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MAKING A CASE FOR BUSINESS COURTS: A SURVEY OF AND PROPOSED FRAMEWORK TO EVALUATE BUSINESS COURTS

Anne Tucker Nees*

INTRODUCTION: MAKING A CASE FOR BUSINESS

[N]o institution other than the state so dominates our public discourse and our private lives. In our world *corporations* make most everything we consume. Their advertising and products fill almost every waking moment of our lives. They give us jobs, and sometimes a sense of identity. They define communities, and enhance both our popular and serious culture. They present the investment opportunities that send our children to college, and provide for our old age. They fund our research.¹

There is no denying that corporations, and all business entities, play a significant role in modern society,² including the legal profession. Their prevalence and influence justify the dedication of resources to their development and problems at all levels of government, including the judiciary.³ Similarly, the legal profession is increasingly one of

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1. LAWRENCE E. MITCHELL, *PROGRESSIVE CORPORATE LAW*, at xiii (1995) (emphasis added).

2. See DAVID SCIULLI, *CORPORATE POWER IN CIVIL SOCIETY: AN APPLICATION OF SOCIETAL CONSTITUTIONALISM* 29 (2001) (discussing corporate law's development of private rights and their impact on state and society); see also *id.* at 25–26 (positing that there are four different roles of corporations in modern and legal society: (1) efficiently produce goods and services which involves agency costs, (2) coordinate productive activities and continue growth which involves ownership concepts, (3) form hierarchical production teams that pursue profits, and (4) encourage commercial activity and participation that dilutes the collective power of government).

3. Democratic societies (societies with democratic public and private institutions, as opposed to mere formal democracies or limited forms of government) establish rules of private governance for major intermediary associations (i.e., mandatory fair dealing and fiduciary responsibilities on corporations). Holding such intermediary associations or their actors (i.e., corporate officers) consistently to the stated norms and procedures supports the institutional design of our democratic society. SCIULLI, *supra* note 2, at 237–38.

Specialization is an increasingly common characteristic of Western societies in the late twentieth century, and that trend is likely to continue into the twenty-first century.

The professions, including the legal profession, are more subject to the pressures that

specialization and niche practice areas, many of which focus on business law and corporate governance issues.⁴ Even among the business and corporate lawyers, there are commercial litigators, securities prosecutors, and transactional attorneys for mergers and acquisitions, lending, and securities, to name a few. Regardless on which side of the line you fall, attorneys are acutely aware that there are lawyers who do “business” work and those who do not. Courts, like the legal profession, are beginning to reflect this practical reality and dedicate resources to the unique legal problems that businesses face.

Georgia has joined at least seventeen other states in creating a specialized court for complex commercial and business litigation. Since October of 2005, the Fulton County Superior Court Business Case Division (Fulton County Business Court or FCBC), located in Atlanta, has operated a business court that adjudicates complex cases, often with significant economic impact, involving special legal issues related to business entities such as contract disputes, securities offerings, corporate governance, dissolution of partnerships, UCC actions, and commercial torts like fraud.⁵

The FCBC, like other business courts, groups complex commercial or business litigation cases to be heard by a specially trained and dedicated business law judge who has expertise in and familiarity with the unique body of statutory and case law for businesses. The purpose of the Fulton

result in specialization than those society activities that are less complex and involve less technical knowledge and experience. While the legal profession itself has become more and more specialized in recent decades, the judiciary, in most jurisdictions, has lagged behind in this trend. In an era of scarce judicial resources, the inefficiencies that result from a failure to specialize have come less and less tolerable.

Ad Hoc Comm. on Bus. Courts, *Business Courts: Toward a More Efficient Judiciary*, 52 BUS. LAW. 947, 948 (1997) [hereinafter Ad Hoc Committee].

4. “[S]pecialization 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.” Ad Hoc Committee, *supra* note 3, at 949. “More than a dozen other states have adopted specialized business courts to handle the complex commercial litigation docke[t]. These states have found that adopting a specialized docket created great judicial expertise, enhances procedural innovation and consistency, and reduces the burden on non-specialized courts by removing these time-consuming cases from their dockets.” Chief Justice Wallace B. Jefferson, Supreme Court of Texas, *The State of the Judiciary*, Address before the 80th Legislature (Feb. 20, 2007), in 70 TEX. B.J. 314, 316 (2007).

5. ATLANTA JUD. CIR. R. 1004, available at http://www.fultoncourt.org/superiorcourt/pdf/business_court.pdf [hereinafter ATLANTA JUD. CIR. R. 1004] (outlining the jurisdiction and procedures of the FCBC).

County Business Court, as well as other business courts, is to provide an efficient forum for the just, expeditious, and consistent resolution of complex commercial or business cases.

In order to justify the resources dedicated to them, business courts should advance five basic goals of the administration of civil justice: access, timely action, equality, judicial independence, and enhanced public trust. The civil justice goals can be categorized into three measureable groups: efficiency, quality decision-making, and the public's perception of due process. Business court features such as case management tools and mediation may predict efficiency; reversal rates, published opinions, and collaborations with multidisciplinary institutions may predict quality decision-making; and uniformity of procedural rights and the collection of party feedback may predict the perception of due process. These features provide a predictive tool to evaluate whether or not a business court is serving its role with the judicial branch of government. Thus, the more features present within a program, the further a business court should be advancing the civil justice goals.

This article establishes a framework to understand and evaluate business courts by describing their developments, identifying their theoretical underpinnings, summarizing commonalities, and proposing predictive features. First, this article explores the historical origins, the perceived advantages, and the criticisms of business courts. Second, this article adopts a proposed model to review the current status of and to evaluate the "success" of business courts. Third, this article compares and contrasts the different business court programs in the country and, in particular, the Fulton County Business Court.

Utilizing the proposed model, North Carolina is the current gold standard in established non-Delaware business courts. The FCBC, although in its infant stage, has five of the proposed features and is in various stages of developing and implementing the missing features. Thus, the FCBC is tracking well with other non-Delaware business courts and is predicted to be a successful court that justifies the resources dedicated to it.

I. HISTORY: EMERGENCE OF SPECIALIZED BUSINESS COURTS

The development of Georgia's business court is a part of a national trend towards "specialization" in the legal profession, especially in the context of complex civil litigation.⁶ "Specialized courts usually are defined as forums of highly limited jurisdiction to which all of the cases of a particular type are channeled."⁷ Georgia is one of eighteen states to implement a specialized complex commercial or civil docket, with four states in various phases of proposing or planning a similar specialized court.⁸

Among these courts, Delaware's Chancery Court, established in 1792, is the "godfather" of modern business courts.⁹ The Chancery Court retained the old English distinctions between law and equity. Today, the Chancery Court hears cases involving breach of fiduciary duties, trust and estate litigation, class actions, shareholder disputes, and civil rights actions seeking injunctive relief. The Chancery Court primarily developed as "the original" business court because corporate governance cases "generally raise the kinds of questions with which equity deals: the duty of disclosure, the duty of good faith, and the

6. See, e.g., Ad Hoc Committee, *supra* note 3, at 949; CHIEF JUSTICE'S COMM'N ON THE FUTURE OF THE N.C. BUS. COURT, FINAL REPORT AND RECOMMENDATION 2 (2004), available at <http://www.ncbusinesscourt.net/ref/Final%20Comission%20Report.htm> [hereinafter COMM'N ON N.C. BUS. COURT] ("In 1997, an ad hoc committee of the American Bar Association recommended that all states consider adopting some form of business court, stating that 'the movement toward specialized business courts' is 'gaining strength,' and 'that there appears thus far to be no criticisms in jurisdictions where business courts have been established.'"); Ben F. Tennille, *Business and Commercial Courts Judges Committee*, CIV. ACTION (Nat'l Ctr. for State Courts, Williamsburg, Va.), Winter 2004, at 5.

7. Rochelle C. Dreyfuss, *Forums of the Future: The Role of Specialized Courts in Resolving Business Disputes*, 61 BROOK. L. REV. 1, 5 (1995).

8. Delaware, Illinois, New York, North Carolina, New Jersey, Pennsylvania, Massachusetts, Nevada, Rhode Island, Maryland, Florida, Georgia, Oregon, and Maine have specialized "business" courts. California and Arizona have "complex" dockets that include, but are not exclusive to, business cases. Also, South Carolina adopted rules to start a new business court in the fall of 2007 and is included in this discussion. See *infra* Table 1.

9. See William T. Quillen & Michael Hanrahan, *A Short History of the Delaware Court of Chancery—1792–1992*, in COURT OF CHANCERY OF THE STATE OF DELAWARE, 1792–1992 (1992), available at <http://courts.state.de.us/Courts/Court%20of%20Chancery/?history.html> (providing a historical overview of the emergence, development, and success of the Delaware Court of Chancery as the original business court); see also Dreyfuss, *supra* note 7, at 7; E. Norman Veasey & Michael P. Dooley, *The Role of Corporate Litigation in the Twenty-First Century*, 25 DEL. J. CORP. L. 131 (2000).

like.”¹⁰ Additionally, the relief often sought in corporate cases such as accountings, injunctions, and specific performance, was traditionally only available in equity courts.¹¹ Delaware’s equity tradition, combined with its “advanced and flexible business formation statute,” has made Delaware the corporate leader of the country.¹² Delaware is the corporate home to 61% of all Fortune 500 companies and more than half of all firms traded on the New York Stock Exchange and NASDAQ, not to mention the number of privately-held companies that incorporate in Delaware.¹³

As Delaware developed as the national leader of corporate law, other states took notice and tried to reproduce the success within their jurisdiction. “Given Delaware’s success in attracting incorporations, the esteem in which many commentators hold Delaware corporate law, and that, in part, these successes are attributed to its special tribunal, other states have followed Delaware’s propitious lead.”¹⁴ New York and Illinois were the first to follow suit in 1993, with North Carolina following in 1995, and six other states by 2000.¹⁵

Early critics did not predict a good future for other business courts (“non-Delaware business courts”) by suggesting that the factors of *commercial law*, as opposed to *corporate law*, did not lend itself well to the constructs of specialized courts.¹⁶ Additionally, one skeptic cautioned that “[u]tilizing public funds to exclusively support the interests of businesses and corporations is not likely to be greeted with favor.”¹⁷

10. Dreyfuss, *supra* note 7, at 7.

11. *Id.*

12. HARRIET SMITH WINDSOR, DEL. DEP’T OF STATE, 2006 ANNUAL REPORT 1 (2007), available at http://corp.delaware.gov/2006%20Annual%20Report%20with%20Signature%20_2_.pdf [hereinafter DEL. 2006 REPORT].

13. *Id.*

14. Dreyfuss, *supra* note 7, at 2; see also Marcel Kahan & Ehud Kamar, *The Myth of State Competition in Corporate Law*, 55 STAN. L. REV. 679, 695–99 (2002) (estimating Delaware’s market share of publicly-traded company incorporations at roughly 50%).

15. See *infra* Table 1.

16. Dreyfuss, *supra* note 7, at 4.

17. *Id.* at 31.

In 1995 at the beginning of the debate, success was anticipated to be measured in terms of how a court compared to Delaware,¹⁸ but more than a decade later, the model constructed by North Carolina is the gold standard and is being replicated by other non-Delaware business courts.¹⁹ “Today, the state courts of Delaware, California, New York, and New Jersey largely comprise what legal scholars call the corporate judiciary.”²⁰ These jurisdictions, which were the first to reproduce Delaware’s success with business courts, are likely to encourage other jurisdictions to develop business courts. It has not been an obstacle-free path, but the creation of fourteen non-Delaware business courts demonstrates that the concept has continued to gain support and momentum.

II. PURPOSE AND GOALS OF BUSINESS COURTS

There are two main purposes for creating business courts: the primary purpose is to serve the administration of civil justice, and the secondary purpose is to attract and retain business within a state.

A. *Serving the Administration of Civil Justice*

State trial courts serve five primary goals that together embody the concept of administration of justice: (1) access to judicial resources, (2) timely action, (3) ruling and operating with equality and integrity, (4) maintaining judicial independence, and (5) instilling public trust and

18. *See id.* at 44.

19. Emerging business court should look to non-Delaware business courts with established programs and proven track records of success. The long and unique history of the Delaware Chancery Court, the state’s small size, and the unwavering focus that the judicial, legislative, and the executive branches devote to business law issues make it a program that would be difficult, if not impossible, to replicate. Dreyfuss, *supra* note 7, at 24–36; *see also* Quillen, *supra* note 9 (describing the evolution and development of the Delaware Chancery Court). The emphasis on non-Delaware business courts throughout this article should in no way diminish the importance or impact that the Delaware Chancery Court has played in the development and promotion of specialized business courts in other jurisdictions.

20. SCIULLI, *supra* note 2, at 15.

confidence in the judicial branch.²¹ Business courts arguably advance all five administration of justice goals by (1) tracking like cases to one judge or judges, (2) dedicating judicial resources to a business court, (3) ensuring that a business court bench is staffed with experienced judges with expertise in the substantive area of law, and (4) selecting business court judges outside of corporate influences.²²

1. Access to Judicial Resources

Access to judicial resources, at least in the context of specialized courts, should evaluate whether or not the parties are able to utilize the judicial system in a manner that addresses their needs, which will depend upon the type of case and the issues in the case.²³ For example, in a criminal trial a defendant needs access to a fair and speedy trial, or in domestic violence cases, a victim may need a protective order issued quickly and without confronting the attacker. In complex business disputes, the parties also have a unique set of needs that require increased judicial oversight, a substantive knowledge base, and responsive scheduling.

Creating business courts should promote access to judicial resources in two respects: first for the business litigants, and second for those in the criminal and general civil dockets. Tracking like cases into specialized courts provides the parties with increased access to both procedural and substantive judicial resources.²⁴ The procedural resources offered in specialized courts are management and oversight of

21. NAT'L CTR. FOR STATE COURTS, TRIAL COURT PERFORMANCE STANDARDS WITH COMMENTARY 5-22 (1990), *available at* <http://www.ncjrs.gov/pdffiles1/161570.pdf> [hereinafter PERFORMANCE STANDARDS].

22. *See generally* COURT CONSULTING SERVS. DIV., NAT'L CTR. FOR STATE COURTS, CIVIL PROGRAMS IN THE PHILADELPHIA COURT OF COMMON PLEAS FINAL REPORT 51 (2004), <http://fjd.phila.gov/pdf/report/NSCS-Civil-Final-Report.pdf> [PHILADELPHIA COURT REPORT].

23. Access to judicial resources is typically measured by state trial courts in a more literal sense, evaluating whether or not the parties were able to find the courthouse and how well the courthouse accommodated people of all abilities, needs, and languages. *See* PERFORMANCE STANDARDS, *supra* note 21, at 7-10.

24. The author uses "procedural" resources to mean management and oversight of a case and "substantive" resources to mean expertise and experience in the bodies of law often litigated in business courts (i.e., securities, corporate fiduciary duties, derivative suits, and the UCC).

complex cases. The more complex the case, arguably, the more judicial resources are required to manage it. Complex business cases often have extended pleading schedules (six months as compared to thirty or sixty days) due to multiple parties and cross claims.²⁵ Additionally, complex business disputes often present complicated and protracted discovery schedules that will require judicial management of disputes and assistance in managing both the sheer volume of documentary evidence as well as the unique issues presented by electronically stored information. Complex business disputes also have rigorous motion practice and the cases can often be resolved, or at least substantially narrowed, on motions for summary judgment. Finally, the disputes presented in complex business cases may require a responsive judiciary that can quickly hear motions such as a preliminary injunction before a shareholders' meeting, appointment of a receiver, or adjudication of issues before a party enters bankruptcy.

The nature of these complex cases requires more judicial management, attention, and responsiveness. In business courts, judges are dedicated to the special docket and generally relieved of handling criminal and/or non-business cases. Additionally, the business court model recognizes the increased resources required to adjudicate complex business cases generally allowing a business court judge to carry lower caseloads than judges hearing criminal and general civil cases.²⁶ Thus, business courts have more judicial resources to dedicate

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25. In routine cases, the pleading stage usually lasts from 21 to 30 days In a complex case, however, the pleading stage tends to be much longer, often lasting four to six months. Complex cases often involve cross-and third-party claims, which necessarily lengthen the pleading stage as new parties are served, retain counsel, and file responsive pleadings. Cases involving large numbers of parties also require more time for the lawyers to organize themselves and prepare for the discovery and negotiation phase of litigation.

The Unique Life Cycle of Complex Cases, CIV. ACTION (Nat'l Ctr. for State Courts, Williamsburg, Va.), Winter 2004, at 4.

26. In the Fulton County Business Court, the senior judges (semi-retired) staffing the court currently have approximately twenty cases assigned each. The initial feasibility study for the FCBC estimated that three senior judges could handle between fifty and seventy-five cases. Aquitas, Georgia Business Court Feasibility Study (December 6, 2002) (unpublished study on file with the author). Similarly, three full-time North Carolina Business Court judges are assigned an average of fifty-four cases each. E-mail from Julie Holmes, Counsel to North Carolina Business Court, to Anne Tucker Nees, Staff Attorney to Fulton County Business Court (Sept. 5, 2007) (on file with author).

to the procedural needs of each complex business case and to facilitate access to justice.

Commercial and business law cases require substantial resources such as knowledge and expertise because the cases present unique legal issues that are both substantive and procedural.²⁷ The more unique or precise the substantive law involved in a case, the more time is required by the judge to learn and rule on the issues involved a case. Thus, grouping cases within a certain substantive area of the law reduces the costs associated with the “learning curve” and promotes efficiency.²⁸

Additionally, parties with specialized complaints such as fraudulent securities offerings or derivative shareholder suits not only seek access to a court, but to a court with experience and expertise with the substantive body of law. Thus, business courts staffed by trained and experienced judges provide the parties access to a court equipped to competently address their unique substantive and procedural needs.²⁹ Also by efficiently utilizing judicial resources to learn the substantive law, the judge has more time to address the procedural needs listed above.

27. Here the author uses “substantive” and “procedural” in the common, legal sense where substantive law affects the rights and obligations of parties in courts and procedural concerns address the process and form by which parties seek to enforce their rights and obligations. Substantive issues in commercial and business law may range from shareholders’ rights to dissolution mechanisms, while procedural issues may include questions such as corporate representation and proper parties to a derivative suit.

28. Lawyers are thus likely to experience a high fixed cost in familiarizing themselves with and internalizing those rules. But once an attorney has handled a number of accessibility cases, the additional cost of learning the rules governing a new case drops. Here as elsewhere, specialization is likely to lead to significant economies of scale. And specialization will also enable the attorney to recover higher fees—both by justifying a higher lodestar rate, and by making possible more effective screening of cases (and hence greater certainty of fee recovery).

Samuel R. Bagenstos, *The Perversity of Limited Civil Rights Remedies: The Case of “Abusive” ADA Litigation*, 54 UCLA L. REV. 1, 13 (2006) (citations omitted). Because judges, like lawyers, have to devote substantial resources to learning the substantive law involved in business and commercial law cases, specialization should promote judicial efficiency in handling cases with similar substantive law issues.

29. See *infra* Table 1. Additionally, judges assigned to a business court usually hear either solely or primarily only the business court’s cases and thus are relieved from the pressures of managing a general criminal and civil docket. Arming the business court judges with extra training in business and commercial law, repeatedly being exposed to common issues, and providing them with adequate time to devote to these complex cases goes to the real heart of the efficiency goals of business courts. With these additional tools, the judges are equipped to rule fairly, consistently, and timely.

All litigants should have increased access to judicial resources by creating a business court. By siphoning off these resource-consuming cases into the specialized tribunals, the remaining parties with general civil or criminal cases benefit from not having to compete with these cases for limited judicial resources (and vice versa). For example, in Fulton County Superior Court, the average criminal caseload is 491 cases per judge and the average non-domestic civil caseload is 226 cases per month.³⁰ The average judge in Fulton County has over 600 cases to manage and adjudicate.³¹ As stated above, the amount of judicial resources necessary to manage a complex civil case with multiple parties, numerous depositions and affidavits, high volumes of documentary evidence, and frequent discovery disputes can impede and interfere with the progress of other criminal and civil cases on a judge's docket. By identifying, tracking, and grouping these resource-intensive cases before one judge or a small group of business court judges, it relieves some of the pressure on the general docket and frees those judges to concentrate on criminal and general civil matters.³² Thus, the criminal defendant and the civil litigant should have greater judicial resources available to facilitate their judicial processes.

2. *Timely Action*

Like access to judicial resources, the 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 such as with a motion for

30. Fulton County Superior Court, April 2006–July 2007 Pending Criminal Caseload with Percentage Increase or Decrease in Total Caseload (Aug. 2007) (on file with author); Fulton County Superior Court, April 2006–July 2007 Pending Civil and Domestic Caseload with Percentage Increase or Decrease in Total Caseload (Aug. 2007) (on file with author).

31. Note that domestic cases are tracked to a specialized family court.

32. See Leonard Post, *Some Courts Are All Business—Study: Commercial Tracks Are Thriving*, 26 NAT'L L.J. 1, 3 (2004) ("giving these cases to judges who have expertise to manage them makes the entire court system more efficient.").

injunctive relief.³³ Additionally, judicial familiarity with the legal issues often presented in complex business litigation should decrease the delays between a motion or argument and the judicial ruling.

Substantive resources (e.g. knowledge) should also facilitate case management by addressing the unique needs of complex cases. For example, familiarity with the issues of complex business litigation allows a judge to address electronic discovery issues in the original scheduling order, build notice hearings into the schedule for a class action case, or allow time for rebuttal experts to be identified and deposed in cases with questions of accounting or valuation.

Similarly, general litigants will benefit from having the complex business cases tracked to a specialized court and not clogging up the general docket. For example, if a judge can schedule one oral argument on a motion for summary judgment in a complex business case or can set thirty default cases on the calendar, those thirty cases benefit from having the complex business case diverted to a specialized court.

3. Ruling and Operating with Equality and Integrity

Additionally, pooling judicial resources so that a single judge or a small group of judges handle all business disputes should promote consistent application and interpretations of the law. Business court judges, trained in the substantive areas of law, should produce consistent and accurate decisions. In other words, the law should be applied to the cases in a business court in a uniform, fair, and predictable manner. Proponents of business courts advance the theory that judicial familiarity with commercial and business law, combined with adequate resources—judicial hours, adequate staff, and reduced caseloads—to oversee such

33. In many complex business cases, particularly those involving changes in ownership or corporate governance issues, preliminary injunctive relief is a critical issue. Often decisions need to be rendered before specific times such as shareholder meetings. "Having a judge available to hear such cases on short notice is a significant benefit to the parties." COMM'N ON N.C. BUS. COURT, *supra* note 6, at 4. Thus, business leaders are better able to focus on running their companies. The speed and flexibility provided by the business court not only improves the administration of justice, but also meets many of the business community's critical needs.

complex cases, will yield “better” results.³⁴ Better results means consistently enforced laws, a cohesive approach to a state’s business organization statutes, and careful attention to the record of the case.

Additionally, business courts can serve to decrease inconsistent application of laws. Businesses looking at case law and statutory interpretation have often complained that they found it inconsistent or incomplete and thus inadequate to properly inform future business decisions. Complaints of inconsistent application of laws combined with the emergence of alternative dispute resolution methods in the 1990s, eroded state corporate law and drove litigants to file suits in federal court, to states with business courts (like Delaware), or to private adjudication.³⁵

The trend of private adjudication and alternative dispute resolution popular in the 1990s contributed to a lack of coherent and consistent bodies of state law.³⁶ Such alternatives to traditional state courts resolved disputes, but did so without setting precedent, without published decisions, and often without the advantage of appellate

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34. Proposals for more specialized courts . . . generally argue that such specialized courts have three advantages. First, diverting a class of cases to specialized courts of appeals will take some of the burden of growing caseloads off of the shoulders of the regular courts Second, a specialist judiciary will enhance the quality of decisions, especially in complex areas of the law. Finally, creating a single court with exclusive jurisdiction over particular areas of the law would enhance uniformity in those areas.

Sarang Vijay Damle, *Specialize the Judge, Not the Court: A Lesson from the German Constitutional Court*, 91 VA. L. REV. 1267, 1268–69 (quoting the remarks of Judge Henry Friends originally printed in 71 YALE L.J. 218, 220 (1981)); *cf. id.* at 1277–87 (arguing that specialized judges will have too much familiarity with the subject matter and may produce undesirable results such as arcane or unsoundly reasoned case law). “Combining limited and exclusive jurisdiction over a subject matter prevents what Judge Posner calls ‘yardstick competition.’ Without the ‘clash of views’ created by such competition, judges might more often rely on sloppy reasoning.” *Id.* at 1284; *see also* RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 59–77 (1985).

35. *See, e.g.*, Carl N. Pickerill, Note, *Specialized Adjudication in an Administrative Forum: Bridging The Gap Between Public and Private Law*, 82 NOTRE DAME L. REV. 1605, 1647 (2007) (suggesting that, among other things, utilizing specialized state business courts patterned after the Delaware Court of Chancery could solve the public/private court dichotomy); *see also* Dreyfuss, *supra* note 7, at 2–3 (documenting the trend to develop state business courts); Jay Tidmarsh, *Pound’s Century, and Ours*, 81 NOTRE DAME L. REV. 513, 580 (2006); *cf. Kahan & Kamar, supra* note 14, at 725–26.

36. Business courts developed out of the emerging complaints from business litigants and their dissatisfaction with traditional state courts, private adjudication and other forms of alternative dispute resolution. Driving business cases away from state courts resulted in a lack of coherent and consistently developed body of case law and an abrogation of state-held rights to decide cases traditionally within their exclusive jurisdiction. *See* Mitchell L. Bach & Lee Applebaum, *A History of the Creation and Jurisdiction of Business Courts in the Last Decade*, 60 BUS. LAW. 147, 152 (2004).

review. While private adjudication may have been an attractive short-term fix to the problems (costs and delays) of traditional state adjudication of business and commercial cases, it did not offer a long term solution because it eroded a stable, consistent, predictable body of law. "Since arbitration awards often are not published as reasoned decisions and some are expressly made confidential, the rules of law applied in these cases cannot be easily determined, scrutinized or applied to similarly situated litigations."³⁷

Inadequately developed commercial and business law generates a cyclical problem: inconsistent or inadequate state court rulings complicate corporate officers' efforts to govern corporations, thereby setting the stage for future corporate governance disputes; as state courts handle these novel issues without an adequate body of appellate-reviewed cases there is greater potential for inconsistent results and the corporate law doctrine is even further undermined. Corporate governance and commercial cases needed to be brought back under the authority of state courts, but such courts could only "win" back litigants by offering the decreased delays, decreased costs, and increased expertise found in specialized courts like business courts. For example, the FCBC was developed, in part, in response to the complaints of business litigants about the costs, delays, and inconsistent results associated with traditional state litigation.

4. *Maintaining Judicial Independence*

The creation of a business court, on its face, serves the fourth goal of judicial independence the least out of the stated goals. In fact, one of the main criticisms against specialized business courts is concern over creating a biased court that is beholden to business interests.³⁸ However,

37. Dreyfuss, *supra* note 7, at 35.

38. Political appointments with specialized courts raise real concerns about politicization, bias, and the ability of special interest groups to unduly influence both the appointment process and the appointed decision maker. *Id.* at 21. Thus, the staffing of a business court is an important consideration for developing and existing business courts. Drawing from an existing pool of judges or utilizing a prominent private or academically-based attorney may be feasible options, but however the selection is made, it must be done in a way that promotes the appearance of judicial independence and fosters public trust and confidence. See PHILADELPHIA COURT REPORT, *supra* note 22, at 53 (discussing concern

by developing a consistent and coherent body of business and commercial law, rulings are less subjective or seemingly arbitrary, which in turn promotes judicial independence because there is less room for judicial discretion or undirected interpretations of the law. Additionally, utilizing senior judges or rotating and limiting terms for the business court bench are possible court structures that decrease concerns of bias and promote judicial independence.³⁹ Finally, collaboration between a business court and a state or local bar association on programs, procedures, and practices in a business court bolsters judicial independence by diluting the potential influence of corporate interests.

5. *Instilling Public Trust and Confidence in the Judicial Branch*

"Justice should not only be done, but should be seen to be done."⁴⁰ This fifth and final goal is an extension of the previous four goals. The first four goals measured an output or an aspect of the court whereas this goal evaluates how the public perceives a court's performance on the first four measures. Instead of asking *whether a court is* accessible, timely, fair, and independent, this measure asks *whether the public believes* that a court is accessible, timely, fair, and independent.⁴¹

As discussed above, business courts advance the first four goals of access, timely action, fairness, and independence. Thus, with effective communication, business courts should also serve the fifth goal of instilling public trust and confidence.

among the bar members about the staffing of the business court); *see also* WASHOE D. CT. R. 2.1, available at <http://www.leg.state.nv.us/CourtRules/SecondDCR.html> (Business Court Docket rule establishing minimum requirements for business court judges); *infra* text accompanying notes 57–61.

39. For example, in Georgia, the FCBC utilizes senior judges to staff their business court. Senior judges are semi-retired Superior Court judges who retain all of their power and authority, but who no longer are on the "wheel" to receive general civil and criminal cases and who are no longer elected. "'Senior judge' means a superior court judge retired from active service, yet authorized by law to serve as a superior court judge." GA. UNIF. SUP. CT. R. 18.1, available at http://www.georgiacourts.org/courts/superior/uniform_rules.html.

40. PERFORMANCE STANDARDS, *supra* note 21, at 20.

41. *Id.* at 20–21.

B. *Attracting Business*

Attracting business in the form of corporate registrations and filed cases is a secondary purpose of creating specialized business courts.⁴² The business attracted by business courts is two-fold: it is believed to help boost the state's reputation as a favorable state of incorporation as well as bringing in, and retaining, cases into the state courts, which are consequently represented by local counsel (as opposed to being filed in federal court or in another state's court and represented by their attorneys).⁴³

There is no real empirical evidence to support a direct correlation between the establishment of a business court and the number of incorporations thereafter. The argument, however, of attracting incorporations, is one that is cited as a precipitating factor by many different programs and is widely relied upon in theoretical discussions of business courts.⁴⁴ Attracting corporations to the state is not a direct concern (or function) for the judiciary,⁴⁵ but it is a necessary step to attracting and retaining the legal business within the state. Additionally, attracting corporations and businesses to the state may be a necessary component of the business court proposal for those programs that rely upon legislative funding or approval.

Attracting and retaining the legal business associated with complex business and commercial litigation is another proposed advantage of

42. "There is no question that one of the reasons these courts have been set up is to attract business—it's become very competitive." Post, *supra* note 32, at 2; cf. Kahan & Kamar, *supra* note 14 (arguing that states do little to attract incorporations within their state and that there is little benefit to have foreign business incorporations).

43. "It is, however, highly likely that states are making this move . . . to capture a piece of the incorporation business that now flows so freely to Delaware." Dreyfuss, *supra* note 7, at 24; cf. Kahan & Kamar, *supra* note 14, at 687–700. "A principal attraction of incorporation in Delaware is the high quality of its chancery court." Kahan & Kamar, *supra* note 14, at 708.

44. "Although it is impossible to quantify the number of new businesses attracted to this State by the creation of the Business Court, the available information is encouraging. For example, in 2001, *Site Selection* magazine chose North Carolina as the State with the best business climate in America." COMM'N ON N.C. BUS. COURT, *supra* note 6, at 3. Georgia also cited attracting and retaining business as a stated goal in creating its business court. *Id.*

45. Attracting and retaining corporations within a state is a primary concern of the state legislature and the governor and secretary of state's office.

establishing a business court.⁴⁶ A 2002 study estimated that a state's lawyers could collectively increase its income by \$3.3 million and revenue by \$4.5 million for every percentage point increase a state gained in being the state of incorporation for public companies.⁴⁷ Additionally, the study demonstrated that the average attorney income in Delaware, where 60% of public corporations are incorporated, is higher than that of lawyers in any other state or city in the US.⁴⁸ One can only conclude that business law is big business with sufficient economic incentive for a state to pursue.

Attracting and retaining legal business is, in part, associated with in-state incorporations, but also relates to the competence of a court's ability to handle such a dispute within the state. For example, in Georgia, the incentive to establish the business court was derived in part because a high profile case involving a Georgia corporation was tried in the North Carolina Business Court specifically because it was trusted as the better venue to produce speedy and just results over the local state court options.⁴⁹ Expeditious resolution of complex cases saves time and money, particularly in the context of commercial and business litigation where the outcome of the pending suit may drive the future direction of the business. "[B]usiness court[s] will offer speedier justice to small and mid-size businesses which . . . suffer most from the high costs and long delays of civil litigation. Better resolution of business matters is often a key factor in 'business climate' discussions and in attracting and retaining business."⁵⁰ Attracting and retaining legal business is

46. Attracting and retaining legal business within a state's judicial system is theoretically in tension with the above-stated goals of efficiency and access to judicial resources. In order to be a viable, and necessary, division of a state trial court, however, there must be a perpetual source of cases with the appropriate level of complexity and subject matter. Thus, attracting legal business within a state ensures the future need for a business court, which is one component of success.

47. Kahan & Kamar, *supra* note 14, at 698.

48. *Id.* at 694–95; DEL. 2006 REPORT, *supra* note 12, at 1.

49. First Union Corp. v. Suntrust Banks, Inc., No. 01-CVS-10075, 2001 WL 1885686 (N.C. Super. Ct., Aug. 10, 2001); see also *SunTrust, First Union Consolidate Merger Lawsuits*, ATLANTA BUS. CHRON., June 1, 2002; Rachel Tobin Ramos, *Business Court May Start Here as Pilot Project*, ATLANTA BUS. CHRON., Oct. 8, 2004, at A3; Tom Barry, *Court's Business Division Gives Cases Needed TLC*, ATLANTA BUS. CHRON., May 18, 2007, at C14; Greg Land, *Rule Change Opens Business Court's Doors*, DAILY REP., June 19, 2007, at A1.

50. Ember Reichgott Junge, *Business Courts: Efficient Justice or Two-Tiered Elitism?*, 24 WM. MITCHELL L. REV. 315, 317–18 (1998).

tangentially related to the number of in-state incorporations, and it is directly related to the reputation and performance of a state's judiciary, particularly if the state operates a business court.⁵¹

III. CRITICISMS—A THEORETICAL CRITIQUE OF SPECIALIZED COURTS

It would be naïve to think that specialization, especially in the context of commercial and business litigation, comes without costs. It is important to understand the theoretical criticisms of specialized courts in order to tailor a program that avoids, mitigates, or neutralizes such concerns in the best available manner. The main criticism levied against specialized business courts is that they cater to the business community which in turn fosters (1) a two-tiered or elitist system of justice, (2) bias, (3) isolation, and (4) procedural inefficiencies.

A. *Elitism*

The criticisms of elitism and creating a two-tiered system of justice are wholesale complaints against creating specializing courts and dedicating resources to them in order to resolve business disputes. The fear is that business courts will “cater to the business community at the expense of other litigants,”⁵² by draining the courts of their best judges and consuming other resources such as courtroom space, calendar time, and judicial attention at the cost of general civil or even criminal cases.⁵³ The question that critics raise is whether specialized courts for complex civil cases create two justice systems: one with the best judges, expeditious resolution, expert attention, and other resources and the other with general judges, longer resolution time, less resources, and a greater risk of inconsistent results. Mary Alexander expressed the

51. A specialized court, however, should only be able to attract “business” once it has demonstrated that it competently serves the five goals of the administration of justice. Specifically, attracting business is a result of regaining public trust and confidence. See, e.g., PERFORMANCE STANDARDS, *supra* note 21, at 20–22.

52. Post, *supra* note 32, at 3.

53. *Id.* at 4 (positing the question: Do specialized courts operate at the detriment of criminal prosecutions and access to courts?).

following concern about business courts when she was acting president of the Consumer Attorneys of California (formerly the California Trial Lawyers Association) that “[c]ommercial courts establish a two-tiered system of justice—one for the rich and one for the average citizen.”⁵⁴

As discussed above, the counter argument to the two-tiered system complaint is that, by pulling resource-draining cases off of the general docket, there are increased efficiencies across the board as the general docket can resolve the criminal and non-complex civil issues more expeditiously.⁵⁵ When relieved of the strain of these cases, the general docket can dedicate the resources to the criminal and general civil cases. Similarly, the trend in specialization is not just in the business arena, but is a prominent state trial court tactic. For example, in Fulton County Superior Court, there is a Family Court Division, a Drug Court, a Mental Health Court, and a non-complex criminal calendar all with the goals of tracking like cases to the same judges in order to increase expertise, efficiency, and the timely resolution of cases.⁵⁶ Thus, the creation of a business court as one of many “specialized” courts decreases the appearance of elitism and decreases the potential impact of dedicating resources to the program.

B. Bias

There is also concern that a business court, acting through its judges and staff, would “court” the business community and be inclined to rule in its favor or at least be susceptible to politicization and bias.⁵⁷ The impression of bias or court-sanctioned sympathies erodes public trust and confidence. They chip away at the civil administration of justice goals of judicial independence and public trust.⁵⁸

54. Junge, *supra* note 50, at 315.

55. Dreyfuss, *supra* note 7, at 31.

56. See Tamar M. Meekins, “Specialized Justice”: The Over-Emergence of Specialty Courts and the Threat of a New Criminal Defense Paradigm, 40 SUFFOLK U. L. REV. 1 (2006) (describing the efforts of trial courts to specialize on the criminal side of operations creating “treatment courts” or “boutique courts”). “Specialized justice” refers to the notion of individualized, treatment-oriented, and problem-solving processing of cases and defendants through the criminal justice system. *Id.* at 3 n.5.

57. Dreyfuss, *supra* note 7, at 21.

58. See PERFORMANCE STANDARDS, *supra* note 21, at 20–22.

Related to the concern of courting the business community with favorable rulings is perceived competition among the different business courts. As stated above, one incentive to develop such programs is the ability to attract business by retaining cases within the state and encouraging companies to incorporate within the state. The concern is that national corporations, for example, with multiple places for personal jurisdiction, may choose a particularly sympathetic business court or judge. Such interstate competition may negatively impact the administration of justice in specialized courts and create, in effect, a race to the bottom of corporate law.⁵⁹

The experiences of established business court jurisdictions such as in Delaware and New York, however, have mitigated these fears somewhat. Neither the legislative law nor court interpretations can tip the scales too heavily in favor of either the corporation (directors) or the shareholders, or unduly limit the range of corporate governance options. To attract shareholder investment (capital) for businesses, the law must protect both the corporation and the shareholders.⁶⁰ Similarly, courts cannot consistently rule against consumers without negatively affecting consumer confidence, spending, and the economy.⁶¹

Bias of a business court is an obvious concern, but such a bias would be short-sighted and create a body of law and legal environment hostile to the sustainability and growth of the businesses themselves and ultimately to the business court as well. To rule or side blindly with businesses would not only injure the court and judicial systems, but would also harm the intended beneficiaries—businesses. The jurisdiction must provide a fair application and interpretation of the law for all parties including corporate managers, shareholders, consumers,

59. As states create specialized business courts to attract and retain business, in-state incorporations, and business for the bar, there is concern that the “dynamics of the competition among states for these benefits will affect substance and procedure also.” Dreyfuss, *supra* note 7, at 37; *see also id.* at 41–42.

60. *See id.* at 23; *see also* SCIULLI, *supra* note 2, at 183–86, 210, 278.

61. For example, courts often repair or rebalance market inefficiencies and externalities such as the health risks associated with tobacco use, silicone breast implants, lead paint, and asbestos. The rebalancing role that the judiciary plays should, arguably, instill consumer confidence and spending, which should also support economic growth. *See, e.g.,* Recent Legislation, *Torts—Products Liability—Florida Enacts Market Share Liability for Smoking-Related Medicaid Expenditures*, 108 HARV. L. REV. 525 (1994).

lenders, and borrowers in order to ensure due process and an equitable, unbiased application of the law. Otherwise, there would be less motivation to work for or invest in companies. Such a one-sided approach to business law would discourage investment in businesses and could ultimately lead to an insufficient supply of financial and intellectual capital necessary for a thriving economy.

C. Isolation

State trial courts are traditionally courts of general jurisdiction that hear both criminal and civil cases of all types. While the traditional model of a general court does breed some inefficiencies (e.g., like cases not grouped with like cases and judges practicing in all areas of law) and prevents building an expertise in a particular area, it also encourages a broad, universal, and multi-disciplinary approach to the application and interpretation of the law. Exposure to all different types of cases, the issues involved, and the parties who bring them creates a “cross pollination among legal theories” that may provide insight, applicable analogous reasoning, or comparable standards to whatever issue is facing the court.⁶² Sitting as a judge in a general jurisdiction court hearing criminal and civil, complex and non-complex cases fosters a holistic view of the administration of justice, the role of the judiciary in society (as arbitrator, disciplinarian, facilitator, or protector), and its impact on individuals, businesses, and families.

Specialized courts, in contrast, operate in isolation. “Since all cases in a single field are funneled to that court, little opportunity exists to exchange theories, to debate positions with other courts, or to compare how different rules work in practice. There is, in short, no opportunity for the percolation that tests, refines, and improves new ideas”⁶³ Isolation is a real concern. There is no vacuum in which any aspect of the law operates; the law has a very real and visceral impact, often on the daily lives of people, even in the context of business disputes.

62. Dreyfuss, *supra* note 7, at 17; see also Damle, *supra* note 33, at 1281 (listing “tunnel vision” and lack of “cross pollination” as common critiques against subject-matter specialized courts).

63. Dreyfuss, *supra* note 7, at 17.

Attention to how the business court bench is staffed and trained may mitigate concerns regarding isolation. For example, senior judges, rotating terms, continuing education, and interaction with multidisciplinary associations such as a state or local bar association may provide the appropriate opportunity for “cross pollination.”⁶⁴ Additionally, traditional business court cases have evenly matched parties and attorneys, which can decrease the potential negative impact of isolation.⁶⁵ Finally, while the substantive subject matter of each case before a business court is similar, the underlying fact patterns, human relationships, public policies, interests, and the parties themselves (which can range from a three shareholder c-corp. to a publicly traded corporation), vary from case to case thus minimizing the actual impact of isolation of a business court bench.

D. Procedural Inefficiencies

Finally, critics raise several procedurally-based complaints against specialized courts: forum shopping and the advantage of repeat players. First, critics assert that specialized courts may undermine the goal of increased efficiency by creating an incentive for parties to forum or judge shop. Litigants may structure pleadings, decide where to file, or bifurcate portions of an action in order to keep the case within the desired court, all of which undermine any resource savings achieved through the concentration of resources in specialized courts.⁶⁶ Additionally, choice has costs. Specifically in jurisdictions where litigants have more control over whether or not the case is heard in the general or specialized courts (for example, where there is no automatic case assignment), the choice of forum requires that the state operate two

64. PHILADELPHIA COURT REPORT, *supra* note 22, at 54–55 (recommending working with the state bar organization to temper concerns regarding the business court).

65. With evenly matched parties there is less concern about an external cost associated with the outcome that is not adequately represented to or considered by the court. Conversely, if, for example, a pro se plaintiff sues a corporation, the pro se plaintiff may not evoke the full range of public policy, legal reform, practical effects, or theoretical arguments that could persuade the court to rule in its favor. Thus the responsibility in those situations lies more with the court to see all of the arguments behind and impacts of a certain case.

66. Dreyfuss, *supra* note 7, at 20.

systems, which increase both the cost and risk of inconsistent results.⁶⁷ These are concerns which should be noted when crafting rules and policies for a business court, but are realities that cannot be entirely mitigated.

Second, repeat players, experts in the field who will have repeated access to a particular specialized court, are argued to have an unfair advantage:⁶⁸ “Commentators have long noted that, in general, repeat players have an advantage over one-time litigants.”⁶⁹

Complex commercial and business litigation, however, may not be susceptible to some of the pitfalls of repeat players because of the equal footing of the litigants and the prevalence of counterclaims. Corporate litigants are traditionally evenly matched in terms of financial resources, business sophistication, and legal savvy.⁷⁰ Additionally, the versatility of roles in corporate litigation reduces the potential advantage of repeat players. For example, counterclaims are prevalent in corporate litigation and thus the parties play the roles of both defendants and plaintiffs. Similarly, a single litigant may seek to terminate a contract in one case and to uphold it in another, or may find itself in the role of the majority shareholder in one suit and the minority in another. This argument also counters the concerns regarding bias. The ever-changing business roles

67. *Id.* at 26–27. “Specializing commercial disputes raises a second efficiency issue If specialized commercial courts turn out to be appealing, and if they indeed clear their dockets quickly, then they will generate a substantial amount of new business, for many of the cases that currently go to arbitration will come back into the public system.” *Id.* at 34. This criticism, however, is tempered with the concern that arbitration erodes a stable, consistent, and predictable body of law because arbitration awards are often not published and many are even made expressly confidential. Thus the applicable rules of law cannot be easily accessed, determined, scrutinized or applied.

68. [T]he experience and expertise gained by those who repeatedly litigate is extremely advantages. These ‘repeat players’ tend to have more resources, in terms of money, knowledge, expert services, *etc.* than do those who on occasion utilize the legal system, the ‘one-shotters.’ These advantages combine with the rules that tend to favor the dominant groups, so that those with greater resources can manipulate the structure more readily.

STACIA L. HAYNIE ET AL., WINNERS AND LOSERS: A COMPARATIVE ANALYSIS OF APPELLATE COURTS AND LITIGATION OUTCOMES 4 (2001),

[http://appl003.lsu.edu/artsci/polisci.nsf/\\$Content/Conference+Papers/](http://appl003.lsu.edu/artsci/polisci.nsf/$Content/Conference+Papers/) (follow “Stacia L. Haynie” link).

69. Dreyfuss, *supra* note 7, at 22.

70. *Id.* at 21–22.

influence a party's legal roles and thus reduce both their interest in, and ability to influence, a particular body of law at the expense of another.⁷¹

Most of these criticisms against business courts can be mitigated through proper structure, as most have been in the fourteen non-Delaware business courts.⁷²

IV. BUSINESS COURT SURVEY AND CASE STUDY

A. *A Proposed Framework to Analyze Business Courts*

In 1995, New York University School of Law Professor Rochelle C. Dreyfuss proposed a model by which to evaluate the performance of specialized courts.⁷³ The model focused on three measurements: (1) efficiency, (2) quality decision-making, and (3) the perception of due process.⁷⁴ These three measures encompass the five goals of civil justice administration stated above: access, timely action, equality, judicial independence, and public trust.

71. Compare, for example, the situation of a landlord who will want the law developed to consistently favor landlord rights and to reduce tenants' rights.

72. For example, business courts are structured to decrease resolution time, not only of business cases, but also to free up general docket resources and thus drive down the case resolution times across the board. Additionally, utilizing senior judges or former general trial judges, providing continued education to the business court bench, and working closely with multidisciplinary organizations such as a state or local bar can counter the impacts of business court isolation. Similarly, consolidating cases before one judge, allocating time and expertise resources, and publishing decisions to increase predictability and decrease the need for judicial interference may offset any inefficiencies generated by creating a specialized court. Finally, avoiding substantial deviation from general docket procedures, such as the right to a jury trial, decreases the perception of bias. Cf. N.J. Judiciary, Civil Division, <http://www.judiciary.state.nj.us/bergen/civil.htm> (last visited Aug. 1, 2007); Memorandum from Richard J. Williams, Admin. Dir. of the Courts, Notice to the Bar Re: Pilot Program for Handling Complex Commercial Cases in General Equity (June 21, 2004), available at <http://www.judiciary.state.nj.us/notices/n040624a.htm> [hereinafter N.J. Pilot Program Notice]; Press Release, Office of Commc'ns, N.J. Judiciary, New Jersey Courts Develop Plans for Pilot Program for Complex Commercial Cases (June 24, 2004), available at <http://www.judiciary.state.nj.us/pressrel/pr040624a.htm> [hereinafter N.J. Press Release]. Business courts should, however, pay careful attention to the bias concern and tailor communications, procedures, and their programs to minimize the appearance of bias.

73. See Dreyfuss, *supra* note 7. Professor Dreyfuss hypothesized that Delaware's success in the business court arena was due to special factors unique to the history and reputation of Delaware that would not lend itself easily to duplication in other jurisdictions. Her article was published relatively early in the development of the business court debate and thus in lieu of directly answering her question of whether or Delaware can be duplicated, she proposed a model by which to evaluate the success of other business courts.

74. *Id.* at 11–16.

1. *Efficiency*

The efficiency measure encompasses the access and timely resolution goals of civil justice. The efficiency prong evaluates the time frame for case resolution (timely action), the judicial resources dedicated to resolution, and the number of cases or issues generated by the Court (access).⁷⁵ The first measurement (time frame) is balanced by looking at what resources are consumed in order to achieve the result. For example, if in order to meet a stated goal of civil case resolution within twenty-four months there were no available judges to hear criminal matters, there would be no positive gain in “efficiency.” Similarly, the number of cases or issues generated by the specialized court evaluates if issues are bifurcated or trials separated to detect when a case may be “resolved” on paper has, in practice, resulted in protracted and piecemeal litigation for the parties.⁷⁶

While there is no empirical data available regarding the efficiency of business courts, factors such as whether a business utilizes a case management or scheduling order, the availability of mediation or arbitration, and whether a court has stated case resolution goals may indicate whether a non-Delaware court is serving the efficiency goal. In addition, business courts should track case resolution time, track time for rulings on motions, and seek to consolidate all related matters before one business court judge.

2. *Quality*

The decision-making or quality prong encompasses the equality goal of civil justice stated above and serves the public trust goal. The decision-making or quality prong focuses on three sub-elements which are accuracy (i.e., low reversal rates), precision (i.e., reproducibility), and coherence. Accuracy of judicial decisions is evaluated by the proper balance between the objective application of the law, the factual

75. *Id.* at 14. The efficiency measurement encompasses the first two stated goals of administration of civil justice access and timely resolution. The efficiency prong also counters the criticism of elitism within a business court.

76. *Id.*

circumstances of particular litigants, and results that reflect the jurisdiction's legislation as well as public norms and policies.⁷⁷ Precision captures the idea that like-situated litigants should receive like results. Additionally, precision in judicial decision-making should lead not only to predictability of judicial results, but in theory, it should also create a lesser need for judicial intervention as future potential litigants can self-regulate instead of litigating.⁷⁸ Accuracy and precision can often be at tension with one another because fact-specific inquiries may lead to correct, but not necessarily reproducible, results. Both measures, however, can be indicators of equality and can influence public trust. Finally, coherence refers to how a court ties together various court policies such as serving corporate needs, efficiently utilizing judicial resources, and freeing up resources on the general docket, into a consistent and closely knit body of law and procedures.⁷⁹ Coherence "reflects how a particular decision fits into a body of law."⁸⁰ Coherence advances the equality and integrity goals as well as counters the criticisms of bias favoring businesses and isolation.

Looking at the reversal rate of a business court (precision), training provided to business court judges (precision), whether or not a court publishes its opinions (predictability),⁸¹ and collaborations between either a multidisciplinary institution or a higher state court (coherence) may demonstrate whether a business court is advancing quality decision making.

77. *Id.* at 12.

78. *Id.* at 12–13.

79. Dreyfuss, *supra* note 7, at 13. "[T]he lawyers in attendance emphasized the importance of coherence—that is, the stability and predictability—of both the substantive law governing business disputes as well as the procedural management of litigation." Paula Hannaford et al., *Civil Action: A Briefing on Civil Justice Reform Initiatives, Focus on Business and Complex Litigation Courts*, CIV. ACTION (Nat'l Ctr. for State Courts, Williamsburg, Va.), Aug. 2000, at 5; *see also* Bach & Applebaum, *supra* note 36, at 227–28.

80. Dreyfuss, *supra* note 7, at 13.

81. *See, e.g.*, NonPublication.com, Non-Published Opinions Erode Stare Decisis, <http://nonpublication.com/bullet/stare.html> (last visited Mar. 26, 2008) (arguing the published opinions promote stare decisis and predictability).

3. *Public Perception of Due Process*

The third prong of Professor Dreyfuss's model is "perception of due process," which focuses on how a particular court fits into the overall structure of a state's judicial branch.⁸² Perception of due process asks how well a specialized court meshes with the existing body of law and judicial policies of that jurisdiction, as well as how it upholds or departs from the procedural norms of notice, hearing, process, and neutrality available to litigants in the general courts, in other words, how the court meets the public trust goal.⁸³ The theoretical assumption is that the fewer procedural deviations within the specialized court, the greater the perception of due process. Departures from uniform and customary procedures often raise suspicion about the credibility of the forum, the result, or the decision maker, thereby raising concerns about judicial independence.⁸⁴ Thus, the due process prong evaluates both goals of public trust and judicial independence.

The following three elements may demonstrate whether a business court is advancing a positive perception of due process: (1) whether a business court deviates from substantive procedural rules such as the right to a jury trial, (2) the structure of the court, which can range from a single state-wide jurisdiction or a unified, multi-location system, and (3) whether it provides avenues for party feedback or overall public perception.

Utilizing efficiency, quality, and due process to compare the existing business courts provides insight into the structure of non-Delaware

82. The third goal is listed as the "perception" of due process instead of actual due process because, in part, this author assumes that the business courts adhere to and serve due process. This prong does not measure actual compliance with those goals, but instead measures the public's belief that the court advances those goals. The reasoning is similar to the fifth goal of public trust in asking whether or not a court fulfilled its first four goals of access, timeliness, equality, and independence. Additionally, the perception of due process measurement encompasses the goals of ensuring the appearance of judicial independence and fostering public trust and confidence and addresses the effects of all of the criticisms against specialized courts.

83. Dreyfuss, *supra* note 7, at 15–16. Readers should note the overlap between the "meshing" concept discussed in the perception of due process measure and the cohesion factor of the quality measure.

84. *Id.* at 16.

business courts and may have predictive value regarding the success of an emerging business court.

*B. Survey of Business Courts*⁸⁵

Fourteen states⁸⁶ have functioning business courts: Delaware, Illinois, New York, North Carolina, New Jersey, Pennsylvania, Massachusetts, Nevada, Rhode Island, Maryland, Florida, Georgia, Oregon, and Maine. Arizona, California, and Connecticut have complex civil divisions that hear traditional business court cases in addition to other civil matters.⁸⁷ In addition, five states (Colorado, Michigan, Oklahoma, Ohio, and South Carolina)⁸⁸ have proposed a business court program. Only South Carolina, which proposed its business court in the fall of 2007, has advanced beyond the initial planning stages, and will soon have a fully operational business court. Finally, Wisconsin established rules for a Business Court in Milwaukee County Circuit Court, but no cases were ever transferred into the program and it remains non-operational.⁸⁹

Utilizing primarily publicly-available information on court websites, court orders, and court rules at the state, county, or division level, the author compiled and analyzed the following information on the various business courts operating throughout the country. The business courts were reviewed based upon structural elements such as case type, minimum damages amount, jurisdictional limits, and transfer mechanisms. Additionally, the business courts were evaluated under the proposed model of efficiency, quality, and decision-making.

While Delaware may have been the business court model of the last decade, it is apparent that non-Delaware business courts are making unique and substantial contributions to the development and importance of business courts in civil jurisprudence. In particular, the North Carolina Business Court contains every predictive feature for efficiency, quality, and due process, thus quantifying its status as the “gold

85. *See infra* Table 1.

86. *See infra* Table 1.

87. *See infra* Table 1.

88. *See infra* Table 1.

89. *See infra* Table 1.

standard.” Non-Delaware business courts are developing common structural and evaluative features, thus, periodically monitoring the trends emerging in business courts may produce new evaluative features to be used in conjunction with those proposed in this article.⁹⁰

1. Structural Elements of Business Courts

The subject matter jurisdiction of a particular business court, including whether the court has a minimum dollar amount, combined with geographical jurisdiction and transfer mechanisms constitute the structural elements of a business court.

90. As jurisdictions modify and implement business courts, non-Delaware models will serve as practical guideposts and benchmarks for those courts. The history and development of the Delaware Chancery Court coupled with the state's unique relationship with, and emphasis on, business law make the Delaware Chancery Court and nation's leader in business law. The stature and reputation of the Delaware Chancery Court has been instrumental in the development of business courts across the country; however, the experience of the Delaware Chancery Court is unique and not readily transferable to other jurisdictions without those same elements. Thus, this article focuses on reproducible elements of success, often found in non-Delaware business Courts. *See Dreyfuss, supra* note 7, at 24–26.

Table 1:
A Comparison of the Structural Elements of Business Courts

State	Subject Matter	Min. \$	Jurisdiction	Transfer
ORIGINAL BUSINESS COURT				
Delaware⁹¹ Chancery Court	Corporate Governance; All Matters & Causes in Equity (non-jury matters) <u>Includes:</u> Corporate Matters; Trusts, Estate, & Fiduciary Matters; Disputes Involving Purchase and Sale of Land	None	Statewide	Automatic assignment
NON-DELAWARE BUSINESS COURTS				
Illinois⁹² Cook County Circuit Court Commercial Calendar Est. 1993	<u>Includes:</u> Securities; Business Sales Agreements; Trade Secrets; UCC; Commercial Real Estate; Shareholder Derivative Suits; Commercial Class Actions; Accountant & Actuary Malpractice; Environmental Insurance Claims; Internal Affairs <u>Excludes:</u> Insurance Claims; Attorney Malpractice; Product Liability; Medicaid & Medicare Disputes; Real Estate Foreclosures	\$125,000	Cook County (Chicago)	Automatic assignment (II designate when file case)
New York⁹³ Est. 1993	<u>Includes:</u> Breach of Contract; Breach of Fiduciary Duty; Misrepresentation; Business Torts; Violations of Law by Business; Corporate Restructuring; Business Agreements; Trade Secrets; Restrictive Covenants; Employment Agreements; UCC Claims; Commercial Real Estate; Shareholder Derivative Actions; Commercial Class Actions; Business Transactions; Commercial Banking; Internal Affairs; Certain Malpractice Claims; Environmental Insurance; Commercial Insurance Coverage; Corporation Dissolution; Arbitration Disputes <u>Excludes:</u> Collecting Professional Fees; Residential Real Estate; Insurance Coverage; Declaratory Judgments; Attorney Malpractice	\$ 25,000–\$100,000 ⁹⁴	New York Supreme Court (trial): 7th Judicial District; Albany, Erie, Kings, Nassau, New York, Onondaga, Queens, Suffolk, and Westchester Counties	Automatic assignment (II designate when file case) or Motion of one party

91. Del. State Courts, Court of Chancery,

<http://courts.state.de.us/Courts/Court%20of%20Chancery/?index.htm> (last visited Sept. 9, 2007).

92. Circuit Court of Cook County, Commercial Calendar, <http://www.cookcountycourt.org/divisions/index.html> (follow “Law Division” hyperlink; follow “Commercial Calendar” hyperlink) (last visited Aug. 1, 2007); see also UNIV. OF MD. SCH. OF LAW, A SURVEY OF EXISTING STATE BUSINESS AND TECHNOLOGY COURTS 4 (2005), http://www.law.umaryland.edu/journal/jbtl/documents/bus_tech_courts.doc [hereinafter SURVEY OF BUSINESS COURTS].

93. N.Y. TRIAL CTS. UNIF. R. 202.70, available at <http://www.nycourts.gov/rules/trialcourts/202.shtml#70> (Rules of the Commercial Division of the Supreme Court); see also Administrative Order of the Chief Administrative Judge of the Court (Dec. 29, 2005), available at <http://www.nysba.org/nysbainfo/committees/cplr/rules/CommDivRules06.pdf>; COMMERCIAL DIV. OF THE SUPREME COURT OF THE STATE OF N.Y., REPORT OF THE OFFICE OF COURT ADMINISTRATION TO THE CHIEF JUDGE ON THE COMMERCIAL DIVISION FOCUS GROUPS 2–4 (2006), available at http://www.nycourts.gov/reports/ComDivFocus_GroupReport.pdf; N.Y. Supreme Court, Commercial

State	Subject Matter	Min. \$	Jurisdiction	Transfer
North Carolina⁹⁵ Est. 1995	<u>Includes:</u> Corporations; Professional Corporations; LLCs; Securities; Tender Offer Disclosures & Investment Advisor Acts; Anti-trust Disputes; Partnership Disputes; Shareholder Derivative Actions; Trade Secrets; Complex Contract Disputes with increased motions and documentary evidence	None	Statewide	Motion of one party or recommendation of assigned judge Chief Judge is the gatekeeper
New Jersey⁹⁶ Est. Pilot Program 1996	<u>Includes:</u> Business & Commercial Matters such as Unfair Competition; Non-Competes; Trade Secrets; Shareholder Derivative Suits; Minority Shareholder Actions; Piercing Veil Claims; Dissolutions	\$15,000	Bergen; Essex Co. (with four new areas under discussion)	Automatic assignment (II designate when file case)
Penn.⁹⁷ Commerce Program Est. 2000	<u>Includes:</u> Intra-corporate Disputes; UCC Claims; Sale of Business Claims; Non-Consumer Banking; Securities; Commercial Property; Franchise Agreements; IP; Trade Secrets; Business Torts; Non-Competes; Class Actions; Shareholder Derivative Suits <u>Excludes:</u> Class Actions for Personal Injury or Product Liability; Compulsory Arbitration; Occupational Health & Safety; Environmental Issues; Eminent Domain; Malpractice; Employment; Agency; Indiv. Real Estate; Domestic Relations	\$50,000	Philadelphia Court of Common Pleas, 1st Judicial District	Automatic assignment

Division, <http://www.nycourts.gov/courts/comdiv/index.shtml> (last visited Sept. 11, 2007); *see also* SURVEY OF BUSINESS COURTS, *supra* note 92, at 7.

94. Administrative Order of the Chief Administrative Judge of the Courts, AO/397/07 (Aug. 9, 2007), *available at* <http://www.nycourts.gov/rules/trialcourts/8-07-Threshold.pdf> (amending Uniform Trial Court Rule 202.70(a) and setting the following monetary thresholds: Onondaga County (\$25,000); 7th Judicial District, Albany, Erie, Suffolk, and Queens Counties (\$50,000); Kings, Westchester, and Nassau Counties (\$75,000); New York County (\$100,000)).

95. Order Adopting Amended Local Rules (July 31, 2006), *available at* <http://www.ncbusinesscourt.net/New/localrules/Order%20Adopting%20Amended%20Local%20Rules.rtf> [hereinafter N.C. Order]; Welcome to the North Carolina Business Court, <http://www.ncbusinesscourt.net> (last visited Aug. 1, 2007). *See generally* SURVEY OF BUSINESS COURTS, *supra* note 92, at 7-8.

96. N.J. Judiciary, Civil Division, <http://www.judiciary.state.nj.us/bergen/civil.htm> (last visited Aug. 1, 2007); N.J. Pilot Program Notice, *supra* note 72; N.J. Press Release, *supra* note 72; *see also* SURVEY OF BUSINESS COURTS, *supra* note 92, at 6.

The Law Division processes cases filed in reference to automobile negligence, personal injury, medical malpractice, products liability, professional liability, contract, assault and battery, civil rights, tenancy, tort, real property, etc. These cases are placed in the applicable track, e.g., expedited, standard or complex, based upon complexity and the anticipated discovery requirements. All cases are processed through teams working in unison with judges' staffs.

N.J. Judiciary, Civil Division, <http://www.judiciary.state.nj.us/bergen/civil.htm> (last visited Aug. 1, 2007).

97. Jonathan K. Hollin, *Philadelphia Begins New Commerce Case Management System for "Business Litigation,"* FINDLAW.COM, Dec. 1, 1999,

State	Subject Matter	Min. \$	Jurisdiction	Transfer
Mass.⁹⁸ Business Litigation Session Est. 2000 (pilot program) Made permanent 2003	<u>Includes:</u> Internal Governance; Internal Affairs; Shareholder Derivative Suit; IP; Trade Secret; Non-Compete; Banking; Investments; Anti-Trust; Professional Malpractice; Breach of Contract; Breach of Fiduciary Duty; Fraud; Complex and UCC Business Statutory Violations	None	Superior Court of Mass. Suffolk County (but can hear cases from other jurisdictions)	Automatic assignment (If designate when file case) or Motion of one party if filed in another county The Presiding Judge is the gatekeeper
Nevada⁹⁹ Business Court Est. 2000	<u>Includes:</u> Corporate Governance; Shareholder Derivative Suits; Deceptive Trade Practices; Investments; Securities; Trademarks; Trade Secrets; Other Complex Commercial Disputes as defined <u>Excludes:</u> Personal Injury; Product Liability; Consumer Claims; Wrongful Termination; Landlord Tenant Disputes	None	2nd & 8th Judicial Districts (but can hear cases from other jurisdictions)	Motion of one party May transfer from other counties if all parties consent The Business Court Judge is the gatekeeper
Rhode Island¹⁰⁰ Business Calendar Est. 2000	<u>Includes:</u> Breach of Contract; Breach of Fiduciary Duty; Fraud; Misrepresentation; Business Torts; UCC; Statutory Violations; Commercial Property; Shareholder Derivative Actions; Commercial Class Actions; Commercial Banking; Internal Affairs; Business Insolvency & Receiverships	None	Providence & Bristol Counties	Request of the Judge

<http://library.findlaw.com/1999/Dec/1/129914.html>; First Judicial District of Pa., Commerce Program, <http://courts.phila.gov/common-pleas/trial/civil/commerce-program.html> (last visited Aug. 1, 2007); First Judicial District of Pa., Commerce Program, Criteria for Assignment of Cases to Commerce Program, <http://fd.phila.gov/pdf/cpcvcompgr/criteria.pdf> (last visited Aug. 1, 2007); see also PHILADELPHIA COURT REPORT, *supra* note 22, at 69–73; SURVEY OF BUSINESS COURTS, *supra* note 92, at 9.

98. Administrative Directive No. 03-1, Superior Court Business Litigation Session Extension and Expanded Venue (Feb. 12, 2003), available at http://www.mass.gov/courts/courtsandjudges/courts/superiorcourt/03_01.pdf; Letter from Allan van Gestel, Presiding Justice, Suffolk Superior Court Bus. Litig. Section, Rules For Filing In Business Litigation Session (July 21, 2003), available at http://www.gesmer.com/blog/business_litigationrules2.pdf; Mass. Court System, Superior Court Department, <http://www.mass.gov/courts/courtsandjudges/courts/superiorcourt/index.html#comm> (last visited Aug. 1, 2007); SURVEY OF BUSINESS COURTS, *supra* note 92, at 5.

99. WASHOE D. CT. R. 2.1, available at <http://www.leg.state.nv.us/CourtRules/SecondDCR.html>; NEV. 8TH JUD. CIR. CT. R. 1.61, available at http://www.co.clark.nv.us/district_court/EDCR.pdf; see also SURVEY OF BUSINESS COURTS, *supra* note 92, at 6.

100. R.I. Superior Court, Message from the Presiding Justice, <http://www.courts.state.ri.us/superior/message.htm> (last visited Aug. 1, 2007); Administrative Order No. 2001-9 (April 17, 2001), available at <http://courts.state.ri.us/superior/pdfadministrativeorders/2001-9.pdf> (establishing a “Business Calendar”); SURVEY OF BUSINESS COURTS, *supra* note 92, at 9.

State	Subject Matter	Min. \$	Jurisdiction	Transfer
Maryland ¹⁰¹ Business & Technology Case Management Program Est. 2003	"Commercial or technology issues of such a complex or novel nature that specialized treatment is likely to improve the administration of justice." <u>Includes:</u> Shareholder Derivative Actions; Technology Developments or Contracts; Internal Affairs; Fraud; Commercial Class Actions; Commercial Banking Transactions; Insurers Declaratory Judgment; Business Torts; Professional Malpractice; Anti-Trust; Securities; Trade Secrets or Unfair & Deceptive Trade Practices Act. <u>Factors:</u> Nature of Relief Sought; Number of Diverse Interest and Parties; Pretrial Motions; Discovery; Novelty and Complexity of Issues; Business or Technology Issues Predominate	None	Circuit Court Business & Technology Case Management Program-Statewide	
Florida ¹⁰² Business Court Subdivision Est. 2004	<u>Includes:</u> Internal Affairs, Dissolution, Business Entity; Trade Secrets; Non-Competes; IP; Securities; Shareholder Derivative Action; Corporate Trust; Officer/Derivative Liability <u>Also, if minimum damages amount met:</u> UCC; Business Sale or Purchase; Non-Consumer Banking or Investments; Commercial Property; Surety Bonds; Franchise; Non-Medical Malpractice; Commercial Insurance	\$75,000	Ninth Judicial Circuit's Complex Business Litigation Court (Orange County)	Automatic assignment (Π designate when file case) or Assigned Judge may request transfer

101. MD. BUS. & TECH. TASK FORCE, REPORT (2000), available at <http://www.courts.state.md.us/finalb&treport.pdf>; MDCourts.gov, Maryland Business and Technology Case Management Program, <http://www.courts.state.md.us/businesstech/index.html> (last visited Aug. 1, 2007); see also SURVEY OF BUSINESS COURTS, *supra* note 92, at 4.

102. Ninth Judicial Circuit Court of Florida, Administrative Order No. 2003-17-04, Amended Order Governing Complex Business Litigation Court and Procedures (Dec. 20, 2006), available at <http://www.ninja9.org/adminorders/orders/2003-17-04%20amended%20order%20governing%20business%20court%20procedures%20and%20criteria.pdf>; Ninth Judicial Circuit Court of Fla., Complex Business Litigation Court, <http://www.ninja9.org/Courts/Business/Index-BC.htm> (select "Court Information" and "Rules" to access the Business Court Procedures) (last visited Sept. 9, 2007); see also SURVEY OF BUSINESS COURTS, *supra* note 92, at 3.

State	Subject Matter	Min. \$	Jurisdiction	Transfer
Georgia ¹⁰³ Business Case Division Est. 2005	Any suit involving a Georgia Business Organization Statute (Corp., LLC, Partnerships, etc.); UCC Claims; Securities Violations; or Complex Commercial Cases <u>Includes:</u> Shareholder Derivative Actions, Breach of Contract, Breach of Fiduciary Duty, Trade Secrets; RICO Violations; Professional Malpractice; Business Torts <u>Excludes:</u> (unless all parties consent): Personal Injury; Wrongful Death; Employment Discrimination; Low-Dollar Consumer Class Actions	\$1M	Fulton County Superior Court Business Case Division (Atlanta)	Motion of one party or Request of the Assigned Judge Three-judge panel acts as the gatekeeper
Oregon ¹⁰⁴ Lane County Circuit Court Commercial Court Program Est. 2006	Any commercial suit that would be burdensome on the normal docket of the court. <u>Includes:</u> Business Affairs; Trade Secrets; Non-competes; Securities; Insurance Coverage; Electronic Technology; Intellectual Property; Real Property; Land Use; Construction Defects; Professional Malpractice; Product Liability; Mass Tort Litigation; Environmental Litigation; Class Actions; other cases at the presiding judge's discretion	None	Lane County (Eugene) (but can hear cases from other jurisdictions)	Motion of one party or Motion of the Court
Maine ¹⁰⁵	Jury or non-jury civil business and/or consumer disputes where (a) the primary claim(s) involve business transactions, corporate governance issues, and/or consumer rights arising out of business transactions, and (b) the case requires specialized judicial case management. <u>Excludes:</u> Family Matters Involving Children	None	Statewide	Motion of one party or recommendation of a judge The BCD judge is the gatekeeper
SPECIALIZED COMPLEX CIVIL COURTS				
California ¹⁰⁶ Complex Litigation Program Est. 2000	Complex cases with novel legal issues, large number of witnesses, parties, or documentary evidence; and related actions such as Anti-Trust; Construction Disputes; Securities; Environmental issues; Toxic Torts; Insurance Claims; Class Actions	None	6 Counties	Automatic Assignment

103. Superior Court of Fulton County Bus. Court, Project Overview, http://www.fultoncourt.org/superiorcourt/business_po.php (last visited Aug. 1, 2007); ATLANTA JUD. CIR. R. 1004, *supra* note 5.

104. OPERATING STATEMENT, COMMERCIAL COURT PROGRAM, SECOND JUDICIAL DISTRICT, LANE COUNTY CIRCUIT COURT (2006), *available at* <http://www.ojd.state.or.us/lan/Commercial%20Court/Comm%20Court.htm>.

105. Administrative Order JB-07-01, Establishment of the Business and Consumer Docket (June 1, 2007), *available at* http://www.courts.state.me.us/maine_courts/specialized/business/index.shtml.

106. ADMIN. OFFICE OF THE COURTS, CAL. COURTS, COMPLEX CIVIL LITIGATION PROGRAM FACT SHEET (2007), *available at* <http://www.courtinfo.ca.gov/reference/documents/factsheets/comlit.pdf>;

State	Subject Matter	Min. \$	Jurisdiction	Transfer
Arizona ¹⁰⁷ Complex Litigation Court Est. 2002 (pilot program through 12/08)	Complex civil litigation selected for the number of motions, parties, and issues, need for management, related cases, post-judgment supervision, complexity of legal issues, and the consumption of time and resources	None	Maricopa County	Automatic assignment (if designate when file case)
Conn. ¹⁰⁸ Complex Litigation Docket Est. 2003	Civil cases with multiple parties, multiple legal issues, and/or high damages	None, but implied requirement of high dollar-damages	Hartford, Middletown, Waterbury and Stamford	Motion of one party and payment of \$250 transfer fee
NON-FUNCTIONING BUSINESS COURTS				
Wisconsin ¹⁰⁹ Est. 1997	Disputes arising out of commercial relationships	\$100,000	Milwaukee County Circuit Court (Milwaukee)	Consent of Both Parties

CAL. COURTS, COMPLEX CIVIL LITIGATION PILOT PROGRAM, available at http://www.courtinfo.ca.gov/programs/innovations/documents/SI_Brief_ComplexCivLit.pdf; Hannaford et al., *supra* note 79, at 4.

107. Administrative Order No. 2002-107, Authorizing a Complex Civil Litigation Pilot Program Applicable in Maricopa County (Nov. 22, 2002), available at <http://supreme.state.az.us/orders/admorder/Orders02/2002-107.pdf>; Administrative Order No. 2006-123, Extension of Authorization for the Complex Civil Litigation Pilot Program Applicable in Maricopa County (Dec. 20, 2006), available at <http://supreme.state.az.us/orders/admorder/Orders06/2006-123.pdf>; see also SURVEY OF BUSINESS COURTS, *supra* note 92, at 1.

108. State of Conn. Judicial Branch, Complex Litigation Docket <http://www.jud.state.ct.us/external/super/spsess.htm#ComplexLitigationDocket> (last visited Aug. 1, 2007); Memorandum from Joseph H. Pellegrino, Judge and Chief Court Adm'r, Conn. Judicial Branch, Notice to Attorneys re Complex Litigation Docket, Superior Court, Civil Division (effective June 3, 2002), available at <http://www.jud.state.ct.us/external/super/ComplexLitigationNotice.pdf>; see also SURVEY OF BUSINESS COURTS, *supra* note 92, at 1.

109. MILWAUKEE COUNTY CIR. CT. R. 330-338, available at http://www.wisbar.org/AM/Template.cfm?Section=Rules_for_the_Civil_Divisions; Telephone Interview with Jim Smith, Chief Deputy Clerk of Milwaukee County Circuit Court (Mar. 12, 2007); Pete Millard, Reworking the Business Courts, BUS. J. OF MILWAUKEE, Mar. 28, 1997, available at <http://milwaukee.bizjournals.com/milwaukee/stories/1997/03/31/newscolumn1.html?page=1>; see also SURVEY OF BUSINESS COURTS, *supra* note 92, at 10.

State	Subject Matter	Min. \$	Jurisdiction	Transfer
PROPOSED BUSINESS COURT PROGRAMS				
South Carolina ¹¹⁰ Est. Sept. 2007	Pilot program for complex business, corporate, and commercial matters <u>Includes:</u> Actions Involving Business Entities; Securities; the UCC; Trade and Commerce (Trusts, Monopolies, and Restraints of Trade); Trade Secrets; Intellectual Property; any other matter in the Chief Justice's discretion	None	Statewide, with judges located in Charleston County, Greenville County, and Richland County (Columbia)	Motion of one party (within 180 days of commencement of action) or at discretion of Chief Justice.
Oklahoma ¹¹¹	A Business Docket for Business Court Divisions was authorized by the General Assembly in 2004, but none has been developed		Cities with 300,000 or more population	
Michigan ¹¹²	General Assembly created, but no court is hosting			
Ohio ¹¹³	Proposed by State Bar Association 1997; Chief Justice of Ohio Supreme Court Appointed a Task Force on Business Courts 2007			
Colorado ¹¹⁴	Reviewed by Governor's Task Force in 2000 and recommended for Implementation			

110. Administrative Order, Business Court Pilot Program (Sept. 7, 2007), *available at* <http://www.sccourts.org/busCourt/index.cfm>. The South Carolina business court rules were adopted in September 2007. The program was just beginning at the time that this article was being researched and written. However, the author's discussions with those involved in or with personal knowledge of the South Carolina business court indicate that this program will quickly become a functioning and robust business court. Thus, the South Carolina business court is listed under the "proposed" section of the table, but is generally included in the following discussion of non-Delaware business courts.

111. H.R. 2106, 51st Leg., 1st Sess. (Okla. 2007), *available at* <http://www.okhouse.gov/Committees/CommitteeReports/7110.doc>; *see also* William O. Pitts, *Commentary: Business Courts in Oklahoma Still Good Idea*, J. REC. (Okla.), July 9, 2007, *available at* http://findarticles.com/p/articles/mi_qn4182/is_20070709/ai_n19353793; SURVEY OF BUSINESS COURTS, *supra* note 92, at 8.

112. BUS. COURT AD HOC COMM., STATE BAR OF MICH. BUS. LAW SECTION, BUSINESS COURT FAQs (2002), *available at* <http://www.bodmanllp.com/publications/articles/pdfs/BusinessCourtFAQs.pdf>; SURVEY OF BUSINESS COURTS, *supra* note 92, at 5.

113. Dan Crawford, *Ohio Bar Considers Push for Separate Business Court*, BUS. FIRST OF COLUMBUS, Jan. 3, 1997, *available at* <http://columbus.bizjournals.com/columbus/stories/1997/01/06/story2.html>; Thomas J. Moyer, Chief Justice, Supreme Court of Ohio, Address at the Ohio State Bar Association Annual Meeting (May 17, 2007), *available at* http://www.sconet.state.oh.us/Communications_Office/Speeches/2007/OSBA_051707.asp; *see also* SURVEY OF BUSINESS COURTS, *supra* note 92, at 8.

114. GOVERNOR'S TASK FORCE ON CIVIL JUSTICE REFORM, REPORT OF THE COMMITTEE ON BUSINESS COURTS (2000), <http://www.state.co.us/cjrtf/report/report1.htm>; *see also* SURVEY OF BUSINESS COURTS, *supra* note 92, at 2; Governor's Task Force on Civil Justice Reform, Bus. Courts Comm., Minutes of Meeting Held on Feb. 21, 2000, *available at* <http://www.state.co.us/cjrtf/min/bc022100mi.htm>.

a. Case Types

As would be expected, all fourteen non-Delaware business courts (including South Carolina, but excluding complex civil courts) capture cases with similar subject matter (i.e., commercial torts, contract disputes, and corporate governance issues). The few variations (either explicitly included or excluded) in the subject matter jurisdiction of business courts were cases involving questions of environmental law, insurance coverage or liability, malpractice, real estate, and personal injury or product liability claims.¹¹⁵

Grouping like cases, particularly in the context of specialized areas of the law such as with commercial and business law serves both the efficiency and the quality of decision making measurements. The consistent application of laws within certain case types or substantive areas of the law increases accuracy and predictability, both elements of the quality of decision making measurement.¹¹⁶ Additionally, grouping like cases before one judge or a group of judges reduces the judicial costs associated with learning the substantive law of the case, particularly within unique or complex areas, which serves the efficiency measurement with regards to appropriate resource allocations, decreased resolution time, and increased access to the courts.

Of the fourteen non-Delaware business courts, eight have no minimum damages threshold.¹¹⁷ Of the six business courts that do impose a minimum damages requirement, the second-highest threshold is \$125,000 in Illinois and the lowest threshold is \$15,000 in New Jersey.¹¹⁸ The Fulton County Business Court, of Georgia, is the outlier in this category, requiring \$1 million or more in damages to qualify for transfer to the court.¹¹⁹ The higher damages minimum in Georgia necessarily reduces the pool of cases eligible for the business court and has potential to diminish the overall impact of the program. One might

115. See *supra* notes 92–114.

116. See *supra* notes 75–86.

117. See *supra* notes 92–114. Note that New York has a sliding scale from \$25,000 to \$100,000 depending upon the county in which the case is filed. See *supra* note 95.

118. See *supra* notes 92–97, 102–103.

119. ATLANTA JUD. CIR. R. 1004, *supra* note 5.

argue, on the other hand, that this newest business court has more incentive to control the type and number of cases in its docket while it establishes its procedures, reputation, and role within the existing judicial branch than the other, more established business courts.

The damages threshold, however, serves no obvious civil justice goal, but it does act as both a gatekeeper for the business court, and as a readily identifiable and easily tracked potential indicator of complexity.¹²⁰ Not addressing the accuracy with which a damages minimum identifies complexity, it is a filter mechanism that requires little resources to employ and is a way to control the number of cases in a business court; thus the damages minimum tangentially advances efficiency.

b. Jurisdictional Limits

Jurisdictional limits varied among the different business courts. The simplest way to break the review down is into two categories: statewide jurisdiction or county or geographic specific. Delaware, North Carolina, Maryland, and South Carolina have statewide jurisdiction for their business courts where the business courts in Massachusetts, Nevada, Oregon, and Maine accept transfers from other counties in the state.¹²¹ The remaining seven states' jurisdictions are restricted to one county or to several counties.¹²² The states with county-specified jurisdiction may, in practice, have a broader scope of jurisdiction than is facially apparent. For example, the county-specific business courts are often located in the economic, political, or population centers of the state.¹²³ The strategic location of the business courts¹²⁴ casts the jurisdiction's net wider than it

120. Obviously the damages amount is not a reliable indicator of the complexity of the case, but the reasoning here is that, the more issues in a case, the higher the damages, and thus the greater the likelihood that the combination of these issues would be complex.

121. See *supra* notes 91, 95, 101, 104, 105, 110.

122. See *supra* notes 92–114.

123. The Cook County Circuit Court Commercial Court is located in Chicago, Illinois, a commercial center for the state and the Midwest. Similarly, the Fulton County Business Court is located in Atlanta, Georgia, the state capital and commercial center for the state and southeast.

124. Junge, *supra* note 50, at 320–21 (“Business courts will be easier to establish if they are done in an evolutionary way, by assigning one, two or three judges to adjudicate business cases in a large, urban county.”).

may appear at first blush. For example, business located outside the specified jurisdiction may routinely do business within the jurisdiction, may be litigating a contract with a forum selection clause in the jurisdiction, or may have filed within the jurisdiction for purposes of registering with the secretary of state. All of these actions could establish personal jurisdiction within the specified jurisdiction.

The debate over the jurisdictional scope of a particular business court is a question of proper resource allocation and will vary from state to state and be dependent upon factors such as geographic size of the state (e.g., Maryland vs. Illinois), overall economy of the state, whether economic activity is concentrated or dispersed throughout the state (e.g., Georgia vs. Delaware). Additionally, there seems to be some tension between locating a business court in the political center of a state and the economic center of a state because the courts in these centers are more likely to be overburdened by the general dockets and not perceived as a viable option by the business community, one of the intended clients of the court.

The jurisdictional limit factor serves the coherence/quality and the perception of due process prongs of Professor Dreyfuss's model.¹²⁵ How a business court fits into the existing trial court makeup and whether it is integrated at a county, multi-county, or statewide level will impact a business court's coherence with the existing system. For example, in comparison to general jurisdiction courts within a state, it is important to understand if a business court's geographic jurisdiction is expanded or restricted and whether transfer mechanisms are relaxed or tightened.

Additionally, the jurisdiction limit factor potentially impacts the perception of due process prong. If a business court's jurisdiction mirrors that of comparable state-level trial courts, then there is less potential to suspect special treatment for businesses. Similarly, if a business court's jurisdiction is significantly expanded such as when a county-level court is given statewide jurisdiction, the gap between the business court and other courts as well as the expanded power of the business court may erode the public's perception of due process and fair

125. See *supra* notes 75–86.

play. This loss, however, may be offset by advances on other measures such as efficiency and quality.

c. Transfer Mechanisms

Business court transfer mechanisms fall into one of three categories: (1) automatic assignment of a case upon filing (six states),¹²⁶ (2) transfer of a case upon the motion of one party (nine states),¹²⁷ and (3) transfer of a case upon the recommendation of a judge (seven states).¹²⁸ business courts employ a combination of two of the three transfer mechanisms. In addition, several business courts (North Carolina, Massachusetts, Nevada, Georgia, Maine, and Oregon) have a designated gatekeeper (e.g., the Chief Judge or a judge affiliated with the business court) to ensure that the minimum thresholds established for the particular court are met for each case assigned to the business court.¹²⁹

Transfer mechanisms may influence the appearance of due process and fostering of public trust. Transfer mechanisms are a crucial element of the overall structure of a particular business court. They determine who controls the cases heard in the court: motion-transfer mechanisms are litigant controlled and automatic or judge referred transfer mechanisms are court controlled. Transfer mechanisms also determine the scope of the program, as automatic assignment programs should have higher number of cases than motion or judge-referred courts.

Maintaining transfer mechanisms that comport with a state's existing procedural rules should, like jurisdictional limits, bolster the public's perception of due process.¹³⁰ Deviations, however, may be necessary if they advance other goals and measurements, such as efficiency.

126. New York, Pennsylvania, Massachusetts, California, and Arizona automatically assign cases to the specialized court. *See supra* notes 93, 97, 98, 106, 107. In addition, Illinois, New Jersey, and Florida automatically assign a case into the specialized court if the party filing the case designates the case for the specialized court upon the initial filing. *See supra* notes 94, 98, 101, 102.

127. North Carolina, Georgia, Florida, New York, Nevada, Connecticut, Oregon, Maine, and South Carolina assign cases to their specialized courts upon the motion of one party. *See supra* notes 93, 95, 99, 102–105, 108.

128. North Carolina, Georgia, Florida, Rhode Island, Oregon, Maine, and South Carolina assign cases to their specialized courts upon the recommendation of a judge. *See supra* notes 95, 100, 102–105, 111.

129. *See, e.g., supra* notes 95–106.

130. *See supra* notes 75–86.

2. *Analysis of Business Courts Utilizing the Framework*

TABLE 2:
Predictive Elements of Business Court Programs¹³¹

State	Efficiency Features	Quality Features	Due Process Features
Delaware Chancery Court	<ul style="list-style-type: none"> • Voluntary Mediation¹³² 	<ul style="list-style-type: none"> • Low Reversal Rate¹³³ • Publish Opinions¹³⁴ 	<ul style="list-style-type: none"> • Substantially similar procedural rules¹³⁵ • Unified statewide system
Illinois Cook County Circuit Court Commercial Calendar	<ul style="list-style-type: none"> • Court-referred Mediation¹³⁶ 		<ul style="list-style-type: none"> • Substantially similar procedural rules
New York	<ul style="list-style-type: none"> • Rules allow for mediation¹³⁷ • Case Management Conference within 45 days of transfer and scheduling order thereafter¹³⁸ 		<ul style="list-style-type: none"> • Unified statewide system¹³⁹ • Substantially similar procedural rules
North Carolina ¹⁴⁰	<ul style="list-style-type: none"> • Case Management Meeting held within 30 days and scheduling order entered thereafter¹⁴¹ • Mandatory Mediation with approved roster of business court mediators¹⁴² 	<ul style="list-style-type: none"> • Opinions are written and published in all non-jury matters • Low reversal rate¹⁴³ • Judge Training • Collaboration with State Bar & Supreme Court 	<ul style="list-style-type: none"> • Some procedural rule deviation (i.e., statewide jurisdiction), but party rights (i.e., jury trial) remain substantially the same • Unified statewide system • Party/Attorney Feedback sought¹⁴⁴

131. See *supra* notes 92–115.

132. CT. OF CHANCERY R. 174, available at <http://courts.state.de.us/Rules/?chanceryrules.pdf>.

133. See Veasey & Dooley, *supra* note 9, at 135.

134. See Del. State Courts, Court of Chancery: Opinions and Orders, [http://courts.delaware.gov/opinions/\(rckphyjg0hha5hndhmzxo5r5\)/list.aspx?ag=court%20of%20chancery](http://courts.delaware.gov/opinions/(rckphyjg0hha5hndhmzxo5r5)/list.aspx?ag=court%20of%20chancery) (last visited Nov. 1, 2007).

135. The Delaware Court of Chancery rules are uniform throughout the state and the court operates as its own level of state court whereas the business courts in other jurisdictions are subdivisions of an existing state court.

136. COOK COUNTY CIR. CT. R. 20.01–20.11, available at http://www.cookcountycourt.org/rules/index_law.htm.

137. N.Y. TRIAL CTS. UNIF. R. 202.70(g)(3), available at <http://www.nycourts.gov/rules/trialcourts/202.shtml#70>.

138. N.Y. TRIAL CTS. UNIF. R. 202.70(g)(7), (9)–(11), (13), available at <http://www.nycourts.gov/rules/trialcourts/202.shtml#70>.

139. NY. State Supreme Court, Commercial Division, <http://www.nycourts.gov/courts/comdiv/index.shtml> (last visited Sept. 11, 2007).

140. Welcome to the North Carolina Business Court, <http://www.ncbusinesscourt.net/> (last visited Aug. 1, 2007); N.C. Order, *supra* note 97.

State	Efficiency Features	Quality Features	Due Process Features
New Jersey	<ul style="list-style-type: none"> • Case Management Conference within 60 days of transfer and scheduling order entered into thereafter¹⁴⁵ • Case resolution goal of 12 months¹⁴⁶ 	<ul style="list-style-type: none"> • Judges Receive Training.¹⁴⁷ • Trial Court Opinions published for six weeks¹⁴⁸ 	<ul style="list-style-type: none"> • Jury trials are waived in Hudson, Burlington, Ocean, and Mercer Vicinages¹⁴⁹
Pennsylvania Commerce Program	<ul style="list-style-type: none"> • Commercial cases are tracked as: Expedited (13 months), Standard (18 months); or Complex (24 months).¹⁵⁰ • Mediation and three-Judge panel arbitration is available through the court¹⁵¹ 	<ul style="list-style-type: none"> • Opinions are published¹⁵² 	<ul style="list-style-type: none"> • Substantially similar procedural rules

141. N.C. BUS. CT. R. 17, *available at* <http://www.ncbusinesscourt.net/New/localrules/NCBC%20Amended%20Local%20Rules%20-%202006.doc>.

142. N.C. BUS. CT. R. 19, *available at* <http://www.ncbusinesscourt.net/New/localrules/NCBC%20Amended%20Local%20Rules%20-%202006.doc>.

143. E-mail from Julie Holmes, Counsel to North Carolina Business Court, to Anne Tucker Nees, Staff Attorney to Fulton County Business Court (Sept. 5, 2007) (on file with author).

144. COMM'N ON N.C. BUS. COURT, *supra* note 6, at 3; N.C. BUS. COURT, TECHNOLOGY SURVEY RESULTS (2002), <http://www.ncbusinesscourt.net/survey/Techsurvey.pdf> (summarizing attorney responses to survey on technology needs in business court).

145. N.J. CT. R. 4:5B, *available at* <http://www.judiciary.state.nj.us/rules/part4toc.htm>.

146. N.J. Pilot Program Notice, *supra* note 72.

147. N.J. Press Release, *supra* note 72.

148. N.J. Judiciary, Trial Court Decisions, <http://www.judiciary.state.nj.us/decisions/index.htm> (last visited Sept. 9, 2007); *see also* Rutgers Sch. of Law, New Jersey Courts Search Page, <http://lawlibrary.rutgers.edu/search.shtml> (last visited Sept. 9, 2000) (where all New Jersey court opinions can be searched from 1994 to present).

149. N.J. Press Release, *supra* note 72.

150. First Judicial District of Pa., Civil Administrative Docket 02 of 2003, In Re: Commerce Case Management Program 5 (Apr. 29, 2003), *available at* <http://fjd.phila.gov/pdf/regs/2003/cptad02-03.pdf>.

151. *Id.* at 8.

152. Opinions for the Commerce Program are available on-line at <http://fjd.phila.gov/opinions.html>.

State	Efficiency Features	Quality Features	Due Process Features
Mass. ¹⁵³ Business Litigation Session		<ul style="list-style-type: none"> • Collaboration with Mass. Bar Assoc. 	<ul style="list-style-type: none"> • Some procedural rule deviation (i.e., statewide jurisdiction), but party rights (i.e., jury trial) remain substantially the same • Litigant survey¹⁵⁴
Nevada ¹⁵⁵ Business Court		<ul style="list-style-type: none"> • Judge requirements¹⁵⁶ 	<ul style="list-style-type: none"> • Some procedural rule deviation (i.e., statewide jurisdiction), but party rights (i.e., jury trial) remain substantially the same
Rhode Island ¹⁵⁷ Business Calendar	<ul style="list-style-type: none"> • N/A 	<ul style="list-style-type: none"> • N/A 	<ul style="list-style-type: none"> • N/A
Maryland ¹⁵⁸ Business & Technology Case Management Program	<ul style="list-style-type: none"> • Track cases into either an expedited (7 mo.) or standard (12 mo.) • Case Management conference held within 30 days and issue scheduling order 	<ul style="list-style-type: none"> • Publish opinions with factual or legal analysis likely of interest • 2000 Task Force (Members of Bar, Courts, Government) to develop program 	<ul style="list-style-type: none"> • Statewide system • Substantially similar procedural rules

153. Administrative Directive No. 03-1, Superior Court Business Litigation Session Extension and Expanded Venue (Feb. 12, 2003), *available at* http://www.mass.gov/courts/courtsandjudges/courts/superiorcourt/03_01.pdf; Mass. Court System, Superior Court Department, <http://www.mass.gov/courts/courtsandjudges/courts/superiorcourt/index.html#comm> (last visited Aug. 1, 2007).

154. BUS. LITIG. SESSION RES. COMM., THE MASSACHUSETTS BUSINESS LITIGATION SESSION: DOCKET AND CASELOAD ANALYSIS 26–27 (2004), http://www.masslawblog.com/bls_docketanalysis431380_1.pdf.

155. WASHOE D. CT. R. 2.1, *available at* <http://www.leg.state.nv.us/CourtRules/SecondDCR.html>; NEV. 8TH JUD. CIR. CT. R. 1.61, *available at* http://www.co.clark.nv.us/district_court/EDCR.pdf.

156. WASHOE D. CT. R. 2.1, *available at* <http://www.leg.state.nv.us/CourtRules/SecondDCR.html> (establishing minimum requirements for business court judges).

157. Rhode Island did not have any information about its program available for review. Whether or not this means that these features do not exist within the court is unknown. This, perhaps, reflects a flaw in the author's research method, but also highlights the need for the participating courts to make information regarding their program publicly available for parties, attorneys, and others.

158. CONFERENCE OF CIRCUIT JUDGES MD. BUS. & TECH. CASE MGMT. PROGRAM, IMPLEMENTATION COMMITTEE FINAL REPORT 8–9, 10, 14, 47 (2001), *available at* <http://www.courts.state.md.us/b&t-cfinal.pdf>.

State	Efficiency Features	Quality Features	Due Process Features
Florida ¹⁵⁹ Business Court Subdivision	<ul style="list-style-type: none"> • Case Management Conference procedures and scheduling order issued thereafter • Participation in ADR program is mandatory¹⁶⁰ 		<ul style="list-style-type: none"> • Substantially similar procedural rules
Georgia ¹⁶¹ Business Case Division	<ul style="list-style-type: none"> • Host Case Management Conference within 30 days of transfer and issue scheduling order thereafter • Utilize voluntary mediation program 	<ul style="list-style-type: none"> • Collaboration with State Bar and Supreme Court • Looking to publish opinions in the future • Judges receive substantive training 	<ul style="list-style-type: none"> • Substantially similar procedural rules
Oregon ¹⁶²	<ul style="list-style-type: none"> • Host Case Management Conference within 30 days of transfer and issue scheduling order thereafter • Parties and court prepare a discovery plan • Utilize court-referred and voluntary mediation/ADR • Trial dates are set within 12 months of the initial filing 	<ul style="list-style-type: none"> • Judges receive substantive training • Opinions are published on the website 	<ul style="list-style-type: none"> • Some procedural rule deviation (i.e., statewide jurisdiction), but party rights (i.e., jury trial) remain substantially the same

159. Ninth Judicial Circuit Court of Fla., Complex Business Litigation Court, <http://www.ninja9.org/Courts/Business/Index-BC.htm> (select "Court Information" and "Rules" to access the Business Court Procedures) (last visited Sept. 9, 2007); Ninth Judicial Circuit Court of Florida, Administrative Order No. 2003-17-04, Amended Order Governing Complex Business Litigation Court and Procedures (Dec. 20, 2006), available at <http://www.ninja9.org/adminorders/orders/2003-17-04%20amended%20order%20governing%20business%20court%20procedures%20and%20criteria.pdf>.

160. See FLA. 9TH JUD. CIR. CT. BUS. CT. P. 6, 8.1, available at <http://www.ninja9.org/Courts/Business/Index-BC.htm> (select "Court Information" and "Rules" to access the Business Court Procedures).

161. Superior Court of Fulton County Bus. Court, Project Overview, http://www.fultoncourt.org/superiorcourt/business_po.php (last visited Aug. 1, 2007); ATLANTA JUD. CIR. R. 1004, *supra* note 5.

162. OPERATING STATEMENT, COMMERCIAL COURT PROGRAM, SECOND JUDICIAL DISTRICT, LANE COUNTY CIRCUIT COURT (2006), available at <http://www.ojd.state.or.us/lan/Commercial%20Court/Comm%20Court.htm>; Press Release, Am. College of Bus. Court Judges, Judge Rasmussen Attends 3rd Annual meeting of American College of Business Court Judges Meeting held in Washington, D.C. (Oct. 2007), available at <http://www.ojd.state.or.us/lan/documents/ACBCJ%20news%20release.pdf>.

State	Efficiency Features	Quality Features	Due Process Features
Maine ¹⁶³	<ul style="list-style-type: none"> • Host Case Management Conference and issue a scheduling order thereafter 		<ul style="list-style-type: none"> • Some procedural deviation (statewide jurisdiction, discovery limits, and special rules regarding motions/oral argument), but substantive rights (i.e., jury trial) remain the same
South Carolina ¹⁶⁴		<ul style="list-style-type: none"> • Orders to be published online 	<ul style="list-style-type: none"> • Some procedural rule deviation (i.e., statewide jurisdiction), but party rights (i.e., jury trial) remain substantially the same

a. Efficiency

As discussed above, the efficiency measure looks at factors such as the consumption of judicial resources and the amount of time (or more accurately, the amount of unnecessary time) to case resolution. Program features such as mediation programs, case management scheduling conferences, and case tracking programs are components designed to reduce both the amount of judicial resources and time necessary to resolve a case.

Of the fifteen business courts, eight operate mediation programs. In North Carolina, Florida, and Oregon, participation in mediation or ADR is either mandatory or may be ordered by the court. In Delaware, Illinois, Georgia, New York, and Pennsylvania participation in mediation is voluntary. Additionally, the business courts in New York, North Carolina, New Jersey, Maryland, Florida, Georgia, Oregon, and Maine utilize some form of a required case management conference and scheduling orders as a required case management tool. In case management conferences the parties appear in court to discuss the issues of the case (substantive, procedural issues like joinder or third parties, or discovery related issues such as electronically stored information) and to

163. Administrative Order JB-07-01, Establishment of the Business and Consumer Docket (June 1, 2007), available at http://www.courts.state.me.us/maine_courts/specialized/business/index.shtml.

164. Administrative Order, Business Court Pilot Program (Sept. 7, 2007), available at <http://www.sccourts.org/busCourt/index.cfm>.

construct a scheduling order for discovery, motions, hearings, and can even set a trial date.

Related to the concept of case management conferences and scheduling orders is case tracking, which both Pennsylvania and Maryland utilize. Case tracking may be employed as an alternative (Pennsylvania) or supplement (Maryland and Oregon) to case management conferences. Case tracking assigns each case to a specific category with pre-determined resolution times and scheduling windows. For example, a business case tracked as complex may have a case resolution goal of eighteen months with predetermined lengths of time for matters such as discovery, and motions for summary judgment, whereas a less complex case may have a resolution goal of twelve months.

b. Quality

The quality measurement is comprised of three factors: precision, predictability, and cohesion. Business court program features such as whether or not opinions are published (predictability), low reversal rates (precision), judicial training (precision), and collaborations with state bar or a higher state court (cohesion) may be good predictors of “quality.”

About one-half of the states publish business court opinions on the court’s website or in some other fashion. This is notable because trial court-level opinions are rarely published. North Carolina has gone so far as to give their business court opinions, in the absence of contradictory appellate court opinions, precedential value over of other pending trial matters in the state.¹⁶⁵ Published opinions from a business court may inform the corporate or litigation decisions within the state and add predictability to the law for litigants. Additionally, publishing opinions encourages transparency, provides information and opens a business court to greater public review and scrutiny. Finally, as a business court bench changes, published opinions will promote predictability within a court.

165. COMM’N ON N.C. BUS. COURT, *supra* note 6, at 9.

Business court achievements such as low reversal rate (confirms no error in ruling) and judicial training (prevents ruling errors) demonstrate the precision prong of the quality decision-making measure. Both Delaware and North Carolina have low reversal rates; however no other business courts provide this information.¹⁶⁶ Additionally, three states, North Carolina, New Jersey, and Georgia, publish information regarding judicial training for their business court bench, and Nevada has minimum requirements to be on its business court bench.¹⁶⁷

Finally, five states—Massachusetts, Maryland, North Carolina, Georgia, and South Carolina—specifically collaborate with a bar association, a higher court, or a similar oversight body. Collaboration with multi-disciplinary, oversight, or multi-interested parties may predict cohesion among a business court and the state's overall judicial structure. Such interaction 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.

c. Appearance of Due Process

The appearance of due process measurement asks how well a court meshes within the existing judicial framework and whether the court erodes or enhances the public's perception of the courts within the state. As discussed above, this is a measurement that evaluates how third parties perceive a particular business court instead of what a business

166. The reversal rate information is only available for Delaware and North Carolina, thus this measurement is incomplete. However, it is an important measurement because it is objective and can easily be calculated internally. This is a measure that all business courts, especially where one of the stated goals of the program is to build the state's body of business law, should collect. It should be noted, however, that reversal in and of itself is not bad within a business court because reversals clarify the boundaries of the court and the application of the law. A more accurate measure would be low reversal rate on established law.

167. Judicial training within the substantive areas of law in the jurisdiction of the business court may be something that more than three programs do. Judicial training, however, may be seen as an internal function rather than a component of the program that requires either codification or public information, which may account for the relatively low percentage (25%) of programs reporting or publicizing this feature. Additionally, the low occurrence of judicial training may reflect that judges may be selected for business courts based upon their preexisting knowledge of business law, thus reducing or deemphasizing the need for additional judicial training.

court is doing. Thus, this measure is more difficult to analyze than the previous two measures. However, factors such as whether the procedural rules are substantially the same within a business court as they are in a general court within the state, whether the court operates within a unified system (if the business court has multiple satellites or locations throughout a state), and whether a court solicits feedback from the parties may predict a business court's appearance of due process.

Ninety-three percent of the business courts utilize substantially the same procedural rules within their business court as are utilized in a general court. Only New Jersey modified the procedural rules substantially by having the business court parties waive the right to a jury trial. Additionally, the transfer rules of North Carolina, Massachusetts, Nevada, Oregon, and Maine allow for some deviation of the standard procedural rules in order to create statewide jurisdiction, but all six courts allow for the continued right to a jury trial.

Of the ten states with multiple-location or statewide business court programs, Delaware, North Carolina, Maryland, Maine, and South Carolina operate under a unified system with shared oversight, rules, procedures, and websites. In the five other states, the business court is operated in multiple locations as an independent court or one court is established which may receive transfers from anywhere within the state. In Georgia, the FCBC was the only business court established in the state and funded by the legislature. Since the FCBC has limited geographical jurisdiction, nothing will prevent additional business courts in Georgia from emerging in the future. The question for the future of business courts in Georgia will be whether the state adopts a statewide approach to business courts or some form of unification, if multiple business courts do in fact emerge.

Finally, two states, Massachusetts and North Carolina, have sought party, public, or litigant feedback regarding the practices and perceptions of their business courts.¹⁶⁸

168. See *supra* notes 149, 159. In order for party or litigant feedback to be accurate and of statistical significance, it should mostly likely be done by a third party collecting anonymous information from a large pool of litigants. Such a study would require a large number of closed cases and the resources to hire a third party to collect the data which suggests that established, statewide programs with

C. Case Study: Fulton County Superior Court Business Court

1. Program Overview

In 2003, a dedicated group of attorneys backed by the Georgia State Bar President determined that Georgia needed a business court and went to work to develop the program, fund it, and find it a home.¹⁶⁹ In 2005, the Fulton County Business Court secured its operating rules from the Georgia Supreme Court, received its funding from the Georgia General Assembly, and opened its doors as an initial two-year pilot program in Fulton County Superior Court.¹⁷⁰

Atlanta Judicial Circuit Rule 1004 governs the Fulton County Business Court.¹⁷¹ The Fulton County Business Court hears cases with \$1 million or more in damages *and* that implicate one or more of the following (1) Georgia business organization statutes (i.e., Corporations, LLCs, Limited Partnerships, Partnerships, and Uniform Partnerships), (2) the UCC, (3) Georgia Securities Act, or (4) involve complex commercial or business litigation.¹⁷² The catchall provision for complex commercial or business litigation often captures cases with multiple parties, novel issues, or a high volume of documentary evidence combined with the appropriate business and commercial law subject matter such as commercial torts or contract disputes.

Originally, cases were transferred to the Fulton County Business Court only with the voluntary consent of all parties. The transfer rule was amended in June 2007 to allow for cases to transfer to the Fulton

presumably more resources would be more likely to implement such a feature as opposed to smaller or younger programs with presumably less resources.

169. See Ramos, *supra* note 49. Working through the State Bar of Georgia, a feasibility study was commissioned to discuss the need for a business court, determine how to start the program, predict the potential pitfalls, and generate a preliminary list of best practices. Aequitas, Georgia Business Court Feasibility Study (Dec. 6, 2002) (unpublished study on file with the author).

170. Although other locations and jurisdictions were considered, Fulton County Superior Court graciously offered to host the Business Court. Additionally, the two-year pilot program was extended by a unanimous vote of the Fulton County Superior Court Judges through at least 2010. Email from Chief Judge Doris Downs to All Fulton County Superior Court Judges, Judy Cramer, Court Administrator, and Anne Tucker Nees, staff attorney to the Business Court (Apr. 17, 2007 10:05 EST) (on file with author).

171. ATLANTA JUD. CIR. R. 1004, *supra* note 5.

172. *Id.*

County Business Court upon the recommendation of the originally assigned judge or the motion of one party.¹⁷³ The amended rules carve out cases involving personal injury, employment discrimination, wrongful death, or low-dollar consumer class action claims from transfer to the Fulton County Business Court unless all parties consent.¹⁷⁴ Additionally, the amended rules create a twenty day briefing period for a party to object to the proposed transfer to the FCBC. Regardless of how the case is identified as a potential Fulton County Business Court candidate, each case is reviewed and voted upon by the Chief Judge, a representative from the Business Court Committee,¹⁷⁵ and one of the senior judges assigned to the Court.¹⁷⁶

Once in Fulton County Business Court, the parties have all of the same rights as in Superior Court such as the right to a jury trial, all rights arising under the Georgia Civil Practice Act, and operate under substantially the same procedures. The FCBC rules require a case management conference within thirty days of transfer to the Fulton County Business Court.¹⁷⁷ During the case management conference, the Court, with the input of the parties, establishes a case scheduling order that governs discovery (including electronic information), motions, hearings, pre-trial matters and contemplates a trial date. Additionally, during the case management conference, the parties discuss alternative dispute resolution techniques and build one of two windows into the schedule: early, pre-discovery mediation or post-summary judgment ruling. Early mediation avoids discovery costs and positional

173. *Id.*

174. *Id.*

175. The Fulton County Business Court Committee is comprised of five active judges plus the Chief Judge. Atlanta Judicial Circuit Rule 1004 requires the Chief Judge, a Business Court Committee Member, and one of the senior judges assigned to the Business Court must vote to "accept" a potential case into the court. *Id.*

176. *Id.* The Fulton County Business Court is staffed by two senior judges, although the rules allow for up to three senior judges to sit on the Business Court bench. Senior judges are former Superior Court judges who are semi-retired and no longer have an active civil or criminal or civil caseload, thus no new judgeship was necessary to staff the bench. Senior judges retain all of the power and authority of active Superior Court judges and thus can issue rulings, orders, and equitable relief such as injunctions or temporary restraining orders. GA. UNIF. SUP. CT. R. 18.1, 18.2, available at http://www.georgiacourts.org/courts/superior/uniform_rules.html.

177. ATLANTA JUD. CIR. R. 1004, *supra* note 5.

entrenching associated with litigation while post-summary judgment mediations are productive because liability will likely be assigned on the substantive issues of the case.

The State Bar of Georgia was instrumental in establishing the FCBC and the close relationship continues. For example, the State Bar Sections, Executive Committee, and Board of Governors vetted and approved the rule amendments passed by the Georgia Supreme Court in June 2007. Additionally, since its inception in 2005, the State Bar Business Law Section has hosted monthly seminars for the Business Court Judges, staff attorney, and other interested judges on relevant business law topics. In response, in part, to this collaboration, the Business Law Section developed a "Commercial Litigation" subcommittee to host the seminar program and to continue working with the FCBC. Additionally, the State Bar helped identify and secure funding for the FCBC from the Georgia State Legislature in the form of a \$100,000 annual grant from 2005–2008.¹⁷⁸ Finally, the FCBC plans to work with the State Bar to elicit feedback, suggestions, and further evaluations of the program in hopes of continuing to develop and improve the court.

Future plans for the FCBC include enhancing the existing technology in the Business Court courtroom to include wireless internet access and document and evidence display systems. The FCBC is currently working to develop further a mediation program as a case management and early-resolution tool for both discovery disputes and substantive issues within a case. Additionally, the FCBC has discussed publishing its opinions on the FCBC website, providing for electronic filing, developing a tool to evaluate litigant feedback, and seeking additional rule amendments to address the high dollar amount and to add an active judge to the bench.¹⁷⁹

178. See Mark Middleton, *Good Leadership Results in Successful 2007 General Assembly*, GA. BAR J., June 2007, at 26; Bus. Court, Fulton County Superior Court, Senate Talking Points (April 16, 2007) (on file with author).

179. The FCBC growth is similar to that of other developing business courts. See, e.g., FIRST JUDICIAL DISTRICT OF PA., 2005 ANNUAL REPORT 49 (2005), <http://fjd.phila.gov/pdf/report/2005-First-Judicial-District-Annual-Report.pdf> (describing the introduction of mediation programs into the Commerce Program, which is Philadelphia's business court).

2. *Analysis of FCBC Utilizing the Framework*

a. *Efficiency*

The Fulton County Business Court, with only two years of experience, does not yet have the data to facilitate a full review under Professor Dreyfuss's model, but using her model as a framework, one can discuss the different attributes and make predictions about the FCBC.

The FCBC, like 53% of the business courts, utilizes case management conference and scheduling orders to efficiently manage complex business cases.¹⁸⁰ Additionally, the FCBC rules allow for mediation and is one of seven business courts to facilitate some type of mediation program. The FCBC hopes to develop a more prominent mediation component into the Court. Although it is also premature for data to verify the expedited resolution of business cases, case management tools and deadlines currently utilized by the FCBC serve the efficiency goals stated in this article.

Additionally, a feature unique to the FCBC is that it is staffed by senior judges. Senior judges are semi-retired judges who no longer manage a full caseload of civil and criminal cases. Thus, the FCBC judges have the time to devote to these cases, without diverting resources away from the demanding civil and criminal caseloads in Fulton County.¹⁸¹

Another efficiency-focused feature of the FCBC is the relation and consolidation of cases before one judge. Rough estimates of the FCBC docket support a finding that up to one-third of the Business Court cases have companion cases.¹⁸² The companion cases are consolidated in the

180. ATLANTA JUD. CIR. R. 1004, *supra* note 5.

181. Narrow field of jurisdiction lends itself to expertise within that field. The Judges have the opportunity and time, without the regular caseload demands, to resolve cases accurately. Dreyfuss, *supra* note 7, at 16. Also, utilizing senior judges who have had years of bench experience on the general docket are not susceptible to the criticisms of "isolation." *See id.* at 17.

182. Uniform Superior Court Rule 3.2 allows for the consolidation of factually related cases before one judge. The receiving judge must accept the transferred case, and the temptation to reject a complex civil case that will eat up judicial resources if often too great to resist. *See* GA. UNIF. SUP. CT. R. 3.2, available at http://www.georgiacourts.org/courts/superior/uniform_rules.html ("When practical, all

FCBC instead of leaving the issues bifurcated, before more than one judge, and under more than one schedule.

In addition to the features examined in this article, in the future additional measures such as case resolution time and motion response time may be important efficiency predictors.

b. Quality

Decision-making or quality is difficult to assess from an internal perspective and is, of course, necessarily flawed by the author's relationship with the FCBC. The two-year old FCBC does not have a significant pool of decided and appealed cases to report valid or significant findings regarding its reversal rate.¹⁸³ The FCBC, however, is not alone, as only North Carolina and Delaware are tracking (and publishing) their reversal rates.

The FCBC does not publish its opinions in any format whereas about half of the business courts do. The Fulton County Business Court, however, has discussed initial plans to publish its opinions on its website in order for important business and commercial law decisions, at the trial level, to be available for potential litigants, in-house legal departments, and private attorneys who may utilize such opinions in developing plans and policies.

The FCBC provides specialized training for the senior judges staffing its court. In addition, the FCBC judges have extensive bench experience, both have attended a national conference of business court judges, and both attend regular business court seminars hosted by subject-matter experts on business-law specific topics.

The FCBC, along with one third of the business courts, has a history of working with its State Bar, and the FCBC plans to continue the collaboration to help inform the future direction of the FCBC. In addition to working with the State Bar of Georgia, the FCBC also works

actions involving substantially the same parties, or substantially the same subject matter, or substantially the same factual issues, whether pending simultaneously or not, shall be assigned to the same judge.”)

183. Due in large part to Professor Dreyfuss's model, the FCBC is closely tracking its reversal rate as an internal benchmark of the quality of its work.

closely with the Fulton County Superior Court Administration and is developing relationships with state law schools in order to develop a program that is cohesive with Georgia's procedural and substantive laws and policies.

c. Appearance of Due Process

The due process measure was evaluated by features such as substantially similar procedural rules and party feedback. Once a case is transferred to the FCBC, the procedures and substantive rights of the parties are substantially the same in the business court as they are in the general docket (e.g., right to jury trial is maintained and injunctive relief is available). Only Delaware's and New Jersey's procedures deviate substantially between their business court and their general docket.

Additionally, the FCBC is exploring ways to solicit party feedback through collaborations with the State Bar and legal scholars at local law schools. Currently, only North Carolina and Massachusetts collect party feedback.¹⁸⁴

During the rule amendment process in the spring of 2007, the FCBC faced opposition from groups such as plaintiffs' bar, consumer advocates, and others. Attorney and litigant opposition, like that faced by the FCBC, is not a benchmark on Professor Dreyfuss's model, but is a practical indication of the public's negative perception of due process. To counter these concerns, the FCBC added additional amended language to the rules to carve out specific cases such as personal injury, wrongful death, employment discrimination, and low-dollar consumer class action claims from its jurisdiction. Additionally, the FCBC built

184. The plaintiffs' bar, alternative dispute resolution advocates, and consumer groups voiced concerns about the intended scope and purpose of the FCBC. Additionally, the FCBC amended its rules in 2007 to remove the voluntary consent requirement to transfer cases. Despite efforts to educate parties about the court, there was reluctance on behalf of many litigants to come to the FCBC. Anecdotal evidence suggested that a litigation mindset ("if you are for it then I am against it") impeded cases transferring into the FCBC under the voluntary consent rules. *See, e.g.,* Land, *supra* note 49; *see also* Bus. Court, Fulton County Superior Court, Rule Amendment Action Plan (Apr. 4, 2007) (on file with author); Business Court, Fulton County Superior Court, Board of Governor's Talking Points (June 6, 2007) (on file with author).

into the transfer procedures a twenty day briefing period so that unwilling parties can raise objections to the proposed transfer.

Thus, the FCBC has attempted to structure its program and rules to promote a perception of due process. In the future, indicators such as the number of objections to transfer filed (and observed) and working with the State Bar to collect post-resolution party feedback will ultimately prove whether or not the FCBC maintains the appearance of due process and will be a guide for its future development.

While still in its early stages of development, the FCBC performs well on the efficiency measure (mediation program and case management tools); is working to establish quality components of the program (tracking its reversal rate and publishing opinions); collaborates with multi-disciplinary institutions; and is taking steps to enhance the appearance of due process (substantially same procedural rules, developing feedback tool, and addressing concerns of members of the bar). Once the FCBC solidifies its program by further utilizing mediation as a case management tool, tracking interim case benchmarks (e.g., number of motions), tracking case resolution timing, publishing its opinions, tracking its reversal rate, and collecting party feedback, it will have a program that serves the efficiency, quality, and appearance of due process measures in comparison with the successful business courts, such as North Carolina and New York.

CONCLUSION

The civil justice system is a cornerstone of our modern society: it helps citizens identify and resolve serious disputes that impact all facets of life. It is critical to understand the national trend of specialization at the trial court level and how specialization impacts the dynamics, purposes, and policies of how a court administers civil justice.¹⁸⁵ To date, however, few have evaluated this trend, especially as it relates directly to business courts. If we as a society are willing to devote

185. See, e.g., Nat'l Ctr. for State Courts, Specialized Courts Resource Center, <http://www.ncsconline.org/wc/CourTopics/ResourceCenter.asp?id=17> (last visited July 30, 2007) (website devoted to the specialization of state courts).

resources to specialized business courts, then we need to understand why we chose specialization, articulate the goals associated with specialization, mitigate the negative impacts, and develop measurements to predict and track how closely the performance of these specialized business courts fulfill their intended purposes.

From an internal perspective, those operating or planning a business court need to understand both the theoretical assumptions (good and bad) underlying business courts as well as the common components of business courts in order to develop a program that serves the goals of civil justice and the needs of that jurisdiction. Additionally, understanding the development of business courts and the forces that have shaped business courts may provide insights into the future direction and next steps for business courts.

The Delaware Chancery Court, the original business court, has been modeled by fourteen different jurisdictions. These non-Delaware business courts have developed programs to judiciously and expeditiously resolve complex commercial and business disputes in a manner that promotes the development of a consistent body of commercial and business law within that state. The non-Delaware business courts will continue to evolve in similar patterns and track into a close-knit group as they did on the three structural factors (case type, jurisdiction, and transfer mechanisms) and the three efficiency factors (efficiency, quality, and due process) reviewed above. Factors such as mediation programs and case management tools (efficiency); reversal rate, published opinions, and collaborations with multi-disciplinary institutions (quality); and substantially unaltered procedural rights and party feedback (due process) may predict the “success” of a business court. As non-Delaware business courts continue to develop, efforts should be made to monitor their progress and trends in order to add evaluative features to the framework model proposed in this article.

Under the proposed framework, North Carolina sets the bar for non-Delaware business courts and has structured its program with attention to efficiency, quality, and due process, which this article argues, serve the underlying goals of civil justice administration (access, timely action, equality, judicial independence, and public trust). As the FCBC

concludes its second year, it performed well on the three-part model and is on track to be a successful business court if it enjoys continued state and county support.