

Minimum Notice Requirements in Small Claims Actions

It's not hard to understand why every state in the United States offers its residents a small claims court. Small claims courts offer two advantages increasingly hard to come by in the court system: they're cheap, and they're fast. In 2009 the North Carolina General Assembly took steps to ensure that small claims cases aren't decided too fast by enacting minimum notice requirements.

Prior to this legislation, a small claims defendant might be served Monday evening for a trial held Tuesday morning. The legislation enacted two separate amendments establishing different minimum notice requirements for (1) summary ejectment actions, and (2) all other small claims cases. As we shall see, despite their differences, the guiding principles for magistrates implementing the legislation are the same for both types of lawsuits.

The Two-Day Rule for Summary Ejectment Actions

When the sheriff's office receives a copy of the summons and complaint in a summary ejectment action, G.S. 42-29 requires prompt action: a copy must be mailed to the defendant "as soon as practicable," and a deputy must attempt personal service at the rental premises within five days. This visit must occur "at least two days prior to the day the defendant is required to appear to answer the complaint, excluding legal holidays." If service is not accomplished at this point, the officer is authorized to post the process in a conspicuous place. The statute is silent on the legal effect of service not complying with the statutory minimum.

The Five-Day Rule for All Other Small Claims Actions

While the Two-Day Rule imposes a requirement on officers serving process, the Five-Day Rule directly applies to magistrates. G.S. 7A-214 states "if the time set for trial is earlier than five days after service of the magistrate summons, the magistrate shall order a continuance."

What Should the Magistrate Do When a Case Comes Up Too Soon?

What should a magistrate do when the minimum notice rule is violated? It depends on who shows up for trial.

If both parties appear and defendant requests a continuance, the magistrate should grant the continuance for at least sufficient time to comply with the relevant statute. In a summary ejectment action, if the defendant is served on Monday and the case is heard on Tuesday, the defendant's request that the trial be delayed until Wednesday should be granted. Similarly, an action for money owed served on Monday and called for trial on Thursday must be continued upon defendant's motion to the following Monday.

Both parties appear, but the defendant does not ask for a continuance or otherwise raise the issue of minimum notice. Neither statute makes the minimum notice requirement contingent on being raised by the defendant. In this situation, the magistrate should inform the defendant that the law entitles small claims defendants to a minimum time to prepare a defense and/or consult an attorney and offer to continue the case for a period complying with the applicable statutory minimum. If the defendant prefers to proceed immediately, the magistrate should note on the judgment that the defendant made a knowing waiver of the right to (five days/two days) minimum notice.

Only the plaintiff appears. When a defendant is not present at a summary ejectment action and service of process occurred the day before trial, there is a very real possibility that inadequate notice is a factor in the defendant's absence. In other small claims cases the statutory language compels a continuance, and a knowing waiver is not possible because the defendant is not present in court. In both situations, the magistrate must continue the case on his or her own motion. The defendant is entitled to notice of the new trial date, and the procedure for this notification will vary depending on local continuance policy.

The plaintiff does not appear. When the plaintiff does not appear at trial, the violation of the minimum notice requirements is complicated by the established rules and procedures for dealing with plaintiffs who fail to appear and prosecute their claims. Obviously, if the court dismisses the case for failure to prosecute, the minimum notice violation does not arise. But what if the plaintiff's absence is prompted by the minimum notice violation? Imagine the following facts: The defendant is served on Monday in an action for money owed. The trial is scheduled for Wednesday. The plaintiff calls the Clerk's office on Tuesday and learns of the late service. Knowing that G.S. 7A-214 states that the magistrate shall grant a continuance in this situation, the plaintiff does not appear for trial on Wednesday. Assuming that the magistrate does not dismiss on these facts, should the result differ if the defendant appears and requests dismissal? What if the action is for summary ejectment rather than money owed?

In my opinion, there's much to be said for the traditional rule that a plaintiff who neither appears for trial nor requests a continuance will not be heard to object if the case is dismissed. Continuing a case when neither party has asked for a continuance and neither party appears places a burden on the court system to re-schedule the case and notify parties of the new trial date. And of course the magistrate can only speculate about the reasons a plaintiff does not appear—in reality, the court is unlikely to know whether the plaintiff was (unwisely) relying on the violation of the minimum notice requirements and assuming the case would be continued. The minimum notice statutes do not provide an answer to this issue, and reasonable minds are likely to differ about the best practice. Whatever the resolution, magistrates are strongly urged to coordinate with other small claims magistrates in their county (and district) so that procedurally identical cases receive a consistent response.

Counting time

GS 1A-1, Rule 6, sets out the general rule for calculating time in civil matters. That provision states that the first day of a time period is not included, and the last day is included (unless it is a Saturday, Sunday, or legal holiday, in which case the time period runs over to the next day when the courthouse is open and doing business). In cases in which the time period is less than seven days, however, Saturdays, Sundays, and legal holidays are not included. The result is that small claims actions, other than those for summary ejectment, may be heard no earlier than one week after service of process (i.e., if service is accomplished on Monday, the case may be heard no sooner than the following Monday).

The law applicable to summary ejectment actions specifically requires that service be accomplished “at least two days prior to the day the defendant is required to appear to answer the complaint, excluding legal holidays.” The first version of this legislation excluded “weekends and legal holidays” but the reference to “weekends” was deleted from the final legislation. The result is an exception to the general rule set out in GS 1A-1, Rule 6, with weekend days counted toward satisfaction of the two-day requirement. Consequently, service on Friday would allow a case to be heard on Monday, since Monday is the third day following service.