

CONCURRENT SESSION

THE NORTH CAROLINA BUSINESS COURT: A GENERAL OVERVIEW AND PRACTICE TIPS

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Ben Norman represents clients in business litigation before federal and state trial and appellate courts. Most of Ben's business litigation arises from failed business relationships and may include claims for breach of contract, breach of fiduciary duty, fraud, or unfair or deceptive trade practices. In addition, Ben has a wide-range of experience in litigation involving interest rate swaps and other similar derivatives, antitrust, tax, property insurance, trusts, real property, partnership rights, minority shareholder rights, trade secrets, fraudulent transfers, and piercing the corporate veil.

Ten years ago, Ben began his career as law clerk to Judge Ben F. Tennille, the first judge to preside in the North Carolina Business Court. As part of his practice with Brooks Pierce, Ben regularly appears in the Business Court and avidly follows its decisions. Ben often advises colleagues on practicing before the Business Court, and has written and presented on the topic.

Representative Experience

- Represented individuals, businesses and other entities located across the United States in disputes related to interest rate swaps and other similar derivatives.
- Represented regional bank against claims for fraud, unfair or deceptive trade practices and rescission.

Practice Areas

Complex Business & Corporate
Litigation

Litigation

Clerkship(s)

Law Clerk to the Honorable
Ben F. Tennille, Chief Special
Superior Court Judge for
Complex Business Cases,
North Carolina Business Court,
2004-05

Education

Wake Forest University, J.D.,
2004, Managing Editor, *Wake
Forest Law Review*, 2003-04.
James and Marie Mason
Scholarship

University of North Carolina at
Chapel Hill, B.A., 2000

- Represented individuals in tax controversies against both federal and state tax authorities.
- Represented members of limited partnership in claims for dissolution, fraud, unfair or deceptive trade practices, and piercing the corporate veil.
- Represented textile company and officers against claims including fraudulent transfer, unfair or deceptive trade practices, and piercing the corporate veil.
- Represented educational testing company against claims of discrimination in public accommodation.
- Represented long-term care company against claims for breach of contract, unfair or deceptive trade practices, fraud and constructive fraud.
- Represented telecommunications company against claims for breach of contract, unjust enrichment, negligent misrepresentation and unfair or deceptive trade practices by contractor.
- Represented real estate developer against claims for breach of contract and unjust enrichment.
- Represented former employee in claims for breach of contract and breach of fiduciary duty and against claims for misappropriation of trade secrets, breach of fiduciary duty, unfair or deceptive trade practices and conversion.
- Represented alleged member of joint venture against claims for breach of contract.
- Represented automotive parts manufacturer against claims for negligence and breach of warranty.
- Represented apartment complex owner in claims against property insurance company for breach of contract and unfair settlement practices.

Honors & Awards

Recognized as a "Rising Star" in business litigation by *North Carolina Super Lawyers* (2013-2015)

Professional & Community Activities

- American Bar Association - Litigation Section
- North Carolina Bar Association - Litigation, Antitrust and Complex Business Dispute Sections
- Greensboro Bar Association
- Greensboro Bar Association - Young Lawyers Section, President, 2011-2012

- Leadership Greensboro, 2014
- GirlCHARGE, Inc. - Board of Directors, 2008-2011
- Grace Church United Methodist

Articles, Publications & Presentations

- *The Electronic Courtroom and Complex Litigation in the North Carolina Business Court: An Introduction.* CLE Co-presenter, October 2007
- *Changes at the North Carolina Business Court, Learn to Utilize this Resource.* Forum Magazine, Summer 2006
- *Changes at North Carolina Business Court, Brooks Pierce Lawyers are Active and Involved.* Legal Topics Bulletin, March 2006
- *Effects of the Shift of the Burden of Proof in the Disposition of Tax Cases.* 38 Wake Forest L. Rev. 1357 (2003)

Bar & Court Admissions

- North Carolina
- U.S. Supreme Court
- U.S. Court of Appeals, 4th Circuit
- United States District Court, Eastern District, North Carolina
- United States District Court, Middle District, North Carolina
- United States District Court, Western District, North Carolina

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I. Introduction

North Carolina became one of the first states to create a business court in order to make the North Carolina court system more responsive to the demands of complex business litigation. The North Carolina Business Court has served as a model for many other states in the attempt to create a more business friendly judicial system.

Since its inception, the Business Court has offered speed, efficiency and flexibility in the difficult management of complex business cases. Special Superior Court Judges for Complex Business Cases (“Business Court Judges”) do not rotate as other Superior Court Judges, therefore reducing the possibility of inconsistency on substantive and evidentiary matters during the course of the litigation. Further, the Business Court utilizes technology in its electronic filing system and the advanced equipment in the courtroom which is not yet available in other courts. Business Court Judges are assisted by law clerks, which other Superior Court Judges do not have. Of great benefit, Business Court Judges must write an opinion on the final disposition of each case assigned as a complex business case. These opinions are published and have established greater predictability with a more developed body of case law.

Over the years, the type of cases designated as complex business cases and assigned to Business Court Judges has expanded. Recently enacted law continues that trend. If you are involved in litigation in North Carolina, you better know what the Business Court is and how it works.

II. History of the Business Court

In the mid-nineties, North Carolina began considering the creation of a Business Court. The process began with the creation of the North Carolina Commission on Business Laws and the Economy (the “1994 Commission”), which was established by an executive order of Governor James B. Hunt, Jr. on April 19, 1994. Rule 2.2 cmt., General Rules of Practice for the Superior and District Courts Supplemental to the Rules of Civil Procedure (“General Rules of Practice”). The 1994 Commission was charged to recommend “any needed

changes in existing statutes and regulations which affect the operation of businesses in North Carolina ... and to recommend any needed new statutes, rules and regulations designed to assure that North Carolina offers a legal environment which provides the flexibility and support to allow businesses to operate successfully in this state and which will attract them to locate and incorporate here.” *Id.* In January of 1995, the 1994 Commission issued a report recommending, among other things, that North Carolina establish a business court. *See* <http://www.ncbusinesscourt.net/history.htm>. The report also noted the success of the Delaware Court of Chancery and its expertise on corporate law issues, the desirability of having case law on corporate law issues, and the predictability for businesses derived from such case law. Rule 2.2, cmt.

The 1994 Commission recommended that the Supreme Court of North Carolina amend Rule 2.1 of the General Rules of Practice to allow the Chief Justice of the Supreme Court of North Carolina to designate certain cases as “complex business cases” and adopt Rule 2.2 to allow the Chief Justice to designate a special superior court judge to hear and decide complex business cases. In the fall of 1995, the legislature appropriated funds for an additional special superior court judge for a five year term and the Supreme Court amended Rule 2.1 and adopted Rule 2.2. In January 1996, Governor Hunt appointed Ben F. Tennille as a Special Superior Court Judge and Chief Justice Burley B. Mitchell, Jr. designated him as North Carolina’s first Special Superior Court Judge for Complex Business Cases, i.e., a Business Court Judge. From there, the Business Court was off and running.

For the first approximately three years, Judge Tennille and the Business Court operated without a permanent home or staff. REPORT ON ACTIVITIES OF THE NORTH CAROLINA BUSINESS COURT 1996 TO 2000, *available at* <http://www.ncbusinesscourt.net/ref/Report%20on%20Businesscourt%20ActivitieA.htm#Origin>. In 1999, funds were raised through private foundations to lease the space in the Meyer’s Building in downtown Greensboro, which previously housed the United States Bankruptcy Court for the Middle District of North Carolina. Also in 1999, the Administrative Office of the Courts classified two staff positions approved by the General Assembly: an administrative assistant and a law clerk. *Id.*

After a successful ten years, in 2006, the legislature acted to increase the influence of the Business Court. The Business Court expanded into Raleigh and Charlotte and added two new Business Court Judges, Judge John R. Jolly, Jr. and Judge Albert Diaz. The General Assembly also enacted N.C.G.S. § 7A-45.4, which created a procedure to designate certain cases as a complex business cases. *See* N.C. S.L. 2005-425, s.2.

In 2014, the General Assembly amended N.C.G.S. § 7A-45.4 and expanded the type of cases that may be designated as complex business cases. *See* N.C. S.L. 2014-102, s.3. The 2014 legislation also created a Subcommittee

on Business Court Modernization (“Subcommittee”) within the Joint Legislative Economic Development and Global Engagement Oversight Committee. The Subcommittee will study the implementation of the new law and submit a report and any proposed legislation prior to the convening of the 2015 General Assembly. More changes appear to be on the horizon, including further legislative amendments, amended local rules for the Business Court and the possibility of additional Business Court Judges and/or locations.

In compiling this short overview of the Business Court’s history, I relied on excellent resources that have a wealth of information on the Business Court. My law partner, Mack Sperling, has a famous blog called the North Carolina Business Litigation Report, which is available at www.ncbusinesslitigationreport.com. The reports mentioned above are available on Mack’s blog at <http://www.ncbusinesslitigationreport.com/2008/02/articles/about-the-business-court/history-of-the-north-carolina-business-court/>. Another great resource for more information on the history of the Business Court through 2002 was written by Carrie A. O’Brien and is entitled “The Wachovia Merger and the North Carolina Business Court: The North Carolina Business Court: North Carolina’s Special Superior Court for Complex Business Cases”, 6 N.C. Banking Inst. 367 (2002).

III. What exactly is the Business Court?

The Business Court is a part of the North Carolina Superior Court system. It is not a court of jurisdiction. A case that is designated as a complex business case remains docketed in the county in which the action was filed. The trial of a complex business case will be heard in the county in which the action was filed and any jury will be pulled from that county. Often, the parties agree to hold hearings at the Business Court courtrooms in Greensboro, Raleigh and Charlotte for the convenience of the court and judicial economy. The current Business Court Judges are the Honorable James L. Gale (who is the Chief Judge), the Honorable Louis A. Bledsoe, III and the Honorable Gregory P. McGuire. The Business Court has several advantageous characteristics which are discussed below in Section VI.

IV. How do I put my case in the Business Court?

A. Rule 2.1 Designation

For approximately ten years, Rule 2.1 of the General Rules of Practice was the sole way to have a case designated as a complex business case and assigned to a Business Court Judge. Under the Rule 2.1 procedure, a party seeking to have a case designated as a complex business case and assigned to the North Carolina Business Court may make a motion pursuant to Rule 2.1 of the General Rules of Practice to the Chief Resident Superior Court Judge of the county in which the

case was filed. The Chief Resident Superior Court Judge may then recommend the complex business designation to the Chief Justice of the Supreme Court of North Carolina. The Chief Justice will consider the recommendation and if he agrees, will then enter an order accordingly. It is my understanding that no new cases have been designated as complex business cases under Rule 2.1 recently due to the Business Court's high caseload. On January 1, 2006, N.C.G.S. § 7A-45.4 became effective and created a new procedure for the designation of a case as a complex business case.

B. Notice of Designation as a Mandatory Complex Business Case and N.C.G.S. § 7A-45.4

In 2005, the General Assembly passed legislation providing that certain actions filed on or after January 1, 2006 could be designated as mandatory complex business cases. These actions included those that involved a material issue related to the following summarized categories:

- Corporate law;
- Securities law;
- Antitrust law (except claims based solely on unfair competition under N.C.G.S. § 75-1.1);
- State trademark or unfair competition law (except claims based solely on unfair competition under N.C.G.S. § 75-1.1);
- Intellectual property law;
- The internet, electronic commerce, and biotechnology; or
- Contested tax actions (added by amendment in 2007 by N.C. S.L 2007-491).

In 2014, the General Assembly enacted law amending N.C.G.S. § 7A-45.4. Those changes became effective on October 1, 2014.

C. 2014 Amendments to N.C.G.S. § 7A-45.4

The amended version of N.C.G.S. § 7A-45.4(a) refined, clarified and expanded the types of actions that may be designated as a mandatory complex business case to those involving a material issue related to the following summarized categories:

- The law governing corporations, partnerships, and limited liability companies, including disputes arising under Chapters 55, 55A, 55B, 57D, and 59 of the General Statutes;
- Securities law, including disputes arising under Chapter 78A of the General Statutes;
- Antitrust law, including disputes arising under Chapter 75 of the General Statutes that do not arise solely under N.C.G.S. § 75-1.1 or Article 2 of Chapter 75 of the General Statutes;

- Trademark law, including disputes arising under Chapter 80 of the General Statutes;
- The ownership, use, licensing, lease, installation, or performance of intellectual property, including software, systems, data, pharmaceuticals, biotechnology products, and bioscience technologies;
- Trade secrets, including disputes arising under Article 24 of Chapter 66 of the General Statutes; or
- Contract disputes where all of the following conditions are met:
 - At least one plaintiff and one defendant is a corporation, partnership, or limited liability company;
 - The complaint asserts a claim for breach of contract or a declaration of rights under a contract;
 - The amount in controversy computed in accordance with N.C.G.S. § 7A-243 is at least one million dollars (\$1,000,000); and
 - All parties consent to the designation.

The amended version of N.C.G.S. § 7A-45.4(b) requires that some actions must be designated as mandatory complex business cases. My partner, Mack Sperling, coined the term “mandatory mandatory” to describe these actions. Actions that must be designated include the following summarized categories:

- Contested tax actions or constitutional challenges to a tax statute;
- An action described in N.C.G.S. § 7A-45.4(a) (except the contract dispute category) in which the amount in controversy computed in accordance with N.C.G.S. § 7A-243 is at least five million dollars (\$ 5,000,000); or
- The regulation of pole attachments brought pursuant to N.C.G.S. § 62-350.

Any party may designate the action as a mandatory complex business case by filing a Notice of Designation in the Superior Court in which the action has been filed and simultaneously serving the notice on each opposing party or counsel and on the Chief Special Superior Court Judge for Complex Business Cases, currently Judge Gale. The party filing the designation must contemporaneously send a copy of the notice to the Chief Justice of the Supreme Court of North Carolina for approval of the action as a mandatory complex business case. The new laws increase the fee that must accompany the filing of a Notice of Designation by one hundred dollars to one thousand one hundred dollars (\$1100), and provide that the fee can now be recovered as a cost.

Generally, a party must file the Notice of Designation at the time of its first filing. Any party may oppose the designation by filing an opposition with the North Carolina Business Court within thirty days of being served with the Notice of Designation. Judge Gale will decide if the designation is proper, and his decision can be appealed to the Chief Justice of the Supreme Court of North Carolina.

The new legislation requires that in an action involving a material issue described in N.C.G.S. § 7A-45.4(a) (except the contract dispute category), the pleading shall state whether or not the relief demanded for damages is equal to or exceeds five million dollars (\$5,000,000). If an action required to be designated under N.C.G.S. § 7A-45.4(b) is not so designated, the Superior Court in which the action has been filed must stay the action until it is designated.

Another significant change provides for direct appeal to the Supreme Court of North Carolina from final judgments or certain interlocutory orders in actions designated as mandatory complex business cases.

V. What do I need to know if my case lands in the Business Court?

First and foremost, read the rules! The Business Court has its own set of rules entitled the General Rules of Practice and Procedure for the North Carolina Business Court (the “Business Court Rules” or “BCR”). The Business Court Rules are available at the Business Court’s website: <http://www.ncbusinesscourt.net>. Business Court Rule 1.5 confirms that the Business Court Rules “are intended to supplement, not supplant, the North Carolina Rules of Civil Procedure” and the General Rules of Practice. BCR 1.5. In fact, if there is a conflict between the Business Court Rules and the Rules of Civil Procedure and General Rules of Practice, the “latter Rules shall control.” BCR 1.5.

Once a case is assigned to the Business Court, you will receive an introduction email from the judicial assistant or law clerk to the particular judge that has been assigned. That email will instruct you on preliminary matters including electronic filing through the Business Court’s electronic filing system. One must register with the Business Court in order to obtain an electronic filing user name and password. The Business Court’s electronic filing system is easy to understand and use. However, note that it may take additional time to file large exhibits. BCR 6 addresses electronic filing and service in the Business Court and has fifteen (15) subparagraphs. Note that you must send hard copies of certain filings to the Clerk of Superior Court in the county in which the matter is pending pursuant to BCR 8.1.

Generally, your first interaction with the Business Court Rules will be with BCR 17.1. Once your case is assigned to the Business Court, you must meet with the other side for a Case Management Meeting pursuant to BCR 17.1. BCR 17.1 provides the numerous case management topics that should be discussed including the length of discovery, the number of depositions, and the form of production for electronic records. Within fifteen days of conducting the Case Management Meeting, the parties must submit a Case Management Report which conveys the views of each party on the topics listed in BCR 17.1. The Business

Court then will schedule a Case Management Conference with attendance by counsel for all parties and their clients unless the Business Court excuses the attendance of the clients. Next, the Business Court will enter a Case Management Order which will manage the case including discovery issues and the schedule.

Review the opinions of the Business Court that may apply to issues in your case. The Business Court Judges are required by law to issue written opinions. The written opinions are published on the Business Court's website and commercial electronic research databases such as LEXIS and Westlaw. Although, the Business Court opinions do not carry precedential value according to the North Carolina Court of Appeals, it is more likely than not that a Business Court Judge will follow the law set forth in other Business Court opinions.

Having knowledge of prior Business Court opinions will help you write briefs, which are required for most motions filed in the Business Court. *See* BCR 15.2, 15.10. BCR 15 and its twelve (12) subparagraphs govern motion practice in the Business Court, including format requirements and length limitations. Note that you must certify that you have complied with the length limitation under BCR 15.8. If the Court schedules a hearing on your motion, the Business Court Judge will have read the briefs filed by the parties and will be prepared. Be ready for the hard questions.

Please note that the above-mentioned points are in no way inclusive, and in fact, are just the tip of the iceberg. When in doubt, check and double check the Business Court Rules.

VI. Should I put my case in the Business Court?

When determining whether to designate an action as a complex business case (assuming it is not a "mandatory mandatory" action that must be designated), one should consider the many benefits of the Business Court. From a case management perspective, a case in the Business Court will have one judge handling all pretrial matters, including discovery and motions. That same judge will preside over the trial. The parties will benefit from the continuous oversight by one judge and the reduced possibility of inconsistency on substantive and evidentiary matters during the course of the litigation. Further, the Business Court provides increased speed and flexibility in setting and hearing motions that deserve expedited consideration and disposition, such as injunctive relief related to mergers and/or shareholders' rights.

In my opinion, the most compelling reason to designate an action as a complex business case is to gain predictability for my clients about the judge who will be making rulings and orders. Due to the limitation on the types of actions that may be designated as complex business cases, the Business Court Judges have consistent exposure to complex business issues and develop expertise in

handling both the substantive law and the case management problems that arise in complex business cases. Moreover, the current Business Court Judges, Jim Gale, Louis Bledsoe, and Greg McGuire, all practiced law for well-respected law firms for decades. As practicing attorneys, the Business Court Judges handled actions including many of the complex business issues that are part of almost every case that is designated as a complex business case. While every Superior Court Judge in North Carolina is capable of determining complex business issues, the Business Court Judges understand the issues from their experience practicing law and also from regularly seeing the issues in their current caseload as Judges. North Carolina has been incredibly fortunate that talented attorneys with distinguished careers as practicing business litigators have been willing to serve the citizens of North Carolina as judges. Judge Tennille started that legacy and it has been honored and continued.

VII. Conclusion

Many of you undoubtedly are aware of the Business Court because you have had cases that were designated complex business cases and assigned to Business Court Judges. Like me, your esteem for the Business Court and its benefits has grown over the years with your experiences. If you have not had experiences with the Business Court, I hope that these materials and my presentation have given you comfort for your next trip to the Business Court. It is highly likely that eventually one of your cases will land in the Business Court. If you have questions as you navigate the Business Court, please do not hesitate to contact me.