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6 KEY TAKEAWAYS

North Carolina Business Court: Overview and Analysis of the 2018-2019 Term

Kilpatrick Townsend attorneys Dustin Greene, Whitney Pakalka, and Beth Winters recently presented a CLE luncheon seminar on "North Carolina Business Court: Overview and Analysis of the 2018-2019 Term." The CLE took an in-depth look at the North Carolina Business Court and provided information that practitioners (both in-house and outside counsel) can utilize when deciding whether to select the Business Court as the forum of choice for their cases. Also covered was how the Business Court handles electronic discovery issues, as compared to North Carolina's other state courts. The presenters followed up with a review of the significant cases decided by the Business Court in the past year to provide attendees with a better understanding of how the Business Court functions and its jurisprudence.

Key takeaways from the presentation, include:

1. The increase in the size of the North Carolina Business Court to five judges, and the relatively consistent total number of cases designated to the Business Court, has resulted in proportionately lower caseloads for the business court judges, with the judges each having between 40-60 active cases at the end of 2018, compared to up to 100 cases per judge in past years.

2. Business Court jurisdiction for cases involving the "ownership, use, license, lease, installation, or performance of intellectual property" continues to be the biggest grey area for designation to the Business Court, particularly in cases involving agricultural or bioscience products.

3. Several opinions from the Business Court in the past year express frustration that practitioners continue to inject Chapter 75 unfair trade practices claims into corporate governance or other purely intra-company disputes.

4. In a case of first impression, the Business Court adopted the *lex loci delicti* choice of law test for claims for violation of the North Carolina Trade Secrets Protection Act, holding that the law of the state "where the tortious act of misappropriation and use of the trade occurred" will apply.

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In another case of first impression, the Business Court held that nominal corporate defendants in shareholder derivative actions can assert counterclaims against the derivative plaintiff, unlike the rule applied by some federal courts.

Finally, the Business Court held that parties seeking to enforce contractual terms allowing for advancement of attorneys' fees at the outset of litigation must satisfy all the requirements to obtain a preliminary injunction, including showing irreparable harm.

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