



# SOUTH CAROLINA'S BUSINESS COURT PILOT PROGRAM

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On September 7, 2007, Chief Justice Jean Hoefler Toal issued an administrative order creating a Business Court Pilot Program in South Carolina's circuit court system. South Carolina joins at least 14 other states in addressing the needs of litigants and the judiciary in managing matters involving business issues through the creation of these courts. To enable lawyers and the public to take advantage of the pilot program, this article will address what a business court is and why South Carolina wants a business court. It also will examine how the pilot program was created. Finally, it will evaluate what cases are appropriate for the business court and how cases get into the business court. This discussion will allow lawyers to consider whether they and their client should take advantage of the business court.

## **Business court defined**

Before explaining *why* South Carolina wants a business court, it is

necessary to understand *what* a business court is. The term "business court" refers generally to a division or program within a court system that is dedicated to hearing business or commercial disputes. South Carolina's pilot program meets this definition because it is a program within the existing state circuit court system with jurisdiction over cases involving business issues.

The business court programs that currently exist in 15 states, including South Carolina's pilot program, vary widely in their format and operation. See the box on page 36 for a list of those states. For example, in Georgia, the business court program is limited to Fulton County, and the amount in controversy must exceed \$1 million, in addition to substantive requirements. See Superior Court of Fulton County, Business Court, Project Overview, [www.fultoncourt.org/superiorcourt/business\\_po.php](http://www.fultoncourt.org/superiorcourt/business_po.php) (last visited March 5, 2008). In Illinois, the business court program is limited to Cook County, and judges hear con-

tract, tort or any other cases involving commercial relationships. See Circuit Court of Cook County, State of Illinois, Commercial Calendars, [www.cookcountycourt.org/divisions/index.html](http://www.cookcountycourt.org/divisions/index.html), (select Law; then select Commercial) (last visited March 5, 2008). The variety of formats reflects the different needs of the litigants and courts in those jurisdictions.

Chief Justice Toal's order creates a pilot program in South Carolina by establishing a business court in the state circuit courts to manage certain business, corporate and commercial matters. The pilot program will last for two years and applies to "civil matters properly filed and subject to jurisdiction and venue in Charleston, Greenville, and Richland Counties, or properly transferred to one of those counties pursuant to § 15-7-100." Administrative Order Regarding Business Court Pilot Program, No. 2007-09-07-01 (S.C. Sup. Ct. filed Sept. 7, 2007), available at [www.sc-courts.org](http://www.sc-courts.org). A judge from each of the selected counties has been assigned to the program, and they will issue written orders on Rule 12 motions to dismiss and Rule 56 motions for summary judgment that will be publicly available online at the Judicial Department's Web site, [www.sc-courts.org](http://www.sc-courts.org). Consistent with Chief Justice Toal's efforts to utilize technology in the judicial system, the pilot program also includes a strong encouragement for the use of technology in business court matters. A notable element of South Carolina's pilot program is that parties are not required to waive their right to a jury trial, which is a shared trait of all successful business court programs created in the past 15 years. South Carolina's pilot program incorporates proven methods from other jurisdictions while allowing participants to experiment in the nature of a pilot program.

### **Why South Carolina wants a business court**

A business court program can provide predictability, experience and efficiency for litigants and the judiciary. The complex relationships among businesses, suppliers, customers and everyone who depends

on businesses create needs for sophisticated dispute resolution. South Carolina's pilot program takes advantage of existing judicial resources to address these needs.

Establishing specialized courts to address the needs of a certain type of case is not a new concept. The federal system has bankruptcy courts, tax courts, claims court and the Court of International Trade. South Carolina already has specialized courts to address the particular needs of parties and the judicial system: family court and probate court. As noted by the ABA's Ad Hoc Committee on Business Courts in *Business Courts: Towards a More Efficient Judiciary*, 52 BUS. LAW. 947, 950

### **States with Rules Allowing Specialized Courts or Programs for Business Cases**

1. Delaware
2. Florida
3. Georgia
4. Illinois
5. Maine
6. Maryland
7. Massachusetts
8. Nevada
9. New Jersey
10. New York
11. North Carolina
12. Oregon
13. Pennsylvania
14. Rhode Island
15. South Carolina

(1997), "[g]iven the success of these specialized courts, the question perhaps should be: 'why not business courts?'"

### **Predictability**

The business court can provide predictability for participants and may remove some of the uncertainty of litigation. In South Carolina's program, the existence of written opinions will create a source of case law that does not now exist. Besides writing opinions for Rule 12 and Rule 56 decisions, business court judges are encouraged "to issue written orders on other non-jury, pretrial matters," as stated in the administrative order. As the collection of opinions grows, increasing

the body of law on a topic, litigants can rely on the opinions to resolve disputes. While written opinions may make litigation more predictable, a dispute may even avoid litigation if the outcome can be predicted by case law, thus conserving public and private resources.

In addition to the responsibility of writing opinions, business court judges are assigned exclusive jurisdiction of the case. Once assigned to the business court, the same judge will manage the case from discovery through trial. Appearing before the same judge may make each step of litigation less of a surprise and will provide continuity throughout the action. Also, the opinions from each judge will be more consistent as the case law develops, which also contributes to a more predictable outcome.

### **Experience**

Having a single judge assigned to a case and having a group of judges assigned to the business court provides another benefit for participants: the judges' experience. As the judges hear more business cases, their experience with commonly litigated business issues grows. The judges' knowledge will also build, and they will be better suited to resolve the sophisticated issues that arise in complex business matters.

### **Efficiency**

Another benefit of a business court program for the judicial system, litigants and the public will be increased efficiency. Businesses—and the people who depend on them—benefit by the prompt and efficient resolution of disputes. The written opinions that business court judges are required to draft will contribute to predictable outcomes and may also result in cases being resolved sooner or consuming fewer resources.

Besides the written opinions, another opportunity for efficiency exists from having a single judge assigned to the case. The judge will know the facts of the case and the background of the litigation without requiring a full explanation at almost every stage. The judge can manage discovery with a view toward the trial over which he

will later preside.

As mentioned previously, Chief Justice Toal's order encourages the use of technology at the individual judge's discretion. For example, parties may be allowed to appear at hearings using telephonic or video-conferencing technologies. Electronic presentations and technology-generated demonstrative evidence, such as video-recorded deposition testimony, may be appropriate in some situations. Business court cases also may be able to test the state's electronic filing and service system. The potential for both time and resource efficiencies is evident. The Business Court Pilot Program will be an ideal place for lawyers, parties and judges to take advantage of technology resources to resolve disputes promptly and efficiently.

The opportunity for efficient judicial proceedings in the business court speaks directly to a common but misplaced criticism of business courts generally. Critics suggest that a specialized business court "provides corporate litigants with an elite form of justice." R. Franklin Balotte & Roland E. Brandel, *Business Bench: Are Special Courts the Future?*, BUS. L. TODAY, Jan.-Feb. 1995, at 25. However, business courts are no different from other specialized courts, like probate and family courts, which focus on a narrow area of the law. These specialized courts were created partly to improve the efficiency of domestic or probate proceedings by creating customized rules, developing judges' experience and knowledge in sensitive and complex matters, and resolving disputes efficiently. The resulting efficiencies in the business court may free resources for use elsewhere in the judicial system or may suggest improvements to other parts of the judicial system.

Another criticism of business courts is a perceived inherent bias in favor of businesses over other litigants. However, this presumption is unfounded because it assumes that noncommercial cases will find their way into the business court. Under the jurisdictional parameters in the administrative order, noncommer-

cial cases are unlikely to be assigned to the business court. Further, no data exists to support the idea that business courts are more likely to rule in favor of business interests more often than nonbusiness interests. In fact, some research shows that business courts in fact do sometimes rule for consumer plaintiffs and therefore do not result in a bias toward business interests.

### **Doing business**

As one of 15 states to create a specialized court to address business matters, South Carolina is increasing the competitiveness of its business environment. Although no empirical evidence exists to show

#### **Statutes for Possible Business Court Jurisdiction**

1. Title 33, S.C. Business Corporation Act
2. Title 35, S.C. Uniform Securities Act
3. Title 36, Chapter 8, S.C. Uniform Commercial Code: Investment Securities
4. Title 39, Chapter 3, Trade and Commerce: Trusts, Monopolies, and Restraints of Trade
5. Title 39, Chapter 8, Trade and Commerce: S.C. Trade Secrets Act
6. Title 39, Chapter 15, Trade and Commerce: Labels and Trademarks

that the existence of business courts prompts businesses to locate in a particular area, anecdotal accounts indicate that having a business court can be a factor for businesses in determining where to expand or locate their next facility. During an interview in May 2007, the Hon. Ben F. Tennille, North Carolina's first business court judge, noted that while businesses will not make a decision to locate based solely on access to a business court, he knows "full well that economic development people use that as one of the arrows in their quiver." Judge Tennille also described the efforts of the N.C. Commission on Business Laws and the Economy, which rec-

ommended creation of that state's business court after PepsiCo lawyers indicated the company's desire to have access to a court that was more like the Delaware Chancery Court. PepsiCo ultimately decided to reincorporate in North Carolina and possibly considered the business court as one of many factors in making that decision. While litigation typically is not a positive outcome of doing business, if it can be made more efficient, or even avoided altogether, by utilizing a specialized court, companies may see more opportunities to do business in South Carolina.

### **Comparing the business court to complex cases**

While the predictability, experience and efficiency of the business court is clear, South Carolina lawyers may question how this program is different than the complex case designation. The two programs are the same in that a single judge is assigned to the case for its duration. However, the two programs differ in several ways. First, written opinions are not required for cases designated as complex. This difference is significant because of the many benefits that result from having written opinions. Second, the business court subject matter jurisdiction is more limited, while complex cases can involve any area of law. The complex case designation is a procedural case management option to facilitate litigation for complex matters, while the business court program is designed to address the substantive needs of litigants in a certain area of law.

### **How the Business Court Pilot Program was created**

The pilot program developed from the concentrated and comprehensive study of business courts across the United States. In July 2006, at the initiative of Chief Justice Toal, the South Carolina Bar organized the Task Force on Courts, which was charged with reviewing the use of judicial resources in South Carolina's circuit courts. The members of the task force represented diverse perspectives, including current and former judges from

appellate and trial levels of court, a law professor, judicial administrators and lawyers who represent various interests in civil litigation. One of the task force's two subcommittees focused on whether South Carolina should establish a court to target business matters.

The task force started work in October 2006. Subcommittee members met at least 10 times, either in person or by teleconference. Pamela Roberts, chair of the Task Force's Subcommittee on Business Courts, and Stephanie Nye, counsel to the Chief Justice and a member of the task force, met with one of the foremost national experts on business courts, Mitchell Bach, who is chair of the ABA Business Law Section's Committee on Business and Corporate Litigation and former chair of the Business Courts Subcommittee. Roberts and Nye also met with North Carolina's Judge Tennille, who was also the first president of the American College of Business Court Judges. In March 2007, the task force conducted a conference call with four national

experts: Bach; Lee Applebaum, co-chair of the ABA's Business Courts Subcommittee; Merrick Gross, former chair of the Business Courts Subcommittee; and Robert Haig, who has authored several books on commercial litigation. At the annual national meeting of business court judges, Bach spoke highly of the task force's work developing the pilot program proposal and of the Chief Justice's strong desire to create the program. As Judge Edward W. Miller described, Bach told the conference attendees that South Carolina had done the best job of any state in preparing and collecting materials to develop the pilot program.

Another important factor in designing the pilot program was the input received from members of the South Carolina Bar in response to two mail surveys. The survey responses favored creation of a specialized court to handle business disputes. Lawyers gave two primary reasons for supporting a business court. First, lawyers desire more predictability with respect to the law applicable to business disputes. Second, lawyers

want one judge to preside over a business dispute for its duration. The perspectives of South Carolina lawyers and the business court experts shaped the task force's pilot program recommendation.

The task force's research and analysis of business court programs in other jurisdictions concluded in April 2007 when it submitted its report and recommendation to the Bar's Board of Governors. The Board of Governors adopted the proposal on April 11, 2007, and on May 31, 2007, after full debate, the Bar's House of Delegates passed the task force's recommendation. After studying the task force's recommendations, on September 7, 2007, Chief Justice Toal issued the administrative order establishing the pilot program. The Chief Justice selected a judge from each pilot county—Charleston, Columbia and Greenville—who will take on business court duties along with their normal workloads.

The judges are the Hon. Roger M. Young Sr., Charleston County; the Hon. J. Michelle Childs,

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Richland County; and the Hon. Edward "Ned" W. Miller, Greenville County. Judge Miller and Judge Young attended the October 2007 College of Business Court Judges conference where they met with other business and commercial court judges from other states and learned best practices from successful programs.

### **When a case is appropriate for business court**

To take advantage of the pilot program, lawyers and their clients must analyze whether business court jurisdiction is appropriate under the administrative order. Jurisdiction may be appropriate if the principal claim or claims are made under the statutes listed in the administrative order. See the list of statutes in the box on page 37. No minimum amount in controversy is required, unlike programs in some other states. Following a recommendation by the business court judge, the Chief Justice determines whether business court jurisdiction is appropriate. By serving as the "gatekeeper" for determining jurisdiction, the Chief Justice is able to monitor the program and adjust as necessary, which is an important element of the pilot program.

In the nature of a pilot program, the scope of the business court's jurisdiction is narrow. The task force explained in its report that "having a list of presumptively appropriate case types is a necessary component of the jurisdictional definition under a pilot program." Further, because the pilot program is not receiving additional judicial resources, a narrow scope is necessary to ensure the volume of cases is manageable.

The limited range of issues also corresponds to the purpose of the program: to provide an efficient method to resolve complex business disputes. As Judge Young noted in an interview for this article, "[c]ases dealing with the fundamental structure of a business do not come up every day." A decision on whether a business continues in existence or dissolves may not be able to wait several years to litigate. Appropriate

cases for the business court will raise significant business-related legal issues.

Even if a party's claims are not based on the specific statutes listed in the order, parties may still participate in the pilot program. Under the hybrid approach recommended by the task force and followed in the administrative order, the Chief Justice has discretion to refer other types of cases to business court jurisdiction. These other matters may not fall within the statutes, but may otherwise be appropriate for treatment as a business court matter. Generally, as explained by the ABA's Ad Hoc Committee on Business Courts, "[t]he more complex the real-life social and economic activity that forms the basis for the dispute, and the more complex the legal doctrine dealing with that social and economic activity, the stronger the case for" referring the case to a court with specialized experience. *Business Courts*, 52 Bus. Law. at 951.

During the first six months of the pilot program, four cases were accepted under Business Court jurisdiction, and three of the four involve dissolution of a corporation, among other issues. In *Gossett v. Gossett*, 2007-CP-230-6540 (Greenville Ct. Com. Pl. dismissed Mar. 27, 2008), the dispute involved interpretation of the Statutory Close Corporation Supplement and the shareholder agreement and claims of self-dealing, conversion, distribution of dividends, and breach of fiduciary duty. In *Lennon v. Smith*, 2007-CP-230-8281 (Greenville Ct. Com. Pl. filed Dec. 6, 2007), the parties seek a judicial dissolution of a corporation. *Coen v. Crowley*, 2006-CP-10-3670 (Charleston Ct. Com. Pl. dismissed Mar. 19, 2008), the only case not involving a dissolution, was a breach of contract action involving limited liability companies. A case involving partition by sale and judicial dissolution in Charleston County was assigned to business court but later was removed to federal court. *Pack Rat Holdings v. Graham*, 2007-CP-10-5075 (Charleston Ct. Com. Pl. filed Nov. 13, 2007).

### **How cases get into the business court**

Once the lawyers and their clients determine whether the case is suitable for the business court, the next step is moving for business court jurisdiction by following the procedures explained in the order and on the application form, SCCA BC Form 101, which is available at [www.sccourts.org](http://www.sccourts.org). One party can request assignment; consent of all parties is not necessary. The revised application form, made available on December 3, 2007, clarifies that the motion may be made by one party. The Chief Justice may also assign cases *sua sponte*, but the four assigned so far have been requested by counsel.

As specified in the administrative order, counsel must request assignment of a case no later than 180 days after the action commences. The moving party submits the form motion to the circuit court judge, and the judge then issues a recommendation on the form to the Chief Justice.

If the Chief Justice approves the request, exclusive jurisdiction of the case is assigned to the business court judge of the pilot county. From there, the judge and the South Carolina Rules of Civil Procedure determine how the case moves forward.

### **What to do next**

The Business Court Pilot Program has much to offer the legal and business communities, as well as the public. The predictability, experience and efficiency offered by the business court are qualities that should interest lawyers and their clients. All counsel should determine whether a client's case would benefit from being in the business court, and then take advantage of the pilot program. The bar's enthusiasm and willingness to participate in an innovative program will determine whether the business court becomes a permanent feature of South Carolina's judicial system.

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