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The New North Carolina Business Court

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Since 1996, some of the most complex and significant business disputes in North Carolina have been

heard in the North Carolina Business Court.¹ With recently expanded jurisdiction and new offices in Charlotte and Raleigh, the business court's complex commercial litigation docket will continue to grow in the future. As more and more attorneys find their cases assigned to the business court, an understanding of the court's jurisdiction and rules will become an important tool

for North Carolina's trial bar.

A Brief History of the North Carolina Business Court

In 1994, Governor Jim Hunt established the North Carolina commission on Business Laws and the Economy.² Governor Hunt tasked the commission with recommending statutes, rules, and regulations that would encourage the growth of local businesses

and entice other businesses to locate and incorporate in the state.³

In January 1995, the commission, noting the high esteem in which the Delaware Court of Chancery was held by the business community, recommended that North Carolina establish a business court.⁴ The creation of a business court, the commission

noted, would solve two problems related to the litigation of complex business disputes in North Carolina.⁵ First, it would ensure that complex cases were heard by a single judge who could manage the cases from beginning to end, thereby solving the problems associated with litigating complex business disputes under North Carolina's



judicial rotation system.⁶ Second, a business court in North Carolina, much like the court of chancery in Delaware, could develop a body of case law to serve as guidance to North Carolina's business community.⁷

The commission recommended that the North Carolina Supreme Court amend Rule 2.1 of the General Rules of Practice for the Superior and District Courts to allow the chief justice of the North Carolina Supreme Court to designate certain cases as complex business cases.⁸ The commission also recommended that the Supreme Court add Rule 2.2 to the General Rules of Practice to allow the chief justice to designate one or more special superior court judges to hear those cases.⁹

In the fall of 1995, the Supreme Court implemented the commission's recommendations, and the General Assembly appropriated funds for an additional special superior court judge.¹⁰ In January 1996, Governor Hunt appointed Ben F. Tennille as a special superior court judge, and the chief justice designated him as North Carolina's first special superior court judge for complex business cases.¹¹ Although Judge Tennille worked out of a home office for the first few years of the business court's existence, by 1999, the General Assembly had provided the court with funding for an office in Greensboro.¹²

In 2001, the business court earned its complex business litigation "sea legs" during the SunTrust challenge to the proposed merger between Wachovia and First Union.¹³ The parties to the dispute agreed to bring both their state and federal claims before the business court in June 2001, and, by August 2001, Judge Tennille rendered the key decision in the case.¹⁴ As reported in the *Business Lawyer*, "the litigation's magnitude, the parties' recognition that the business court embodied a trustworthy and capable forum to resolve all of their disputes, and the speed and thoroughness with which the legal issues were addressed established a national identity for [the court]."¹⁵

Four years later, the commission on the Future of the North Carolina Business Court (created by Chief Justice I. Beverly Lake Jr. and chaired by Associate Justice Mark Martin) recommended several changes to the court's operations.¹⁶ In August of 2005, the General Assembly adopted most of these recommendations, passing a bill expanding the business court's

jurisdiction by designating certain types of cases as "mandatory complex business cases" and allocating funds to expand the court into Charlotte and Raleigh.¹⁷

The North Carolina Business Court Today

Today, the business court hears three types of cases: mandatory complex business cases, discretionary complex business cases, and exceptional cases.

Under section 7A-45.4 of the North Carolina General Statutes, any case that involves a material issue related to the law governing corporations, partnerships, limited liability companies, or limited liability partnerships is a mandatory complex business case.¹⁸ Likewise, any case that involves a material issue related to (1) securities law, (2) antitrust law, (3) state trademark and unfair competition law,¹⁹ (4) intellectual property law, or (5) the internet, electronic commerce, or biotechnology is considered a mandatory complex business case.²⁰

Additionally, following legislation enacted earlier this year, the commission's mandatory complex business case jurisdiction has been expanded to include appeals in contested tax cases brought under the provisions of Article 4 of Chapter 150B of the General Statutes, G.S. 150B-43 *et seq.*²¹

The parties to a mandatory complex business case may designate it as such by filing a notice of designation with the superior court in which the case is pending and serving the notice on each opposing party, the chief special superior court judge for complex business cases, and the chief justice.²² Once the chief justice approves a designation, the chief special superior court judge for complex business cases assigns the case to a commission judge.

Cases that are not assigned to the business court as mandatory complex business cases may nevertheless be assigned to the court as either discretionary complex business or exceptional cases. Both types of cases are designated pursuant to the General Rules of Practice. While an exceptional case may be assigned to any special superior court judge, only a business court judge may hear a discretionary complex business case.²³

In contrast to mandatory complex business cases, the chief justice designates a case as either an exceptional or discretionary complex business case based upon the rec-

ommendation of a senior resident superior court judge, a chief district court judge, or a presiding superior court judge, all of whom may make their recommendation *ex mero motu* or on the motion of a party.²⁴ In further contrast to mandatory complex business cases, no set of issues necessarily qualifies a case as either a discretionary complex business or exceptional case; rather, the chief justice, when deciding how to designate a case, considers a variety of factors, including (1) the interests of the parties, (2) the amount and nature of pre-trial discovery and motions, (3) whether the parties voluntarily agree to waive venue for hearing pre-trial motions, (4) the complexity of the evidentiary matters and legal issues involved in the case, and (5) whether designation as a discretionary complex business case or an exceptional case will promote the efficient administration of justice.²⁵

Although the designation "mandatory complex business case" has only existed since January 2006, mandatory complex business cases have quickly come to dominate the business court's docket. Of the 155 active cases before the business court as of November 2007, 93 of them are mandatory complex business cases.²⁶ Furthermore, of the 451 cases assigned to the business court since its inception, 197 have been assigned since January 2006.²⁷

Practice Before the Court

The General Rules of Practice and Procedure for the North Carolina Business Court (the "Business Court Rules")²⁸ apply to every case assigned to the court, regardless of the case's designation as mandatory complex business, discretionary complex business, or exceptional, and "are intended to take advantage of computer-assisted methods of information processing and the transmission of such information by advanced communications equipment"²⁹ The Business Court Rules

and the equipment and methods they enable are intended to provide better access to court information for litigants, counsel, and the public; increase the efficiency and understanding of court personnel, counsel, and witnesses; decrease costs for litigants and others involved in the court system; and facilitate the efficient and effective presentation of evidence in the courtroom.³⁰

While an attorney practicing before the

court should read and understand all of the Business Court Rules, this article will highlight those rules most often overlooked.

Business Court Rule 15

Business Court Rule 15 addresses motion practice before the court. Among other things, the rule sets word limits on the length of briefs and requires that certain motions be accompanied by a brief.

Under Rule 15, all motions must state "with particularity the grounds [for the motion], . . . cite any statute or rule of procedure relied upon and . . . [state] the relief or order sought."³¹ Further, nearly every motion filed in the business court must be accompanied by a *separate* brief;³² the business court will not normally accept a motion that purports to include a brief in its body. Failure to accompany a motion with a separate brief is grounds for the court to summarily deny it.³³

Once a motion and supporting brief have been filed in the business court, the respondent has 20 days after service of the brief supporting the motion (or 30 days if the motion is for summary judgment) to file a response.³⁴ If a respondent does not file a response within the time allotted by the rules, such failure "constitute[s] a waiver of the right thereafter to file such brief or response . . . [and] the motion will be considered and decided as an uncontested motion, and ordinarily will be granted without further notice."³⁵ A reply brief may be filed ten days after service of a response,³⁶ and an addendum to a brief or a suggestion of subsequently decided controlling authority may be filed any time prior to the court's ruling on the motion.³⁷

Business Court Rule 15.8 sets limitations on the length of briefs. Under the rule, "briefs in support of motions and responsive briefs shall be double-spaced and limited in length to a maximum of 7,500 words. Reply briefs shall also be double spaced and may not exceed 3,750 words."³⁸ The word limits contained in Rule 15.8 cannot be enlarged by informal agreement; if the parties need to enlarge those limits, they must file a motion with the court.³⁹ Additionally, any motion to expand the limits contained in Rule 15.8 must be made at least five days before the filing of the brief for which the expansion of word limitations is sought; the Court will deny any requests to expand the limitations contained in Business Court Rule 15.8 that are filed simultaneously with the brief.⁴⁰

One requirement of Business Court Rule 15.8 often overlooked by attorneys is the requirement that every brief filed be accompanied by a certification that it complies with the length limitation of the Rule 15.8.⁴¹ Where the court has entered an order expanding the word limits on a brief, the attorney filing the brief should file a certificate indicating that the brief complies with the word limits set out in the order. While failure to include this certificate will usually only result in a directive from the court that the attorney comply with the rule, the court will strike any brief where the attorney filing it does not, or cannot, make the required certification.

Business Court Rule 17

Business Court Rule 17 sets forth the case management protocols for the court's docket. Under this rule, the parties to a business court case must meet within 30 days of the assignment or designation of a case to the court to discuss the case management issues set out in the Rule.⁴² Within 15 days of the case management meeting, the parties must submit a joint case management report that indicates their positions regarding the case management issues.⁴³ After the parties file the joint case management report, the court will hold a case management conference.⁴⁴ Following the conference, the court will issue a case management order governing all case management issues.⁴⁵

The deadlines under Rule 17 are calculated from the filing date of either the order designating the case a discretionary complex business or exceptional case or the order assigning a mandatory complex business case to a particular business court judge. The three-day period for service under Rule 6 of the North Carolina Rules of Civil Procedure does not apply to the deadlines under Rule 17 of the Business Court Rules; however, if the deadline for filing a joint case management report falls on a weekend or holiday, then the joint case management report is due the following business day.

Unless the parties agree otherwise, counsel for the first plaintiff listed in the complaint is responsible for initiating and scheduling the case management meeting, and preparing and circulating a first draft of the joint case management report.⁴⁶ Moreover, "[i]f the parties disagree on any issues in the Case Management Report, they shall nonetheless file a single Case Management

Report that, in any areas of disagreement, states the views of each party."⁴⁷ Thus, the parties do not have to come to an agreement on all issues in the case management report before filing it with the Court. The parties must, however, submit a *joint* case management report; the court will likely strike any case management report that is submitted unilaterally.

Following submission of the case management report, the court will set a date for the case management conference. Under Rule 17.3, "the Court will convene a Case Management Conference with attendance by counsel for all parties and their clients . . . unless the court shall, in its discretion, excuse the attendance of clients."⁴⁸ Accordingly, an attorney whose case is assigned to the business court should contact the office of the business court judge to whom his case is assigned and determine whether that judge will excuse client attendance at the case management conference.

Business Court Rule 18.6(a)

Business Court Rule 18.6(a) addresses discovery motions. Under that Rule, the court "will not consider motions and objections relating to discovery unless moving counsel files a certificate that, after personal consultation and diligent attempts to resolve differences, the parties are unable to reach an accord."⁴⁹ This certificate must contain "the date of the conference, the names of the participating attorneys, and the specific results achieved."⁵⁰ Simply attaching a string of correspondence to a discovery motion does not satisfy the certification requirement of Rule 18.6(a). Rather, the certificate should be set out on a separate page from the motion and contain a concise, yet detailed, description of the discovery conference. The court will strike any discovery motion that does not include the certificate required by Rule 18.6(a).

Misconceptions Regarding the Court

Although the business court has been in operation for over a decade, there are still some misconceptions regarding its operation.

For example, there is no requirement that parties waive both their right to trial by jury and any objection to venue in Charlotte, Greensboro, or Raleigh as a precondition to transfer of the case to the business court. Nor is there any minimum

amount in controversy requirement for assignment of cases to the court.

Finally, the court does not exist to decide cases in a manner that benefits business. As the Court emphatically noted in *Digital Recorders, Inc. v. McFarland*:

[T]he North Carolina Business Court was created to provide judicial specialization in complex business litigation. Th[e] court's judges do not, however, decide cases based on the prevailing economic winds, nor do [they] consider how best to promote a litigant's business interests. [Their] oath is the same as that of any judge in this state—to apply the law and decide cases without regard to the parties who are before [the court].⁵¹

Conclusion

The business court's website, www.ncbusinesscourt.net, contains a wealth of information about the North Carolina Business Court, including the court's rules, instructions on electronic filing, and an index of business court opinions. The website also contains contact information for each of the court's offices, and the staff at each office is willing and able to answer any question regarding the court. ■

Judge Diaz has served as a special superior court judge for complex business cases since August 2005. Before taking the bench in November 2001, Judge Diaz practiced law with Hunton & Williams and served on active duty as a Marine Corps judge advocate, handling criminal cases at trial and all levels of appeal, including the US Supreme Court, and serving as a military trial and appellate judge. Judge Diaz received his JD from the New York University School of Law, his MSBA from Boston University, and his BS in Economics from the University of Pennsylvania. Judge Diaz's chambers are in Charlotte.

Jordan Sykes served as Judge Diaz's law clerk from August 2006-August 2007. He received his JD from Wake Forest University School of Law and his BA in Economics from Princeton University. Jordan is a litigation associate with Helms Mullis & Wicker, PLLC.

Endnotes

1. Paul C. Ridgeway, *Practice Before the North Carolina Business Court*, Trial Briefs, Oct. 2005, at 5.
2. North Carolina Business Court, History of the Court, www.ncbusinesscourt.net/history.htm (last visited Nov. 2, 2007).
3. *Id.*

4. *Id.*
5. Carrie A. O'Brien, Note, *The North Carolina Business Court: North Carolina's Special Superior Court for Complex Business Cases*, 6 N.C. Banking Inst. 367, 375 (2002).
6. *Id.* at 375-76.
7. *Id.* at 376.
8. North Carolina Business Court, *supra* note 2.
9. *Id.*
10. *Id.*
11. *Id.*
12. O'Brien, *supra* note 5, at 377.
13. Ridgeway, *supra* note 1.
14. *Id.*
15. *Id.* (quoting Mitchell L. Bach & Lee Applebaum, *A History and Creation of Business Courts in the Last Decade*, 60 Bus. Law. 147 (2004)).
16. North Carolina Bar Association, *NC Business Court Announces Expansion*, Nov. 21, 2005, www.ncbar.org/news/1/1107/index.aspx.
17. *Id.* Judge John Jolly serves as the Raleigh Business Court Judge; Judge Tennille now serves as the chief special superior court judge for complex business cases, with chambers in the Elon University School of Law.
18. N.C. Gen. Stat. § 7A-45.4(a)(1) (LEXIS through 2007 legislation).
19. Cases that contain only claims based on unfair competition under section 75-1.1 of the North Carolina General Statutes, however, are not considered mandatory complex business cases. N.C. Gen. Stat. § 7A-45.4(a)(4).
20. N.C. Gen. Stat. § 7A-45.4(a)(2)-(6).
21. For a detailed explanation of this new legislation see Charles B. Neely Jr. & Nancy S. Rendleman, *North Carolina's New Tax Assessment, Refund, and Appeal Procedures*, North Carolina State Bar Journal (December 2007).
22. N.C. Gen. Stat. § 7A-45.4(b). A plaintiff seeking to designate an action as a mandatory complex business case must file the notice contemporaneously with the filing of the complaint. N.C. Gen. Stat. § 7A-45.4(d)(1). A defendant must move to designate within 30 days of receipt of service of the pleading seeking relief from the defendant. N.C. Gen. Stat. § 7A-45.4(d)(3). Any objection to the notice of designation must be filed within 30 days after service of the notice. N.C. Gen. Stat. § 7A-45.4(e).
23. Gen. R. Prac. 2.1(b).
24. Gen. R. Prac. 2.1(a).
25. Gen. R. Prac. 2.1(d).
26. Thirty-six of the active cases are discretionary complex business cases, and 26 are exceptional cases.
27. Although the business court has been assigned at least one case from 52 different counties in North Carolina, the majority of the business court's cases have come from Mecklenburg County (95 cases), Wake County (88 cases), and Guilford County (65 cases).
28. The Business Court Rules were adopted on March 9, 2000, and significantly revised on July 31, 2006. The latest version of the rules is available on the business court's website, www.ncbusinesscourt.net.
29. BCR 1.2 (2006).
30. BCR 1.4. The key to the facilitation of access to case information is the court's electronic filing and

service system.

31. BCR 15.3.
32. BCR 15.2. Motions made orally during a hearing or a trial need not be accompanied by a brief, BCR 15.2, and written motions that do not require a brief are listed in Business Court Rule 15.10. These motions include: (1) discovery motions in which the parties have agreed to the expedited procedures described in Business Court Rule 15.12; (2) motions for an extension of time; (3) motions to continue a pre-trial conference, hearing, or trial; (4) motions to add parties; (5) motions to amend the pleadings; (6) motions to file supplemental pleadings; (7) motions to appoint a next friend or a guardian ad litem; (8) motions for substitution of parties; (9) motions to stay proceedings or enforce judgments; and (10) motions for pro hac vice admission. BCR 15.10. Additionally, some business court judges may not require a separate brief for certain ministerial motions not listed in Business Court Rule 15.10, such as a motion to appoint a commissioner, a motion to expand the word limits under Business Court Rule 15.8, or a consent motion for a protective order.
33. BCR 15.11. When filing a motion, however, attorneys should remember that, under Rule 5(f)(7) of the North Carolina Rules of Civil Procedure, the clerk of court will not accept briefs without an order from the court directing it to do so. Thus, briefs in support of or in opposition to a motion should only be filed on the commission's electronic filing system.
34. BCR 15.6.
35. BCR 15.11.
36. BCR 15.7. The reply brief should be limited to a discussion of matters newly raised in the response, and should not merely restate arguments addressed in the first brief. *Id.*
37. BCR 15.9. A suggestion of subsequently decided controlling authority should contain only the citation to the case relied upon, if published, or a copy of the opinion if the case is unpublished. *Id.*
38. BCR 15.8. Headings, footnotes, quotations, and citations count toward these word limits; the case caption, any tables of contents or authorities, and any required certificates do not. *Id.*
39. *Id.* The court, however, favors concise briefs. *Id.*
40. *Id.*
41. *Id.* The certificate of compliance need not appear in any particular location. It may be placed within a brief, or it may be attached to the brief on a separate page. The certificate may state the exact number of words in the brief, or it may simply state, "I certify that this brief complies with Business Court Rule 15.8."
42. BCR 17.1.
43. BCR 17.2.
44. BCR 17.3.
45. BCR 17.4.
46. BCR 17.1-17.2.
47. BCR 17.2.
48. BCR 17.3.
49. BCR 18.6(a).
50. *Id.*
51. *Digital Recorders, Inc. v. McFarland*, 2007 NCBC 23 74 (NC Super. Ct. June 29, 2007), www.ncbusinesscourt.net/opinions/2007%NCBC%2023.pdf.