

# Examining Changes to North Carolina's Law Governing Recovery of Attorneys' Fees in Construction Lien and Payment Bond Disputes

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Legal disputes arising from construction projects commonly involve lien claims (in the case of private construction projects) or payment bond claims (in the case of public construction projects) asserted by a general contractor or subcontractor who hasn't been timely paid for work or materials contributed to the project.

**Lien and payment bond claims** are governed by **North Carolina General Statutes Chapter 44A Article 2** (applies to lien claims) and **Article 3** (applies to payment and performance bond claims on public projects). **Section 35 of Chapter 44A** contains an attorneys' fees provision ("Fees Provision") that provides a means for the prevailing party in a lien or payment bond dispute to seek recovery of their reasonable attorneys' fees. In March of 2022, the Fees Provision was amended by the state Legislature, and important changes were made regarding what litigants need to prove to claim eligibility to attorneys' fees under the Fees Provision. This article examines the changes that were made to the Fees Provision in the recent amendment and what litigants will now need to establish if seeking recovery of attorneys' fees (or defending against such a claim) under the Fees Provision.

Prior Version of the Fees Provision

Prior to amendment, the Fees Provision provided that in any suit brought or defended under Article 2 (applicable to lien disputes on private construction projects) or Article 3 (applicable to payment and performance bond disputes on public construction projects) of Chapter 44A, "the presiding judge may allow a reasonable attorneys' fee to the attorney representing the prevailing party. . . . upon a finding that there was an unreasonable refusal by the losing party to fully resolve the matter." Thus, to prove eligibility to recover attorneys' fees, a litigant had to show (1) its suit was brought or defended under Article 2 or Article 3 of Chapter 44A, (2) it was the prevailing party, and (3) there was an unreasonable refusal by the other party to resolve the dispute. If these three points were proved, then the judge could, in its discretion, award reasonable attorneys' fees to the prevailing party.

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The prior version of the Fees Provision defined the "prevailing party" primarily by reference to the percentage the claimant recovered of the monetary amount sought in its claim. If the claimant recovered greater than 50% of the amount it sought in its claim, then it was the prevailing party. If the claimant recovered less than 50% of the amount it sought, then the Defendant was the prevailing party. For example, if the claimant sought to recover \$100,000.00 and recovered only \$40,000.00, then the defendant was the prevailing party. One exception to the prevailing party calculus was that if an offer of judgment was made and rejected under N.C. Rule of Civil Procedure 68, then the prevailing party was the party who obtained a judgment more favorable than the Rule 68 offer of

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judgment. For example, if an offer of judgment in the amount of \$100,000.00 was made by the defendant and rejected by the plaintiff and the plaintiff recovered only \$70,000.00 at trial, then the defendant was considered the prevailing party.

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With respect to the “unreasonable refusal to resolve the dispute” requirement, the prior version of the Fees Provision did not define what constituted an unreasonable refusal to resolve. So, courts exercised discretion in deciding whether there was an unreasonable refusal to resolve the dispute that warranted an award of attorneys' fees. If the losing party did not have a good faith or factually supported basis for refusing to resolve the claim and/or engaged in malicious or wrongful conduct, then a court might find an unreasonable refusal to resolve the dispute. Courts, however, are generally reluctant to award attorneys' fees, so the existence of the “unreasonable refusal to resolve” requirement provided an additional basis for courts not to award attorneys' fees and made recovery of attorneys' fees more difficult.

Current Version of the Fees Provision

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In the new and current version of the Fees Provision, only two of the previous requirements to prove eligibility to recover attorneys' fees remain the same: (1) the litigant must show that it brought or defended the at-issue lawsuit under the provisions of Article 2 or Article 3 of Chapter 44A and (2) the litigant must be the prevailing party in the lawsuit. Additionally, as in the prior version of the Fees Provision, the decision to award attorneys' fees is discretionary. The court or arbitrator, in its discretion, “may allow a reasonable attorneys' fee to the prevailing party,” but it is not required to do so. Thus, there is no guarantee that attorneys' fees will be recoverable in construction disputes involving a lien or payment bond dispute, even if you are the prevailing party and establish the other required elements. Put simply, if you are seeking attorneys' fees, the establishment of the required elements allows you to open the door to a recovery, but the judge or arbitrator ultimately decides, at their discretion, whether you are allowed to walk through that door and actually receive a recovery of attorneys' fees.

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The five biggest changes in the new version of the Fees Provision are (1) a new definition of “prevailing party,” (2) dropping the requirement that there be an “unreasonable refusal to resolve” by the losing party in order for fees to be recoverable, (3) adding a list of factors for the decision maker to consider in determining the amount of any attorneys' fee award; (4) detailing the evidence the prevailing party may submit in support of its request for attorneys' fees; and (5) expressly providing that the Fees Provision applies to both trials and arbitrations. Each of these changes is discussed below.

## Redefining “Prevailing Party”

First, the new version of the Fees Provision defines “prevailing party” differently from the prior version. The “prevailing party” is now defined as “the party whose monetary position at the commencement of the trial, arbitration, or hearing is closest to the amount of the judgment or arbitration award.” This definition of “prevailing party” clarifies that the monetary position of the parties is measured as of the commencement of trial or arbitration and is not based on the position of the parties earlier in the case. So, if a party reasonably changes its monetary position prior to the commencement of trial based on the evidence, it can put itself in a better position to be the prevailing party. This encourages parties to be realistic about what the evidence shows when staking out monetary positions before trial or arbitration. By way of example, under this definition of prevailing

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party, if the plaintiff claims it is owed \$100,000.00 prior to trial or arbitration and the Defendant claims the plaintiff is owed \$20,000.00 and the Plaintiff recovers \$52,000.00, then the Defendant would be the prevailing party. By way of further example, if, at the time of trial, the plaintiff claims it is owed \$100,000.00 and the defendant has a counterclaim and claims it is owed \$60,000.00, and the plaintiff recovers \$40,000.00, then the plaintiff is the prevailing party because its monetary position prior to trial was closest to the final judgment. Contrary to the prior version of the Fee Provision, the mere fact that a party recovers more or less than 50% of the amount sought in its claim does not mean it will or won't be the prevailing party.

Additionally, under the new Fees Provision, if a party serves (i) an offer of judgment under Rule 68 or (ii) a written settlement offer at least 30 days before the commencement of trial, arbitration, or hearing, then the party's last offer is deemed to be its monetary position for purposes of determining the amount in controversy. This encourages parties to make reasonable settlement offers based on what they believe the facts show, and a likely outcome will be if the case proceeds through trial or arbitration.

## **So Long “Unreasonable Refusal to Resolve” Requirement**

Another notable difference between the past version of the Fees Provision and the current version is that the prevailing party no longer has to prove that the losing party “unreasonably refused to fully resolve the matter.” This requirement in the prior version of the Fees Provision provided an additional hurdle to be cleared by the prevailing party and made the recovery of attorneys' fees less likely. Now, the prevailing party at trial or arbitration in a lien or payment bond dispute need only show that it is the prevailing party to show it is eligible to recover its reasonable attorneys' fees. This should mean that a prevailing party is more likely to recover its reasonable attorneys' fees under the current version of the Fees Provision.

## **Consideration of Facts and Circumstances in Determining Amount of Attorneys' Fees**

The current version of the Fees Provision also adds a new section that provides the decision maker with facts and circumstances it may consider when determining the amount of reasonable attorneys' fees to award the prevailing party, including:

- (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 commencement of the trial, arbitration, or hearing.

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(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 or withheld payment of undisputed amounts.

(9) The timing of settlement offers.

(10) The extent to which the party seeking attorneys' fees prevailed in the action.

(11) The amount of attorneys' fees awarded in similar cases.

The prior version of the Fees Provision offered no real guidance on what the decision maker could consider when determining a reasonable attorney fee, so this provision provides some assistance to the decision maker when crafting its reasonable attorneys' fee award. This section of the Fees Provision also provides assistance to the prevailing party in crafting their argument in support of the amount they claim they are entitled to as a reasonable attorneys' fee. Notably, the making of settlement offers and the reasonableness of positions taken by the parties during litigation are factors the decision maker may consider in determining the amount of attorney's fees. The making of settlement offers as an offensive and defensive tactic was important under the prior version of the Fees Provision and remains relevant in the current version of the Fees Provision.

## **Evidence Prevailing Party Can Submit in Support of Request for Reasonable Attorneys' Fees**

The current version of the Fees Provision also adds a new section that provides assistance to the prevailing party in crafting their argument in support of the amount they claim they are entitled to as a reasonable attorneys' fee. Section (e) of the current version of the Fees Provision explains that a prevailing party can submit evidence in support of its request for attorneys' fees by affidavit, declaration, or expert testimony (though expert testimony is not required). The court or arbitrator may admit other evidence in its discretion.

## **Express Inclusion of Arbitrators**

The prior version of the Fees Provision provided that “the presiding judge” could allow reasonable attorneys' fees to the attorney representing the prevailing party. The new version of the Fees Provision clarifies that the “presiding judge or arbitrator” may award reasonable attorneys' fees to the prevailing party. This is significant as the use of arbitration clauses in construction contracts is prevalent, and many lien or bond disputes are resolved through arbitration. The fact that the Fees Provision is now expressly applicable to arbitration encourages the continued use of arbitration clauses in construction contracts and provides a basis for parties arbitrating a construction lien or bond dispute to recover their attorneys' fees.

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The amendments to the Fees Provision enacted by the legislature in 2022 made significant changes to the Fees Provision. By dropping the former “unreasonable refusal” requirement, the amended version of the Fees Provision appears to make recovery of attorneys' fees by the prevailing party more likely. Additionally, the extension of the Fees Provision to the arbitration context provides a

basis for parties involved in lien or bond disputes before an arbitrator to recover their attorneys' fees at arbitration. Taken together, the updated version of the Fees Provision appears to provide a better opportunity for the prevailing party in a lien or bond dispute to recover its reasonable attorneys' fees than the prior version. The amendments also provide more direction and instruction to judges, arbitrators, and litigants regarding what evidence should be considered when determining whether and what amount of reasonable attorneys' fees should be awarded to a prevailing party. This more formulaic approach should make the award of attorneys' fees more uniform across courts and arbitration hearings.

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