



ATTORNEYS AT LAW

June 4, 2018

North Carolina Statute On Choice of Law in Business Contracts

A Big Change Applicable to North Carolina Business Contracts

When parties to a commercial contract agreed that North Carolina law would govern future disputes arising under the contract, they likely did so to provide predictability and clarity to the relationship. As many such businesses later discovered, however, such “choice of law” clauses were not always enforced by North Carolina courts. The North Carolina Choice of Law and Forum in Business Contracts Act (the “Act”), which went into effect July 18, 2017 and is codified as N.C. Gen. Stat. § 1G *et seq.*, marks an important change in how North Carolina will treat choice of law provisions in business contracts. The Act gives parties to a “business contract” added predictability because choice of law of provisions are no longer subject to attacks that made them unenforceable under previous North Carolina case law.

Application to Past and Future “Business Contracts”

The Act applies only to “business contracts,” defined as a “contract or undertaking, contingent or otherwise, entered into primarily for business or commercial purposes.” N.C. Gen. Stat. § 1G-2(1)(2017). Employment and consumer contracts, which are also defined by the Act, are expressly excluded from the definition. *Id.* See also N.C. Gen. Stat. § 1G-2(2)(defining “consumer contracts” as contracts “entered into by an individual primarily for the individual's personal, family, or household purposes”); N.C. Gen. Stat. § 1G-2(3)(defining “employment

contracts” as contracts “between an individual and another party to provide labor or personal services by that individual to the other party, whether the relationship is in the nature of employer-employee or principal-independent contractor”).

Further, the Act is retroactive, meaning it applies to past and future business contracts, not just those that were executed after the law went into effect. Therefore, businesses that have already entered into contracts with choice of law provisions designating North Carolina law as the governing law are already within the Act’s protective sphere. Parties need not take any additional steps to gain the protection afforded by the Act.

What the Act Does for Parties to a Business Contract

Prior to the Act, a party to a business contract may have been able to find a way around applying North Carolina law, despite the fact that the parties had agreed that the state’s law would govern their future disputes, by making two arguments previously accepted by North Carolina courts. The party could argue that (i) the dispute did not bear any “reasonable relation” to the state or (ii) North Carolina law would violate a “fundamental policy” of the state whose law would have applied in the absence of the choice of law provision. Each of those arguments has been supported by the Restatement (Second) on Conflicts of Laws § 187 (1971) and accepted by North Carolina courts. See, e.g., Mosteller Mansion, LLC v. Mactec Engineering And Consulting of Georgia, Inc., 190 N.C.App. 674, 661 S.E.2d 788 (2008); Cable Tel Services, Inc. v. Overland Contracting, Inc., 154 N.C.App. 639, 574 S.E.2d 31 (2002).

Allowing parties that had agreed to be bound by North Carolina law to slip out of that part of the contract disadvantaged the party wanting North Carolina law to apply because an

important portion of the parties' bargain was not being enforced. In addition, litigating the choice of law issue added to litigation expenses, caused delay, and increased uncertainty. These were the risks the parties presumably wanted to avoid when they agreed that North Carolina law would govern disputes arising under the contract.

The Act directly addresses, and removes from the litigation playbook, both of those arguments:

The parties to a business contract may agree in the business contract that North Carolina law shall govern their rights and duties in whole or in part, **whether or not** any of the following statements are true:

- (1) The parties, the business contract, or the transaction that is the subject of **the business contract bear a reasonable relation to this State.**
- (2) A provision of **the business contract is contrary to the fundamental policy of the jurisdiction whose law would apply in the absence of the parties' choice of North Carolina law.**

N.C. Gen. Stat. § 1G-3(a)(emphasis added).

Why the Act Matters to North Carolina Businesses

Most importantly, the Act gives businesses, and the lawyers who advise them, clarity and predictability on the question of which law will govern disputes arising under business contracts. By removing the mystery surrounding the issue of which state's law will apply, businesses are more likely to have a clear understanding of the merits of their case and the risks associated with litigation. The Act also seems likely to lower legal fees and decrease litigation delays by removing a heavily litigated issue from the dispute. In addition to saving businesses money that may otherwise be spent litigating the issue, the Act also preserves judicial time and resources.

Supporters are hopeful that the Act will be a positive step in making North Carolina a more business-friendly state. According to the Report from the Legal Opinion Committee of the Business Law Section of the North Carolina Bar Association (the “NCBA Report”), prior North Carolina case law, and the rules espoused by the courts therein, negatively impacted North Carolina’s standing as a “leading center for business and commerce. NCBA Report. at p. 2 (2017). The Committee supported the legislation and believes the Act will “enhance the perception of North Carolina as a business friendly state” and will “place North Carolina on an equal footing with states such as Delaware, New York, Illinois and California” by providing the predictability and clarity that businesses seek. Id. at p. 4.

Conclusion

As of the date of this article, there are no published cases applying the Act, so it remains to be seen what creative arguments litigants and their attorneys will make in order to avoid the Act’s requirements that choice of law and forum selection clauses be enforced. However, given the plain language and clear aim of the statute, it may be a good time for those businesses that want North Carolina law to govern their business contract disputes to review their standard choice of law and forum selection clauses, with an eye toward revisions that will help ensure they receive the Act’s protections.

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