

## **Delaware Courts Continue to Excel in Business Litigation with the Success of the Complex Commercial Litigation Division of the Superior Court**

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*Although still in its infancy, the Delaware Superior Court's Complex Commercial Litigation Division ("CCLD") has already earned a reputation as a premier business court in keeping with the Delaware judiciary's tradition of excellence in the resolution of corporate and business controversies. Regarded as an "accent" to the Court of Chancery, the CCLD offers businesses a forum dedicated to the resolution of commercial disputes where equitable jurisdiction is lacking. The CCLD's collaborative and uniquely flexible approach to the management of complex commercial litigation is a model for what the modern business court should be. Not surprisingly, business litigants have embraced the CCLD, as evidenced by the wide variety of complex commercial disputes that have been filed and adjudicated in this forum. The CCLD continues Delaware's status as the world's most respected forum for adjudicating highly complex business disputes.*

### **I. INTRODUCTION**

Over its more than two-hundred-year history, Delaware's Court of Chancery has emerged as the world's most respected forum for adjudicating highly complex business disputes. But the Court of Chancery's subject matter jurisdiction is limited; it is a court of equity. Business disputes arising from claims of contractual breach or tortious conduct, where money damages will remedy the wrong, do not sound in equity. Delaware's general jurisdiction trial court, the Superior Court, is the proper forum to resolve these claims. The Superior Court, however, unlike the Court of Chancery, oversees a broad civil docket comprising, on average, more than four hundred cases per judge, and a felony criminal docket with thousands of cases moving through the system at any one time. Until re-

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cently, complex commercial cases in the Superior Court were placed in the civil pipeline along with every other civil case filed in the court. This dynamic frequently resulted in less-than-optimal judicial management of the court's most demanding civil cases. Delaware business entities wanted and deserved better.

The Delaware Superior Court's Complex Commercial Litigation Division ("CCLD") was created in 2010 to complement Delaware's Court of Chancery and to offer businesses a forum dedicated to the resolution of business disputes where wrongs could be righted with legal remedies. In just a few short years, the CCLD has earned a reputation as a premier business court in keeping with the Delaware judiciary's tradition of excellence in the resolution of corporate and business controversies. Its collaborative and flexible approach to the management of complex litigation is a model for the modern business court.

In this article, we will briefly discuss the national "business court" movement for the sake of context. We will then discuss the CCLD's place within this movement, highlight its unique facilitative approach to judicial case management, and extol the benefits of this approach when addressing the court's most challenging and resource-dependent cases.

## II. THE "NEW" SPECIALIZED BUSINESS COURTS

### A. RECENT EMERGENCE OF PROBLEM-SOLVING COURTS

The relatively recent appearance of "business courts" should come as no surprise to those who follow trends in judicial case management. So-called "problem-solving courts," such as drug courts, mental health courts, domestic violence courts, and gambling courts, first surfaced about thirty years ago in response to criticism that traditional approaches to dealing with "justice-involved individuals" facing particular problems that require judicial solutions were not working.<sup>1</sup> These problem-solving courts were intended to address the following binary issues: (i) a distinct population of the court's constituents that, because of particular needs, required the court's special attention to address those needs (e.g., criminal defendants with substance abuse or mental health issues)<sup>2</sup> and (ii) resource-starved courts that needed to deploy resources creatively and efficiently to produce better outcomes in particularly challenging cases.<sup>3</sup>

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1. See Robert V. Wolf, *Race, Bias, and Problem-Solving Courts*, 21 NAT'L BLACK L.J. 27, 37-38 (2009); see also WEST HUDDLESTON & DOUGLAS B. MARLOWE, PAINTING THE CURRENT PICTURE: A NATIONAL REPORT ON DRUG COURTS AND OTHER PROBLEM-SOLVING COURT PROGRAMS IN THE UNITED STATES 37 (July 2011), available at <http://www.ndci.org/sites/default/files/nadcp/PCP%20Report%20FINAL.PDF>.

2. See RACHEL PORTER, MICHAEL REMPEL & ADAM MANSKY, WHAT MAKES A COURT PROBLEM-SOLVING?: UNIVERSAL PERFORMANCE INDICATORS FOR PROBLEM-SOLVING JUSTICE 1 (Feb. 2010), available at [www.courtinnovation.org/sites/default/files/What\\_Makes\\_A\\_Court\\_P\\_S.pdf](http://www.courtinnovation.org/sites/default/files/What_Makes_A_Court_P_S.pdf) ("Problem-solving courts each seek to address a different set of problems, from systemic concerns such as exponential increases in criminal caseloads, growing jail and prison populations, and decreasing public confidence in justice, to individual-level problems like drug addiction, domestic violence and community disorganization.").

3. See Raymond H. Brescia, *Beyond Balls and Strikes: Towards a Problem-Solving Ethic in Foreclosure Proceedings*, 59 CASE W. RES. L. REV. 305, 310 (2009).

Courts oriented toward the problem-solving model survey their dockets to determine where results could be improved with a more focused and thoughtful allocation of resources. In this regard, while statistics and judicial administrators play an important role in identifying the “problems” that can and should be solved by a specialty court, the judges working in the courtroom trenches are best able to identify where a “problem-solving” approach is most needed:

Judges are active in trying to identify trends that lend themselves to a more systemic response from the court, modifying procedural rules and sometimes sidestepping conventions to bring parties in from the outside or to bring parties together who are already inside the courtroom, in the hope of finding creative and lasting solutions to pending disputes.<sup>4</sup>

Because problem-solving courts are tasked with forging new responses to societal issues that have “proven resistant to conventional solutions,” judges must employ a range of flexible and innovative responses.<sup>5</sup> Indeed, the problem-solving approach expects and allows judges to be more reactive and responsive in devising solutions that are best suited to addressing the needs of each person who comes before them.<sup>6</sup> Flexibility is key to the success of these courts.<sup>7</sup>

## B. THE EMERGENCE OF THE BUSINESS COURT MOVEMENT

Delaware’s Court of Chancery, generally regarded as the first of our nation’s business courts,<sup>8</sup> clearly was not conceived with the ideals of the problem-solving court in mind. The court traces its origin back to 1792, and it has been deciding business law disputes for most of its history.<sup>9</sup> Yet the Court of Chancery’s role in the recent emergence of business courts across the country is undeniable.<sup>10</sup> The court has earned an international reputation for subject

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4. *Id.* at 316; see also Richard C. Boldt, *Problem-Solving Courts and Pragmatism*, 73 MD. L. REV. 1120, 1146 (2014) (“By design, problem-solving courts vest considerable discretion in the judges . . . who make crucial decisions with respect to the disposition of the criminal offenders subject to their jurisdiction. This highly discretionary practice necessarily is shaped by the perspectives these decisionmakers bring to their work. These perspectives frame the decisionmakers’ conception of the ‘problems’ to be addressed and the ‘solutions’ to be sought.”).

5. Brescia, *supra* note 3, at 309.

6. See Brenda Bratton Blom, Julie Galbo Moyes & Robin Jacobs, *Community Voice and Justice: An Essay on Problem-Solving Courts as a Proxy for Change*, 10 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 25, 37–38 (2010) (“A traditional problem-solving approach typically involves a flexible judicial response tailored to meet the needs of each defendant . . . .”); Timothy Casey, *When Good Intentions Are Not Enough: Problem-Solving Courts and the Impending Crisis of Legitimacy*, 57 SMU L. REV. 1459, 1517 (2004).

7. See Boldt, *supra* note 4, at 1123 (“Given the incremental and local nature of their development and the lack of a single authoritative blueprint for their design and operation, it should come as little surprise that the ‘problems’ addressed and the ‘solutions’ attempted by these courts vary considerably.”).

8. See Randy J. Holland, *Delaware’s Business Courts: Litigation Leadership*, 34 J. CORP. L. 771, 773 (2009); William T. Quillen & Michael Hanrahan, *A Short History of the Delaware Court of Chancery—1792–1992*, 18 DEL. J. CORP. L. 819, 825 (1993).

9. See Quillen & Hanrahan, *supra* note 8, at 821–22.

10. See Andrew Jurs, *Judicial Analysis of Complex & Cutting-Edge Science in the Daubert Era: Epidemic Risk Assessment as a Test Case for Reform Strategies*, 42 CONN. L. REV. 49, 95 (2009) (“Due to

matter expertise in business law, as illustrated by the judges' thoughtful courtroom exchanges with the nation's most adept business litigators and their well-reasoned written decisions that are "progressively refined by the jurisdiction's extensive exposure to business controversies."<sup>11</sup> While perhaps not by design, the court's focus on high-stakes business litigation has caused it to be sensitive to the unique challenges presented by complex civil litigation and to adapt its case management practices to address these challenges.<sup>12</sup>

Viewing Delaware's Court of Chancery as the beacon, several state trial courts have set out to capture the "essence" of this prestigious court in creating their own specialized business courts.<sup>13</sup> This effort commenced roughly twenty years ago when trial courts in New York and Illinois established specialized dockets to hear primarily complex commercial disputes.<sup>14</sup> The precise impetus for the rather sudden emergence of these specialized business courts outside of Delaware has been the subject of much debate among legal scholars. Some commentators suggest that the business court movement marks an effort by states to compete with Delaware for the corporate franchise as a means to stimulate economic development.<sup>15</sup> As Lee Applebaum, a national expert on state business and complex litigation courts, explains:

[C]ompetitive implications between cities and states are undeniable. The business court becomes a means to give businesses and their lawyers confidence that business

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the success of the Delaware [Court of Chancery], other states have authorized business or complex commercial courts with similar models."); Jacob A. Sommer, *Business Litigation and Cyberspace: Will Cyber Courts Prove an Effective Tool for Luring High-Tech Business into Forum States?*, 56 VAND. L. REV. 561, 564 (2003) ("It is no secret that other states envy Delaware's grip on corporate law.").

11. Matthew R. Koch, *Shhh . . . Secret Arbitration in Process: The Unconstitutionality of Delaware's Chancery Arbitrations*, 118 PENN. ST. L. REV. 437, 448 (2013); see also Jeremy J. Kobeski, *In Re Oracle Corporation Derivative Litigation: Has a New Species of Director Independence Been Uncovered?*, 29 DEL. J. CORP. L. 849, 878 (2004) ("In its role as a forerunner of corporate law, the decisions of Delaware courts, especially those of the court of chancery, have proven to be influential on a national level."); Anne Tucker Nees, *Making a Case for Business Courts: A Survey of and Proposed Framework to Evaluate Business Courts*, 24 GA. ST. U. L. REV. 477, 481 (2007) ("Given Delaware's success in attracting incorporations, the esteem in which many commentators hold Delaware corporate law, and that, in part, these successes are attributed to its special tribunal, other states have followed Delaware's propitious lead."); Donald F. Parsons, Jr. & Joseph R. Slight III, *The History of Delaware's Business Courts: Their Rise to Preeminence*, BUS. L. TODAY, Mar./Apr. 2008, at 21, 23 ("The members of the Court of Chancery and the Delaware Supreme Court regularly interact with academics, shareholder groups, corporate directors, mergers and acquisition lawyers, and corporate litigants around the country to keep current on the most recent business developments.").

12. See sources cited at *supra* note 11.

13. See Lee Applebaum, *The "New" Business Courts: Responding to Modern Business and Commercial Disputes*, BUS. L. TODAY, Mar./Apr. 2008, at 13, 14; Mitchell L. Bach & Lee Applebaum, *A History of the Creation and Jurisdiction of Business Courts in the Last Decade*, 60 BUS. LAW. 147, 217 (2004); see also Nees, *supra* note 11, at 531 (noting that the Court of Chancery has served as a model for the establishment of business courts in several other jurisdictions).

14. See ABA Ad Hoc Comm. on Bus. Courts, *Business Courts: Towards a More Efficient Judiciary*, 52 BUS. LAW. 947, 956-57 (1997); see also Applebaum, *supra* note 13, at 14; Bach & Applebaum, *supra* note 13, at 217.

15. See John F. Coyle, *Business Courts and Interstate Competition*, 53 WM. & MARY L. REV. 1915, 1934 (2012); ABA BUS. LAW SECTION, *ESTABLISHING BUSINESS COURTS IN YOUR STATE 2008-2009*, at 1 (undated), available at [http://meetings.abanet.org/webupload/commupload/CL150011/sitesofinterest\\_Files/establishing-business-courts0809.pdf](http://meetings.abanet.org/webupload/commupload/CL150011/sitesofinterest_Files/establishing-business-courts0809.pdf).

and commercial disputes will be decided with informed and deliberate reasoning. This adds a component of stability to a state, region, or city that wants to keep or attract businesses. If a city or state has such a court, and its neighbor does not, that neighboring city or state may come to sense a potential disadvantage. The concentration of business courts along the East Coast may be explained, in some part, by this potential for competitive disadvantage.<sup>16</sup>

Proponents of this view assert that the tribunal's commercial and corporate law expertise enhances the business community's confidence in the court's competence, which in turn enhances the state's ability to retain in-state businesses and attract new or foreign businesses to form within that state.<sup>17</sup>

Other scholars maintain that specialized business courts emerged purely to improve administrative efficiency within the state's trial court system.<sup>18</sup> In the business court model, trial courts remove complex commercial disputes from the trial court's clogged general civil docket and assign them to their own specialized court or division.<sup>19</sup> The specialized business court judges are then able to concentrate on these cases and employ customized case management practices to ensure that complex business disputes are resolved quickly and efficiently.<sup>20</sup> The judges attending to cases in the general civil docket, in turn, can do so without confronting the well-known burdens that are features of complex civil litigation.<sup>21</sup>

Yet another view is that specialized business courts fill a need created by evolving expectations within business communities throughout the country.<sup>22</sup>

16. Applebaum, *supra* note 13, at 16.

17. See Coyle, *supra* note 15, at 1935.

18. See *id.* at 1979–80; Nees, *supra* note 11, at 481–82.

19. See Nees, *supra* note 11, at 487; Benjamin F. Tennille, Lee Applebaum & Anne M. Tucker, *Getting to Yes in Specialized Courts: The Unique Role of ADR in Business Court Cases*, 11 PEPP. DISP. RESOL. L.J. 35, 41 (2010) (“Business courts ease pressure on overcrowded state court systems. Removing complex commercial cases from other parts of the courts allows those parts to function more efficiently and reduces the possibility that a few complicated commercial cases will displace the time and attention that the many other cases pending in those parts should receive.”).

20. See ABA Ad Hoc Comm., *supra* note 14, at 951 (“Specialized judges handle every aspect of cases, from discovery to motion practice, to settlement conferences, to responding to in-court requests of counsel, to making the ultimate decision more rapidly, more confidently, and with much less use of resources.”); see also Nees, *supra* note 11, at 512 (“[G]rouping like cases before one judge or a group of judges reduces the judicial costs associated with learning the substantive law of the case, particularly within unique or complex areas, which serves the efficiency measurement with regards to appropriate resource allocations, decreased resolution time, and increased access to the courts.”).

21. See Nees, *supra* note 11, at 478 n.4 (noting that specialized courts reduce the burden on non-specialized courts by removing time-consuming complex commercial matters from their dockets); see also Coyle, *supra* note 15, at 1979 (“[T]he assignment of one or more existing trial judges to a specialized business docket will result in the more efficient resolution of business cases and nonbusiness cases alike. Business cases will be resolved expeditiously by a specialist judge with an active interest in business law. Nonbusiness cases, in turn, will be resolved more quickly because they will no longer be forced to compete for docket space with business cases.” (internal citations omitted)).

22. See Jack J. Jacobs, *The Role of Specialized Courts in Resolving Corporate Governance Disputes in the United States and in the EU: An American Judge's Perspective* (Mar. 20, 2006), available at <http://www.oecd.org/corporate/ca/corporategovernanceprinciples/37188750.pdf> (noting that those states that have created specialized business courts have done so because their “business communities were dissatisfied by the inability of their local courts of general jurisdiction to resolve business dis-

As one jurist recognized, the growth of today's business courts is attributable to "the rapidly increasing complexity, rate of change and globalization of business, which ha[ve] driven the demand for dispute resolution processes that can accommodate the needs of modern business."<sup>23</sup> These "needs" include access to a civil justice system that adjudicates large-scale, complex commercial disputes without oppressive costs or undue delays. Indeed, chief among the complaints of business litigants are the attendant costs and delays when litigating in the civil justice system.<sup>24</sup> These "enemies" to efficient dispute resolution often surface during discovery and have the potential to derail even the most straightforward cases.<sup>25</sup>

The temporal connection between the appearance of the first business courts and the emergence of problem-solving courts in other areas is hardly coincidental. Trial courts were finding that the proper management of complex civil cases in the midst of overwhelmed civil and criminal dockets was, indeed, problematic. Whether the perception of the problem was colored by a sense that other courts were managing the cases better, a sense that complex cases were overwhelming the trial court's ability to fulfill its dispute resolution function across the board, or a sense that businesses may view the jurisdiction less favorably because its trial courts were not properly attending to their complex cases, the fact is that business courts were created to solve what trial courts perceived as a problem—complex civil cases were resource-starved and languishing on the courts' dockets.

Some form of problem-solving business courts has now been established in twenty-four (24) states including: New York (1993), Illinois (1993), North Carolina (1995), New Jersey (1996), Pennsylvania (2000), Massachusetts (2000), Nevada (2000), Rhode Island (2001), Maryland (2003), Florida (2004), Georgia (2005), Oregon (2006), Colorado (2007), South Carolina (2007), Maine (2008), New Hampshire (2008), Alabama (2009), Ohio (2009), Delaware (2010), Michigan (2012), West Virginia (2012), Iowa (2012), Arizona (2015), and Tennessee (2015).<sup>26</sup>

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putes in any expeditious matter, due largely to those courts' large backlogs of criminal and other non-business cases"); Tennille, *supra* note 19, at 41 (noting the perception that "[b]usiness courts result in more cost-effective and timely case processing and an improvement in the quality of dispositions," which fosters a "more favorable environment for creating and maintaining businesses").

23. See Lee Applebaum, *The Steady Growth of Business Courts*, in *FUTURE TRENDS IN STATE COURTS 70* (Carol R. Flango et al. eds., 2011).

24. See Thomas D. Rowe, Jr., *American Law Institute Study on Paths to a "Better Way": Litigation, Alternatives, and Accommodation: Background Paper*, 1989 DUKE L.J. 824, 830; see also Danya Shocair Reda, *The Cost-and-Delay Narrative in Civil Justice Reform: Its Fallacies and Functions*, 90 OR. L. REV. 1085, 1098 (2012) ("[C]rippling cost and delay are enemies of access because high costs can bar worthy parties from filing suit, or may force them to take a low settlement to avoid the higher costs of litigating.")

25. See Rowe, *supra* note 24, at 831; see also Reda, *supra* note 24, at 1098 ("Discovery [in complex litigation] is often conducted in a mean-spirited way. Discovery is used as a strategic tool, not to facilitate resolution of a controversy.")

26. See Nees, *supra* note 11, at 505–09 tbl.1 (Florida, Georgia, Illinois, Maine, Maryland, Massachusetts, Nevada, New York, North Carolina, New Jersey, Oregon, Pennsylvania, Rhode Island); Applebaum, *The Steady Growth of Business Courts*, *supra* note 23, at 71 (Alabama, Delaware, New Hampshire, Ohio, South Carolina); Admin. Order No. 2015-15: Authorizing Commercial Court Pilot Program in the Superior Court of Maricopa County (Ariz. Feb. 18, 2015), available at <http://www>.

Other jurisdictions (e.g., Indiana) are considering the move but have yet to act.<sup>27</sup>

### C. THE STRUCTURE OF THE MODERN BUSINESS COURTS

Although most jurisdictions regard the Court of Chancery as the “aspirational model,”<sup>28</sup> the unique structure (nonjury) and limited subject matter jurisdiction of the Court of Chancery (equity only) make it a tough act to follow.<sup>29</sup> Most state trial courts create their business courts within a framework that allows the court to offer both jury and nonjury trials and to exercise both equitable and common law subject matter jurisdiction. These specialized courts are carving a distinctly different path in an effort to remain competitive with Delaware’s nationally ranked court system. Each is different in structure but the core mission is the same: to create a forum where the court’s most complex cases can be managed and adjudicated efficiently and effectively.

While the jurisdictional elements of the modern business courts vary, they all purport to boast one common feature—an assigned set of judges to preside over complex commercial cases, with a single judicial officer handling a case from beginning to end.<sup>30</sup> By designating specific judges to adjudicate a select category of cases, the assigned judges develop expertise in the subject matter focus of their

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azcourts.gov/Portals/22/admorder/Orders15/2015-15F.pdf (Arizona); *Public Impact Docket*, COLO. JUD. BRANCH, [https://www.courts.state.co.us/Courts/County/Custom.cfm?County\\_ID=6&Page\\_ID=417](https://www.courts.state.co.us/Courts/County/Custom.cfm?County_ID=6&Page_ID=417) (last visited Mar. 22, 2015) (Colorado); Memorandum from Mark S. Cady, Chief Justice, Supreme Court of Iowa, In the Matter of Establishment of the Iowa Business Specialty Court Pilot Project (Dec. 21, 2012), available at <http://www.iowacourts.gov/wfdata/files/Committees/BusinessCourts/MemorandumOfOperation.pdf> (Iowa); *Business Courts*, MICH. CTS., <http://courts.mi.gov/administration/admin/op/business-courts/pages/business-courts.aspx> (last visited Mar. 23, 2015) (Michigan); No. ADM2015-00467: Order Establishing the Davidson County Business Court Pilot Program (Tenn. Mar. 16, 2015), available at [http://www.tncourts.gov/sites/default/files/docs/order\\_est.\\_davidson\\_county\\_business\\_court\\_pilot\\_project\\_3-16-2015.pdf](http://www.tncourts.gov/sites/default/files/docs/order_est._davidson_county_business_court_pilot_project_3-16-2015.pdf) (Tennessee); *Business Court Division*, W.V. JUDICIARY, <http://www.courtswv.gov/lower-courts/business-court-division/> (last visited Mar. 23, 2015) (West Virginia).

27. See Dave Stafford, *Rush Proposes Business Court, Makes Pitch for E-Filing Funding*, IND. LAW. (Jan. 14, 2015), <http://www.theindianalawyer.com/rush-proposes-business-court-makes-pitch-for-e-filing-funding/PARAMS/article/36134>. On January 14, 2015, Indiana announced that its judiciary was in the process of developing a business court model focused on complex commercial litigation. *Id.* This type of specialty court, explained Indiana Chief Justice Loretta Rush, “will bring together judges experienced in handling business and commercial law cases to preside over a specialized docket with business-specific resources.” *Id.* As of the date of this publication, no other details of Indiana’s proposed business court have been released.

28. Applebaum, *supra* note 13, at 13.

29. See *Wal-Mart Stores, Inc. v. AIG Ins. Co.*, Civ. A. No. 19875, 2006 WL 3742596, at \*3 (Del. Ch. Dec. 12, 2006) (“A fundamental tenet of Delaware jurisprudence counsels that the Court of Chancery, because it is a court of equity, ‘is a court of limited jurisdiction.’” (quoting *Clark v. Teeven Holding Co.*, 625 A.2d 869, 880 (Del. Ch. 1992))); *Park Oil, Inc. v. Getty Ref. & Mktg. Co.*, 407 A.2d 533, 535 (Del. 1979) (explaining that the right to a jury trial does not apply in an equity suit); see also Applebaum, *supra* note 13, at 16 (“Chancery’s ‘aspirational model’ goes more to the essence than the attributes of these ‘new’ business courts, however, which have taken a distinctly different form.”).

30. See Applebaum, *supra* note 13, at 14; see also Tennille, *supra* note 19, at 39 (“The hallmark of each business court is the designation of specific judges to sit as business court judges, and for each business court case to be assigned to a single business court judge from beginning to end.”).



court so they can render high-quality, consistent, and well-reasoned decisions in these specialized, often complex fields of law.<sup>31</sup> Well-reasoned, consistent opinions promote predictability,<sup>32</sup> and businesses like predictability.<sup>33</sup> On this point, all commentators agree:

Business court judges, trained in the substantive areas of law, should produce consistent and accurate decisions. In other words, the law should be applied to the cases in a business court in a uniform, fair, and predictable manner. Proponents of business courts advance the theory that judicial familiarity with commercial and business law, combined with adequate resources—judicial hours, adequate staff, and reduced caseloads—to oversee such complex cases, will yield “better” results. Better results means consistently enforced laws, a cohesive approach to a state’s business organization statutes, and careful attention to the record of the case.<sup>34</sup>

The appointment of a single judicial officer to handle a case from start to finish also promotes the overarching goal of these specialized business courts—improving the administration of civil justice.<sup>35</sup> Once a case is assigned to a designated judge, that judge is accountable for the progress of the case and can collaborate with the litigants efficiently and creatively to address all manner of case management issues, including e-discovery protocols, deadlines for fact and expert discovery, *Daubert* motion practice, and briefing schedules for dispositive motions.<sup>36</sup> This collaboration allows the court to enter a meaningful case management order that will serve as the blueprint for the litigation.<sup>37</sup>

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31. See Applebaum, *supra* note 13, at 16; see also Lawrence Baum, *Judicial Specialization and the Adjudication of Immigration Cases*, 59 DUKE L.J. 1501, 1538 (2010) (“Whether or not judges on a specialized court have prior experience in the field of their court’s work, they become specialists once they begin their judicial service. Thus, they gain expertise in their field more quickly than judges on a generalist court.”); Tennille, *supra* note 19, at 42 (“In order to expeditiously and fairly resolve . . . business disputes, judges sitting on specialized business courts must have (or be able to develop) expertise in the business laws and case management procedures appropriate to control such legally and factually complex matters.”).

32. See Tennille, *supra* note 19, at 42–43 (“The quality of legal rulings, ability to handle complex cases, speed and efficiency in reaching resolution, and establishing a valuable form of predictability all depend upon judicial expertise in both case management skills in business and commercial cases, as well as knowledge of the substantive business and commercial laws at issue. Thus, predictability includes establishing precedent, but the precedent must be well-reasoned and explained, and it must become part of a coherent body of legal opinions for that predictability to be meaningful and to advance the goals of civil justice. The belief is that the specialized judge is much more likely to achieve these goals through greater depth of knowledge and experience, and also in being among those who are repeatedly addressing similar issues in court.”).

33. *Id.* at 41 (“[B]usinesses require predictability in order to maintain efficient organization and operation of resources. This predictability is required not only in determining a business’s own internal procedures, but also with respect to a business’s relationship to, and rights under, the law so that it may plan and accurately assess the risk of future litigation or liability.”).

34. Nees, *supra* note 11, at 488.

35. See *id.* at 484–86; see also Tennille, *supra* note 19, at 43 (“The business court goals of improved decision making and case management in individual business cases are also aimed at improving the overall administration of justice.”).

36. See Ann M. Scarlett, *Shareholders in the Jury Box: A Populist Check Against Corporate Mismanagement*, 78 U. CIN. L. REV. 127, 175 (2009) (noting that business courts often have expedited schedules that enable business to quickly resolve disputes).

37. See, e.g., Administrative Directive of the Presiding Judge of the Superior Court of the State of Delaware, No. 2010-3: Complex Commercial Litigation Division 2–3 (May 1, 2010) [hereinafter



### III. DELAWARE'S COMPLEX COMMERCIAL LITIGATION DIVISION

#### A. THE SUPERIOR COURT STUDIES THE FEASIBILITY AND DESIRABILITY OF CREATING A BUSINESS COURT

More than 50 percent of all companies whose stock is traded on the New York Stock Exchange and NASDAQ, including 64 percent of Fortune 500 companies, call Delaware their legal home.<sup>38</sup> The quality of Delaware's court system undoubtedly plays a role in Delaware's distinction as the go-to choice for companies to incorporate.<sup>39</sup> Against the backdrop of Delaware's status as a favored home for the nation's businesses, and cognizant of the momentum of the national business court movement and the success of Delaware's internationally renowned Court of Chancery, the Honorable James T. Vaughn, Jr., then President Judge of the Delaware Superior Court, appointed a nine-member Committee on Superior Court Business/Complex Litigation (the "Committee")<sup>40</sup> to explore whether the Superior Court should take additional measures to address the needs of businesses litigating disputes in the Delaware Superior Court.<sup>41</sup> The Committee's specific task was to determine whether a companion court to the Court of Chancery, which would entertain only complex civil disputes arising at law, would help maintain Delaware's status as a top venue for business litigation.<sup>42</sup>

In conducting its inquiry, the Committee began by considering why Delaware's judiciary consistently was recognized as among the best in the nation. In this regard, the Committee observed that Delaware has a natural connection to most of the business disputes adjudicated in its courts because the vast ma-

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Administrative Directive No. 2010-3], available at [http://courts.delaware.gov/superior/pdf/Administrative\\_Directive\\_2010-3.pdf](http://courts.delaware.gov/superior/pdf/Administrative_Directive_2010-3.pdf).

38. See *About Agency*, DEL. DIVISION CORPS., <http://corp.delaware.gov/aboutagency.shtml> (last visited Mar. 14, 2015).

39. See Coyle, *supra* note 15, 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.”); Holland, *supra* note 8, at 772 (“The success of the State of Delaware in becoming the ‘go-to’ choice for companies as a place to incorporate in the United States turns in no small measure on the fact that its laws are watched over by a sophisticated bench and, through judicial precedents, are particularly well understood.”); see also Ann E. Conaway, *Lessons to Be Learned: How the Policy of Freedom to Contract in Delaware’s Alternative Entity Law Might Inform Delaware’s General Corporate Law*, 33 DEL. J. CORP. L. 789, 789 (2008) (“Delaware has long enjoyed a reputation for a sophisticated and expert judicial system and bar, modern and flexible business entity laws, a wealth of well-reasoned case law, and an efficient and user-friendly Office of the Secretary of State.”); Robert C. Holmes, *Benefits of Incorporating in Delaware Versus New Jersey: Busting the Myth and Closing the Gap*, 11 RUTGERS BUS. L. REV. 1, 29 (2014) (“Delaware’s unique engine for attracting corporate business, and arguably its single greatest advantage, is the Delaware Courts and the body of case law they have developed.”).

40. The CCLD Committee consisted of the following well-respected members of the Delaware bar: Frederick L. Cottrell, III, Robert J. Katzenstein, Edward M. McNally, Somers S. Price, Jr., Donald E. Reid, Philip A. Rovner, John W. Shaw, Allen M. Terrell, Jr., and Jeffrey M. Weiner. See SPECIAL COMM. ON SUPERIOR COURT BUS./COMPLEX LITIG., REPORT AND RECOMMENDATIONS (June 2, 2009) [hereinafter CCLD COMMITTEE REPORT], available at <http://www.ncbusinesslitigationreport.com/uploads/file/Delaware%20Special%20Committee%20Report.doc>.

41. See *id.* at 1.

42. *Id.*

jority of the business litigants are “citizens” of Delaware. Businesses like to litigate where “they feel at home.”<sup>43</sup> The Committee also noted that businesses, by and large, trust Delaware judges.<sup>44</sup> This was not surprising to the Committee given that Delaware’s trial court judges come to their positions with extensive experience and well-established reputations for fairness, a steady demeanor, and subject matter expertise.

The Committee went to some length to recount Delaware’s unique judicial selection process, and it bears mentioning here. Unlike many jurisdictions, the members of Delaware’s judiciary are appointed after a meticulous judicial selection process.<sup>45</sup> Following the submission of each judicial candidate’s application, a Judicial Nominating Committee (“JNC”) reviews all candidates for judicial office before selecting three individuals to recommend to the governor.<sup>46</sup> The stated purpose of the JNC is to “seek men and women of the highest caliber, who by intellect, work ethic, temperament, integrity and ability demonstrate the capacity and commitment to sensibly, intelligibly, promptly, impartially and independently interpret the laws and administer justice.”<sup>47</sup> The measures implemented by the JNC “ensure a balanced and independent judiciary, and, therefore, it is no surprise that the public perceives Delaware courts as fair arbiters of justice.”<sup>48</sup> Finally, with respect to judicial selection, the Committee highlighted the fact that the Delaware Constitution is unique in its requirement that each court and the judiciary as a whole be comprised of judges balanced between the two major political parties.<sup>49</sup> This novel aspect of Delaware’s judicial selection process ensures that a governor cannot “stack” the courts with political pals in a manner that undermines public confidence in the fairness and impartiality of the tribunals.<sup>50</sup>

The Committee then turned its focus from Delaware’s judges to Delaware’s juries. Here the Committee noted that businesses generally regard Delaware juries to be fair and that businesses remain confident that “runaway” verdicts in Dela-

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43. *Id.* at 2.

44. Marcel Kahan & Edward Rock, *Symbiotic Federalism and the Structure of Corporate Law*, 58 VAND. L. REV. 1573, 1603 (2005) (“Delaware’s judiciary is nonpoliticized. Delaware is one of only eight states in which judges are selected based on merit by a nominating commission and face no elections thereafter.”); see also Jessica M. Erickson, *Overlitigating Corporate Fraud: The Empirical Examination*, 97 IOWA L. REV. 49, 97 (2011) (noting that Delaware courts enjoy a high degree of confidence among business leaders and jurists are appointed for their uncanny business sense).

45. DEL. CONST. art. IV, § 3.

46. See Exec. Order No. 4 (Mar. 27, 2009) (Gov. Markell), available at [http://www.governor.delaware.gov/orders/exec\\_order\\_04.shtml](http://www.governor.delaware.gov/orders/exec_order_04.shtml).

47. *Id.*

48. Devera B. Scott et al., *The Assault on Judicial Independence and the Uniquely Delaware Response*, 114 PENN ST. L. REV. 217, 243–44 (2009).

49. See DEL. CONST. art. IV, § 3 (“[A]t any time when the total number of the offices of the Justices of the Supreme Court, the Judges of the Superior Court, the Chancellor and all the Vice-Chancellors shall be an even number, not more than one-half of the members of all such offices shall be of the same major political party; and at any time when the total number of such offices shall be an odd number, then not more than a bare majority of the members of all such offices shall be of the same major political party; the remaining members of the Courts above enumerated shall be of the other major political party.”).

50. See Scott et al., *supra* note 48, at 243–44.

ware are extremely rare.<sup>51</sup> As one Delaware jurist has explained, “Delaware juries tend to be conservative with damage awards, and the post-trial disappointment is more frequently with the low awards and seldom with high awards.”<sup>52</sup>

With regard to the perception of the Superior Court as an institution, the Committee noted that, notwithstanding the Delaware court systems’ demonstrated competence and expertise in handling complex business litigation, the perception of civil practitioners in Delaware and elsewhere was that the Superior Court could and should handle more complex commercial matters.<sup>53</sup> The absence of more complex cases in the Superior Court, the CCLD Committee opined, appeared to be the result of several factors, including the perception that a substantial number of both criminal cases and less complex, small-value civil matters (e.g., automobile accident, premises liability, and general debt collection actions) would distract the judges of the court from conscientiously managing large-scale civil disputes.<sup>54</sup> The Committee also observed that litigants perceive a lack of uniformity and consistency in case management approaches and styles among the many judges of the court, which created the risk of disparate scheduling and unpredictable rulings.<sup>55</sup> And finally, the Committee noted (without explanation) that some litigants and attorneys generally perceive that state courts are “unfair” in comparison to their federal counterparts.<sup>56</sup> According to the Committee, these “perceptions” of the Superior Court contributed to fewer filings of complex commercial disputes in the Superior Court.<sup>57</sup>

Upon investigation, the Committee concluded that the business perceptions of the Superior Court were, in fact, misperceptions.<sup>58</sup> As the Committee discovered, neither criminal cases nor smaller civil matters created an “insurmountable” barrier to the court’s handling of complex civil cases.<sup>59</sup> Superior Court judges handle criminal matters on a rotating schedule that is fixed months in advance.<sup>60</sup> Even when a judge is in her criminal rotation, she typically has time to address matters that arise in her civil caseload.<sup>61</sup> With respect to smaller civil matters, the Committee found that these cases generally present routine issues that require less judicial supervision and that they tend to “run themselves through established rules and experienced counsel.”<sup>62</sup> Moreover, the vast majority of smaller civil cases settle before trial with little judicial intervention.<sup>63</sup> Furthermore, while acknowledging that judges varied in the manner in which they

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51. CCLD COMMITTEE REPORT, *supra* note 40, at 2.

52. Porter v. Ferrence, Civ. A. No. 97C-04-019-JOH, 1998 WL 465140, at \*1 (Del. Super. Ct. July 22, 1998).

53. CCLD COMMITTEE REPORT, *supra* note 40, at 10.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* at 11.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

managed civil cases, the Committee noted that these variations “relate[d] to individual preferences in procedural matters, such as in the details of scheduling orders,” and not in the application or interpretation of substantive law.<sup>64</sup> Lastly, the Committee rebutted the misconception that Delaware’s state courts are “unfair.”<sup>65</sup> According to the Committee, “[t]he handling of cases involving Delaware-based businesses and Delaware lawyers is no different from the handling of those in which out-of-state counsel or clients are the primary participants.”<sup>66</sup> Therefore, according to the Committee, any perception of “unfairness” was misplaced.<sup>67</sup>

At the conclusion of its lengthy investigation, the Committee issued its formal Report and Recommendations (the “Report”), in which it recommended that the Superior Court create a division within the court, the CCLD, that would be specially tasked with adjudicating complex business disputes where the parties sought exclusively legal remedies.<sup>68</sup> In support of its recommendation, the Committee observed that the establishment of a venue to hear complex business disputes outside of Chancery’s limited jurisdiction and not subject to the federal subject matter jurisdictional hurdles would be welcomed by businesses as an important addition to Delaware’s nationally ranked court system.<sup>69</sup>

In determining how best to structure and implement this new division, the Committee examined the examples set by business courts in other jurisdictions. While these courts provided valuable features from which the Committee borrowed when recommending a structure for the CCLD, ultimately the Committee concluded that Delaware should create its own model in light of its “fairly unique” court system. Trading on the Court of Chancery’s flexible approach to complex case management, the Committee explained that the goal of the CCLD was to provide commercial litigants with “simplicity” and “flexibility” in structure without compromising “predictability” in results.<sup>70</sup>

In keeping with this “less is more” approach, the Committee envisioned that, rather than creating an entirely new court, the new division would be established within the Superior Court’s existing structure. This approach to the structure of the CCLD ensured that Delaware business litigation counsel would already be

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64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* at 18. The Committee recognized that, under certain circumstances, the Court of Chancery could exercise subject matter jurisdiction to adjudicate large commercial claims for money damages where the controversy is vested with equitable features. *Id.* at 4. Under the so-called “clean-up doctrine,” “[o]nce the Court [of Chancery] determines that equitable relief is warranted, even if subsequent events moot all equitable causes of action or if the court ultimately determines that equitable relief is not warranted, the court retains the power to decide the legal features of the claim pursuant to the clean-up doctrine.” *Duff v. Innovative Discovery LLC*, C.A. No. 7599-VCP, 2012 WL 6096586, at \*4 (Del. Ch. Dec. 7, 2012). Nevertheless, the Committee noted that commercial parties embroiled in civil litigation often do not possess or wish to assert equitable claims and frequently prefer to resolve their disputes via trial by jury. CCLD COMMITTEE REPORT, *supra* note 40, at 4. As for these litigants, a dedicated commercial litigation division within the Superior Court would provide invaluable service. *Id.*

69. CCLD COMMITTEE REPORT, *supra* note 40, at 16.

70. *Id.*

familiar with the civil rules and administrative protocols that would carry over into the new division.<sup>71</sup> The Report further recommended that the newly created commercial division be established without resorting to the General Assembly for statutory authority or the Supreme Court of Delaware for wholesale amendment of the existing Superior Court Civil Rules.<sup>72</sup> Instead, the Report recommended that the President Judge of the Superior Court invoke his power to manage the court's affairs by creating the CCLD through an administrative directive. The Report also recommended that the court utilize "judges [and staff] already in place" to preside over the CCLD's cases.<sup>73</sup> By recommending that the court invoke its inherent power to manage its own dockets *with existing resources* when creating the CCLD, the Committee hoped to minimize disruption of the existing institution and avoid the need to appropriate additional funds.<sup>74</sup> Importantly, these recommendations allowed the court maximum flexibility to change the structure of the CCLD as it deemed necessary without seeking amendments to enabling statutes or court rules. As will be discussed below, these recommendations regarding the manner in which the CCLD should be created have had a profound effect on the court's ability to collaborate with the Bar to provide an effective, responsive forum for the resolution of complex business disputes.

As to structure, the Report recommended that the court assign a fixed number of judges to the CCLD to handle, either primarily or exclusively, complex business disputes.<sup>75</sup> By limiting the number of judges assigned to the CCLD to two or three, the Committee hoped to maximize the CCLD's ability to provide commercial litigants with not only judicial predictability but also judicial accountability.<sup>76</sup>

Once assigned to the division, a complex case would remain with a single judge for the life of the case with the expectation that the assigned judicial officer would be readily accessible to the parties.<sup>77</sup> In making this recommendation, the Report noted that litigants often credit the accessibility of judges as a reason for filing cases in the U.S. District Court for the District of Delaware.<sup>78</sup> At the outset of the case, the assigned judge would schedule a Rule 16 scheduling conference, at which time all deadlines would be established, including the trial date.<sup>79</sup> Here again, the Report noted that early judicial intervention provides litigants with confidence that their case is on the court's radar and that the court will actively oversee the progress of the case.<sup>80</sup>

In determining the class of cases that should be eligible for this new division, the Committee considered whether the CCLD should hear all complex civil cases, including tort cases, or only a subset of the court's civil docket. Ultimately, the Com-

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71. *Id.* at 18.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.* at 19.

76. *Id.* at 15.

77. *Id.* at 3.

78. *Id.* at 15.

79. *Id.* at 19–20.

80. *Id.*

mittee recommended that the division focus only on “large and complex business disputes, particularly between corporate parties,” where the amount in controversy exceeded one million dollars.<sup>81</sup> In this regard, the Report noted that certain classes of cases naturally would be excluded from the division, as the Superior Court already maintained established specialized dockets for these cases.<sup>82</sup>

## B. THE CREATION OF THE SUPERIOR COURT’S COMPLEX COMMERCIAL LITIGATION DIVISION

On May 1, 2010, consistent with the Committee’s recommendation, the Delaware Superior Court’s Complex Commercial Litigation Division was established by administrative directive of the president judge.<sup>83</sup> An integral component of Delaware’s highly regarded court system, the CCLD offers litigants an alternative venue for complex commercial litigation where equitable jurisdiction is lacking. Regarded as an “accent” to the Court of Chancery, the CCLD is steadily finding its niche in Delaware’s judicial system.<sup>84</sup>

### 1. Governance

Created as a division within the Superior Court, the CCLD is governed by the Superior Court’s existing rules and procedures. Thus, parties litigating in the CCLD need not waste time familiarizing themselves with a new set of overly complex rules and procedures. As the Committee envisioned, by utilizing the Superior Court’s existing framework, with its proven track record, the CCLD is able to provide litigants with a familiar structure within which to resolve their complex commercial disputes.

### 2. Designation of Cases

As the division’s name suggests, only a narrow subset of cases will qualify for the CCLD. Rather than designate specific categories of cases, however, the administrative directive provides only that to qualify for assignment to the CCLD, cases must (1) present a claim by and between businesses where the amount in controversy is \$1,000,000 or more; (2) arise from an exclusive choice-of-court provision within a contract designating the CCLD (without regard to an amount in controversy);<sup>85</sup> or (3) receive special assignment on appli-

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81. *Id.* at 10.

82. *Id.* For instance, the Committee noted that the Court had established specialized dockets to handle certain mass tort cases.

83. Administrative Directive No. 2010-3, *supra* note 37.

84. See C. Malcolm Cochran, IV & Jason J. Rawnsley, *Delaware Superior Court’s Complex Commercial Litigation Division*, 80 BNA INSIGHTS (COM. L.) 427, 429 (Oct. 4, 2011).

85. The inclusion of the choice-of-court criterion for case designation is intended to assist transactional lawyers who wish to counsel their clients that dispute resolution in Delaware is preferable. Prior to the creation of the CCLD, businesses choosing the Court of Chancery as the exclusive forum for dispute resolution within their agreements could not be certain that the dispute would fit within Chancery’s limited subject matter jurisdiction. The CCLD allowed parties to choose both the Court of Chancery and the CCLD as exclusive fora, depending on the nature of the dispute that arose from the

cation to the president judge of the Superior Court.<sup>86</sup> Certain matters are expressly excluded from the CCLD, including cases involving a claim for personal, physical, or mental injury; mortgage foreclosure actions; mechanics' lien actions; condemnation proceedings; and any case involving an exclusive choice of court agreement where a party to the agreement is an individual acting primarily for personal, family, or household purposes, or where the agreement relates to an individual or collective contract of employment.<sup>87</sup>

While the CCLD's broad subject matter jurisdiction is not a unique feature, the CCLD's statewide reach is rare among state business courts and facilitates the court's goals of uniformity and simplicity.<sup>88</sup> Some states, such as New York and Florida, have created business courts in multiple counties or districts, each subject to a different set of jurisdictional prerequisites.<sup>89</sup> Due to its small size and the existing statewide architecture of the Superior Court, Delaware created only one specialized business court subject to only one set of jurisdictional requirements. Again, a hallmark of the CCLD is its simplicity.

### 3. Case Management

Complex commercial cases feature rigorous motion practice, voluminous discovery, and often lengthy trials.<sup>90</sup> Consequently, they "require[] more judicial management, attention, and responsiveness."<sup>91</sup> The CCLD's approach to judicial case management begins with a fundamental appreciation that litigants and their attorneys know their case better than the judge ever could. Accordingly, the CCLD judges encourage parties to meet with the court as soon as possible, after responsive pleadings have been filed, to discuss the particular needs of the case. If the parties wish to delay resolution (e.g., to facilitate ongoing settlement negotiations or a pending transaction that could affect the controversy), then the court can tailor a case management plan that will provide a "long runway" for the parties to work with each other before the litigation commences in earnest. On the other hand, if the parties have a need to resolve their dispute

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contract. *See id.* Importantly, by statute, the Superior Court and Court of Chancery may transfer a case to the other court, without dismissal, when it is determined that one court lacks subject matter jurisdiction. *See* DEL. CODE ANN. tit. 10, § 1902 (2013); *see also* Mass. Mut. Life Ins. Co. v. Certain Underwriters at Lloyd's of London, C.A. No. 4791-VCL, 2010 WL 3724745 (Del. Ch. Sept. 24, 2010) (transferring case to Superior Court because Court of Chancery lacked equitable jurisdiction over breach of contract claim for money damages); *Lost Creek Land & Cattle Co. v. Wilson*, Civ. A. No. 01C-10-029WLW, 2002 WL 31478004 (Del. Super. Ct. Oct. 16, 2002) (transferring action to Court of Chancery upon finding that Superior Court lacked subject matter jurisdiction over cause of action).

86. Administrative Directive No. 2010-3, *supra* note 37, at 1–2.

87. *Id.*

88. *See* Applebaum, *supra* note 13, at 15.

89. *See, e.g.,* N.Y. STATE TRIAL CTS. UNIF. R. 202.70 (setting different monetary thresholds for each county with a commercial division); FL. BAR ASS'N, FLORIDA CONSTRUCTION LAW AND PRACTICE (7th ed. 2013) (noting that each complex litigation division in Florida is "created by an administrative order of the chief judge of the judicial circuit and uses separate procedures, local rules, and forms common only to that division or unit").

90. *See* Nees, *supra* note 11, at 484.

91. *Id.*



quickly, the CCLD judges will accommodate this need with a scheduling order that provides for focused expedited discovery and a prompt trial date. As discussed below, the court allows the parties substantial input with regard to the form and substance of the case management order, the scope and timing of electronic discovery, and the scope and timing of expert discovery. The court has published default standards in these areas so that the parties know what they will get from the court and what the court will expect in the event that they are unable to reach an agreement.<sup>92</sup>

Furthermore, the CCLD offers litigants ready access to judges well versed in complex commercial litigation. The jurists assigned to the CCLD are selected by the president judge of the Superior Court based on their expertise and experience in handling complex business litigation.<sup>93</sup> As with the Court of Chancery, it is understood that the success of the CCLD will depend in large measure on the ability of the judges assigned to the division to demonstrate proficiency in both substantive business law and complex case management. Indeed, because judges assigned to the CCLD “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.”<sup>94</sup>

Once a case is designated to the CCLD, it remains with the assigned judge for its duration, affording parties greater predictability and consistency in decision making.<sup>95</sup> Parties may also avail themselves of the CCLD’s mediation and arbitration proceedings, where CCLD judges have committed to serve as mediators in other CCLD cases to which they are not assigned as the trial judge.<sup>96</sup>

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92. There are a variety of resources available on the Superior Court’s website, including sample forms and pleadings, designed to assist parties litigating in the CCLD. See *Superior Court Complex Commercial Litigation Division*, DEL. ST. CTS., <http://courts.delaware.gov/superior/complex.stm> (last visited Apr. 1, 2015). The Superior Court’s website also provides the judicial preferences of certain of the members of the CCLD. *Id.* Finally, business litigants may access all prior opinions issued by the CCLD on the Superior Court’s website. *Superior Court Opinions & Orders*, DEL. ST. CTS., <http://courts.delaware.gov/opinions/list.aspx?ag=superior+court> (last visited Apr. 1, 2015).

93. The current judges assigned to the Superior Court’s CCLD are President Judge Jan R. Jurden, Judge William C. Carpenter, Jr., Judge Mary M. Johnston, and Judge Eric M. Davis. See *Superior Court Complex Commercial Litigation Division: Description*, DEL. ST. CTS., <http://courts.delaware.gov/superior/complex.stm> (last visited Mar. 29, 2015).

94. See Andrew R. Jones, *Toward a Stronger Economic Future for North Carolina: Precedent and the Opinions of the North Carolina Business Court*, 6 ELON L. REV. 189, 208 (2014).

95. Administrative Directive No. 2010-3, 2010-3, *supra* note 37, at 3; see also Andrew A. Powell, *It’s Nothing Personal, It’s Just Business: A Commentary on the South Carolina Business Court Pilot Program*, 61 S.C. L. REV. 823, 833 n.104 (2010) (“What is great about business court is you get the consistency of one judge, and you get a judge that knows the facts . . . . It’s more like federal court where you get assigned a judge.” (citation omitted)); Leo E. Strine, Jr., *The Delaware Way: How We Do Corporate Law and Some of the New Challenges We (and Europe) Face*, 30 DEL. J. CORP. L. 673, 682 (2005) (noting that having a single judge preside over a case promotes consistency in application).

96. See Cochran, *supra* note 84, at 430.

a. *The CCLD Case Management Order*

As noted above, the judges of the CCLD conduct an early case-scheduling conference with the parties to map out a schedule for the case. The parties are encouraged to meet and confer prior to the conference in an effort to reach agreement on a customized case management approach. The CCLD has published a form default Case Management Order (“CMO”) that provides the parties with a clear idea of the subjects the court will expect to address at the case-scheduling conference.<sup>97</sup> The default CMO covers all phases of litigation, including the cutoff for expert, fact, and electronic discovery; the filing of dispositive motions and motions *in limine*; the timing for mandatory alternative dispute resolution,<sup>98</sup> and a firm trial date.<sup>99</sup> The CCLD judges are open to including fewer or more event deadlines in the CMO, depending on the needs of the specific case.<sup>100</sup> If the parties cannot agree, however, the court will enter the default CMO and will insert event deadlines. Regardless of whether the parties or the court creates the CMO, the parties are advised that the CMO will be strictly enforced and that the trial date set forth therein is firm.<sup>101</sup> As a result, cases progress promptly and efficiently in the CCLD without the delays that often accompany civil litigation.<sup>102</sup>

b. *Expert Discovery*

Commercial cases often require experts due to the complexity of the issues involved.<sup>103</sup> Yet not all complex cases involve experts and, when experts are involved, not all expert discoveries need be conducted in the same manner. Here again, the CCLD judges recognize that a one-size-fits-all approach is not the best. The judges allow the parties to take the lead in devising a plan for expert discovery that makes the most sense for the particular case. And, once again, the CCLD has prepared a default Expert Discovery Protocol to assist the parties in anticipating the issues that will be of most concern to the court when crafting a meaningful CMO.<sup>104</sup> The Expert Discovery Protocol addresses such issues as

97. Administrative Directive No. 2010-3, *supra* note 37, at 3.

98. See DEL. SUPER. CT. CIV. R. 16(b)(4) (providing for mandatory ADR in all but a few expressly enumerated categories of civil cases).

99. Administrative Directive No. 2010-3, *supra* note 37, app. A, at 1–6.

100. See *Superior Court Complex Commercial Litigation Division: Description*, DEL. ST. CTS., <http://courts.delaware.gov/superior/complex.stm> (last visited Mar. 29, 2015).

101. Administrative Directive 2010-3, *supra* note 37, app. A, at 4.

102. See Nees, *supra* note 11, at 486–87 (“[T]he creation of business courts should encourage timely action within the business court and within the general dockets. For parties litigating in a business court, judicial management of the procedural issues should expedite resolution by preventing discovery disputes from spiraling out of control, pre-scheduling motions deadlines and hearing dates to prevent delay, and being available to respond to a party’s needs . . .”).

103. See N. Lee Cooper & Scott S. Brown, *Selection of Experts, Expert Disclosure and the Pretrial Exclusion of Expert Testimony: Finding and Selecting Experts*, in 3 BUSINESS AND COMMERCIAL LITIGATION IN FEDERAL COURTS § 28:3 (3d ed. 2014) (“Commercial litigation offers an almost infinite array of subject matters on which an expert can help the judge or jury understand the evidence or determine a fact at issue.”).

104. Administrative Directive No. 2010-3, *supra* note 37, exh. A.2, at 10–13.

the manner and timing of expert witness disclosures and the means, costs, and timing of expert witness depositions.<sup>105</sup> By encouraging the parties to think in terms of firm deadlines, the CCLD strives to offer litigants a greater degree of certainty and predictability as to how discovery will proceed. Nevertheless, the precise scope and timing of expert discovery is left to the parties to decide in the first instance. The court will assume control by applying and enforcing the default Expert Discovery Protocol only if they cannot agree.

### c. *Electronic Discovery*

Complex business litigation often brings with it a “minefield of electronic discovery.”<sup>106</sup> Navigating through this “minefield” unscathed is a feat in itself.<sup>107</sup> Indeed, litigants must balance the necessity of e-discovery against the significant expense such discovery often entails.<sup>108</sup> As business litigants know all too well, “litigation often consumes the controversy.” In light of these concerns, business litigants must confer early and often to determine the most efficient means by which to conduct discovery.<sup>109</sup>

Aware of the challenges presented by e-discovery, the CCLD has established E-Discovery Plan Guidelines that provide litigants with practical guidance.<sup>110</sup> Similar to the Guidelines established by the Court of Chancery,<sup>111</sup> the CCLD’s E-Discovery Plan Guidelines (“Guidelines”) mandate that litigants hold a meet-and-confer session early in the litigation to discuss discovery of electronically stored information (“ESI”).<sup>112</sup> By requiring a meeting early in the litigation,

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105. *Id.*

106. Denise Seastone Kraft & K. Tyler O’Connell, *National E-Discovery Trends and the Delaware Court of Chancery’s Approach*, BUS. L. TODAY, Sept. 2010, at 1, 1, available at [http://www.americanbar.org/publications/blt/2010/09/02\\_kraft.html](http://www.americanbar.org/publications/blt/2010/09/02_kraft.html); see also *Concord Steel, Inc. v. Wilmington Steel Processing Co.*, Civ. A. No. 3369-VCP, 2010 WL 3931097, at \*7 (Del. Ch. Oct. 7, 2010) (“Discovery of electronically stored information . . . is ubiquitous in litigation today.”); *Beard Research, Inc. v. Kates*, 981 A.2d 1175, 1187 (Del. Ch. 2009) (“In complex commercial litigation today, virtually all discovery involves electronic discovery to some extent.”).

107. See Nees, *supra* note 11, at 484 (“[C]omplex business disputes often present complicated and protracted discovery schedules that will require judicial management of disputes and assistance in managing both the sheer volume of documentary evidence as well as the unique issues presented by electronically stored information.”).

108. See Michael O’Day, *Building a Path to Resolution: Key Considerations of a Construction Dispute*, in CONSTRUCTION DISPUTE RESOLUTION: LEADING LAWYERS ON NAVIGATING THE ADR PROCESS, DRAFTING EFFECTIVE CONTRACTS, AND MANAGING CLIENT EXPECTATIONS, 2013 WL 5755146 (Nov. 2013) (“The cost of electronic discovery is a growing concern in commercial litigation generally.”).

109. See *Beard Research*, 981 A.2d at 1187.

110. Administrative Directive No. 2010-3, *supra* note 37, ex. B, at 1–4.

111. In an effort to ensure that litigants practicing before the Court of Chancery are aware of the court’s expectations and procedures, the Court of Chancery established Guidelines that set forth suggested “best practices.” GUIDELINES TO HELP LAWYERS PRACTICING IN THE COURT OF CHANCERY 1 (undated), available at <http://courts.delaware.gov/chancery/docs/CompleteGuidelines2014.pdf>. While not binding, the Court of Chancery’s Guidelines are “intended as a practice aid that will allow our excellent Bar to handle cases even more smoothly and to minimize disputes over process, rather than the substantive merits.” *Id.* Among other things, the Guidelines provide litigants with practical guidance on how to comply fully with their discovery obligations, including the preservation, review, and production of electronic discovery. *Id.* at 13–20.

112. Administrative Directive No. 2010-3, *supra* note 37, ex. B, at 1.

the parties are provided the opportunity to take control over the scope and structure of e-discovery in advance of the entry of an e-discovery order. The Guidelines set forth a non-exhaustive list of factors to be discussed by the parties at the meet-and-confer session, including preservation and collection of ESI, the form in which ESI will be produced, the scope of production, and allocation of expenses among the parties for the preservation and production of ESI.<sup>113</sup> If a party fails to address e-discovery issues early in the litigation, the court is “not likely to be sympathetic when [that] party later complains that stringent measures were not instituted voluntarily by her adversary to ensure that no potentially relevant information was lost.”<sup>114</sup>

Following the meet-and-confer session, the parties must submit a report to the court in which they summarize their proposed e-discovery plan and identify their position with respect to unresolved issues.<sup>115</sup> After submission of the parties’ e-discovery plans and after further consultation with the parties, the CCLD judge will enter an order governing the permissible scope of discovery of ESI.<sup>116</sup> The order will also address issues relating to preservation and production of ESI and the allocation of expenses of production, all in the context of the unique issues and character of the particular case.<sup>117</sup> By permitting the parties to drive the e-discovery process, the E-Discovery Plan Guidelines afford business litigants the opportunity to address the particular features of their own ESI and to devise a plan that makes sense within the context of the particular controversy.

#### 4. Flexibility in Structure and Case Management

Perhaps most unique to the CCLD is its flexibility in responding to the needs of business litigants. Unlike many jurisdictions, the CCLD was created by administrative directive, which allows the Superior Court to address and fine-tune unforeseen issues that may arise without the need to promulgate new rules or amend an implementing statute. With ease, the Superior Court can tailor the CCLD’s structure, jurisdiction, or implementation to adapt to the needs of business litigants or to accommodate technological developments.<sup>118</sup>

When issues arise with respect to the management of cases generally within the CCLD, the judges of the CCLD address these issues promptly through efficiently executed standing orders.<sup>119</sup> The court also meets regularly with the still-

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113. *Id.*

114. *Beard Research*, 981 A.2d at 1187.

115. Administrative Directive No. 2010-3, *supra* note 37, exh. B, at 1.

116. *Id.* at 2.

117. *Id.*

118. *See, e.g.*, Administrative Directive of the Presiding Judge of the Superior Court of the State of Delaware, No. 2011-3: Assignment of Judges 2–3 (May 1, 2011), available at [http://www.courts.state.de.us/Superior/pdf/Administrative\\_Directive\\_2011\\_3.pdf](http://www.courts.state.de.us/Superior/pdf/Administrative_Directive_2011_3.pdf) (adding an additional judge to the CCLD to address its increased caseload).

119. *See, e.g.*, *In re* Complex Commercial Litig. Div., Standing Order No. 1 (Oct. 19, 2010), available at [http://courts.delaware.gov/superior/pdf/CCLD\\_standing\\_order\\_1.pdf](http://courts.delaware.gov/superior/pdf/CCLD_standing_order_1.pdf) (permitting litigants to exceed page limitations for dispositive and discovery motions); *In re* Complex Commercial Litig. Div., Standing Order No. 2 (Nov. 10, 2010), available at <http://courts.delaware.gov/superior/pdf/>

extant Committee to discuss what is working in the CCLD and what needs to be fixed. The CCLD judges also host regular continuing education conferences with lawyers from Delaware and around the country to discuss the latest developments in the law and to receive and give feedback regarding the progress of litigation within the division. Not only do these measures permit the CCLD judges to remain responsive to the needs of business litigants, but they also demonstrate an ongoing commitment to the problem-solving origins of the business court model.

#### **IV. THE COMPLEX COMMERCIAL LITIGATION DIVISION CONTINUES DELAWARE'S PREEMINENCE AS A TOP FORUM FOR BUSINESS DISPUTES**

No longer the “new kid on the block,” the CCLD has emerged as a model for what the modern business court should be—efficient, nimble, and responsive to the needs of the particular case. Thus far, businesses have responded as reflected in the wide variety of complex commercial disputes that have been filed and adjudicated in the CCLD. As civil litigation costs skyrocket, particularly in complex litigation, the CCLD's uniquely flexible and collaborative approach to the management of litigation offers a welcome alternative to the entirely unstructured or overly structured case management models that have previously dominated the state trial court landscape.