BUSINESS COURT IN UTAH:

AN EXAMINATION OF SIMILAR COURTS

[Updated, Sept. 20, 2022]

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

BUSINESS COURT IN UTAH: AN EXAMINATION OF BUSINESS COURT SUCCESSES

OVERVIEW

Due at least partially to the Delaware Court of Chancery's dominance as the go-to forum for business litigation in the last hundred years, several state trial courts have set out to capture the essence of this court in creating their own specialized business courts. That effort commenced in the early 1990s when trial courts in New York and Illinois established specialized dockets to hear primarily complex commercial disputes. Some commentators suggest that this business court movement marks an effort by states to compete with Delaware for the corporate franchise as a means to stimulate economic development.[1] As Lee Applebaum, a national expert on state business and complex litigation courts, explains:

> [C]ompetitive implications between cities and states are undeniable. The business court becomes a means to give businesses and their lawyers confidence that business and commercial disputes will be decided with informed and deliberate reasoning. This adds a component of stability to a state, region, or city that wants to keep or attract businesses. If a city or state has such a court, and its neighbor does not, that neighboring city or state may come to sense a potential disadvantage. The concentration of business courts along the East Coast may be explained, in some part, by this potential for competitive disadvantage.[2]

Specialized business courts also fill a need created by evolving expectations within business communities throughout the country. Business is rapidly increasing in complexity and the rate of change and globalization of business drives the demand for dispute resolution processes "that can accommodate the needs of modern business."[3] These "needs" include access to a civil justice system that adjudicates large-scale, complex commercial disputes without oppressive costs or undue delays. Indeed, chief among the complaints of business litigants are the attendant costs and delays when litigating in the civil justice system.[4] These "enemies" to efficient dispute

---

[1] *See* John F. Coyle, *Business Courts and Interstate Competition*, 53 WM. & MARY L. REV. 1915, 1934 (2012); ABA BUS. LAW SECTION, ESTABLISHING BUSINESS COURTS IN YOUR STATE 2008–2009, at 1.

[2] *See* Lee Applebaum, *The "New" Business Courts: Responding to Modern Business and Commercial Disputes*, BUS. L. TODAY, Mar./Apr. 2008, at 16 (hereinafter "Applebaum, *The "New" Business Courts*").

[3] *See* Lee Applebaum, The Steady Growth of Business Courts, in FUTURE TRENDS IN STATE COURTS 70 (Carol R. Flango et al. eds., 2011).

[4] *See* Thomas D. Rowe, Jr., American Law Institute Study on Paths to a "Better Way": Litigation, Alternatives, and Accommodation: Background Paper, 1989 DUKE L.J. 824, 830; see also Danya Shocair Reda, The Cost-and-Delay Narrative in Civil Justice Reform: Its Fallacies and Functions, 90 OR. L. REV. 1085, 1098 (2012) ("[C]rippling cost and delay are enemies of access because high costs can bar worthy parties from filing suit, or may force them to take a low settlement to avoid the higher costs of litigating.").

resolution often surface during discovery and have the potential to derail even the most straightforward cases.

Typically, a business court is a state program, not necessarily a specific courtroom, that is dedicated to specifically handling business disputes or complex litigation within its respective jurisdiction. A business court is typically created within a state's existing trial court or civil division. The majority of business courts have several common, fundamental building blocks that allow them to remain successful. For example, in nearly every business court, judges are trained and assigned to the court to handle complex business disputes specifically, and a single judge handles all aspects of the case from beginning to end.

Some of the clearest advantages of a business court are that it streamlines the court's efficiency, educates judges and litigants, and creates predictable business case law that encourages companies to incorporate or complete transactions within the state. By taking complex cases that would otherwise force judges to learn the business law as the case develops, and assigning those cases to trained judges, the process frees up the docket and decreases the amount of time spent on expensive litigation.

This paper provides an overview of five business courts in four states—Delaware, Arizona, South Carolina, and New York—as examples of how business courts are created and operate. Two Delaware business courts, the Court of Chancery (court of equity) and its companion court, the Complex Commercial Division within the state's Superior Court (court of law) are highlighted due to Delaware's standing as the most popular forum for business dispute resolution. An overview of Arizona's Commercial Court is included as an example of a Mountain West state which recently established its business court. South Carolina is included due to its desire to draw business away from the neighboring North Carolina. Finally, New York's Commercial Division, one of the pioneers of the business court movement, is examined herein due to the state's prominence in international business and the success of that court.

STATE EXAMPLES

I. DELAWARE CHANCERY COURT

A. Purpose

The Delaware Court of Chancery is a non-jury trial court that is widely recognized as the nation's preeminent forum for the determination of disputes involving the internal affairs of the thousands of Delaware corporations and other business entities through which a vast amount of the worlds commercial affairs is conducted.

A noteworthy aspect of the Court of Chancery is the equitable expertise implemented by chancellors rather than a jury. The Chancellor or a Vice-Chancellor will hear a case and make a ruling, rather than a panel of judges. This is significant because the chancellors are skilled and experienced in corporate law and other matters in equity; thus, there is no need to educate an uniformed and lay jury on the intricacies of corporate law, which saves time and legal fees. Not involving juries is also consistent with common law principles for claims in equity.

B. Jurisdiction

The Court of Chancery has jurisdiction to hear and determine all matters and causes in equity. Absent special statutory authorization, the Court of Chancery lacks jurisdiction "to determine any matter wherein sufficient remedy may be had by common law, or statute, before any other court or jurisdiction of this State."[5] Unlike the Superior Court, the Court of Chancery has statutory authority to grant injunctive relief.[6] The Court of Chancery can hear cases that involve both legal and equitable claims, so long as at least some part of the case involves equitable features sufficient to confer equitable jurisdiction in the first instance. The Court cannot grant relief in the form of money damages to compensate a party for a loss or where another court has coterminous jurisdiction. However, under the rules of equity, the Court of Chancery can grant monetary relief in the form of restitution by ruling that another party has unjustly gained money that belongs to the plaintiff. The Court of Chancery is generally without jurisdiction to enter punitive damage awards, unless otherwise permitted by statute.

Apart from its general equitable jurisdiction, the Court of Chancery has jurisdiction over certain types of disputes. For instance, Section 111 of Delaware's General Corporation Law vests jurisdiction in the Court of Chancery "to interpret, apply, enforce or determine the validity of" various corporate instruments, including certificates of incorporation, bylaws, stock purchase agreements, proxies, and merger agreements (among others). The statute is not exclusive as such actions "may" be brought in the Court of Chancery. This means there is the potential for certain business cases to be brought in Complex Commercial Division of the Superior Court.[7] The Court of Chancery likewise has non-exclusive jurisdiction over actions to "interpret, apply or enforce the provisions of" partnership agreements and limited liability company agreements, again leaving open the potential for such actions to be filed in Complex Commercial Division, when equitable remedies are not sought.[8] The Court of Chancery has exclusive jurisdiction, however, over "all actions for advancement . . . or indemnification" brought against a Delaware corporation by or on behalf of its officers and directors, but (as will be seen) has been found to lack the authority to determine coverage issues in the context of director and officer insurance disputes.[9] The Court of Chancery also has sole jurisdiction over guardianship, trust, and estate matters, because the fiduciary rights and duties that arise in those contexts are considered equitable rights.[10]

Importantly, while Delaware's Declaratory Judgment Act vests the Delaware courts with the power, "within their respective jurisdictions . . . to declare rights, status and other legal relations whether or not further relief is or could be claimed,"[11] it is well established that the Court of

---

[5] 10 *Del. C.* § 341.

[6] 10 *Del. C.* § 343.

[7] 8 *Del. C.* § 111(a).

[8] *See* 6 *Del. C*. §§ 17-111, 18-111.

[9] *See, e.g., Desai v. RSUI Indemnity Co*., C.A. No. 9199-VCG, p. 24 (Del. Ch. Feb. 24, 2014) (TRANSCRIPT).

[10] *See, e.g., Christiana Town Ctr., LLC v. New Castle Cnty*., 2003 WL 21314499, at *3 (Del. Ch. June 6, 2003); *Cummings v. Estate of Lewis*, 2013 WL 979417, at *3–4 (Del. Ch. Mar. 14, 2013).

[11] 10 *Del. C.* § 6501.

Chancery does not have subject matter jurisdiction over claims for declaratory relief, in the absence of equitable jurisdiction—which typically requires the presence of a claim for equitable relief.[12]

Thus, the Court of Chancery may acquire subject-matter jurisdiction over a matter in three different ways: (1) by a party's invocation of an equitable right, such as a fiduciary duty claim; (2) by a party's request for an equitable remedy such as specific performance when there is no adequate remedy at law; or (3) by the grant of statutory authority, such as 8 *Del. C.* § 111, which grants the Chancery Court authority over actions to interpret the provisions of corporate documents.

C. Procedural Considerations in the Court of Chancery

The Court of Chancery is generally a bench trial court. When issues of fact to be tried by a jury arise, the Court of Chancery may order such facts to trial at the Superior Court. Otherwise, issues of fact are determined by the Chancellor or Vice-Chancellor at a bench trial.

Cases in the Court of Chancery are assigned to one of the seven members of the Court until conclusion. The Court will move as fast or as slow as the litigants and the controversy may require. While there is an extensive set of written "guidelines," parties in the Court of Chancery are generally expected to negotiate and agree (subject to Court approval) on matters including case schedule, expert discovery protocols, e-discovery protocols, the production of confidential information and others.[13]

There is a robust, court-sponsored mediation program in which members of the court not assigned to a case may serve as mediators, assuming agreement to the process by the parties, or assignment by court order (in certain cases).

D. Judicial Appointment

The Delaware Court of Chancery consists of seven justices; the head of the Court of Chancery is known as the Chancellor while the other six are called Vice-Chancellors. There are also two Masters in Chancery, similar to Magistrates, which are available to address discovery and other issues, though more often than not the members of the court address discovery and other interlocutory issues themselves.

The Chancellor and Vice-Chancellors are nominated by the Governor of Delaware and confirmed by the Delaware Senate. They serve twelve-year terms. The Delaware Constitution requires that each court as a whole be comprised of judges balanced between the two major political parties. This aspect of Delaware's judicial selection process ensures that a governor cannot "stack" the courts with political pals in a manner that undermines public confidence in the

---

[12] *See Reader v. Wagner*, 2007 WL 3301026, at *1 (Del. Ch. Nov. 1, 2007) ("It is well settled that the Declaratory Judgment Act does not independently confer jurisdiction on this court. As Chancellor Quillen said . . . , this court will not exercise jurisdiction in a declaratory judgment action unless the complaint reflects 'some special, traditional basis for equity jurisdiction.'").

[13] Guidelines to Help Lawyers Practicing in the Court of Chancery, http://courts.delaware.gov/chancery/docs/CompleteGuidelines2014.pdf.

fairness and impartiality of the tribunals. The two Masters in Chancery are chosen by the Chancellor.

Those selected to serve on the Court of Chancery historically have been experienced and sophisticated practitioners familiar with the corporate and commercial matters that routinely come before the Court of Chancery. Indeed, most chancellors join the bench from successful partnerships at large law firms, specializing in corporate and commercial litigation. Many return to private practice after their term and are highly sought-after practitioners to continue their careers litigating in the Court of Chancery.

E. Benefits for Business

1. Predictability

The Court of Chancery has no juries, so all cases are decided by the Chancellor or a Vice-Chancellor, who explain their decisions in comprehensive and reasoned written opinions. The Court of Chancery's tradition of written opinions stretches back more two hundred years. A significant advantage of the Court of Chancery is that its chancellors rely on hundreds of years of case law in making their rulings. The quantity and quality of the opinions relied on by the chancellors makes their decisions more predictable than decisions made by juries, and makes businesses more confident of a decision based on law and precedent rather than emotions and prejudices that often accompany decisions made by juries. Managers and lawyers of Delaware business entities can use this extensive case law to guide in planning their business and affairs.

2. Business judgment rule

The Delaware business judgment rule directs the court to respect the good-faith decisions of the company's directors, even when the outcome of their decisions may not have been the best in hindsight. Directors are charged with making informed, independent decisions with care and loyalty to the shareholders, with the absence of self-dealing. When the directors shirk their duty to be loyal to the best interest of the company, or to take due care in making their decisions, or when they engage in self-dealing and fraudulent actions, the Court of Chancery has the power to punish them by levying personal fines and removing them from office.

3. Speed

Another advantage that the Court of Chancery has over most other courts is its flexibility and speed in which disputes can be resolved. When a new case is filed with the Court, it is assigned by the Chancellor to one of the Vice-Chancellors. The assigned chancellor oversees the litigation and manages the schedule until the case's conclusion. The Court of Chancery was an early adopter of electronic filing, allowing the parties ease in accessing and filing Court documents. The Court of Chancery's procedural rules do not impose formalistic schedules or procedures and instead allow the Court and the parties to tailor litigation as necessary. The Court also has the discretion to issue equitable remedies customized for the circumstances of a particular case.

The Court's limited jurisdiction allows it to consider and dispose of complex matters in an expedited fashion when the circumstances require it, without sacrificing quality and careful

attention. This keeps the Chancery Court free to decide major corporate law disputes and business-to-business contract disputes with the speed that modern commerce requires.

As stated above, the chancellors will allow the parties to litigate as fast or slow as the litigants feel they need. Expedited proceedings are a commonplace in the Court of Chancery. In fact, the Court will err on the side of more expedited proceedings, rather than less, in the face of a colorable showing of imminent, irreparable harm. Unlike in many other courts, therefore, litigants can seek (and obtain) an expert ruling from the Court within days or weeks, if necessary.

F. Item for Consideration

Although most jurisdictions regard the Court of Chancery as the aspirational model, the unique structure (nonjury) and limited subject matter jurisdiction of the Court of Chancery (equity only) make it a tough act to follow. Most state trial courts create their business courts within a framework that allows the court to offer both jury and nonjury trials and to exercise both equitable and common law subject matter jurisdiction. These specialized courts are carving a distinctly different path in an effort to remain competitive with Delaware's nationally ranked court system.

II. DELAWARE COMPLEX COMMERCIAL DIVISION

A. Jurisdiction

As the division's name suggests, only a narrow subset of cases will qualify for the Complex Commercial Division of Delaware's Superior Court ("CCLD"). Rather than designate specific categories of cases, however, the administrative directive provides only that to qualify for assignment to the CCLD, cases must (1) present a claim by and between businesses where the amount in controversy is $1,000,000 or more; (2) arise from an exclusive choice-of-court provision within a contract designating the CCLD (without regard to an amount in controversy); or (3) receive special assignment on application to the president judge of the Superior Court.[14] Certain matters are expressly excluded from the CCLD, including cases involving a claim for personal, physical, or mental injury; mortgage foreclosure actions; mechanics' lien actions; condemnation proceedings; and any case involving an exclusive choice of court agreement where a party to the agreement is an individual acting primarily for personal, family, or household purposes, or where the agreement relates to an individual or collective contract of employment.[15]

While the CCLD's broad subject matter jurisdiction is not a unique feature, the CCLD's statewide reach is rare among state business courts and facilitates the court's goals of uniformity and simplicity.[16] Some states, such as New York and Florida, have created business courts in

[14] Administrative Directive of the Presiding Judge of the Superior Court of the State of Delaware, No. 2010-3: Complex Commercial Litigation Division 2−3 (May 1, 2010) (hereinafter Administrative Directive No. 2010-3), available at http://courts.delaware.gov/superior/pdf/Administrative_Directive_2010-3.pdf.

[15] Administrative Directive No. 2010-3, at 1–2.

[16] *See* Applebaum, *The "New" Business Courts*, at 15.

multiple counties or districts, each subject to a different set of jurisdictional prerequisites.[17] Due to its small size and the existing statewide architecture of the Superior Court, Delaware created only one specialized business court subject to only one set of jurisdictional requirements.

B. Practice Details

1. Case scheduling

Complex commercial cases feature rigorous motion practice, voluminous discovery, and often lengthy trials.[18] Consequently, they "require[] more judicial management, attention, and responsiveness."[19] The CCLD's approach to judicial case management begins with a fundamental appreciation that litigants and their attorneys know their case better than the judge ever could. Accordingly, the CCLD judges encourage parties to meet with the court as soon as possible, after responsive pleadings have been filed, to discuss the particular needs of the case.

The judges of the CCLD conduct an early case-scheduling conference with the parties to map out a schedule for the case. The parties are encouraged to meet and confer prior to the conference in an effort to reach agreement on a customized case management approach. The CCLD has published a form default Case Management Order ("CMO") that provides the parties with a clear idea of the subjects the court will expect to address at the case scheduling conference.[20] The default CMO covers all phases of litigation, including the cutoff for expert, fact, and electronic discovery; the filing of dispositive motions and motions in limine; the timing for mandatory alternative dispute resolution;[21] and a firm trial date.[22] The CCLD judges are open to including fewer or more event deadlines in the CMO, depending on the needs of the specific case. If the parties cannot agree, however, the court will enter the default CMO and will insert event deadlines. Regardless of whether the parties or the court creates the CMO, the parties are advised that the CMO will be strictly enforced and that the trial date set forth therein is firm.[23] As a result, cases

[17] *See, e.g.*, N.Y. STATE TRIAL CTS. UNIF. R. 202.70 (setting different monetary thresholds for each county with a commercial division); FL. BAR ASS'N, FLORIDA CONSTRUCTION LAW AND PRACTICE (7th ed. 2013) (noting that each complex litigation division in Florida is "created by an administrative order of the chief judge of the judicial circuit and uses separate procedures, local rules, and forms common only to that division or unit").

[18] 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, 484 (2007) (hereinafter "Nees, *Making a Case for Business Courts*").

[19] *Id.*

[20] Administrative Directive No. 2010-3, at 3.

[21] *See* Del. Super. Ct. Civ. R. 16(b)(4) (providing for mandatory ADR in all but a few expressly enumerated categories of civil cases).

[22] Administrative Directive No. 2010-3, app. A, at 1–6.

[23] Administrative Directive 2010-3, app. A, at 4.

progress promptly and efficiently in the CCLD without the delays that often accompany civil litigation.[24]

2. Expert discovery

Commercial cases often require experts due to the complexity of the issues involved.[25] Yet not all complex cases involve experts and, when experts are involved, not all expert discoveries need be conducted in the same manner. Here again, the CCLD judges recognize that a one-size-fits-all approach is not the best. The judges allow the parties to take the lead in devising a plan for expert discovery that makes the most sense for the particular case. And, once again, the CCLD has prepared a default Expert Discovery Protocol to assist the parties in anticipating the issues that will be of most concern to the court when crafting a meaningful CMO.[26] The Expert Discovery Protocol addresses such issues as the manner and timing of expert witness disclosures and the means, costs, and timing of expert witness depositions.[27] By encouraging the parties to think in terms of firm deadlines, the CCLD strives to offer litigants a greater degree of certainty and predictability as to how discovery will proceed. Nevertheless, the precise scope and timing of expert discovery is left to the parties to decide in the first instance. The court will assume control by applying and enforcing the default Expert Discovery Protocol only if they cannot agree.

3. Electronic Discovery

Complex business litigation often brings with it a "minefield of electronic discovery."[28] Navigating through this "minefield" unscathed is a feat in itself. Indeed, litigants must balance the necessity of e-discovery against the significant expense such discovery often entails. As business litigants know all too well, litigation often consumes the controversy as the proverbial tail wagging the dog. In light of these concerns, business litigants must confer early and often to determine the most efficient means by which to conduct discovery.

---

[24] *See* Nees, *Making a Case for Business Courts*, at 486–87 ("[T]he creation of business courts should encourage timely action within the business court and within the general dockets. For parties litigating in a business court, judicial management of the procedural issues should expedite resolution by preventing discovery disputes from spiraling out of control, pre-scheduling motions deadlines and hearing dates to prevent delay, and being available to respond to a party's needs . . . .").

[25] *See* N. Lee Cooper & Scott S. Brown, *Selection of Experts, Expert Disclosure and the Pretrial Exclusion of Expert Testimony: Finding and Selecting Experts*, in 3 BUSINESS AND COMMERCIAL LITIGATION IN FEDERAL COURTS § 28:3 (3d ed. 2014) ("Commercial litigation offers an almost infinite array of subject matters on which an expert can help the judge or jury understand the evidence or determine a fact at issue.").

[26] Administrative Directive No. 2010-3, exh. A.2, at 10–13.

[27] *Id.*

[28] Denise Seastone Kraft & K. Tyler O'Connell, *National E-Discovery Trends and the Delaware Court of Chancery's Approach*, BUS. L. TODAY, Sept. 2010, at 1, 1, available at http://www.americanbar.org/publications/blt/2010/09/02_kraft.html.

Aware of the challenges presented by e-discovery, the CCLD has established E-Discovery Plan Guidelines that provide litigants with practical guidance.[29] Similar to the Guidelines established by the Court of Chancery, the CCLD's E-Discovery Plan Guidelines ("Guidelines") mandate that litigants hold a meet-and-confer session early in the litigation to discuss discovery of electronically stored information ("ESI").[30] By requiring a meeting early in the litigation, the parties are provided the opportunity to take control over the scope and structure of e-discovery in advance of the entry of an e-discovery order. The Guidelines set forth a non-exhaustive list of factors to be discussed by the parties at the meet-and-confer session, including the preservation and collection of ESI, the form in which ESI will be produced, the scope of production, and the allocation of expenses among the parties for the preservation and production of ESI.[31] If a party fails to address e-discovery issues early in the litigation, the court is "not likely to be sympathetic when [that] party later complains that stringent measures were not instituted voluntarily by her adversary to ensure that no potentially relevant information was lost."[32]

Following the meet-and-confer session, the parties must submit a report to the court in which they summarize their proposed e-discovery plan and identify their position with respect to unresolved issues.[33] After submission of the parties' e-discovery plans and after further consultation with the parties, the CCLD judge will enter an order governing the permissible scope of discovery of ESI.[34] The order will also address issues relating to preservation and production of ESI and the allocation of expenses of production, all in the context of the unique issues and character of the particular case.[35] By permitting the parties to drive the e-discovery process, the Guidelines afford business litigants the opportunity to address the particular features of their own ESI and to devise a plan that makes sense within the context of the particular controversy.

C. Benefits for Business

1. Predictability

Judges on the CCLD publish written opinions, promoting predictability for businesses and litigants alike. Rendering high-quality, consistent, and well-reasoned decisions in specialized and often complex fields of law are hallmarks of not just the CCLD, but business courts in general. Indeed, well-reasoned and consistent opinions promote predictability such that businesses can set their course of action based on established precedent.

---

[29] Administrative Directive No. 2010-3, exh. B, at 1–4.

[30] Administrative Directive No. 2010-3, exh. B, at 1.

[31] *Id.*

[32] *Beard Research, Inc. v. Kates*, 981 A.2d 1175, 1187 (Del. Ch. 2009).

[33] Administrative Directive No. 2010-3, exh. B, at 1.

[34] *Id.* at 2.

[35] *Id.*

2. Efficiency and Flexibility

An overarching goal of the CCLD is to promote efficiency and flexibility. Acknowledging that the litigants themselves know how to best litigate their case, the CCLD judges encourage parties to meet with the court as soon as possible, after responsive pleadings have been filed, to discuss the particular needs of the case. If the parties wish to delay resolution (e.g., to facilitate ongoing settlement negotiations or a pending transaction that could affect the controversy), then the court can tailor a case management plan that will provide a "long runway" for the parties to work with each other before the litigation commences in earnest. On the other hand, if the parties have a need to resolve their dispute quickly, the CCLD judges will accommodate this need with a scheduling order that provides for focused expedited discovery and a prompt trial date.

The court allows the parties substantial input with regard to the form and substance of the case management order, the scope and timing of electronic discovery, and the scope and timing of expert discovery. The court has published default standards in these areas so that the parties know what they will get from the court and what the court will expect in the event that they are unable to reach an agreement.[36]

When issues arise with respect to the management of cases generally within the CCLD, the judges of the CCLD address these issues promptly through efficiently executed standing orders.[37] The court also meets regularly with the still extant Committee to discuss what is working in the CCLD and what needs to be fixed. The CCLD judges also host regular continuing education conferences with lawyers from Delaware and around the country to discuss the latest developments in the law and to receive and give feedback regarding the progress of litigation within the division. Not only do these measures permit the CCLD judges to remain responsive to the needs of business litigants, but they also demonstrate an ongoing commitment to the problem-solving origins of the business court model.

The expertise of the CCLD judges and the litigants' access to judges well versed in complex commercial litigation promote efficiency as well. The jurists assigned to the CCLD are selected by the president judge of the Superior Court based on their expertise and experience in handling complex business litigation. As with the Court of Chancery, it is understood that the success of the CCLD will depend in large measure on the ability of the judges assigned to the division to demonstrate proficiency in both substantive business law and complex case management. Indeed, because judges assigned to the CCLD "consistently hear particular types of cases, they develop expertise, experience, and knowledge enabling them to perform their functions

[36] There are a variety of resources available on the Superior Court's website, including sample forms and pleadings, designed to assist parties litigating in the CCLD. See Superior Court Complex Commercial Litigation Division, Del. St. Cts., https://courts.delaware.gov/superior/complex.aspx (last visited July 5, 2022). The Superior Court's website also provides the judicial preferences of certain of the members of the CCLD. *Id*. Finally, business litigants may access all prior opinions issued by the CCLD on the Superior Court's website. Superior Court Opinions & Orders, Del. St. Cts., https://courts.delaware.gov/opinions/ (last visited July 5, 2022).

[37] *See, e.g.*, In re Complex Commercial Litig. Div., Standing Order No. 1 (Oct. 19, 2010), available at http://courts.delaware.gov/superior/pdf/CCLD_standing_order_1.pdf (permitting litigants to exceed page limitations for dispositive and discovery motions).

more proficiently than they could without that expertise. They are more efficient, and the quality of their decisions is better."[38]

The appointment of a single judicial officer to handle a case from start to finish promotes the overarching goal of this specialized business courts— improving the administration of civil justice. Once a case is assigned to a designated judge, that judge is accountable for the progress of the case and can collaborate with the litigants efficiently and creatively to address all manner of case management issues, including e-discovery protocols, deadlines for fact and expert discovery, *Daubert* motion practice, and briefing schedules for dispositive motions.[39]

The judges on the CCLD will allow the litigation to move as quickly as the litigants feel is needed. Much like the Court of Chancery, the CCLD often has expedited schedules to enable business to quickly resolve disputes and keep up with the speed of modern commerce.

The flexibility of the CCLD in responding to the needs of business litigants makes this an attractive forum for business disputes. Unlike many jurisdictions, the CCLD was created by administrative directive, which allows the Superior Court to address and finetune unforeseen issues that may arise without the need to promulgate new rules or amend an implementing statute. With ease, the Superior Court can tailor the CCLD's structure, jurisdiction, or implementation to adapt to the needs of business litigants or to accommodate technological developments.[40]

D. Judicial Appointment

The members of Delaware's judiciary are appointed to twelve-year terms after a meticulous judicial selection process. Following the submission of each judicial candidate's application, a Judicial Nominating Committee ("JNC") reviews all candidates for judicial office before selecting three individuals to recommend to the governor.[41] The stated purpose of the JNC is to "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."[42] The measures implemented by the JNC

---

[38] Administrative Directive No. 2010-3, at 3.

[39] *See* Ann M. Scarlett, *Shareholders in the Jury Box: A Populist Check Against Corporate Mismanagement*, 78 U. CIN. L. REV. 127, 175 (2009) (noting that business courts often have expedited schedules that enable business to quickly resolve disputes).

[40] *See, e.g.*, Administrative Directive of the Presiding Judge of the Superior Court of the State of Delaware, No. 2011-3: Assignment of Judges 2–3 (May 1, 2011), available at http://www.courts.state.de.us/Superior/pdf/Administrative_Directive_2011_3.pdf (adding an additional judge to the CCLD to address its increased caseload).

[41] *See* Exec. Order No. 4 (Mar. 27, 2009) (Gov. Markell), available at http://www.governor.delaware.gov/orders/exec_order_04.shtml.

[42] *Id.*

"ensure a balanced and independent judiciary, and, therefore, it is no surprise that the public perceives Delaware courts as fair arbiters of justice."[43]

With respect to judicial selection, the Delaware Constitution is unique in its requirement that each court and the judiciary as a whole be comprised of judges balanced between the two major political parties.[44] This novel aspect of Delaware's judicial selection process ensures that a governor cannot "stack" the courts with political pals in a manner that undermines public confidence in the fairness and impartiality of the tribunals.

III. ARIZONA COMMERCIAL COURT

A. Purpose

Arizona's Commercial Court is a Superior Court "venue within the Civil Department to resolve controversies that arise in commercial settings expeditiously and to reduce the expense of litigation."[45] A key purpose of the Commercial Court is to enhance the judicial process and justice provided for commercial entities in Arizona. To be clear, the Commercial Court does not exist to be more friendly to businesses.[46] Just as there are dockets for tax, family, juvenile, etc., cases, there needed to be a Commercial Court docket for complex business litigation.[47]

Notably, the Arizona Court system has a long history of requiring Superior Court judges to rotate court assignments "every two to three years."[48] This made it near impossible for judges to gain the knowledge and experience required to efficiently handle many of the complex business cases that they would encounter. By creating the Commercial Court, Arizona created a space inside the civil division where businesses could confidently go to litigate their complex matters, knowing

[43] Devera B. Scott et al., *The Assault on Judicial Independence and the Uniquely Delaware Response*, 114 PENN ST. L. REV. 217, 243–44 (2009).

[44] See DEL. CONST. art. IV, § 3 ("[A]t any time when the total number of the offices of the Justices of the Supreme Court, the Judges of the Superior Court, the Chancellor and all the Vice-Chancellors shall be an even number, not more than one-half of the members of all such offices shall be of the same major political party; and at any time when the total number of such offices shall be an odd number, then not more than a bare majority of the members of all such offices shall be of the same major political party; the remaining members of the Courts above enumerated shall be of the other major political party.").

[45] *Commercial Court,* THE JUDICIAL BRANCH OF ARIZONA, MARICOPA COUNTY (June 24, 2022, 10:29 AM), https://superiorcourt.maricopa.gov/civil/commercial-court.

[46] *Id.*

[47] *Id*.

[48] ARIZONA SUPREME COURT CAPITAL CASE TASK FORCE, REPORT OF RECOMMENDATIONS TO THE ARIZONA JUDICAL COUNCIL, (September 2007), https://www.azcourts.gov/Portals/74/Archive/CCTF/CCTF2007Report.pdf.

the judge would have the special knowledge required to effectively handle the case.[49] The Commercial Court is not pro-business, it is pro-efficiency.[50]

B. Formation

Being at the forefront of innovation, the Arizona Court system recognized the success other courts saw after creating a business court. In 2014, the Arizona Supreme Court established a Business Court Advisory Committee, comprised of Superior Court judges, in-house and private practice attorneys, the president of the Arizona Chamber of Commerce and Industry, and others involved in court administration, to explore creating a business court.[51] The Advisory Committee unanimously agreed that the success of a pilot business court would depend on "the quality of the judges who are assigned to the court… and … early and active judicial case management."[52]

In 2015, pursuant to Article VI, Section 3, of the Arizona Constitution, the Superior Court of the Maricopa County "authorize[d] a Commercial Court pilot program in the Superior Court in Maricopa County."[53] The Arizona Supreme Court also authorized Arizona Rules of Civil Procedure Rule 8.1 to govern Commercial Court proceedings.[54]

The purpose of the pilot Commercial Court was to "measure litigant satisfaction," obtain the "view[s] of judges and attorneys concerning the effectiveness and benefits of the pilot," and recommend changes concerning "eligibility criteria for [the] assignment of cases" to the court.[55] This was done via required submissions of annual Commercial Court progress reports to the Judicial Council.[56] These reports provided valuable insight into what was and was not working with the new Commercial Court.[57] By focusing on these data, the pilot court could "demonstrate

---

[49] *Id*.

[50] *Id*.

[51] COMMERCIAL COURT REV. COMM., SUPREME COURT OF ARIZ., REPORT TO THE ARIZONA JUDICIAL COUNCIL, 5 (June 18, 2018) (hereinafter "COMMERCIAL COURT REV. COMM."), https://www.ncsc.org/~/media/Microsites/Files/Civil-Justice/AZCCRCreport.ashx; BUSINESS COURT ADVISORY COMM., SUPREME COURT OF ARIZ., REPORT TO THE ARIZONA JUDICIAL COUNCIL, 5 (December 11, 2014), https://superiorcourt.maricopa.gov/media/1087/business-court-advisory-committee.pdf.

[52] *Id*.

[53] Supreme Court of AZ., Administrative Order 2015-15 (Feb. 18, 2015).

[54] COMMERCIAL COURT REV. COMM., at 5.

[55] *Id.*

[56] Institute for the Advancement of the American Legal System (IAALS), *Rule One Map – Arizona – Arizona Commercial Court,* (June 23, 2022, 6:30 PM), https://iaals.du.edu/action-ground?state=AZ.

[57] COMMERCIAL COURT REV. COMM., at 5–7.

[the] Commercial Court's usefulness, and… identify improvements before the Commercial Court achieves a permanent or statewide status."[58]

In 2018, the Supreme Court of Arizona created a Commercial Court Review Committee "to review the data and issues discussed in the two progress reports[,] to solicit input from Superior Court leadership and other key stakeholders[,] and to make recommendations about whether to make the Commercial Court rules and procedures permanent."[59]

1. Making Adjustments

Initially, the pilot Commercial Court consisted of three judges.[60] However, after the court had been in existence for several months, the judges noticed a "substantial increase in the number of motions they needed to hear and decide."[61] The numerous complex motions made it difficult for the judges to "promptly hear and resolve motions."[62] To solve this issue, a fourth judge was added to the Commercial Court bench. [63]

Additionally, the Commercial Court struggled initially with prompt resolution because civil judges often transferred cases to the Commercial Court after receiving a complex substantive motion.[64] This meant that "cases were transferred to Commercial Court at the very stage at which they required prompt judicial attention."[65] Subsequently, Rule 8.1 was amended to add a limited timeframe in which a civil court judge could "transfer a case to the Commercial Court if the judge determines the matter is an eligible commercial case."[66]

When the pilot Commercial Court was established, there was no minimum amount in controversy requirement for eligible cases.[67] To align with a tangential change in the Arizona Rules of Civil Procedures and to reduce judicial caseloads, Rule 8.1 was amended to require eligible Commercial Court cases to seek $300,000 or more in monetary relief.[68]

---

[58] Mark Meltzer, *FEATURE: NEW COURT VENUE FOR COMMERCIAL LITIGATION*, 51 AZ Attorney 32, 36 (2015) (hereinafter "Meltzer, *FEATURE: NEW COURT VENUE"*).

[59] Paula Hannaford-Agor, *Commercial Court Evaluation- Final Report*, 2 (DECEMBER 2018) (hereinafter "Hannaford-Agor, *Commercial Court Evaluation*"), HTTPS://IAALS.DU.EDU/SITES/DEFAULT/FILES/DOCUMENTS/PUBLICATIONS/AZ_COMMERCIAL_COURT_NCSC_EVALUATION_12-12-18.PDF.

[60] COMMERCIAL COURT REV. COMM., at 6.

[61] *Id.*

[62] *Id*.

[63] *Id*.

[64] *Id*.

[65] *Id*.

[66] ARIZONA RULES OF CIVIL PROCEDURE, Rule 8.1(d)(7).

[67] COMMERCIAL COURT REV. COMM., at 10.

[68] ARIZ. R. CIV. PRO., at 8.1(c); Paula Hannaford-Agor, *Commercial Court Evaluation*.

2. Adopting the Pilot

Ultimately, the Commercial Court Review Committee discussed the changes mentioned above and recommended that the pilot Commercial Court and respective rules become permanent.[69] Based on this recommendation, the Supreme Court of Arizona officially established the Commercial Court and permanently adopted Rule 8.1, effective January 1, 2019.[70]

C. Jurisdiction

Only Maricopa County has a Commercial Court program, for two reasons.[71] First, Arizona only has two main metropolitan areas where many businesses are operated: Maricopa and Pima County. However, only Maricopa County was interested in establishing a Commercial Court in its jurisdiction. Second, and closely related, the remaining 13 counties in Arizona do not have a Commercial Court program because they currently "lack the volume of… [complex] commercial cases that would justify the establishment of a specialized Commercial Court."[72] To assist with the limited jurisdiction, Rule 8.1(g) allows the procedures within Rule 8.1 to be used "wholly or partially, in managing a commercial case that is not assigned to the Commercial Court, or that is pending in a county that has not established a Commercial Court."[73]

1. Case Eligibility

Commercial Court case eligibility is determined by the subject matter of the case.[74] Specifically, Rule 8.1(b) provides 13 descriptions of what case types may be eligible to transfer to the Commercial Court, including: claims regarding business deterioration, claims between business owners, claims concerning the sale, merger, or dissolution of a business, claims for shareholder actions, claims arising from a "business contract or transaction,"[75] etc.[76] Rule 8.1 goes on to expressly exclude "disputes concerning consumer contracts or transactions… [such as] one that is primarily for personal, family, or household purposes," unless "business issues predominate,"[77] and requires that all commercial cases eligible for the commercial court have "at least one plaintiff and one defendant [that] are 'business organizations."[78] If a case meets one of these descriptions, it is only eligible for the Commercial Court if the party seeks $300,000 or more

[69] COMMERCIAL COURT REV. COMM., at 8.

[70] Supreme Court of AZ., Administrative Order 2018-64 (June 26, 2018).

[71] COMMERCIAL COURT REV. COMM., at 8.

[72] *Id.*

[73] ARIZ. R. CIV. PRO., at 8.1(g).

[74] *Id.* at 8.1(b).

[75] Rule 8.1(a)(3) defines a 'business contract or transaction' as "one in which a business organization sold, purchased, licensed, transferred, or otherwise provided goods, materials, services, intellectual property, funds, realty, or other obligations." *Id.* at 8.1(a)(3).

[76] *Id.* at 8.1(b)(1) – 8.1(b)(13).

[77] *Id* at 8.1(c), 8.1(c)(8).

[78] *Id.* at 8.1(a)(1)(A).

in monetary relief.[79] While arbitrary, this $300,000 requirement serves as threshold that cases must meet in order to trigger the judicial resources devoted to the Commercial Court.

For further clarification, Rule 8.1(c) provides a list of "case types that are generally not commercial cases unless business issues predominate."[80]

2. Case Assignment

Parties to an "eligible commercial case may request assignment of the case to the Commercial Court."[81] To assign a case at the time of filing, the plaintiff must "includ[e] in the initial complaint's caption the words "Commercial Court assignment requested," and complet[e] a civil cover sheet that indicates the action is an eligible commercial case."[82] If a party other than the plaintiff would like to assign the case to the Commercial Court, the party may, "within 20 days after that party's appearance. . . file a separate notice stating that the case is eligible for, and requesting assignment of the case to, the commercial court."[83]

If a judge of a general civil court desires to transfer a case to the Commercial Court, they must request the transfer "within 20 days after the filing of the first responsive pleading or Rule 12 motion."[84] The case will be transferred if the Commercial Court judge "determines the matter is an eligible commercial case."[85]

A Commercial Court judge has the right to transfer cases out of the Commercial Court "if the Commercial Court judge determines the matter is not an eligible commercial case."[86] However, the judge is not required to transfer the case and may decide to keep it..[87] If a case is deemed eligible for the Commercial Court based on subject matter outlined in Rule 8.1 (b)(6), (7), (10), or (11), the presiding judge may reassign that case to a general civil court.[88]

The Commercial Court does not have specific venue transfer rules. If parties wish to change venue into the Commercial Court, they must do so through a manner outlined in Section 12-401 of the Arizona Revised Statutes.[89]

---

[79] *Id.* at 8.1(c).

[80] ARIZ. R. CIV. PRO., at 8.1(c)(1) – 8.1(c)(8).

[81] *Id.* at 8.1(d)(1).

[82] *Id.* at 8.1(d)(2).

[83] *Id.* at 8.1(d)(3).

[84] *Id.* at 8.1(d)(7).

[85] *Id.*

[86] *Id.* at 8.1(d)(5).

[87] *Id.*

[88] *Id.* at 8.1(d)(7).

[89] ARIZONA REVISED STATUTES, §12-401.

D. Relationship to Model Rules

For all proceedings in the Commercial Court, Rule 8.1 of Arizona Rules of Civil Procedure governs.[90] Unless specifically modified by Rule 8.1, other rules of Arizona civil procedure still apply to the proceedings.[91] Specifically, Rule 8.1 provides additional rules surrounding electronically stored information (ESI), early scheduling conferences, and Joint Report and Scheduling Order.[92]

A "majority" of Commercial Court cases "involve disclosure and discovery of electronically stored information [ESI]."[93] In an attempt to streamline parties' communication regarding ESI, the Commercial Court requires parties to "confer and attempt to reach agreements regarding ESI."[94] This includes the use of a two-page ESI checklist that includes many topics, including ESI preservation, ESI discovery, privilege considerations, ESI production, and more.[95]

Additionally, the parties' Joint Report and Proposed Scheduling Order must address: (1) whether ESI is an expected issue and if so, whether an agreement regarding discovery has been met, whether a stipulated order has been filed, and whether ESI disputes are anticipated; (2) if parties have an "agreement regarding the inadvertent production of privileged material" and if a stipulated order has been filed; (3) whether claims regarding privileged trial material are anticipated; and (4) if a protective order is necessary. [96]

Under Rule 8.1(e)(2), parties to a Commercial Court case must conduct mandatory scheduling conferences.[97] This is different from standard Superior Court cases where the scheduling conferences are not required, but available by "request."[98] Since Rule 8.1 does not specifically govern how parties should resolve discovery issues, the Commercial Court applies the guidelines set forth in Arizona's general discovery rule.[99]

---

[90] COMMERCIAL COURT REV. COMM., at 5.

[91] Meltzer, *FEATURE: NEW COURT VENUE*, at 34.

[92] ARIZ. R. CIV. PRO., at 8.1(e)(1) – 8.1(e)(3).

[93] Meltzer, *FEATURE: NEW COURT VENUE*, at 34.

[94] *Id.*; *see* ARIZ. R. CIV. PRO., at 8.1(e)(1) – 8.1(e)(2)).

[95] Meltzer, *FEATURE: NEW COURT VENUE*, at 34; *see* ARIZ. R. CIV. PRO., at 8.1(e)(2)(A) – 8.1(e)(2)(C).

[96] ARIZ. R. CIV. PRO., at 8.1(e)(3)(A) – 8.1(e)(3)(D).

[97] *Id.* at 8.1(e)(1) – 8.1(e)(2).

[98] ARIZ. R. CIV. PRO., at 16(d).

[99] *See* Meltzer, *FEATURE: NEW COURT VENUE*, at 34.

Notably, Commercial Court judges "may modify the formal requirements of Rule 7.1(a) [Motions] and may adopt a different practice for the efficient and prompt resolution of motions," so long as the parties are notified.[100] However, this does not occur frequently.

E. Benefits for Business

1. Experienced Judges

The Commercial Court currently has four judges who are "experienced jurists with extensive knowledge of commercial law and the practicalities of business." [101] These individuals "understand not only legal issues in business cases, but also the complexities, realities, and nuances of commercial disputes."[102] Interestingly, no Commercial Court judge has an exclusive business docket. While on the bench, Commercial Court judges also have a personal, smaller docket in another area of the law.[103]

Commercial Court judges are selected by the presiding judge, who looks at an applicant and takes into account their commercial business knowledge prior to selecting an appointment.[104] Arizona has not explicitly stated how long judges will stay on the Commercial Court bench. While the Commercial Court Review Committee "urges that the terms be longer than the typical term [of two to three years] employed by other assignments," this desire did not sway the Arizona Supreme Court to make any statement on this topic.[105] Notably, multiple organizations involved with the creation of Arizona's Commercial Court have discussed the difficult balance of maintaining judges for an extended period of time to "use [judges'] expertise to its fullest," while abiding by Arizona's "longstanding policy preference for regular judicial rotation."[106]

A common criticism for business courts in general is that the judges are biased towards corporations. Arizona has worked hard to ensure that judicial bias is not an issue in the Commercial Court by crafting specific, meaningful rules to regulate the types of cases allowed into the Commercial Court. These rules make it hard, if not impossible, for large corporations to sue an unsuspecting individual in the Commercial Court.[107] Cases that make it into the business court are almost exclusively business versus business, effectively eliminating any worry of judicial bias.[108]

---

[100] ARIZ. R. CIV. PRO., at 8.1(f).

[101] *Commercial Court FAQ*, THE JUDICIAL BRANCH OF ARIZONA, MARICOPA COUNTY (June 24, 11:53 AM), https://superiorcourt.maricopa.gov/civil/commercial-court-faq.

[102] *Id.*

[103] *Id.*

[104] *Id.*

[105] COMMERCIAL COURT REV. COMM., at 12.

[106] Hannaford-Agor, *Commercial Court Evaluation*, at 13.

[107] *Id.*

[108] *Id.*

2. Efficient Resolution

To promote efficient resolution within the Commercial Court, Rule 8.1(e) includes specific, additional conferencing and early meeting requirements.[109]Commercial Court judges also have the option to modify motions "for the efficient and prompt resolution of [the same]."[110] The process of designating a case to the business court is not very time-consuming, allowing the Commercial Court to quickly begin hearing appropriate cases.

In a study conducted by the National Center for State Courts (NCSC), a sample of commercial cases that were filed and disposed of prior to the creation of the Commercial Court, were compared to a sample of cases adjudicated within the Commercial Court.[111] Using a statistical analysis to predict the disposition of existing Commercial Court cases, the NCSC found that "the average (mean) time to disposition for Commercial Court cases that were fully disposed was 373 days . . . compared to 415 days . . . for cases in the pre-Commercial Court baseline sample."[112] The NCSC did note that the Commercial Court is still in its infancy, so it may be too soon to tell whether the Commercial Court will consistently be more efficient.[113] However, the NCSC noted that "even if the survival curves for the Commercial Court cases never match or exceed those for the baseline cases, it would not necessarily mean that the Commercial Court cases are being managed less efficiently."[114] The difference in resolution times could be attributed to the increased complexity of the cases within the Commercial Court.[115]

Although the Commercial Court had some initial efficiency problems, adding a fourth judge and tightening the case eligibility requirements have "alleviated much of the backlog that caused the unexpectedly high workload demands" and subsequently slower resolution times.[116] Similarly, the mandatory scheduling conferences have led to increased judicial attention, causing cases to progress faster. Although judges have the option to modify motions, this does not occur often in practice. Nonetheless, the Commercial Court is accelerating case progression.

3. Reduce Expenses

By focusing on judicial expertise and striving for efficiency, Arizona's Commercial Court has been successful in reducing expenses. Both attorneys and litigants "consistently remarked that judges were able to identify and keep the parties focused on key legal and evidentiary issues,

[109] ARIZ. R. CIV. PRO., at 8.1.

[110] *Id.* at 8.1(f).

[111] Hannaford-Agor, *Commercial Court Evaluation*, at 6.

[112] *Id*.

[113] *Id*. at 7.

[114] *Id*. at 12.

[115] *Id*.

[116] *Id*.

ultimately saving time and controlling costs."[117] Additionally, when judges are familiar with the complex legal issue that is presented to them, judges can swiftly and accurately decide the case.

F. Items for Consideration

1. Lawyer Satisfaction

Based on Court Administrator surveys and focus groups, the data shows that attorneys "like and support the Commercial Court."[118] Some attorneys complained about "the amount of time judges took to enter a decision on pending motions," but "there was a great consensus that the quality of judicial decision-making in the written opinions was exemplary."[119] Attorneys also noted that the case management practices set forth in Rule 8.1 were very effective and "increased accountability that judges imposed on parties."[120] Attorneys and litigants appreciated the "active judicial involvement in case management – especially the judges' genuine interest in the cases and their accessibility and engagement in case conferences and hearings."[121] Those involved in Commercial Court cases really valued the "early access to judges experienced and knowledgeable about commercial litigation."[122]

The attorney feedback and focus group comments made it clear "that expeditious case processing is not the most important consideration."[123] The "assignment of highly experienced judges with specific commercial litigation expertise" was the "most frequently noted benefit of the Commercial Court."[124]

IV. SOUTH CAROLINA BUSINESS COURT

A. Purpose

South Carolina's Business Court exists "to handle complex business, corporate, and commercial matters."[125] This "limited range of issues also corresponds to the purpose of the program: to provide an efficient method to resolve complex business disputes."[126]

---

[117] *Id*. at 13.

[118] COMMERCIAL COURT REV. COMM., at 8.

[119] Hannaford-Agor, *Commercial Court Evaluation*, at 13.

[120] *Id*. at 9.

[121] *Id*. at 13.

[122] *Id*. at 9.

[123] *Id*. at 13.

[124] *Id*.

[125] Supreme Court of S.C., Administrative Order 2007-09-07-01 (Sept. 7, 2007).

[126] Pamela J. Roberts, Carmen Harper Thomas, Cory E. Manning, *South Carolina's Business Court Pilot Program*, 19-May S.C. Law. 30, 35 (2008) (hereinafter "Roberts, *South Carolina's Business Court Pilot Program*").

B. Formation

South Carolina's Business Court Program began in 2006, when the South Carolina Bar's Task Force on Courts spent time analyzing different business courts throughout the country to figure out how to best structure a business court in South Carolina that would best serve the needs of business litigants in the state.[127] The Task Force was comprised of "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."[128] Its research included gathering input from South Carolina Bar members and meeting with national experts on business courts.[129] Due to the complexity of business relationships and the difficulty of interpreting and applying complicated statutes, the Task Force determined that the creation of a specialized court could better "promote predictability in resolving disputes, which would contributed to efficient business operations and a more competitive business community" in the state.[130] The Task Force identified the following common "best practices" in its research: "(1) assignment of a matter to a single judge for the life of the matter; (2) development of a body of case law through written opinions; (3) management of a business court program by a single gatekeeper; and (4) the use of technology in resolving disputes."[131]

On May 31, 2007, the South Carolina Bar House of Delegates adopted the Task Force's report and recommendations by vote.[132] Then, "[o]n September 7, 2007, Chief Justice Toal issued the administrative order creating the Business Court Pilot Program, Order 2007-09-07-01."[133] The 2007 Order initially made the program a two-year pilot program but was extended by subsequent orders in 2009, 2011, and 2014.[134] In 2019, recognizing the pilot program's success, "the Supreme Court of South Carolina declared the Business Court Program was now permanent and would continue 'unless rescinded or modified by Order of the Chief Justice.'"[135]

---

[127] Pamela J. Roberts, Carmen Harper Thomas, Corey E. Manning, *Getting Down to Business*, 21-Jan S.C. Law. 12, 13 (2010) (hereinafter "Roberts, *Getting Down to Business*").

[128] Roberts, *South Carolina's Business Court Pilot Program*, at 33-34.

[129] *See id.* at 34. Experts included "Mitchell Bach, who is chair of the ABA Business Law Section's Committee on Business and Corporate Litigation," "Lee Applebaum, cochair 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."

[130] Roberts, *Getting Down to Business*, at 12.

[131] *Id.*

[132] *Id.*

[133] *Id.*

[134] Carmen Harper Thomas, *Re-Open for Business*, 26-Jan S.C. Law. 36, 38 (2015) (hereinafter "Thomas, *Re-Open for Business*").

[135] Lee Applebaum, Mitchell Bach, Eric Milby, Richard L. Renck, *Through the Decades: The Development of Business Courts in the United States of America*, 75 Bus. Law. 2053, 2066 (2020) (quoting Supreme Court of S.C., Administrative Order 2019-01-30-01 (Jan. 30, 2019)) (hereinafter "Applebaum, *Through the Decades*").

C. Jurisdiction

South Carolina's business court exists as a division "within the existing state circuit court system with jurisdiction over cases involving business issues."[136] Whereas some business courts have geographic specific jurisdiction, the business court in South Carolina is one which has statewide jurisdiction.[137] Initially, under South Carolina's Business Court Pilot Program, the court had jurisdiction "for 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 Section 15-7-100 of the South Carolina Code of Laws."[138] By 2014, South Carolina "had extended the pilot program to all counties in the state, which were grouped into three regions, with each region having one judge assigned to the pilot Program."[139] By 2017, "the Business Court Pilot Program had [further] expanded to ten judges in the three regions."[140]

For a case to get into South Carolina's Business Court Program, a party must make a motion for Business Court Assignment, which is done through Form SCCABC 101.[141] The motion for business court assignment can be made by "[a]ny party . . . with or without consent of all parties."[142] Pursuant to paragraph 3 of Form SCCABC 101, a party moving for case assignment to the Business Court Program must "[i]ndicate whether the non-moving party or parties consents, does not oppose, opposes, [or if their] position on assignment is unknown."[143] According to Order No. 2014-09-17-03, which is "the primary order establishing Business Court procedures, . . . '[c]ounsel shall request assignment of a case to the Business Court no later than 180 days after the commencement of the action,' but '[t]his requirement may be waived by the Business Court Judge.'"[144]

Paragraph 5 of Order No. 2019-01-30-01 specifies that "[w]ithout respect to the amount in controversy, civil matters in which the principal claim or claims are made under the following Titles of the South Carolina Code of Laws are appropriate matters to be assigned to the Business Court."[145] These include disputes concerning:

> (a) Business organizations (Title 33, South Carolina Business Corporation Act of 1988);

---

[136] Roberts, *South Carolina's Business Court Pilot Program*, at 31.

[137] Nees, *Making a Case for Business Courts*, at 513.

[138] Applebaum, *Through the Decades*, at 2066 (citing Supreme Court of S.C., Administrative Order 2007-09-07-01 (Sept. 7, 2007)).

[139] *Id.* (citing Supreme Court of S.C., Administrative Order 2014-01-03-02 (Jan. 3, 2014)).

[140] *Id.* (citing Supreme Court of S.C., Administrative Order 2017-12-20-02 (Dec. 20, 2017)).

[141] Thomas, *Re-Open for Business*, at 38.

[142] *Id.*

[143] Form SCCABC101, https://www.sccourts.org/forms/pdf/SCCABC101.pdf.

[144] Thomas, *Re-Open for Business*, at 38-39.

[145] Supreme Court of S.C., Administrative Order 2019-01-30-01 (Jan. 30, 2019).

(b) Securities (Title 35, South Carolina Uniform Securities Act of 2005 and Title 36, Chapter 8, South Carolina Uniform Commercial Code: Investment Securities);

(c) Anti-competitive claims (Title 39, Chapter 3, Trade and Commerce: Trusts, Monopolies, and Restraints of Trade);

(d) Trade secrets (Title 39, Chapter 8, Trade and Commerce: The South Carolina Trade Secrets Act); and

(e) Trademarks (Title 39, Chapter 15, Trade and Commerce: Labels and Trademarks).[146]

Furthermore, the Order allows jurisdiction "for such other cases as the Chief Business Court Judge may determine," which broadens the types of cases over which the business court can have jurisdiction.[147] As a result, even if a case is not based on the specific statutes listed above, it can still be deemed appropriate to be heard in the business court if the Chief Justice so determines.[148] Finally, unlike other business courts, South Carolina "does not require a minimum amount in controversy and does not require parties to waive their right to a jury trial."[149]

A list of the Business Court Judges currently serving is laid out in paragraph 4 of Administrative Order 2019-01-30-01.[150] These Business Court judges are also circuit court judges, and they oversee a Business Court Region "[i]n addition to their other duties as circuit court judges."[151] Because these judges have some responsibilities outside of the business court, "[t]he Chief Business Court Judge . . . review[s] the caseload activity of the Business Court Judges periodically during the program to ensure efficiency and appropriate use of judicial resources."[152]

D. Practice before the court

As previously noted, a case can get into the Business Court's "jurisdiction by following the procedures [for requesting assignment, as] explained in the order and on the application form, SCCA BC Form 101."[153] Additionally, "[t]he Chief Justice may also assign cases *sua sponte*" to the business court."[154] After "the Chief Justice approves the request, exclusive jurisdiction of the

---

[146] *Id.*

[147] *See id.*

[148] Roberts, *Getting Down to Business*, at 13.

[149] Andrew A. Powell, *It's Nothing Personal, It's Just Business: A Commentary on the South Carolina Business Court Pilot Program*, 61 S.C. L. Rev. 823, 831 (2010) (hereinafter "Powell, *It's Nothing Personal, It's Just Business*").

[150] Supreme Court of S.C., Administrative Order 2019-01-30-01 (Jan. 30, 2019).

[151] *Id.*

[152] *Id.*

[153] Roberts, *South Carolina's Business Court Pilot Program*, at 35.

[154] *Id.*

case is assigned to the business court judge" and "[f]rom there, the judge and the South Carolina Rules of Civil Procedure determine how the case moves forward."[155] When access to the Business Court was expanded in 2014, the procedures were improved relative to the original pilot program.[156] In 2014, the "Court Administration [also] issued a Uniform Procedure for Business Court Pilot Program ("Uniform Procedure") that is incorporated into the Clerk of Court Manual. Together, the 2014 orders and the Uniform Procedure provide instructions to lawyers seeking to move a case into the Business Court."[157]

After a particular case is assigned to one of the Business Court Judges, "the judge may hold a status conference, familiarize parties with the Business Court and the judge's Business Court preferences, set potential hearing dates and address any scheduling issues."[158] Additionally, as a procedural recommendation, the use of technology is encouraged in South Carolina's Business Court Program.[159] South Carolina Supreme Court Chief Justice Toal, who strongly encourages the judicial system to utilize technology more often, created South Carolina's Business Court Pilot Program.[160] Consistent with that goal, the order states that "the use of technology by parties in matters assigned to the Business Court is encouraged," and the presiding Business Court Judge has discretionary authority to determine "whether the use of technology in any proceeding or conference is warranted."[161] For a summary of the case management procedures used in South Carolina's business court, see "Management and Disposition Procedures for Business Court" in the South Carolina Supreme Court's Administrative Order 2019-01-30-01.[162]

E. Benefits for Business

Given "the complex relationships among businesses, suppliers, customers and everyone who depends on businesses," there was a "need[] for sophisticated dispute resolution" in South Carolina, which was best accomplished by the establishment of a business court.[163] There are multiple factors that ultimately helped to establish the permanence of South Carolina's business court.[164] Among other things, South Carolina's business court program has "provide[d] predictability, experience, and efficiency for litigants and the judiciary."[165] Furthermore, having a

---

[155] *Id.*

[156] Thomas, *Re-Open for Business*, at 38.

[157] *Id.*

[158] *Id.* at 40.

[159] *See* Supreme Court of S.C., Administrative Order 2019-01-30-01 (Jan. 30, 2019).

[160] Roberts, *South Carolina's Business Court Pilot Program*, at 31-32.

[161] Supreme Court of S.C., Administrative Order 2019-01-30-01 (Jan. 30, 2019).

[162] *Id.*

[163] Roberts, *South Carolina's Business Court Pilot Program*, at 32.

[164] *See* Powell, *It's Nothing Personal, It's Just Business*, at 835.

[165] Roberts, *South Carolina's Business Court Pilot Program*, at 32.

business court in the state has helped attract businesses to open operations there, further enhancing the state's economy.[166]

1. Predictability

Judge Roger Young, Charleston County's Business Court judge, stated that "[b]usinesses want predictability . . . . They want to know how they will invest in their future."[167] Certain provisions relevant to South Carolina's business court program help ensure such predictability remains intact.[168] Most prominently, "the program requires that all judges write opinions for Rule 12 and 56 motions and publish them on the court's Web site."[169] Additionally, [t]he Business Court judge is encouraged to issue written orders on other non-jury, pretrial matters."[170] The ongoing publication and collection of these motions and orders enables potential litigants to rely on precedent with confidence.[171] A group of "lawyers participating in the business court have [also] suggested that more written orders . . . help them better advise clients based on precedent."[172] Along with the publishing requirement, the same-judge, exclusive-jurisdiction characteristics of the business court model help to contribute consistency and predictability as caselaw develops in these complex business litigation matters.[173]

2. Experienced Judges

Assigning a single judge to a case throughout all stages of litigation provides for greater predictability and enhances the judge's expertise, resulting in the judge being "better suited to resolve the sophisticated issues that arise in complex litigation matters."[174] According to a series of surveys conducted with South Carolina lawyers involved with the Business Court, an evaluation committee reported "that lawyers perceive the greatest benefit of the Business Courts is having a single judge assigned to the case, followed by the judges experience with business issues."[175] Because of the deep knowledge and expertise of business court judges in complex litigation cases, they are better-equipped to accurately apply the law in making decisions as compared to

---

[166] *See id.* at 33.

[167] Powell, *It's Nothing Personal, It's Just Business*, at 836 (citing Schuyler Kropf, *Business Court to Get Trial Run*, Post & Courier (Charleston, S.C.), Oct 1, 2007, at 1A).

[168] *See id.*

[169] *Id.* (citing 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)).

[170] S.C. Misc. Orders Order No. 2017-02-08-02 (2017).

[171] Roberts, *South Carolina's Business Court Pilot Program*, at 32.

[172] Powell, *It's Nothing Personal, It's Just Business*, at 833.

[173] *See id.*

[174] *See id.*

[175] Thomas, *Re-Open for Business*, at 38.

nonspecialized judges, which is an attractive characteristic to businesses seeking an efficient resolution to litigation.[176]

3. Efficient Resolution

Under the initial Business Court Pilot Program in South Carolina, lawyers would have to transfer venue for their client's cases into one of the few approved counties, a complicated and inefficient process which deterred cases from getting into the business court.[177] Now, however, after the Supreme Court of South Carolina issued Administrative Order 2014-01-03-02, all counties throughout the state can participate in the business court program.[178] Widening the scope of the business court to all counties in the state created a level of procedural efficiency that did not exist before.[179] Also, as discussed previously, the enhanced predictability of business court decisions and in-depth experience of business court judges both enable judges to handle complex business litigation cases more efficiently than a traditional trial court.[180] Because of their enhanced familiarity with "the same complex corporate issues, [South Carolina Business Court judges] can address these issues more quickly than nonspecialized judges."[181] Furthermore, instead of wasting resources by having multiple judges preside over a case at different stages, which requires each of them to learn the case proceedings and facts at different times, "South Carolina's pilot program further encourages efficiency by requiring that the same judge preside over the entire disposition of a case."[182]

4. Attract Business

The existence of a business court entices out-of-state companies to move into a state and discourages in-state companies from leaving the state.[183] "Lee Applebaum, an attorney who has written extensively in support of business courts," provides a well-articulated explanation of why having a business court is a positive source of economic development:

> [C]ompetitive implications between cities and states are undeniable. The business court becomes a means to give businesses and their lawyers confidence that business and commercial disputes will be decided with informed and deliberate reasoning. This adds a component of stability to a state, region, or city that wants to keep or attract businesses. If a city or state has such a court, and its neighbor does not, that neighboring city or state may come to sense a potential disadvantage. The

[176] Powell, *It's Nothing Personal, It's Just Business*, at 839.

[177] *See* Thomas, *Re-Open for Business*, at 38.

[178] *See* Supreme Court of S.C., Administrative Order 2014-01-03-02 (Jan. 3, 2014).

[179] *See* Thomas, *Re-Open for Business*, at 38.

[180] *See* Powell, *It's Nothing Personal, It's Just Business*, at 831.

[181] *Id.*

[182] *Id.*

[183] John F. Coyle, *Business Courts and Interstate Competition*, 53 WM & Mary L. Rev. 1915, 1935 (2012).

concentration of business courts along the East Coast may be explained, in some part, by this potential for competitive disadvantage.[184]

Even though "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," or in other states with a business court.[185] Businesses consider many factors in deciding where to expand operations, and states with a business court may be one enticing factor companies use in making that analysis.[186] For example, the Hon. Ben F. Tennille, who was the first business court judge in North Carolina, described how "PepsiCo ultimately decided to reincorporate in North Carolina and possibly considered the business court as one of many factors in making that decision."[187] Since North Carolina has been considered by some to be "the current gold standard in established non-Delaware business courts," it is likely that South Carolina's decision to implement a business court system has been influenced by the successes seen in North Carolina.[188]

F. Items for Consideration

A few other notable items from South Carolina's Business Court Program include the benefits of collaboration between different parties and associations, the satisfaction of involved attorneys, and how South Carolina has responded to common business court criticisms, such as potential bias towards businesses and the concern of forum shopping.

1. Collaboration and Uniformity

A good indicator of the quality of a business court is whether it collaborates with other "multi-disciplinary, oversight, or multi-interested parties" such as "a bar association, a higher court, or a similar oversight body."[189] Several states, including South Carolina, collaborate with such parties.[190] This type of collaboration helps "predict cohesion among a business court and the state's overall structure . . . , [which] should prevent a business court from being skewed too far towards business interests, isolated, or operating in a way that erodes or is inconsistent with the rights, obligations, or interests of non-business court parties."[191] Furthermore, even though South Carolina's business court operates in multiple locations, it "operate[s] under a unified system with

---

[184] *Id.* at 1937-38. (citing Applebaum, *The "New" Business Courts*, at 16).

[185] Roberts, *South Carolina's Business Court Pilot Program*, at 33.

[186] *Id.*

[187] *Id.* (explaining that "Judge Tennille also described the efforts of the N.C. Commission on Business Laws and the Economy, which recommended creation of [North Carolina]'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.").

[188] *See* Nees, *Making a Case for Business Courts*, at 479.

[189] Nees, *Making a Case for Business Courts*, at 522.

[190] *Id.*

[191] *Id.*

shared oversight, rules, procedures, and websites," which helps to "enhance[] the public's perception of the courts within the state."[192]

2. Lawyer Satisfaction

Lawyers in South Carolina have expressed their appreciation in having a Business Court. Specifically, lawyers have "most appreciated the opportunity to have a single judge assigned to their cases, with 95 percent of survey responses indicating this was a factor in their decision to move for assignment."[193] Since Business Court judges have exclusive jurisdiction of a case after it is "assigned to the business court, the same judge will manage the case from discovery through trial," which provides continuity, predictability, and consistency.[194] Along with this positive characteristic of South Carolina's Business Court, "[t]he next two most important factors" identified by South Carolina lawyers "were the potential for the judge to have experience in business issues and the opportunity for efficient resolution of the case."[195]

3. Court's Bias

One of the prevailing criticisms of business courts are that they "may be biased in favor of business interests" and against non-business parties.[196] However, two different groups of survey respondents in South Carolina indicate otherwise.[197] First, in a survey of "South Carolina lawyers who had moved for Business Court assignment," 46 percent agreed that "the Business Court was a fair option for a non-business party," with 33 percent indicating "neutral" on the issue and nobody disagreeing.[198] Second, "[a]mong members of the S.C. Association for Justice who responded to a similar survey . . . 67 percent thought the Business Court would be as fair to a non-business party as a business party (24 percent were neutral and [only] eight percent disagreed)."[199] Furthermore, the presumption of a bias in favor of business interests is "unfounded because it assumes that noncommercial cases will find their way into the business court," but due to "the jurisdictional parameters in the administrative order, noncommercial cases are unlikely to be assigned to the business court" in the first place.[200]

4. Forum Shopping

Another common criticism of business courts is the risk of forum shopping, and that "[l]itigants may structure pleadings, decide where to file, or bifurcate portions of an action in order

---

[192] *Id.* at 523.

[193] Roberts, *Getting Down to Business*, at 14.

[194] Roberts, *South Carolina's Business Court Pilot Program*, at 32.

[195] Roberts, *Getting Down to Business*, at 14.

[196] Thomas, *Re-Open for Business*, at 38.

[197] *Id.*

[198] *Id.*

[199] *Id.*

[200] Roberts, *South Carolina's Business Court Pilot Program*, at 33.

to keep the case within the desired court, all of which undermine any resource savings achieved through the concentration of resources in specialized courts."[201] Furthermore, "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."[202] However, South Carolina's Business Court Program has "attempt[ed] to resolve these issues by allowing the chief justice to transfer cases from general trial court to the business court sua sponte."[203] This active monitoring and transferring of general trial court cases should eliminate the risk of forum shopping within a state.[204]

V. NEW YORK COMMERCIAL DIVISION

A. Purpose

The purpose of the New York Commercial Division is to promote "the cost-effective, predictable and fair adjudication of complex commercial cases."[205]

B. Formation

The Commercial Division began as a judicial experiment in the early 1990s. The experiment was designed to test whether "concentrating" commercial litigation would result in increased efficiency and quality in judicial decision-making.[206] Judges and commercial litigators reacted positively during and at the conclusion of the trial period, having seen both efficiency and quality improve. In response, the Commercial and Federal Litigation Section of the New York State Bar Association recommended formalizing a commercial litigation component of the state court system by establishing a "Commercial Division of the Supreme Court."[207]

Thereafter, the Chief Judge of the New York Supreme Court created a Commercial Courts Task Force, led by two judges, to examine the bar association's recommendation. The task force followed the report's lead and proposed that a "Commercial Division" be established in "appropriate" jurisdictions throughout the state, known for hearing complex commercial matters.[208] Accordingly, in November 1995, the New York Commercial Division was established by order of the Chief Judge of the New York Supreme Court system, and the first two Commercial Division courts opened in Monroe County and New York County shortly thereafter.[209]

---

[201] Nees, *Making a Case for Business Courts*, at 497.

[202] Powell, *It's Nothing Personal, It's Just Business*, at 839.

[203] *Id.*

[204] *Id.*

[205] N.Y.C.R.R. § 202.70(g).

[206] COMMERCIAL DIVISION N.Y. SUPREME COURT, *History*, http://ww2.nycourts.gov/courts/comdiv/history.shtml (last visited June 20, 2022) (hereinafter "COMMERCIAL DIVISION, *History*").

[207] *Id.*

[208] *Id.*

[209] *See id.*

While the Commercial Division's primary goals continue to be efficiency and fairness, over time, the Division's purpose has expanded. A major Commercial Division incentive has become "attract[ing] business disputes and businesses" to New York.[210] While judges remain neutral, they also recognize the Commercial Division's importance to the state's long term success: "we cannot overstate the importance to New York State generally — its economy and its vitality — of maintaining a first-rate court system."[211] Additionally, the Commercial Division has embraced an "incubator" role."[212] Innovative rules and technology are introduced in the division and later serve as a "model for broader reform" throughout the state's other courts.[213]

C. Jurisdiction

Currently, nine counties and two judicial districts have their own Commercial Divisions; however, the state continually assesses the need for division expansion. As a baseline, the Supreme Court concentrates Commercial Division courts in areas with higher amounts of business activity and commercial disputes.[214] Then, the Office of Court Administration collects statewide Supreme Court case data and statistics to inform both further Commercial Division expansion and the division's resource allocation generally.[215] In addition, commercial bar groups advocate for division growth as needed.[216] Still, no matter how many courts are added within the division, a common set of standards and rules govern them all. While individual judges may supplement the standards with their own nuanced procedure, the Commercial Division's Uniform Standards of Cases & Rules of Practice governing jurisdiction are consistent statewide.

1. Amount in Controversy

First, each county and district has its own monetary threshold that must typically be met to request judicial intervention within the Commercial Division. The minimum threshold excludes punitive damages, interest, costs, disbursements, and counsel fees:[217]

Albany County	$50,000
Bronx County	$75,000

[210] The Chief Judge's Task Force on Commercial Litigation in the 21st Century, *Report and Recommendations to the Chief Judge of the State of New York*, COM. DIV. N.Y. CNTY 1, 1 (2012), http://ww2.nycourts.gov/courts/comdiv/ny/newyork.shtml (hereinafter "Chief Judge's Task Force, *Report and Recommendations*").

[211] *Id.* at 4.

[212] Chief Administrative Judge of the New York Courts, Administrative Order 270-20 (Dec. 29, 2020).

[213] Chief Judge's Task Force, *Report and Recommendations* at 1.

[214] *See* COMMERCIAL DIVISION, *History*.

[215] *See id.*

[216] *See id.*

[217] N.Y.C.R.R. § 202.70(a).

Eighth Judicial District	$100,000
Kings County	$150,000
Nassau County	$200,000
New York County	$500,000
Onondaga County	$50,000
Queens County	$100,000
Seventh Judicial District	$50,000
Suffolk County	$100,000
Westchester County	$100,000

2. Subject Matter

Second, the division standards specify a list of "principal claims" that qualify for jurisdiction. Parties must either meet the monetary threshold, or seek equitable or declaratory relief under one or more of the 12 named sub-categories.[218] Some matters that must meet the monetary threshold include transactions governed by the Uniform Commercial Code, the internal affairs of business organizations, and breach of contract or fiduciary duty.[219] In contrast, matters dealing with shareholder derivative actions, commercial class actions, and dissolution of corporations do not carry the amount in controversy requirement.[220] The division standards are also explicit in naming matters that will not, alone, qualify for commercial judicial intervention, including disputes over residential real estate property rent payments, proceedings to enforce a judgement generally, and first-party insurance claims by insurers to collect premiums or rescind non-commercial policies.[221] However, efficiency dictates that qualifying matters get parties in the division's door in which case non-qualifying matters may also be litigated.[222]

3. Large Complex Case list:

Recently, the Commercial Division launched a complex case pilot program in New York County (home to Manhattan). To qualify for the special docket, a case must have a $50 million amount in controversy or deal with sufficiently complex or important issues that warrant

[218] N.Y.C.R.R. § 202.70(b)(1–12).

[219] *See* N.Y.C.R.R. § 202.70(b)(1, 2, 7).

[220] *See* N.Y.C.R.R. § 202.70(b)(4–5, 11).

[221] *See* N.Y.C.R.R. § 202.70(c)(3, 5–6).

[222] *Id.*

augmented case management.[223] County judges have discretionary authority in determining whether an issue is sufficient and warrants being added to the docket.[224]

4. Assignment

Any party may seek assignment of a case to the Commercial Division within the 90 days following service of the complaint. The party must file a Request for Judicial Intervention ("RJI") that attaches a completed Commercial Division RJI Addendum "certifying that the case meets the jurisdictional requirements" set forth by the rules. A party must file an RJI to enter the commercial division or will be precluded from doing so.[225] Three exceptions to this general rule also allow cases to reach the division including (1) administrative error, (2) transfer from a non-commercial supreme court venue, and (3) the parties' forum selection.

First, a party may be allowed into the Commercial Division for RJI error or "good cause shown" for missing the 90-day window. The Supreme Court's Administrative Judge has sole authority and discretion to grant exceptions based on administrative error.[226] Second, a non-commercial Supreme Court judge may *sua sponte* request the Administrative Judge transfer a case to the Commercial Division, if it meets the aforementioned subject matter and monetary threshold requirements.[227] Lastly, New York General Obligations Law, Section 5-1402, permits any party, including non-U.S. persons or entities, to bring an action in New York courts where parties enter an agreement that "(i) selects New York law to govern the contract; (ii) selects New York courts as the forum for the resolution of their dispute, or otherwise consents to the jurisdiction of the New York courts; and (iii) involves an amount in excess of $50,000 U.S. dollars."[228] Since the law applies to New York courts generally, parties must still meet commercial jurisdiction requirements to appear before that division.

D. Judges

1. Election

New York Supreme Court Judges are elected to represent their judicial districts when a vacancy in that district occurs. In order to seek nomination, judges must have been admitted to

---

[223] *See* SUPREME COURT OF N.Y., Administrative Order 203-17 (Jan. 1, 2018); *see also* Patrick G. Rideout, *New York's Commercial Division Continues its Efforts to Increase Efficiencies*, SKADDEN, ARPS, SLATE, MEAGHER & FLOM, LLP (Sep. 24, 2018), https://www.skadden.com/insights/publications/2018/09/quarterly-insights/new-yorks-commercial-division-continues (hereinafter "Rideout, *Commercial Division Continues its Efforts*").

[224] *Id.*

[225] N.Y.C.R.R. § 202.70(d).

[226] N.Y.C.R.R. § 202.70(e).

[227] *See id.*

[228] Hon. Barry R. Ostrager, *New York's Commercial Division: The Premier Forum for the Resolution of International Business Disputes*, N.Y. STATE BAR ASS'N (May 2020), https://nysba.org/new-yorks-commercial-division-the-premier-forum-for-the-resolution-of-international-business-disputes/ (hereinafter "Ostrager, *New York's Commercial Division*").

practice law in New York for 10 years.[229] In New York, Democratic Party candidate nomination nearly always guarantees election, so the Democratic nomination screening process is extremely well established, particularly in Manhattan.[230] Screening panels are comprised of a rotating list of volunteer members who represent vastly diverse organizations within the district.[231] The top three "Most Highly Qualified" candidates are "reported out" of the screening panel and compete for the Party's nomination.[232] Once elected, a Supreme Court judge's term length is 14 years.[233] Although the Commercial Division selection process does not seem to be formally codified, most division judges appear to be appointed through the acting judge appointment process outlined below. Accordingly, most commercial judges appear to have made lateral moves from other judicial appointments within the state. Candidates for the Commercial Division are "sophisticated and experienced jurists with deep experience handling complex commercial disputes."[234] With a singular commercial focus, judges are expected to devote their full attention to understanding the intricacies of complex agreements and transactions, and [keep] up to date on the latest legal developments impacting business relations."[235] Such specialization allows judges to anticipate legal issues and provide proactive advice to litigants.[236]

2. Acting Judge Appointment

Acting judges are appointed by the Chief Administrator of the Courts upon consultation and agreement with the presiding justice of the appropriate Appellate Division.[237] Selection is made from recommendations provided by a panel of judges and administrators who consult with other New York administrative judges, bar associations, and additional appropriate persons and groups to consider "the productivity, scholarship, temperament, and work ethic of eligible candidates and any complaints made against the judge being considered."[238] Seniority is also a

[229] *See* N.Y. CONST. art. VI § 20(a).

[230] *See* Counsel on Judicial Administration, *Judicial Selection Methods in the State of New York: A Guide to Understanding and Getting Involved in the Selection Process*, N.Y. CITY BAR ASS'N. 1, 16 (Mar. 2014), https://www2.nycbar.org/pdf/report/uploads/20072672-GuidetoJudicialSelectionMethodsinNewYork.pdf) (hereinafter "Counsel on Judicial Admin., *Judicial Selection Methods in N.Y.*").

[231] *See id.* at 42 (organizations that have been asked to contribute panel members include minority bar associations, women's bar associations, and national origin-affiliated bar associations).

[232] *Id.*at 14.

[233] N.Y. CONST. art. VI § 6(c).

[234] Ostrager, *New York's Commercial Division*.

[235] *Id.*

[236] *Id.*

[237] *See* Counsel on Judicial Admin., *Judicial Selection Methods in N.Y.* at 10.

[238] *Id.*

factor and any judge being considered for an acting role must have two years of experience in a New York court of limited jurisdiction.[239]

E. Practice before the court.

The New York State Court Rules of Part 202 apply broadly to the Commercial Division but since the beginning, the Commercial Division has implemented rules, procedures, and forms "especially designed to address the unique problems of commercial practice." The rules are intended to "maximize efficiency and ensure prompt resolution" of matters.[240]

1. Electronic Filing

One example is the rule requiring Commercial Division matters to utilize the New York State Courts Electronic Filing ("NYSEF") system.[241] To further enhance efficiency and transparency, electronically submitted memoranda must include internal bookmarks and hyperlinks to any NYSEF documents previously filed in the case.[242] Hyperlinks to discovery documents remove redundancy in providing exhibits and save time.

Additionally, the rules seek proportionality in discovery and discuss the Discovery of Electronically Stored Information ("ESI") in detail.[243] Appendix A of the Commercial Rules contains specific ESI Guidelines. And although the ESI Guidelines are advisory, they are quickly becoming the division standard.[244] Other rule sections emphasize and encourage party use of technology-assisted review ("TAR") of documents, including ESI.[245] New TAR methods include keyword searching, concept searching, email threading, near-duplicate identification, clustering, and predictive coding.[246] While new technologies always require some fine tuning, they show promise in simplifying document-intensive, multi-party commercial disputes.[247]

2. Optional Accelerated Adjudication and Streamlined Discovery

Further efficiency is promoted by Rule 9 which allows parties to consent via contract to an "accelerated judicial process" informally known as the "Rocket Docket." [248] On the Rocket Docket, a case can be ready for trial within nine months. Alternatively, parties must adhere to a

---

[239] *See id.*

[240] N.Y.C.R.R. § 202.70(g)(2).

[241] *See* NEW YORK STATE COURTS ELECTRONIC FILING SYSTEM, https://iapps.courts.state.ny.us/nyscef/HomePage (last visited Jul. 7, 2022).

[242] *See* N.Y.C.R.R. § 202.70(g), Rule 6.

[243] *See* N.Y.C.R.R. § 202.70(g), Rule 11.

[244] Rideout, *Commercial Division Continues its Efforts*.

[245] *See* N.Y.C.R.R. § 202.70(g), Rule 11-e(f).

[246] *See* Rideout, *Commercial Division Continues its Efforts*.

[247] *See id.*

[248] N.Y.C.R.R. § 202.70(g), Rule 9.

myriad of other discovery limitations designed to get at the heart of a matter, including robust expert disclosures and limits on depositions and interrogatories.[249] Discovery rules also streamline privilege logs requiring parties to meet and confer to categorize privileged documents into classes, further saving time.[250]

When disputes arise in discovery the division is committed to expedited resolution.[251] For example, disputes should generally be resolved via court conference as opposed to motion practice.[252] Parties must meet and confer first, and if unable to resolve the dispute, must submit a letter outlining the dispute (three single space pages maximum) and requesting a telephone conference. The relevant opposing party or non-party shall submit a responsive letter no later than four business days later.[253] The preference is for the presiding judge to conduct a telephone or in-court conference with the parties to clearly parse the issues and quickly resolve the dispute.

Several other division standards aid in the efficient resolution of all commercial matters. Notable procedures include time limits on all trials, streamlined presentation of evidence, word limitations on motion papers, direct witness testimony by affidavit only, and a strong commitment to early case disposition through Alternative Dispute Resolution ("ADR") (settlement conferences and mediation by a trained neutral).[254]

F. Benefits to Business

1. Efficiency

Commercial court rules have attracted businesses for their characteristic efficiency and predictability. "[M]ore than 90% of business disputes end in a settlement," but businesses often complain about the high cost of getting to that point.[255] The Commercial Division judges expertly hone issues and encourage ADR to resolve matters in a cost-effective way.[256] Applied together, the Commercial Division's rules, procedures, and forms are all designed to streamline the litigation process to "attract business disputes and businesses" into New York's jurisdiction. An efficient court system "serves the state's economic interests and increases demand for the services of New York attorneys."[257] As evidence of this demand, a 2009 study showed that New York law is

[249] *See* N.Y.C.R.R. § 202.70(g), Rule 11.

[250] *See* N.Y.C.R.R. § 202.70(g), Rule 11(b).

[251] *See* N.Y.C.R.R. § 202.70(g), Rule 14.

[252] *See id.*

[253] *See id.*

[254] *See id.*

[255] Chief Judge's Task Force, *Report and Recommendations* at 25.

[256] *See id.*

[257] Geoffrey P. Miller & Theodore Eisenberg, *The Market for Contracts*, 30 CARDOZO L. REV. 2073, 2073 (2009) (demonstrating the "existence of a robust market for choices of law and forum in major corporate contracts).

selected in greater than 45 percent of material contracts of public companies and its forum is selected in 41 percent of the contracts that specify a forum.[258]

Even with proven success, New York continually strives to attract global businesses and compete with other commercial courts such as Delaware's Chancery Court and the Commercial Court in London.[259] The Large Complex Case List is an example of New York's continued effort and innovation. Complex cases may take advantage of several procedural enhancements including the assignment of a special referee, akin to a federal magistrate, with experience in discovery disputes, free mediation and settlement judges, and active case management all aimed at reducing delays.[260]

2. Predictability

Moreover, predictability continues to draw business to New York courts. New York offers a "stable and reliable body of law for business contracts."[261] New York is known as a "strict enforcement" jurisdiction where business parties can count on judges to take a "text-based" approach to interpreting disputes.[262] Judges applying New York law focus on the intent of the parties as expressed by the words parties select in their agreements.[263] Additionally, all division court opinions are published and searchable by keyword, in addition to case number or party.[264] Because businesses, attorneys, and academics have easy access to opinions, they also have the opportunity to resolve disputes without court involvement and know what to expect when intervention is required.

New York also makes it easy for parties to select their forum for litigation. Example forum selection clauses are included as Appendices to the Commercial Division rules.[265] Further, companies, and particularly foreign entities, do not need any contacts within New York to contractually agree to having the state as their forum or governing law of choice.[266]

Finally, the Commercial Division offers a neutral forum for disputes. "[E]nsuring neutrality, especially in the context of high-profile international disputes, is especially important,

---

[258] *See id.* at 2074.

[259] *See* Rideout, *Commercial Division Continues its Efforts*.

[260] *See id.*

[261] Ostrager, *New York's Commercial Division*.

[262] *Id.*

[263] *See id.*

[264] *See* Search New York Slip Decisions, https://iapps.courts.state.ny.us/lawReporting/Search (last visited Jul. 7, 2022).

[265] *See* N.Y.C.R.R. § 202.70, Appendix C–D.

[266] *See* Ostrager, *New York's Commercial Division*.

and a neutral third-country [or party] adjudicator brings greater legitimacy and certainty to the outcome."[267]

3. Technology

In addition to ESI TAR tools and maintaining an electronic filing system, the commercial Division has also incorporated technology called the "Courtroom for the New Millennium" or "Courtroom 2000." Courtroom 2000 innovations have "reduced the average trial time of civil cases by as much as 25 percent" and have led to more accurate decision-making processes.[268] Courtroom 2000 has proven especially useful in commercial cases involving massive volumes of documentary evidence, allowing evidence to be incorporated into easily displayed databases.[269] High-tech tools in the modern courtroom include document cameras, video conferencing, multiple "zoom-in" capable flat screen devices, and docking stations at counsel tables with full monitor connectivity.[270] Beyond its current technological capabilities, the division receives continued feedback on incorporating emerging technology from its Advisory Council, ultimately striving to be the "most attractive forum" for businesses.[271]

G. Items for Consideration

1. Advisory Counsel

The Commercial Division Advisory Council reports on more than just technology, remaining "broadly devoted to the division's excellence."[272] The council is appointed by the Chief Judge of the State of New York and "is comprised of respected members of the New York Commercial Bar, corporate in-house counsel from the world's leading companies, and current and former members of the judiciary."[273] The Advisory Council ensures that the division stays on par with or ahead of business developments and accommodates the business market's growing need for legal services. The Advisory Council is a key reason why the Commercial Division is the "recognized leader in court system innovation, demonstrating an unparalleled creativity and flexibility in development of rules and practices."[274]

2. Alternative Dispute Resolution ("ADR")

---

[267] *Id.*

[268] Hon. Martin E. Ritholtz & Rebecca C. Smithwick, *Techniques for Expediting and Streamlining Litigation*, *in* N.Y. PRAC. GUIDE, COMMERCIAL LITIGATION IN NEW YORK STATE COURTS (Robert L. Haig ed., 5th ed. 2020).

[269] *See id.*

[270] *See id.*

[271] Ostrager, *New York's Commercial Division*.

[272] N.Y.C.R.R. § 202.70(g)(2).

[273] Ostrager, *New York's Commercial Division*.

[274] N.Y.C.R.R. § 202.70(g)(2).

One product of that creativity is the division's robust ADR program. The Commercial Division rules provide that at any stage in the matter, the court may direct, or counsel may seek, the appointment of a mediator or neutral evaluator to attempt resolution of all or some issues in the case.[275] The division preference is for parties to elect this option early on to "explore the possibility of settlement," potentially saving money that would be spent in the discovery process.[276] Once parties elect ADR, a mediator or neutral will be designated by the Administrative Office ADR Coordinator, however, parties may confer and select their own agreed- upon candidate.[277]

Neutral roster candidates must have 10 years of experience as a practitioner of commercial law and 40 hours of Part 146 approved mediation training (24 hours in basic mediation training and 16 hours in commercial mediation techniques). Prior mediation experience is preferred, but not required.[278]

The ADR process follows a strict timeline. The parties' first ADR session must occur within 30 days from the date the mediator is confirmed, and the entire mediation process should conclude within 45 days.[279] Parties are mandated to attend the first three hours of mediation, during which there is no charge for the mediator.[280]

In addition to mediation, the rules mandate that every case pending in the Commercial Division must participate in a court-ordered mandatory settlement conference following the matter's certification for trial, or any time after the discovery cut-off date. Mandatory conferences can follow one of four tracks: (1) a settlement conference before the assigned judge or another division judge, (2) referral by the assigned judge to a Judicial Hearing Officer or Special Referee, (3) referral by the judge to the Supreme Court ADR Coordinator who will assign a neutral from the county's roster, or (4) mutual agreement by the parties to engage a private neutral. [281] Thus, multiple opportunities exist for parties to target key issues in the case and resolve disputes in a timely and cost-effective manner.

Although Utah is not on par with New York as a global business headquarters, Utah can turn to New York as a model of best practices and standards. Foremost, the Advisory Counsel provides invaluable input for New York's Commercial Division, ensuring commercial judges and courts do not become siloed or stale in their view of commercial disputes and how they relate to other areas of the law. The commercial standards and rules are largely based on Advisory Counsel feedback and create a framework for what is expected from all parties during each phase of litigation. Notably, the emphasis on prompt discovery dispute resolution, mediation, and

[275] N.Y.C.R.R. § 202.70(g), Rule 3.

[276] COMMERCIAL DIVISION – NEW YORK COUNTY, *ADR Overview*, ww2.nycourts.gov/courts/comdiv/ny/ADR_overview.shtml (last visited June 24, 2022).

[277] *See id.*

[278] *Id.*

[279] *Id.*

[280] *Id.*

[281] N.Y.C.R.R. § 202.70(g), Rule 30.

settlement conferences encourages collegiality with an eye toward early resolution, enabling all parties to get back to business quickly. Additionally, while Utah should identify its own most common commercial litigation causes of action, New York's enumerated list could provide a helpful guide. Above all, New York has succeeded in attracting business and business litigation to the state. This purpose guides much of what New York has done in the past 27 years and can inspire Utah as it explores ways to streamline commercial litigation.

VI. UTAH BUSINESS COURT

Before preparing a Utah specific recommendation, the following should be considered:

a. Utah constitution. Courts of record may be established by the legislature. Utah Const. Art VII, Section 1.

b. How would a business court impact current case law, precedent, statutes and model rules?

Non-jury bench trials are appealing to many business courts and can be an option for Utah's business court, regardless of whether the court is a division within the existing district court, or if it is a new, separate court. First, the clearest way to have a non-jury court is to require that both parties waive their right to a jury trial. The U.S. Constitution only preserves a right to trial by jury for civil cases in the federal court system,[282] but the Utah Constitution provides that "[a] jury in civil cases shall be waived *unless demanded*."[283] If either party wants to demand a jury trial, they will still have the venue to do so in any of the state district courts of general jurisdiction. However, if they want to have their case tried in the business court, they will need to consent to waive the ability to demand a trial by jury.

This waiver requirement to use the business court would enable any party to object to the venue of the business court by simply demanding a jury. There are pros and cons to this depending on the goals of the business court. On the one hand, if the business court is designed to only adjudicate business disputes between entities that choose to be in business court, only willing litigants will be in this court. On the other, if there is a broader jurisdictional requirement for the business court such that individuals are allowed to adjudicate their claims, individuals may choose to demand a jury and gain leverage by avoiding the business court.

Second, a less clear and perhaps disputable way to create a court without a jury, and without requiring the parties to waive their jury demand right, is for the Legislature to pass a statute establishing that there is no jury in business court. The Utah Constitution allows the Legislature to establish the number of jurors in civil cases.[284] Pursuant to this instruction, Utah Code Ann. § 78B-1-104 provides that there is no jury trial for small claims cases and in certain criminal offences

[282] *See* U.S. CONST. amend. VII.

[283] UTAH CONST. art. I, § 10 (emphasis added)

[284] *See* UTAH CONST. art. I, § 10.

involving minors. This concept should be explored as an opportunity to codify the requirement that there is no jury in business court.[285]

c. Appointment process, term limits, and retention elections. Consider that in Utah, every judge in a court of record shall be subject to a retention election. Utah Const. Art. VIII, Sect 9.

Retention elections for judges are mandated by the Utah Constitution:

> "Each appointee to a court of record shall be subject to an unopposed retention election at the first general election held more than three years after appointment. Following initial voter approval, each Supreme Court justice every tenth year, and ***each judge of other courts of record every sixth year***, shall be subject to an unopposed retention election at the corresponding general election. Judicial retention elections shall be held on a nonpartisan ballot in a manner provided by statute. If geographic divisions are provided for any court of record, the judges of those courts shall stand for retention election only in the geographic division to which they are selected."[286] (emphasis added.)

In addition to the Utah Constitution, Utah Code Ann. § 20A-12-201(1)(a)-(b) includes similar language:

> (1)(a) Each judicial appointee to a court is subject to an unopposed retention election at the first general election held more than three years after the judge or justice was appointed.
>
> (b) After the first retention election:
>
> > (i) each Supreme Court justice shall be on the regular general election ballot for an unopposed retention election every tenth year; and
> >
> > (ii) each judge of other courts shall be on the regular general election ballot for an unopposed retention election every sixth year.

Furthermore, the statute provides additional procedures that must be followed by judges who seek to retain office, such as filing a declaration of candidacy with the lieutenant governor and paying a filing fee.[287] More procedures about the lieutenant governor's responsibilities, along with details regarding the election ballots, are outlined in Utah Code Ann. § 20A-12-201(3)-(4).

d. Evaluate other considerations for attracting top tier talent.

e. Clerks. What resources would be required to meet the purpose of a business court?

---

[285] *See* UTAH CODE ANN. § 78B-1-104(1).

[286] UTAH CONST. art. VIII, § 9 (emphasis added).

[287] UTAH CODE ANN. § 20A-12-201(2)(a)-(b).

f. Statewide jurisdiction and how to invoke. Consider that "[g]geographic divisions for all courts of record except the Supreme Court may be provided by statute." Utah Const. Art VIII, Sect 6.

Without the creation of a new court by the Legislature, Utah is presently limited to creating divisions within the existing district system. In other words, the Third District could establish a commercial division, but the division's jurisdiction would be limited to the Third District alone. Still, this could be an option for a pilot program, with the understanding in the remaining seven districts, that a commercial division of statewide jurisdiction would be forthcoming. Also, the states we researched seemed to find that single-county jurisdiction carried far beyond county lines given the likelihood of businesses statewide having minimum contacts with commercial centers, like Salt Lake City.[288] It is unclear whether this provision references subject matter jurisdiction *and* geographic jurisdiction. But considering districts have drug courts, it seems like the prohibition limits only geographic jurisdiction.

The Legislature could then establish a commercial division at the conclusion of the pilot program. There seem to be two paths to do this:

(1) Allow for the creation and expansion of commercial divisions in each of the eight districts, following the drug court and veteran's court models. This path would continue to preclude statewide jurisdiction (in theory although, perhaps not in practice).[289]

(2) Modify the geographic division of the district courts, as applied to a commercial/business division. This could likely entail adding an exception to Utah Code Ann. § 78A-5-103(3) to allow for statewide jurisdiction of a commercial division, centrally located in Salt Lake County, to serve the complex commercial litigation needs of Utah's businesses.[290]

Or, as mentioned above, the Legislature could establish a separate commercial/business court independent of the existing district court system.[291]

---

[288] *See id.* § 78A-5-103(3) (although District Court Case Management law permits a district court to "establish divisions within the court for the efficient management of different types of cases," divisions may not "affect the jurisdiction of the court").

[289] *See id.* §§ 78A-5-201–02, §§ 78A-5-301.5–13 (sections corresponding to drug court and veteran's court expansion).

[290] *See* UTAH CONST. art. VIII, § 6 ("Geographic divisions for all courts of record except the Supreme Court may be provided by statute"); *see also* UTAH CODE ANN. § 78A-5-101(2) (establishing district courts shall be located "in the county seat of each county"); *but see* UTAH CODE ANN. § 78A-5-103(3) (allowing for district courts to establish divisions within their district as long it does not "affect the jurisdiction of the court")

[291] *See id.* § 1 ("[t]he judicial power of the state shall be vested in a Supreme Court, in a trial court of general jurisdiction known as the district court, *and in such other courts as the Legislature by statute may establish*") (emphasis added).

g. Name of the business court.

The name of the court should depend on its makeup. If the court is going to maintain a true divide only hearing equitable claim, like the Delaware Court of Chancery, it should be called the Utah Chancery Court or Chancery Court of Utah. Having "chancery" in the name will give the court recognition as being an equitable court only given the reputation of the Delaware Court of Chancery. Likewise, judges should be called Chancellor and Vice Chancellors.

However, if the court will maintain jurisdiction over both equitable and legal claims and relief, it could be called a Business Court or Commercial Court (if it's a separate court), or Commercial Division or Business Division (if it's a division within the existing district court).