

General Assembly Validates Reciprocal Attorney Fee Reimbursement Agreements in Commercial Contracts

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Under current law attorney fee reimbursement provisions in contracts are not enforceable in North Carolina, unless there is a statute that authorizes an award of attorney fees in the particular type of lawsuit or transaction at issue. For an ordinary breach of a run-of-the-mill commercial contract, the prevailing party almost never recovers their attorney fees from the other party in court, even if the contract expressly calls for it. There is an existing statute that validates attorney fee reimbursement provisions in promissory notes and other debt instruments (subject to certain limitations) but not for ordinary non-debt contracts.

However, on June 27, 2011, Governor Perdue signed into law Senate Bill 414, which makes many attorney fee reimbursement provisions in non-debt contracts enforceable in North Carolina. Senate Bill 414 establishes a new section of the North Carolina General Statutes, N.C.G.S. § 6-21.6, which declares reciprocal attorney fee provisions in commercial contracts “valid and enforceable,” subject to the provisions of the statute.

N.C.G.S. § 6-21.6 applies only to commercial contracts, not to consumer contracts, employment contracts (including contracts with independent contractors) or contracts where one of the parties is a government or governmental agency.

N.C.G.S. § 6-21.6 only applies to reciprocal attorney fee reimbursement provisions. It does not validate attorney fee reimbursement provisions that benefit only one of the parties to a contract. Further, it only applies to contracts that are signed “by hand” by all parties. This requirement is

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unfortunate as it will severely limit the utility of electronic signatures in commercial transactions.

Another potential limitation of N.C.G.S. § 6-21.6 is that it merely provides that a court or arbitrator “may” award attorney fees in accordance with the parties’ agreement, and does not require the court or arbitrator to make any attorney fee award at all. So even if an attorney fee reimbursement agreement conforms to all the criteria of N.C.G.S. § 6-21.6 a court still may decline to award attorney fees to the prevailing party in a particular case.

N.C.G.S. § 6-21.6 includes a cap on the amount of fees that can be awarded in cases primarily for the recovery of monetary damages. But there is conflicting language in N.C.G.S. § 6-21.6 regarding the amount of the cap. One part of N.C.G.S. § 6-21.6 caps fee awards at the amount of monetary damages awarded. Another part caps it at the amount in controversy. This conflict will need to be corrected by future legislation. In any event, N.C.G.S. § 6-21.6 provides that any award of attorney fees must be “reasonable.”

N.C.G.S. § 6-21.6 becomes effective October 1, 2011, and applies to contracts entered into on or after that date.

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