

catalyst

SURETY PARTNERS



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Dear Valued Client,

Like any other year, 2022 has had its unique set of challenges that a contractor has had to manage through. While some type of headwinds will undoubtedly emerge no matter the economic climate, most are not as daunting and dissipate quicker than the prevailing headwinds that contractors have more recently had to endure. Our hats are off to you for navigating your company through these challenges.

As we get ready to turn the calendar to 2023, material price volatility, which was perhaps the most pressing risk many contractors have more recently had to face, has thankfully eased. However, scheduling your individual projects and overall backlog likely remains difficult as some key materials continue to carry long lead times. Adding quality labor to your team is still almost impossible. The good news is that these two primary headwinds may very well ease in 2023. The bad news is that significant improvements for these issues would most likely be driven by an economic slowdown. What the ensuing year has in store for us is anybody's guess, but many economists anticipate tougher sledding ahead for the construction industry.

In planning each year's Catalyst Construction Journal, our main goal is to provide you with information which could help you position your company to best face the current market. On the following pages you will find nine White Papers written for this publication by subject matter experts in their space of the construction arena. It's our hope that you find at least one piece of useful information within this resource that brings value to your business. However, we would recommend that you consult with either the author of any White Paper of interest or with your existing professional in that space prior to enacting any changes. Every individual business is different - what might be prudent for one business may not be the best choice for another.

Lastly, thank you for placing your trust in our agency. It's a responsibility that we do not take lightly. We're honored for the opportunity to play a small part in your company's continued success.







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Maximizing Recovery of Your Attorneys' Fees in Carolina Construction Cases



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Could anyone guess that COVID-19 and supply shortages would linger, or that an American recession would likely follow by the end of 2022? While these challenges created global repercussions, they uniquely impacted the construction industry, causing soaring costs and timeframes. As the American construction industry continues battling economic concerns, finances may seem bleak. But current Carolina statutory and case law offer a way for contractors to potentially save money when construction projects inadvertently end up in litigation: recovery of your attorneys' fees.

Both North Carolina and South Carolina include attorneys' fees provisions. North Carolina offers three predominant construction-related statutes: (A) N.C. Gen. Stat. § 6-21.6; (B) N.C. Gen. Stat. § 6-21.2; and (C) N.C. Gen. Stat. § 44A-35. Meanwhile, South Carolina includes three primary construction-related laws: (A) South Carolina caselaw; (B) S.C. Code Ann. §§ 29-5-10 and 29-5-20; and (C) S.C. Code Ann. § 27-1-15.

North Carolina

A. Business Contracts

"Commercial" construction contracts are classified as "business contracts." Section 6-21.6(c) 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...

If your construction contract includes a reciprocal attorney's fee provision, a judge or arbitrator can award some or all of your attorneys' fees to the prevailing party, so you are not stuck covering those costs. But what exactly is a "reciprocal attorneys' fee provision?"

A reciprocal attorneys' fee provision exists where the parties mutually agree that they could be responsible to pay the other party's fees if a specific condition occurs.¹ Generally, a reciprocal attorneys' fee provision is structured so that the losing party (i.e., the non-prevailing party) will pay the winner's attorneys' fees (i.e., the prevailing party). For example, your construction contract may have a provision which states: "In any action or proceeding arising out of or relating to the terms or enforcement of the contract, the prevailing party shall be entitled to payment of its attorney's fees by the non-prevailing party." If your construction contract has such a provision and you prevail in your case, you could be eligible to have the other party pay for your attorneys' fees. However, the court retains discretion as to whether it orders payment of fees and in what amount.

But there is a catch. If your construction contract includes a reciprocal attorneys' fee provision and you are the non-prevailing party, there is a risk that you potentially will have to pay the other side's fees.

Maximizing Recovery of Your Attorneys' Fees in Carolina Construction Cases**B. Evidence of Indebtedness**

N.C. Gen. Stat. § 6-21.2 governs general civil cases. Section § 6-21.2(a) states,

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, subject to the following provisions . . .

Here, the key language is that of "evidence of indebtedness." Evidence of indebtedness is defined as "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."² Construction contracts can "constitute an evidence of indebtedness."³

For example, imagine that you (a subcontractor) have a subcontract agreement with a general contractor. Your subcontract is in writing, and it includes an attorneys' fee provision. If you end up in litigation with the general contractor, you can offer the subcontract agreement as evidence of indebtedness, or as proof that the general contractor is contractually obligated to pay your attorneys' fees because you upheld your end of the bargain by completing the agreed-upon work.⁴ However, notice of your indebtedness must be given "after maturity of the obligation by default or otherwise."

The statute caps recovery of attorneys' fees at fifteen percent of the indebtedness at the time of filing the lawsuit inclusive of "principal and interest."⁵ The fifteen percent cap only applies at the trial level. This provision is therefore a useful mechanism for partially recovering your attorneys' fees because the court cannot disallow fees or award a lower percentage than agreed by the parties, so long as they have complied with the statute.

C. Liens and Bonds

If your North Carolina construction project involves liens (on real property or funds) or bonds, you may be eligible to recover your attorneys' fees. N.C. Gen Stat. § 44A-35(a) states,

In any suit brought or defended under the provisions of Article 2 or Article 3 of this Chapter, the presiding judge or arbitrator may allow a reasonable attorneys' fee to the attorney representing the prevailing party. This attorneys' fee is to be taxed as part of the court costs with the final judgment or arbitration award.

Recovering your attorneys' fees under N.C. Gen. Stat. § 44A-35 requires you to be the prevailing party. In order for a judge to find that you are the prevailing party, you must receive the largest "principal amount in controversy" as a result of the lawsuit. In other words, you must receive the most money from the court's judgment. However, if your case settles outside of the courtroom through a written settlement offer or offer of judgment, your status as the prevailing party is based on how much each party would receive via its last settlement offer.

Remember that all cases are unique, and so are judicial determinations regarding the amount of attorneys' fees you can recover. To that end, N.C. Gen. Stat. § 44A-35 includes factors the judge will consider when determining who the prevailing party is, such as the legal issues at stake, the reasonableness of the fees, and how the case has been resolved.

Because this statute was recently updated in 2022, interpretations for recovery of attorneys' fees in the lien context may be up for judicial debate over the next few years. Previous analysis under § 44A-35 involved unclear money calculations; the new version has subsequently streamlined the statutory analysis for lien-related attorneys' fees.

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South Carolina

A. Breach of Contract

Unlike North Carolina, South Carolina offers a generalized method for receiving attorneys' fees in breach of contract cases.⁶ South Carolina caselaw generally provides that the prevailing party in a breach of contract case may at times recover its attorneys' fees from the opposing party if the original contract at issue included an attorneys' fee provision.⁷

B. Liens

Similar to N.C. Gen Stat. § 44A-35 described above, S.C. Code Ann. §§ 29-5-10 and 29-5-20 apply to liens. While both S.C. Code Ann. §§ 29-5-10 and 29-5-20 are similar, "they distinguish between two classes of persons: (1) those with a direct contractual relationship to the owner (or leaseholder, as the case may be), such as contractors, and (2) those who are not in direct privity of contract with the owner, such as subcontractors and materialmen or suppliers."⁸

S.C. Code Ann. § 29-5-10(a), in part, states, "The costs which may arise in enforcing or defending against the lien under this chapter, including a reasonable attorney's fee, may be recovered by the prevailing party."

South Carolina's provision defines "prevailing party" differently than North Carolina. Here, under S.C. Code Ann. § 29-5-10, the prevailing party is "based on one verdict in the action. . . . The party whose offer is closer to the verdict reached is considered the prevailing party in the action." This means that if the case includes settlement offers, whichever party's settlement offer was closest to the final judgment could receive their attorneys' fees from the opposing party. However, settlement offers must be brought "not less than fifteen days before the first term of court at which the trial is set." If a settlement offer is given within the aforementioned timeframe, "within ten days thereafter the party served may respond by filing and serving his offer of settlement."

Alternatively, if the case goes through the litigation process without settling, the presumption is that the defendant's offer is "the value of his counterclaim" or is zero, if there is no counterclaim. The plaintiff's offer is the amount claimed in the pleading. Watch out though because this means you could win your case and still have to pay the opposing party's attorneys' fees.

Moreover, S.C. Code Ann. § 29-5-20(a) states,

Every laborer, mechanic, subcontractor, or person furnishing material for the improvement of real estate when the improvement has been authorized by the owner has a lien thereon . . . including the costs of the action and a reasonable attorney's fee which must be determined by the court in which the action is brought but only if the party seeking to enforce the lien prevails. If the party defending against the lien prevails, the defending party must be awarded costs of the action and a reasonable attorney's fee as determined by the court. The fee and the court costs may not exceed the amount of the lien...

This means that if you "furnish [] material for the improvement of real estate" through a construction contract, *and* a lien is involved, *and* you win the case, *and* you were the party trying to enforce the lien, *then* you can recover your reasonable attorneys' fees. Meanwhile, if you are the party defending against the lien and you win, you can receive your attorneys' fees.

As noted above, "the determination of the prevailing party is based on one verdict in the action," so the judge is primarily focused on how much each party is set to recover based on the court's award to each party or based on which party's "offer of settlement is closer to the verdict."

Maximizing Recovery of Your Attorneys' Fees in Carolina Construction Cases

C. Improvements to Real Property

S.C. Code Ann. § 27-1-15 is relevant when you (as the contractor in a construction project) have “expended labor, services, or materials under contract for the improvement of real property, and where due and just demand has been made by certified or registered mail for payment for the labor, services, or materials under the terms of any regulation, undertaking, or statute.”

This boils down to a simple concept. If your contract is meant to improve real property, you might be able to receive some of your attorneys' fees. The party you claim owes you attorneys' fees is obligated “to make a reasonable and fair investigation of the merits of the claim and to pay it.” If they do not do so within 45 days from the request, or if they do not pay the claim, the party will likely have to pay your “reasonable attorney's fees and interest at the judgment rate from the date of the demand.” Therefore, this statutory section allows for recovery of attorneys' fees where the other side does not fairly investigate, or there has been unreasonable refusal to pay the claim or any undisputed portion.

Takeaway

The key takeaway for your construction company is that while enforceable attorneys' fees provisions exist, a prudent contractor can maximize potential recovery by contract. Lien statutes, too, may provide shifting of attorneys' fees. As you go through the steps of a lawsuit, be sure to consult with your attorney and evaluate the cost of your attorneys' fees in relation to the claims you might recover.

Author Bios

David Carson is a litigation partner at Johnston, Allison & Hord with over 30 years of experience in the construction industry. He counsels contractors on the front end of projects and represents companies in disputes concerning contracts, project delays, completion and cash flow issues, construction defects, permitting, surety issues, safety and more.

Grace Ketron is a litigation associate at Johnston, Allison & Hord whose practice focuses on construction law, employment law and other business disputes.

1. *Miriam Equities, LLC v. LB-UBS 2007-C2 Millstream Rd., LLC*, 2022 NCBC 3, at *66 (2022).
2. *Crescent Univ. City Venture, LLC v. AP Atl., Inc.*, 2019 NCBC LEXIS 46, 108-09 (N.C. Sup. Ct. 2019).
3. *Id.*
4. *United States ex rel. SCCB, Inc. v. P. Browne & Assoc.*, 751 F. Supp. 2d 813, 817 (M.D.N.C. 2010).
5. <https://www.jahlaw.com/can-i-recover-my-attorney-fees-news-and-events/>; N.C. Gen. Stat. § 69-21.2(3).
6. <https://www.carolinasconstructionattorneys.com/2020/02/can-i-recover-my-attorneys-fees-in-north-carolina-and-south-carolina/>
7. *Id.*; See generally *Lady Beaufort v. Hird Island Invmts.*, 2022 S.C. App. Unpub. LEXIS 316, at *14 (S.C. Ct. App. 2022).
8. *Ferguson Fire & Fabrication, Inc. v. Preferred Fire Prot., LLC*, 2014 S.C. LEXIS 255, at *9-10 (S.C. 2014).

A large construction crane is the central focus of the image, set against a dark blue, overcast sky. The crane's lattice structure is clearly visible, extending from the bottom center towards the top right. A long jib extends horizontally to the left. The crane is positioned in front of a building under construction, with concrete slabs and rebar visible. The overall tone is industrial and professional.

**WE EXIST TO HELP
CONTRACTORS
SUCCEED**