

# The Basics of Contract Law for Engineers

Luke J. Farley, Esq.

Douglas P. Jeremiah, Esq., PE

Conner Gwyn Schenck PLLC

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I promise to  
mow your  
lawn for \$10  
- Luke F.



# Restatement (Second) of Contracts

**A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.**

# Does my contract need to be in writing?

**NO**

**Most contracts DO NOT have to be in writing to be valid.**

# *Should my contract be in writing?*

# YES

Regardless of whether your contract must be in writing in order to be valid, it is always good practice to have your agreements put in writing.

# Can I get out of a contract because I didn't read it?



# NO

**Unless you were tricked or have a disability, the law presumes that you have read the contract and know its contents.**

# Can I change a contract after I enter into it?

# YES

Contracts can be changed with other writings or through words or conduct. Even contracts which prohibit oral modification can still be changed through words.

**What happens if I have a  
contract to perform work,  
but I am not paid?**

# SUE FOR DAMAGES

You are entitled to be put in the same position you would have been in if the contract had been fully performed.

**What happens if I have a  
contract to perform work but  
don't want to carry it out?**

# YOU ARE SUED FOR DAMAGES

But—you cannot be forced to perform the work; you can only be forced to pay damages.

# What is a non-competition agreement?

# KEEPS YOU FROM COMPETING WITH YOUR EMPLOYER AFTER YOU LEAVE

They're valid—but they have restrictions.  
They must be reasonable as to time, space  
and activity.

# Attorney's Fees

- Two attorney's fees statutes relevant to engineers
  - Collecting a debt
  - Reciprocal attorney's fees in commercial contracts

# Collecting a Debt

- Can the engineer collect the attorney's fees incurred in the collection of a past due account?
- Maybe. North Carolina does have a statute that allows for the awarding of attorney's fees for debts owing under a contract (N.C. Gen. Stat. § 6-21.2)

## Collecting a Debt, cont.

- The contract must specify that the engineer has this right if collection procedures become necessary.
- The statute limits the amount of attorney's fees collectible to 15% of the amount owing, and the debtor must be provided with five days written notice within which to pay the debt before becoming responsible for the engineer's attorney's fees.

# Reciprocal Atty Fees in Commercial Contracts

- 2011 Legislation declares that “reciprocal attorneys’ fees” provisions in “business contracts” are valid and enforceable under the laws of North Carolina (N.C. Gen. Stat. § 6-21.6).
- “Business contracts” are those entered into primarily for business or commercial purposes.
- “Reciprocal attorneys’ fees” provisions are those that require all parties to the agreement to agree to pay attorneys’ fees incurred by the other party in dispute resolution.

# Court's Discretion

- The recovery of attorneys' fees is not made automatic simply by including a reciprocal attorneys' fees provision in a business contract.
- The award is in the court's discretion and the court may consider "all relevant facts and circumstances," including a list of thirteen separate factors:
  - (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.

# Thirteen Factors

- (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.

# Thirteen Factors, cont.

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

# Effective 10/1/11

- This act becomes effective on October 1, 2011 and applies only to contracts entered into on or after that date.
- Cannot use both attorney's fees statutes, must pick one.

# Limitation of Liability Clauses

- Limitation of liability clauses can be used by engineers to limit their contractual liability on a project to an agreed upon amount with the client.
- Enforceable in North Carolina (*Blaylock, 2008*)

# What is the Cap?

- Typically, the limitation on liability is capped at either the:
  - (1) amount paid by the client to the engineer under the contract
  - (2) amount of insurance coverage obtained by the engineer
  - (3) a stipulated amount, such as \$50,000

# Language

- The limitation of liability clause should not be contained in small-font boilerplate language or hidden on the back page of a proposal.
- The language of the clause should be clear and unambiguous.

# Negotiating the clause

- The client, however, may not be willing to agree to the limitation of liability clause.
- By agreeing to the limitation, the client is foregoing the right to pursue certain claims against the engineer above the limitation amount.
- This could be a large release of liability by the client, potentially hundreds of thousands or even millions of dollars.
- The engineer will need to consider the relationship with the client along with the current work environment in determining whether to modify or remove the limitation of liability provision if the client requests it.

# ADR Clauses

- Engineers should consider inclusion of an alternative dispute resolution clause (“ADR”) in their contracts.
- In an ADR clause, the parties typically agree to resolve all of their potential disputes arising under the contract through mediation, arbitration, or a combination of the two.
- Resolving a dispute through ADR is typically thought to be less expensive and faster than litigation and provides the parties with some control over the process.

# Mediation

- In mediation, the parties attempt to settle their dispute with the help of a neutral third party, the mediator.
- Mediation is non-binding, meaning the dispute is only settled if both parties agree.
- The mediator cannot force a settlement nor does the mediator decide the case as would an arbitrator or judge.

# Mandatory vs. Contractual Mediation

- Mediation is mandatory in most North Carolina law suits (“Mediated Settlement Conference”)
- Mediation provisions in contracts govern pre-litigation mediation

# Location of Mediation

- The location for the mediation should be specified in the mediation clause.
- The engineer can choose the location of his/her home office or another location convenient to the engineer such as the project location.
- If the location is not specified, and the client and/or project are in another state, then a dispute can arise over the location of the mediation.

# Mediation Rules/Procedures

- While contractual mediations can typically be held without specifying any procedures or rules in the contract, the parties can agree to conduct the mediation under a set of rules such as the American Arbitration Association's ("AAA") Construction Industry Mediation Procedures.

# Pros/Cons of Arbitration

- Pros
  - Arbitration may be cheaper than litigation
  - Dispute is kept private
  - Choose arbitrator experienced in construction disputes
  - Parties choose the schedule
  - Parties can agree to limited discovery
- Cons
  - Can be as expensive as litigation
  - You have to pay for the arbitrator(s)

# Arbitration Rules/Procedures

- Arbitration clauses in North Carolina do not have to specify the procedures and rules to be used in the arbitration in order for the clause to be enforceable.
- The North Carolina Revised Uniform Arbitration Act (“RUAA”) statute provides a minimum level of procedures and rules and sets forth the arbitrator’s authority.
- The AAA Construction Industry Arbitration Rules are commonly included in design and construction contracts and provides more extensive procedures and rules than the RUAA.

# Arbitration Rules/Procedures, cont.

- Some parties, however, prefer to draft their own procedures.
- If the procedures are left to be developed after the dispute arises, the parties can spend many months negotiating with each other over the procedures.
- If the parties are unable to reach an agreement on the procedures and arbitration schedule, they may need to involve the arbitrator.
- The arbitration provision in the contract should set forth the location for the arbitration hearing, or else that may be subject to negotiation as well.

# Mediation and Arbitration?

- The ADR clause may provide for mediation, arbitration, or a combination of the two.
- If mediation is selected in the ADR clause without arbitration, then the clause should specify that the dispute will be subject to litigation in the event that mediation is unsuccessful.
- Typically if mediation and arbitration are included in the ADR clause then arbitration is held in the event that mediation is unsuccessful.
- Once the dispute arises, the parties can agree to waive the requirement for mediation if they feel arbitration is a better way to resolve the dispute.

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