



Getting Down to Business

The Successes of the S.C. Business Court Pilot Program

By Pamela J. Roberts, Carmen Harper Thomas and Cory E. Manning

The S.C. Business Court Pilot Program, which began on October 1, 2007, was renewed for an additional two years by order of Chief Justice Jean H. Toal on October 13, 2009. An evaluation of the pilot program showed that lawyers around the state had overall positive experiences with the program and support its continuation. This article describes the results of the evaluation undertaken during the summer of 2009, which recommended renewal of the program and provided suggestions for how the program can accomplish its primary purpose of creating an efficient forum to resolve complex business disputes.

Introduction to the program

More than two years ago, the South Carolina Bar's Task Force on Courts (the "task force") analyzed business courts across the country and identified a structure suited to the needs of business litigants in South Carolina. The task force determined that South Carolina needed a forum to hear business disputes based on several factors: (1) business relationships are complex; (2) the body of law governing many business disputes depends on interpretation of complex statutes; and (3) such specialized courts can promote predictability in resolving disputes,

which would contribute to efficient business operations and a more competitive business community.

In its research, the task force recognized the following best practices for a business court: (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. The task force's report and recommendations, which included these best practices, were adopted by a vote of the South Carolina Bar House of Delegates on May 31, 2007. On September 7, 2007, Chief Justice Toal issued the administrative order creating the Business Court Pilot Program, Order 2007-09-07-01.

Description of program

According to the order, business court assignment is available for certain civil cases filed and subject to jurisdiction and venue in Charleston, Greenville and Richland counties, or properly transferred to one of those counties pursuant to S.C. Code Ann. § 15-7-100. No minimum amount in controversy is required.

Judges. Three circuit court judges were assigned to preside over

the business court in addition to their other judicial duties: Hon. Roger M. Young, Charleston County; Hon. Edward W. Miller, Greenville County; and Hon. J. Michelle Childs, Richland County.

Jurisdictional parameters.

As stated in the order, a case is presumptively appropriate for business court if the principal claims are made under one of the following statutes:

- Title 33—South Carolina Business Corporations Act
- Title 35—South Carolina Uniform Securities Act
- Title 36, Chapter 8—South Carolina Uniform Commercial Code: Investment Securities
- Title 39, Chapter 3—Trade and Commerce: Trusts, Monopolies and Restraints of Trade
- Title 39, Chapter 8—Trade and Commerce: The South Carolina Trade Secrets Act
- Title 39, Chapter 15—Trade and Commerce: Labels and Trademarks

In addition to these statutes, the Chief Justice may determine jurisdiction is appropriate for other cases.

A party must move for assignment of a case to the business court no later than 180 days after the commencement of the action using the form approved by the S.C. Supreme Court. The moving party

must attach a complete description of the claims and the basis for business court assignment to the form motion, along with the filing fee. One party can move for assignment; consent of all parties is not necessary to move a case to the business court. The Chief Justice also can assign a case *sua sponte*.

If a party moves for business court assignment, the business court judge makes a recommendation to the Chief Justice, who then decides whether assignment is appropriate. If a case is assigned, a business court judge will have exclusive jurisdiction over the case. Importantly, neither a party moving for business court assignment nor one who agrees to such assignment is required to waive its right to a jury trial.

Written opinions required.

The business court judges are required to issue written orders for all decisions on Rule 12 motions to dismiss and Rule 56 motions for summary judgment, and those orders are to be made available on the business court Web page, which is www.sccourts.org/buscourt/index.cfm. Written orders on other non-jury, pretrial matters are encouraged.

Analysis of initial two-year pilot period

Chief Justice Toal appointed a committee of the following persons to evaluate the pilot program: Kevin R. Dean of Motley Rice; Cory Manning of Nelson Mullins Riley & Scarborough, who is vice chair of the American Bar Association's Subcommittee on Business Courts; Stephanie Nye, Counsel to the Chief Justice; Pamela J. Roberts of Bowman and Brooke, LLP, who chaired the Bar's Task Force on Business Courts; Sandy Stern of Covington Patrick Hagins Stern & Lewis; Carmen Harper Thomas of Nelson Mullins Riley & Scarborough; and Bob Wells, executive director of the South Carolina Bar.

Methodology. The evaluation committee began work in May 2009 and began several efforts to measure the effectiveness of the program:

- Surveys of lawyers who participated in the pilot program, with 40 responses from almost 100 sur-

veys, and surveys of participants of the South Carolina Association for Justice (SCAJ) annual conference, with 59 responses;

- Review of case files from all cases in which a motion for business court assignment was filed before July 31, 2009;
- Comments solicited from the Bar at large that could be submitted to an e-mail address publicized in the Bar's E-Blast and other publications;
- Interviews of the three business court judges;
- Review of other states' programs, including efforts to evaluate and improve their programs; and
- Informal interviews of clerks of court in the business court pilot counties.

Results. During its initial two-year pilot period, motions for business court assignment were made in 46 cases, and Chief Justice Toal approved assignment in 42 cases.

The plaintiff moved for assignment in most of the cases (21), while the defendant moved in 10. In 15 cases the parties consented to the assignment. In five of the cases, the non-moving party opposed assignment, but those five cases ultimately were assigned to the business court. Of the 42 cases assigned, 25 were still active as of July 31, 2009, while 13 had been resolved. Most of the resolved cases (11) were settled or dismissed by consent, but two were resolved by decisions on the merits: a motion for summary judgment and judgment following a non-jury trial.

Meeting expectations. The business court generally met lawyers' expectations, with 67 percent responding positively to the question. Only eight percent, or three people, indicated that the pilot program did not meet their expectations.

Importantly, lawyers generally responded that their clients were pleased with the business court experience (51 percent positive, 33 percent neutral and 15 percent negative). One lawyer responding to the survey explained that the Business Court Pilot Program has restored in his business clients some confidence in the legal system. These results show, at least in part, that the business court is accomplishing its purposes.

Best practices. Of the best practices incorporated into the pilot program, lawyers 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. The next two most important factors were the potential for the judge to have experience in business issues and the opportunity for efficient resolution of the case.

Another best practice of the business court is its written orders, which have potential to become an asset to lawyers. Written orders are required for decisions on Rule 12 and Rule 56 motions and are encouraged for other issues. As of November 13, 2009, five written orders have been posted; two are for Rule 12 decisions and three are for other issues, including motions for judgment on the pleadings and a motion to enforce a settlement. These and additional opinions are posted on the business court Web site at www.sccourts.org/busCourt.

Bias. Although the potential for bias in favor of business is a common (albeit unfounded) criticism about business courts generally, this perception is not found among South Carolina lawyers nor evidenced by the pilot program cases. Only two cases have been resolved as a result of business court proceedings, and in those two cases, while the parties included individuals, those individuals either owned a stake in the business or were directors or officers of the business. Lawyers seem to believe that the business court is a fair option for a non-business party (46 percent agree, 33 percent neutral, none disagree). While in some states the plaintiffs' bar, which traditionally represents individual interests, may perceive business courts as biased, the SCAJ survey responses show that the majority in South Carolina (68 percent) think the business court would be as fair to a non-business party as a business party, with only eight percent in disagreement and 24 percent as neutral. Thus far, the South Carolina Business Court is an option that any type of party with an appro-

appropriate case should consider.

Appropriate cases. Most of the cases brought in the business court (22) have involved the South Carolina Business Corporations Act, but 23 cases relied on the "Other" category either as the sole or an additional basis for jurisdiction. Of the "Other" cases, 10 were breach of contract cases; three were shareholder derivative actions; and two each were breach of non-competes, employment and LLC cases. The other four "Other" cases involved misrepresentation, non-profit corporations, the Mortgage Brokers Act and the Unfair Trade Practices Act. The "Other" category allows a wide variety of business cases to take advantage of the business court and is a critical component of the pilot program. While more lawyers favored expanding the types of cases (35 percent) than opposed an expansion (18 percent), more responses were neutral about expanding jurisdiction (48 percent). The extensive use of the "Other" category and generally neutral responses about expanding jurisdiction influenced the evaluation committee's recommendations, which are described below.

Venue. Charleston, Greenville and Richland counties have provided convenient venues for the pilot program. Parties in those counties may move for assignment, or parties may transfer cases in other counties to the business court if venue is otherwise proper in one of the three business court counties. As of the date of the evaluation, Greenville had 24 assignments, Charleston had 14 and Richland had four. One motion to assign an Anderson County case was granted, but the case settled before any business court proceedings occurred. The option to transfer cases to the business court is valuable for cases in the other 43 counties. Lawyers should evaluate the business court assignment process and consult the Rules of Civil Procedure regarding transfer to determine how to transfer their cases into the business court from a non-pilot program county.

Judges. Invaluable components of the business court are the judges appointed to preside over the cases.

In their interviews with members of the evaluation committee, the judges agreed that having a business background is not necessary to being a business court judge. However, the ability to manage cases is critical, and the judges rely on their law clerks to help manage the business court caseload. Because no funding is allocated to the business court, the law clerks' assistance is vital to efficient case management. Another business court case management tool on which the judges depend is enhanced communication among the lawyers, the clerks' offices, and the judges and their law clerks. Lawyers agreed that they communicate more with the business court judges than judges in other cases, with 49 percent responding affirmatively. Also, according to 46 percent of lawyers responding to the survey, business court judges have been more involved in managing business court cases than other civil cases.

Rules and procedures. The order establishing the pilot program provided certain details on how the program should work, but it did not create detailed rules and procedures.

Lawyers responding to the survey offered insightful comparisons of litigating in federal court and other states that will instruct development of the business court. Some possible improvements suggested by lawyers included adopting rules or practices specific to the business court, adopting electronic discovery rules similar to those in federal court, streamlining the filing process, and requiring a scheduling conference and order. Continued input from lawyers who have participated in the pilot program, along with the existing flexibility of the business court, will help ensure that this venue is effective for clients.

Although the order does not specify requirements for technology, it encourages the use of technology in business court cases. Lawyers responding to the survey generally had neutral responses to whether they had used technology more in the business court than other cases, and 30 percent responded in the negative. One judge thought that the use of technology would increase as more cases go forward to trial. Business court cases are an

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George DuRant, CPA, ABV, ASA, is a frequent expert witness in commercial litigation involving accounting principles and ethics, business valuation, compensatory damages and insolvency. A past chairman of the Business Valuation and Litigation Services Committee of the South Carolina Association of CPAs, he has authored and co-authored articles published in *South Carolina Lawyer*, *The CPA Report* and other professional journals.

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References from leading members of the bar available upon request.

ideal opportunity in which to take advantage of electronic communication and other technology tools.

Recommendations from the analysis

Based on the responses to the surveys and interviews and the details of the case files, the evaluation committee recommended several strategies to the Chief Justice to effectively continue the business court:

Renew the program. The evaluation committee submitted its report, which recommended continuing the pilot program, to the Chief Justice on September 8, 2009. On October 13, 2009, Chief Justice Toal issued Order 2009-10-13-1 to renew the pilot program for two years.

Improve awareness. While 46 motions for assignment are a positive trend, more participation would benefit the program and the lawyers and clients using the business court by developing a body of written opinions and judicial experience. Many lawyers who responded to the SCAJ survey were not aware of the program. The evaluation committee recommended various efforts to

increase awareness of the program, and if you are reading this article, those efforts are paying off. In addition, a South Carolina Bar CLE program in February 2010 will feature an update on the business court, and other projects are underway.

No change to jurisdiction.

The success of the "Other" category of cases in the pilot program supported not yet changing or expanding the substantive bases for jurisdiction, although lawyers suggested certain areas that they would like to see included. Breach of contract claims were the major component of the "Other" category, so a category related to contract is the most probable choice if it is appropriate to alter the jurisdiction in the future.

Judges. The recent order renewing the program provided that the three judges will continue to preside over the next two years of the pilot program. The committee also recommended that the judges continue to pursue further training.

Rules and procedures. The lawyers responding to the surveys described a variety of areas in which they would like to see business court

procedures or practices developed. The development of some form of guidelines will be pursued as the program continues. The evaluation committee members continue to appreciate input from the Bar on how the business court can meet their needs.

Conclusion

Resolving business disputes in South Carolina's courts has become a more efficient and effective process since the creation of the Business Court Pilot Program. The lawyers who have participated in the program and, importantly, their clients have indicated the experience was positive. As lawyers learn about the program and its benefit to their clients, the number of cases in the business court will grow. If your case fits the jurisdictional parameters in the order, South Carolina's business court is the place to be.

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