Attorney Fee Provisions in Business Contracts – New Legislation Loosening the "Sign by Hand" Requirement

First, Some Attorney Fee Basics. North Carolina generally follows the "American Rule" in requiring parties to civil litigation to be responsible for their own attorney fees: "It is well-established that the non-allowance of counsel fees has prevailed as the policy of this state at least since 1879." *Stillwell Enters, Inc. v. Interstate Equip. Co.*, 300 N.C. 286, 289 (1980). Attorney fee awards are allowed only when specifically authorized by statute. In general, fee-shifting is not allowed even when a party has agreed in a contract to reimburse another party's attorney fees incurred in enforcing the agreement. *Id.* Two key statutory exceptions apply, however, to this rule against enforcement of attorney fee agreements. First, and most familiar, is G.S. 6-21.2, which allows enforcement of attorney fee-shifting provisions in notes, conditional sale contracts, and "other evidence of indebtedness." I discuss the ins and outs of G.S. 6-21.2—enacted in 1967 and the subject of lots of case law—here.

Attorney Fee Provisions in Business Contracts. The second exception is the much newer G.S. 6-21.6, enacted in 2011. That statute makes reciprocal attorney fee provisions in business contracts "valid and enforceable." The statute defines "business contract" as "a contract entered into primarily for business or commercial purposes," but the term excludes consumer contracts, employment contracts, and contracts with state government. G.S. 6-21.6(a)(1). By "enforceable", the statute means that the trial court *may* award the fees in its discretion. G.S. 6-21.6(c). If the court chooses to do so, thirteen factors should be considered in reaching a "reasonable" fee, but the list is not exclusive, and the court "may consider all relevant facts and circumstances." *Id.* When setting the fee, the court is not limited by the terms of the contract, other statutory presumptions, or the results of other cases enforcing the same contract. G.S. 6-21.6(d). In actions for the recovery of monetary damages, the award of reasonable fees may not exceed the amount in controversy. G.S. 6-21.6(f). Back in 2011, I wrote about the statute in more detail here.

A Limitation of the Statute and the New Amendment. G.S. 6-21.6 could, in theory, materially increase the number of civil cases in which our courts shift fees. Thus far, however, a particular detail has stood in the way: The statute requires that reciprocal fee agreements are enforceable "only if all of the parties to the business contract *sign by hand* the business contract." G.S. 6-21.6(b) (emphasis added). The "sign by hand" language was added in the 2011 bill's fourth edition. Read literally, the requirement of signature "by hand" (of all parties, not just the party against whom enforcement was sought), appeared to exclude the many business contracts routinely executed in one electronic form or another.

Which brings us to the new legislation. Session Law 2015-264, Sec. 32.5, amends G.S. 6-21.6 to state that,

"Signature "by hand" is not intended to prevent the application of this section to a business

contract executed by either of the following:
(1) A party's electronic signature as defined in G.S. 66-312, if the party's electronic signature originates from an affirmative action on the part of the party to evidence acceptance and execution such as typing the party's signature or writing the party's signature with a finger or stylus on a touchscreen to indicate acceptance and execution.
(2) A party's manual signature that is delivered by an electronic reproductive image thereof."

The second part of this amendment is simple enough, as it seems to refer to the practice of inserting a scanned image of a person's actual signature onto a document. The first and more complicated part of the amendment, however, must be read in conjunction with G.S. 66-312, part of the Uniform Electronic Transactions Act. G.S. 66-312(8) defines "electronic signature" as an electronic sound, symbol, or process attached to, or logically associated with, a record and executed or adopted by a person with the intent to sign the record." G.S. 66-312(14) goes on to define "record" as "information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form."

With these changes, signature "by hand" still seems to involve a physical act of acceptance, but now the statute tries to take into account the modern practice of noting this acceptance in electronic form. Those of you with expertise in electronic transactions: I welcome your comments about the technical aspects of the new language and about the implications of the amendment. It became effective October 1, 2015.