2015

Revisiting the North Carolina Business Court After Twenty Years

Gregory Day

Follow this and additional works at: http://scholarship.law.campbell.edu/clr

Part of the Law Commons

Recommended Citation


This Article is brought to you for free and open access by Scholarly Repository @ Campbell University School of Law. It has been accepted for inclusion in Campbell Law Review by an authorized administrator of Scholarly Repository @ Campbell University School of Law.
Revisiting the North Carolina Business Court After Twenty Years

GREGORY DAY*

ABSTRACT

Over the past two decades, almost half of all states have enacted business courts to assume jurisdiction over locally arising business disputes. Advocates of these new courts assert that by trying business disputes in a specialized forum using an expert jurist, these venues should improve the adjudication of local business conflicts, while developing the states’ business climate. Considering that a majority of Fortune 500 companies are incorporated in Delaware, where the state’s esteemed Court of Chancery hears all local corporate disputes, out-of-state businesses may become more likely to incorporate or relocate to a state that has enacted a business court. Most academics, however, refute that these nascent business courts will generate tangible benefits. Their first point is that business courts differ substantially from Delaware’s Court of Chancery. The second argument is that business courts are not nearly as established or reputable as the Chancery Court. It is also argued that companies are not nearly as concerned with a state’s legal landscape as they are with other factors, and thus, should be unlikely to migrate to another state for the sake of a business court. Indeed, these competing narratives raise important questions about the ability of states and their court systems to improve business adjudication and to build local value.

The North Carolina Business Court is one of the most reputable and established of these new specialty courts. Having been established almost twenty years ago, the North Carolina Business Court should provide meaningful insights into this debate regarding the benefits of having a business court. Using both statistical and anecdotal evidence, this Article explores whether business courts have improved, or are likely to improve, American business jurisprudence. Alternatively, this Article explores

* Assistant Professor of Legal Studies, Oklahoma State University Spears School of Business. The author extends his gratitude to North Carolina Supreme Court Justice Paul M. Newby, Cole Hayes, and the members of the Campbell Law Review.
whether business courts can help states to compete against Delaware’s corporate monopoly.

INTRODUCTION ................................................................. 278

I. DEFINING AND COMPARING THE NORTH CAROLINA BUSINESS COURT AND THE DELAWARE COURT OF CHANCERY .......... 283
   A. The Delaware Court of Chancery ........................................ 283
   B. The North Carolina Business Court ..................................... 288

II. THE POTENTIAL BENEFITS OF THE NORTH CAROLINA BUSINESS COURT ................................................................. 292
   A. Improving Business Jurisprudence ...................................... 293
   B. Attracting Corporate Charters ............................................. 295
   C. Creation and Retention of Business .................................... 300
   D. Attracting Litigation and Other Legal Work ......................... 301

III. ASSESSING THE EXPECTATIONS OF THE BUSINESS COURT .. 308

CONCLUSION ............................................................................. 318

INTRODUCTION

At the North Carolina Business Court’s inception, local leadership suggested that the state could benefit from a forum specifically designed to adjudicate complex business disputes. This prediction often rested upon the belief that Delaware’s corporate prominence is attributable to its esteemed Court of Chancery, which the North Carolina Business Court hoped to replicate. Indeed, Delaware’s Chancery Court was one of the


first, and currently is the premier, of specialty courts exercising plenary jurisdiction over statewide corporate disputes. This forum has helped Delaware to become a particularly attractive corporate environment, as evidenced by the number of Fortune 500 companies incorporated in the state. At least twenty-two other states have sought to capture some of Chancery and the decisions of many large companies to incorporate in Delaware as a desirable outcome (citing ANNUAL REPORT OF THE NORTH CAROLINA COMMISSION ON BUSINESS LAWS AND THE ECONOMY 8 (1995) [hereinafter COMMISSION REPORT]). The Commission Report stated:

The Delaware Chancery Court is one reason many Fortune 500 companies choose to incorporate in that state. That court provides a high level of judicial expertise on corporate law issues. It has developed a substantial body of corporate law that provides predictability for business decision-making. Corporations litigating a corporate legal issue in the Delaware Chancery Court get a timely and well-reasoned written decision from an expert judge.


4. See Marcel Kahan & Ehud Kamar, The Myth of State Competition in Corporate Law, 55 STAN. L. REV. 679, 725–26 (2002) (arguing that Delaware’s reputation and capability has been built largely upon its longevity, considering that the court has developed substantial corporate case law in comparison to other states (citing Ehud Kamar, A Regulatory Competition Theory of Indeterminacy in Corporate Law, 98 COLUM. L. REV. 1908, 1928–32 (1998))).


6. See id. at 893–94. Alva recounts several theories of why the Court of Chancery attracts outside corporations, but finds:

The most detailed explanation of Delaware’s success in the charter market is [Roberta] Romano’s. She concludes that Delaware’s success is a result of: (a) comprehensive statutes and a body of case law, which provide greater certainty of legal outcome; (b) an experienced and small judiciary, which also increases certainty; (c) the large number of corporations currently domiciled in Delaware,
Delaware’s corporate monopoly by enacting business courts ostensibly modeled after the Court of Chancery. In turn, some commentators suggest that states that fail to enact a business court may lose jobs and businesses to those states that do have business courts.

which increases the rate at which precedents are made and increases the relative economic importance of franchise tax revenue to the state; (d) a two-thirds supermajority vote requirement in the General Assembly for amendments to the Delaware General Corporation Law making it difficult to reverse the presently favorable corporate code; and (e) high levels of investment in transaction specific assets such as a highly developed statutory law and common law and the expertise of its corporate attorneys.

Id. (first citing Roberta Romano, The State Competition Debate in Corporate Law, 8 CARDozo L. REV. 709 (1987); then citing Roberta Romano, Law as a Product: Some Pieces of the Incorporation Puzzle, 1 J.L. ECON. & Org. 225, 241, 280 (1985)). In the 2004 Final Report and Recommendation created by the North Carolina Chief Justice’s Commission on the future of the North Carolina Business Court, the Commission specifically mentioned that the North Carolina Commission and Bureau for Laws and the Economy (NCCBLE), the organization tasked with making business-law recommendations, cited Delaware’s Court of Chancery, and stated the following:

The NCCBLE noted the high esteem in which the Delaware Chancery Court is held by the national business community. While many states, including North Carolina, had amended their business laws to be more consistent with the Model Corporation Act, none had taken steps to make its court system as responsive and predictable as the Delaware Chancery Court in dealing with complex corporate issues.


7. See generally Michal Barzuza, Market Segmentation: The Rise of Nevada as a Liability-Free Jurisdiction, 98 VA. L. REV. 935, 938–45 (2012) (noting that the State of Nevada has redrafted its corporate laws, eliminating almost all corporate director liability, the effect of which is to try to attract corporate charters away from Delaware).


A number of legal scholars, however, doubt whether these nascent business courts can compete against Delaware, even questioning whether the states are fighting over businesses and corporations. They argue that the Chancery Court is too established, reputable, and effective for an upstart business court to attract corporations away from Delaware. They also insist that business courts offer few advantages that corporations actually desire. Moreover, even if a business court could replicate the
Court of Chancery’s inner mechanics, most companies care more about non-judicial factors, including tax rates and regulatory schemes, than they care about a state’s legal landscape, when making business and incorporation decisions. In short, while leaders and officials in North Carolina expect the Business Court to produce tangible state benefits, most legal scholars reject this contention.

The purpose of this Article is to align expectations with reality. The North Carolina Business Court may improve the state’s business climate, but not necessarily in all of the ways that its proponents originally expected. The most important point of clarification is that the North Carolina Business Court—and most other business courts—has a different design from the Chancery Court. The architects of each state’s business courts sought contrasting objectives, vested the courts with asymmetrical jurisdictional mandates, and provided each court with distinct tools to resolve a dispute. This Article creates a clearer picture of which characteristics distinguish the North Carolina Business Court from the Court of Chancery, explaining why the two forums should rarely compete over the same goods. That said, improving upon and specializing North Carolina’s legal landscape might still bear fruit.

Part I explains in greater detail the functions, powers, and jurisdictions of the North Carolina Business Court and the Delaware Court of Chancery, emphasizing the ways in which the courts compare and diverge. Part II traces many of the ways in which the Business Court could benefit North Delaware, but simply to “streamline commercial litigation.” Id. (citing Kahan & Kamar, supra note 4, at 715).

13. See id. at 1940–41 (explaining that firms are more likely to be concerned about tax incentives, for instance, and only slightly care about the quality of the state’s courts). Coyle states:

[M]ost studies suggest that business expansion decisions are driven largely by economic factors rather than by legal or regulatory factors. Specifically, these studies show that when businesses are expanding, they focus on issues such as market size, product demand, distribution channels, infrastructure quality, customer needs, the availability of capital, and the presence or absence of competitors, among others.

Id. (citations omitted); cf. David M. Wilson, Note, Climate Change: The Real Threat to Delaware Corporate Law, Why Delaware Must Keep a Watchful Eye on the Content of Political Change in the Air, 5 ENTREPRENEURIAL BUS. L.J. 481, 481–82 (2010) (suggesting that political developments are more likely to influence incorporation decisions than judiciary developments).

14. See Coyle, supra note 10, at 1955 (indicating that most business courts are designed to handle a broad range of commercial litigation and are not designed to cater to the litigation needs of corporations specifically).
Carolina and the reasons why most scholars are less hopeful. Part III explores how North Carolina has fared with the Business Court and the possibility of creating local benefits, improving business jurisprudence, and usurping business opportunities from Delaware. The Article concludes with critiques and recommendations.

I. DEFINING AND COMPARING THE NORTH CAROLINA BUSINESS COURT AND THE DELAWARE COURT OF CHANCERY

The North Carolina General Assembly established the Business Court to improve the state’s business and corporate atmosphere. Since many commentators assumed that the Business Court would function similarly to the Court of Chancery—or produce similar results—this Part details both the Business Court and the Court of Chancery, comparing their essential features. This Article offers a framework that explains why the Business Court should benefit North Carolina’s business environment, but perhaps not to the magnitude that its advocates had hoped.

A. The Delaware Court of Chancery

When Delaware first sought to attract outside corporations, its main tool was the state’s legislative branch, thinking little of the Chancery Court’s potential role. The Delaware General Assembly first drafted and


16. See Exec. Order No. 44, North Carolina Commission on Business Laws and the Economy, 9 N.C. Reg. 227 (May 16, 1994) (establishing a commission to make recommendations to the legislature that will improve the business climate in North Carolina); see also O’Brien, supra note 1, at 367 (providing sources from North Carolina suggesting that a business court would provide significant local benefits); About the Court, supra note 1.


amended the Delaware General Corporation Law (DGCL) in 1899, designing it to compete against New Jersey, which at that time was in possession of more corporate charters than any other state. 19 Then, after Delaware copied New Jersey’s corporate code, New Jersey Governor Woodrow Wilson—who was laboring under local political conditions—scaled back many of the state’s corporate protections, effectively helping Delaware to become the nation’s new favored corporate home. 20

Also contrary to popular belief, Delaware’s leadership did not originally intend the Court of Chancery to serve as the state’s exclusive forum for corporate disputes. 21 Instead, Delaware created the Chancery Court in 1792 to serve as a court of equity, granting it the same equitable jurisdiction that existed in England before the American Revolution. 22 The key distinction between courts of law and those of equity is that courts of law favor legal remedies (i.e., monetary damages), whereas courts of equity fashion remedies, such as specific performance and injunctive relief, when


In 1897, Delaware adopted a new constitution, permitting incorporation under general law instead of by special legislative mandate. Under this provision, Delaware enacted a general corporation law in 1899 calling for perpetual corporate existence and general powers. Before then, most of the country’s large corporations incorporated in New Jersey. In fact, Delaware modeled its 1899 General Corporation Law largely after the relatively liberal statute New Jersey had at that time.

Id.

20. Robert C. Holmes, Benefits of Incorporating in Delaware Versus New Jersey: Busting the Myth and Closing the Gap, 11 Rutgers Bus. L. Rev. 3, 11 (2014) (mentioning how Delaware copied New Jersey’s corporate statute to attract charters, but was not successful until Woodrow Wilson’s administration passed certain state-level legislation, driving its corporations to Delaware); Parsons & Slights, supra note 18, at 22 (explaining that corporations fled New Jersey after the state passed laws decreasing competition and mitigating antitrust concerns); Wilson, supra note 13, at 482–84 (remarking that Woodrow Wilson’s attempt to dismantle New Jersey corporate law was in an attempt to placate national audiences in hopes of successfully campaigning for the presidency).

21. See Quillen & Hanrahan, supra note 3, at 825–31 (reciting the anomalous historical factors that led to the Chancery Court’s creation). While it seems that the Chancery Court’s creation was due, at least in part, to the growth of industry, little evidence suggests that corporate law was at the forefront of the decision. See id.

22. Id. at 849 (“[T]he Supreme Court . . . determined that the Court of Chancery constitutionally possesses the general equity powers of the High Court of Chancery in Great Britain as they existed at the time of the 1776 separation.”).
monetary damages are inadequate or fail to make the claimant whole. In fact, only a few other courts of equity existed at that time, since the trend in the late eighteenth century was to eliminate courts of equity in favor of general courts of law with equitable capabilities.

Today, the Court of Chancery remains a court of equity, applying a two-part test to determine whether a dispute’s subject matter is appropriate

---

23. See Thomas O. Main, *Traditional Equity and Contemporary Procedure*, 78 WASH. L. REV. 429, 442, 451 (2003) (explaining that equitable jurisdiction is satisfied when courts of law cannot provide “plain, adequate and complete” relief). Typical equitable disputes involve remedies such as the specific performance of a contract, a temporary injunction against irreparable harm, or an action to remedy an alleged breach of fiduciary duties. *Id.* at 477–78; see also Quillen & Hanrahan, *supra* note 3, at 864. Equitable jurisdiction also favors cases involving “unique” subject matter, like a painting or real property, considering that legal remedies typically provide only a poor replacement. See, e.g., Kozar v. Christie’s, Inc., No. 30029/10, 2011 N.Y. Misc. LEXIS 2350, at *18–19 (N.Y. Sup. Ct. 2011) (“Items that have been found to be unique are heirlooms, works of art, patents and inventions, and particular shares of stock with peculiar investment features.” (first citing *Staff v. Hemingway*, 1975 N.Y. App. Div. LEXIS 8954 (N.Y. App. Div. 1975); then citing *Morse v. Penzimer*, 1968 N.Y. Misc. LEXIS 1163 (N.Y. Sup. Ct. 1968)); see also Carl F. Zick, *Note, Equity—Specific Performance of Contracts*, 16 MARQUETTE L. REV. 276, 276–77 (1932) (noting that equitable remedies, including specific performance, are appropriate when legal remedies are inadequate). Stock, for instance, is considered a “unique” good and is thus appropriate for equitable jurisdiction, because a legal remedy can only compensate its owner for the market value of the stock at the time its owner was deprived of it. See, e.g., *Hoge v. Pollard*, 188 S.E. 867, 869 (W. Va. 1936) (noting that because of the unique value of stock, “a court of equity will take jurisdiction to administer specific performance or kindred relief). The owner is thus deprived of any expected benefits from future appreciation or any corporate ownership benefits attendant to the stock. Rochelle Dreyfuss finds that:

> These cases appear on Chancery’s docket, however, not because the Delaware Legislature carved out this jurisdiction, but because these cases generally raise the kinds of questions with which equity deals: the duty of disclosure, the duty of good faith, and the like. Moreover, corporate cases often involve demands for the kind of relief—accountings, appointments of receivers, and orders to transfer corporate shares—that were traditionally available only at equity. Finally, because Delaware procedure treats class actions and shareholder derivative actions as equitable in nature, Chancery Court hears all corporate cases structured along those lines.


24. The only states that currently employ equitable courts are Delaware, Mississippi, and Tennessee. See Kate Margolis, *A Brief History of Mississippi’s Chancery Court*, CAP. AREA B. ASS’N (May 2012), http://www.caba.ms/articles/features/history-mississippi-chancery.html.

25. See Main, *supra* note 23, at 431 (“In the middle of the nineteenth century, procedural codes merged law and equity into a single unified system in most American state courts.”).
for equitable jurisdiction.\textsuperscript{26} The first prong assesses whether the plaintiff has asked for an equitable remedy based upon an equitable right, and the second prong looks at whether an adequate legal remedy exists.\textsuperscript{27} A legal remedy bars equitable jurisdiction if it is “full, fair and complete,” “available as a matter of right,” and able to provide as full and sufficient relief as equity.\textsuperscript{28} Under the “clean-up doctrine,” the Chancery Court may issue a legal remedy if the dispute’s primary basis lies in equity.\textsuperscript{29} For much of the Chancery Court’s early tenure, the court was not viewed as a forum that specialized in corporate disputes.\textsuperscript{30} However, during the 1980s, the number of hostile corporate takeovers sharply increased, and corporate managers realized the Court of Chancery’s ability to efficiently resolve corporate disputes.\textsuperscript{31} This is because most corporate conflicts involve subject matter that implicates an equitable remedy without an adequate legal resolution.\textsuperscript{32} For instance, equity is typically available to remedy breaches of fiduciary duties or to settle matters of corporate control.\textsuperscript{33} The property at issue in most corporate disputes is also typically

\textsuperscript{26} See Bird v. Lida, Inc., 681 A.2d 399, 402 (Del. Ch. 1996) (“Generally, equity jurisdiction arise[s] from two sets of circumstances. The first involves a request for an \textit{equitable remedy}: injunction, constructive trust, specific restitution, etc. The second rests on the assertion of an \textit{equitable right}: the right to hold a trustee to account, fiduciary duties generally etc.” (emphasis in original)).

\textsuperscript{27} See id.


\textsuperscript{29} See Medek v. Medek, C.A. No. 2559-VCP, 2008 Del. Ch. LEXIS 132, at *13–14 (Del. Ch. 2008) (quoting Prestancia Mgmt. Grp., Inc. v. Va. Heritage Found., II LLC, No. 1032-S, 2005 Del. Ch. LEXIS 80, at *11 (Del. Ch. 2005)); see also Bird, 681 A.2d at 402 (“The fact that a complaint seeks only the award of a money judgment does not mean, however, that a legal remedy is adequate and this Court is therefore without jurisdiction.”).

\textsuperscript{30} See Parsons & Slight, \textit{supra} note 18, at 21–22.

\textsuperscript{31} Quillen & Hanrahan, \textit{supra} note 3, at 863. Quillen and Hanrahan observe:

As takeover fever continued to mount and the array of takeover techniques and defenses continued to expand, the Court was called upon to arbitrate marathon takeover battles with multiple expedited applications for equitable relief. . . . The fever finally broke in the early 1990s. However, the Court’s body of opinions deciding, usually within a few days, complex legal issues arising from extremely complicated transactions stands as a remarkable judicial achievement. Under intense scrutiny, the Court proved it was up to the task of deciding quickly and coherently whatever corporate America and its advisors could concoct.

\textit{Id.}

\textsuperscript{32} Nees, \textit{supra} note 3, at 480–81 (quoting Dreyfuss, \textit{supra} note 3, at 7).

unique, such as stock, which allows shareholders to use the Chancery Court to challenge acts that affect their corporate ownership.\textsuperscript{34}

The nature of equitable jurisdiction alone is probably not the reason that a majority of large American companies have chosen to incorporate in Delaware. A more salient factor is likely that the business and legal communities hold the Chancery Court and its chancellors in the highest regard.\textsuperscript{35} Indeed, the Chancery Court writes and publishes opinions after almost every case, creating a lengthy and reliable body of case law.\textsuperscript{36} Delaware has also sought to remove political stigma from the court by appointing chancellors to serve eight-year terms, whereas most state judges compete in judicial elections for shorter terms.\textsuperscript{37}

The Delaware General Assembly also allocates significant resources to the chancellors to hire law clerks, and considering the nature of the court’s work, Chancery Court clerkships have become some of the most prestigious and competitive clerkships in the country.\textsuperscript{38} The end result is a court that possesses substantial power to remedy corporate disputes, manned by highly respected jurists with the resources and capabilities to

---

\textsuperscript{34} Quillen & Hanrahan, supra note 3, at 832–34; see supra note 23.

\textsuperscript{35} See Coyle, supra note 10, at 1951–52 ("Delaware’s success in attracting corporate charters is frequently attributed to the fact that its Court of Chancery generates and draws upon a vast body of published case law, is staffed by judges with considerable expertise in corporate law, and has a reputation for expeditious resolution of cases.").

\textsuperscript{36} See Kahan & Kamar, supra note 4, at 725–26 (noting the depth of Delaware’s corporate case law).

\textsuperscript{37} See Wilson, supra note 13, at 486. Wilson states:

This process is further checked by a requirement of bi-partisan representation amongst the judges, thus ensuring chancellors are beholden only to the law and its efficient execution; they have no interest in possessing a bully pulpit to espouse their beliefs to the citizens of Delaware.

\textit{Id.} (citing Del. Const. art. IV, § 3).

\textsuperscript{38} See Kahan & Kamar, supra note 4, at 713–14 n.115 (comparing the lack of funding at the inception of the North Carolina Business Court to the funding and availability of clerks at the Delaware Court of Chancery); see also J.W. Verret, \textit{Clerkships in Delaware for Aspiring Corporate Lawyers}, TRUTH ON MKT. (Apr. 12, 2010), http://truthonthemarket.com/2010/04/12/clerkships-in-delaware-for-aspiring-corporate-lawyers/ (observing that for aspiring corporate lawyers, a clerkship in the Delaware Court of Chancery “is far more valuable than one in a federal appellate court, or even . . . the U.S. Supreme Court”).
establish a formidable history of corporate law. In fact, other states hold Delaware corporate opinions in such high regard that many have sought to improve or develop their own bodies of corporate law by incorporating Delaware case law into their own court opinions.

B. The North Carolina Business Court

Since its establishment in 1996, the North Carolina Business Court has assumed a primary role in the adjudication of business disputes in North Carolina. As the current chief judge of the court has stated, the Business Court “is not simply a pro-business court. It is a court for sophisticated business cases, creating a sophisticated environment for both businesses and those having disputes with businesses.”

The Business Court currently sits in the state’s three largest cities—Greensboro, Charlotte, and Raleigh—and the court’s presence in the state is expected to expand this year, with the addition of a fourth judge. Some of the court’s early advantages included being staffed by judges with expert knowledge of commercial law, reassuring companies that disputes would be resolved in an efficient and sophisticated manner.

39. See Coyle, supra note 10, at 1951–52 (finding that corporations are most likely to be chartered in Delaware because the “Court of Chancery generates and draws upon a vast body of published case law, is staffed by judges with considerable expertise in corporate law, and has a reputation for expeditious resolution of cases” (citing Randy J. Holland, Delaware’s Business Courts: Litigation Leadership, 34 J. CORP. L. 771, 776–79 (2009))).


43. See Friedman, supra note 41; Matt Leerberg, Mike Robinson Nominated to Become Fourth Business Court Judge, N.C. APP. PRAC. BLOG (Mar. 25, 2015), http://www.ncapb.com/2015/03/25/mike-robinson-nominated-to-become-fourth-business-court-judge/ (announcing the governor’s nomination of a fourth business court judge, but noting that the site of the fourth judge’s court is still unknown); see also id. (noting that, according to several sources, “there is a desire to provide closer access to the business court for parties and attorneys in the far west and far east of the state”).

44. See O’Brien, supra note 1, at 370 (suggesting that judges with specialized knowledge are more likely to issue “timely” decisions); see also CHIEF JUSTICE’S COMM’N ON THE FUTURE OF THE N.C. BUS. COURT, supra note 6 (noting that the NCCBLE originally

http://scholarship.law.campbell.edu/clr/vol37/iss2/2
judges are selected based on their business and corporate expertise, and subsequent experiences on the court’s bench likewise promote an even greater knowledge of local business jurisprudence.45 Similar to the Court of Chancery, each Business Court judge was initially appointed by the governor in an effort to depoliticize the court.46 Each judge presides over the entire life span of a lawsuit, promoting greater continuity throughout litigation.47

Importantly, the Court of Chancery and the Business Court differ in the types of disputes that they hear and the manner in which each case is resolved. Whereas the Court of Chancery hears only equitable cases without a jury, the Business Court allows attorneys to request a jury trial for both equitable and nonequitable disputes, including contract conflicts and other cases where the plaintiff seeks a legal remedy.48

For the Business Court to have jurisdiction over a case, the initial design was to streamline cases through a bimodal system. First, there is an original class of disputes that automatically implicated the Business Court’s

---

45. Jones, supra note 2, at 208. Jones explains:

The selection of “expert[s] in corporate law matters” and other highly qualified legal practitioners to serve as Business Court judges provides the Business Court with a strong foundation of knowledge. Further, as these judges “consistently hear particular types of cases, they develop expertise, experience, and knowledge enabling them to perform their functions more proficiently than they could without that expertise. They are more efficient, and the quality of their decisions is better.” Id. (alteration in original) (first quoting COMMISSION REPORT, supra note 2, at 9; then quoting Ad Hoc Comm. on Bus. Cts., supra note 17, at 951).

46. See id. at 199 (noting that North Carolina’s governor appoints special superior court judges, and the chief justice of the state supreme court designates them as business court judges (first citing N.C. GEN. STAT. §§ 7A-45.1, .3 (2013); then citing N.C. BUS. CT. R. 2.2)). But see N.C. GEN. STAT. § 7A-45.1(a10) (amended 2014) (requiring General Assembly confirmation for all Business Court judgeships that begin on or after September 1, 2014). Under the new procedure in section 7A-45.1(a10), current Business Court judges must be confirmed by the General Assembly each time their five-year term expires. See id.


48. See Coyle, supra note 10, at 1953–54 (explaining that the type of jurisdiction of business courts differs substantially from the Court of Chancery (citing Kahan & Kamar, supra note 4, at 711 tbl.4)).
jurisdiction, including securities law, tax law, corporations, and antitrust. The General Assembly recently expanded the categories of cases that receive mandatory jurisdiction. That expansion added disputes pertaining to certain tax issues and corporate disputes over $5 million. Otherwise, a plaintiff must initiate a case in accordance with North Carolina’s ordinary rules of procedure and contemporaneously file a notice of designation with the complaint that seeks removal to the Business Court. If a plaintiff fails to make such a filing, the defendant may request within thirty days that the superior court remove the case to the Business Court, at which point the chief justice of the North Carolina Supreme Court decides whether to remove the dispute to the Business Court. Removal requests are usually granted if the case embodies a “substantial” or “complex business” subject matter. Although the enumerated dispute categories were contemplated by and included in the Business Court’s operative statute, the North Carolina legislature intentionally left the term “complex” undefined. Former North Carolina Supreme Court Chief Justice Lake issued a memorandum that sought to add clarity, noting that the Business Court should hear so-called *Meiselman* disputes regarding shareholders’ rights in closely held corporations, partnership disputes, and other types of corporate conflicts.

Although the Business Court started slowly, its usage and reputation has grown to the degree that leadership in North Carolina, including the General Assembly and the chief justice of the state supreme court, has

51. See id. §§ 7A-45.4(b)(1), (2).
53. N.C. GEN. STAT. §§ 7A-45.4(d), (f).
54. See, e.g., Order on Notice of Designation, supra note 52; see also N.C. Business Court Frequently Asked Questions, supra note 52.
55. N.C. GEN. STAT. § 7A-45.4.
58. Memorandum from I. Beverly Lake, Jr., supra note 47, at 2; see also Millen, supra note 56, at VI-B-8.
sought to expand the court’s prominence. After all, the Business Court initially published only a handful of opinions, releasing five written opinions in 1997, four in 1998, and less than a dozen in 2005. That number increased to fifty-five cases in 2013, which prompted legislation to increase the state’s reliance on the Business Court. For instance, litigants may now fast-track more cases directly to the Business Court, eliminating much of the cost and wasted time associated with complex business litigation. Appeals were previously directed to the North Carolina Court of Appeals, but now, litigants can bypass that court and appeal directly to the Supreme Court of North Carolina. In fact, a fourth judge will soon be added to help compensate for the court’s booming workload. Considering that these actions will likely increase the Business Court’s efficiency, parties may become even more likely to choose the Business Court as the favored forum for business disputes.

However, an issue remains concerning the value of Business Court opinions: they lack precedential value. Some courts may be persuaded to


64. N.C. GEN. STAT. § 7A-45.1(a9) (amended 2014); see supra note 43 and accompanying text.

65. Estate of Browne v. Thompson, 727 S.E.2d 573, 576 (N.C. Ct. App. 2012) (“The Business Court is a special Superior Court, the decisions of which have no precedential value in North Carolina.”); see Jones, supra note 2, at 206–07 (noting that while Business Court decisions are not binding on any other court, they should be granted persuasive
adopt the court’s rulings, though other courts will likely choose to ignore them.\textsuperscript{66} In fact, this has created discord among varying levels of the North Carolina judiciary.\textsuperscript{67} This uncertainty has led a few North Carolina Court of Appeals decisions to explicitly announce that they would not be bound by Business Court decisions.\textsuperscript{68}

In sum, direct appeals from the Business Court to the Supreme Court of North Carolina could potentially help to strengthen the weight of Business Court opinions.\textsuperscript{69} Even as “non-precedential,” the Business Court’s decisions are highly instructive and persuasive in helping to develop a business-law tradition and in establishing a thorough body of case law from its increasingly high volume of written opinions on complex business matters.

Part II explores how the North Carolina Business Court might (or might not) benefit the state in ways similar to which the Court of Chancery benefits the State of Delaware.

\section*{II. THE POTENTIAL BENEFITS OF THE NORTH CAROLINA BUSINESS COURT}

In light of both the Business Court’s and the Chancery Court’s inner mechanics, it appears that the Business Court could boost North Carolina business and commerce, though probably not in a manner that competes with Delaware. This is because, as previously stated, the Business Court and Chancery Court are disparate forums, formed under different, salient conditions.

For instance, the Chancery Court hears only equitable disputes and issues equitable remedies. The Chancery Court has a history of effectively resolving certain disputes, while the Business Court is still in its infancy. That said, the benefits that some observers expect the North Carolina Business Court to produce span a diverse range. For instance, some of the effects may be felt exclusively on the state level by improving local authority, like opinions from the Delaware Court of Chancery); \textsc{Chief Justice’s Comm’n on the Future of the N.C. Bus. Court}, supra note 6.

\textsuperscript{66} Jones, \textit{supra} note 2, at 205–06 (asserting that while some confusion might exist over whether Business Court decisions definitively lack precedential value, courts have at least cited these opinions as persuasive sources, while acknowledging their lack of binding precedence).

\textsuperscript{67} \textit{Id.} (discussing the North Carolina Court of Appeals’ treatment of Business Court decisions).

\textsuperscript{68} \textit{See, e.g.}, \textit{Estate of Browne}, 727 S.E.2d at 576.

\textsuperscript{69} \textit{See} Leerberg, \textit{supra} note 63.
adjudication of business disputes. Other predictions, though, concern whether the Business Court could help North Carolina compete against other states. This latter category includes retaining local businesses, attracting out-of-state companies, encouraging foreign firms to incorporate in North Carolina, and increasing the rate of local litigation. The Sections below address each theory in greater detail.

A. Improving Business Jurisprudence

At its core, advocates of the Business Court say that the court will increase judicial consistency and improve the sophistication and skill of the dispute-resolution process. For example, one study found that business courts are likely to improve core qualities of the legal process, including “access to judicial resources,” “timely action,” “ruling and operating with equality and integrity,” “maintaining judicial independence,” and “instilling public trust and confidence in the judicial branch.” States and their business courts improve these core qualities by “tracking like cases to one judge or judges,” “dedicating judicial resources to a business court,” “ensuring that a business court bench is staffed with experienced judges with expertise in the substantive area of law,” and “selecting business court judges outside of corporate influences.”

While the factors listed above focus largely on the quality and process of jurisprudence, the Business Court could also bolster the state’s local business climate by improving judicial economy. A significant aspect of business is the cost associated with trying a claim. By streamlining and

---

70. Ertel Berry, More Judges Needed to Keep Pace With Increased Caseload, N.C. LAW. WKLY., Jan. 17, 2005, at 1, 3 (noting that the Business Court has been an “unqualified success” due to “improved case management; increased speed and flexibility in handling complex business issues; cutting-edge courtroom technology; the benefits of specialization; predictability and uniformity afforded by posting all opinions; and attracting business to the state” (quoting CHIEF JUSTICE’S COMM’N ON THE FUTURE OF THE N.C. BUS. COURT, supra note 6)); see also More About North Carolina’s Business Court, W. VA. REC. (Nov. 15, 2010, 8:00 AM), http://wvrecord.com/news/231260-more-about-north-carolinas-business-court (discussing the advantages of the North Carolina Business Court to the state in debating whether West Virginia should consider enacting its own business court). See generally Nees, supra note 3.

71. Nees, supra note 3, at 482–83.

72. Id. at 483.

73. See Richard A. Posner, Economic Analysis of Law § 21.11, at 781 (8th ed. 2011) (explaining that the costs of litigation may even encourage resourceful companies to artificially spend more on litigation in hopes of spending to the point where their opponent cannot continue); Robert Bovarnick, When Is Litigation Worth the Hassle?, FORBES (July 21, 2010, 6:40 PM), http://www.forbes.com/2010/07/21/when-to-sue-entrepreneurs-law-
simplifying the process, the Business Court allows litigants to not only receive high-quality jurisprudence, but to do so at a cheaper cost.74

Other qualities of the Business Court similarly improve judicial economy. For instance, the Business Court has been given advanced technology to resolve commercial and corporate disputes more timely and efficiently.75 The court’s use of enhanced technology has served as a model for other states—especially for its use of electronic filing and case-management systems.76 This is just one way that the court has helped to improve judicial economy and expedite efficiency in business disputes.

The Business Court can also help keep litigants out of court, further reducing the costs of business. This is because the Business Court issues around sixty opinions per year, which are focused on some business aspect.77 With an increased depth of North Carolina case law, conflicting parties should be more likely to settle claims out of court instead of paying the added costs of litigation. Indeed, parties that have less information about how a court will rule are more apt to litigate than parties who can rely upon rich case law to determine whether the costs of litigation seem worthwhile.78 By improving the quantity and quality of available case law,

taxation-bovarnick.html (outlining how the costs inherent to litigation often influence how to negotiate strategies and even whether to go to trial). High litigation costs can undermine the benefits of a meritorious claim. \textit{But cf. id.}

74. See N.C. GEN. STAT. §§ 7A-27(a)(2)–(3) (amended 2014) (directing appeals from the Business Court to the Supreme Court of North Carolina, bypassing the state court of appeals); \textit{see also supra} note 69 and accompanying text. Litigants can now skip one appellate process, which inherently leads to a reduction in costs.

75. O’Brien, \textit{supra} note 1, at 378–82 (mentioning that North Carolina’s use of technology distinguishes it from other business courts). The technology is used in a range of areas: “[f]irst, the [court] created an electronic filing system, with the ultimate goal being a paperless courtroom. . . . The second goal of the technology project was to improve the technology inside the courtroom itself. . . . The final goal . . . was to create an online database for the court’s opinions.” \textit{Id.}

76. See Friedman, \textit{supra} note 41, at 13.

77. \textit{Court Opinions}, \textit{supra} note 60. This number is expected to increase as a result of the recent legislation, which requires Business Court judges to “issue a written opinion in connection with any order granting or denying a motion under [North Carolina Rules of Civil Procedure] Rule 12, 56, 59, or 60, or any order finally disposing of a complex business case, other than an order effecting a settlement agreement or jury verdict.” N.C. GEN. STAT. § 7A-45.3.

78. See Posner, \textit{supra} note 73, § 20.1, at 743–44. For instance, stare decisis is important because it entails the governing rules of case law. The body of case law serves a utility by adding information to claimants about the likely merits of their case and, in turn, whether litigating makes economic sense. \textit{Id.}
the Business Court provides predictability, thus helping parties to reduce litigation costs by increasing the frequency of settlements.\textsuperscript{79}

\section*{B. Attracting Corporate Charters}

Another contention is that the Business Court will allow North Carolina to compete against other states for corporate charters,\textsuperscript{80} though most scholars refute this assertion.\textsuperscript{81} While corporations overwhelmingly select Delaware as their corporate home, it is errantly assumed that companies incorporate in Delaware solely because of the Chancery Court.\textsuperscript{82} In reality, there are a number of other attractive factors unique to Delaware, including the strength of the DGCL and the state’s reputation as a long-time steward of corporate jurisprudence.\textsuperscript{83} In turn, the choice of where to incorporate is typically bimodal in the sense that 97\% of companies incorporate either in Delaware or in their home state, suggesting that business courts are unlikely to threaten Delaware’s corporate monopoly.\textsuperscript{84} Perhaps more importantly, the value of attracting corporate charters is vastly misunderstood, considering that marginal increases should produce few meaningful benefits.

As background, freedom of incorporation is made possible by the internal-affairs doctrine, which permits a company to incorporate in any

\textsuperscript{79} Id.; see also Friedman, supra note 41, at 13 (“The business court, which often issues thoughtful opinions on issues that have yet to be developed in the appellate courts, helps reduce the unknown.”).

\textsuperscript{80} See Millen, supra note 56, at VI-B-2 (noting that the architects of the Business Court sought to attract outside companies to incorporate in North Carolina); see also Kahan & Kamar, supra note 4, at 723–24 (discussing historic interstate competition for corporate charters).

\textsuperscript{81} See, e.g., Kahan & Kamar, supra note 4, at 724–25 (arguing that the depth and intricacy of Delaware case law is attractive to lawyers and corporations, which others states will struggle to recreate).

\textsuperscript{82} See Jill E. Fisch, The Peculiar Role of the Delaware Courts in the Competition for Corporate Charters, 68 U. Cin. L. Rev. 1061, 1081 (2000) (asserting that Delaware offers a particularly attractive corporate landscape leading to corporate charters because of the unique inner-workings of the Chancery Court relative to the state’s legislature).

\textsuperscript{83} Kahan & Kamar, supra note 4, at 726 (“It is true that by emulating Delaware a competitor state would not deliver the same product that Delaware does. Copying Delaware statutory law would not obviate the need for an expert court and, even with such a court, the competitor state would lack Delaware’s reputation.”).

\textsuperscript{84} Daines, supra note 10, at 1562 (“Firm choices are thus oddly ‘bimodal’—they operate as if there is no national market but a single choice: their home jurisdiction or Delaware.”).
state, despite a lack of contacts. This allows out-of-state corporations to avail themselves of another state’s laws while also becoming amenable to lawsuits in that state. Said differently, the primary good sold on the interstate corporate market is each state’s legal system. While the predominant choice is functionally bimodal, according to other researchers, a meaningful number of companies elect to incorporate in some third state—that is, a state other than Delaware or their home state. That said, some studies opine that Delaware’s corporate dominance is even greater than it was previously perceived to be.

Despite the historical preference for Delaware’s corporate law, proponents of the North Carolina Business Court assert that replicating Delaware’s judiciary could help North Carolina to become a competing corporate forum. This belief seems unlikely though, considering that other factors are more likely to influence incorporation decisions than a state’s judiciary. In particular, a state’s legislature is probably far more

---

85. See Deborah A. DeMott, Perspectives on Choice of Law for Corporate Internal Affairs, LAW & CONTEMP. PROBS., Summer 1985, at 161, 161 (defining the internal-affairs doctrine).
86. See Wilson, supra note 13, at 482. Wilson states:
   The [internal-affairs doctrine] prescribes that the law of the state of incorporation govern[s] a corporation’s internal affairs, primarily the decisions made by corporate leaders, and the fiduciary duties associated with those decisions. Historically, this doctrine has been followed both horizontally between states and vertically between individual states and the federal government.
87. Daines, supra note 10, at 1562 (finding that “there is little evidence of a nationwide market in legal rules”). Further, “[i]n spite of all the debate about firms’ freedom to incorporate anywhere, the importance of corporate law, and spirited state competition for charters, firms’ actual choices are much more mundane: 97% of public firms incorporate in their home state or Delaware.” Id. (emphasis in original).
89. See Bebchuk & Hamdani, supra note 10, at 555 (“We present evidence that Delaware’s dominant position is far stronger, and thus that the competitive threat that it faces is far weaker, than has been previously recognized.”).
90. See O’Brien, supra note 1, at 367–68 (recounting that local leaders in North Carolina believed that the Business Court would help the state to replicate Delaware’s corporate success).
91. Coyle, supra note 10, at 1940–41 (arguing that companies care more about “economic factors” than legal or regulatory factors, and that particular interests include a state’s “market size, product demand, distribution channels, infrastructure quality, customer needs, the availability of capital, and the presence or absence of competitors, among others”).
important. The Delaware General Assembly, for example, has proven particularly capable of quickly and efficiently creating and amending its corporate code in a manner that favors corporations. With the state’s history of corporate-friendly legislation and an expert judiciary to adjudicate its code, one study on initial public offerings found that incorporating in Delaware significantly increases a company’s value. Replicating either Delaware’s case law or the quality of its judiciary would likely be so difficult that it would take generations before a state could possibly compete. Similarly, some research suggests that companies that are considering incorporating in a jurisdiction outside of either their home state or Delaware risk substantial agency costs, since a company’s lawyers and practitioners will often be most familiar with and competent to practice a more well-known body of law—and some lawyers may even have incentives to steer their clients to certain states.

---

92. But see Fisch, supra note 82, at 1066 (suggesting that states probably do not incorporate in certain states for its corporate statutes because there is little significant variation between the various bodies of law).

93. See Wilson, supra note 13, at 485 (“The legislature does not micromanage the courts; rather it allows them to develop a stable body of law; however, if significant mistakes do occur in the creation of common law, the system is able to move swiftly to correct any uncertainty.”).

94. The argument follows beyond the fact that corporations favor the substance of Delaware’s law. Indeed, corporations may prefer Delaware’s legislature, which some have suggested rarely overrules established precedent and allows the Court of Chancery to create solid case law. It is the willingness of the legislature to defer to the Chancery Court that, in part, makes Delaware a favorable corporate location. Id. See generally Lawrence A. Hamermesh, The Policy Foundations of Delaware Corporate Law, 106 COLUM. L. REV. 1749, 1752 (2006) (discussing the creation of Delaware corporate law from an insider’s perspective).

95. Kahan & Kamar, supra note 4, at 726 (stating that even if a state could replicate Delaware’s corporate code, it would lack a judiciary that is as capable or esteemed as the Court of Chancery).

96. Daines, supra note 10, at 1560 (citing his previous work, Robert Daines, Does Delaware Law Improve Firm Value?, 62 J. FIN. ECON. 525, 532 (2001) (finding that, all other things being equal, incorporating in Delaware raises a company’s value by up to 2%)).

97. Kahan & Kamar, supra note 4, at 726 (“It is true that by emulating Delaware a competitor state would not deliver the same product that Delaware does. Copying Delaware statutory law would not obviate the need for an expert court and, even with such a court, the competitor would lack Delaware’s reputation.”).

98. Daines, supra note 10, at 1584. Daines states: [M]anagers do not choose domicile themselves but instead hire others (lawyers) to advise them. Once we allow that managers rely on agents, it is natural to ask whether agents’ self-interests might affect their advice.
Some assert that it is not just the overall strength of a state’s corporate code, but the nature of certain specific types of laws that affect a company’s incorporation decision. One notable study suggests that a company’s incorporation choice is highly influenced by a state’s antitakeover laws: a survey of publicly traded companies found that corporations prefer to incorporate in states where hostile takeovers are made difficult by the legislative process.

Another advantage that Delaware has over competing states stems from the Court of Chancery’s equitable powers over corporate disputes. In comparison, North Carolina’s legislature established the Business Court to exercise jurisdiction over corporate and most commercial claims, widening the court’s scope beyond what most companies desire. After all, the Business Court often hears contract disputes, tort claims, and other conflicts with a sought-after legal remedy, whereas the Court of Chancery resolves only corporate cases primarily involving fiduciary-duty disputes, stock disputes, temporary injunctions, and other corporate matters in which the plaintiff has demanded performance or forbearance from a specific act. In contrast, one study shows that most business courts were created not to attract incorporations, but to “streamline commercial litigation.” This suggests that while the Business Court may improve the adjudication of

One agency-cost hypothesis is that local lawyers encourage local incorporation because it is in their interest, while “national” law firms (i.e., those with clients in many states) encourage incorporation in Delaware.

Id. (footnote omitted).

At one end of the spectrum, states with no antitakeover statutes, such as California, do poorly and retain a relatively small fraction of the companies located in them. At the other end of the spectrum, states that amass most or all standard antitakeover statutes are the most successful both in retaining in-state firms and in attracting out-of-state firms.

Id.

100. Id. (mentioning that corporations prefer to incorporate in states where its board of directors are better insulated from hostile takeovers).

101. DEL. CODE ANN. tit. 8, § 111 (2012) (granting the Chancery Court jurisdiction over most corporate disputes).

102. Coyle, supra note 10, at 1953 (citing Kahan & Kamar, supra note 4). Coyle argues:
This expansive jurisdictional focus suggests that these courts were not designed primarily to attract incorporations. If this was the goal, then one would expect these courts to have a jurisdictional ambit more narrowly targeted on corporate law—that is, the law that is most relevant to companies considering whether to reincorporate under the law of another state. They do not.

Id. (emphasis in original) (citing Kahan & Kamar, supra note 4, at 712).

103. Id. at 1955 (citing Kahan & Kamar, supra note 4, at 715).
business disputes, its design may lack the mechanisms necessary to attract foreign corporations.

Other states may also encounter difficulties in competing against Delaware’s corporate monopoly due to the Court of Chancery’s special role in the corporate-law arena. Professor Jill Fisch found that, compared to other states, a relatively significant portion of Delaware’s corporate body of law is derived from the Chancery Court, which is particularly adept at creating case law to counter fast-arising concerns in a timely manner. In fact, judge-made law may be optimal, considering that it is less susceptible to a shift in political winds than laws that are enacted by the legislature. This suggests that other states would have a difficult time replicating this unique facet of Delaware’s unique legislative–judicial relationship.

Even if a state is able to compete with Delaware, there is confusion surrounding the benefits and advantages of attracting corporate charters. There is a significant difference between relocating a company’s production and business and the decision of where to incorporate. Even though a substantial number of companies have chosen to incorporate in Delaware, only a sparse few have moved local operations or facilities to the state. The only local presence of most Delaware corporations is a mailbox.

104. Fisch, supra note 82, at 1081. Fisch concludes:

Delaware’s unusual lawmaking structure enhances firm value and perhaps explains the widespread preference for Delaware incorporation. Delaware’s lawmaking process is valuable in three ways. First, Delaware’s indeterminate corporate law may have benefits as well as costs. Indeterminacy induces negotiation and removes some incentives for strategic behavior. Indeterminate law also gives the courts greater flexibility. Second, Delaware’s lawmaking is uniquely structured to maximize responsiveness to changing business developments. Finally by vesting a high degree of legislative lawmaking power in a decisionmaker that is largely insulated from political pressure, Delaware reduces the potential for rent-seeking in connection with the lawmaking process.

105. Id. at 1074 (“Delaware corporate law relies on judicial lawmaking to a greater extent than other states. Other state statutes, for example, define the standard of care applicable to corporate directors; the Delaware statute does not.”).

106. Id. at 1064, 1077 (asserting that the “flexibility, responsiveness, insulation from undue political influence, and transparency” offered by Delaware lawmaking “increase Delaware’s ability to adjust its corporate law to changes in the business world” and that “Delaware decisional law is also characterized by a high degree of flexibility and responsiveness”).

107. See id. at 1072 (“Unlike legislatures, courts rarely change legal rules as a result of a shift in political power or a rejection of the policies that motivated the adoption of the original rule, preferring to leave those decisions for the legislative process.”).
and registered agent to receive service.\textsuperscript{108} The primary benefit that Delaware receives from this structure is the franchise fee charged to those companies that have incorporated in the state,\textsuperscript{109} though this is no insignificant amount, totaling approximately $440 million per year.\textsuperscript{110} Said differently, Delaware receives few statewide economic benefits from Delaware corporations beyond the rents accrued from chartering fees and franchise taxes.

\textbf{C. Creation and Retention of Business}

Some say that an effective business court will attract transient businesses to North Carolina or help the state to retain companies that are already operating local facilities.\textsuperscript{111} One article found that the recent growth of state business courts was motivated by the belief that out-of-town businesses prefer and would relocate to jurisdictions that offer sophisticated and specialized mechanisms to adjudicate business disputes.\textsuperscript{112} The presence of a business court could also indicate a state’s

\begin{itemize}
\item \textsuperscript{108} See Coyle, \textit{supra} note 10, at 1940 (outlining the “[i]relevance of [d]ispute [r]esolution” in attracting, or retaining, out-of-state businesses).
\item \textsuperscript{109} \textit{Id.} at 1951 (mentioning that states primarily seek corporate charters in order to capitalize upon the fees accrued from corporate charters); Renee L. Crean, \textit{Case Law Update, Recent Development in New York Law}, 72 \textit{St. John’s L. Rev.} 695, 696–97 (1998) (arguing that New York’s business court could help New York accrue millions in franchise fees); Kahan & Kamar, \textit{supra} note 4, at 687–88.
\item \textsuperscript{110} Fisch, \textit{supra} note 82, at 1061.
\item \textsuperscript{111} \textit{See, e.g.,} Nees, \textit{supra} note 3, at 491. Nees remarks: Attracting business in the form of corporate registrations and filed cases is a secondary purpose of creating specialized business courts. 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 . . . . \textit{Id.}; see also O’Brien, \textit{supra} note 1, at 367 (“State officials believe the Business Court will attract out-of-state businesses to the state by developing their understanding of North Carolina corporate law.”).
\item \textsuperscript{112} Coyle, \textit{supra} note 10, at 1934–35. Coyle states: The first, and by far the most popular, theory of economic competition cites the business court as the product of competition among states to attract business activity. This theory suggests that the creation of a business court serves both to attract out-of-state companies to the state and to keep in-state companies from moving their operations elsewhere. Under this theory, states that compete successfully by establishing business courts will enjoy faster economic development and job growth than states that do not. \textit{Id.}
\end{itemize}
willingness to create a business-friendly climate.\textsuperscript{113} Whether a business court would actually attract or retain industries, jobs, and revenue is a more difficult question. Some scholars suggest that corporations are unlikely to relocate operations,\textsuperscript{114} considering that low tax rates, subsidies, and other economic carrots are substantially more likely to influence decisions regarding where to place production.\textsuperscript{115} In fact, it logically follows that corporate bodies of law should rarely attract outside businesses, since firms may incorporate in any state and take advantage of its legal system without assuming the step of relocating facilities. It thus appears more likely that a business court could attract corporate charters than it would for the court to convince foreign corporations to transport operations to North Carolina. However, there is a realistic chance that improving North Carolina’s business judiciary could render significant benefits to the state’s legal community.

\textbf{D. Attracting Litigation and Other Legal Work}

Local interest groups, particularly lawyers, could prosper from the increased workload derived from the Business Court. Business Court advocates cite the substantial sum of Chancery Court litigation as a likely intended consequence of a firm’s incorporation choice.\textsuperscript{116} A litigant who seeks to file an action against a corporation may often choose between several state forums, though the Constitution imposes limitations.\textsuperscript{117}

\textsuperscript{113} Nees, \textit{supra} note 3, at 491 (noting that many advocates believe that a business court can bolster a state’s business reputation).
\textsuperscript{114} Coyle, \textit{supra} note 10, at 1940–41.
\textsuperscript{115} \textit{Id.; see supra} note 13 and accompanying text.
\textsuperscript{116} See Kahan & Kamar, \textit{supra} note 4, at 698. Kahan and Kamar posit that: Lawyers in other states may be able to generate revenues proportionate to those of Delaware lawyers to the extent that their states attract incorporations. Since Delaware’s market share of roughly 50\% of incorporations by public companies yields $165 million in income and $227 million in revenue from legal business, lawyers in another state would likely gain about $3.3 million in income and $4.5 million in revenue for each percentage increase in their state’s market share of public corporations.
\textsuperscript{117} \textit{Id.; see also} Jones, \textit{supra} note 2, at 196 (discussing the intent of Business Court designers to model the court after the Delaware Chancery Court to help attract corporate charters similar to Delaware).

\textsuperscript{117} See John Armour et al., \textit{Delaware’s Balancing Act}, 87 IND. L.J. 1345, 1351 (2012) [hereinafter Armour et al., \textit{Delaware’s Balancing Act}] (explaining that a plaintiff can choose to file a corporate lawsuit against a corporation in the company’s state of incorporation and where its principal place of business or headquarters is located, plus potentially other states).
The primary restriction concerns whether a potential forum court can exercise personal jurisdiction over the defendant, which is established by either general or specific jurisdiction.118 A court has specific jurisdiction over a corporate defendant when both the context of the dispute and the actions of the company have a sufficient nexus and minimum contacts that make it fair and foreseeable for the company to be brought to court in the forum.119 General jurisdiction exists when the defendant has substantial

118. See Daimler AG v. Bauman, 134 S. Ct. 746, 754 (2014) (stating that general jurisdiction over a defendant is appropriate only when the corporation’s affiliations with the state in which the lawsuit is brought “are so ‘continuous and systematic’ as to render [it] essentially at home in the forum State” (quoting Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2851 (2001))). In Goodyear, the United States Supreme Court held:

A state court’s assertion of jurisdiction exposes defendants to the State’s coercive power, and is therefore subject to review for compatibility with the Fourteenth Amendment’s Due Process Clause. . . .

A court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them when their affiliations with the State are so “continuous and systematic” as to render them essentially at home in the forum State. . . . Specific jurisdiction, on the other hand, depends on an “affiliation[n] between the forum and the underlying controversy,” principally, activity or an occurrence that takes place in the forum State and is therefore subject to the State’s regulation. Goodyear, 131 S. Ct. at 2850–51 (alteration in original) (first quoting Int’l Shoe Co. v. Washington, 326 U.S. 310, 316, 317 (1945); then quoting Arthur T. von Mehren & Donald T. Trautman, Jurisdiction to Adjudicate: A Suggested Analysis, 79 HARV. L. REV. 1121, 1136 (1966)); see also John Armour et al., Is Delaware Losing Its Cases?, 9 J. EMPIRICAL LEGAL STUD. 605, 606 (2012) [hereinafter Armour et al., Is Delaware Losing Its Cases?]. Armour and his colleagues note:

[P]laintiffs can sue wherever they can achieve both personal and subject matter jurisdiction. Both of these are available in Delaware, so Delaware is one possible and often convenient forum. However, plaintiff lawyers can typically also obtain jurisdiction and thus sue a company’s directors and officers in the state courts of its “home state” (where its headquarters are located) . . . .

Id.

119. The current framework for determining “minimum contacts” was set forth in International Shoe Co. v. Washington, whereby a Delaware corporation, located with a principal place of business in Missouri, refused to pay a tax to the State of Washington based upon salesmen residing therein. Int’l Shoe Co., 326 U.S. at 311. Upon Washington bringing suit against International Shoe Co. in the state, the Court sought to establish whether the state could establish personal jurisdiction over the out-of-state corporation. Id. at 316. The Court held:

[D]ue process requires only that, in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain
and continuous contacts with the forum. In the corporate context, general jurisdiction is satisfied when the company is virtually “at home” in the forum state, such as in the location of a company’s headquarters or principal place of business, or even in a state in which the company sells a high volume of products.

Because it is possible to initiate litigation wherever a company is incorporated, attracting corporate charters creates value for the incorporating state’s legal community. For instance, Delaware’s legal community receives a substantial benefit from the number of companies that have consented to being sued in the state and from the corporations that must employ local counsel to effectuate transactional work. This can be inferred from the Delaware Bar’s denial of reciprocity to all out-of-state attorneys. Out-of-state lawyers seeking to represent a client in the Court of Chancery must partner with local Delaware counsel to share in both the litigation responsibilities and the attendant legal fees.

Importantly, however, certain qualities of a state’s judiciary likely influence where a lawsuit is ultimately filed, considering that plaintiffs generally have a choice to bring an action in any court that can exercise personal jurisdiction over the defendant corporation. Litigants thus have

minimum contacts with it such that the maintenance of the suit does not offend “traditional notions of fair play and substantial justice.”

Id. (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

120. See id. at 317.

121. Goodyear, 131 S. Ct. at 2853–54. In Goodyear, the Court reiterated that general jurisdiction is satisfied when a corporation is “fairly regarded as at home,” referring to whether the forum state is the corporation’s principal place of business or situs of incorporation. Id. (citing Lea Brilmayer et al., A General Look at General Jurisdiction, 66 TEX. L. REV. 721, 728 (1988)).

122. See Matthew D. Cain & Steven Davidoff Solomon, A Great Game: The Dynamics of State Competition and Litigation, 100 IOWA L. REV. 465, 467–68 (2015) (discussing Delaware’s incentive in both drawing charters and potential litigants as well as providing an attractive forum for both defendant and plaintiff litigants).

123. Kahan & Kamar, supra note 4, at 694–95.

124. It is generally stated that only ten states deny any form of reciprocity. See, e.g., Delaware Bar Exam Information: Reciprocity, BOARD L. EXAMINERS SUP. CT. DEL., https://media.law.wisc.edu/m/zdd3f/de.pdf (last visited Apr. 4, 2015) (explaining that the state has no reciprocity agreements with other states).


126. See Armour et al., Is Delaware Losing Its Cases?, supra note 118, at 608 n.12. Armour explains:
a host of options to bring suit, including in a forum where a company is incorporated, in any other state where sufficient contacts exist, and in corresponding federal courts. Some suggest that the choice of where to file a lawsuit depends on where litigants perceive that they can find a competent and respected judiciary. It is thus argued that businesses are more likely to incorporate in Delaware so that they may litigate their corporate disputes in the Court of Chancery. Others argue that the path to court is more strategic, considering that the act of attracting litigation requires incentivizing both the defendant and plaintiff. After all, plaintiffs will likely file suit in courts that are known to be sympathetic to their causes, such as a hometown court against a foreign defendant.

However, defendants will likely also seek to avoid such states when making the incorporation decision. For example, the State of West Virginia is reputed to be a particularly hostile forum for out-of-state corporations, which makes companies unlikely to incorporate in that state. Typically, courts of general jurisdiction, so subject matter jurisdiction is not a concern. Personal jurisdiction over the company’s officers will normally be easy, since most will work and often live in the company’s home state. The fact that most companies hold at least some board meetings at their headquarters should provide the minimum contacts with directors needed for personal jurisdiction.


128. Id. at 1480.

129. Armour et al., Delaware’s Balancing Act, supra note 117, at 1345.

130. Id. at 1350. Armour explains:

It cannot be taken for granted, however, that corporate litigation will be launched in Delaware courts. Plaintiffs’ attorneys usually have a choice of venue when filing a corporate suit. If they perceive that filing outside Delaware is advantageous, they may well do so. They might avoid Delaware because they believe its judges tend to favor corporate defendants.

Id.

131. Id. at 1345 (finding that in order to retain litigation, Delaware and other forums must appeal to both defendants and plaintiffs); id. ("If Delaware accommodates litigation too readily, companies fearful of lawsuits, may incorporate elsewhere. But if plaintiffs’ attorneys find the Delaware courts unwelcoming, they can often file cases in other courts "); see also Cain & Solomon, supra note 122, at 468 (noting that plaintiffs’ lawyers are strategic actors who respond to judicial developments in deciding in which court to file suit).
Corporations may also choose to incorporate in their home state in hopes of exploiting favorable treatment by local judges and juries. A state’s judiciary could also seek to insulate out-of-state corporate defendants from liability, yet doing so would encourage plaintiffs to file lawsuits in the corporation’s principal place of business or in another state where they have minimum contacts for a court to exercise personal jurisdiction over them.

Importantly, parties can often negotiate the site of future litigation by contract. One study found that contracts often use forum-selection clauses to designate the Court of Chancery as the exclusive forum for disputes, and choice-of-law provisions that select Delaware law to govern corporate disputes, but that New York is often chosen for contract and other commercial conflicts. In some limited instances, parties agree to arbitrate later-arising conflicts, the frequency of which may increase, considering that the Chancery Court has sought to capitalize on this market. Because litigation forums are often bargained ex ante, it should


133. Bebchuk & Cohen, supra note 88, at 398-99. Bebchuk and Cohen suggest that firms may incorporate at home because doing so gives them “hope of getting favorable treatment”:

Even though a state is supposed to treat all firms incorporated in it in the same way regardless of where they are located, a firm located in a state—especially a large firm located in a small state—might hope that its stature and clout in the state would lead judges or public officials to give it favorable treatment with respect to some corporate law issues that might arise.

Id.

134. See Armour et al., Delaware’s Balancing Act, supra note 117, at 1347-48 (explaining the forum-balancing act where, in order to attract litigation, forum states must first induce potential defendant corporations to incorporate in their state with certain bodies of law, but also to provide a legal landscape whereby plaintiffs will choose the state to file an action).

135. See Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 596 (1991) (holding that a forum-selection clause was valid); Eisenberg & Miller, supra note 127, at 1476-77 (explaining that many types of contracts include forum-selection and choice-of-law provisions to govern where prospective disputes must be brought).

136. Eisenberg & Miller, supra note 127, at 1477-78 (finding that contracting parties select Delaware law most often regarding choice-of-law and choice-of-forum provisions for certain issues of corporate law, however, New York law is most frequently chosen for most other forms of financing and commercial law disputes).

137. See Del. Coal. for Open Gov’t, Inc. v. Strine, 733 F.3d 510, 520–21 (3d Cir. 2013) (finding unconstitutional Delaware’s attempt to run private, confidential arbitration hearings...
be expected that plaintiffs and defendants would be more likely to mutually select an expert, distinguished judiciary, thus creating market dominance.\textsuperscript{138} This is, again, why forum-selection clauses in corporate contracts typically designate the State of Delaware as the exclusive forum for disputes, while commercial disputes find a home in New York.

A notably understudied variable is a litigant’s taste for federal courts, where a large number of corporate cases are decided, although most theoretical and empirical analyses indicate that Delaware’s biggest litigation threat comes from other states.\textsuperscript{139} It appears that the federal courts have little desire to usurp corporate disputes, and that both plaintiffs and corporate defendants have no preference to leave the state courts.\textsuperscript{140} In other words, attracting litigation is a delicate balancing act whereby the

---

\textsuperscript{138}. See Eisenberg & Miller, supra note 127, at 1479 (explaining that contracting parties should desire certain qualities in a judiciary and thus contract for a forum that can provide such qualities). Eisenberg and Miller state:

Parties presumably care about certainty and predictability. This can be achieved by development of a substantial body of reasonable case law in any locale. Once the venue is perceived as having a lead in legal development, that lead should induce more parties to contract for that state’s law to govern. Therefore choices of law may cluster around a few states for various contracts types on grounds of predictability.

\textit{Id.}


Delaware has little to fear when its cases are brought in federal court, as many recently have been. Although it may be true that the principal threat to Delaware is the federal government, not rival states, the federal government exercises its power by preempting Delaware law through legislation and rulemaking. There is little threat in a federal judge hearing the occasional Delaware case. Moreover, in the absence of federal incorporation, federal judges have even less incentive than rival state judges to encourage merger litigation in their jurisdiction.

\textit{Id.}

\textsuperscript{140}. But see Armour et al., Delaware’s Balancing Act, supra note 117, at 1355 fig.2, 1358 fig.4 (showing that corporate business cases are increasingly filed in federal courts, despite the lack of research on the subject, and also, representing the increase in mergers and acquisition cases in federal courts relative to other courts); see also Richard A. Posner, The Federal Courts: Challenge and Reform 216 (1985) (noting that “it is widely believed that federal judges are, on average . . . of higher quality than their state counterparts”); \textit{id.} at 215 (noting out-of-state defendants’ preference for federal court over state court because of “the problem of ‘local bias’”).
judiciary must favor businesses enough to attract corporate charters, but only to the degree that plaintiffs will choose the location to bring suit.

It is possible, then, that the North Carolina Business Court could have the effect of increasing statewide litigation, rendering significant local benefits to a certain limited industry of actors. Since litigants appear rationally motivated, the Business Court could prompt companies to incorporate in North Carolina or to draft North Carolina as the designated choice of forum or choice of law in their business contracts.141

While previous arguments remain relevant, such as those that suggest that traditional litigation homes such as Delaware are too entrenched, litigation choices may be more dynamic; in fact, current research indicates that plaintiffs’ lawyers have started to direct lawsuits away from Delaware into nontraditional forums.143 It is possible that the Business Court could present such an attractive forum that plaintiffs’ lawyers will choose to litigate in North Carolina, or that local lawyers might decide to stay in their home state rather than litigate in Delaware or other similar states. Although certain methods could empirically test whether the Business Court has increased local legal work,145 the real litigation benefits of the forum have yet to be discovered.

Considering that lawyers are renowned for being risk averse, the Business Court’s recent rise to prominence may soon begin to produce fruit, even if current testing shows no particular movement. Indeed, few companies desire to be North Carolina’s test subject while the state’s judiciary seeks to create more expansive case law.146 But after the litigants

141. See Armour et al., Delaware’s Balancing Act, supra note 117, at 1392 (arguing that litigants value certain qualities in a judiciary or legal system and thus rationally pursue such qualities using contract terms or via ex post litigation strategies).
142. Kahan & Kamar, supra note 4, at 726 (noting that a state that chooses to copy Delaware law would not usurp much of Delaware’s corporate advantage because it could not replicate the Court of Chancery’s reputation).
143. Armour et al., Delaware’s Balancing Act, supra note 117, at 1359 (finding that corporate-takeover cases are becoming more likely to be filed and tried in states other than Delaware).
144. See, e.g., Premier, Inc. v. Peterson, No. 11 CVS 1054, 2012 NCBC LEXIS 61, at *4 (N.C. Super. Ct. Dec. 7, 2012) (noting that the action was properly before the court because the parties, almost all of whom were incorporated out of state, chose North Carolina to govern future disputes, vacated on other grounds, 755 S.E.2d 56 (N.C. Ct. App. 2014)).
145. See infra notes 147–203 and accompanying text (empirically testing whether the Business Court has helped North Carolina attract corporations and litigation).
146. Holland, supra note 39, at 778–79 (noting that businesses prefer extensive case law for the sake of predictability and ex ante business planning (quoting William H. Rehnquist,
who lack other forum choices help add to the Business Court’s predictability, parties may later prefer to litigate in North Carolina over neighboring states. Thus, even modest or null results should be understood in this context. With this background, the next Part provides an empirical assessment for whether the Business Court has already produced local benefits.

III. ASSESSING THE EXPECTATIONS OF THE BUSINESS COURT

Most predictions about the Business Court’s ability to produce statewide benefits were formed by theoretical expectations backed by no empirical data. Some anecdotal evidence suggests that companies, when given a choice among litigation forums, choose North Carolina because of the Business Court’s ability to adjudicate complex business disputes.147

Empirically, no statistics prove or disprove whether the Business Court has been successful, though some trends are suggestive. Even in light of the suggestive nature of the data, no statistics can definitively prove more than a correlation between the variables. Considering that there are a variety of ways in which the Business Court could benefit North Carolina,148 several empirical methods are relevant. For instance, recall that North Carolina leaders often refer to Delaware’s Chancery Court when discussing the likely virtues of the Business Court. Since Delaware’s primary claim is that it has accrued more corporate charters than any other

The Prominence of the Delaware Court of Chancery in the State-Federal Joint Venture of Providing Justice, 48 BUS. LAW. 351, 354 (1992)).


In First Union, the parties filed complaints in several state courts, but eventually selected North Carolina, citing the benefits offered by the Business Court. See First Union, 2001 NCBC LEXIS 7; see also Mitchell L. Bach & Lee Applebaum, A History of the Creation and Jurisdiction of Business Courts in the Last Decade, 60 BUS. LAW. 147, 169 (2004) (citing the parties’ recognition of the Business Court as a “trustworthy and capable forum”); Yang, supra, at 337–38.

The decision of the parties in First Union to litigate in North Carolina caused some in Georgia to advocate for a similar business court. See Bach & Applebaum, supra, at 170 (“[L]awyers are actively seeking assignment to the North Carolina Business Court, including lawyers from adjacent states, motivated by the court’s understanding of complex business matters, predictability, fairness, and impartiality. This sounds like the oft-heard description of the qualities litigants find in Delaware’s Chancery Court.”).

148. See supra notes 70–146 and accompanying text (detailing the possible ways that the Business Court may provide local benefits to the State of North Carolina).
state,\textsuperscript{149} could the Business Court replicate part of Delaware’s success by increasing the rate of incorporation in North Carolina?

The numbers suggest that the skeptical scholars are correct that the Business Court will not help states compete against Delaware, rendering little effect upon corporate chartering. This Article presents a dataset that was constructed using methodology adopted by other studies regarding the incorporation choices of North American publicly traded companies. While there is value in studying nonpublic companies, there is a lack of assessable data pertaining to all companies. In contrast, a plentiful sum of information concerning publicly traded companies can be found in the dataset \textit{Compustat}.\textsuperscript{150} Thus, most research that studies corporations assesses only publicly traded companies.

The first analysis scrutinized publicly traded companies that have their principal place of business in North Carolina. Keeping in mind that the choice of where to incorporate is primarily bimodal, whereby companies choose either their home state or Delaware,\textsuperscript{151} if the Business Court is a truly attractive incorporation home to North Carolina companies, one would assume that North Carolina companies, at an increasing rate, are deciding to stay at home instead of incorporating in Delaware. After all, incorporating out of state comes with certain costs, including the risk of litigating out of state and relinquishing the home-court advantage.\textsuperscript{152}

\textsuperscript{149} See Daines, \textit{supra} note 10, at 1562, 1573 tbl.4 (stating that “97% of public firms incorporate either in their home state or Delaware” (emphasis omitted)); see also Jones, \textit{supra} note 2, at 196–97 (noting that the North Carolina Commission on Business Laws and the Economy cited Delaware and the Chancery Court as a model in proposing the Business Court).


\textsuperscript{151} See Daines, \textit{supra} note 10, at 1562.

\textsuperscript{152} See Bebchuk & Cohen, \textit{supra} note 88, at 398–99 (discussing that some corporations perceive that local judges may give favorable treatment to home-state residents and businesses).
The patterns of North Carolina corporations were striking. First, the number of publicly traded North Carolina corporations has decreased over the years, though this phenomenon mimics the national trend. In 1988, before the Business Court was established, publicly traded North Carolina companies chose to incorporate in North Carolina and Delaware at a near-equal rate, with each state claiming approximately 40% of the corporate market share and other third-party states taking the remaining 20%. Entering the 1990s, Delaware’s market share of North Carolina companies slowly increased, rising to almost 45% in 1996 when the Business Court was enacted. Therefore, at some point in the 2000s, it could be expected that North Carolina would reclaim some of these corporate charters away from Delaware. Instead, Delaware’s claim to North Carolina corporations

153. See supra Figure 1.
155. See supra Figure 1.
156. See supra Figure 1.
grew to the detriment of North Carolina. By the late 2000s, 48% of North Carolina firms were calling Delaware home—a number that grew above 50% in the late 2000s.\textsuperscript{157}

On the other hand, as shown in Figure 2, the number of North Carolina publicly traded companies incorporated in North Carolina has dramatically dropped.

**Figure 2: The Decline of Out-of-State Public Companies in North Carolina**

When the Business Court was first established in North Carolina, only about 38% of local companies had chosen North Carolina as their incorporation home.\textsuperscript{158} Ten years later, the number precipitously dropped to 32%.\textsuperscript{159} Today, less than 30% of firms incorporate in North Carolina.\textsuperscript{160} Indeed, despite the Business Court’s prominence, North Carolina continues to lose the competition for corporate charters to Delaware—as well as the other forty-eight states whose share has remained constant at around 20% of the North Carolina market.\textsuperscript{161}

The competition for corporate charters is also about attracting foreign companies into North Carolina, not just retaining North Carolina companies, as previously studied. In 1998, two years after the Business

\textsuperscript{157} See supra Figure 1.  
\textsuperscript{158} See supra Figure 1.  
\textsuperscript{159} See supra Figure 1.  
\textsuperscript{160} See supra Figure 1.  
\textsuperscript{161} See supra Figure 2.
Court’s enactment, North Carolina was the home of incorporation to eighty-six foreign publicly traded companies—a number that would decline at a faster rate than Delaware or the national average. Just four years later, that number fell to seventy-four, and in 2008, only fifty-three publicly traded companies were incorporated in North Carolina. 163

Importantly, in 2001, 20% of North Carolina incorporations were companies that had a principal place of business located out of state. That number stayed constant and then began to drop quickly. By 2011, only 10% of North Carolina incorporations arrived from out of state, and today, just barely over 8% of these firms have an out-of-state principal place of business. Indeed, North Carolina is failing to retain incorporations of publicly traded companies from both in-state and out-of-state companies. In 2013, only four out-of-state companies were incorporated in North Carolina, compared to the fourteen that had incorporated in North Carolina in 2000. Despite the presence of the Business Court, North Carolina is failing to compete for publicly held companies.

While the number of publicly traded companies declined nationwide, including in Delaware and in North Carolina, the number of North Carolina incorporations dropped at a far greater rate than in Delaware. While Delaware lost a bit of ground in the national market share, it had lost far more than North Carolina. It appears that firms have begun to choose other nontraditional states, such as Nevada, though the companies are definitely not selecting North Carolina, regardless of the promise of the Business Court.

Another method in which the incorporation challenge can be viewed is through the activity of the Business Court and the rate at which North Carolina incorporates new companies, whether publicly or privately held. The North Carolina Secretary of State’s Office provides data regarding the number of corporations that have chosen to incorporate in North

---

162. See supra Figure 2.
163. See supra Figure 2.
164. See supra Figure 2.
165. See supra Figure 2.
166. See supra Figure 2.
167. See supra Figure 2.
168. See supra Figure 2.
169. See supra Figure 2 (showing this trend).
170. See supra Figure 2.
171. See supra Figure 2.
That agency keeps statistics on two types of new companies: foreign and domestic. Domestic refers to companies residing in North Carolina who have chosen to incorporate in the state, while foreign companies are international companies or those from other states who have incorporated in North Carolina. Both of these categories of corporations have independent significance, considering that North Carolina companies can always elect to incorporate elsewhere, while the number of new foreign corporations is instructive, since these companies have chosen North Carolina over the traditional bimodal choice of Delaware or their respective home state.

During the early 1990s, before the creation of the Business Court, the rate at which companies elected to incorporate in North Carolina remained steady. Even in 1993, when 8% more North Carolina companies incorporated locally than in 1992, the number of foreign incorporations stayed fairly constant (less than a 3% increase). Interestingly, the number of foreign and domestic corporations in North Carolina began to increase at a noticeable rate during the years in which local leaders planned to operate a Business Court—68% more foreign corporations chose North Carolina in 1998 than in 1994 (5733 to 3413).

The Business Court’s promise, though, began to appear more like a fluke shortly thereafter, as the number of foreign corporations suddenly decreased. From 1998 to 1999, the number of new foreign corporations dropped by almost 8%, and then in 2001, this number decreased by another 9%. The number slipped again slightly in 2002. One possible explanation for the decline in foreign corporations is the Business Court’s inactivity during that time. Indeed, the number of cases that the Business Court decided during that period remained low, as the court generally

172. See infra Table 1.
173. See infra Table 1.
174. See infra Table 1.
175. See supra Figure 2; infra Table 1.
176. See supra Figure 2; infra Table 1.
177. See infra Table 1. The number of domestic corporations that incorporated in North Carolina also increased during that same period (43%), though this number is less helpful, because many more intervening variables muddy this relationship. See id. Because the historic choice of incorporation has been between the company’s home state and Delaware, a foreign company’s choice to go against the grain and incorporate in North Carolina sheds more light on the question.
178. See infra Table 1.
179. See infra Table 1.
released only around eleven opinions annually (in both 1999 and 2000). 180 In 2002, the court released only four opinions. 181 If experts predicted that companies are strategic actors who would choose where to incorporate based, in part, on the ability of a locale to adjudicate business disputes, then the decline of new foreign incorporations made sense. After all, the Business Court must actually be active and effective for foreign corporations to seek out its benefits. If this is a spurious relationship, one can still certainly conclude that the Business Court was not helping to improve this situation during that time.

As shown in Table 1, the number of foreign corporations entering North Carolina then began to fluctuate. 182

Table 1: Creations, Dissolutions, and Withdrawals of Domestic and Foreign Corporations in North Carolina Through September 2013 183

<table>
<thead>
<tr>
<th>Calendar Year</th>
<th>Creations</th>
<th>Voluntary Destruction Documents</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Domestic</td>
<td>Foreign</td>
</tr>
<tr>
<td>1990</td>
<td>14,566</td>
<td>2,369</td>
</tr>
<tr>
<td>1991</td>
<td>14,049</td>
<td>2,294</td>
</tr>
<tr>
<td>1992</td>
<td>15,179</td>
<td>2,817</td>
</tr>
<tr>
<td>1993</td>
<td>16,428</td>
<td>2,896</td>
</tr>
<tr>
<td>1994</td>
<td>20,200</td>
<td>3,413</td>
</tr>
<tr>
<td>1995</td>
<td>22,648</td>
<td>3,922</td>
</tr>
<tr>
<td>1996</td>
<td>25,165</td>
<td>4,547</td>
</tr>
<tr>
<td>1997</td>
<td>28,118</td>
<td>5,188</td>
</tr>
<tr>
<td>1998</td>
<td>29,030</td>
<td>5,733</td>
</tr>
<tr>
<td>1999</td>
<td>32,611</td>
<td>5,630</td>
</tr>
<tr>
<td>2000</td>
<td>36,402</td>
<td>6,418</td>
</tr>
<tr>
<td>2001</td>
<td>34,623</td>
<td>5,816</td>
</tr>
<tr>
<td>2002</td>
<td>38,754</td>
<td>5,772</td>
</tr>
<tr>
<td>2003</td>
<td>41,518</td>
<td>6,010</td>
</tr>
<tr>
<td>2004</td>
<td>48,289</td>
<td>6,517</td>
</tr>
<tr>
<td>2005</td>
<td>54,132</td>
<td>7,110</td>
</tr>
<tr>
<td>2006</td>
<td>56,285</td>
<td>8,362</td>
</tr>
<tr>
<td>2007</td>
<td>58,930</td>
<td>8,627</td>
</tr>
</tbody>
</table>

180. See Court Opinions, supra note 60.
181. Id.
182. See infra Table 1.
183. Report from the N.C. Secretary of State’s Office (original on file with author). This Table includes data reported through September 13, 2013.
For instance, the rate that foreign companies incorporated picked up in accordance with the number of decisions that the court issued. In 2006, when the number of opinions increased from seven to twenty-six, the number of foreign corporations incorporating in North Carolina increased 18% from 2005. The numbers began to dip again in the late 2000s, which is likely a result of the rise of business courts in other states. Indeed, many states perceived that they were losing businesses and corporations to those states with business courts, causing these states to create their own business courts. This is the very situation noted previously in this Article that took place between North Carolina and Georgia in the First Union case. While the number of domestic and foreign corporations that chose North Carolina annually has settled, the average gross number of new incorporations far exceeds pre-Business Court levels. The point is that it seems like the Business Court attracted the most foreign corporations and retained a significant number of local ones when it was one of the only business courts in the region, though its draw has settled now that many other states have employed this same judicial tool.

Another area of possibility is whether the Business Court could help North Carolina attract litigation to the state. Again, litigants can bring a lawsuit in any court that can exercise personal jurisdiction over the defendants. Determining whether North Carolina is prospering in the

<table>
<thead>
<tr>
<th>Year</th>
<th>Total</th>
<th>Foreign</th>
<th>Domestic</th>
<th>Foreign</th>
</tr>
</thead>
<tbody>
<tr>
<td>2008</td>
<td>51,396</td>
<td>7,237</td>
<td>15,088</td>
<td>3,265</td>
</tr>
<tr>
<td>2009</td>
<td>46,494</td>
<td>6,719</td>
<td>16,142</td>
<td>3,405</td>
</tr>
<tr>
<td>2010</td>
<td>45,772</td>
<td>6,882</td>
<td>17,191</td>
<td>3,384</td>
</tr>
<tr>
<td>2011</td>
<td>47,827</td>
<td>6,860</td>
<td>15,847</td>
<td>2,914</td>
</tr>
<tr>
<td>2012</td>
<td>50,294</td>
<td>7,092</td>
<td>16,447</td>
<td>3,128</td>
</tr>
<tr>
<td>2013</td>
<td>39,000</td>
<td>4,832</td>
<td>11,870</td>
<td>2,556</td>
</tr>
</tbody>
</table>

184. See supra Table 1; see also Court Opinions, supra note 60.
185. See Court Opinions, supra note 60.
186. See supra Table 1.
187. See supra Table 1.
188. See Applebaum, supra note 8, at 71 (showing a timeline of the introduction of business courts).
189. See, e.g., Ward, supra note 9, at 415 (advocating the creation of a business court to avoid losing business to other states that have specialized business courts).
190. See supra note 147 and accompanying text; see also Bach & Applebaum, supra note 147, at 170 (describing the choice to litigate in the North Carolina Business Court).
191. See supra Table 1; see also supra Figure 2.
192. See supra notes 116–21 and accompanying text.
competition for litigation is difficult, considering that it is impossible to truly understand a plaintiff’s or defendant’s litigation strategy, or how the case ended up in North Carolina. For example, if a Georgia corporation with a principal place of business in Georgia files a lawsuit in North Carolina, it could be an indication that the corporation prefers the North Carolina Business Court over Georgia, Delaware, or any other state’s legal system; or the corporation could be suing North Carolina residents, and thus, North Carolina is the only proper jurisdiction under the minimum-contacts standard. That said, taken as a whole, one could possibly draw inferences from the changes in the number of foreign corporations that litigate in the North Carolina Business Court.

In preparing this research, each opinion on the North Carolina Business Court’s website was analyzed. From there, the cases in which all of the parties were individuals, with no corporations represented, were removed. Additionally, each case where a branch of the North Carolina government was a party to the lawsuit was eliminated, as well as the trusts and estates cases, since there is little possibility that these cases could have been filed in a different state. The parties to each case were then researched, including their locations of incorporation and principal places of business. Generally, this could be accomplished by referring to the cases themselves if the court announced the status of the parties. Otherwise, various secretary of state websites were reviewed in order to determine the status of the entities.

The findings suggested that out-of-state corporations took full advantage of the North Carolina Business Court—at least at one point in time. Here, an out-of-state corporation means a company that has chosen to incorporate elsewhere, despite whether it is has a local headquarters in North Carolina. This is because even if a Delaware corporation has its principal place of business in North Carolina, it putatively chose to incorporate in Delaware in order to exploit its legal system.

In the first couple of years, no out-of-state plaintiffs were represented in a Business Court opinion. As the Business Court’s activity grew, so did the proportion of plaintiffs hailing from out of state. In 2006, for example, an anomalous 81% of studied opinions contained at least one plaintiff party from out of state. While, again, some of these plaintiffs

193. *Court Opinions, supra* note 60. The specific list of opinions studied is on file with the author, but all opinions can be accessed on the Business Court’s website. *See id.*

194. *See id.*

195. *See id.*

196. *See id.*
were compelled to file in North Carolina because it was the only proper forum, many of the plaintiffs assuredly selected North Carolina over other states.

For example, in Premier, Inc. v. Peterson, the plaintiff sought a declaratory judgment with respect to a contested stock purchase agreement. The defendants, a group of companies and private parties who sought to sell their stock in a certain company, hailed from out of state, and the plaintiff, a Delaware corporation, specifically endeavored to have the dispute brought before the North Carolina Business Court. In fact, the stock purchase agreement designated North Carolina law to govern the dispute, suggesting that North Carolina and the Business Court, in this instance, did attract certain out-of-state parties on both \textit{ex ante} and ad hoc bases.

The percentage of plaintiffs that file from out of state then became more dynamic, yet still significant. Generally, somewhere between 30\% and 50\% of the cases studied from any given year included a plaintiff from out of state. This is highly suggestive that in some cases, out-of-state plaintiffs are selecting North Carolina as their home for litigation.

Defendants seemed to find themselves in North Carolina at a rather significant rate as well. This should not be surprising, particularly since North Carolina residents and businesses likely wish for their lawsuits to be litigated in North Carolina. That said, usually around 50\% of the studied cases included an out-of-state defendant, which is very significant considering that the site of litigation is often mutually agreed upon.

For example, as multiple fragmented plaintiffs file lawsuits among a host of jurisdictions, creating multi-jurisdictional litigation, the parties often bargain as to which jurisdiction will become the home for litigation. In other cases, contracts provide the law and forum that will

---

198. \textit{Id.} at *2.
199. \textit{Id.}
200. \textit{Id.} at *4.

Some companies are considering a broader solution to the multi-jurisdictional litigation problem than what can be employed within the confines of a particular case—specifically the use of “choice of forum” provisions in charters and bylaws. These provisions address typical state law deal litigation claims—such as breach of fiduciary duty and other stockholder-related claims—and require them to be
govern disputes, such as in *Premier*\(^{202}\). Even though defendants are not the parties filing lawsuits, they often have control over which forums and venues will adjudicate a conflict. Therefore, the staggering number of studied cases with a defendant corporation from out of state is significant, especially considering the number of cases that contain an out-of-state plaintiff. It seems that parties are amenable to—or even prefer—North Carolina and the Business Court’s jurisdiction.

Again, the choice to incorporate is distinct from where a company does its business. Unfortunately, this is a rather difficult, if not impossible, concept to measure. This is especially true when one considers the inability to parse through the many reasons why a company may elect to incorporate in the state. While scholars have suggested that a company is unlikely to move operations to North Carolina solely for the sake of the Business Court\(^{203}\)—after all, the same advantages could be obtained by incorporating—it is possible that the Business Court has played a role in retaining some business. Although I believe that the Business Court’s role here is negligible, particularly when considering the larger influence of tax rates and regulatory systems, more research is needed in this area to draw a proper conclusion.

**CONCLUSION**

In short, the North Carolina Business Court has likely improved the adjudication of corporate and business disputes in the state. Many local leaders predicted that this dynamic would render advantages similar to the Court of Chancery. After exploring the Court of Chancery’s accomplishments and how the Business Court functions in comparison, it appears that both the Business Court’s critics and supporters are correct. The critics properly identified that companies will seldom relocate activities to North Carolina, considering that the advantages of relocating can be realized by simply incorporating in the state. However, the critics were overly pessimistic about the Business Court’s ability to attract corporate charters and outside legal business.

The Business Court will probably never threaten Delaware’s established corporate expertise. Nonetheless, the Business Court has

---

\(^{202}\) *Premier*, 2012 NCBC LEXIS 61, at *4.

helped North Carolina to become a formidable corporate figure in its region for smaller corporations, and possibly for larger publicly traded companies. Earlier scholarship suggested that the historic corporate decision was bimodal in the sense that firms generally choose to incorporate in their home state or in Delaware. Perhaps the North Carolina Business Court’s presence in North Carolina has added an option for companies in surrounding states.