

Reciprocal Attorneys' Fees Provisions Allowed in Business Contracts

by Richard A. Prosser

On June 27, 2011, Governor Perdue signed into law [Senate Bill 414](#) making reciprocal attorneys' fees provisions enforceable in business contracts. This is a significant change of law in North Carolina in that businesses can now contractually shift the burden of attorneys' fees to the other side if forced to litigate their disputes.

Under the so-called "American rule," the general rule in the United States is that each side pays their own way in civil cases. This is in contrast to other countries where the losing party is required to pay the prevailing parties' fees. This default allocation, however, can be modified by statute to allow for recovery of attorneys' fees in certain contexts. The enactment of Senate Bill 414 (codified as N.C. Gen. Stat. § 6-21.6) effects such a modification, allowing businesses to contract for reimbursement of attorneys' fees.

The scope of the new law is limited to provisions in written contracts between businesses. "Business contracts" are defined as contracts entered primarily for business or commercial purposes. Consumer contracts, employment contracts and contracts with the government are specifically excluded.

Notably, there is no limitation on the amount of fees recoverable, except that the amount cannot exceed the amount in controversy between the parties and must be "reasonable" in light of certain criteria. This is a departure from other statutes that cap recovery at a specified percentage of the amount at issue. There is also no automatic trigger for reimbursement under the new law, meaning the parties are free to define the conditions that trigger recovery of attorneys' fees. The only requirement is that the terms of the provision are reciprocal and applicable to all parties.

The new law takes effect October 1, 2011 and applies to business contracts entered on or after that date. Businesses should consider whether a reciprocal attorneys' provision is something to include in their contracts and also be on the look out for these provisions in contracts from other parties.