

**Report of the South Carolina Bar's Task Force on Courts re:  
The Creation of a Business Court Pilot Program**

August 1, 2007

## **I. Background**

The South Carolina Bar created the Task Force on Courts at the request of its President and with the approval of the Chief Justice of the South Carolina Supreme Court.<sup>1</sup> The Task Force was charged with reviewing the use of judicial resources in South Carolina’s Circuit Courts, with a particular focus on researching and recommending whether South Carolina should (1) establish a “fast track” system to resolve certain civil cases on an expedited basis and (2) establish a specialized business court. The Task Force formed two subcommittees to research and make recommendations on the feasibility of these propositions.

With respect to the creation of a specialized business court, the Task Force recommended to the Bar that the Supreme Court create a pilot program establishing a Business Court in the South Carolina Circuit Courts to adjudicate complex business, corporate, and commercial matters. The Business Court would be a civil trial court, created with existing judicial resources, and dedicated to hearing and resolving traditional business disputes, such as cases involving corporate governance issues. Under the pilot program, three existing Circuit Court judges would be assigned a docket in the Business Court for a two-year period.

This Report chronicles the work of the Task Force and sets forth the bases for the Task Force’s recommendation, including a statement of the purpose and need for a Business Court, a record of the research and investigation performed by the Task Force in arriving at its recommendation, and a prototype of the Task Force’s recommendation.<sup>2</sup>

## **II. Purpose and Need for a Business Court**

A robust business community benefits the State of South Carolina and its citizens. The State’s business community rests on a host of relationships between individuals, corporate entities, and governmental entities. Due to the complex nature of these relationships, disputes among members of South Carolina’s business community are commonplace, and South Carolina courts are often called upon to resolve these disputes.

The rights and duties of members of the business community are commonly defined by statute. Cases involving issues of corporate organization, governance, or liability typically involve substantial questions of law requiring interpretation of complex statutes. This body of business law is distinct from the bodies of law that apply to other aspects of our society, such as criminal law, tort law, and family law.

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<sup>1</sup> The Task Force roster is attached to this Report at [Tab 1](#).

<sup>2</sup> This Report does not address the feasibility of a “fast track” system.

The corporate statutes highlighted in the Task Force’s recommendation affect all businesses in South Carolina. The efficient organization and operation of those businesses requires predictability with respect to the law, so businesses may plan and organize for the future and more accurately assess the effects of potential litigation. To achieve this predictability, courts must develop expertise with respect to the applicable statutes and particular business disputes. The creation of a Business Court will serve this goal.<sup>3</sup>

Many business disputes can be resolved through prompt pre-trial disposition. The current case-assignment system for civil matters in South Carolina does not lend itself to the prompt and efficient resolution of traditional business disputes. For example, Circuit Court judges who are assigned to a case at the beginning of the matter are not required to stay with that case until its final resolution. In a business dispute, the reassignment of a new judge in the middle of a lawsuit requires the parties to expend additional resources re-educating a new judge on what is often complex subject matter.<sup>4</sup> This is inefficient. By directing such litigation to a specialized business court, where a single judge will preside over the case throughout its pendency, the goal of efficiency (for both the parties and the judicial system) will be served.<sup>5</sup>

The creation of a specialized business court is a proven mechanism that has been adopted by more than a dozen states, including North Carolina and Georgia.<sup>6</sup> For example, specialized business courts created in New York, Massachusetts, and Florida have expanded from their original composition by adding additional judges and funding or by including additional counties in the business court program.<sup>7</sup>

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<sup>3</sup> See, e.g., Carrie O’Brien, *The North Carolina Business Court: North Carolina’s Special Superior Court for Complex Business Cases*, 6 N.C. Banking Inst. 367, 369-71 (2002) (“O’Brien Article”), attached at [Tab 2](#); Oklahoma Economic Development Generating Excellence Regulatory Environment Expert Team, *Final Report* at 4 (2003) (“One of the central advantages of a business and technology court is expertise.”) (“Oklahoma EDGE Report”), attached at [Tab 3](#).

<sup>4</sup> See, e.g., O’Brien Article at 371-72 ([Tab 2](#)); Massachusetts Litigation Session Resource Center, *Massachusetts Business Litigation Session: Docket and Caseload Analysis*, at iv (Dec. 2004) (“Massachusetts Report”), attached at [Tab 4](#).

<sup>5</sup> Specialization has been an undeniable force in the legal profession for quite some time. “Like it or not, specialization of the legal profession is a dominant theme today and is likely to become even more dominant because specialization is an efficient method to deliver legal services in complex matters. Courts are subject to the same powerful forces that have produced specialization throughout components of our legal system.” Ad Hoc Committee on Business Courts, *Business Courts: Towards a More Efficient Judiciary*, 52 Bus. Law. 947, 949 (May 1997), attached at [Tab 5](#).

<sup>6</sup> Mitchell L. Bach and Lee Applebaum, *A History of the Creation and Jurisdiction of Business Courts in the Last Decade*, 60 Bus. Law. 147, 151 (2004) (“History of Business Courts”), attached at [Tab 6](#); Wilbur D. Preston, Jr., et al., *Maryland Business and Technology Court Task Force Report* at 5, 23-25 (2002) (“Maryland Report”), attached at [Tab 7](#).

<sup>7</sup> Massachusetts Report at 2 ([Tab 4](#)); History of Business Courts at 151 ([Tab 6](#)).

### **III. Task Force Due Diligence**

The Task Force's recommendation has been nearly one year in the making. Since the creation of the Task Force in July 2006, its members have met with national experts on the creation and operation of business courts and with judges from the business courts of other states, conducted extensive research on business courts, attended conferences regarding business courts, conferred with judges regarding the present treatment of complex matters in South Carolina's Circuit Courts, and surveyed South Carolina lawyers regarding the feasibility and necessity of a Business Court.

#### **A. Academic Research Regarding Business Courts**

The Task Force conducted extensive academic research on the issue of business courts. This research included analyzing the creation and operation of business courts in other jurisdictions, reviewing the procedures utilized in the creation and implementation of these business courts, and critically examining the best practices in those jurisdictions.

##### **1. Best Practices**

More than a dozen states have specialized business courts.<sup>8</sup> A review of these business courts revealed several elements that can be described as best practices in this area.<sup>9</sup>

Single Judge Throughout the Proceeding. The Task Force's research revealed, almost without exception, that the assignment of one judge throughout the entire proceeding of a matter was one of the most important elements of a specialized business court. While litigants can achieve single-judge assignment through South Carolina's current Complex Case Designation procedure, research revealed that it was quite difficult in practice to have a case designated as complex and receive such treatment.<sup>10</sup> Furthermore, business cases, whether they are complex or not, are subject to more opportunities for pre-trial disposition than other civil matters, such as personal injury cases, thus creating a much different settlement dynamic.<sup>11</sup> Having a single

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<sup>8</sup> See generally History of Business Courts ([Tab 6](#)); American Bar Association Committee on Business and Corporation Litigation, *2007 Review of Developments in Business and Corporate Litigation, Chapter 5: Business Courts* (2007), attached at [Tab 8](#).

<sup>9</sup> For a discussion of several best practices in this area, see generally Tim Dibble and Geoff Gallas, *Best Practices in U.S. Business Courts*, 19 *Court Manager* 2, at 25-47 (2002), attached at [Tab 9](#).

<sup>10</sup> See Memorandum to Task Force from Pamela Roberts, Results of Judges Survey on Complex Case Designation (Mar. 10, 2007), attached at [Tab 10](#).

<sup>11</sup> See Business Courts "Ask the Experts" Conference Call Summary at 2 (Mar. 21, 2007) ("Ask the Experts Call Summary"), attached at [Tab 11](#).

judge assigned to a matter throughout its pendency will help to ensure that unique opportunities to resolve business cases are not lost.

Development of a Body of Case Law Through Written Opinions. In addition to single-judge assignment, one of the most celebrated aspects of a specialized business court is the creation of a written body of case law. A body of written case law on specific issues applicable to business disputes provides a level of predictability for parties, lawyers, and judges. In addition, a written body of case law makes the pre-trial disposition process more efficient by providing litigants with set interpretations of the often complex statutory schemes that govern many business disputes.<sup>12</sup>

Single Gatekeeper. The role of gatekeeper--the person who determines whether a matter will be assigned to the specialized business court--is best left to a single individual, normally the chief justice of the state supreme court. The nimbleness and efficiency associated with having one person act as a gatekeeper is consistent with the experimental nature of a pilot program. Having the Chief Justice of the South Carolina Supreme Court serve in this role allows her to monitor the progress of the pilot program and make any necessary changes to the program.

Promoting the Use of Technology. Many states have promoted and operated their specialized business courts as technological laboratories, where litigants and court personnel are encouraged to use technology in the resolution of disputes. For example, several states allow parties to attend hearings by video conference. Using technology in the administration and resolution of business cases furthers the goal of efficiency.

The Task Force has incorporated each of these best practices into its recommendation.

## **2. Addressing Criticisms of Specialized Business Courts**

Most criticisms of the creation of a specialized business court are based on the premise that business courts are biased. From this premise, critics argue that specialized business courts create a two-tiered system of justice that weakens protections offered to litigants that have non-commercial disputes. The following sections address these primary concerns.

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<sup>12</sup> See Oklahoma EDGE Report at 4 ([Tab 3](#)) (noting that written opinions not only “discipline the path of judicial reasoning,” but they also “help to develop a body of case law which clarifies what the law is so subsequent disputes may be resolved more quickly”); Maryland Report at 6 ([Tab 7](#)) (noting that written opinions lead to “increased correctness and predictability of an identifiable group of judges,” which results in a “higher rate of settlements”).

Two-Tiered System of Justice. Opponents of business courts suggest that a specialized business court “provides corporate litigants with an elite form of justice.”<sup>13</sup> While this criticism has some populist appeal, a closer examination of specialized courts in general and a specialized business court in particular reveals that the criticism is unfounded. Business courts are no different than other specialized courts, such as probate or family courts, which have not been met with similar criticism.<sup>14</sup>

In addition, a specialized business court has the effect of streamlining the general docket by exorcizing those complex commercial or business cases that involve numerous pre-trial motions and can take years to resolve. This process allows for other non-commercial matters to proceed uninterrupted and at a more efficient pace. According to the ABA’s Ad Hoc Committee on Business Courts, “the more efficient handling of disputes by judges who understand the complex economic activity and complex legal principles applicable to that commercial activity will free up resources for other litigants.”<sup>15</sup>

Bias in Favor of Businesses. Similarly, critics of specialized business courts charge that such courts are biased in favor of business. For example, commentators have noted a recent trend in assigning or transferring non-business cases to specialized business courts and have argued that this trend weakens consumer protections due to the bias of such courts in favor of business interests.<sup>16</sup> Such a charge is unfounded for at least two reasons.

First, this criticism assumes that non-commercial cases will find their way into the specialized business court. Such cases are inappropriate for specialized treatment under the Task Force’s recommendation and are unlikely to be assigned (or approved for transfer) under the proposed jurisdictional parameters of the recommendation. Indeed, the large majority of cases

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<sup>13</sup> R. Franklin Balotti and Roland E. Brandel, *Are Special Courts the Future?*, *Bus. L. Today* at 25 (Feb. 1995), attached at [Tab 12](#); see also Elaine Friedman, *New Business Courts Gain Acceptance*, *Nat’l L.J.* at B1 (Dec. 30, 1996) (quoting Mary Alexander, then-President of the Consumer Attorneys of California stating, “Commercial courts establish a two-tiered system of justice--one for the rich and one for the average citizen.”), attached at [Tab 13](#); see generally Ember Reichgott Junge, *Business Courts: Efficient Justice or Two-Tiered Elitism?*, 24 *Wm. Mitchell L. Rev.* 315 (1998) (“Junge Article”), attached at [Tab 14](#); Kimberly A. Ward, *Getting Down to Business-- Pennsylvania Must Create a Business Court or Face the Consequences*, 18 *J.L. & Comm.* 415, 423-24 (1999), attached at [Tab 15](#).

<sup>14</sup> See Oklahoma EDGE Report at 6 ([Tab 3](#)) (noting that “no one would argue that drug courts are designed to show favoritism towards drug defendants or that mental health courts are somehow calculated to curry favor with the mentally ill.”); see also Maryland Report at 7, 19-20 ([Tab 7](#)); Ad Hoc Committee Report at 953 ([Tab 5](#)).

<sup>15</sup> ABA Ad Hoc Committee Report at 953 ([Tab 5](#)); see also Oklahoma EDGE Report at 6 ([Tab 3](#)); Maryland Report at 6 ([Tab 7](#)); Junge Article at 317-18 ([Tab 14](#)).

<sup>16</sup> See, e.g., Gary W. Jackson, *Do Business Courts Really Mean Business?*, *Trial* (June 2006), attached at [Tab 16](#).

assigned or transferred to specialized business courts involve business-to-business disputes, as opposed to disputes brought by individual consumers or classes of consumers.<sup>17</sup>

In addition, this criticism lacks empirical support. In practice, there is no data to support the notion that business courts are any more likely to rule in favor of business interests than in favor of non-business interests.<sup>18</sup>

## **B. Field Research Regarding Business Courts Experts**

In addition to its extensive academic research, the Task Force held various conference calls and meetings with nationally recognized individuals and groups on business courts. The highlights from this “field” research are discussed in this section.

### **1. Internal Task Force Meetings and Subcommittee Meetings**

On September 9, 2006, less than seven weeks after the creation of the Task Force, Chief Justice Jean Toal met with Task Force co-chairs, Judge Don Rushing and Pamela Roberts, along with the South Carolina Bar’s Executive Director, Robert Wells, to discuss and develop a plan to achieve the objectives of the Task Force. Approximately one month later, the entire Task Force met and divided into two subcommittees: (1) the Business Court Subcommittee and (2) the Fast Track Court Subcommittee. Over the next five months, the Business Court Subcommittee met no less than ten times, either in person or by teleconference.<sup>19</sup>

### **2. Meetings with National Experts on Business Courts**

In January 2007, Pamela Roberts and Task Force Member and Counsel to the Chief Justice, Stephanie Nye, met with one of the foremost experts on business courts in the country, Mitchell Bach, Chair of the ABA Business Law Section’s Committee on Business and Corporate Litigation, and North Carolina’s first business court judge, The Honorable Ben Tenille, to discuss the creation and operation of a specialized business court.<sup>20</sup>

In March 2007, a member of the Task Force attended the ABA Section on Business Law’s annual meeting in Washington, D.C., participated in two seminars on business courts, and met with several business court judges from around the country and various national experts on

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<sup>17</sup> See Ask the Experts Call Summary at 1 ([Tab 11](#)).

<sup>18</sup> See Lee Applebaum, *The Business of Business Courts*, Trial (Sep. 2006) (responding to Mr. Jackson’s concerns), attached at [Tab 17](#).

<sup>19</sup> See [Tab 18](#) (timeline of Task Force activities); [Tab 19](#) (agendas and notes from Task Force meetings).

<sup>20</sup> See [Tab 20](#) (resume of Mitchell Bach); [Tab 21](#) (summary of Jan. 11, 2007 meeting).

business courts. Also in March, the Task Force held a conference call with four national experts on business courts: Mr. Bach, Lee Applebaum, Merrick Gross, and Robert Haig, which enabled all Task Force members to ask questions.<sup>21</sup> The comments from the experts on this call can be summarized as follows:

- *Business courts are no different from any other specialized court.* As noted earlier, judicial systems have long had specialized courts for probate matters and family disputes.<sup>22</sup>
- *Preservation of the right to a jury trial for business court litigants is essential.* Given the importance of the jury trial to our system of justice, it makes little sense to ask litigants to give up this right as the price of admission to a specialized business court. In addition, eliminating the right to a jury exposes a specialized court to additional criticism as an elitist forum.<sup>23</sup>
- *The criticism that business courts are inherently biased in favor of business lacks empirical support.*<sup>24</sup>
- *All state judicial systems are unique and have disparate needs.* The best way to start a specialized business court is through a pilot program, which can be adjusted to the particular needs of each state.<sup>25</sup>
- *It is unnecessary, and potentially counterproductive, to request additional appropriations for a business court pilot program.* Additional judicial resources are unnecessary during the pilot stage. According to the experts, requesting additional funding at the pilot stage can be interpreted as contrary to one of the stated goals of a specialized business court: the efficient use of judicial resources.<sup>26</sup>

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<sup>21</sup> See [Tab 22](#) (resumes of Lee Applebaum, Merrick Gross, and Robert Haig).

<sup>22</sup> See Section III.A.2., *supra*.

<sup>23</sup> See Section IV.F., *infra*.

<sup>24</sup> See Section III.A.2., *supra*.

<sup>25</sup> See Ask the Experts Call Summary at 2-3 ([Tab 11](#)).

<sup>26</sup> See Ask the Experts Call Summary at 1-3 ([Tab 11](#)).



### **3. Communications with Attorneys**

In February 2007, the Task Force distributed a survey to South Carolina attorneys regarding the need and interest for a specialized court to handle business disputes. The response from this survey strongly favored the creation of such a court. The primary reasons given for this positive response were a desire for more predictability with respect to the law applicable to business disputes and the desire for one judge to preside over a business dispute throughout the life of the dispute.

In April 2007, The Task Force distributed a supplemental survey to collect input from additional attorneys throughout the state, and the results were consistent with the response to the earlier survey. This data is consistent with the data received in similar surveys conducted in other states.<sup>27</sup>

### **4. Presentations to the South Carolina Bar Leadership**

Board of Governors. In April 2007, the Task Force concluded its research and analysis of business court programs in other jurisdictions and developed the prototype for a proposed pilot program for South Carolina, which was adopted by the Task Force without dissent. The Task Force then presented the proposal to the South Carolina Bar's Board of Governors, which adopted the proposal on April 11, 2007.<sup>28</sup>

House of Delegates. In May 2007, the Task Force presented its proposal to the South Carolina Bar's House of Delegates.<sup>29</sup> After approximately thirty minutes of floor debate regarding the concerns addressed in this Report, the Task Force's submitted recommendation for a Business Court in South Carolina's Circuit Court passed with overwhelming support.

## **IV. Prototype of a Business Court Recommended by the Task Force**

### **A. The Task Force's Proposal**

The Task Force proposes a two-year Business Court Pilot Program for all civil matters properly filed and subject to jurisdiction and venue in Charleston, Greenville, and Richland Counties, or properly transferred to one of those counties. Cases falling within this definition (and other jurisdictional requirements noted below) will be appropriate for assignment to the Business Court. Only these counties will have a Business Court during the pilot program.

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<sup>27</sup> See, e.g., Massachusetts Report at 3-4 ([Tab 4](#)).

<sup>28</sup> See [Tab 23](#) (materials prepared for April 11, 2007 meeting of South Carolina Bar Board of Governors).

<sup>29</sup> See [Tab 24](#) (materials prepared for May 31, 2007 meeting of South Carolina House of Delegates).

Importantly, the Task Force recommends the creation of a Business Court Pilot Program in South Carolina using existing judicial resources. The Task Force’s recommendation does not require additional funding from the legislature or the hiring of additional judges.

## **B. Procedure for Creating a Business Court**

Research has also revealed that the best way to create a pilot program for a Business Court is through administrative order.<sup>30</sup> The use of an administrative order to implement a specialized business court is favored by the experts and commentators because of its efficiency, its nearly instant applicability, and the ability to adjust aspects of the program through additional administrative orders, as necessary.

The South Carolina Constitution enables the Chief Justice to establish, through administrative order, a Business Court in the Circuit Courts of South Carolina. Pursuant to Article V, Section 4, of the South Carolina Constitution:

The Chief Justice of the Supreme Court shall be the administrative head of the unified judicial system. . . . The Chief Justice shall set the terms of any court and shall have the power to assign any judge to sit in any court within the unified judicial system.

Not only does this mechanism enable the Chief Justice to *create* a Business Court, but it also enables her to *adjust* the Business Court, as necessary. The Chief Justice has used this constitutionally granted power in the past to establish other specialized procedures for the administration of cases in South Carolina’s Circuit Court system.<sup>31</sup>

## **C. Assignment of a Matter to the Business Court**

Chief Justice as Sole Gatekeeper. The Chief Justice will determine whether a matter will be assigned to the Business Court. This “gatekeeper” role is very important to the effective operation of the pilot program. The nimbleness and efficiency associated with having one person act as a gatekeeper is consistent with the experimental nature of a pilot program. Having the Chief Justice serve in this role allows her to monitor the progress of the pilot program and make any necessary changes to the program.

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<sup>30</sup> See, e.g., Ask the Experts Call Summary at 1 ([Tab 11](#)); Notice to Bar, *Business Litigation Session Suffolk Superior Court*, 29 Mass. Law. Wkly. 268 (Oct. 2, 2000) (“Mass. Admin. Order”), Admin. Order, attached at [Tab 25](#); Fla. Admin. Orders and Procedures (orders and procedures from three different counties), attached at [Tab 26](#).

<sup>31</sup> See, e.g., July 26, 2007 Administrative Order of the South Carolina Supreme Court (establishing complex case designation procedures), attached at [Tab 27](#).

Having a single judicial gatekeeper who reviews and accepts or denies a case for assignment is the best practice in this area.<sup>32</sup> For example, in North Carolina, the assignment of cases to the business court is solely at the discretion of the Chief Justice of the North Carolina Supreme Court, upon application by a party or the trial judge, and even at the Chief Justice's own accord over the parties' objections.<sup>33</sup>

Procedure for Assignment. Assignment may be made on the Chief Justice's own motion or on motion of counsel for either party. Counsel choosing to move for assignment should make their motion on an approved form, which would be part of a proposed administrative order.

If the motion is granted, the Chief Justice will assign the matter to the Business Court for all purposes, including motion practice, discovery disputes, injunctive relief, hearings, and a trial on the merits. Assigned cases will be under the exclusive jurisdiction of the Business Court.

If the Chief Justice determines that the case is not appropriate for assignment, the motion will be denied and the matter will proceed in the same manner as all other civil matters filed in South Carolina's Circuit Courts.

#### **D. Procedure for Designating Business Court Judges**

Under the proposed pilot program, the Chief Justice will designate three judges as Business Court judges from the existing pool of Circuit Court judges. One judge will be designated the Business Court judge for Charleston County, one for Greenville County, and one for Richland County. These counties were chosen because of their populations and concentrations of commercial activity, as compared with other South Carolina counties. Given these metrics, the Task Force believes that these counties would be the most appropriate "test" counties for the Business Court Pilot Program.

The Chief Justice will have the responsibility to review the dockets for Business Court judges periodically to ensure an appropriate use of judicial resources. In the event that a Business Court judge is not fully engaged by properly assigned cases, his or her docket will be complemented with other matters filed in the Circuit Courts. Currently, the Chief Justice reviews the dockets of Circuit Court judges every six months to ensure that judicial resources are being used in a full and efficient matter.

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<sup>32</sup> See Massachusetts Report at iv ([Tab 4](#)); Mass. Admin. Order ([Tab 25](#)); Fla. Admin. Order ([Tab 26](#)); N.C. Sup. Ct. R. 2.1 and General Rules of Practice and Procedures for the North Carolina Business Court, attached at [Tab 28](#).

<sup>33</sup> See N.C. Sup. Ct. R. 2.1 ([Tab 28](#)).

## **E. Jurisdiction of the Business Court**

### **1. A Hybrid Approach to Jurisdiction**

The jurisdiction of the Business Court will be defined by the Chief Justice’s administrative order, and the Task Force proposes a relatively narrow jurisdictional basis. Research revealed that states with specialized business courts have defined the jurisdiction of those courts in a number of ways.<sup>34</sup> In general, the jurisdictional distinctions fall within three broad categories: (1) including all cases that fall within specific case-type definitions; (2) including only complex cases or cases with novel legal issues; or (3) a hybrid approach.<sup>35</sup>

The Task Force recommends a hybrid approach in an attempt to make the Business Court sufficiently inclusive and provide the Chief Justice with the discretion necessary for the successful implementation of a pilot program. The determination of what constitutes a “commercial” or “business” case may not be the type of question that can be answered by mere reference to a set of statutes. The hybrid approach provides a statutorily defined test for assignment and another test based on subjective factors for those matters that may not fall within the statutorily defined jurisdiction, but are otherwise appropriate for specialized treatment.

#### **a) Statutorily Defined Jurisdiction**

Civil matters in which the claim or claims are made under the following Titles of the South Carolina Code will be considered appropriate for assignment to the Business Court:

- Title 33--South Carolina Business Corporation Act of 1988;
- Title 35--South Carolina Uniform Securities Act of 2005;
- 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; or
- Title 39, Chapter 15--Trade and Commerce: Labels and Trademarks.

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<sup>34</sup> See [Tab 29](#) (chart of jurisdictional parameters of various specialized business courts).

<sup>35</sup> History of Business Courts at 220 ([Tab 6](#)).

The Task Force believes that having a list of presumptively appropriate case types is a necessary component of the jurisdictional definition under a pilot program. This list can be adjusted as necessary by further administrative order of the Chief Justice.

#### **b) Other Matters Appropriate for Specialized Treatment**

Even in those states that premise jurisdiction of a specialized business court on a finite list of presumptively appropriate bases, parties may gain access to the specialized court even if their claim or claims are not based on the specific statutes listed.<sup>36</sup> Under the prototype developed by the Task Force, a civil matter may be assigned to the Business Court if the Chief Justice determines that the case merits assignment for the following reasons:

- the case is expected to have implications for business and industry beyond the decision in the particular case;
- the case is likely to result in a significant interpretation of a statute within the scope of the Business Court; or
- for such other reasons as the Chief Justice may determine.

The Task Force believes that having a subjective test for jurisdiction is also appropriate at the pilot program stage. Like the list of statutes, this subjective test can be adjusted based on the results of its application during the pilot program.

### **2. No Minimum Amount in Controversy**

Jurisdiction in the Business Court will not be subject to a minimum monetary amount in controversy. Research revealed that such a limitation has the potential to exclude disputes that can be of particular interest to the business community and, therefore, limit the benefits realized by a specialized business court. Because the dollar amount tends to be arbitrary, it often excludes some types of business cases and is not a useful criterion for cases involving declaratory relief. In addition, a minimum monetary amount subjects a specialized business court to the additional criticism that it is elitist.

### **F. Right to Jury Trial Preserved**

Parties seeking to have a matter assigned to the Business Court are not required to waive their right to a jury trial. There is little justification for the removal of the right to a jury trial, and in particular, business court programs that require parties to waive their right to a jury trial

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<sup>36</sup> See, e.g., Atlanta Judicial Circuit Rule 1004, attached at [Tab 30](#); N.C. Sup. Ct. Rule 2.1 ([Tab 28](#)).

would be subject to harsh criticism. In addition, all states that have successfully created specialized business courts in the last fifteen years have preserved the right to a jury trial.<sup>37</sup>

#### **G. Written Opinions Will be Issued by Business Court Judges**

One of the most celebrated benefits of a specialized business court is the requirement that the judges memorialize their decisions in written opinions that are publicly available. Written opinions further one of the basic goals for a specialized business court: predictability.

The Task Force's proposal requires judges presiding over a matter assigned to the Business Court to issue a written opinion on pre-trial dispositions of a matter, which include, but are not limited to, motions to dismiss under South Carolina Rule of Civil Procedure 12 and motions for summary judgment under South Carolina Rule of Civil Procedure 56.

In addition, under the proposal, Business Court Judges are encouraged to issue written opinions on other final determinations and other pre-trial issues where a written decision would provide predictability in making business decisions for other litigants or potential litigants in the same business or industry.

Written opinions of the Business Court will be publicly available during the pilot program at [www.sccourts.org](http://www.sccourts.org). The Task Force has been informed by Circuit Court administrators that the technology is available to have a searchable database of opinions at this portal.

#### **V. The Use of Technology is Encouraged in the Business Court**

In the spirit of a pilot program and in keeping with the goal of efficiency, the Task Force recommends that the Chief Justice, in her order, encourage parties, counsel, judges, and administrative personnel participating in the Business Court pilot program to use technology solutions in the operation, administration, and use of this specialized forum.<sup>38</sup> Examples of such solutions are as follows:

- The filing and service of pleadings and the service of discovery by electronic means is also encouraged. It is the Task Force's understanding from conversations with South Carolina Circuit Court administrative personnel that the technology is currently available to beta test electronic filing for a subset of civil cases.

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<sup>37</sup> See History of Business Courts at Appendix A ([Tab 6](#)); see also Ask the Experts Call Summary at 1 ([Tab 11](#)).

<sup>38</sup> See Oklahoma EDGE Report at 5 ([Tab 3](#)) ("Business courts are also ideal places to introduce state of the art technology into case management.").

- The use of electronic presentations and technologically generated demonstrative evidence is encouraged to enhance the trier of fact's understanding of the matter or to further the convenience and efficiency of the Business Court litigation process.
- In addition, by agreement, counsel for parties in a matter assigned to the Business Court may arrange for any proceeding or conference to be held by video conferencing by coordinating a schedule for such an arrangement with the Business Court.

The Business Court Judge presiding over a matter will have the final determination as to whether the use of technology in any proceeding or conference is warranted.

## **VI. Support for the Creation of a Business Court Pilot Program**

Specialized business courts enjoy broad support from various legal communities and notable organizations from around the country and in South Carolina.

First, no business court that has been created and successfully implemented has been discontinued. Indeed, many of the business courts from around the country have been expanded.<sup>39</sup> This is a testament to the success and support such courts enjoy.<sup>40</sup>

Second, the ABA Section of Business Law endorsed the creation of specialized business courts over ten years ago. In 1996, the Section's Ad Hoc Committee on Business Courts recommended "that courts which hear a substantial number of corporate and commercial disputes establish specialized court divisions to provide the expertise needed to improve substantially the quality of decision making and the efficiency of the courts with respect to such business cases."<sup>41</sup>

Third, the Conference of Chief Justices adopted a resolution in February 2007 encouraging "states to study and, where appropriate, establish business courts or their equivalents for the effective management of complex corporate, commercial and business cases."<sup>42</sup>

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<sup>39</sup> O'Brien Article at 369-72 ([Tab 2](#)); Massachusetts Report at 2 ([Tab 4](#)); Larry Smith, *Rebuilding an Infrastructure*, 16:1 Of Counsel 2 (Jan. 6, 1997), attached at [Tab 31](#).

<sup>40</sup> See Oklahoma EDGE Report at 3 ([Tab 3](#)) ("Although the jurisdiction and procedural practices of these courts vary, the reception given to such courts in the states in which they have been established has been, almost without exception, overwhelmingly enthusiastic.").

<sup>41</sup> See ABA Ad Hoc Committee Report at 947 ([Tab 5](#)).

<sup>42</sup> See Conference of Chief Justices, *Resolution 6: In Support of Case Management of Complex Business, Corporate and Commercial Litigation* (2007), attached at [Tab 32](#).

Finally, as noted, the South Carolina Bar's Board of Governors and House of Delegates enthusiastically support the creation of a Business Court.<sup>43</sup>

## **VII. Conclusion**

The Task Force recommends the creation of a Business Court Pilot Program under the guidelines set forth above. The creation of a Business Court would be a positive development for South Carolina's judicial system. In addition to serving the stated goals of efficiency and predictability, a Business Court would improve the public perception of South Carolina's judicial system. Businesses will be more likely to view the state as a place where their disputes can be fairly and thoughtfully resolved.

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<sup>43</sup> See Section III.B.4., *supra*.