



Attorney Fee Provisions in North Carolina Contracts

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The long-standing rule in North Carolina is that, unless a statute provides otherwise, the parties to litigation are responsible for their own attorney fees.¹ “It is well established that the non-allowance of counsel fees has prevailed as the policy of this state at least since 1879.”² This rule applies even when a party has agreed in a contract to reimburse another party’s attorney fees incurred in an enforcement action:

Even in the face of a carefully drafted contractual provision indemnifying a party for such attorneys’ fees as may be necessitated by a successful action on the contract itself, our courts have consistently refused to sustain such an award absent statutory authority therefor.³

A key statutory exception to the rule against enforcing contractual attorney fee provisions is found in Section 6-21.2 of the North Carolina General Statutes (hereinafter G.S.), which allows enforcement of attorney fee provisions in notes, conditional sale contracts, and “other evidence of indebtedness” under certain circumstances. Since 1967, this statute has been the main statutory exception applicable to fee provisions in contracts and the subject of much case law.⁴ In June 2011, the North Carolina General Assembly added another major exception by creating G.S. 6-21.6, which authorizes courts to enforce reciprocal attorney fee provisions in business contracts. This bulletin discusses the law surrounding the existing statute and introduces new G.S. 6-21.6.

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1. *Hicks v. Albertson*, 284 N.C. 236, 238, 200 S.E.2d 40, 42 (1973); *Stevenson v. Bartlett*, 177 N.C. App. 239, 244–45, 628 S.E.2d 443, 445 (2006) (Attorney fees “in this State are entirely creatures of legislation, and without this they do not exist.”). There is a narrow common law exception, called the “common fund doctrine,” where a party who, by his or her own effort and expense, has preserved or increased a common fund or common property. *Hoke Cnty. Bd. of Educ. v. State*, 198 N.C. App. 274, 281, 679 S.E.2d 512, 518 (2009) (stating the general standard).

2. *Stillwell Enters., Inc. v. Interstate Equip. Co.*, 300 N.C. 286, 289, 266 S.E.2d 812, 814–15 (1980).

3. *Id.*

4. Numerous other statutes allow attorney fees in circumstances not specifically related to contractual provisions. Examples of commonly invoked statutes include G.S. 6-21.5, allowing fees in nonjusticiable cases; G.S. 75-16.1, authorizing fees in certain unfair trade practice actions; and G.S. 1D-45, requiring fees in certain cases in which punitive damages have been awarded.

G.S. 6-21.2: Actions on Notes and Other Evidence of Indebtedness

A “far-reaching exception”⁵ to the long-standing rule against allowing attorney fees as costs, G.S. 6-21.2 provides that

Obligations to pay attorneys’ fees upon any note, conditional sale contract or other evidence of indebtedness, in addition to the legal rate of interest or finance charges specified therein, shall be valid and enforceable, and collectible as part of such debt, if such note, contract or other evidence of indebtedness be collected by or through an attorney at law after maturity[.]

The statute places specific limits on these fees, as discussed in detail below. When the statutory requirements are met, however, the court does not have discretion to disallow the fees.⁶ The statute applies only to actions to enforce mature debt; it does not provide for fees in actions to enforce other provisions of the same contract.⁷

Determining the Fee Amount

The statute sets a limit on the amount of the award at 15 percent of the “outstanding balance” due on the contract.⁸ The court of appeals reversed an award of \$3,670.05 on an outstanding debt balance of \$20,846.43 because it exceeded the 15 percent allowed in G.S. 6-21.2, and remanded to the trial court for an award of \$3,126.97.⁹ Similarly, the court reversed and remanded a fee award of \$5,876.49 where that amount “far exceeded th[e] fifteen percent (15%) limitation.”¹⁰ The trial court may not exceed the 15 percent limitation even if the actual attorney fees incurred are in excess of that amount.¹¹

In most cases, the court’s fee award involves no exercise of discretion and amounts to exactly 15 percent of the outstanding balance. Whether a fee award will amount to *less* than 15 percent depends on the wording of the contractual attorney fee provision at issue. The statute contemplates two basic scenarios:

Contract States Specific Fee Percentage (G.S. 6-21.2(1))

First, where the provision sets a specific percentage, the court must enforce it “up to but not in excess of” 15 percent. G.S. 6-21.2(1) states that:

5. Coastal Prod. Credit Ass’n v. Goodson Farms, Inc., 70 N.C. App. 221, 227, 319 S.E.2d 650, 655 (1984).

6. Kindred of North Carolina, Inc. v. Bond, 160 N.C. App. 90, 104, 584 S.E.2d 846, 855 (2003).

7. For example, the court of appeals reversed an award of \$22,575.00 in attorney fees in a breach of contract action where the agreement and promissory note did provide for attorney fees, but the plaintiff’s action involved breach of other provisions of the agreement, not collection of the debt itself. Moreover, the debt had not yet matured, and the defendant was not the specific party owing the debt. Lee Cycle Ctr., Inc. v. Wilson Cycle Ctr., Inc., 143 N.C. App. 1, 12, 545 S.E.2d 745, 752 (2001).

8. G.S. 6-21.2(1), (2).

9. Wachovia Bank & Trust Co. v. Peace Broad. Corp., 32 N.C. App. 655, 660, 233 S.E.2d 687, 690 (1977).

10. McGinnis Point Owners Ass’n, Inc. v. Joyner, 135 N.C. App. 752, 757, 522 S.E.2d 317, 320 (1999); *see also* Southland Amusements and Vending, Inc. v. Rourk, 143 N.C. App. 88, 96, 545 S.E.2d 254, 258 (2001) (remanding a fee award of 32% of the liquidated damages judgment).

11. North Carolina Indus. Capital, LLC v. Clayton, 185 N.C. App. 356, 368, 649 S.E.2d 14, 23 (2007) (reversing an award where the trial court enforced a lease provision requiring defendant to “fully reimburse all attorneys’ fees reasonably incurred”).

If such note, conditional sale contract or other evidence of indebtedness provides for attorneys' fees in some specific percentage of the "outstanding balance" as herein defined, such provision and obligation shall be valid and enforceable up to but not in excess of fifteen percent (15%) of said "outstanding balance" owing on said note, contract or other evidence of indebtedness.

So, if the contract provides for a fee of 10 percent of the outstanding balance, the court will allow a fee of 10 percent. If the contract provides for a fee of 20 percent, the court will allow a fee of 15 percent. When awarding the fee, the court need not receive evidence or make findings as to reasonableness.

When the specified percentage is exact, as just described, the trial court's task is simple enough. If, however, the contract provides a percentage *range*, the trial court's discretion comes into play. In *Coastal Production Credit Ass'n v. Goodson Farms, Inc.*,¹² the promissory note provided for "a reasonable attorney's fee of not less than ten per centum of the total amount" due. The court of appeals determined that this language did in fact provide "some specific percentage" and thus fell within G.S. 6-21.2(1). The percentage was not fixed at a single number, however, so the trial court was required to exercise its discretion in determining a reasonable attorney fee within the contractual range—between 10 percent (the contract minimum) and 15 percent (the statutory maximum):

The provision in the note is "valid and enforceable up to but not in excess of fifteen percent." The note and the statute combine to set a range of reasonable attorneys' fees between 10% and 15%. What the proper award was within this range was thus the question before the trial court at the hearing.¹³

The trial court was required to consider evidence as to the reasonableness of the fees and to make specific findings of fact to support its award.¹⁴ The trial court did in fact make findings of fact and ultimately awarded the plaintiff \$36,356.91, an amount lower than the 15 percent statutory cap. The court of appeals examined the trial court's findings of fact, however, and based on the actual attorney time spent and the hourly rate for services, determined that those findings could support a figure no higher than \$27,112.50. The court remanded the matter for a downward modification of the award.¹⁵

Language to a similar effect appeared in the promissory note in *West End III Limited Partners v. Lamb*.¹⁶ The note provided for "reasonable attorney fees *not exceeding* a sum equal to

12. 70 N.C. App. 221, 319 S.E.2d 650 (1984).

13. *Id.* at 225, 319 S.E.2d at 654.

14. *Id.* at 226, 319 S.E.2d at 655. Generally, the factors about which a court must make findings when setting an attorney fee include the skill, ability, and experience of the attorney; the customary fee for like work; and the time and labor expended. *Printing Servs. of Greensboro, Inc. v. American Capital Grp., Inc.*, 180 N.C. App. 70, 82, 637 S.E.2d 230, 237 (2006). Other factors often considered are those listed in Rule 1.5 of the North Carolina State Bar Rules of Professional Conduct. The N.C. Supreme Court has further stated that a judge should consider, where appropriate, the novelty and difficulty of the legal questions; the adequacy of the representation; the difficulties the attorney faced (especially if unusual); and the types of cases for which fees are usually appropriate. *United Laboratories v. Kuykendall*, 335 N.C. 183, 195, 437 S.E.2d 374, 381–82 (1993).

15. *Id.* at 228–29, 319 S.E.2d at 656.

16. 102 N.C. App. 458, 402 S.E.2d 472 (1991).

fifteen percent (15%) of the outstanding balance.¹⁷ Citing *Coastal Production*, the court of appeals held that, because the trial court had discretion to award a sum in any amount up to 15 percent, it was required to make written findings of fact to support an award in that range. The trial court awarded the full 15 percent (\$39,924.24 on a balance of \$265,000.00) but made

no findings as to the amount of time defendants' attorney actually spent attempting to collect the debt, the attorney's hourly rates, or the reasonable amount of time required to collect at debt such as the one owed by plaintiffs.

The court of appeals thus remanded the case to the trial court for appropriate findings.¹⁸ Likewise, in *Jennings Communications Corp. v. PCG of the Golden Strand, Inc.*,¹⁹ the contract at issue called for an attorney fee "not exceeding a sum equal to fifteen percent (15%) of the outstanding balance." Because the trial court awarded the full 15 percent without making findings of fact, the court of appeals remanded the award.²⁰

Finally, in *Barker v. Agee*,²¹ the contract called for "reasonable fees 'but not more than such attorneys' usual hourly charges for the time actually expended.'" The court of appeals held that this language also fell within G.S. 6-21.2(1) and would permit an award of reasonable fees of any amount up to the "attorneys' usual hourly charges for the time actually expended," capped at 15 percent of the outstanding balance.²² Thus, pursuant to *Coastal Production*, findings of fact and an evidentiary basis were required. The court of appeals examined the trial court's findings and held that the "evidence and findings of fact are sufficient to support the amount of the award."²³

Contract Silent as to Amount of Fee (G.S. 6-21.2(2))

If the contract specifies *no* specific fee amount or percentage, the court must allow a fee of 15 percent of the outstanding balance. No exercise of discretion is involved. G.S. 6-21.1(2) provides that:

If such note, conditional sale contract or other evidence of indebtedness provides for the payment of reasonable attorneys' fees by the debtor, without specifying any specific percentage, such provision shall be construed to mean fifteen percent (15%) of the "outstanding balance" owing on said note, contract or other evidence of indebtedness.

Therefore, if the contract provides for a fee, but is silent as to the amount of the fee, the statutory fee is 15 percent.²⁴ Where a contract provides for "reasonable attorneys' fees" without further specifying a fee amount or percentage, it is "subject to the provisions in G.S. 6-21.2 subsection

17. *Id.* at 459, 402 S.E.2d at 473 (emphasis added).

18. *Id.* at 461, 402 S.E.2d at 475.

19. 126 N.C. App. 637, 642, 486 S.E.2d 229, 232 (1997).

20. *Id.* at 643, 486 S.E.2d at 233.

21. 93 N.C. App. 537, 378 S.E.2d 566 (1989), *aff'd in part and rev'd in part on other grounds*, 326 N.C. 470, 389 S.E.2d 803 (1990).

22. *Id.* at 544, 388 S.E.2d at 571-72.

23. *Id.*

24. *McGinnis Point Owners Ass'n, Inc. v. Joyner*, 135 N.C. App. 752, 757, 522 S.E.2d 317, 321 (1999); *RC Assocs. v. Regency Ventures, Inc.*, 111 N.C. App. 367, 372, 432 S.E.2d 394, 397 (1993); *W.S. Clark & Sons, Inc. v. Ruiz*, 87 N.C. App. 420, 422, 360 S.E.2d 814, 816 (1987); *Four Seasons Homeowners Ass'n v. Sellers*,

(2), [which] has predetermined that 15% is a reasonable amount.”²⁵ Characterizing the 15 percent fee as a “statutory mandate,” the court of appeals has further held that the 15 percent fee is required even where it exceeds the actual attorney fees incurred by the creditor.²⁶

Outstanding Balance

The statute provides two definitions of “outstanding balance,” depending on the type of contract at issue. The first, G.S. 6-21.2(3), applies to notes and evidence of indebtedness:

As to notes and other writing(s) evidencing an indebtedness arising out of a loan of money to the debtor, the “outstanding balance” shall mean the principal and interest owing at the time suit is instituted to enforce any security agreement securing payment of the debt and/or to collect said debt.

The second, G.S. 6-21.2(4), applies to conditional sales contracts and certain security agreements:

As to conditional sale contracts and other such security agreements which evidence both a monetary obligation and a security interest in or a lease of specific goods, the “outstanding balance” shall mean the “time price balance” owing as of the time suit is instituted by the secured party to enforce the said security agreement and/or to collect said debt.

While these provisions speak in terms of the amount owing at “the time suit is instituted,” typically it is not the amount alleged in the pleadings that determines the actual “outstanding balance.” In matters in which a jury determines such damages, it is the jury’s measure of damages that decides the figure. In *North Carolina Industrial Capital, LLC v. Clayton*,²⁷ the court explained that where the balance due on a contract is a question for the jury, the “outstanding balance” under G.S. 6-21.2 is the amount awarded by the jury as contract damages. Thus the jury award is the basis for calculating the attorney fee, and the trial court properly calculated a fee of \$15,274.55 on the jury award of \$101,830.38.²⁸ Similarly, where a jury awarded the plaintiff \$10,199.49 as damages for breach of an operating contract, the trial court exceeded the statutory cap by awarding a fee of \$3,300.²⁹

Also, while the definitions of “outstanding balance” speak of balance owing at the time “suit” is instituted, the “suit” is not necessarily the underlying action in which the judge is making the fee award. Several opinions have upheld awards in which the trial court included in the “outstanding balance” sums garnered in earlier proceedings to collect portions of the same debt. The key factor is whether the other proceedings are “reasonably related” to the collection of the debt in question. As the court of appeals has stated,

72 N.C. App. 189, 191–92, 323 S.E.2d 735, 737–38 (1984); *see also* *Inst. Food House, Inc. v. Circus Hall of Cream, Inc.*, 107 N.C. App. 552, 558, 421 S.E.2d 370, 374 (1992) (strictly enforcing G.S. 6-21.2(2)).

25. *Trull v. Cent. Carolina Bank & Trust*, 124 N.C. App. 486, 493–94, 478 S.E.2d 39, 44 (1996).

26. *Id.* (rejecting an argument that such a fee amounts to a windfall). This holding is in contrast to the situation in which the contract allows a fee within a percentage range, such as the contractual language at issue in *Coastal Production*, discussed *supra*.

27. 185 N.C. App. 356, 649 S.E.2d 14 (2007).

28. *Id.* at 368, 649 S.E.2d at 23.

29. *Southland Amusements and Vending, Inc. v. Rourk*, 143 N.C. App. 88, 96, 545 S.E.2d 254, 258 (2001).

Mindful of . . . the infinite variety of activities which attorneys may engage in to bring a case to successful settlement or verdict, we believe that when other actions are reasonably related to the collection of the underlying note sued upon, attorneys' fees incurred therein may properly be awarded under G.S. 6-21. 2. Nothing prohibits such an interpretation; the statute merely allows attorneys' fees "upon any note" "collected by or through an attorney at law." The General Assembly did not limit those fees solely to those incurred directly in the prosecution of the action on the note. In fact, it recognized that in some cases "ancillary claims" would be necessary, without in any way barring attorneys' fees incurred in pursuing such claims.³⁰

The court of appeals has found bankruptcy proceedings, receiverships, foreclosure actions, and deficiency actions to be reasonably related to the collection of debt under a note.³¹

In a recent action to collect on a lease agreement, the trial court awarded \$92,208.76 in attorney fees on a jury award of \$421,680.67. The defendant argued that the attorney fee award violated G.S. 6-21.2(2) because it exceeded the statutory 15 percent cap. The court of appeals disagreed, noting that the plaintiff had collected an additional \$302,635.00 of the debt through an ancillary Kansas bankruptcy proceeding. Thus the "balance of the debt collected in both the current action and the Kansas . . . proceeding was \$724,315.67." Finding that the Kansas proceeding was "reasonably related to the current action," the court held that the fee award was thus "well below the statutory ceiling of fifteen percent."³²

The burden of demonstrating that the other proceeding is "reasonably related" to collection of the debt is on the plaintiff.³³ Where a trial court declines to include other collection proceedings in its calculation of "outstanding balance," that decision is reviewed only for abuse of discretion.³⁴

Other Evidence of Indebtedness

The statute authorizes enforcement of obligations to pay attorney fees upon any note, conditional sale contract, or "other evidence of indebtedness." Whether a contract falls within the category of other evidence of indebtedness has been a frequent question for the courts. In *Stillwell Enterprises*, the Supreme Court held generally that "the term 'evidence of indebtedness' as used in G.S. 6-21.2 has reference to any printed or written instrument, signed or otherwise executed by the obligor(s), which evidences on its face a legally enforceable obligation to pay money."³⁵ Thus far, North Carolina courts have held that the following types of agreements fall within this definition:

30. *Coastal Prod. Credit Ass'n v. Goodson Farms, Inc.*, 70 N.C. App. 221, 227–28, 319 S.E.2d 650, 655–56 (1984) (internal citations omitted).

31. *Trull v. Cent. Carolina Bank & Trust*, 124 N.C. App. 486, 493, 478 S.E.2d 39, 44 (1996); *Coastal Production*, 70 N.C. App. at 228, 319 S.E.2d at 656.

32. *Telerent Leasing Corp. v. Boaziz*, 200 N.C. App. 761, 767, 686 S.E.2d 520, 524 (N.C. App. 2009); see also *Trull*, 124 N.C. App. at 493, 478 S.E.2d at 43 (affirming award of \$100,825.27 on original balance of \$672,168.48 calculated prior to the beginning of an earlier collection proceeding).

33. *Coastal Production*, 70 N.C. App. at 227–28, 319 S.E.2d at 655–56.

34. *North Carolina Indus. Capital, LLC v. Clayton*, 185 N.C. App. 356, 369, 649 S.E.2d 14, 24 (2007).

35. 300 N.C. 286, 292–95, 266 S.E.2d 812, 817–18 (1980). Contracts must be in writing to fall within this statute. *Jacobs v. Cent. Transport, Inc.*, 891 F. Supp. 1120, 1124 (1995).

- commercial real property leases;³⁶
- personal property leases;³⁷
- credit agreements;³⁸
- credit applications signed in connection with related credit accounts;³⁹
- operator agreement to supply equipment to defendant amusement park;⁴⁰
- obligation by lot owners to pay maintenance fees in a declaration of covenants, conditions, and restrictions;⁴¹ and
- guaranty agreements in connection with commercial loan.⁴²

By contrast, in the following cases the courts have held that the agreements in question did *not* constitute evidence of indebtedness:

- consent judgment to settle a declaratory judgment action,⁴³
- contract for construction of condominiums on defendant's land,⁴⁴
- sales receipts and invoices.⁴⁵

In addition, in the unusual case of *Calhoun v. WHA Medical Clinic, PLLC*,⁴⁶ the court of appeals was confronted with the question of whether an employer–employee non-compete agreement fell within the scope of G.S. 6-21.2. Rather than decide the legal question, the court noted that the trial court had made no “findings of fact” as to whether an employment contract was a “printed or written instrument, signed or otherwise executed by the obligor(s), which evidences on its face a legally enforceable obligation to pay money” and whether it “relates to commercial transactions.” The court then remanded to the trial judge for those findings.⁴⁷

36. *WRI/Raleigh, L.P. v. Shaikh*, 183 N.C. App. 249, 257–58, 644 S.E.2d 245, 250 (2007); *RC Assocs. v. Regency Ventures, Inc.*, 111 N.C. App. 367, 372, 432 S.E.2d 394, 397 (1993).

37. *Stillwell Enterprises*, 300 N.C. at 292–95, 266 S.E.2d at 817–18.

38. *W.S. Clark & Sons, Inc. v. Ruiz*, 87 N.C. App. 420, 422, 360 S.E.2d 814, 816 (1987) (“A formal credit agreement executed by the parties prior to the establishment of an open account is evidence of indebtedness; and if such an agreement contains a provision for attorney’s fees it will be legally enforceable pursuant to GS 6-21.2.”).

39. *Hedgecock Builder’s Supply Co. of Greensboro v. White*, 92 N.C. App. 535, 544, 375 S.E.2d 164, 170–71 (1989).

40. *Southland Amusements and Vending, Inc. v. Rourk*, 143 N.C. App. 88, 94–96, 545 S.E.2d 254, 256–58 (2001). This case takes a very expansive view of the definition of “evidence of indebtedness,” particularly by contrast to the earlier case of *Yeargin Construction Co., Inc. v. Futren Development Corp.*, 29 N.C. App. 731, 733–34, 225 S.E.2d 623, 625 (1976), noted *infra*.

41. *Four Seasons Homeowners Ass’n v. Sellers*, 72 N.C. App. 189, 191–92, 323 S.E.2d 735, 737–38 (1984).

42. *FNB Se. v. Lane*, 160 N.C. App. 535, 541, 586 S.E.2d 530, 534 (2003).

43. *Harborage Property Owners Ass’n, Inc. v. Mountain Lake Shores Dev. Corp.*, 145 N.C. App. 290, 298, 551 S.E.2d 207, 212 (2001) (declining to enforce a provision in the consent judgment requiring the non-prevailing party to “cover reasonable attorney fees” of the prevailing party).

44. *Yeargin Constr. Co., Inc. v. Futren Dev. Corp.*, 29 N.C. App. 731, 733–34, 225 S.E.2d 623, 625 (1976) (provision for attorney fees in the amount of 10% of any unpaid amounts under the contract was not enforceable).

45. *State Wholesale Supply, Inc. v. Allen*, 30 N.C. App. 272, 277–78, 227 S.E.2d 120, 124 (1976) (where attorney fee provision was absent from the underlying credit agreement).

46. 178 N.C. App. 585, 632 S.E.2d 563 (2006).

47. *Id.* at 604–05, 632 S.E.2d at 575.

Enforcement against Guarantors

An attorney fee provision may be enforced under G.S. 6-21.2 against a guarantor to the agreement when the document the guarantor signed properly references the fee obligation. For example, where the note in question provided for payment of attorney fees by guarantors, but the guaranty agreement had no such attorney fee provision, the attorney fee provision was not binding on the guarantors. The court of appeals, in *EAC Credit Corp. v. Wilson*,⁴⁸ stated that “North Carolina . . . recognizes that the obligation of the guarantor and that of the maker, while often coextensive are, nonetheless, separate and distinct.”⁴⁹ By contrast, where the note maker and the guarantor signed one instrument together, rather than separate agreements, the attorney fee provision in the instrument would be enforced against the guarantor.⁵⁰

The language in the guaranty agreement need not, however, specifically reference attorney fees if it otherwise provides adequate notice of the attorney fee obligation. In *RC Associates v. Regency Ventures, Inc.*,⁵¹ the guaranty agreement stated that the guarantor “unconditionally guarantees the full and punctual payment of the rent and other charges provided for in this lease[.]” The court of appeals found this language sufficient to put the guarantor on notice of the obligation to pay attorney fees pursuant to the language of the lease.⁵²

Notice Requirement

The statute contains a notice requirement that gives debtors a *very* brief window during which to avoid attorney fees. In most contracts covered by the statute, the party seeking to collect is required to provide notice to the debtor of its intent to enforce the attorney fees provision.⁵³ The debtor “has five days from the mailing of such notice to pay the ‘outstanding balance’ without the attorneys’ fees.” If the party pays in full within that time frame, “the obligation to pay the attorneys’ fees shall be void, and no court shall enforce such provisions.”⁵⁴ Because mailing often takes at least two days, the window for payment typically amounts to no more than three days.

48. 12 N.C. App. 481, 183 S.E.2d 859 (1971).

49. *Id.* at 485–86, 183 S.E.2d at 862. A note’s *endorsers* are treated differently than guarantors, as endorsers’ obligations do not necessarily arise from a separate agreement. Where a note provided that the attorney fee obligation would apply to “all parties,” and “all parties” was defined to include endorsers, the attorney fee provision would be enforced against the note’s endorsers. *Wachovia Bank & Trust Co. v. Peace Broad. Corp.*, 32 N.C. App. 655, 659, 233 S.E.2d 687, 689–90 (1977) (distinguishing *EAC Credit*).

50. *First-Citizens Bank & Trust Co. v. 4325 Park Road Assocs., Ltd.*, 133 N.C. App. 153, 157, 515 S.E.2d 51, 54 (1999).

51. 111 N.C. App. 367, 373–74, 432 S.E.2d 394, 397–98 (1993).

52. *Id.*; *see also* *Devereux Props., Inc. v. BBM & W, Inc.*, 114 N.C. App. 621, 625, 442 S.E.2d 555, 557 (1994) (reaching same result interpreting identical guarantee language).

53. G.S. 6-21.2(5) provides that

The holder of an unsecured note or other writing(s) evidencing an unsecured debt, and/or the holder of a note and chattel mortgage or other security agreement and/or the holder of a conditional sale contract or any other such security agreement which evidences both a monetary obligation and a security interest in or a lease of specific goods, or his attorney at law, shall, after maturity of the obligation by default or otherwise, notify the maker, debtor, account debtor, endorser or party sought to be held on said obligation that the provisions relative to payment of attorneys’ fees in addition to the “outstanding balance” shall be enforced[.]”

54. G.S. 6-21.2(5). There is an exception to the notice requirement where certain ancillary claims must be filed to recover possession of the property:

There is no particular time requirement for sending the notice other than “after maturity of the obligation.”⁵⁵ It is not necessary to give the notice prior to instituting an enforcement action; the parties may give the notice during the course of the proceedings.⁵⁶ In *Gillespie v. DeWitt*, the court held that a plaintiff was entitled to collect attorney fees pursuant to a note even where the defendant received the statutory notice four days after the collection action was initiated.⁵⁷ In the bankruptcy context, the Fourth Circuit Court of Appeals held that a creditor could provide the statutory notice in conjunction with a motion for relief from the automatic stay.⁵⁸ It should be noted however, that after a voluntary dismissal without prejudice of a foreclosure action under North Carolina Rule of Civil Procedure 41(b), the plaintiffs were required to send a new notice of intent to seek attorney fees. The first notice did not survive the voluntary dismissal.⁵⁹

As for form, “[t]he statute does not require any particular form, other than mailing, for giving such notice.”⁶⁰ In practice, notice is typically given in the form of a letter to the debtor or its counsel.⁶¹ Discussing long-standing agency principles, the court of appeals held that service upon counsel representing the debtor in connection with the debt constitutes proper notice upon the debtor itself.⁶² Citing similar agency principles codified in G.S. 59-42, the court also held that a North Carolina partnership was properly notified when the creditor sent the notice letter to the home address of *one* of the partners in the partnership.⁶³

While the timing and form of the notice are flexible, the courts consider the notice requirement itself to be “explicit” and strictly enforce it before allowing an award of fees.⁶⁴ Where a

Notwithstanding the foregoing, however, if debtor has defaulted or violated the terms of the security agreement and has refused, on demand, to surrender possession of the collateral to the secured party as authorized by G.S. 25-9-609, with the result that said secured party is required to institute an ancillary claim and delivery proceeding to secure possession of said collateral; no such written notice shall be required before enforcement of the provisions relative to payment of attorneys’ fees in addition to the outstanding balance.

G.S. 6-21.2(6).

55. *Coastal Prod. Credit Ass’n v. Goodson Farms, Inc.*, 70 N.C. App. 221, 223, 319 S.E.2d 650, 653 (1984).

56. *Federal Land Bank of Columbia v. Lieben*, 86 N.C. App. 342, 348, 357 S.E.2d 700, 704 (1987).

57. 53 N.C. App. 252, 269, 280 S.E.2d 736, 747 (1981). Accordingly, the notice may be sent to the debtor’s attorney of record after the proceedings have commenced. *First Citizens Bank & Trust Co. v. Larson*, 22 N.C. App. 371, 377–78, 206 S.E.2d 775, 779 (1974).

58. *Shangra-La, Inc. v. Harden*, 167 F.3d 843, 850–52 (4th Cir. 1999).

59. *Thomas v. Miller*, 105 N.C. App. 589, 592, 414 S.E.2d 58, 60 (1992).

60. *Coastal Production*, 70 N.C. App. at 223, 319 S.E.2d at 653.

61. Apparently there is no requirement that the notice actually mention attorney fees as long as it refers specifically to the relevant provision in the agreement. In *Beau Rivage Plantation, Inc. v. Melex USA, Inc.*, a certified mail letter informing defendant that “we shall exercise our rights pursuant to paragraph 19 ‘Remedies’ of the Lease” was acceptable notice of intent to enforce attorney fee provision, where paragraph 19 included an attorney fee provision. 112 N.C. App. 446, 453, 436 S.E.2d 152, 156 (1993). This type of indirect reference, however, is not standard (or suggested) practice.

62. *Crist v. Crist*, 145 N.C. App. 418, 425–26, 550 S.E.2d 260, 265–66 (2001) (“[D]efendant was placed on notice when his attorney received the letter from plaintiff[.]”).

63. *Hedgecock Builder’s Supply Co. of Greensboro v. White*, 92 N.C. App. 535, 544, 375 S.E.2d 164, 171 (1989).

64. *McGinnis Point Owners Ass’n, Inc. v. Joyner*, 135 N.C. App. 752, 757, 522 S.E.2d 317, 320 (1999); see also *ITT-Indus. Credit Co. v. Hughes*, 594 F.2d 384, 388 (4th Cir. 1979) (holding that filing a claim in bankruptcy was not sufficient to satisfy the notice requirement).

creditor did not demonstrate compliance with the notice requirement, the court of appeals held that an award of attorney fees was unauthorized and must be vacated.⁶⁵ Similarly, in *McGinnis Point Owners Ass'n, Inc. v. Joyner*,⁶⁶ the record on appeal did not reflect whether or not notice was given, so the court vacated the fee award and remanded to the trial court to determine whether notice was given.

Special Requirements for Debt Buyers and Assignees

In 2009, the General Assembly enacted legislation aimed in part at ensuring fair collection practices by “debt buyers”—companies in the business of buying and collecting delinquent consumer debt.⁶⁷ Part of the legislation requires such a company to more thoroughly document to the court its entitlement to collect the debt, including its right to enforce an attorney fee provision in the debt instrument. G.S. 6-21.2 was amended to provide that, where the plaintiff is a debt buyer or assignee of the debt, that party must provide the court all of the following:

- a. A copy of the contract or other writing evidencing the original debt, which must contain a signature of the defendant. If a claim is based on credit card debt and no such signed writing evidencing the original debt ever existed, then copies of documents generated when the credit card was actually used must be attached.
- b. A copy of the assignment or other writing establishing that the plaintiff is the owner of the debt. If the debt has been assigned more than once, then each assignment or other writing evidencing transfer of ownership must be attached to establish an unbroken chain of ownership. Each assignment or other writing evidencing transfer of ownership must contain the original account number of the debt purchased and must clearly show the debtor’s name associated with that account number.⁶⁸

The court must receive and be satisfied that these requirements (in addition to the notice requirements) have been met before allowing the party to receive an award of fees under this statute.⁶⁹

65. *Davis Lake Cmty. Ass'n v. Feldmann*, 138 N.C. App. 292, 297, 530 S.E.2d 865, 869 (2000); *Northwestern Bank v. Barber*, 79 N.C. App. 425, 430, 339 S.E.2d 452, 455 (1986).

66. 135 N.C. App. 752, 756–57, 522 S.E.2d 317, 320 (1999).

67. This legislation was part of the Consumer Economic Protection Act of 2009, S.L. 2009-573. “Debt buyer” is defined in the amended G.S. 58-70-15(b)(4) as

a person or entity that is engaged in the business of purchasing delinquent or charged-off consumer loans or consumer credit accounts, or other delinquent consumer debt for collection purposes, whether it collects the debt itself or hires a third party for collection or an attorney-at-law for litigation in order to collect such debt.

68. G.S. 6-21.2(6).

69. *Id.*

New Legislation: G.S. 6-21.6—Reciprocal Attorney Fees in Business Contracts

In June 2011, the General Assembly enacted new legislation providing another significant exception to the general North Carolina rule against enforcement of contractual attorney fee provisions. Session Law 2011-341 created G.S. 6-21.6, which authorizes courts to enforce reciprocal contractual attorney fee provisions in business contracts. The statute provides that

[r]eciprocal attorneys' fees 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.⁷⁰

In enacting this statute, North Carolina joins what appears to be a majority of the states in allowing attorney fees in some types of general business agreements. The law is effective October 1, 2011, and it applies to business contracts entered into on or after that date.

Scope of the Statute

"Business contract" is defined in the new statute as "a contract entered into primarily for business or commercial purposes."⁷¹ That definition by itself is quite broad, but expressly excluded from its scope are consumer contracts, employment contracts, and contracts "to which a government or a governmental agency of this State is a party."⁷² A consumer contract is a contract "entered into by one or more individuals primarily for personal, family, or household purposes."⁷³ An employment contract is a contract "between an individual and another party to provide personal services by that individual to the other party, whether the relationship is in the nature of employee-employer or principal-independent contractor."⁷⁴ By excluding consumer and employment agreements, the General Assembly sought to confine the statute to contracts in which the parties are in reasonably even bargaining positions.

Attorney fee provisions in business contracts are "reciprocal" when each party to the contract agrees

upon the terms and subject to the conditions set forth in the contract that are made applicable to all parties, to pay or reimburse the other parties for attorneys' fees and expenses incurred by reason of any suit, action, proceeding, or arbitration involving the business contract.⁷⁵

Thus, a fee clause that provides for payment of attorney fees by only one (or by less than all) the parties to the contract cannot be enforced under this statute.

"Sign by Hand"

The statute provides that these reciprocal fee provisions are enforceable "only if all of the parties to the business contract *sign by hand* the business contract."⁷⁶ The statute does not define the phrase "sign by hand." If in fact it is to be read literally to mean physically signed in ink with

70. G.S. 6-21.6(b).

71. G.S. 6-21.6(a)(1).

72. *Id.*

73. G.S. 6-21.6(a)(2).

74. G.S. 6-21.6(a)(3).

75. G.S. 6-21.6(a)(4).

76. G.S. 6-21.6(b) (emphasis added).

a writing instrument, it serves as a significant limitation on the applicability of the statute. On the other hand, is it possible that “sign by hand” is a term of art that may be read to encompass electronic signatures or other common forms of delivery and acceptance? This latter scenario would better reflect modern business, but it appears unlikely at best: the language was added in the fourth edition of the bill, so there seems to have been a specific limiting purpose behind it. *Counsel may wish to advise their business clients to have the parties physically execute these agreements if they truly seek to enforce reciprocal fee provisions.*

In addition, the statute states that “all parties” to the business contract must sign it by hand in order for it to be enforceable. Again, if “sign by hand” is to be interpreted literally, a party may not, then, enforce a fee provision against a party who signed the agreement by hand if there is any other party who *did not* sign it by hand (who signed it electronically, for example). It appears that a key to enforceability under this new statute is thoroughness and formality in the preparation and execution of the final agreement.

Determining the Amount of the Fee

Like G.S. 6-21.2, this new statute provides that the relevant attorney fee provisions are “valid and enforceable.” In the new statute, however, the trial court’s enforcement discretion is much broader. As discussed above, G.S. 6-21.2 generally *requires* the court to award the attorney fee, typically at the fixed and limited amount of 15 percent of the outstanding balance. The new reciprocal attorney fee statute takes the more traditional approach (found in other attorney fee statutes) of giving the trial judge considerable discretion over *whether* to award a fee and *how much* to award. The statute states:

If a business contract governed by the laws of this State contains a reciprocal attorneys’ fees provision, the court or arbitrator in any suit, action, proceeding, or arbitration involving the business contract *may* award reasonable attorneys’ fees in accordance with the terms of the business contract.⁷⁷

In determining “reasonable” fees, the court or arbitrator “may consider all relevant facts and circumstances, including, but not limited to” the following thirteen factors listed in the statute:

- (1) The amount in controversy and the results obtained.
- (2) The reasonableness of the time and labor expended, and the billing rates charged, by the attorneys.
- (3) The novelty and difficulty of the questions raised in the action.
- (4) The skill required to perform properly the legal services rendered.
- (5) The relative economic circumstances of the parties.
- (6) Settlement offers made prior to the institution of the action.
- (7) Offers of judgment pursuant to Rule 68 of the North Carolina Rules of Civil Procedure and whether judgment finally obtained was more favorable than such offers.
- (8) Whether a party unjustly exercised superior economic bargaining power in the conduct of the action.
- (9) The timing of settlement offers.
- (10) The amounts of settlement offers as compared to the verdict.
- (11) The extent to which the party seeking attorneys’ fees prevailed in the action.

⁷⁷ G.S. 6-21.6(c) (emphasis added).

- (12) The amount of attorneys' fees awarded in similar cases.
- (13) The terms of the business contract.⁷⁸

The judge's discretion in setting the award under this statute is not limited by terms in the contract at issue, by other statutory presumptions, or by the results of prior litigation:

Reasonable attorneys' fees and expenses shall not be governed by (i) any statutory presumption or provision in the business contract providing for a stated percentage of the amount of such attorneys' fees or (ii) the amount recovered in other cases in which the business contract contains reciprocal attorneys' fees provisions.⁷⁹

It appears, then, that even if a business contract attempts to limit the amount of a reciprocal fee award (for example, to 20% of a compensatory damages verdict), the court is not to be bound by that limit.

While the judge has very broad discretion in setting the award, the statute does attempt to set an upper limit in actions primarily for the recovery of monetary damages. Two separate subparagraphs of the statute, however, each place the cap at a different amount. Subparagraph (b) states that, "[i]n any suit, action, proceeding, or arbitration primarily for the recovery of monetary damages, the award of reasonable attorneys' fees *may not exceed the monetary damages awarded*."⁸⁰ Subparagraph (f) states that, "[i]n any suit, action, proceeding, or arbitration primarily for the recovery of monetary damages, the award of reasonable attorneys' fees *may not exceed the amount in controversy*." It is unclear from the legislative history which provision was intended to be the final provision in the act. Both limits are high, however, and it seems that most fee awards—at least in larger cases—will not approach either of them.

In addition, any award of fees by the court under this statute should be supported by findings and conclusions in the order. It is well-settled North Carolina law that where a trial court has discretion over an attorney fee award, the judge must support that award with written findings of fact and conclusions of law. These findings and conclusions must address both entitlement to attorney fees and the dollar amount of attorney fees awarded, taking into consideration the factors relevant to each case, including those prescribed by statute.⁸¹

Relationship to G.S. 6-21.2

Many, if not most, notes and similar debt instruments covered by G.S. 6-21.2 contain unilateral, rather than reciprocal, fee provisions; thus they do not come within the scope of the new reciprocal fee statute. Other contracts covered by G.S. 6-21.2 may, however, fall within both statutes, and where this occurs, the new statute allows parties to elect recovery under either statute:

If the business contract is also a note, conditional sale contract, or other evidence of indebtedness that is otherwise governed by G.S. 6-21.2, then the parties that are entitled to recover attorneys' fees and expenses may elect to recover

⁷⁸ *Id.*

⁷⁹ G.S. 6-21.6(d).

⁸⁰ G.S. 6-21.6(b) (emphasis added).

⁸¹ See generally *Gilchrist v. French*, 169 N.C. App. 255 (2005); *Washington v. Horton*, 132 N.C. App. 347 (1999). See also note 14, *supra*.

attorneys' fees and expenses either under this section or G.S. 6-21.2 but may recover only once for the same attorneys' fees and expenses.⁸²

The statute does not specify when the party must make the election, but presumably the party may do so after the judge determines the amount of the fee to be awarded under the reciprocal statute.

The court is not expressly prohibited from setting the fee under both statutes at 15 percent of the outstanding balance (or damages award). The new statute makes clear, however, that the fee "shall not be governed by . . . any statutory presumption . . . providing for a stated percentage of the amount of such attorneys' fees."⁸³ Thus the court should be careful to support its determination with specific findings of fact to show the decision was not arbitrary or based purely on the statutory presumption set by G.S. 6-21.2.

Together, G.S. 6-21.2 and the new G.S. 6-21.6 carve out significant exceptions to the common law rule against enforcing contractual attorney fee provisions. Given a trial court's wide discretionary range in setting a fee under the new business contracts statute, this state's trial judges can expect to have more attorney fee hearings on their civil dockets than in decades past.

82. G.S. 6-21.6(e). The new statute also does not affect the validity of a contractual provision falling within the older statute: "Nothing in this section shall in any way make valid or invalid attorneys' fees provisions in consumer contracts or in any note, conditional sale contract, or other evidence of indebtedness that is otherwise governed by G.S. 6-21.2." *Id.*

83. G.S. 6-21.6(d).

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