

There's a Court for That:
"Forum" Selection in Business Cases

A panel discussion with:

The Honorable Albert Diaz
Judge of the United States Court of Appeals for the Fourth Circuit

The Honorable James L. Gale
Chief Judge of the North Carolina Business Court

The Honorable Paul C. Ridgeway
Resident Superior Court Judge for Wake County

Moderated by:
Matt Leerberg
Smith Moore Leatherwood LLP

Sponsored by:
The Federal Bar Association, Eastern District of
North Carolina Chapter
Smith Moore Leatherwood LLP

* * *

When you think of "forum selection," visions of having your North Carolina-based client dragged into a remote court in North Dakota may come to mind. But there is a type of forum selection that hits closer to home.

Take a typical contract dispute between two businesses, one based in N.C. and one not, with more than \$75,000 at stake. If the case touches on "the law governing corporations," trade secrets, antitrust, or other statutorily enumerated categories, there are as many as *four* forums in which the case can be litigated locally.

First, North Carolina has a unified court system known as the General Court of Justice, in which business disputes worth over \$25,000 are handled by our county-based superior courts.

- The procedures in each county can vary a great deal, but generally such cases are managed in accordance with the [North Carolina Rules of Civil Procedure](#) and the General Rules of Practice for the Superior and District Courts.
- Motions and trials are presided over by whichever superior court judge is assigned for that week of court. See [North Carolina Administrative Office of the Courts Master Calendar](#).
- Appeals are generally taken to the North Carolina Court of Appeals, with further review by the Supreme Court of North Carolina available only in select cases. [N.C. Gen. Stat. § 7A-27](#).

Second, North Carolina offers a pathway to obtain a dedicated superior court judge, sidestepping the judicial rotation that can pose challenges for more complicated cases. [Rule 2.1](#) of the General Rules of Practice allows cases to be designated as “exceptional” by the Chief Justice.

- Exceptional cases are assigned to a specific judge, who then presides over all motions, hearings, and the trial.
- Still, the case is considered part of the superior court docket in the county in which it was brought.
- Appeals follow the same pathway as other superior court cases. [N.C. Gen. Stat. § 7A-27](#).

Third, North Carolina boasts a flagship business court to manage “complex business cases.”

- In any cases involving a material issue related to the law governing corporations, securities, antitrust law, trademark law, intellectual property, and certain other matters, a party *may*

designate the action as a “mandatory complex business case.” [N.C. Gen. Stat. § 7A-45.4](#). (Though rare, certain tax cases and business disputes in which \$5MM or more is at stake *must* be designated as complex business cases.)

- If the presiding business court judge and the Chief Justice agree that the matter fits the statutory criteria, the case will be presided over by a business court judge and will be subject to the [General Rules of Practice and Procedure for the North Carolina Business Court](#).
- Importantly, the business court is not a separate court and does not have its own jurisdiction. Instead, it is an “administrative division” of the General Court of Justice. In other words, business court cases are technically still pending in the superior court of the county in which they were filed. See [The NC Business Court Frequently Asked Questions](#).
- Appeals are taken directly to the Supreme Court of North Carolina. [N.C. Gen. Stat. § 7A-27](#).

Fourth, North Carolina has three federal district courts.

- The federal courts have federal-question jurisdiction under [28 U.S.C. § 1331](#) and diversity jurisdiction under [28 U.S.C. § 1332](#).
- Federal cases are presided over by an assigned Article III judge, often with the assistance of an assigned magistrate judge.
- Federal cases are governed by the Federal Rules of Civil Procedure, as supplemented by the local rules [for each district](#), which in turn are supplemented [by standing orders](#) and judges’ [“practice preferences.”](#)
- Appeals are taken to the United States Court of Appeals for the Fourth Circuit.

Each forum should, ideally, yield the same ultimate outcome for a given dispute, so as to undercut the risk of forum shopping and to strengthen confidence in the judicial system. But the differences in how cases are handled in these four “forums” can make a big difference in the pathway to that result and to the strategy employed by counsel.

Take, for example, a common scenario: a business dispute involving a close but complicated question under North Carolina state law, in which there is favorable dicta on point from an old North Carolina Court of Appeals case, but nothing from our Supreme Court. Suppose you represent the defendant, and move to dismiss the plaintiff’s complaint on this ground. Let’s examine how your motion to dismiss might play out in the four forums:

1. State Superior Court. You look online and learn that two judges are scheduled to hear motions on a given Monday. You prepare a brief in support of your motion to dismiss, and send a courtesy copy to the judges’ offices on the prior Thursday afternoon. Your opponent does the same with a brief in opposition. But when you arrive for the hearing on Monday, you learn that your motion has been slated to be heard by a different judge altogether. The judge has not read any of the briefs. Your opponent hammers the “any set of facts” test for motions to dismiss in North Carolina, and your motion is denied. You have no right to immediate appeal.

2. State Superior Court, Rule 2.1 Judge. Your Rule 2.1 judge sets a longer briefing schedule, and has closely studied the briefs by your hearing date. Your motion is granted in a one-page order. Your opponent has a right to appeal to the Court of Appeals, but that court is likely to affirm because of the precedent on point. Your opponent could then seek discretionary review by the Supreme Court of North Carolina, arguing that the Court of Appeals case was wrongly decided. Such petitions, however, have less than a 10% chance of being granted.

3. Business Court. The business court uses an orderly briefing schedule by rule, and allows for a lengthy hearing. The court issues a detailed opinion in your favor, but also questions whether the Court of Appeals dicta is actually binding and offers several countervailing

arguments for why the Court of Appeals might have gotten it wrong. Your opponent appeals directly to the Supreme Court of North Carolina as of right.

4. Federal Court. The federal court also uses an orderly briefing schedule by rule, but does not call counsel in for a hearing. In considering the motion, the federal court has to *guess* at what the Supreme Court of North Carolina would hold if the issue were presented to it. The dicta from the Court of Appeals is persuasive on that question, but not dispositive. The district court grants your motion. Your opponent appeals to the Fourth Circuit. That court, however, must also guess as to what the Supreme Court of North Carolina would do with the close question, because North Carolina *is the only state in the country* that has no process for federal courts to certify questions of state law to the state's highest court.

* * *

In short, the differences among these forums go far beyond technical matters of procedure. They go directly to questions of strategy. Parties and counsel should think carefully about how these distinctions play into the broader strategy of the case.