The State of South Carolina

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February 12, 1990

The Honorable Jack M. Scoville, Jr.
Master In Equity of Georgetown County
P. O. Box 1250
Georgetown, South Carolina 29442

Dear Judge Scoville:

You have requested the opinion of this Office regarding certain questions that arise in the court's handling of default matters. You suggest in your request letter that the South Carolina Rules of Civil Procedure are not completely clear regarding when a default judgment may be entered upon the pleadings as contrasted to when a damages-assessment hearing must be held prior to the entry of the default judgment.[1] You further suggest that, in your opinion, a damage-assessment hearing is required prior to the entry of the default judgment unless the claim is for liquidated damages. Generally, I concur with these conclusions and, in so doing, I note my appreciation for your thorough research upon the questions.

Former South Carolina Code Section 15-35-310[2] generally provided for the entry of a default judgment without the necessity of a damage-assessment hearing in the following actions for

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1. Pursuant to South Carolina Rule of Civil Procedure 55(a), the clerk enters a record of default upon the calendar when it is made to appear to him that a party has failed to plead or otherwise defend as provided by the rules. However, a default judgment is entered by the court only after the court has determined damages. Ricks v. Weinrauch, 293 S.C. 372, 360 S.E.2d 535 (S.C. App. 1987).

2. This provision was expressly repealed by 1985 Act 100, Section 2, and has been preempted by the South Carolina Rules of Civil Procedure.

recovery of money only:

(1) When the demand was liquidated; or

(2) When the demand was unliquidated and the complaint was served with an itemized verified statement of account.

Howard v. Holiday Inns, Inc., 271 S.C. 238, 246 S.E.2d 880 (1978). Again, default proceedings are currently governed by the South Carolina Rules of Civil Procedure.

Rule 5(a) of the Civil Rules requires, among other things, that "notice of any trial or hearing on unliquidated damages shall also be given to parties in default." The official commentators to the Rules suggest in this context that "[g]enerally, if relief other than money damages is sought, or the amount is unliquidated, an evidentiary hearing is required." Lightsey and Flanagan, South Carolina Civil Procedure, at 80. This requirement of notice and an opportunity to be heard where the claim is for unliquidated damages traces the Court's teachings that predate the enactment of the Rules of Civil Procedure. The Supreme Court, in Lewis v. Congress of Racial Equality, etc., 275 S.C. 556, 274 S.E.2d 287 (1981), revisited its earlier holding in Howard v. Holiday Inns, Inc., supra, and instructed the bench and bar that

> [p]roblems growing out of [damage-assessment] hearings convince us that in all unliquidated-damages default hearings, even when no appearance has been made, it is the better practice for claimant's counsel to give to the defending party four days' notice, as set out in Section 15-9-960 of the Code, of the time and place of the hearing. Participation by the defending party will give to the judge and/or jury a broader understanding of the amount which should be awarded and will tend to insure a more fair verdict and judgment.

Lewis, 274 S.E.2d at 287, 288. Further in Lewis, the Court clearly distinguished the procedure required where the default involved unliquidated, as opposed to liquidated, damage claims. Most significantly, the Court's reasoning was not premised upon then extant Section 15-35-310, but appears instead to be a directive founded upon the common law and principles of fairness. Consequently, in directing the procedure for handling defaults, the Court did not distinguish between those claims seeking unliquidated damages where plaintiff serves an itemized

verified statement of his account [Section 15-35-310(2)] and other claims for unliquidated damages. The Court simply instructed that in any default proceeding where the claim is for unliquidated damages prior to the entry of a default judgment a damage assessment hearing with notice to the party in default is required, regardless whether the party in default has appeared.

The Lewis holding appears to be the procedure captured in Rule 5(a). [See also, People's Federal Savings and Loan Association v. Graham, et al., 291 S.C. 178, 352 S.E.2d 511 (S.C. App. 1987), and Ricks v. Weinrauch, 293 S.C. 372, 360 S.E.2d 535 (S.C. App. 1987), wherein the Court of Appeals has determined that a default judgment could not be entered for unliquidated damages until a hearing had been held upon the issue.] Accordingly, I believe that Rule 5(a) requires as a requisite to the entry of a default judgment a damage-assessment hearing with notice to the party in default whenever the claim is for unliquidated damages.

South Carolina Rule of Civil Procedure 55 must, of course, be read in pari materia with Rule 5(a) since it also relates to the procedure to be followed in the handling of defaults. Rule 55(b)(1) expressly requires notice of the application for judgment to be served upon a defaulting party who has appeared. This required notice provided by the Rule apparently is not flexible and applies whether the claims are for liquidated or unliquidated damages (contrast with the requirement in Rule 5(a) that if the claim is for unliquidated damages, a damage-assessment hearing must be held and the defaulting party must be notified). Moreover, the official commentators note that notice to the defaulting party of the application for judgment is required in three discrete instances:

> First, if the defaulting party has appeared, he is entitled to three days' written notice of the application for judgment. The Federal precedents find an appearance when there has been a presentation or submission to the court. [Cite omitted]
>
> Second, notice is also necessary when the default is sought against a minor or incompetent person. Rule 55(b)(1) requires representation by a guardian ad litem who has appeared in the case, and the appearance triggers the notice requirement. . .
>
> Third, the last sentence of Rule 5(a) requires that notice be given to a party in default of any hearing on unliquidated damages to permit an appearance to contest the amount of the judgment.

Lightsey and Flanagan, supra, at 80. Thus, I believe that at least insofar as whether notice of the application for default judgment is required, the requirements of Rules 5(a) and 55 are not inconsistent, although each presents its particular notification requirement.

Arguably, the provisions of Rules 5(a) and 55(b)(1) are not as easily reconciled regarding when a damage assessment hearing is required. As earlier noted, I believe Rule 5(a) captured the Court's prior instruction in Lewis v. Congress of Racial Equality, supra, that a damage-assessment hearing is required prior to entry of a default judgment in all unliquidated damage claims in order that the party in default may contest the amount of damages. Rule 55(b)(1) generally authorizes the court to hold a hearing if it is necessary to enter the judgment or to determine the amount of damages. I believe this language refers to those situations when a damage-assessment hearing is otherwise required by law, and is not intended to alter the procedure directed in Lewis v. Congress of Racial Equality, supra. The discretionary language in Rule 55(b)(1) probably only applies in those situations where a damage assessment hearing is not required by law.

You have also inquired regarding the procedure to be followed in the event the court holds a damage-assessment hearing. There are two cases that I believe are particularly instructive upon this point. In Lewis v. Congress of Racial Equality, 274 S.E.2d at 289, the court instructs,

> [w]hether a defendant is or is not in default, it is incumbent upon the judge and/or the jury to make a judicial determination of the amount of damages based on the proof, and such proof must be by the preponderance of the evidence.

Moreover, the Court in Lewis instructs the bench and bar that Section 15-13-100, with its concomitant provision for specific findings and conclusions, is fully applicable to a damage-assessment hearing. The South Carolina Court of Appeals in Jackson v. Midlands Human Resources Center, 296 S.C. 526, 374 S.E.2d 505 (S.C. App. 1988), provides these comments:

> In a default case, the plaintiff must prove by competent evidence the amount of his damages, and such proof must be by the preponderance of the evidence. [Cite omitted.] Although the defendant is in default as to liability, the award of damages must be in keeping not only with the allegations of the

> complaint and the prayer for relief, but also with the proof that has been submitted. [Cite omitted.]

374 S.E.2d at 506. Of course, the admission of evidence is ordinarily in the discretion of the trial judge, South Carolina Electric & Gas Co. v. Aetna Ins. Co., 238 S.C. 248, 120 S.E.2d 111 (1961), and hearsay testimony is generally competent if not disputed by timely objection, Cantrell v. Carruth, 250 S.C. 415, 158 S.E.2d 208 (1967). It is important to also note that pursuant to South Carolina Rules of Civil Procedure 54(c) and 55(d), a judgment by default cannot exceed the amount prayed for in the demand (River Road Company v. Energy Master Products, Inc., (Slip Op. 1430, December 11, 1989); see also in this regard Wiggins v. Todd, 296 S.C. 432, 373 S.E.2d 704 (S.C. App. 1988), and Goodson v. American Bankers Insurance Company, 295 S.C. 400, 368 S.E.2d 687 (S.C. App. 1988)).

You also asked if there is any South Carolina law that defines the term "liquidated damages" in the context of a default proceeding.[3] As you are aware, the substantive law in this area is not clear. The Supreme Court's decision in Lewis v. Congress of Racial Equality, supra, provides some guidance:

> In liquidated-damages cases, the amount is usually a sum certain, or at least the amount is capable of ascertainment by computation.

274 S.E.2d, at 289. Further, the Court of Appeals has concluded without discussion that an action for the sum due under a note as principal and interest involved a liquidated amount. Porter Brothers, Inc. v. Thompson, 284 S.C. 23, 324 S.E.2d 327 (S.C. App. 1984). On the other hand, the Supreme Court has long held that an action on an account for monies owed for goods or services is an unliquidated claim as that term is used in the default context. H. W. Carriker Co., Inc. v. Johnson, 277 S.C. 280, 286 S.E.2d 140 (1982); Morgan's, Inc. v. Surinam Lumber Corporation, 251 S.C. 61, 160 S.E.2d 191 (1968). Thus, I can only suggest that those claims of a character identified in Lewis v. Congress of Racial Equality, Inc., that involve a sum certain or at least an amount that is capable of ascertainment

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3. The South Carolina Supreme Court defined liquidated damages generally as "those the amount whereof has been ascertained by judgment or by the specific agreement of the parties." Retail Service Business, Etc., Inc. v. Smith, 165 S.C. 238, 163 S.E.2d 649 (1932).

by computation and that arise out of actions upon a contract, such as a promissory note, are probably "liquidated" as that term is used in the default context. Nonetheless, claims for damages upon a delinquent open account are most often characterized as unliquidated.

Please let me know if I can provide further assistance.

Very truly yours,

Edwin E. Evans
Chief Deputy Attorney General

EEE/shb

REVIEWED AND APPROVED:

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