

## **Reciprocal Attorney Fee Provision in Business Contracts**

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When I talk with clients about filing a lawsuit against someone who has breached a business contract, the most frequently asked question I receive is, “Will the other side be responsible for my attorneys’ fees?” Typically, I had to answer “no,” but a new North Carolina statute has changed my response.

Effective October 1, 2011, North Carolina General Statute §6-21.6, provides that “reciprocal attorneys’ fee 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 sign by hand the business contract.” In order to qualify under this new statute, the contract at issue must be a contract “primarily for business or commercial purposes” excluding consumer contracts, employment contracts, and contracts where the government or governmental agency is a party. The contract must also contain a “reciprocal” attorneys’ fee provision – meaning that all parties to the contract must agree to pay or reimburse the other parties for attorneys’ fees and expenses incurred as part of any suit, action, proceeding or arbitration involving the contract. Finally, the contract must be “signed by hand” which would prevent such a provision from being enforceable if entered on a website or other electronic media.

There are, however, some limitations on whether fees can be recovered. First, the statute sets out thirteen (13) relevant facts and circumstances to assist a Court in establishing an award of reasonable attorneys’ fees. These factors include things such as the amount in controversy and the results obtained, the novelty or difficulty of the questions raised in the action, the skill required to perform properly the legal services rendered, and the relative economic circumstances of the parties. All of these give a Court discretion to limit recovery for attorneys’ fees. Second, the statute also establishes a cap on the amount of attorneys’ fees which can be awarded. While there is some inconsistency in the statute itself, the fees awarded may not exceed the “amount in controversy” or the monetary damages awarded.”

Most standard business contracts in use today will not include the appropriate language to take advantage of this statute. Therefore, it is important to consider updating your business contracts to include this new provision.