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## It's Nothing Personal, It's Just Business: A Commentary on the South Carolina Business Court Pilot Program

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**IT'S NOTHING PERSONAL, IT'S JUST BUSINESS: A COMMENTARY ON THE  
SOUTH CAROLINA BUSINESS COURT PILOT PROGRAM**

I. INTRODUCTION

Judge Richard Posner once said the following about specialization in the court system:

One does not have to be a Marxist, steeped in notions of anomie and alienation, to realize that monotonous jobs are unfulfilling for many people, especially educated and intelligent people, and that the growth of specialization has given to many white-collar jobs a degree of monotony formerly found only on assembly lines. . . . The activities [of a federal court of appeals judge], repeated over and over and over again, have about them an undeniable element of the monotonous. . . . While there are able people who would like nothing better than to spend twenty or thirty years just judging appeals in tax or patent or social security or antitrust cases, I do not think it would be easy to maintain a high quality federal appeals bench on such a diet.<sup>1</sup>

Despite Judge Posner's bleak outlook on judicial specialization, the practice has grown significantly in the last quarter of a century.<sup>2</sup> The use of specialized courts such as family and probate courts has become commonplace in many state judiciary systems.<sup>3</sup> One of the most recent developments in judiciary specialization is the business court. A business court is a specialty court that addresses only complex corporate and commercial matters.<sup>4</sup> South Carolina recently began a pilot program establishing a business court in three counties of the state.<sup>5</sup>

This Comment evaluates the potential of creating a permanent business court in South Carolina by studying the business court pilot program in effect in this state. First, this Comment looks at two of the most successful courts specializing in business—Delaware's Court of Chancery and the North Carolina Business Court—to help understand the nature and functions of business courts. Next, this Comment explores the newly created South Carolina Business Court Pilot Program's goals, history, structure, and initial results. Furthermore, this

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1. Richard A. Posner, *Will the Federal Courts of Appeals Survive Until 1984? An Essay on Delegation and Specialization of the Judicial Function*, 56 S. CAL. L. REV. 761, 779–80 (1983) (footnote omitted).

2. See, e.g., Hunter Hurst, Jr., *Family Courts in the United States*, FAM. CT. BULL., Fall 1999, at 1, 1–2 (“In the last two decades, the family court idea has gained momentum in a host of state task forces, commissions, and pilot efforts.”).

3. See Pamela J. Roberts et al., *South Carolina's Business Court Pilot Program*, S.C. LAW., May 2008, at 31, 32.

4. *Id.* at 31.

5. See S.C. Sup. Ct. Admin. Order No. 2007-09-07-01 (2007), amended by S.C. Sup. Ct. Admin. Order No. 2007-11-30-01 (2007).

Comment analyzes the advantages and disadvantages of the pilot program to determine if the program benefits the state. Finally, this Comment proposes changes to the pilot program that better serve the program's goals of providing efficient and predictable resolution of corporate disputes in the state's judicial system.

## II. DEVELOPMENT OF BUSINESS COURTS

A movement began in the early 1990s for states to create business courts to address corporate issues better and to curtail the increased use of the federal judicial system and alternative dispute resolution by business litigants.<sup>6</sup> In 1993, New York was the first state to respond to this movement when it created a commercial court pilot program in the New York County Supreme Court.<sup>7</sup> Since then, fourteen states have created business courts in some part of their court systems.<sup>8</sup> Despite being created around the same time, the business court programs in each state vary widely as to their procedures and their subject matter jurisdiction.<sup>9</sup> For example, certain programs require that parties must have a threshold amount in controversy before the business court may hear a dispute, while other programs have no such requirement.<sup>10</sup> The differences in each program demonstrate “the different needs of the litigants and courts in those jurisdictions.”<sup>11</sup> Because each program is different, it is best to focus on two of the most successful courts specializing in business—Delaware's Court of Chancery and the North Carolina Business Court—to gain a better insight into the nature of business courts.

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6. See, e.g., Mitchell L. Bach & Lee Applebaum, *A History of the Creation and Jurisdiction of Business Courts in the Last Decade*, 60 BUS. LAW. 147, 152 (2004) (describing New York's motivations for creating a business court program).

7. See *id.*

8. The following states have created business court programs since 1993: Florida, Georgia, Illinois, Maine, Maryland, Massachusetts, Nevada, New Jersey, New York, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, and South Carolina. See Roberts et al., *supra* note 3, at 32. Prior to the early-1990s movement, Delaware was the only state with a specialized court dedicated to business. See Ad Hoc Comm. on Bus. Courts, *Business Courts: Towards a More Efficient Judiciary*, 52 BUS. LAW. 947, 955–56 (1997).

9. See Roberts et al., *supra* note 3, at 31–32.

10. For example, the Fulton County Superior Court Business Case Division of Georgia will hear disputes only if the amount in controversy exceeds \$1 million. See ATLANTA JUD. CIR. R. 1004, available at [http://www.fultoncourt.org/sca200807/documents-and-forms/doc\\_download/6-business-court-rules.html](http://www.fultoncourt.org/sca200807/documents-and-forms/doc_download/6-business-court-rules.html). In contrast, Maine requires no minimum amount in controversy for a dispute to be heard under its Business and Consumer Docket. See Me. Sup. Jud. Ct. Admin. Order No. JB-07-1 (2008).

11. Roberts et al., *supra* note 3, at 32.

A. *Delaware's Court of Chancery*

Delaware's Court of Chancery is the oldest and most successful business court in the United States.<sup>12</sup> Unlike most other states, which after the American Revolution required judges to hear both equity and law cases in their courts,<sup>13</sup> Delaware, through its first constitution, created the Court of Chancery as a separate and distinct court for equity.<sup>14</sup> Many business remedies are based in equity, "such as accountings, injunctions, and specific performance."<sup>15</sup> Furthermore, "because corporate governance cases 'generally raise the kinds of questions with which equity deals: the duty of disclosure, the duty of good faith, and the like,'" the Court of Chancery became the perfect court to develop into a court specializing in business.<sup>16</sup>

Currently, the court consists of one chancellor and four vice chancellors.<sup>17</sup> These chancellors serve for a twelve-year term after receiving an appointment from the Governor.<sup>18</sup> The Court of Chancery sits over all three counties in Delaware.<sup>19</sup> Only one chancellor hears and decides each case.<sup>20</sup> Therefore, there are no jury trials in the court.<sup>21</sup> Because the court is based in equity, the subject matter of disputes appearing in the court is not limited to corporate issues.<sup>22</sup> Because equity cannot reach all elements of corporate law, the jurisdiction of the Court of Chancery has been expanded on occasion to hear claims for money damages.<sup>23</sup> Parties may appeal final decisions of the Court of Chancery to the Delaware Supreme Court.<sup>24</sup>

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12. See Ad Hoc Comm. on Bus. Courts, *supra* note 8, at 955–56.

13. William T. Quillen & Michael Hanrahan, *A Short History of the Delaware Court of Chancery—1792-1992*, 18 DEL. J. CORP. L. 819, 825 (1993) (citing Garrard Glenn & Kenneth Redden, *Equity: A Visit to the Founding Fathers*, 31 VA. L. REV. 753, 757 (1945)).

14. 1 DONALD J. WOLFE, JR. & MICHAEL A. PITTENGER, *CORPORATE AND COMMERCIAL PRACTICE IN THE DELAWARE COURT OF CHANCERY* § 1.02 (2009) (citing DEL. CONST. of 1792, art. VI, § 14). For a more in-depth look at the history and development of the Delaware Court of Chancery, see Quillen & Hanrahan, *supra* note 13.

15. Anne Tucker Nees, *Making a Case for Business Courts: A Survey of and Proposed Framework to Evaluate Business Courts*, 24 GA. ST. U. L. REV. 477, 481 (2007) (citing Rochelle C. Dreyfuss, *Forums of the Future: The Role of Specialized Courts in Resolving Business Disputes*, 61 BROOK. L. REV. 1, 7 (1995)).

16. *Id.* at 480–81 (quoting Dreyfuss, *supra* note 15, at 7).

17. Donald F. Parsons Jr. & Joseph R. Slights III, *The History of Delaware's Business Courts: Their Rise to Preeminence*, BUS. L. TODAY, Mar./Apr. 2008, at 21, 22.

18. DEL. CONST. art. IV, § 3.

19. DEL. CODE ANN. tit. 10, § 301 (1999).

20. DEL. CONST. art. IV, § 10.

21. See *id.*

22. Dreyfuss, *supra* note 15, at 6–7 ("[The Court of Chancery's] caseload includes cases involving trusts and estates, fiduciary duties, guardianships, and civil rights actions seeking only injunctive relief.").

23. See, e.g., Randy J. Holland, *Delaware's Business Courts: Litigation Leadership*, 34 J. CORP. L. 771, 773 (2009) ("[T]he jurisdiction of the Court of Chancery was expanded by statute 'to include adjudication of technology disputes that arise out of agreements involving at least one

Due to its unique structure and jurisdiction, the Court of Chancery is the court of choice for corporations. For example, in 2007, 61% of the corporations in the Fortune 500 and “[m]ore than 90 percent of all U.S.-based public offerings . . . were incorporated in Delaware.”<sup>25</sup> Many factors have contributed to the popularity of the Court of Chancery. A unique feature of the court is the selection process of the chancellors. Delaware uses a judicial nominating commission in the process of appointing judges and chancellors.<sup>26</sup> The commission, which consists of eleven members from various political parties, creates a list of candidates from which the governor must select.<sup>27</sup> To ensure impartiality, no more than six members may be from the same political party.<sup>28</sup> Furthermore, the commission must select candidates by their merits.<sup>29</sup> By utilizing an impartial selection process, Delaware ensures that Court of Chancery judges have adequate expertise in corporate law.<sup>30</sup>

Another factor that has contributed to the popularity of the Court of Chancery is its efficient adjudication of disputes. According to one former chancellor, “[i]t is not unusual for the validity of a hugely complex corporate

Delaware business entity, even if they concern solely claims for [money] damages.” (second alteration in original) (quoting *Parsons & Sights*, *supra* note 17, at 22–23)).

24. Delaware State Courts, Overview of the Delaware Court System, <http://courts.delaware.gov/Courts/> (last visited May 11, 2010).

25. DEL. DEP’T. OF STATE DIV. OF CORPS., 2007 ANNUAL REPORT (2008), available at <http://corp.delaware.gov/2007DivCorpAR.pdf>. Though incorporation statistics alone do not fully explain why corporations make Delaware their home, many have noted that the Court of Chancery is a central reason for incorporation in the state. *See, e.g., id.* (“Even beyond our widely-respected courts, there are many advantages to incorporating or forming business entities in Delaware.”); Nees, *supra* note 15, at 481 (“Delaware’s equity tradition, combined with its ‘advanced and flexible business formation statute,’ has made Delaware the corporate leader of the country.” (quoting DEL. DEP’T OF STATE DIV. OF CORPS., 2006 ANNUAL REPORT (2007), available at [http://corp.delaware.gov/2006%20Annual%20Report%20with%20Signature%20\\_2\\_.pdf](http://corp.delaware.gov/2006%20Annual%20Report%20with%20Signature%20_2_.pdf))).

26. RANDY J. HOLLAND, *THE DELAWARE STATE CONSTITUTION: A REFERENCE GUIDE* 129 (2002). Since 1897, the Delaware legislature has made efforts to ensure impartiality in the state’s judicial selection process. *See* DEL. CONST. art. IV, § 3 (providing limitations on the number of judges from each political party that can be in office at the same time).

27. Exec. Order No. 4, Preservation of Delaware’s Independent Judiciary and Continuance of the Judicial Nominating Commission, paras. 1–2 (Mar. 27, 2009), available at [http://governor.delaware.gov/orders/exec\\_order\\_4.shtml](http://governor.delaware.gov/orders/exec_order_4.shtml).

28. *Id.* para. 4.

29. *See* Holland, *supra* note 23, at 777. The Delaware Governor has directed the committee to consider only merit:

[T]he Commission shall seek men and women of the highest caliber, who by intellect, work ethic, temperament, integrity and ability demonstrate the capacity and commitment to sensibly, intelligibly, promptly, impartially and independently interpret the laws and administer justice. The Commission shall seek the best qualified persons available at the time for the particular vacancy at issue.

Exec. Order No. 4, *supra* note 27, para. 9. However, because most of the committee’s proceedings are confidential, the exact mechanisms used by the committee to select judges by their merits are unclear. *See id.* para. 6.

30. *See* Robert B. Thompson, *Piercing the Veil: Is the Common Law the Problem?*, 37 CONN. L. REV. 619, 626 (2005).

decision to be determined in Chancery within 60 days.”<sup>31</sup> Special procedures, such as expedited discovery, no doubt help to speed up this process.<sup>32</sup> Parties want their disputes decided quickly, and the Court of Chancery provides just that.

Additionally, the Court of Chancery provides businesses with predictability within the law. The court’s opinions are published in both regional and state reporters, and they are included on both LexisNexis and Westlaw.<sup>33</sup> By publishing the cases, “the Court of Chancery establish[es] precedents that provide the predictability needed for businesses to act with confidence.”<sup>34</sup> Indeed, former Chief Justice William Rehnquist, in an address commemorating the bicentennial anniversary of the court, noted that “most Delaware corporations do not find themselves in litigation. The process of decision in the litigated cases has so refined the law that business planners may usually order their affairs to avoid law suits.”<sup>35</sup>

However, at least one scholar has noted that the factors contributing to the Court of Chancery’s popularity most likely cannot be replicated by other states.<sup>36</sup> These factors include the court’s status as the first to specialize in business matters, Delaware’s small size, and the overall focus of its government on the development of corporate law.<sup>37</sup> As a result, many states have looked to more recently created business courts as models for their own programs.<sup>38</sup> One such court is the North Carolina Business Court, which one commentator calls “the gold standard.”<sup>39</sup>

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31. Omari Scott Simmons, *Branding the Small Wonder: Delaware’s Dominance and the Market for Corporate Law*, 42 U. RICH. L. REV. 1129, 1163–64 (2008) (quoting William T. Allen, *Whence the Value-Added in Delaware Incorporation?*, CORP. EDGE, Fall 2007, at 3, 4).

32. See *Giammargo v. Snapple Beverage Corp.*, Civ. A. No. 13845, 1994 WL 672698, at \*2–3 (Del. Ch. Nov. 15, 1994).

33. See Marcel Kahan & Ehud Kamar, *The Myth of State Competition in Corporate Law*, 55 STAN. L. REV. 679, 708 (2002).

34. Holland, *supra* note 23, at 778.

35. William H. Rehnquist, *The Prominence of the Delaware Court of Chancery in the State-Federal Joint Venture of Providing Justice*, 48 BUS. LAW. 351, 354 (1992) (internal quotation marks omitted).

36. See Dreyfuss, *supra* note 15, at 25 (discussing the unlikelihood of Pennsylvania creating a business court as successful as Delaware’s Court of Chancery).

37. See *id.* at 4 (“Delaware’s success is partly due to its being the first mover in the field of specialized business adjudication, and to its very special history, homogeneous population, and unique finances. Unless [other states’ business courts] are able to duplicate these factors, other states will not be able to capture the benefits of specialization as easily as Delaware.”).

38. See Bach & Applebaum, *supra* note 6, at 170 (“[The North Carolina Business Court] has further proved a reference point in other jurisdictions seeking to create business courts, such as Maryland and Georgia.” (footnotes omitted)).

39. Nees, *supra* note 15, at 482.

*B. The North Carolina Business Court*

In 1994, North Carolina's Governor created the North Carolina Commission on Business Laws and the Economy (NCCBLE) to recommend changes to the statutes and regulations of North Carolina in order to attract more business to the state.<sup>40</sup> Citing the success of Delaware's Court of Chancery, the NCCBLE noted that no other state "had taken steps to make its court system as responsive and predictable as the Delaware Chancery Court in dealing with complex corporate issues."<sup>41</sup> Consequently, the NCCBLE recommended the creation of a business court in the state, which the North Carolina Supreme Court created in January of 1996.<sup>42</sup>

Initially, only one judge, the Honorable Ben F. Tennille, sat on the court.<sup>43</sup> Though he was based in Greensboro,<sup>44</sup> Judge Tennille would travel to the county where the litigation originated for most cases.<sup>45</sup> However, due to the increasing use of the court,<sup>46</sup> in 2006, North Carolina added an additional business court in Mecklenburg County and another in Raleigh County, each with its own judge.<sup>47</sup> The chief justice of the North Carolina Supreme Court selects the judges for the business court from the pool of current superior court judges.<sup>48</sup> The designated judges serve for five-year terms.<sup>49</sup>

The North Carolina Business Court has statewide jurisdiction.<sup>50</sup> Actions involving antitrust law, corporation law, securities law, electronic commerce, intellectual property law, tax law, and unfair competition law must be heard in

40. CHIEF JUSTICE'S COMM'N ON THE FUTURE OF THE N.C. BUS. COURT, FINAL REPORT AND RECOMMENDATION (2004), *available at* <http://www.ncbusinesscourt.net/ref/Final%20Commission%20Report.htm> [hereinafter 2004 N.C. COMM'N REPORT].

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *See* The North Carolina Business Court Frequently Asked Questions, [http://www.ncbusinesscourt.net/FAQ/business\\_court\\_frequently\\_asked\\_.htm](http://www.ncbusinesscourt.net/FAQ/business_court_frequently_asked_.htm) (last visited May 12, 2010) [hereinafter N.C. Business Court FAQ] ("It has consistently been the policy of the Court to try each case in the county in which it is filed unless there are other standard reasons for a change of venue.").

46. *See* 2004 N.C. COMM'N REPORT, *supra* note 40. It should also be noted that other factors contributed to the decision to add two additional judges to the business court. *See id.* For example, many observed that under the single judge structure, a conflict of interest between the judge and one of the parties to a dispute would render the court unable to hear the case. *See id.*; Carrie O'Brien, Note, *The North Carolina Business Court: North Carolina's Special Superior Court for Complex Business Cases*, 6 N.C. BANKING INST. 367, 387 (2002).

47. *See* Russell Rawlings, *Business Court Expands; Diaz, Jolly Appointed*, N.C. LAW., Jan./Feb. 2006, *available at* <http://www.ncbar.org/about/communications/nc-lawyer/2006-nc-lawyer-editions/januaryfebruary-2006/business-court-expands-diaz-jolly-appointed.aspx>.

48. *See* 2004 N.C. COMM'N REPORT, *supra* note 40.

49. *See id.*

50. Nees, *supra* note 15, at 513.

the business court.<sup>51</sup> Furthermore, the chief justice of the North Carolina Supreme Court may designate any case for the business court as a “complex business” case.<sup>52</sup> If a party would like a case to be heard in the court, the party must file a designation, which is served on the opposing party, the state’s chief justice, and the senior business court judge.<sup>53</sup> The senior business court judge then determines if the case falls under the business court’s jurisdiction.<sup>54</sup> Any party may then appeal the decision as to jurisdiction to the chief justice.<sup>55</sup>

North Carolina requires no minimum amount in controversy to appear in the business court.<sup>56</sup> Also, the court supports the use of technology during litigation with videoconferencing and computer technologies in the courtroom.<sup>57</sup> Even the witness stand contains a touch-screen computer, which a party may use to help demonstrate a witness’s testimony.<sup>58</sup>

Upon the final disposition of a nonjury matter, the judge must write an opinion.<sup>59</sup> All of these opinions are available and searchable on the court’s Web site.<sup>60</sup> By making the opinions available online, North Carolina has created a “large body of case law at the trial court level [which] provides greater predictability for businesses.”<sup>61</sup> Parties may appeal all final decisions of the business court to the state’s court of appeals.<sup>62</sup>

The North Carolina Business Court has been very successful.<sup>63</sup> The court’s crowning moment came in 2001 during the Wachovia, First Union, and SunTrust merger litigation.<sup>64</sup> Wachovia and First Union attempted to merge, while SunTrust attempted a hostile takeover of Wachovia.<sup>65</sup> All parties agreed to file the litigation related to the merger in the business court.<sup>66</sup> The court proved valuable to the parties because the case was rapidly and efficiently adjudicated.<sup>67</sup> One author noted that the “decision was important, not just because it made the

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51. See N.C. GEN. STAT. § 7A-45.4(a) (2009).

52. N.C. SUPER. & DIST. CT. R. 2.1(a).

53. See § 7A-45.4(b).

54. *Id.* § 7A-45.4(e).

55. *Id.*

56. N.C. Business Court FAQ, *supra* note 45.

57. See 2004 N.C. COMM’N REPORT, *supra* note 40.

58. See *id.*

59. N.C. Business Court FAQ, *supra* note 45.

60. See North Carolina Business Court, Court Opinions, <http://www.ncbusinesscourt.net/New/opinions/> (last visited May 12, 2010).

61. 2004 N.C. COMM’N REPORT, *supra* note 40.

62. See *id.*

63. See, e.g., Nees, *supra* note 15, at 482 (“[The business court] model constructed by North Carolina is the gold standard and is being replicated by other non-Delaware business courts.”).

64. See *First Union Corp. v. SunTrust Banks, Inc.*, No. 01-CVS-10075, 2001 WL 1885686 (N.C. Super. Ct. Aug. 10, 2001).

65. *Id.* at \*1.

66. See David Boraks, *In Battle for Wachovia, Many Suits, Many Goals*, AM. BANKER, June 4, 2001, at 9, 11.

67. O’Brien, *supra* note 46, at 386.



country notice the North Carolina Business Court, but also because it proved to be a quick disposition to a difficult case.”<sup>68</sup>

During its first seven years, the court showed promising statistics. By the beginning of 2003, the court had closed 116 cases.<sup>69</sup> Of these cases, 73 were settled, 24 reached judgment, 16 were voluntarily dismissed, and 3 were removed to federal court.<sup>70</sup>

However, despite the popularity and efficiency of the court, it is unclear whether North Carolina has reached its ultimate goal of encouraging more businesses to incorporate in the state. It is impossible to know how many corporations the business court has attracted to the state; however, the state is encouraged by some recent developments.<sup>71</sup> For example, *Site Selection* magazine selected North Carolina as having the best business climate in the country in 2001.<sup>72</sup>

In sum, both the Delaware Court of Chancery and the North Carolina Business Court exemplify successful business court systems. This Comment will now focus on the South Carolina Business Court Pilot Program and weigh the advantages and disadvantages this program may offer to the state’s judiciary and business climate.

### III. THE SOUTH CAROLINA BUSINESS COURT PILOT PROGRAM

In 2006, the South Carolina Bar created the Task Force on Courts to “review[] the use of judicial resources in South Carolina’s circuit courts.”<sup>73</sup> The task force consisted of current and former judges, practitioners, and a law professor.<sup>74</sup> After nearly a year of research and analysis, the task force recommended the creation of a business court pilot program.<sup>75</sup> Upon this recommendation,<sup>76</sup> South Carolina Supreme Court Chief Justice Jean Toal

68. *Id.* Also, the fact that more than 28,000 people visited the North Carolina Business Court’s Web site on the day that the court released the merger litigation’s opinion further demonstrates how this case projected the court into the national spotlight. See Chris Serres, *A Clear Winner: The Court*, NEWS & OBSERVER (Raleigh, N.C.), July 24, 2001, at D1.

69. See REPORT ON ACTIVITIES OF THE NORTH CAROLINA BUSINESS COURT 2002 TO 2003, <http://www.ncbusinesscourt.net/ref/2002%20General%20Assembly%20Report.htm> (last visited May 12, 2010).

70. *Id.*

71. See 2004 N.C. COMM’N REPORT, *supra* note 40.

72. See Ron Starner, *North Carolina Claims No. 1 Business Climate Ranking*, SITE SELECTION, Nov. 2001, <http://www.siteselection.com/portal/> (follow “Past Issues” hyperlink; then follow “November” hyperlink under the 2001 column).

73. Roberts et al., *supra* note 3, at 33.

74. *Id.* at 33–34.

75. *Id.* at 34. The Task Force on Courts conducted academic research to determine the best practices of other states’ business courts and met with leading business court scholars such as Mitchell Bach and Judge Tennille. See TASK FORCE ON COURTS, S.C. BAR, REPORT ON THE SOUTH CAROLINA BAR’S TASK FORCE ON COURTS RE: THE CREATION OF A BUSINESS COURT PILOT PROGRAM 6 (2007) [hereinafter S.C. BAR TASK FORCE REPORT].

76. Roberts et al., *supra* note 3, at 34.

signed an administrative order on September 7, 2007, creating the South Carolina Business Court Pilot Program.<sup>77</sup> The goal of the business court is to create a better business climate by creating a more predictable and efficient judiciary for business clients.<sup>78</sup> However, the judiciary received no additional funds from the legislature to create the business court.<sup>79</sup>

The South Carolina program places a business court in three counties—Charleston, Richland, and Greenville.<sup>80</sup> However, cases do not have to originate in these counties for the business court to hear them, because an action from any county in the state may be transferred to the business court.<sup>81</sup>

The South Carolina business court is a circuit court with a special business docket.<sup>82</sup> The appeals process is the same as any other case at the trial level.<sup>83</sup> One judge in each of the selected counties carries both a business docket and a general docket.<sup>84</sup> Currently, the three judges serving on the business court are the Honorable Roger W. Young in Charleston County, the Honorable Edward W. Miller in Greenville County, and the Honorable J. Michelle Childs in Richland County.<sup>85</sup>

The business court's jurisdiction is limited to certain types of business disputes.<sup>86</sup> These include disputes arising from the state's Business Corporation Act, Uniform Securities Act, Trade Secrets Act, Uniform Commercial Code, trust laws, monopoly laws, investment securities laws, and trademark laws.<sup>87</sup> The state's chief justice also retains the right to determine what other cases fall within the court's jurisdiction.<sup>88</sup> Further, the South Carolina business court does not require a minimum amount in controversy and does not require parties to waive their right to a jury trial.<sup>89</sup>

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77. S.C. Sup. Ct. Admin. Order No. 2007-09-07-01 (2007), *amended by* S.C. Sup. Ct. Admin. Order No. 2007-11-30-01 (2007). The chief justice has the power to create the court through article V, section 4 of the South Carolina Constitution. *See* S.C. CONST. art. V, § 4. This provision gives the chief justice, as the head administrator of the South Carolina judicial system, the power to set the terms of each court and to assign the state's judges within the court system. *Id.*

78. *See* S.C. BAR TASK FORCE REPORT, *supra* note 75, at 15.

79. *See* Robert Behre, *New Courts Get Down to Business: Complex Cases Pursued in Experimental Venues*, POST & COURIER (Charleston, S.C.), July 20, 2009, at 1B.

80. *See* S.C. Sup. Ct. Admin. Order No. 2007-09-07-01 (2007), *amended by* S.C. Sup. Ct. Admin. Order No. 2007-11-30-01 (2007).

81. *See* Schuyler Kropf, *Business Court to Get Trial Run*, POST & COURIER (Charleston, S.C.), Oct. 1, 2007, at 1A. The South Carolina Code permits the court to change the location of the trial. *See* S.C. CODE ANN. § 15-7-100 (2005).

82. *See* Roberts et al., *supra* note 3, at 32.

83. *See id.*

84. S.C. Sup. Ct. Admin. Order No. 2007-09-07-01 (2007), *amended by* S.C. Sup. Ct. Admin. Order No. 2007-11-30-01 (2007).

85. *Id.*

86. *See id.*

87. *Id.*

88. *Id.*

89. *Id.*

Cases in the South Carolina circuit courts are assigned to the business court either sua sponte by the South Carolina Supreme Court's chief justice or on a motion from one of the parties.<sup>90</sup> If a party moves to transfer a case to the business court, the party must file its motion within 180 days of the commencement of the action.<sup>91</sup> The business court judge then makes a recommendation to the chief justice, who ultimately decides if the case should be assigned to the business court.<sup>92</sup> One judge is assigned for the duration of a business court case.<sup>93</sup> Also, the chief justice's order requires that the business court judge publish all written orders related to summary judgment and motions to dismiss on the South Carolina Judicial Department's Web site.<sup>94</sup> The business court judges are also encouraged to "issue written orders on other non-jury, pretrial matters."<sup>95</sup>

The original administrative order created the court for two years.<sup>96</sup> However, Chief Justice Toal extended the pilot program for an additional two years in a second administrative order issued in October 2009.<sup>97</sup> The court has experienced moderate success in the first two years of its existence.<sup>98</sup> By September 2009, forty-two cases had been assigned to the court.<sup>99</sup> Of these cases, thirteen were resolved, and twenty-five were still active.<sup>100</sup> Slightly more than half of the cases fell under the specific subject matter jurisdiction set forth in the original administrative order.<sup>101</sup> However, twenty-three of the cases were assigned to the court using the chief justice's discretionary power.<sup>102</sup> Greenville County had the

90. *Id.*

91. *Id.*

92. *Id.*

93. See Roberts et al., *supra* note 3, at 32.

94. S.C. Sup. Ct. Admin. Order No. 2007-09-07-01 (2007), *amended by* S.C. Sup. Ct. Admin. Order No. 2007-11-30-01 (2007).

95. *Id.*

96. *Id.*

97. S.C. Sup. Ct. Admin. Order No. 2009-10-13-01 (2009). This order did not make any procedural or substantive changes to the court. See *id.* However, the order authorized business court judges to determine administrative procedures for the court. *Id.*

98. For example, Chief Justice Toal stated in the administrative order extending the court that the pilot program "has successfully created an option to litigate complex business, corporate, and commercial matters in the circuit courts of this State." *Id.*; see also Behre, *supra* note 79 ("South Carolina's two-year business court experiment has gone well and likely will be extended this fall, perhaps with some changes, said Stephanie Nye, counsel for S.C. Supreme [Court Chief] Justice Jean Toal.").

99. EVALUATION COMM. FOR S.C.'S BUS. COURT PILOT PROGRAM, REPORT ON SOUTH CAROLINA'S BUSINESS COURT PILOT PROGRAM 6 (2009) [hereinafter EVALUATION COMMITTEE REPORT].

100. *Id.* Of the thirteen cases resolved by the business court, four were dismissed by the consent of the parties, seven were settled, one was resolved by summary judgment, and one went to judgment after a nonjury trial. *Id.*

101. *Id.* at 9.

102. *Id.* The largest category of cases assigned to the business court not in the enumerated list of the administrative order was breach of contract actions. *Id.* at 10.

most cases assigned to its court.<sup>103</sup> Litigants who have used the business court have generally looked favorably upon it.<sup>104</sup> However, the court has had difficulties gaining attention around the state. Court officials are currently “work[ing] on getting more education for [the state’s] lawyers so they feel more comfortable about transferring a case there.”<sup>105</sup>

Despite the requirement that all orders concerning motions to dismiss and summary judgment be written and posted on the judiciary’s Web site, the business court has posted few written orders.<sup>106</sup> As of September 2009, business court judges have ruled on eleven such motions, but the court has posted only two written orders on those motions.<sup>107</sup> Some lawyers participating in the business court have suggested that more written orders would help them better advise clients based on precedent.<sup>108</sup>

Prior to the business court’s renewal, the Evaluation Committee for South Carolina’s Business Court Pilot Program (Evaluation Committee) presented a report to Chief Justice Toal on the progress of the court.<sup>109</sup> As part of this report, the Evaluation Committee conducted multiple surveys, including a survey of attorneys who participated in the business court (the Lawyer Survey) and a survey of attorneys who attended the South Carolina Association for Justice conference (the SCAJ Survey).<sup>110</sup>

The Evaluation Committee sent the Lawyer Survey to about a hundred lawyers and received forty responses.<sup>111</sup> The survey consisted of twenty-two questions, most of which asked the respondent to rate a statement from “Strongly Disagree” to “Strongly Agree.”<sup>112</sup> The survey found that two-thirds of the respondents either agreed or strongly agreed with the statement “The Business Court met my expectations.”<sup>113</sup> The survey also inquired about the motivation of lawyers to have a case assigned to the business court.<sup>114</sup> Ninety-five percent of

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103. *Id.* at 11. The number of cases assigned to each county has varied tremendously. *See id.* For example, as of September 2009, Charleston County was assigned fourteen cases; Richland County was assigned four cases; and Greenville County was assigned twenty-four cases. *Id.* Court officials were unsure what caused the increased use of the business court in Greenville County. *See Behre, supra* note 79.

104. For example, Brad Waring, a former president of the South Carolina Bar, commented positively about his experience in the court, stating, ““What is great about business court is you get the consistency of one judge, and you get a judge that knows the facts . . . . It’s more like federal court where you get assigned a judge.”” *Behre, supra* note 79.

105. *Id.* (internal quotation marks omitted).

106. *See* EVALUATION COMMITTEE REPORT, *supra* note 99, at 12.

107. *Id.* Also, the judges have posted three other opinions on the Web site relating to motions for judgment on the pleadings and to a motion to enforce a settlement. *Id.*

108. *See id.* at 13.

109. *See id.* at 1.

110. *See id.* at 4.

111. *Id.* The committee also sent the Lawyer Survey to all lawyers who represented a party in a case in which the chief justice denied assignment to the business court. *Id.*

112. *See id.* exhibit C, at 1.

113. *Id.*

114. *See id.* exhibit C, at 1–3.

the respondents indicated that the opportunity to have only one judge assigned to the case contributed to the decision.<sup>115</sup> Ninety percent of the respondents were also partially motivated by the opportunity for the efficient resolution of their cases.<sup>116</sup> Also, the possibility of a predictable resolution helped motivate seventy percent of the respondents.<sup>117</sup> The survey additionally found that only fifteen percent of the respondents' clients were displeased with their experience in the business court.<sup>118</sup> Finally, no respondents reported finding, from their experience, that the court was biased in favor of businesses over nonbusiness parties.<sup>119</sup>

The Lawyer Survey also requested answers to a few open-ended questions.<sup>120</sup> Many respondents commented that the court's procedures were unclear and inefficient.<sup>121</sup> Other respondents expressed their desire to have the court's jurisdiction changed.<sup>122</sup> Some respondents also suggested that the court use automatic assignment procedures.<sup>123</sup> Furthermore, several respondents suggested that the business court judges carry only a full-time business docket.<sup>124</sup>

The Evaluation Committee's second survey, the SCAJ Survey, had fifty-nine respondents.<sup>125</sup> These respondents practice in all areas of the law. Like the Lawyer Survey, the SCAJ Survey asked respondents to rate statements using a scale from "Strongly Agree" to "Strongly Disagree."<sup>126</sup> The most telling results came from the open-ended questions. Multiple lawyers commented on their preconceived notion that the court would be biased in favor of businesses over

115. *Id.* exhibit C, at 2. The exact statement read, "The opportunity to have a single judge assigned to my case was important in deciding to move for assignment to the Business Court." *Id.* Seventy-five percent of the respondents indicated "Strongly Agree," and another twenty percent indicated "Agree." *Id.*

116. *Id.* exhibit C, at 1. Specifically, the Evaluation Committee asked the respondents whether "[t]he opportunity for efficient resolution of my case was important in deciding to move for assignment to the Business Court." *Id.* Fifty-two and a half percent of the respondents indicated "Strongly Agree," and another thirty-seven and a half percent indicated "Agree." *Id.*

117. *Id.* exhibit C, at 2. The exact question read, "The possibility of a predictable resolution was important in deciding to move for assignment to the Business Court." *Id.* Thirty-five percent of the respondents indicated "Strongly Agree," and another thirty-five percent indicated "Agree." *Id.*

118. *Id.* exhibit C, at 7.

119. *Id.*

120. *See id.* exhibit C, at 10, 11.

121. *See id.* exhibit C (open-ended responses). For example, one respondent commented that the court needs to be "[b]etter [at] scheduling . . . matters." *Id.* Another respondent said, "As the Court currently operates, it serves essentially as a way to have claims 'fast tracked[.]' but lacks the organization and efficiencies that are present in other states' business/commercial courts." *Id.* One respondent simply stated, "Currently, the business court is too lax." *Id.*

122. *See id.* Many respondents argued for an expansion of the jurisdiction, such as including additional commercial matters. *Id.* However, at least one respondent wanted to create a "business sophistication" requirement to limit the number of business cases assigned. *Id.*

123. *See id.*

124. *See id.*

125. *Id.* exhibit D, at 1.

126. *Id.*

individuals.<sup>127</sup> One lawyer went as far as to say, “There is a perception that the business court is/will be pro-business and anti-consumer. Until this perception is proven wrong, business court will be a tough sell to the plaintiff’s bar. Ensure a level playing field, and it will take hold.”<sup>128</sup> Despite these negative preconceptions of bias in the court, only one participant of the fifty-nine surveyed disagreed with the statement “If appropriate, I would recommend to my client the use of the Business Court.”<sup>129</sup>

These survey results suggest that the court has seen moderate success but still has many obstacles to surmount. Furthermore, these survey results do not demonstrate why South Carolina needs a business court. By exploring both the advantages and disadvantages of a South Carolina business court, one can determine if a business court should be a permanent feature of the South Carolina judicial system.

#### IV. THE ADVANTAGES AND DISADVANTAGES OF THE BUSINESS COURT PILOT PROGRAM

This Part will explore the advantages and disadvantages of the business court to assess whether South Carolina’s business court should continue and become a permanent court. A business court offers many possible benefits to South Carolina, including a more efficient and predictable judiciary.

Many scholars and practitioners have argued that specialized courts such as business courts improve the efficiency of a judiciary.<sup>130</sup> Because business court judges constantly see the same complex corporate issues, they can address these issues more quickly than nonspecialized judges.<sup>131</sup> Furthermore, because business court judges have more experience in corporate law and understand the application of that law better than general trial judges, the quality of the decisions issued by business courts is superior.<sup>132</sup> These superior opinions should result in cases spending less time on appeal, which would free up more judicial resources. Further, the business court’s efficiency has secondary effects on all judges. Because the general trial judges need not preside over complex business

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127. *Id.* exhibit D, at 3.

128. *Id.*

129. *Id.* exhibit D, at 1.

130. *See, e.g.*, Ad Hoc Comm. on Bus. Courts, *supra* note 8, at 951 (“[Business court judges] are more efficient and the quality of their decisions is better.”); Jeffrey W. Stempel, *Two Cheers for Specialization*, 61 BROOK. L. REV. 67, 113 (1995) (“Specialist judges may be better, more efficient managers and may offer case processing decisions that intrude less upon litigants’ substantive rights.”); Roberts et al., *supra* note 3, at 32 (“Another benefit of a business court program for the judicial system, litigants and the public will be increased efficiency.”).

131. *See* Stempel, *supra* note 130, at 114.

132. *See* Ad Hoc Comm. on Bus. Courts, *supra* note 8, at 951.

cases, they have more time to dedicate to other matters, which should lead to more efficient resolutions in all cases.<sup>133</sup>

South Carolina's pilot program further encourages efficiency by requiring that the same judge presides over the entire disposition of a case.<sup>134</sup> In the general trial court, it is common for multiple judges to preside over different stages of a case.<sup>135</sup> This practice wastes resources because it requires multiple judges to learn the facts and proceedings of the same case.<sup>136</sup>

A business court also provides predictability regarding the disposition of complex business matters.<sup>137</sup> One of the elements that attracts businesses to a state is a predictable judiciary.<sup>138</sup> As noted by Charleston County's business court judge, Judge Roger Young, "[b]usinesses want predictability . . . . They want to know how they will invest in their future."<sup>139</sup> The South Carolina Business Court Pilot Program includes special provisions to ensure predictability.<sup>140</sup> For example, the program requires that all judges write opinions for Rule 12 and 56 motions and publish them on the court's Web site.<sup>141</sup> Thus, "litigants can rely on the opinions to resolve disputes."<sup>142</sup> Also, the predictability created by these opinions can help litigants avoid litigation altogether, freeing up more judicial resources.<sup>143</sup>

However, a business court may also pose many disadvantages if it is not properly structured. The possible disadvantages of a South Carolina business court include the creation of a "two-tiered" judicial system, "bias," "isolation" of business judges, and "procedural inefficiencies."<sup>144</sup>

First, the possibility of a two-tiered judicial system, where business litigants get the most resources and best educated judges, may be a disadvantage of a business court.<sup>145</sup> Critics fear that a business court will "drain[] the courts of

133. See *id.* at 952. New York's business court has demonstrated the efficiency created by a business court. See *id.* In the first year of the court's operation, New York disposed of thirty-five percent more commercial cases than the general court judges had in the previous year. *Id.* This suggests that three business court judges can do the equivalent of four general trial judges. *Id.*

134. Roberts et al., *supra* note 3, at 32.

135. See Kropf, *supra* note 81.

136. See Roberts et al., *supra* note 3, at 32.

137. *Id.*

138. See Theodore Eisenberg & Geoffrey P. Miller, *The Flight to New York: An Empirical Study of Choice of Law and Choice of Forum Clauses in Publicly-Held Companies' Contracts*, 30 CARDOZO L. REV. 1475, 1485 (2009).

139. Kropf, *supra* note 81.

140. See Roberts et al., *supra* note 3, at 32.

141. S.C. Sup. Ct. Admin. Order No. 2007-09-07-01 (2007), amended by S.C. Sup. Ct. Admin. Order No. 2007-11-30-01 (2007).

142. Roberts et al., *supra* note 3, at 32.

143. *Id.*

144. Nees, *supra* note 15, at 493.

145. *Id.* (citing Leonard Post, *Some Courts Are All Business*, May 17, 2004, at 1, 3). The South Carolina judiciary has been cognizant of the worry about the creation of a two-tiered judiciary system from the inception of the court. See Kropf, *supra* note 81 ("[T]he [South Carolina Business] [C]ourt does not mean giving special treatment to business cases.").

their best judges and consum[e] other resources such as courtroom space, calendar time, and judicial attention at the cost of general civil or even criminal cases.”<sup>146</sup> Mary Alexander, former president of the Consumer Attorneys of California, popularized this view when she stated, ““Commercial courts establish a two-tiered system of justice—one for the rich and one for the average citizen.””<sup>147</sup>

However, this argument is flawed for multiple reasons. First, this argument assumes that the best judges in business law are also the best judges in all other fields of law. No evidence supports the idea that judges best educated in business are also those best educated in tort or criminal law. In fact, specialization will most likely have the opposite effect by creating better educated judges in all fields of the law.<sup>148</sup> For example, judges who are most knowledgeable in another field of the law, such as tort law, will be able to focus more time in that area because they will be spending less time presiding over complex business actions.<sup>149</sup>

Additionally, because specialization is nothing new to the judicial system, it is unlikely that a business court will create a two-tiered judicial system.<sup>150</sup> For many years, state judicial systems, including South Carolina, have used specialized courts of limited jurisdiction, such as family courts, to address the needs of certain parties.<sup>151</sup> It is unlikely that one can consider a family court to be an elite court that shows favoritism to divorcees.<sup>152</sup> It is simply a forum where judges who are best educated in family law may deal with such disputes. The same could be said about a business court.

Furthermore, South Carolina’s business court structure does not create a two-tiered system. No extra funding was allocated specifically to the business court.<sup>153</sup> Additionally, because business court judges continue to participate in both civil and criminal matters in addition to their business docket,<sup>154</sup> the South Carolina business court does not steal the best judges at the expense of the general courts.

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146. Nees, *supra* note 15, at 493 (citing Post, *supra* note 145, at 3–4).

147. Ember Reichgott Junge, *Business Courts: Efficient Justice or Two-Tiered Elitism?*, 24 WM. MITCHELL L. REV. 315, 315 (1998) (quoting Elaine R. Friedman, *New Business Courts Gain Acceptance*, NAT’L L.J., Dec. 30, 1996, at B1).

148. See Roberts et al., *supra* note 3, at 33.

149. See Nees, *supra* note 15, at 494.

150. See *id.*

151. See Roberts et al., *supra* note 3, at 32.

152. Cf. OKLA.’S ECON. DEV. GENERATING EXCELLENCE REGULATORY ENV’T EXPERT TEAM, FINAL REPORT 6 (2003) (“[N]o one would argue that drug courts are designed to show favoritism towards drug defendants or that mental health courts are somehow calculated to curry favor with the mentally ill.”).

153. See Behre, *supra* note 79. Furthermore, the business court does not cannibalize the general trial courts’ funding because the judiciary simply shifts the general trial courts’ funding for business cases to the business court.

154. See S.C. Sup. Ct. Admin. Order No. 2007-09-07-01 (2007), *amended by* S.C. Sup. Ct. Admin. Order No. 2007-11-30-01 (2007).



Second, bias on the part of a business court judge in favor of business parties over nonbusiness parties may be another disadvantage of a business court. Specifically, critics fear that business court judges will attempt to attract corporations to the state by issuing probusiness opinions.<sup>155</sup> These biased opinions can “erode[] public trust and confidence” in the judiciary.<sup>156</sup> Furthermore, critics fear that different states will “compete” through their business courts by issuing the most probusiness opinions to attract new companies to the state.<sup>157</sup> Each state will sacrifice the integrity of its judiciary in “a race to the bottom of corporate law.”<sup>158</sup>

However, business courts must find the appropriate balance between the interests of corporate managers, shareholders, and consumers to attract corporations to a state.<sup>159</sup> For example, if a business court of a given state shows bias in favor of corporate managers and against shareholders, shareholders will be less likely to support corporations’ continued activities in the state.<sup>160</sup> As one commentator has noted, “courts cannot consistently rule against consumers without negatively affecting consumer confidence, spending, and the economy.”<sup>161</sup> A one-sided approach by a judiciary would eventually lead to decreased investment in businesses.<sup>162</sup> Additionally, the opposing parties in business court cases generally are not big businesses and individuals; rather, both parties are usually well-informed business entities.<sup>163</sup>

Furthermore, the South Carolina Business Court Pilot Program provides additional checks against bias through the appellate process. If a business court issues a biased opinion, both the South Carolina Court of Appeals and the South Carolina Supreme Court have the opportunity to overturn the opinion.

Third, the isolation of the court’s judges may be a disadvantage. Specifically, critics argue that if business court judges focus too narrowly on business issues, they will lose touch with other legal theories that may assist them in addressing business disputes.<sup>164</sup> The isolation of business court judges will prevent the opportunity for these judges “to exchange theories, to debate positions with other courts, or to compare how different rules work in practice.”<sup>165</sup> However, the South Carolina Business Court Pilot Program prevents the isolation of judges by requiring them to carry both a business and a

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155. See Nees, *supra* note 15, at 494–96.

156. *Id.* at 494.

157. See *id.* at 495.

158. *Id.*

159. See *id.*

160. See *id.* at 495–96.

161. *Id.* at 495.

162. *Id.* at 496.

163. See Behre, *supra* note 79 (“These cases [in the business court] are usually business versus business or the business owners within the business litigating . . .”).

164. See Dreyfuss, *supra* note 15, at 17.

165. *Id.*

general docket,<sup>166</sup> thereby ensuring an exchange of legal theories. Furthermore, even if the judges were isolated, the appeals process should serve as a check on the business court to ensure that all relevant legal theories are applied appropriately to the state's business cases.

Finally, a possible disadvantage of a business court is procedural inefficiency.<sup>167</sup> Business courts may lead litigants to forum shop.<sup>168</sup> For example, a party with a case appropriate for the business court may choose not to transfer it there so as to avoid a certain business court judge. This type of forum shopping may eliminate many of the goals of the business court, such as efficiency and predictability, because it would result in nonbusiness court judges adjudicating business matters.<sup>169</sup>

However, both of these concerns will occur in any court. Businesses have always forum shopped and will continue to do so, whether this forum shopping occurs within a state or between states. The South Carolina pilot program attempts to resolve these issues by allowing the chief justice of the South Carolina Supreme Court to transfer cases from general trial court to the business court *sua sponte*.<sup>170</sup> An active effort by the chief justice and her counsel to monitor and to transfer business law cases filed in the general trial court should eliminate opportunities for a business to forum shop within the state.

The South Carolina Business Court Pilot Program offers many advantages to business litigants in South Carolina, and the program addresses most of the disadvantages related to the court. However, the court has not yet fully developed into an efficient and predictable option. This Comment will now propose possible changes to the South Carolina Business Court Pilot Program.

## V. RECOMMENDATIONS

Chief Justice Toal, the Task Force on Courts, and the Evaluation Committee have developed a well-structured court. However, some minor changes should be made to the court in order to make it more efficient and predictable.

First, the Evaluation Committee should draft specific court rules and procedures for the business court.<sup>171</sup> It is clear from the Lawyer Survey

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166. See S.C. Sup. Ct. Admin. Order No. 2007-09-07-01 (2007), *amended by* S.C. Sup. Ct. Admin. Order No. 2007-11-30-01 (2007).

167. See Nees, *supra* note 15, at 497.

168. *Id.*

169. See Dreyfuss, *supra* note 15, at 20.

170. S.C. Sup. Ct. Admin. Order No. 2007-09-07-01 (2007), *amended by* S.C. Sup. Ct. Admin. Order No. 2007-11-30-01 (2007).

171. The Evaluation Committee has recommended forming a panel to draft court rules prior to the end of the court's two-year sunset provision. See EVALUATION COMMITTEE REPORT, *supra* note 99, at 19. For the time being, the committee suggests that the business court judges use the powers conveyed to them by a provision of the South Carolina Code, which allows each judge to establish necessary court rules. See *id.* (citing S.C. CODE ANN. § 14-5-310 (1976)). For a concise summary of all the Evaluation Committee's recommendations, see Pamela J. Roberts et al., *Getting Down to*

conducted by the Evaluation Committee that inefficiencies exist in the court. Many of the lawyers in the survey complained that the discovery procedures of the court are unclear and inefficient.<sup>172</sup> A complete set of business court rules would give clerks, judges, and lawyers clear guidelines. Furthermore, these rules should be uniform for all of the business courts because many business lawyers litigate in different venues throughout the state. Additionally, the rules must be drafted as soon as possible, because the court is not well established within the state, and a positive reputation for the court is crucial to its success. Because one of the main attractions of the business court is its potential efficiency, any continued inefficiency could negatively affect the court's reputation within the South Carolina Bar.

Also, some of the inefficiencies could be attributable to the lack of resources allocated to the business courts. Business court judges and their clerks are currently managing their business court dockets in addition to their general dockets without any additional resources.<sup>173</sup> The judiciary should lobby the legislature to allocate resources to create three new clerkship positions. Each new clerk would be able to assist a business court judge with the management of the judge's business docket. These new clerks would help draft the required written orders and schedule business court proceedings in a more efficient manner. Though the cost of these clerks would be high now, they would prove valuable in the future because judges would be disposing of their cases more quickly. Furthermore, these clerks would be essential to the success of the court if more lawyers begin using the business court. The judges of the business court have attributed much of the success of the court to their clerks' ability to manage the cases.<sup>174</sup> Adding one more clerk to each court would ensure that the pilot program runs as efficiently as possible.

However, even if the creation of new clerkship positions is not possible, the chief justice and the Evaluation Committee should encourage the business court judges to post all written orders dealing with motions to dismiss and summary judgment.<sup>175</sup> These written orders are essential to the success of the court. In time, these orders will give practitioners a vast amount of guidance to advise their clients. Furthermore, the fact that business court judges have failed to post many of the required written orders hurts the integrity of the court. It gives the appearance that the judges do not consider the court important. As a result, practitioners may get the impression that they cannot trust the quality of the court's work. This problem is not the judges' fault—they have received no

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*Business: The Successes of the S.C. Business Court Pilot Program*, S.C. LAW., Jan. 2010, at 13, 14–16.

172. See EVALUATION COMMITTEE REPORT, *supra* note 99, exhibit C (open-ended responses).

173. See Behre, *supra* note 79.

174. See Roberts et al., *supra* note 171, at 15.

175. As of September 2009, only about twenty percent of the required written orders have been posted on the business court's Web site. See EVALUATION COMMITTEE REPORT, *supra* note 99, at 12.

additional funding and must allocate their limited available resources to their two dockets. One possible solution suggested by the Evaluation Committee is for judges to require all parties to file draft orders on or shortly after a hearing on a Rule 12 or Rule 56 motion.<sup>176</sup> The judges could then use the parties' written orders to draft their own orders.<sup>177</sup>

In addition, the chief justice should not expand the jurisdiction of the court. The court's current jurisdiction benefits from being flexible by allowing the chief justice to transfer cases as she sees fit. Expansion of the court's jurisdiction to other subject areas, such as all contract claims, would compromise the court's efficiency. Part of the purpose of the business court is to provide an efficient outlet for complex litigation. In the current system, the chief justice serves as a gatekeeper, determining what business matters are complex enough to benefit from adjudication in the business court. She should continue this role. One may argue that leaving this discretion with the chief justice prevents parties from determining whether their actions qualify for adjudication in the business court. However, as the caseload for the business court grows, guidelines will emerge to help parties make this determination.

The chief justice should also continue to require that business court judges carry both business and general dockets. Though many other states require their business court judges to carry only a business docket, the demand for South Carolina's business court at present is not great enough to warrant full-time business court judges. Currently, on average, each business court judge presides over only seven business court cases a year.<sup>178</sup> However, if the court grows in popularity, the creation of full-time business court judgeships could address the new demand.

Finally, the chief justice must be patient with the court. As the old cliché goes, "Rome was not built in a day." Neither will the business court. The success of the court depends on its acceptance within the South Carolina bar. This acceptance will likely grow through word of mouth among South Carolina lawyers who have successfully litigated in the courts. This process takes time. For example, it took six years before the North Carolina Business Court had its landmark case with the SunTrust litigation.<sup>179</sup> As long as the court makes efforts to increase efficiency, predictability, and the appearance of fairness, more practitioners will use the court.

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176. *Id.* at 13.

177. *See id.* Judge Michelle Childs utilized this method when she drafted the thirty-page opinion for *Covan v. Blue Cross & Blue Shield*. Interview with the Honorable J. Michelle Childs, S.C. Business Court Judge, in Columbia, S.C. (Feb. 2, 2010).

178. EVALUATION COMMITTEE REPORT, *supra* note 99, at 5, 6.

179. *See supra* notes 64–68 and accompanying text.

## VI. CONCLUSION

Two years ago, Chief Justice Toal created the South Carolina Business Court Pilot Program with the goals of providing predictable, efficient, and consistent resolutions to complex business litigation. The court has seen moderate use in its first two years. However, the state bar has not fully embraced the court. The pilot program is a valuable resource for business litigants, and it addresses many of the problems associated with other states' business courts. However, minor changes should be made to the South Carolina Business Court to ensure its efficiency and predictability, including creating uniform procedures and encouraging the judges to post all required written orders. Additionally, the chief justice should be patient with the development of the court. At this moment, it is too early to tell whether the business court should become a permanent addition to the state's judiciary. Ultimately, this determination will come from the state's bar. If the bar's attorneys and their clients are satisfied with the court and continue to use it, the court will be worth keeping. However, if attorneys and their clients find the court does not meet their needs, the court will be an unnecessary addition to the judiciary. Only time will tell what the fate of the South Carolina Business Court will be.

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