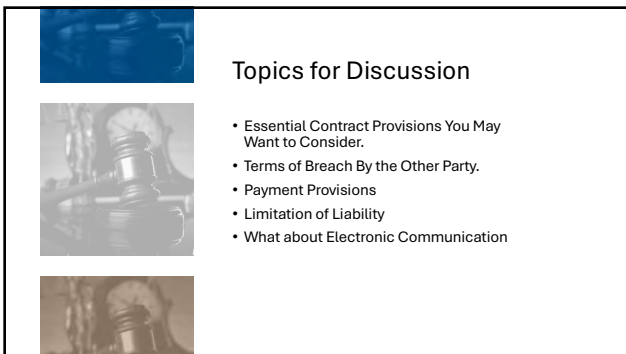




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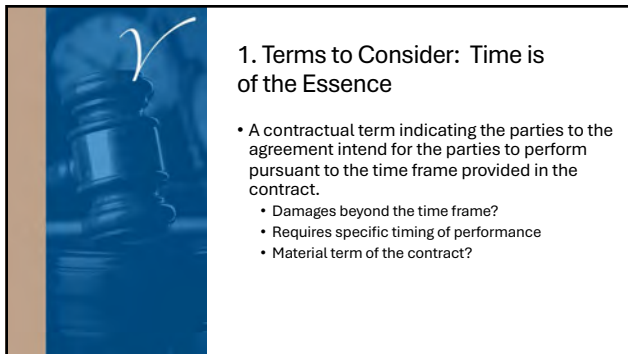
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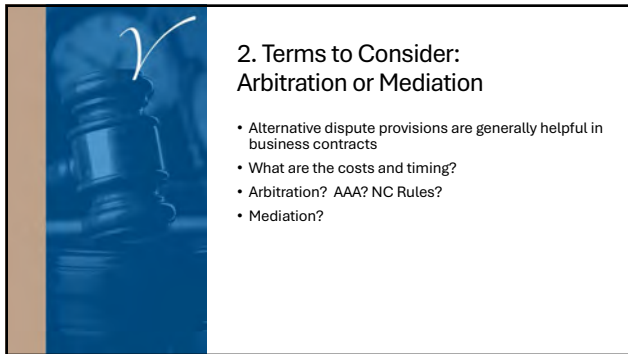
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6



**3. Terms to Consider:
Integration**

- An integration term generally provides that written contract is the final agreement between the parties.
- Typical interpretation is that any prior agreements or discussions are not included.
- Any previously terms not included in the final contract? If so, the terms are not to be relied upon.


7



**4. Terms to Consider: Choice
of Law**

- In case there is a dispute, which State law will apply?
- If the contract provides for a specific State law, then that might be the law used.
- Where are the parties located?
- Where is the contract to be performed?
- What makes sense?

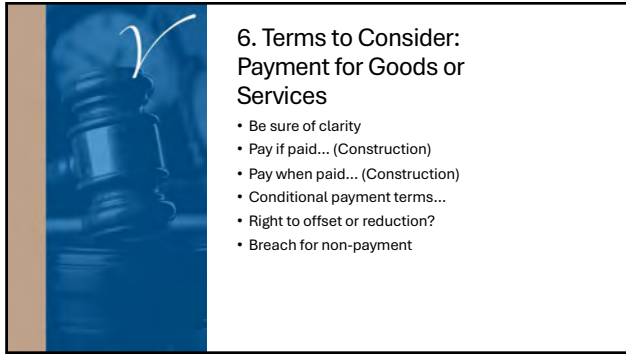
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**5. Terms to Consider:
Jurisdiction**

- In case there is a dispute, where will the lawsuit, mediation or arbitration be held. (State and County)
- Where are the parties located?
- Where is the contract to be performed?
- What makes sense?

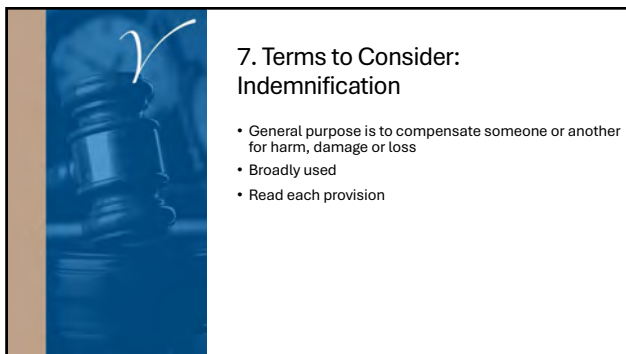
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**6. Terms to Consider:
Payment for Goods or
Services**

- Be sure of clarity
- Pay if paid... (Construction)
- Pay when paid... (Construction)
- Conditional payment terms...
- Right to offset or reduction?
- Breach for non-payment

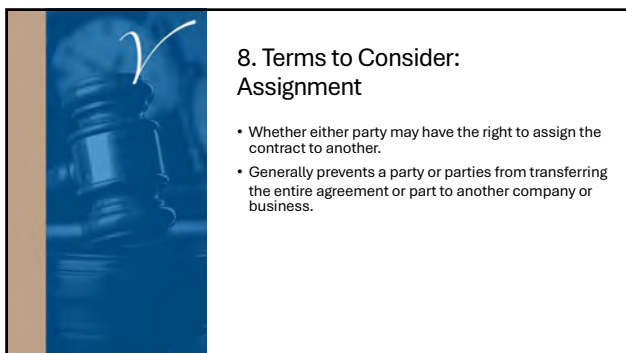
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**7. Terms to Consider:
Indemnification**

- General purpose is to compensate someone or another for harm, damage or loss
- Broadly used
- Read each provision

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**8. Terms to Consider:
Assignment**

- Whether either party may have the right to assign the contract to another.
- Generally prevents a party or parties from transferring the entire agreement or part to another company or business.

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9. Terms to Consider: Limit of Liability

- Generally attempts to limit the liability of the parties in the contract.
- Can be for
 - Actual damages
 - Incidental damages
 - Consequential damages
- Can be limited to compensation under the contract, limit of values, etc.

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10. Terms to Consider: Warranty Disclaimers


- Operates to disclaim or limit warranty claims.
- Some warranties are automatic or implied unless they are expressly disclaimed in writing.

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LIMITATION OF LIABILITY

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Limitation of Liability: Force Majeure

- What does this mean?
 - Unforeseeable circumstances that prevent someone from fulfilling a contract provision
 - A contractual provision to protect the parties in the event that a part of the contract cannot be performed due to causes which are outside the control of the parties and could not be avoided by exercise of due care. (Blacks Dictionary)
- How is it used?
 - Often used to excuse the contractual performance of one party to another;


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Limitation of Liability: Force Majeure

- There is no standard or common boilerplate clause.
- Read your specific contract for certainty.
- This is normally a negotiated clause.


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Limitation of Liability: Force Majeure: Sample Wording

- When a period of time is herein prescribed for any action, to be taken by (Party Name), as applicable, shall not be liable or responsible for and there shall be excluded from the computation for any such period of time, any delays due to strikes, riots, terrorism, acts of God, shortages of labor or materials, war, laws, regulations or restrictions, inability or delays in obtaining governmental permits, or any other causes of any kind whatsoever which are beyond the reasonable control of (Party Name).


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Limitation of Liability: Force Majeure: Sample Wording

- Should performance of any obligation created hereinunder of this Contract become illegal or impossible due to fire, flood, storm, act of God, governmental authority, labor disputes or shortages, war or any other cause not listed herein but which is beyond the reasonable control of the Party whose performance is affected, then the performance of such Party is suspended during the period of such prevention or hindrance, provided that the affected Party provides reasonable notice of the event of force majeure and exercises all reasonable diligence to remove the cause preventing performance.


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Limitation of Liability: Force Majeure: Sample Wording

- Without limiting any other provision in this Agreement, COMPANY will not have any liability for any failure or delay resulting from any governmental action, fire, flood, insurrection, earthquake, power failure, riot, explosion, embargo, strikes whether legal or illegal, labor or material shortage, transportation interruption of any kind, work slowdown or any other condition beyond the control of COMPANY affecting production or delivery in any manner.

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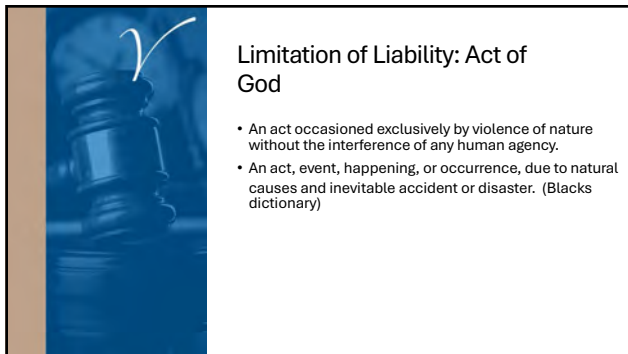
Limitation of Liability: Force Majeure: Sample Wording

- Lists of common events in Force Majeure provisions:
 - Flood
 - Fire
 - Storm
 - Earthquake
 - Governmental authority
 - Strike or labor shortage
 - Acts of terrorism
 - War
 - Natural disaster
 - Act of God
 - Catch all phrase

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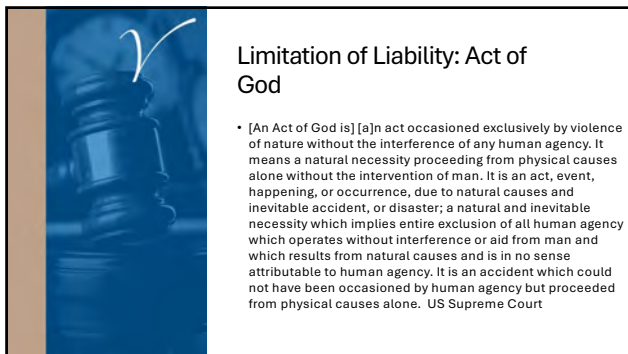
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Limitation of Liability: Act of God


- An act occasioned exclusively by violence of nature without the interference of any human agency.
- An act, event, happening, or occurrence, due to natural causes and inevitable accident or disaster. (Blacks dictionary)



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Limitation of Liability: Act of God


- [An Act of God is] [a]n act occasioned exclusively by violence of nature without the interference of any human agency. It means a natural necessity proceeding from physical causes alone without the intervention of man. It is an act, event, happening, or occurrence, due to natural causes and inevitable accident, or disaster; a natural and inevitable necessity which implies entire exclusion of all human agency which operates without interference or aid from man and which results from natural causes and is in no sense attributable to human agency. It is an accident which could not have been occasioned by human agency but proceeded from physical causes alone. US Supreme Court



**Limitation of Liability:
Impossibility or Impracticability**

- As absolving a party from liability for nonperformance, means not only strict impossibility, but impracticability because of extreme and unreasonable difficulty, expense, injury or loss involved.
- An action is impossible in legal contemplation when it is not practicable; and an action is impracticable when it can only be done at an excessive and unreasonable cost.
- Generally involves changed circumstances.
- Something unexpected must have occurred.
- The risk of the unexpected event must not have been allocated.
- The event must have rendered performance commercially impracticable. (Blacks dictionary)


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**Limitation of Liability:
Frustration of Purpose**

- The doctrine excuses a contractual event in circumstances when the objectives of contract have been defeated by circumstances arising after the contract was formed. (Blacks dictionary)

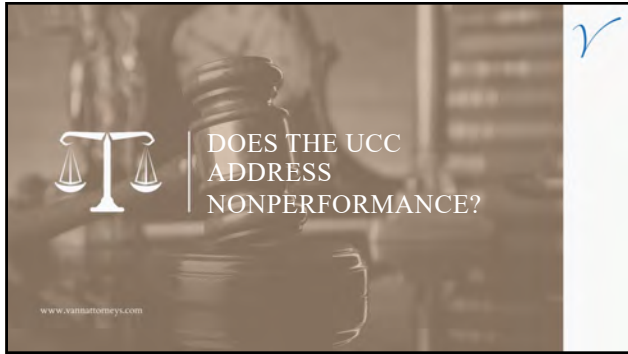
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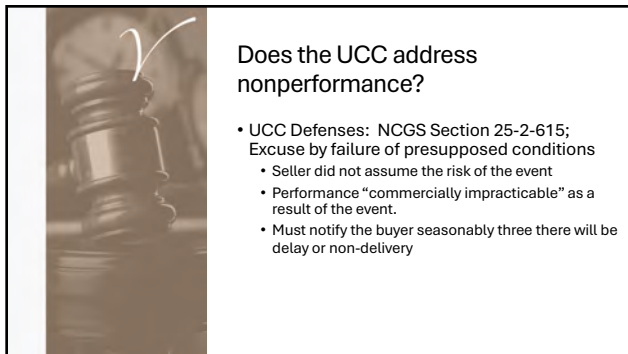
**Limitation of Liability: Notice
Requirements**

- What does your contract provide?
- Reasonable notice?
- Prompt notice?
- Immediate notice?
- When did the event causing inability to perform begin?
 - Look at the facts of the circumstances

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29




30



How might this impact accounts receivables?

- Customer says they have not worked and cannot pay. What happens?
- Customer says they cannot perform due to conditions.
- Develop a plan of repayment early.
- Document the plan in writing with an agreed payment plan and possible Confession of Judgment.
- Record security interests and/or lien rights.
- Comply with your contractual notices, etc.


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How might this impact accounts receivables?

- Be proactive in reaching out to your customers.
- Work to make sure you are a priority for payment.
- If a customer tries to use a force majeure defense, what do you do?
 - Look at your contracts with the customer
 - Devise a response to such defenses early
 - Develop a plan for payment
 - Are the statute of limitations an issue?

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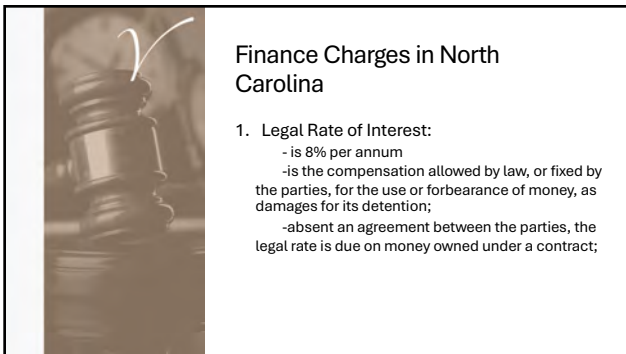
Attorney's Fees

- If the contract is enforceable, any attorney's fee provision in a contract should also be enforceable
- In the event you must use an attorney to collect on an account, the provisions of N.C. Gen. Stat. 6-21.2 and/or 6-21.6 will likely come into play
- Unfortunately, no way to retroactively add an attorney's fee provision to a contract, but all of your contracts going forward should contain this provision as well as a force majeure clause

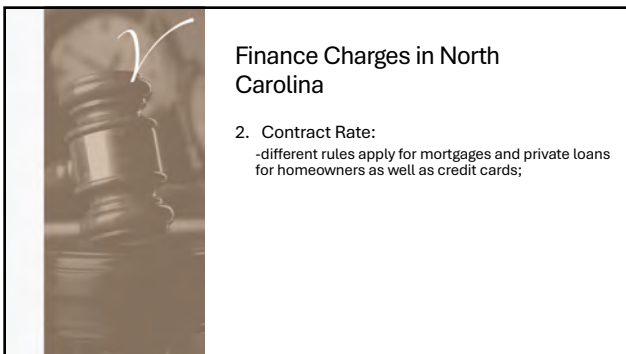
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Finance Charges in North Carolina

2. Contract Rate:
 ** NCGS 24-5 Interest on Judgments
 -provides for finance charges in a case for breach of contract;
 -contract rate applies after judgment until paid in full; (8% vs. 18%); must state so in the contract;
 -does not apply to personal, family, household or agricultural purposes;


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Finance Charges in North Carolina

2. Contract Rate:
 ** NCGS 24-5 Interest on Judgments
 -provides for finance charges in a case for breach of contract;
 -Example:
 In the event payment is not timely made, Buyer agrees to pay a finance charge of 1½% per month (18% per annum) or at the highest rate allowed by law on all overdue amounts. In conformity with North Carolina General Statute § 24-5, the aforementioned contract rate also applies after judgment.


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Finance Charges in North Carolina

2. Contract Rate: Revolving Credit Charges
 -open-end credit or similar plan, revolving charge, etc., can charge and collect finance charges or other fees not to exceed 1 ½% per month computed on the unpaid portion (NCGS 24-11)

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Finance Charges in North Carolina

3. Usury issues (NCGS 24-2)
 -if taking, receiving or charging a greater rate than permitted, when done knowingly=
 forfeiture of the entire interest
 -where greater rate has been paid, the payor may recover twice the amount of interest paid


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 **ELECTRONIC COMMUNICATION WITH CONTRACTS**

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Contract Law and E-Commerce

- Remember normal contract law.
- In general, the general principles of contract law will not change due to the fact that your communications are conducted by use of the facsimile, internet, email, etc.


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E-Sign Act and UETA

- Our discussion will describe the current legal framework created by two pieces of legislation:
 - The federal E-Sign Act; and
 - The Uniform Electronic Transactions Act (UETA).


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Uniform Electronic Transactions Act (UETA)

- It applies only to electronic records and signatures that relate to a "*transaction*", which is defined as those interactions between people relating to business, commercial, or governmental affairs


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Uniform Electronic Transactions Act (UETA)

- UETA has the limited objective of ensuring that electronic records and electronic signatures are the equivalents of paper records and manual signatures.

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Uniform Electronic Transactions Act (UETA)

- UETA applies only to transactions in which each party has agreed to conduct themselves by electronic means.
- It does not require the use of electronic records or signatures.


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Uniform Electronic Transactions Act (UETA)

Agreement to use electronic means between the parties may be derived in several ways:

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Uniform Electronic Transactions Act (UETA)

Agreement to use electronic means between the parties may be derived in several ways:

- Express Assent;
- From the context and surrounding circumstances, parties' intent;
- An express "trading partner agreement" that describes how the parties will proceed with e-contracting.

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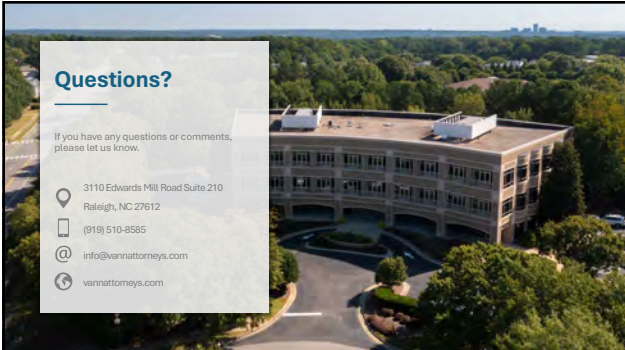


Uniform Electronic Transactions Act (UETA)

Agreement to use electronic means between the parties may be derived in several ways:

- In some circumstances, the use of a business card that includes an e-mail address may be an indication of assent to contract electronically.

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Questions?

If you have any questions or comments, please let us know.

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