

North Carolina's New Statute; Attorney's Fees and Business Contracts

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On October 1, 2011, North Carolina will join most of the rest of the States in allowing business contracts to provide that in any litigation arising out of contract the losing party may be required to pay the prevailing party's attorneys' fees. A copy of the statute is attached. It should be required reading for every attorney who practices business law in North Carolina. The essence of this statute is found in subsection (b) which states:

Reciprocal attorneys' fees provisions in business contracts are valid and enforceable for the recovery of reasonable attorneys' fees and expenses only if all of the parties to the business contract signed by hand the business contract.

The statute requires attorneys' fees provisions to be "reciprocal", in other words the provisions must apply equally to all parties to the agreement. Attorneys' fees provisions that apply unequally to the parties in the contract will not be enforced. The parties must sign the contract "by hand." This is obviously meant to render ineffective such provisions as "click through" agreements. It also renders ineffective attorneys' fee agreements that are otherwise enforceable under the Uniform Electronic Transactions Act, N.C.G.S. §66-311, et. seq.

The statute applies only to "business contracts." It expressly does not apply to "consumer contracts" or "employment contracts." It also does not apply to attorneys' fees provisions in notes, conditional sales contracts or other evidence of indebtedness. Such provisions shall continue to be governed by N.C.G.S. § 6-21.2. If a business contract is also a note, conditional sale contract or other evidence of indebtedness, then the agreement may specify whether the attorneys' fees provision is governed by N.C.G.S. § 6-21.2 or 6-21.6. In making this choice the drafter of the agreement will have to evaluate the benefits and burdens of each statute. N.C.G.S. § 6-21.2(2) has the benefit of an automatic fee award equal to 15% of the amount recovered while it has the burden of the 15% cap on attorneys' fees. On the other hand, N.C.G.S. § 6-21.6 does not have the 15% cap on fees, but also does not allow creditor to recover 15% of the amount due as attorneys' fees without the need to prove the actual amount

of fees incurred. I predict that in most of these cases the drafter will choose that the agreement will be governed N.C.G.S. § 6-21.2.

Subsection (c)(11) of the statute allows the possibility that a party who prevails in only part of an action may recover attorney's fees. This section was intended to give drafters broad latitude in crafting attorneys' fees provisions in business contracts.