

New Law Changes How Courts Award Attorneys' Fees in Business Disputes

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Sometimes in litigation, even if you win, you lose. Even if you have a great case and recover all the money you're owed, you're usually still out of pocket for your attorneys' fees. Historically, North Carolina law has not allowed the winning party in a lawsuit or in an arbitration to recover its attorneys' fees from the other party -- except in very limited cases. This has been true even though your contract may have contained a provision which seemingly created the right to recover attorneys' fees.

Earlier this year, however, the North Carolina Legislature passed a law that makes it easier to be awarded attorneys' fees in litigation or arbitration -- as long as you meet certain requirements. The law, known as Senate Bill 414, allows the parties to a "business contract" to agree to a "loser pays the winner's attorneys' fees" provision in their contract. The Legislature called this a "reciprocal attorneys' fees" provision. In order for an attorneys' fee provision to be enforceable under the new law, the provision must apply equally to both of the parties to the contract and each party must sign the agreement by hand. For example, a provision in a contract that only allows one party to recover its attorneys' fees, as you might see in a subcontract between a general contractor and a first-tier subcontractor, will not be enforceable.

Having a "reciprocal attorneys' fees" provision in your contract does not mean the losing party is automatically required to pay the other party's attorneys' fees. The decision whether to award the winning party its attorneys' fees is made by the judge (or arbitrator). The amount of fees awarded, if any, is in the judge's discretion and is based on "all relevant facts and circumstances" before the judge. The attorneys' fees awarded cannot be greater than the money damages awarded to the winning party. For example, a party cannot be awarded \$10,000 in damages but \$15,000 in attorneys' fees.

Proponents of the new law have argued that it will make it easier to settle cases. Now, not only will a party who breaches a construction contract be forced to pay the other side what it is owed, the breaching party could also face the prospect of having to pay the other side's attorneys' fees too. The thought of having to cut large checks following a trial for both sets of attorneys may make the breaching party more open to sitting down at the negotiating table.

Although it is not clear how judges (and arbitrators) will apply this law, one thing is clear -- parties in commercial litigation or arbitration stand a better chance of recovering their attorneys' fees if they have a well-drafted "reciprocal attorneys' fees" provision in their contracts. Now is the time to review and update your contract and subcontract forms to make sure they comply with Senate Bill 414 to take advantage of the protection offered by this new law.

This law became effective on October 1, 2011, and applies only to contracts entered into on or after that date.

This publication is intended for informational purposes only.
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