

# *the Business Lawyer*

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“Recovering Attorneys’ Fees: A New Day Dawns in North Carolina”

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# Recovering Attorneys' Fees

## A New Day Dawns in North Carolina

*By Scott A. Miskimon*

For businesses in North Carolina long frustrated at the inability to recover attorneys' fees in contract disputes that go to court, a new day has dawned. North Carolina recently enacted a statute that expands the opportunity to recover attorneys' fees incurred in business contract litigation, and the new law may dramatically alter the costs of litigating contract disputes and affect decisions to either litigate or settle.

### ***How does the new law work?***

General Statutes section 6-21.6 applies to all "business contracts" entered into on or after Oct. 1, 2011. The statute gives a judge or arbitrator the discretion to award attorneys' fees if the business contract at issue contains a "reciprocal attorneys' fees provision." The statute does not require an attorneys' fees provision in business contracts, but if the parties elect to include such a provision, it must state that each party agrees to pay the other party's attorneys' fees and expenses that were incurred by reason of any suit, action, proceeding or arbitration involving the business contract.

The new law applies to a business contract, which is defined as "a contract entered into primarily for business or commercial purposes." Certain types of agreements are explicitly excluded from the scope of the statute. Consumer contracts (involving individuals and which are primarily for personal, family and household purposes) are outside the statute. Also excluded are employment contracts, which are defined as personal services agreements made with an individual who performs services, either as an employee or independent contractor. Business contracts also do not include contracts made with the State or with any State agency.

Many types of agreements will now be subject to an award of attorneys' fees if they contain a reciprocal attorneys' fees provision. These will include contracts between businesses for services, for the sale or lease of goods (products and equipment), commercial real estate contracts and leases, construction contracts, asset purchase agreements, stock agreements, corporate shareholder agreements and operating agreements for limited liability companies.

Under the new law, the judge or the arbitrator has the discretion whether to award attorney fees at all, and the amount of fees to award. Decisions to award fees are to be based on "all relevant factors." The new law provides a list of thirteen non-exclusive factors, such as the terms of the contract, the extent to which the party asking for attorneys' fees prevailed in the action, the amount in controversy, the amount of damages awarded, the reasonableness of the amount of fees requested, the relative economic circumstances of the parties, and the timing and amount of settlement offers. Interestingly, it is not an absolute requirement that a party win the case in order to recover

its attorneys' fees.

The statute has a notable quirk to it: the business contract must be "signed by hand" by all the parties to it. Consequently, contracts formed electronically with electronic signatures would prevent the parties from recovering attorneys' fees. The intent behind this provision is to prevent unfairness and surprise in internet-based "click accept" contracts, but it appears to undercut existing state law regarding electronic contracting.

### ***How is the new law different than an earlier statute?***

For a business contract that contains a reciprocal attorneys' fees provision, all parties to the business contract will have the potential to recover attorneys' fees. This is a significant expansion of North Carolina law. Under an already existing statute (N.C.G. S. § 6-21.2), certain types of contracts can allow for the recovery of attorneys' fees. This earlier statute has not been repealed and remains a viable alternative for recovering attorneys' fees if the contract qualifies as an "evidence of indebtedness" and provides for the recovery of attorneys' fees. Promissory notes and commercial leases qualify as evidences of indebtedness, but the recovery of attorneys' fees is not reciprocal. For example, in a case involving the breach of a commercial lease, under the existing statute only the landlord may recover attorneys' fees; a tenant may not. By contrast, because of the new law's explicit requirement of mutuality, all parties to a business contract that contains a reciprocal attorneys' fees provision will be entitled to seek attorneys' fees.

### ***What amount of attorneys' fees can be recovered?***

The amount of attorneys' fees that can be recovered is not specified in the new law. For example, under the earlier statute, attorneys' fees can be based on a fixed percentage of 15 percent of the amount owed under the "evidence of indebtedness." By contrast, the new law prohibits recovery of fees based on any stated percentage. The only limit on fees is that, if the case involves primarily a claim for money damages (as opposed to an injunction), the amount that a court or arbitrator awards cannot exceed the amount of monetary damages that are awarded.

### ***Conclusion***

Although the courts have not yet been called on to apply and en-

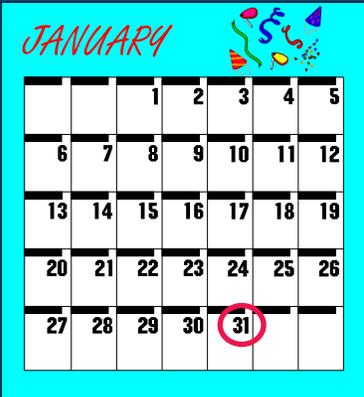
force the new law, the language of the statute suggests that companies should carefully consider the following when drafting a business contract that contains a reciprocal attorneys' fees provision:

- If there is a dispute over the business contract, how expensive will litigation of that dispute likely be?
- How will the cost of litigation compare to the amount of damages that will likely be at issue?
- What is the company's risk tolerance for paying damages, its own attorneys' fees and the attorneys' fees of its opponent?
- Is reciprocity desirable? If the contract is likely to qualify as an evidence of indebtedness under the earlier statute, does the company give up its leverage if it agrees to a reciprocal attorneys' fees provision under the new law?
- Because the new law makes the terms of the contract a factor to consider when awarding attorneys' fees, businesses should consider including provisions to clarify the circumstances under which the parties intend attorneys' fees to be recoverable. Such provisions could include language that makes clear that only a prevailing party may recover attorneys' fees, and that a successful defense of a claim

will entitle the defendant to recover its reasonable attorneys' fees.

As these points suggest, the new law hands businesses a powerful tool that may affect whether and how contract disputes are resolved. Therefore, new business contracts should be evaluated in light of this new law and drafted to either limit exposure or create greater leverage for resolving disputes that may arise. Businesses should also carefully consider the impact of the new attorneys' fees statute on their existing standard form contracts and revise them accordingly. •

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