LEGISLATIVE SUMMARY SHEET
Tracking No. 0145-19

DATE: June 7, 2019

TITLE OF RESOLUTION: AN ACT RELATING TO LAW AND ORDER, NAABIK'ÍYÁTI' COMMITTEE AND NAVAJO NATION COUNCIL; ESTABLISHING THE NAVAJO NATION BUSINESS COURT; AMENDING NAVAJO NATION CODE, TITLE 7, COURTS AND PROCEDURE

PURPOSE: The purpose of this legislation is to establish a Navajo Nation Business Court within the District Courts of the Navajo Nation.

This written summary does not address recommended amendments as may be provided by the standing committees. The Office of Legislative Counsel requests each Council Delegate to review each proposed resolution in detail.

5-DAY BILL HOLD PERIOD: 23-25
Website Posting Time/Date: 6.19.19 8:57am
Posting End Date: 6.19.19
Eligible for Action: 6.20.19

Law & Order Committee
Thence
Naa'bik'íyáti' Committee
Thence
Navajo Nation Council

PROPOSED NAVAJO NATION COUNCIL RESOLUTION

24th NAVAJO NATION COUNCIL -- First Year, 2019

INTRODUCED BY

(Prime Sponsor) Kee Allen Begay Jr

TRACKING NO. 0145-19

AN ACT

RELATING TO LAW AND ORDER, NAABIK'ÍYÁTI' COMMITTEE AND NAVAJO NATION COUNCIL; ESTABLISHING THE NAVAJO NATION BUSINESS COURT; AMENDING NAVAJO NATION CODE, TITLE 7, COURTS AND PROCEDURE

BE IT ENACTED:

Section One. Authority

A. The Law and Order Committee has legislative oversight over the Judicial Branch. 2 N.N.C. § 601(C)(1).

B. The Law and Order Committee of the Navajo Nation Council reviews and makes recommendations to the Navajo Nation Council proposed amendments to the Navajo Nation Code. 2 N.N.C. § 601(B)(14).

C. The Naabik'íyáti' Committee of the Navajo Nation Council reviews proposed legislation which requires final action by the Navajo Nation Council. 2 N.N.C. § 164(A)(9)

D. Enactments of positive law must be reviewed and approved by resolution by the Navajo Nation Council. 2 N.N.C. § 164(A).

E. The Law and Order Committee's purpose is "[t]o improve the administration of justice on the Navajo Nation by ensuring a justice system that is independent from political influence and that is accountable and responsible to the Navajo Nation in its administration and operations" and "[t]o protect the rights and interests of the Navajo

People by improving the quality and effectiveness of the justice system within the Navajo Nation. 2 N.N.C. § 600 (C)(1) and (2).

F. The Navajo Nation Council may create other Navajo Nation courts. 7 N.N.C. § 201 (B).

G. In 1985, the Navajo Nation Council enacted the Judicial Reform Act with the goal of strengthening the Navajo Nation Courts by creating the Navajo Nation Supreme Court that will hear appeals and render final judgments based on "law, equity, and tradition." CD-95-85, Whereas Clause 13.

H. Pursuant to CD-68-89, "[t]he Navajo Tribal Council further authorizes and directs that any amendment to…the 1985 Judicial Reform Act, 7 N.T.C., Section 101 *et. seq.*, shall require two-thirds (2/3) vote of the full membership of the Navajo Tribal Council…these amendments shall be presented at the regular session of the Navajo Tribal Council." CD-68-89, Resolved Clause 6.

Section Two. Findings

A. A business court is trial court that specializes in disputes related to specified business activities.

B. A Navajo Nation business Court will allow a judge with at least five years of business experience to hear and make determinations on cases involving commercial or business disputes brought to the Navajo Nation District Courts.

C. The creation of business courts or courts with specialized dockets is an increasing trend in the United States. As of 2010, there were "over 40 court programs within 22 states." **Exhibit A**, Lee Applebaum, "The Steady Growth of Business Courts" Future Trends in State Courts (2011).

D. The creation of the Navajo Nation Business Court will improve the administration of justice, improve judicial quality and effectiveness, and protect the rights and interests of litigants that appear before Navajo courts.

Section Two. Amending Navajo Nation Code Title 7

The Navajo Nation amends the Navajo Nation Code, Title 7 as follows:

Title 7. Courts and Procedure

Chapter 3. Judicial Branch

Subchapter 3. District Courts

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§253. Jurisdiction-Generally

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C. The Navajo Nation Business Court shall have original exclusive jurisdiction over all cases outlined in 7 N.N.C. § 294 (B).

Title 7. Courts and Procedure

Chapter 3. Judicial Branch

Subchapter 4a. Navajo Nation Business Court

§ 294. Establishment and Eligible Cases

A. There is established the Navajo Nation Business Court.

B. The criteria for assignment or transfer to the Navajo Nation Business Court are:

1. Civil cases filed on or after March 31, 2020, and
2. Cases, as defined in 7 N.N.C. § 394 (B)(3), in which at least fifty thousand ($50,000) dollars compensatory damages are alleged, or claims seeking primarily injunctive or declaratory relief, and
3. Cases which satisfy one or more of the following:
    a. Relate to the internal affairs of businesses (i.e., corporations, limited liability companies, general partnerships, limited liability partnerships, sole proprietorships, professional associations, real estate investment trusts, and joint ventures), including the rights or obligations between or among shareholders, partners, and members, or the liability or indemnity of officers, directors, managers, trustees or partners;
    b. Involve claims of breach of contract, fraud, misrepresentation, breach of fiduciary duty or statutory violations or relationships;

c. Constitute a shareholder derivative or commercial class action;

d. Involve commercial real property disputes other than residential landlord-tenant disputes and foreclosures;

e. Involve business claims between or among two or more business entities or individuals as to their business or investment activities relating to contracts, transactions, or relationships between or among them;

f. Arise from technology licensing agreements, including software and biotechnology licensing agreements, or any agreement involving the licensing of any intellectual property right, including patent rights;

g. Constitute an action alleging violations of non-competition or non-solicitation clauses, confidentiality agreements, or an antitrust, trade secret, or securities-related action;

h. Professional malpractice claims brought in connection with the rendering of professional services to a business enterprise;

i. Commercial construction contract dispute and/or commercial construction defect claims.

§ 295. Excluded Cases

The following cases are excluded from the Navajo Nation Business Court:

A. Personal injury or wrongful death;

B. Professional malpractice claims;

C. Residential landlord-tenant matters, including residential foreclosure actions;

D. Employee/employer disputes, except where pendent or incidental to the matters listed in 7 N.N.C. § 294(B);

E. Health care liability;

F. Where the only claim is a professional fee dispute;

G. Where the Navajo Nation is a party;

H. Administrative appeals from the Office of Hearings and Appeals and the Navajo Nation Labor Commission, including tax and zoning matters.

§ 296. Composition

A. The Navajo Nation Business Court shall consist of one district court judge, who shall be assigned by the Chief Justice.

B. The Navajo Nation Business Court judge shall be a state and Navajo Nation licensed attorney who has at least five years business experience.

§ 297. Rules and Procedure

The Navajo Rules of Civil Procedure, the Navajo Rules of Evidence, and Navajo Rules of Court shall apply to the Navajo Nation Business Court. In addition, the Navajo Nation Business Court shall have broad discretion to establish Navajo Rules of the Business Court and to develop case management procedures to allow for more efficient handling of cases and produce quicker resolutions with reduced litigation in accordance with 7 N.N.C. § 601.

§ 298. Appellate Review

The Navajo Nation Supreme Court shall have jurisdiction to hear appeals from final Navajo Nation Business Court judgments and other final orders as provided in 7 N.N.C. § 302.

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Title 7. Courts and Procedure

Chapter 3. Judicial Branch

Subchapter 7. Justices and Judges

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§354. Qualifications for judicial appointment

A. District Courts. The following standards and qualifications shall apply to all judicial appointments to the District Court of the Navajo Nation:

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3. Education. Each applicant shall have earned, at a minimum, an Associate of Arts or Science degree from an accredited institution of higher education. An applicant who has earned a higher educational degree shall be preferred, with particular preference being given to a law degree (J.D. or LL.M.). Navajo Nation Business Court applicants shall hold a Juris Doctor (J.D.) degree from an ABA accredited law school.

4. Experience. Each applicant shall have at least four years direct work experience in a law related area and shall have a working knowledge of Navajo and applicable federal and state laws. Those applicants with experience working with the Navajo Nation Courts or with state and federal courts shall be preferred. Navajo Nation Business Court applicants shall have at least five years business experience.

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Section Three. Directive to the Judicial Branch to Include Funding for the Business Court in the Navajo Nation Fiscal Year 2020 Budget Process

The Judicial Branch shall request an appropriation for the Navajo Nation Business Court in its Fiscal Year 2020 budget in accordance with 12 N.N.C. §840.

Section Four. Codification

The provisions of the Act which amend or adopt new sections of the Navajo Nation Code shall be codified by the Office of Legislative Counsel. The Office of Legislative Counsel shall incorporate such amended provisions in the next codification of the Navajo Nation Code.

Section Five. Saving Clause

Should any provision of this Act be determined invalid by the Navajo Nation Supreme Court or the District Courts of the Navajo Nation, without appeal to the Navajo Nation Supreme Court, the remainder of the Act shall remain the law of the Navajo Nation.

Section Six. Effective Date

The provisions of this Act shall become effective in accord with 2 N.N.C. § 221(B).



THE STEADY GROWTH OF BUSINESS COURTS

Lee Applebaum
Honorary Charter Member, American College of Business Judges

There is a two-decade evolution in the creation of business and commercial dockets within state trial courts. These "business courts" assign specialist judges to manage and decide commercial and business cases and have increased from three pilot dockets in 1993 to over 40 court programs within 22 states in 2010.

The last 18 years have witnessed the creation and development of "business courts," or "commercial courts," within state-trial-court civil systems. These are specialized dockets, with one or more designated judges, primarily designed to provide timely and well-reasoned case management and disposition to (1) commercial disputes between businesses, sometimes involving individuals with an interest in the business, and (2) internal disputes over the management and control of business entities.

These state business courts were conceived based on the experience, or belief, that then-existing state trial courts were unable to address commercial and business disputes expeditiously, consistently, and reliably. Whether empirically warranted, the controlling belief in many large jurisdictions was that the state trial judges lacked the knowledge and experience base, as well as the facility with case-specific management tools, to ensure timely adjudication and well-reasoned decision making in business and commercial disputes. In some jurisdictions, the concern was exacerbated by relatively slow moving general calendars with multiple judges handling different aspects of a single case, instead of having one assigned judge for the entire case.

> *The growth of modern business courts corresponds to "the rapidly increasing complexity, rate of change and globalization of business, which has driven the demand for dispute resolution processes that can accommodate the needs of modern business."*
>
> *– North Carolina Business Court Judge Ben F. Tennille*

The idea for creating specialized commercial or business dockets was the subject of serious discussion in the late 1980s and early 1990s, most notably in California, Chicago, and New York. California, after long debate, ultimately rejected the idea of a specialized business court in favor of specialized complex-litigation courts; i.e., procedural specialization in handling all forms of difficult cases was chosen over subject-matter specialization.[1] In Chicago and New York, business court dockets were developed and became operational in 1993. Since that time, state court commercial and business dockets have grown steadily, with virtually all such dockets enduring after their creation.

In seeking specialized dockets, businesses were not looking for fixed results. Nor were they seeking tort reform, as the cases at issue would most typically involve businesses or sophisticated parties as litigants, not consumers. Commercial and business litigants did not need to know that they were going to win the case or cap their losses, but simply that a decision would be made in a reasonable time and that the decision would have an articulated core of legal principles shaping the court's ruling. Such express judicial reasoning would not only promote confidence in the process, Delaware's Chancery Court being the aspirational model, but also provide future guidance for conducting ongoing business practices outside the courtroom. Theoretically, a business might look favorably on a city, region, or state with courts that could engender such confidence.

Further, as observed by North Carolina Business Court judge Ben F. Tennille, whose business court tenure extended from 1996 until his retirement in March 2011, the growth of modern business courts corresponds to "the rapidly increasing complexity, rate of change and globalization of business, which has driven the demand for dispute resolution processes that can accommodate the needs of modern business." Thus, there is an evolution in the business environment to which court systems have responded by creating business courts, just as court systems have responded with other specialized court programs to address newly developing problems and conflicts.[2]

Business Courts Creation and Development

1993	Chicago Commercial Calendar; judge added later in year	Commercial Pilot Parts Manhattan	Complex commercial case assignment, Essex County, NJ
1994	Judge added in Chicago		
1995	Two judges added in Chicago	Commercial divisions created in Manhattan and Monroe County, NY	
1996	North Carolina Business Court	Commercial pilot projects, Bergen & Essex counties, NJ	
1997	Judge added in Chicago		
1998	Commercial divisions added in Nassau, Erie, and Westchester counties, NY	Connecticut Complex Litigation Docket	
2000	Philadelphia Commerce Court Judge added in Chicago	Boston Business Litigation Session (BLS) California complex-litigation pilot program in six counties	Reno, NV Business Court
2001	Las Vegas Business Court	Rhode Island Business Calendar	
2002	Commercial divisions added in Albany, Suffolk, and Kings counties, NY	Boston BLS assigns judge part-time (6 months) for second session	
2003	Maryland - Business & Technology Case Management Program, statewide Phoenix complex-litigation pilot program	Delaware Chancery Court technology jurisdiction created for adjudication and mediation	Judge added in Philadelphia
2004	Orlando - Complex Business Litigation Court		
2005	Atlanta Business Case Division Commercial Division added in Queens County, NY	Boston BLS expanded to surrounding counties; additional judge assigned part-time (6 months) creating two full sessions Third judge added in Nassau County, NY Commercial Division	North Carolina Business Court adds two judges in additional counties
2006	Maine Business and Consumer Docket Eugene, OR Commercial Court has express business and nonbusiness complex-litigation-court jurisdiction	Miami Complex Business Litigation Section San Mateo County, CA Complex Civil Litigation Program	Judge added in Orlando
2007	Tampa Complex Business Litigation Division Gwinnett County, GA Business Court Pilot Program	Pittsburgh Commerce and Complex Litigation Center Commercial Division added Onandaga County, NY	South Carolina Business Court Pilot Program Colorado Springs, CO Commercial Docket
2008	Ft. Lauderdale Complex Business Litigation Subdivision of Complex Litigation Unit	New Hampshire Business and Commercial Dispute Docket	
2009	Ohio Court of Common Pleas Commercial Dockets pilot in five counties South Carolina Business Court pilot extended	Parties from any Massachusetts County may access BLS by agreement Birmingham, AL Commercial Litigation Docket	Delaware Chancery Court given commercial arbitration jurisdiction Judges added to Las Vegas and Reno Business Courts
2010	Delaware Superior Court Complex Commercial Litigation Division Michigan State Bar Judicial Crossroads Task Force adopts recommendation for specialized-business-court docket	West Virginia adopts a law to create business court divisions and Supreme Court of Appeals appears to be moving toward implementation	Oregon Supreme Court establishes Oregon Complex Litigation Court

Business court jurisdictional formats vary, and there is no one universal model among existing business courts. This reflects the fact that different models better suit different jurisdictions' docket size, case management objectives, or both.

A common jurisdictional model in large cities, such as New York's Commercial Division, requires (1) a specific jurisdictional amount in controversy and (2) that the case's subject matter falls within a defined list of case types that set the parameters of the business court's jurisdiction. There is no additional express procedural-complexity requirement. Another paradigm is the complex business court model, such as Maryland's Business and Technology Case Management Program (BTCMP), where jurisdictional mandates include not only some form of business, technology, or commercial dispute, but also a list of criteria that a case must meet to be considered "complex."[3] This is a more subjective model and requires greater exercise of the judicial gatekeeping function. There is also a hybrid model, such as now found in the North Carolina Business Court, where certain specified case types automatically fall within the business court's jurisdiction, and the inclusion of other cases outside those categories requires procedural complexity or the presence of novel issues that will make important advances in the law.

As set forth in the accompanying charts, there has been a steady trend in the creation and growth of business courts since 1993.[4] One measure of business court development is to count the number of states in which these dockets are located.[5] Viewed by this measure, taking 1993 as year 1 and excluding the Delaware Court of Chancery as it existed in year 1,[6] business courts were created in four states during the first five years of the modern business court movement (1993-97). In the next five years (1998-2002), business courts were established within another four states.

In the next five years (2003-07), business courts were created within another seven states. Delaware's Court of Chancery is included within this number because its jurisdiction was transformed to accommodate a subset of purely commercial disputes without an equity component. The Lane County, Oregon, Commercial Court was not included because it could be viewed as a complex-litigation court, rather than solely as a business court, a matter addressed in more detail below. In the three years from 2008-10, business courts were added within three more states that previously had no business court dockets. Thus, in years 11 through 18 of the modern business court movement, business courts were created within ten states, compared to eight in the first ten years. These numbers do not include states where a business court's creation was authorized but never implemented, or implemented but never genuinely used by litigants.

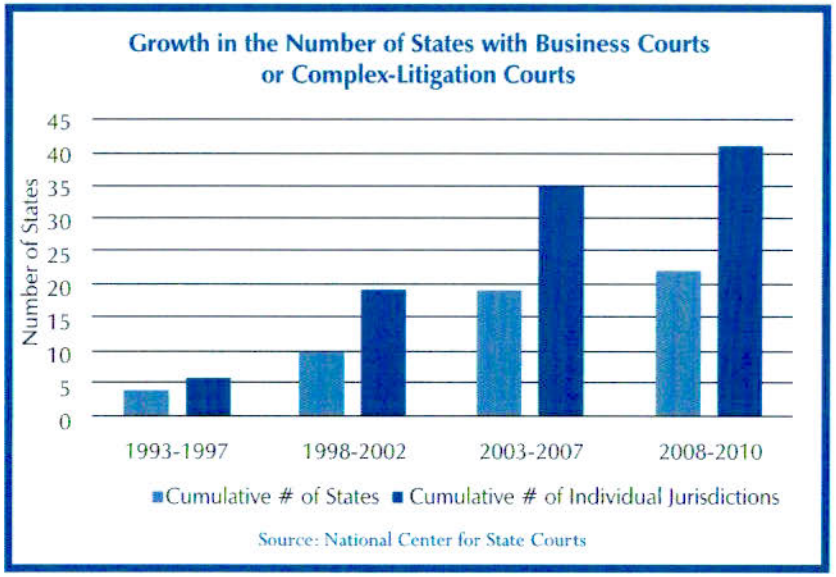
A more significant measure of growth, however, is the number of individual jurisdictions in which decisions had to be made to establish a business court. For example, a single (though wide and broadly collaborative) decision was made in Maryland to create the statewide BTCMP in all of Maryland's judicial circuits; but four separate and distinct decisions had to be made by administrative judges in Florida's Ninth, Eleventh, Thirteenth, and Seventeenth judicial circuits to establish business courts in those individual circuit courts. The number of decisions to create business courts, either by legislatures passing laws then signed by a governor, by administrative judges issuing orders in an individual jurisdiction within a state, or by a state's highest court creating a business court docket, is more reflective of the growing trend toward creating business courts because the choice existed in each distinct instance not to create a business court.

Viewed in this light, there were 6 business courts created in the first five years; 11 business courts created in years 6-10; 13 business courts created in years 11-15; and 5 business courts created in years 16-18. This would make 17 business courts in the first ten years, and 18 business courts in the following eight years, with West Virginia apparently on the verge of making that 19. As above, these numbers do not include circumstances where a business court was authorized but never implemented or implemented but never genuinely utilized. However, it is worth observing that under this "decision-making" standard, even in the few instances where a law was passed but not implemented, or a summary-proceeding-type docket with unusual features was adopted but not used by lawyers and litigants, there were still some constituencies that decided to create a business court.[7]

This does not end the analysis. By express or practical definition, complex-litigation-program judges (California, Connecticut, Oregon, and Phoenix) will hear complex commercial and business cases among other substantive case types. These judges may not be as specialized as those with a docket solely dedicated to business and commercial cases, but they will be handling complex business and

commercial cases more often than judges with more generalized dockets. This will increase their experience, and they will thus develop a greater degree of actual knowledge in (1) these subjects and in (2) the case management dynamics of business and commercial cases. In this regard, it is significant that a number of judges from jurisdictions with specialized-complex-litigation dockets, including some specialized-complex-litigation judges themselves, have become members of the American College of Business Court Judges.

If these complex-litigation dockets are included in the measure of business court growth, then the results are as follows. Using the measure of growth by state, total business court numbers in the first five years (1993-97) remain the same at four, but the next five-year period increases to six, and years 11 to 15 increase from seven to nine. The final three years stay the same. Thus, the total in the first ten years is 10, and the total for the ensuing eight years is 12, for an 18-year total of specialized business courts being created within 22 states, with West Virginia on the verge of making that 23. Using the measure of growth by implementation decisions made: 6 business courts were created in the first five years; 13 business courts were created in years 6-10; 16 business courts were created in years 11-15; and 6 business courts were created in years 16-18. This would make 19 business courts created in the first ten years, and 22 business courts created in the following eight years, for a total of 41, with West Virginia seemingly on the verge of making that 42.



As nearly two decades have passed, there is also some ability to measure whether business courts will survive once created and operational. Of the business courts that have been unsuccessful, including the summary proceedings in the Delaware Superior Court and Milwaukee Circuit Court, and the assignment of business court cases to chancery judges in New Jersey on an expedited nonjury basis, none (at least originally) were based upon a traditional format that was enhanced through judicial specialization alone. In other instances where business courts have been studied or created but never actually implemented or made operational, there have been political or practical issues preventing the business court from becoming operational, the analysis of which is beyond the scope of this article.

Of the business courts not relying upon atypical procedural formats, which focus instead upon enhanced judicial specialization, none have failed. The Commercial Division in New York and Commercial Calendar in Chicago have been functioning, and growing, over the last 18 years. North Carolina's Business Court is 15 years old and has expanded and developed over that decade and a half; and at least six other business courts will be ten years old or more by the end of this year. Numerous pilot programs have been extended or permanently implemented; judges have been added to a number of business courts; and the breadth of geographical jurisdiction has been expanded in some business courts.

Two other points are worth considering in evaluating future business court evolution. First, Delaware is generally perceived as preeminent in business litigation. This is based primarily on its deep history, established jurisprudence, and the high quality of its jurists. During the first ten years of the modern business court movement, Delaware Chancery Court basically remained the same 200-year-old equity court of limited jurisdiction that did not compete with the modern business courts in purely commercial cases. In the second decade, however, Delaware's three branches of government worked to expand chancery's jurisdiction twice, broadening its scope to permit the adjudication, mediation, and arbitration of some forms of commercial and technology claims otherwise not within traditional

equity jurisdiction. In 2010, Delaware went further and created a specialized-commercial-court docket in its law court, the Delaware Superior Court's Complex Commercial Litigation Docket. These steps can be reasonably understood not only as meeting competition from other states' court systems, but as part of a judicial evolution to better meet new challenges facing all courts.

The second point is the international development of commercial courts. During the same time period that modern U.S. state business courts have been evolving, various forms of commercial courts have been created or have expanded in, e.g., Abu Dhabi, Argentina, Australia, Bermuda, the British Virgin Islands, Canada, Croatia, Dubai, Egypt, England and Wales, Ghana, Guyana, Hong Kong, Ireland, Israel, Lesotho, Malawi, Malaysia, Mauritius, Morocco, New Zealand, Northern Ireland, Qatar, Rwanda, Saudi Arabia, Scotland, Serbia, South Africa, Spain, Tanzania, Thailand, Turkey, Uganda, and Ukraine. Austria, Belgium, France, England, the Netherlands, and Switzerland have long-standing commercial courts. Other nations, such as India, are currently considering commercial courts and have studied U.S. business courts, among others, in that process.

This parallel growth or enhancement in international commercial courts is consistent with the growth in the United States. It gives broad context to the view that commercial and business courts are necessary components of a region's economic health and that their absence creates a competitive disadvantage with other regions. Thus, business court development is not limited to how a business entity may view the overall economic environment in one U.S. city compared to another U.S. city, but to how that court system compares to cities or regions in other nations, as well.

ENDNOTES

[1] Some courts' civil systems have both specializations within their dockets. Thus, in practice, there is no inherent reason that a specialized business court docket must be excluded from a civil system if the court system were to include a complex-case specialization as well. Second, the jurisdictional definition of what constitutes a complex case could encompass business and commercial cases falling within that definition, as well as other subject matter. If so, designated complex-litigation judges will have repeated experience with a distinct subset of complex business/commercial cases, will develop a greater expertise in handling those cases over time compared to judges with a general docket, and will effectively become specialized-business-court judges relative to those with a general docket.

[2] Judge Tennille shared these observations with the author in December 2010.

[3] Maryland Rule 16-205(c), governing assignment to the BTCMP, directs the assigning judge to consider the following factors in actions presenting complex or novel commercial or technological issues: "(1) the nature of the relief sought, (2) the number and diverse interests of the parties, (3) the anticipated nature and extent of pretrial discovery and motions, (4) whether the parties agree to waive venue for the hearing of motions and other pretrial matters, (5) the degree of novelty and complexity of the factual and legal issues presented, (6) whether business or technology issues predominate over other issues presented in the action, and (7) the willingness of the parties to participate in ADR procedures."

[4] The information in these charts and concerning unsuccessful programs can be found in American Bar Association Section of Business Law's Committee on Business and Corporate Litigation, 2004-11; Bach and Applebaum, 2004; Minnesota Judicial Branch, 2001; and Toutant, 2006.

[5] This does not mean the business court is statewide; it only means that a business court was created somewhere within a state.

[6] Since 2003, the Delaware Chancery Court's jurisdiction has twice changed to add some entirely nonequity commercial and technology disputes.

[7] One lesson from these unutilized dockets and nonjury programs is that a significant population of litigants and lawyers are either entrenched in the familiar litigation structures or are genuinely more interested in maintaining traditional forms of litigation for considered reasons. Some, even including judges, argue, e.g., that jury trials are inconsistent with business-docket specialization, an issue not addressed herein. For the present, for reasons not the subject of this article, it appears that litigants and lawyers using business courts are primarily seeking knowledgeable and efficient judicial operation and oversight of traditional litigation structures.

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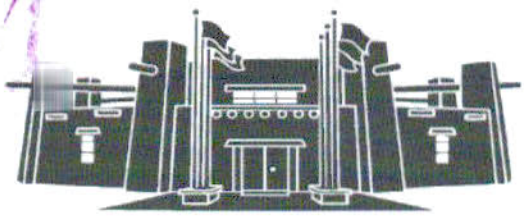
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Council



Honorable Seth Damon
Speaker
24th Navajo Nation

MEMORANDUM

TO: Honorable Kee Allen Begay, Jr.
24th Navajo Nation Council

FROM: Kristen Lowell, Principal Attorney
Office of Legislative Counsel

DATE: June 7, 2019

SUBJECT: **AN ACT RELATING TO LAW AND ORDER, NAABIK'ÍYÁTI' COMMITTEE AND NAVAJO NATION COUNCIL; ESTABLISHING THE NAVAJO NATION BUSINESS COURT; AMENDING NAVAJO NATION CODE, TITLE 7, COURTS AND PROCEDURE**

As requested, I have prepared the above-referenced proposed resolution and associated legislative summary sheet pursuant to your request for legislative drafting. Based on existing law and review of documents submitted, the resolution as drafted is legally sufficient. As with any action of government however, it can be subject to review by the courts in the event of proper challenge.

Please ensure that this particular resolution request is precisely what you want. You are encouraged to review the proposed resolution to ensure that it is drafted to your satisfaction.

The Office of Legislative Counsel confirms the appropriate standing committee(s) based on the standing committees powers outlined in 2 N.N.C. §§301, 401, 501, 601 and 701. Nevertheless, "the Speaker of the Navajo Nation Council shall introduce [the proposed resolution] into the legislative process by assigning it to the respective oversight committee(s) of the Navajo Nation Council having authority over the matters for proper consideration." 2 N.N.C. §164(A)(5).

If the proposed resolution is unacceptable to you, please contact me at the Office of Legislative Counsel and advise me of the changes you would like made to the proposed resolution.

THE NAVAJO NATION
LEGISLATIVE BRANCH
INTERNET PUBLIC REVIEW PUBLICATION

LEGISLATION NO: 0145-19 **SPONSOR:** Kee Allen Begay Jr.

TITLE: An Action Relating To Law And Order, NAABIK'IYATI' Committee And Navajo Nation Council; Establishing The Navajo Nation Business Court; Amending Navajo Nation Code, Title 7, Court And Procedure

***Date posted*:** June 14, 2019 at 8:57 AM

Digital comments may be e-mailed to comments@navajo-nsn.gov

Written comments may be mailed to:

Executive Director
Office of Legislative Services
P.O. Box 3390
Window Rock, AZ 86515
(928) 871-7586

Comments may be made in the form of chapter resolutions, letters, position papers, etc. Please include your name, position title, address for written comments; a valid e-mail address is required. Anonymous comments will not be included in the Legislation packet.

Please note: This digital copy is being provided for the benefit of the Navajo Nation chapters and public use. Any political use is prohibited. All written comments received become the property of the Navajo Nation and will be forwarded to the assigned Navajo Nation Council standing committee(s) and/or the Navajo Nation Council for review. Any tampering with public records are punishable by Navajo Nation law pursuant to 17 N.N.C. *§374 et. seq.*

THE NAVAJO NATION
LEGISLATIVE BRANCH
INTERNET PUBLIC REVIEW SUMMARY

LEGISLATION NO.: 0145-19

SPONSOR: Honorable Kee Allen Begay Jr.

TITLE: An Act Relating To law And Order, Naabik'íyáti' Committee and Navajo Nation Council; Establishing The Navajo Nation Business Court; Amending Navajo Nation Code, Title 7, Courts And Procedure

Posted: June 14, 2019 at 8:51 PM

5 DAY Comment Period Ended: June 19, 2019

Digital Comments received:

Comments Supporting	*None*
Comments Opposing	*None*
Inconclusive Comments	**Karen Francis, Government Relations Officer Judicial Branch of the Navajo Nation**

Legislative Tracking Secretary
Office of Legislative Services

10-20-19 9:15am
Date/Time

Judicial Branch of the Navajo Nation

JoAnn Jayne
Chief Justice of the Navajo Nation

Karen Francis
Government Relations Officer

MEMORANDUM

To: Hon. Delegates
24th NAVAJO NATION COUNCIL

From: Karen Francis, *Government Relations Officer*
Office of the Chief Justice
JUDICIAL BRANCH OF THE NAVAJO NATION

Date: June 19, 2019

Re: Proposed Legislation No. 0145-19

I submit this public comment on behalf of the Judicial Branch. Legislation No. 0145-19 proposes the establishment of a business court within the Judicial Branch of the Navajo Nation. The branch has several concerns regarding this proposal, which are outlined as follows:

A. **It is unclear whether the creation of a Navajo Nation Business Court will improve the Navajo justice system.**
The current judiciary is made up of nine highly competent trial judges who have all met the qualifications for judicial appointments pursuant to 7 N.N.C. § 353. Moreover, the Judicial Branch employs seven to nine full time staff attorneys who each hold a Juris Doctor degree from an ABA accredited law school and possess the necessary knowledge and skills to advise the judiciary on complex matters coming before the District Courts. While more qualified judges and justices are needed, there is no evidence set forth in the legislation which suggests the District Courts are inadequate to address business related matters.

B. **There has been no expressed need for a Business Court from the public.**
The Judicial Branch has been involved in several initiatives to obtain input from the public and other entities of the Navajo Nation on our justice system beginning with a Criminal Justice Summit in 2015 at which time needs and fears were identified (domestic violence, substance abuse, and suicide). The effort continued

with the development of the Diné Action Plan when two workshops – open to the public and to our leadership – were held in 2016. The Diné Action Plan workshops identified the same three modern day nayéé' that needed to be addressed by the Navajo Nation. Subsequently, the Judicial Branch was an active participant in the two Public Safety Summits held in 2017 and 2018, where both the public and justice system entities were also invited to provide input to improve the public safety and justice systems. The vision included the needs for communication, capacity building, consistency and uniformity, and community engagement. At none of these public forums was a need for a specialty court specifically for businesses identified as a pressing need of the Navajo Nation. Rather, Dr. Manley Begay, a professor of Indigenous Studies at Northern Arizona University, has found that a strong, independent judicial system free of political influence is key to economic development.

C. **The legislation will create an unfunded mandate.**
The Judicial Branch is substantially underfunded. Creating another judge position with the stated qualifications will be a recurring cost that will require an increased allocation of funding to the Branch and due to the qualifications, will result in a judge position with a salary that is higher than the current starting salary of a Navajo Nation District Court Judge. With the significant decrease in revenues that the Navajo Nation is anticipating, it will be very difficult to increase the total allocation to the Judicial Branch, a cost that will need to be funded each year.

D. **The stated qualifications will make the position difficult to fill.**
The qualifications stated in the proposed legislation require an applicant to have 1) a J.D. degree, 2) a state bar license, and 3) five years of business experience, in addition to all of the standard qualifications of a district court judge applicant. These requirements will make this position extremely difficult to fill. There are already nine vacant District Court Judge positions and one vacant Associate Justice position on the Navajo Supreme Court, none of which require the additional qualifications stated in the legislation. Many of these positions have remained vacant for years as it is very hard to find qualified candidates. Finding a qualified applicant for the proposed position will be considerably more difficult because most applicants whom have a J.D. degree lack the five years of business experience required by the legislation. Further, the requirement of "business experience" is not defined in the legislation and is therefore vague and open to interpretation.

The difficulty of filling judge positions is reflected in the number of applicants for judge and justice. In the past year, the Judicial Branch has received only two completed applications for district court judge and no completed application for Associate Justice. Only one applicant (for district court judge) has been forwarded to the President for consideration of probationary appointment in the past year. These applications are for positions that do not require a J.D. degree, a state bar license, and five years of business experience.

E. **The resulting business court judge will have a low caseload.**
Compared to other types of cases that are filed in the Navajo Nation District Courts, the number of commercial cases filed with our courts is relatively low. The following chart shows the number of such cases from FY 2015 to FY 2019. Note that these numbers could include cases where the amount of compensatory damages alleged falls below the $50,000 minimum contemplated by the legislation. Therefore, the number of cases actually assigned or transferred to a Business Court could be even smaller.

Business and commercial cases

	FY2015	FY2016	FY2017	FY2018	FY2019 *	Average
Business Transaction	1	3	4	1	2	2.2
Consumer Law	1	1	1	0	0	0.6
Employment Contract	3	0	2	0	0	1
Lease Agreement	5	17	10	5	2	7.8
Loan Agreement	2	2	3	0	0	1.4
Repossession	617	689	597	609	349	572.2
Sales Contract	14	13	5	2	2	7.2
Service Contract	3	1	2	3	1	2
Tenant Eviction	2	1	2	1	4	2
TOTAL	648	727	626	621	360	596.4
Percentage of total caseload	1.2%	1.5%	1.4%	1.3%		
					* as of 6/17/19	

Based on this information it is clear that the proposed legislation will result in the creation of a court that will have a position that will be difficult to fill, is expensive to fund and maintain, and whose caseload will be small.

Alternative to Business Court

The rules of arbitration and the qualifications of arbiters should be developed in accordance with the Arbitration Act. This is an area that the Judicial Branch has already identified as a need to address. A task force to begin drafting the rules will be forthcoming in accordance with Title 7.