

**§ 6-21.2. Attorneys' fees in notes, etc., in addition to interest.**

Obligations to pay attorneys' fees upon any note, conditional sale contract or other evidence of indebtedness, in addition to the legal rate of interest or finance charges specified therein, shall be valid and enforceable, and collectible as part of such debt, if such note, contract or other evidence of indebtedness be collected by or through an attorney at law after maturity, subject to the following provisions:

- (1) If such note, conditional sale contract or other evidence of indebtedness provides for attorneys' fees in some specific percentage of the "outstanding balance" as herein defined, such provision and obligation shall be valid and enforceable up to but not in excess of fifteen percent (15%) of said "outstanding balance" owing on said note, contract or other evidence of indebtedness.
- (2) If such note, conditional sale contract or other evidence of indebtedness provides for the payment of reasonable attorneys' fees by the debtor, without specifying any specific percentage, such provision shall be construed to mean fifteen percent (15%) of the "outstanding balance" owing on said note, contract or other evidence of indebtedness.
- (3) As to notes and other writing(s) evidencing an indebtedness arising out of a loan of money to the debtor, the "outstanding balance" shall mean the principal and interest owing at the time suit is instituted to enforce any security agreement securing payment of the debt and/or to collect said debt.
- (4) As to conditional sale contracts and other such security agreements which evidence both a monetary obligation and a security interest in or a lease of specific goods, the "outstanding balance" shall mean the "time price balance" owing as of the time suit is instituted by the secured party to enforce the said security agreement and/or to collect said debt.
- (5) The holder of an unsecured note or other writing(s) evidencing an unsecured debt, and/or the holder of a note and chattel mortgage or other security agreement and/or the holder of a conditional sale contract or any other such security agreement which evidences both a monetary obligation and a security interest in or a lease of specific goods, or his attorney at law, shall, after maturity of the obligation by default or otherwise, notify the maker, debtor, account debtor, endorser or party sought to be held on said obligation that the provisions relative to payment of attorneys' fees in addition to the "outstanding balance" shall be enforced and that such maker, debtor, account debtor, endorser or party sought to be held on said obligation has five days from the mailing of such notice to pay the "outstanding balance" without the attorneys' fees. If such party shall pay the "outstanding balance" in full before the expiration of such time, then the obligation to pay the attorneys' fees shall be void, and no court shall enforce such provisions.
- (6) If the attorneys' fees are for services rendered to an assignee or a debt buyer, as defined in G.S. 58-70-15, all of the following materials setting forth a party's obligation to pay attorneys' fees shall be provided to the court before a court may enforce those provisions:
  - a. A copy of the contract or other writing evidencing the original debt, which must contain a signature of the defendant. If a claim is based on credit card debt and no such signed writing evidencing the original debt ever existed, then copies of documents generated when the credit card was actually used must be attached.

- b. A copy of the assignment or other writing establishing that the plaintiff is the owner of the debt. If the debt has been assigned more than once, then each assignment or other writing evidencing transfer of ownership must be attached to establish an unbroken chain of ownership. Each assignment or other writing evidencing transfer of ownership must contain the original account number of the debt purchased and must clearly show the debtor's name associated with that account number.

Notwithstanding the foregoing, however, if debtor has defaulted or violated the terms of the security agreement and has refused, on demand, to surrender possession of the collateral to the secured party as authorized by G.S. 25-9-609, with the result that said secured party is required to institute an ancillary claim and delivery proceeding to secure possession of said collateral; no such written notice shall be required before enforcement of the provisions relative to payment of attorneys' fees in addition to the outstanding balance. (1967, c. 562, s. 4; 2000-169, s. 27; 2009-573, s. 7.)

*[Staff Note: Judge Michael Robinson believes G.S. 6-21.2 could benefit from some revision. He has posed the following questions:*

1. *What is the statute's applicability as far as what parties or what promissory notes it applies to? For instance, is it limited to notes where the notes are to be interpreted pursuant to North Carolina law (so a note that by its terms incorporates and applies the law of some other state would make this provision inapplicable)? Is it applicable to any note for which collection is sought by application to the Courts in North Carolina (State or Federal)? Or is it applicable to some broader or narrower group?*
2. *What is the purpose for the statute? I assume, without knowing, that there are two main purposes: (a) to cap the amount of attorneys' fees allowed to be recovered in a suit over a note; and (b) to require some period of notice (so satisfaction of the note can possibly occur and thereby avoid litigation – or continued litigation) prior to the note holder being able to recover attorneys fees.*
3. *Why does the statute use a defined term “outstanding balance” that is keyed to a date in the future (the date on which suit is filed)?*
4. *Why are fees limited by a percentage of the amount owed as of the date a lawsuit is filed, when litigation may last for several years with interest accruing in the interim making the “outstanding balance” (and hence recoverable fees) potentially much greater.*
5. *Subsections (1) and (2) appear to be the only alternative ways of calculating the amount of attorneys fees – in subsection (1) the note includes a provision that calculates attorneys fees “in some specific percentage” and in subsection (2) the note calculates fees in terms of a “reasonable amount”. Are those the only ways attorneys' fees can be set in a note? How about a fixed amount such as \$1,000?*
6. *Subsection (5) appears to me to be potentially the most problematic given its wording. First, it uses the term “five days from **the mailing** of such notice”. If using the US Mail to provide notice, five days effectively gives the maker of the note substantially less than five days of*

*“actual” notice and opportunity to avoid suit (and consequent imposition of fees and costs). Second, if the note holder hand delivers, uses overnight delivery service, or emails the notice, is the requirement still five days? Third, since “outstanding balance” is calculated as of “the time suit is instituted” (see subsection (3)), it is implicit in the wording that the person sending the notice must know at the time the notice is sent how much is going to be owed on the day the note holder actually files suit. Fourth, is it sufficient for the notice to simply use the term “outstanding balance” and demand that the note maker pay whatever that amount may be as of the date of payment, or does the statute implicitly require that the notice set forth a specific numerical amount that is due and payable on a specific date? That certainly is possible since there would be little other reason to know and state the amount of principal and interest that will be due at the time the lawsuit is filed. And what happens if a partial payment is made between the date of the notice and the date suit is filed?]*