

Adam Doerr



Original Jurisdiction:

How NC's Business Court became a model of its own

The Delaware Chancery Court proclaims its “unique competence in and exposure to issues of business law,” and justifiably so, as the court tasked with deciding many of the largest corporate law disputes in the United States. In addition to making it a model for business courts in other states, including North Carolina, the Chancery

such direct comparisons are relatively meaningless. Rather, the point is that incorporations and business are two very different things. The Chancery Court’s reputation developed from its expertise in resolving disputes relating to companies incorporated in Delaware. Its biggest cases, from takeover battles in the 1980s to litigation over the hiring

In 1994, Gov. James B. Hunt created the North Carolina Commission on Business Laws and the Economy to make recommendations to improve the state’s business climate. The commission’s 1995 report recommended the creation of a business court. The commission viewed this as an opportunity for North Carolina: despite the success of the Chancery Court, no other state had worked to emulate its responsiveness and predictability. In 1995, the legislature added the funds for an additional state Superior Court judge, which was the beginning of the Business Court.

The Court’s first judge, Benjamin Tennille, was appointed in January 1996 to a court with no office, no staff and no budget. He spent years building the Court’s reputation and developing its infrastructure, including court rules, staff and an electronic filing system. In 2006, the Court added two new judge-ships. The current Court is comprised of Chief Judge James L. Gale in Greensboro, Judge Louis Bledsoe in Charlotte and Judge Gregory McGuire in Raleigh. Each has a dedicated chambers and staff, including law clerks, as well as courtrooms equipped with advanced technology. Gov. Pat McCrory recently appointed Winston-Salem attorney Michael Robinson to fill a fourth seat, pending confirmation by the legislature, and a fifth judge has been authorized.

In 2014, the legislature expanded the Court’s docket. With these changes, the

The North Carolina Business Court has become a national model in resolving contract, trade secret and other major business litigation.

Court’s distinguished reputation has earned it a starring role in Delaware’s efforts to market itself as a location for business incorporation. Those efforts have been extraordinarily successful — nearly two-thirds of Fortune 500 companies are incorporated in Delaware, and the state formed 169,000 new business entities in 2014. In fact, the number of Delaware corporations and LLCs now exceeds the state’s human population.

But when it comes to business, not incorporations, the story is different. Only two Fortune 500 companies are headquartered in Delaware, less than half the number headquartered in Nebraska or Arkansas. North Carolina has more than a dozen. Given the fact that North Carolina’s population is about 10 times larger than Delaware’s,

and firing of Disney executives, did not involve any business activity in Delaware. Most cases in the Chancery Court are there because the companies involved were incorporated in Delaware, not because they do business there.

The North Carolina Business Court plays a similar role in deciding cases involving the internal affairs of companies incorporated in North Carolina. But equally important — and somewhat in contrast to the Chancery Court — the Business Court handles numerous disputes arising from businesses that operate in North Carolina. Indeed, when it comes to providing a court able to resolve contract, trade secret and other major business litigation, it is North Carolina that has become a national model.

Court’s docket now covers disputes that involve: (1) the law governing corporations, partnerships and LLCs; (2) securities; (3) antitrust law; (4) trademark law; (5) intellectual property, including computer software, pharmaceuticals and biotech; (6) trade secrets; and (7) contract disputes between businesses involving at least \$1 million, provided that the parties consent. When the amount in controversy exceeds \$5 million, cases in the first six categories must be litigated in the Business Court. If the parties fail to designate these larger cases themselves, other state trial judges are required to transfer them.

Many other states have formed business courts, a number of them modeled on North Carolina’s Business Court. Georgia, in particular, was inspired to develop a business court following one of the North Carolina Business Court’s most prominent cases, SunTrust’s challenge to the First Union/Wachovia merger. SunTrust was a Georgia bank, and the proposed merger between the two North Carolina banks generated litigation in both states. Early in the case, the lawyers for the three banks agreed to have all the cases transferred to the Business Court. Robinson Bradshaw & Hinson’s Russell Robinson – one of the leaders of the effort to create the Court – represented First Union in the litigation. As Robinson later explained, transferring the Georgia cases to the Business Court “put the litigation in a court with a judge who understood the issues and could deal with them expeditiously.” Following this experience, several Georgia lawyers involved in the litigation helped lead the effort to form a business court in their own state.

Delaware added a new business court in May 2010 called the Complex Commercial Litigation Division. As a release from a prominent Delaware law firm noted at the time, “Delaware has joined states such as Massachusetts and North Carolina that also have established specialized divisions organized for business and commercial litigation.” The fact that Delaware felt the need to establish a business court might come as a surprise, and it illustrates the strengths of North Carolina’s system.

Delaware’s Chancery Court has undeniable expertise in legal issues regarding the internal affairs corporations and LLCs, but its ability to handle other types of business disputes is more limited. The Chancery Court is a court of equity, which makes it a bit of an anachronism. Historically speaking, equity courts could enter restraining orders and injunctions — orders that command a party to do something or refrain from doing something. Courts of equity could not enter a judgment for money damages or determine title to property, as this was the role of courts of law.

the royal governor fled Tryon Palace due to the impending revolution. Nearly all states have consolidated law and equity. By contrast, Delaware chose to maintain the distinction and still has two trial courts today – the Court of Chancery and the Delaware Superior Court.

Over time, the Delaware legislature has expanded the Chancery Court’s authority to handle a broader range of issues. But the Court’s historical origins still impose constraints. The Delaware Chancery Court cannot conduct jury trials, and it generally cannot hear cases involving money damages unless they also involve an equitable remedy. It also handles cases that do not involve business litigation at all. The Chancery Court has jurisdiction over all equity cases in Delaware, from corporate merger litigation to guardianship disputes and civil rights, including a notable 1952 decision ordering the desegregation of Delaware’s public schools.

The Chancery Court’s origins as a court of equity make it an excellent fit for certain kinds of business litigation. When

Competing for incorporation business is difficult, and the efforts made by some states have been controversial.

Most states abolished the distinction between law and equity around the time of the American Revolution. Courts of chancery were associated with the English crown, and they were unpopular in the colonies. In North Carolina, the court of chancery never sat again after

shareholders sue to stop a corporate merger, they are seeking an equitable remedy. The same is true of cases asking the Court to undo a corporate decision where the directors are alleged to have breached their duties of good faith or loyalty. These cases seek equitable relief,

Adam Doerr

such as an injunction against an upcoming shareholder vote, and they happen quickly. During the takeover battles in the 1980s, the Chancery Court was often able to resolve such cases in just a few months.

The Business Court's value to North Carolina businesses lies in its ability to resolve complex cases in a nuanced and thoughtful way.

The Chancery Court's expertise in cases like the above is a linchpin in Delaware's efforts to recruit businesses to incorporate there. The state's Division of Corporations website lists reasons why businesses choose Delaware. Three of the five reasons emphasize the state's judicial system — its courts, its case law and its legal tradition. Delaware obtains substantial revenue from its ability to attract business charters. In 2014, Delaware took in more than \$900 million in franchise taxes and business entity fees, which was 26% of the state's general fund.

Other states have attempted to challenge Delaware's lead. South Dakota, Nevada and Connecticut have all worked to attract out-of-state businesses to incorporate there.

North Carolina does not seem likely to make significant inroads on Delaware's success in this area. Competing for incorporation business is difficult, and the efforts made by some states have been controversial. Nevada, in particular, has been criticized for competing for corporate charters by lowering its standards. One Delaware judge said that Nevada's director liability standard was so lax that it could invite the federal

government to step in and establish a minimum national standard.

Thus, despite the best efforts of some other states, most businesses seeking to incorporate outside their home state appear likely to continue choosing

Delaware. In fact, some of North Carolina's largest companies are Delaware corporations — while Delaware receives the franchise taxes, up to an annual maximum of \$180,000, North Carolina gets the economic benefit of serving as the physical home to corporations that employ large numbers of North Carolinians. The North Carolina Business Court is well-equipped to handle litigation involving these businesses — not just cases involving out-of-state companies with local presence as only a registered agent, as in Delaware, but disputes that arise from business operations in North Carolina. Indeed, when a Delaware newspaper asked Chief Business Court Judge Gale about competing with Delaware for incorporations, Judge Gale's comments focused on cooperation with the Chancery Court, not competition, and the fact that the Business Court's jurisdiction over both legal and equitable issues allows it to hear different kinds of business cases.

The North Carolina Business Court has handled multiple cases of the type the Chancery Court is known for deciding, including litigation over several multibil-

lion-dollar mergers. It has even handled merger challenges involving Delaware corporations, where the parties could have proceeded in the Chancery Court and chose the Business Court instead. But the Business Court also handles cases that the Chancery Court cannot. Thus, while the Chancery Court's reputation is more established, the North Carolina Business Court may actually be in a better position to handle business disputes that arise from business operations in the state.

The Business Court's value to North Carolina businesses lies in its ability to resolve these complex cases in a nuanced and thoughtful way. All of the current members of the Court have substantial experience in commercial litigation — Judge Bledsoe successfully litigated complex commercial cases for 30 years at Robinson Bradshaw, Judge McGuire spent 25 years representing clients involved in high-stakes class actions and other significant cases for a leading employment firm, and Judge Gale earned a reputation as one of the top commercial litigators in the state in his 35 years of practice. These decades of experience give the Court's decisions a level of depth and sophistication previously unavailable outside of Delaware and New York.

In a conversation for this article, Judge Gale referenced a comment he received from an in-house attorney. The lawyer said that he didn't know how the case would come out, but he felt that he had been heard, heard fairly and understood. This is the Court's goal — to ensure that its decisions are thoughtful, well-reasoned and grounded in a thorough understanding of the law.

When parties have misunderstood this goal, or mistakenly assumed that a

“business court” should always rule in favor of business, the Court has been careful to correct them. In a 2007 case, a litigant argued that it should win a particular legal argument because its opponent’s position was bad for business. Judge Diaz, now a judge on the U.S. Court of Appeals for the Fourth Circuit, responded that this argument “misapprehends badly this Court’s charter.” As he explained, the Business Court “was created to provide judicial specialization in complex business litigation. This Court’s judges do not, however, decide cases based on the prevailing economic winds, nor do we consider how best to promote a litigant’s business interests. Our oath is the same as that of any judge of this state — to apply the law and decide cases without regard to the parties who are before us.”

Beyond its expertise and ability to respond quickly, the Business Court provides predictability and certainty by issuing written opinions. These opinions provide guidance on the interpretation of North Carolina’s corporation laws and other issues important to businesses. The Business Court has now issued more than 450 decisions, and its ability to generate useful precedents has grown as the Court matures and adds new judges. In 2014, the Business Court issued nearly as many published opinions as during its first 10 years of existence, and it is on pace to nearly double that output in 2015.

These decisions are also likely to receive more precedential weight as a result of recent changes. Appeals from Business Court decisions now go straight to the North Carolina Supreme Court. While it is too early to assess the impact of this change, having the state’s highest court decide unresolved legal questions

seems likely to increase the predictability and certainty of North Carolina law.

Despite these advances, the Court still faces challenges. Expanding its jurisdiction will place new demands on the Court, and expanding to five judges will require additional chambers and staff. Chief Judge Gale also regularly emphasizes that the need to invest in the court system goes beyond the Business Court – North Carolina businesses and the people who work for them all benefit from a judiciary that is fully funded, supported and well-functioning at all levels. Indeed, North Carolina Supreme Court Chief Justice Mark Martin has made statewide court funding a top priority.

Compared to factors such as infrastructure, incentive programs and quality of life, it may be difficult to see how a business court could have a meaningful impact in North Carolina’s business climate. But the prestige of the Delaware Chancery Court provides a powerful rebuttal to such doubts, as does the apparent success of that state’s efforts to market its court system. Because North Carolina’s early and ongoing investments have established the Business Court as a national model for how to serve businesses operating within the state, as well as those incorporated here, the Business Court can and should play a similar role for North Carolina.

To learn more:

North Carolina Business Court site, with Court Rules and Opinions:
www.ncbusinesscourt.net

Business Court Modernization Act
www.ncleg.net/Sessions/2013/Bills/Senate/PDF/S853v7.pdf

Delaware Chancery Court:
courts.delaware.gov/chancery/

History of the Chancery Court:
courts.delaware.gov/chancery/history.stm

North Carolina Business Litigation Blog:
www.ncbusinesslitigationreport.com/

Carolinas Class Action Report:
www.carolinasclassaction.com/

North Carolina Bar Association,
Antitrust and Complex Business Law
Disputes Section,
www.ncbar.org/members/sections/antitrust-business-law/

National Center for State Courts,
Business/Specialty Courts Resource
Guide
www.ncsc.org/Topics/Special-Jurisdiction/Business-Specialty-Courts/Resource-Guide.aspx

North Carolina Lawyers Weekly (subscription)
nclawyersweekly.com/tag/nc-business-court/

ADAM DOERR is a partner in the Charlotte office of Robinson Bradshaw & Hinson, P.A. He represents businesses involved in shareholder litigation, class actions, disputes between boards and executives, and other complex business disputes. He also handles appeals and is a member of the North Carolina Appellate Rules Committee. Adam has defended companies, boards and private equity sponsors in a significant number of corporate merger disputes, including litigation over the Wells Fargo/Wachovia and Duke/Progress mergers. He appears frequently in the Business Court.