transaction is consummated.
- (3) A creditor may not be held liable in any action brought under this section for a violation of this title if the creditor shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid the error.
- (4) Any action which may be brought under this section against the original creditor in any credit transaction involving a security interest in land may be maintained against any subsequent assignee of the original creditor where the assignee, its subsidiaries, or affiliates were in a continuing business relationship with the original creditor either at the time the credit was extended or at the time of the assignment, unless the assignment was involuntary, or the assignee shows by a preponderance of evidence that it did not have reasonable grounds to believe that the original creditor was engaged in violations of this title and that it maintained procedures reasonably adapted to apprise it of the existence of the violations.
- (5) No action pursuant to this section may be brought more than one year after the date of the occurrence of the violation.
- (6) In this section, creditor includes a person who in the ordinary course of business regularly extends or arranges for the extension of credit, or offers to arrange for the extension of credit. Nothing in this subsection, however, shall be construed to impose civil liability or penalties on an arranger of credit when disclosure constituting a violation of the Federal Truth in Lending Act is actually committed by another person and the arranger of credit has no knowledge of the violation when it occurred. The creditor shall provide a copy of the final closing documents to the arranger of credit.
- (7) The liability of the creditor under this section is in lieu of and not in addition to his liability under the Federal Truth in Lending Act; no action with respect to the same violation may be maintained pursuant to both this section and the Federal Truth in Lending Act.
- (8) The right of a person to sue for a violation of Section 37-2-309 or 37-3-308 is maintainable only as an individual action.

HISTORY: 1962 Code Section 8-800.353; 1974 (58) 2879; 1982 Act No. 385, Section 49; 1996 Act No. 430, Section 1; 2003 Act No. 42, Sections 3.C, 3.D, eff January 1, 2004.

SECTION 37-5-205. Refunds and penalties as setoff to obligation.

Refunds or penalties to which the debtor is entitled pursuant to this part may be set off against the debtor's obligation, and may be raised as a defense to a suit on the obligation without regard to the time limitations prescribed by this subdivision.

Frequently Asked Question #3

- ▶ What can the creditor do/ how far can they go to collect?

Answer FAQ#3

(S.C. Department of Consumer Affairs)

- ▶ A Creditor CAN do any of the following:
 - Send letters (but not postcards)
 - Telephone the client, but not at unusual times and not collect, unless the client agrees to accept the call
 - Talk to the client's family, employer, friends, or neighbors to locate the client but NOT to discuss the debt
 - Talk about the client's debt with anyone who has a valid business need, such as a credit bureau
 - Call the client's employer to confirm their employment – but a creditor CANNOT call client at work if client's employer does not allow such calls
 - Sue the client or threaten to sue, in most cases

Answer FAQ#3 (cont.)

(S.C. Department of Consumer Affairs)

▶ A creditor **CANNOT**:

- Threaten to sue client if the creditor has not intention or right to sue
- Garnish or threaten to garnish client's wages

▶ It is **ILLEGAL** for a creditor to:

- Tell client anything that is not true
- Harass and threaten the client, curse or use dirty language
- Use fake legal papers or pretend to be a lawyer or other government official
- Demand sexual favors
- Ignore client's requests to stop calling client, if the person calling represents a collection agency
- Contact the client directly if they have a lawyer

Frequently Asked Question #4

- ▶ **What items constitute household goods? Which items are not?**

Answer FAQ #4

FTC Credit Practices Rule and S.C. Consumer Protection Code Non purchase money, non-possessory (not held by creditor) liens on household items are invalid. 16 CFR Part 444 and 6-5-86 Memo to Magistrates

▶ Household goods include

- Clothing
- Furniture
- Appliances
- One television
- One radio
- Linens
- China
- Crockery
- Kitchenware
- Personal effects (including wedding rings)

▶ Household goods do not include

- Works of art
- Electronic equipment (except one TV and one radio)
- Antiques
- Jewelry (except wedding rings)



Cases in S.C. Bankruptcy Court regarding avoidance of liens on household goods.

- ▶ Household goods defined as previously stated in two cases:
 - In re Mundy, 363 B.R. 407 (Bankr.M.D.Pa. 2007)
 - In re Stewart, C/A No. 07-02189-HB, 2007

Issues with refinancing loans w/security interest in household goods

- ▶ Determine whether facts support lack of knowledge or understanding of process on the part of debtor
- ▶ Determine whether creditor properly re-disclosed that the loan will be secured by the same property (which may no longer exist or be in debtor's possession)
- ▶ Determine whether creditor identified current existence of collateral with each refinancing

7. Conclusion

Consider what usually happens to the case in Magistrate Court.