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A History of the Creation and Jurisdiction of Business Courts in the Last Decade

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What follows is a history and description of business courts¹ established or contemplated throughout the United States.² We have included some statistical information,³ with our chief focus being on the various courts' respective jurisdictional parameters.⁴ We do not provide the detailed narrative necessary to do full justice to the individual and group efforts and dynamics resulting in the establishment of the business courts discussed herein. Though the nature of that effort and dynamic bears its own unique mark in each jurisdiction, it was only through the common trait of determination that the establishment of any business court has become possible.

I. INTRODUCTION

The creation of specialized business courts in the United States has expanded greatly in the last ten years. Business courts, or more accurately business programs or divisions within existing trial level courts, have been established and are operating in New York, Chicago, North Carolina, New Jersey, Philadelphia, Pennsylvania, Reno and Las Vegas, Nevada, Massachusetts, Rhode Island, Maryland, and Orlando, Florida. In May 2004, Oklahoma's Legislature created a state-wide business court. In New York, Chicago, Philadelphia, Massachusetts, and New Jersey, the original business programs have been expanded by adding additional judges and/or by expanding into additional counties.

One new aspect of the "traditional" business court is the creation of specialized courts that include technology disputes as part of their express jurisdiction. Through legislative effort and court rule, effective January 1, 2003, Maryland established a Business and Technology Case Management Program.⁵ In May 2003,

1. The phrase "business courts" is used as a generic term for the variety of courts and programs that have been created which are not separate courts at all, but divisions or programs within an existing court.

2. There are specialized business and commercial courts in other nations. We include a very brief description of commercial courts in England and Ireland, as well as a "Commercial List" in the Superior Court of Justice in Toronto, Ontario, Canada. See *infra* Section XV. We also note England's specialized Technology and Construction Court. See *infra* note 433. The express reasons for creating or refining these specialized courts are similar to purposes behind the creation of American business courts.

3. The authors do not purport to have obtained or analyzed all available statistics; nor do we intend to portray this piece as encompassing a comprehensive statistical review of business courts. That being said, we believe that the information is valuable with regard to the numbers and types of cases being heard and resolved in business courts, with the caveat that these numbers may have different meanings depending on the jurisdiction of each business court, the practical meaning of the term "case," and each jurisdiction's goals. By way of a single example, as will be discussed below, North Carolina has established a respected and valued business court that by its nature may not involve a high volume of cases in comparison to New York, Chicago, or Philadelphia.

4. This piece will not focus on procedural rules, technology used to enhance business court programs or the extensive application of Alternative Dispute Resolution ("ADR"). There is no question that integrating ADR methods as adjuncts to the judges' work in business court litigation is an essential part of many business courts. Integrating computer and other technology into business court practice also appears to be approaching a new standard, rather than a novelty. Although these elements are important to a successful business court, our research is most clear that it is the judge that is the single most important factor in creating a court that is successful in balancing the qualities of fairness, attention, care, and expeditiousness that make for an exemplary court.

5. Md. R. 16-205.

Delaware expanded the Court of Chancery's jurisdiction to include technology disputes, and to permit the mediation of other kinds of business disputes.⁶ Michigan has created a "Cyber Court," which, however, remains unfunded.⁷

California, Connecticut, and more recently the Maricopa County Superior Court in Phoenix, Arizona have created specialized courts for complex litigation that would include some business disputes within a broader jurisdiction of complex matters. Other states are in various stages of moving toward or away from business courts,⁸ with Colorado and Georgia having conducted extensive studies into the merits and potential parameters of creating a business court.⁹

A brief history and description of existing business courts follows, along with an overview of complex litigation programs. Generally, we discuss the business courts in the chronological order of their creation, followed by a summary of complex litigation programs, and culminating with a discussion of Delaware's Court of Chancery and Superior Court. The final section of the Article compares the jurisdictional parameters of the business courts.

II. SUPREME COURT OF NEW YORK COMMERCIAL DIVISION

A. INTRODUCTION

In 1993, a pilot commercial court program was initiated in New York County's (Manhattan) Supreme Court.¹⁰ This effort is a critical point of origin for the decade long trend in creating business and commercial courts.¹¹ The pilot program arose at a time of failing confidence in the state trial courts' ability to address business litigation. Thus, given a choice, it was "unlikely that a business litigant . . . would have elected to litigate in the state courts in New York. Most such litigants preferred the federal courts, the courts of other states like Delaware, and private [alternative dispute resolution (ADR)]."¹²

The pilot program assigned business and commercial cases to a single judge for all aspects of the case. This was aimed at alleviating back log, as well as achieving other goals, which included expediting cases, reducing expense, cre-

6. DEL. CODE ANN. tit. 10, § 346 (1999).

7. MICH. COMP. LAWS ANN. § 600.8001 (West Supp. 2004). North Carolina may create a defined technology dispute jurisdiction as well. See *supra* note 184.

8. See Appendix B for a listing of the experience in some states, although the list is not exhaustive.

9. See *infra* Section XIV.

10. NYS *Unified Court System's Comprehensive Civil Justice Program* at III.1 (Mar. 24, 1999) [hereinafter *NYS Unified Court System*], available at <http://www6.law.com/ny/links/civiljustice.html> (last visited Nov. 15, 2004). This early effort at a business court program is often referred to as the "pilot parts."

11. Paula Hannaford et al., *Civil Action: A Briefing on Civil Justice Reform Initiatives: Focus on Business and Complex Litigation Courts*, 1 NAT'L CENTER FOR ST. CTS. 1, 2-3 (Aug. 2000) [hereinafter *Focus on Business and Complex Courts*]. This article was the result of a "Justice Roundtable" sponsored by the National Center for State Courts on November 16, 1999, with representatives from Delaware (Chancellor William B. Chandler III), New York (Justice Stephen G. Crane), and California (Justice Richard D. Aldrich).

12. Legal Opinion Letter from Robert L. Haig, Esquire, to Washington Legal Foundation (Jan. 9, 1998) [hereinafter *Haig Opinion Letter*]. See *infra* notes 72-73 and accompanying text on Mr. Haig's role in establishing business courts.

ating consistency in case management, and creating judicial expertise in business and commercial matters.¹³ In addition to developing judicial expertise, this format “promoted early and active judicial involvement and facilitated linkage to alternative dispute resolution programs and services.”¹⁴

New York’s Commercial Division, the heir to this pilot program, would reflect these goals as well. As stated by New York’s Council on Judicial Administration in 1997: “[t]he overall objective of the commercial division is to concentrate expertise in commercial litigation, so that business disputes can be resolved better and more efficiently.”¹⁵ New York County’s current Commercial Division operating statement reiterates these same goals:

Absent vigorous case management, these cases tend to become protracted and expensive, and, indeed, to become a drag upon the court’s inventory of non-commercial matters. By concentrating most of the commercial cases filed in New York County in the [Commercial] Division, before Justices familiar with commercial jurisprudence and litigation and who are charged with the task of active case management, court administrators hope that delay and expense can be reduced for all parties in commercial cases, and derivatively for litigants in non-commercial cases as well.¹⁶

B. THE COMMERCIAL DIVISION’S EVOLUTION

The pilot parts¹⁷ proffered signs of immediate success. A 35 percent increase in the disposition of cases between 1992 and 1993 was attributed to the creation of four specialized “commercial parts” in New York County.¹⁸ The efficiencies attributed to judicial specialization permitted three specialized business judges to handle the work of more than four generalist judges using the same resources.¹⁹

In November 1995, this experiment led to the creation, through the office of Chief Judge Judith S. Kaye, of the Commercial Division of the Supreme Court of New York.²⁰ The Commercial Division was initially established in New York and

13. *Focus on Business and Complex Courts*, *supra* note 11, at 3.

14. *NYS Unified Court System*, *supra* note 10, at III.1.

15. The Council on Judicial Administration, *Report on the Chief Judge’s Court Restructuring Plan*, 52 RECORD 929, 948 (1997) [hereinafter *Restructuring Plan*].

16. The Commercial Division of the State of New York, *Commercial Division Operating Statement: Part I: Explanation of Filing and Other Procedures*, at <http://www.nycourts.gov/comdiv/CD%20Operating%20Statement%202002%20-%20Part%20I.htm> (last visited Oct. 30, 2004).

17. See *NYS Unified Court System*, *supra* note 10.

18. ABA Ad Hoc Committee on Business Courts, *Business Courts: Towards a More Efficient Judiciary*, 52 BUS. LAW. 947, 957 (1997).

19. *Id.* Originally, there were four judges, but this number was later reduced to three.

20. *NYS Unified Court System*, *supra* note 10, at III.1. In January 1995, a task force of the Commercial and Federal Litigation Section of the New York State Bar Association had recommended the commercial pilot parts expansion into a commercial division of the Supreme Court. Chief Judge Kaye then created the Commercial Courts Task Force, led by the Honorable E. Leo Milonas and Robert L. Haig, Esquire to study that report. The Task Force went on to recommend the commercial division’s creation. The Commercial Division of the State of New York, *A Brief History of the Commercial Division* (Jan. 2001), at http://www.nycourts.gov/comdiv/Brief_History_of_CD.htm. Robert L. Haig, Esquire, among the handful of preeminent figures in the modern effort to establish business courts, described

Monroe Counties.²¹ Consistent with the pilot program's creation, the new Commercial Division's goals included the intention to "expedite the processing of cases and develop judicial expertise in doing so, and to return the New York courts to a leadership role in adjudicating major commercial disputes."²²

Success in New York and Monroe Counties "led the bar and business community to call for Commercial Division expansion to other counties."²³ The Commercial Division's success had "helped to stem the flight of commercial litigants from New York's courts, and to maintain New York's status as the premier state for the conduct of business."²⁴ In December 1998, Chief Judge Kaye announced the expansion of the Commercial Division to Nassau, Erie, and Westchester Counties.²⁵ In 2002, the Commercial Division expanded to Albany, Suffolk, and Kings Counties.²⁶

By 1998, the New York County Commercial Division's average disposition rate in contract cases was 552 days, compared to an average of 648 days for contract disputes in 1992.²⁷ By the end of 2000, that disposition time had fallen to 412 days, a 36 percent improvement from the pre-pilot days.²⁸ By 2002, the average time for disposition in contract cases brought within the Commercial Division was down to 364 days, a 44 percent decrease from ten years earlier.²⁹

Although each Commercial Division judge has more than the approximately 300 cases on a comparable federal judge's docket, cases reportedly do not get caught in the mire as the judges "make it a priority to decide motions and other issues quickly and efficiently."³⁰ Currently, seven justices sit in the Commercial

Chief Judge Kaye as the only truly indispensable person in creating the Commercial Division. The Commercial Division of the State of New York, *Commercial Division Law Report* (Jan. 2000), at http://www.nycourts.gov/comdiv/law_report_-_january_2000.htm. In light of New York's influence on creating business courts nationally, her efforts and decisions lay behind more than the creation of New York's Commercial Division.

21. *NYS Unified Court System*, *supra* note 10, at III.1.

22. *Id.*

23. *Id.*

24. *Restructuring Plan*, *supra* note 15, at 948.

25. State of New York, *Twenty-First Annual Report of the Chief Administrator of the Courts for Calendar Year 1998*, at 40 (Dec. 1998) [hereinafter 1998 New York Report].

26. The Commercial Division of the State of New York, *A Brief History of the Commercial Division*, at http://www.nycourts.gov/comdiv/Brief_History_of_CD.htm (last visited Sept. 12, 2004).

27. *NYS Unified Court System*, *supra* note 10, at III.1. Monroe County showed a similarly high degree of judicial involvement and success in resolving cases. *Id.*

A comparison from 1992 through November 1996 in New York County showed that in the Commercial Division's first year, the average disposition time improved by 29 percent; the number of cases settling before trial increased 85 percent; the total number of pending cases was reduced by 26 percent; the number of dispositions a year increased by 6 percent; and a court annexed ADR program "resulted in a 43 percent settlement rate." State of New York, 1997-98 Executive Budget: Appendix I, Part III, Appropriations Requested by the Judiciary and Legislature, The Judiciary, Judiciary 1997-98 Budget Request, Executive Summary at 19 (on file with *The Business Lawyer*, University of Maryland School of Law).

28. Sharon M. Porcellio, *Innovation, Successes for Litigation*, N.Y. L.J., Jan. 22, 2001, at 3.

29. Letter from Robert L. Haig, Esquire, to Mitchell L. Bach, Esquire (July 3, 2003) [hereinafter Haig Letter].

30. Tamara Loomis, *Commercial Division: High-Profile Case Casts Spotlight on Well-Regarded Court*, N.Y. L.J., June 20, 2002, at 5.

Division in New York County,³¹ two in Nassau County,³² two in Kings County,³³ and one justice each in Monroe,³⁴ Erie,³⁵ Suffolk,³⁶ Albany,³⁷ and Westchester³⁸ Counties.

The Commercial Division's design is for "hands-on" judicial involvement, occurring early in the case and continuing through to disposition.³⁹ This includes the ability to refer cases to the Commercial Division's own ADR program.⁴⁰ The New York County Commercial Division established an ADR process in early 1996.⁴¹ This program includes more than 250 volunteer neutrals who handle mediation or other forms of ADR that the parties might seek.⁴² Through the use of its ADR process in 1998, close to 60 percent of the Commercial Division's cases have settled at or near their commencement.⁴³ The number was similar two years later.⁴⁴ In 2002, over 60 percent of cases referred to the Commercial Division's mediation program in New York County settled.⁴⁵ In 1998, 87 percent of cases filed in New York County's Commercial Division were disposed of prior to action being taken to put the cases on the court's trial calendar, as compared to 75 percent for the rest of the court.⁴⁶ Commercial Division ADR has expanded to other counties as well.⁴⁷

31. The Commercial Division of the State of New York, *Justices of the Commercial Division*, at <http://www.nycourts.gov/comdiv/cd%20justices.htm> (last visited Sept. 12, 2004). There are six full time justices, and one additional justice has a part time role as a judicial hearing officer. Michael Bobelian, *Commercial Part Experiments With Category, Caseload*, N.Y. L.J., Apr. 6, 2004, at 4.

32. The Commercial Division of the State of New York, *Justices of the Commercial Division*, at <http://www.nycourts.gov/comdiv/nassaujustices.htm> (last visited Sept. 12, 2004). Kevin Schlosser, *Commercial Division Judges Help Shape Procedure and Law*, N.Y. L.J., Sept. 23, 2003, at 16.

33. The Commercial Division of the State of New York, *Justices of the Commercial Division*, at http://www.nycourts.gov/comdiv/Kings_Justices.htm (last visited Sept. 12, 2004).

34. The Commercial Division of the State of New York, *Justices of the Commercial Division*, at http://www.nycourts.gov/comdiv/biography_of_justice_stander.htm (last visited Sept. 12, 2004).

35. The Commercial Division of the State of New York, *Justices of the Commercial Division*, at http://www.nycourts.gov/comdiv/Erie_County.htm (last visited Sept. 12, 2004).

36. The Commercial Division of the State of New York, *Justices of the Commercial Division*, at http://www.nycourts.gov/comdiv/Suffolk_County.htm (last visited Sept. 12, 2004). The Suffolk Commercial Division has attempted to adopt procedures consistent with the other Long Island Commercial Division in Nassau County. Schlosser, *supra* note 32, at 16.

37. The Commercial Division of the State of New York, *Justices of the Commercial Division*, at http://www.nycourts.gov/comdiv/Albany_County.htm (last visited Sept. 12, 2004).

38. The Commercial Division of the State of New York, *Justices of the Commercial Division*, at http://www.nycourts.gov/comdiv/WestChester_presiding_judge.htm (last visited Sept. 12, 2004).

39. NYS *Unified Court System*, *supra* note 10, at III.1.

40. *Id.*

41. The Commercial Division of the State of New York, *A Brief History of the Commercial Division*, at http://www.nycourts.gov/comdiv/Brief_History_of_CD.htm (last visited Sept. 12, 2004).

42. *Id.* A link to the roster of neutrals is available at http://www.courts.state.ny.us/comdiv/alternative_dispute_resolution_program.htm (last visited Sept. 12, 2004).

43. 1998 NEW YORK REPORT, *supra* note 25, at 40. A March 1997 survey showed a high level of satisfaction among the neutrals and attorneys involved in the Commercial Division's ADR process. Robert C. Meade, Jr., *Outside Counsel, Commercial Division ADR: A Survey of Participants*, N.Y. L.J., Oct. 3, 1997, at 1.

44. Porcellio, *supra* note 28, at 3.

45. Haig Letter, *supra* note 29.

46. NYS *Unified Court System*, *supra* note 10, at III.1.

47. See, e.g., The Honorable Joseph G. Makowski, *Mediation Training for Commercial Division Completed*, 41 BAR ASS'N OF ERIE COUNTY BULL. 14 (July-Aug. 2001) (twenty-six "skilled and experienced

C. COMMERCIAL DIVISION JURISDICTION

Part I of New York County's Commercial Division Operating Statement poses the question: "What is a Commercial Case?" The answer: "[t]he focus of the Division is the complex commercial matter. Because of the complexity of the issues and the sums at stake, such cases often involve significant discovery and generate many motions."⁴⁸ As will be discussed in detail below, written guidelines exist which set out the case types included in the Commercial Division's jurisdiction; however, the Commercial Division's history includes jurisdictional refinements. Most recently, this has included a three-month experiment suspending the monetary damage minimum requirement and the guidelines providing judicial power to transfer and preliminarily review cases.⁴⁹ The study of this three-month pilot project's results will help the court refine its guidelines, including the threshold, and weigh the effect of an additional full-time Commercial Division Judge.⁵⁰ This Article will discuss the guidelines as they were in effect on February 29, 2004 and again on June 1, 2004.

There are specific types of cases presumptively included within New York County's Commercial Division. In cases seeking monetary damages, however, there are jurisdictional amounts which first must be met. The New York County plaintiff must generally be seeking a minimum of \$125,000 to bring a case in the Commercial Division.⁵¹ Other Counties in New York State typically have lower

commercial practitioners" received twenty-five hours of mediation training to serve in matters assigned to Commercial Division) (on file with *The Business Lawyer*, University of Maryland School of Law).

48. The Commercial Division of the State of New York, *Commercial Division Operating Statement—Part I, Explanation of Filing and Other Procedures* (June 2001), at <http://www.courts.state.ny.us/comdiv/CD%20Operating%20Statement%202002%20-%20Part%201.htm>.

49. See John F. Werner, *Guidelines for the Assignment of Cases: Court Note* (Feb. 23, 2004); John F. Werner, *Guidelines for the Assignment of Cases: Court Note* (May 25, 2004), both available at http://www.nycourts.gov/comdiv/Guidelines_for_Assignment_of_CasesNYC.htm. This experimental program occurred from March 1, 2004 through May 28, 2004. The February 23, 2004 Court Note states:

Effective March 1, 2004, and until further notice, the Commercial Division of Supreme Court, Civil Branch, New York County will suspend operation of the transfer and preliminary review mechanisms set out in the Guidelines for Assignment of Cases to the Commercial Division. Cases that have been designated "Commercial" on the Request for Judicial Intervention will not be assigned to a General Part after preliminary review nor transferred out of the Division and re-assigned for failure to meet a monetary threshold or because of the nature of the subjects at issue (except for matters that are manifestly not commercial in character, such as a dispute over the valuation of assets in a matrimonial proceeding). The Division will study the effects of this suspension and will make such permanent adjustments to the Guidelines as may be advisable in light of the results, notice of which will promptly be provided to the Bar.

Id.

50. Bobelian, *supra* note 31. The Commercial Division justices have transferred and regularly rejected cases. "The pilot program may lead to the development of more uniform guidelines among the division's judges. . . ." *Id.*

51. The guidelines, as now in effect, state:

In general, the Commercial Division entertains complex commercial and business disputes in which a party seeks compensatory damages totaling \$125,000 or more (exclusive of interest, costs, and attorney's fees). Due to caseload considerations, the Justices of the Division are empowered to transfer out of the Division cases which, in their judgment, do not fall within this category notwithstanding that a party has described the case as "commercial" on the Request for

dollar thresholds, ranging from \$25,000 to \$100,000.⁵² Erie County's rule requiring a \$25,000 minimum damage claim is footnoted, with the comment "[i]t should be noted that the dollar amount at issue to qualify a case as Commercial may be changed from time to time in order to adjust the workload of the Court."⁵³

Assuming that the jurisdictional amount is reached, the types of cases that are listed as within New York County's Commercial Division jurisdiction include claims arising out of business dealings such as securities transactions, business sales, business agreements, trade secrets and restrictive covenants, breach of contract, breach of fiduciary duty, fraud, misrepresentation, business torts, and statutory violations arising out of business dealings.⁵⁴ Other claims within the Commercial Division's parameters include Uniform Commercial Code (U.C.C.) transactions, complicated commercial real estate transactions, shareholder derivative suits, commercial class actions, commercial bank transactions, internal affairs of business organizations or liability to third parties of officials thereof, accountant or actuarial malpractice, and complicated environmental insurance coverage litigation.⁵⁵ Other Supreme Court Commercial Divisions in New York State presumptively include within their jurisdictions declaratory judgment actions and third-party indemnification claims against insurers in cases where the underlying dispute involves contract claims within the Commercial Division's scope,⁵⁶ and breach of contract actions involving security interests in or leases for personal property.⁵⁷ In Kings and Westchester Counties, counsel must certify that the case is appropriate for the Commercial Division.⁵⁸

In New York County, if the case is filed under the court's electronic filing guidelines, case type jurisdiction expands and the minimum jurisdictional amount falls to \$25,000.⁵⁹ Thus,

commercial cases in which compensatory damages of \$ 25,000 or more are sought will not be transferred out of the Division if filed in accordance with

Judicial Intervention. The principles set out below will guide the exercise of this authority. Parties should adhere to these principles when designating a case type on the RJL.

Appendix A, *infra* p. 248.

The Commercial Division of the State of New York, *Guidelines for Assignment of Cases to the Commercial Division, Supreme Court, New York County* (July 3, 2001), available at http://www.courts.state.ny.us/comdiv/Guidelines_for_Assignment_of_CasesNYC.htm (last visited Sept. 12, 2004).

52. Albany County (\$25,000); Erie (\$25,000); Kings County (\$50,000); Monroe County (\$25,000); Nassau County (\$75,000); Suffolk County (\$25,000); Westchester County (\$100,000). See Appendix A, *infra* pp. 250, 252, 254, 256, 258, 260, 262.

53. *Id.* at 252 n.1.

54. *Id.* at 248–49.

55. *Id.*

56. Albany County, Kings County, Monroe County, and Westchester County all have jurisdictions of this sort. *Id.* at 251, 255, 257, 263.

57. Albany County, Monroe County, and Westchester County have jurisdictions of this sort. See *id.* at 250, 256, 262.

58. See *id.* at 254, 263–64.

59. The Commercial Division of the State of New York, *The Commercial Division of the State of New York, Electronic Filing Overview*, at http://www.nycourts.gov/comdiv/electronic_filing_main%20page.htm (last visited Sept. 18, 2004).

the procedures governing the Division's Filing by Electronic Means program. For this purpose, "commercial cases" include commercial real property disputes and the types of matters identified in Paragraphs (A) 1-2 and 4-6 and (B) 1-8. . . .⁶⁰

This adds the following types of suits to the Commercial Division's jurisdiction:

(1) Suits to collect professional fees; (2) Cases seeking a declaratory judgment as to insurance coverage for a personal injury or property damage action; . . . (4) Proceedings to enforce a judgment regardless of the nature of the underlying case; (5) First-party insurance claims and actions by insurers to collect premiums or rescind policies; and (6) Attorney malpractice actions.⁶¹

The jurisdictional guidelines also provide case types that are excluded from the Commercial Division's jurisdiction. In New York County, absent electronic filing, these are collection actions for professional fees, declaratory judgment actions against insurers based on personal injury or property damages, landlord tenant matters, real estate disputes, proceedings to enforce judgments whatever the underlying basis of the suit, first party insurance actions concerning premium collection and policy rescission, and lawyer malpractice cases.⁶² Albany County's guidelines also expressly exclude real estate foreclosures, products liability claims, Medicare or Medicaid actions, and discrimination cases.⁶³ Kings County excludes even commercial leases;⁶⁴ however, its Commercial Division will hear discrimination claims if based on a contract, as will Monroe County.⁶⁵

D. THE COMMERCIAL DIVISION'S EFFECT AND INFLUENCE

The Commercial Division has been described within New York as "a virtually unqualified success."⁶⁶ Contrary to the state of affairs where business litigants once seemed to avoid New York's state trial courts,

[t]he Commercial Division is widely perceived as a viable and in many cases a preferable alternative for resolving business cases. It is popular because it has demonstrated that it can provide efficient, cost-effective, and timely processing of commercial cases, and has improved the quality and predictability of judicial decisions.⁶⁷ These achievements have been brought about by the

60. The Commercial Division of the State of New York, *Guidelines for the Assignment of Cases*, at http://www.nycourts.gov/comdiv/Guidelines_for_Assignment_of_CasesNYC.htm (last visited Sept. 12, 2004).

61. *Id.* See also Appendix A, *infra* p. 248.

62. *Id.*

63. *Id.* at 251.

64. *Id.* at 255-56.

65. *Id.* at 255, 258.

66. Loomis, *supra* note 30, at 5.

67. The Commercial Division makes many of its judicial opinions available on its website via "Law Reports." The Commercial Division of the State of New York, *Commercial Division Law Report*, at http://www.nycourts.gov/comdiv/law_report.htm. These reports begin in March 1998. The New York Law Journal has begun publishing columns looking at the decisions issued by the State's Commercial Division Judges on the same subject matter. See, e.g., Jeffery A. Miller, *Admitting Expert Testimony*, N.Y. L.J., May 29, 2003, at 5.

experience and expertise of the Commercial Division judges and other court personnel, their use of advanced case management techniques, the ADR opportunities available in the Division, and its technological innovations.⁶⁸

New York's efforts also have had a powerful impact in other jurisdictions. New York's Commercial Division has been studied and/or emulated in greater or lesser degrees in Philadelphia,⁶⁹ Massachusetts,⁷⁰ Maryland,⁷¹ and Florida.⁷² The particular role played by New York's Robert L. Haig, Esquire, co-chair of the Commercial Courts Task Force, in spreading knowledge about New York's experience and the potential offered through the creation of business and commercial courts must also be recognized.⁷³

This also brings up the distinct and important impact of the ABA Ad Hoc Committee on Business Courts.⁷⁴ This Committee, chaired by R. Franklin Balotti, Esquire, and Roland E. Brandel, Esquire, which included Mr. Haig, and other such national figures as Dennis J. Block, Esquire, Helen D. Chaitman, Esquire, William H. Clark, Jr., Esquire, Gandolfo V. DiBlasi, Esquire, Campell A. Griffin, Jr., Esquire, James J. Hanks, Jr., Esquire, Robert L. Nutt, Esquire, and David R. Woodward, Esquire, jointly presented the 1997 Report, *Business Courts:*

68. Haig Opinion Letter, *supra* note 12.

69. See, e.g., Michael A. Riccardi, *Start Small, New York Lawyers Tell Philadelphia Business Court Advocates*, LEGAL INTELLIGENCER, Dec. 3, 1997, at 1.

70. Business Litigation Session Resource Committee, *The Business Litigation Session Massachusetts Superior Court: A Status Report* (Feb 2003), at 4–5 [hereinafter *Massachusetts Status Report*] (on file with *The Business Lawyer*, University of Maryland School of Law).

71. Maryland Business and Technology Court, *Maryland Business and Technology Court Task Force Report*, Appendix B at 24–25 [hereinafter *Maryland Task Force Report*], available at <http://www.courts.state.md.us/finalb%20report.pdf>.

72. Telephone interview with Michael J. Higer, Esquire (Sept. 11, 2003) (on file with authors). See also Elaine R. Friedman, *New Business Courts Gain Acceptance*, NAT'L L. J., Dec. 30, 1996–Jan. 6, 1997, at B1. Colorado's Report of the Committee on Business Courts similarly looked to New York's results in setting forth the rationale for creating a business court. Governor's Task Force on Civil Justice Reform, Committee on Business Courts, *Final Report of Governor's Task Force on Civil Justice Reform* 14–15 (Sept. 6, 2000) [hereinafter *Colorado Report*], at <http://www.state.co.us/cjrtf/report/download/report1.doc>.

73. Maryland Task Force Report, *supra* note 71, discusses the New York Commercial Division at length, and states that Mr. Haig has acted as advisor to nine states and five countries concerning the establishment of specialized business courts. *Id.* at 24. R. Franklin Balotti, Esquire, one of America's leading business lawyers and a prime mover in the creation of business courts nationally, said in 1997 that "Mr. Haig has written more on the subject and has been given more credit for establishing business courts in New York than any other lawyer." *ABA Highlights Business Courts At Annual Meeting in San Francisco*, 5 METROPOLITAN CORP. COUNS. 28 (Sept. 1997). Among other efforts, Mr. Haig has consulted or advised about business courts in: Florida (Telephone interview with Michael J. Higer, Esquire (Sept. 11, 2003) (on file with authors)); Georgia (Telephone interview with Raymond Fortin, Esquire (Oct. 1, 2003) (on file with authors)); Boston (E. Douglas Banks, *Lawmaker, Corporate Executives Push for Separate 'Business Court' Speed up Commercial Litigation*, BOSTON BUS. J. (Jan. 18, 1999)); Colorado (Business Court Committee, Minutes of December 2, 1999 Meeting, Governor's Task Force on Civil Justice Reform Business Courts Committee, at <http://www.state.co.us/cjrtf/min/bcmin120299.htm>); Michigan (Commercial Litigation Committee Reports, State Bar of Michigan Business Law Section (Dec. 7, 2002), at http://www.michbar.org/business/commercial_reports.html); Connecticut (Susan Etkind, *A Connecticut Commercial Court?*, CONN. L. TRIB., Jan. 13, 1997); and Philadelphia (Michael A. Riccardi, *Start Small, New York Lawyers Tell Philadelphia Business Court Advocates*, LEGAL INTELLIGENCER, Dec. 3, 1997, at 1).

74. The ad hoc committee has evolved into the permanent Business Courts Subcommittee of the Business and Corporate Litigation Committee of the ABA Section of Business Law.

Towards A More Efficient Judiciary,⁷⁵ which was published in *The Business Lawyer*.⁷⁶ This Report, approved by the ABA's Section of Business Law, recommended "that courts which hear a substantial number of corporate and commercial disputes establish specialized court divisions to provide the expertise needed to improve substantially the quality of decision making and the efficiency of the courts with respect to such business cases."⁷⁷ The words in the Ad Hoc Committee's Report resonate through the later national dialogue on the creation of business courts.⁷⁸

III. CIRCUIT COURT OF COOK COUNTY COMMERCIAL CALENDAR

A. HISTORY OF THE COMMERCIAL CALENDAR

On September 9, 1992, an administrative order was issued by Presiding Judge Donald P. O'Connell of the Cook County Circuit Court's Law Division, establishing a pilot program for judges to handle entire cases individually.⁷⁹ This pilot program for "Individual Calendars" included an individual General Calendar Section and a Commercial Calendar Section.⁸⁰ Prior to the Individual Calendar pilot programs, the Circuit Court had not used a system with one judge for one case, but instead used a master calendar system where different judges would address various pretrial matters, with yet another judge handling the trial. "The master calendar system . . . faced criticism because a single judge was not accountable for the case before it went to trial and because of the uncertainty of trial dates."⁸¹ Thus, Individual Calendar judges were to hear cases at every phase, from the start of the case to its finish.⁸²

As stated above, the experimental program was "equally geared to provide special expertise in the area of commercial litigation and also to provide scheduling priority for the disposition of commercial disputes to enhance the commercial climate in Cook County. . . ."⁸³ Although Presiding Judge O'Connell's Or-

75. ABA Ad Hoc Committee on Business Courts, *Business Courts: Towards A More Efficient Judiciary*, 52 BUS. LAW. 947, 947 (1997).

76. This article was substantially the same as the Committee's August 1, 1996 Report, which was approved by the American Bar Association's Section of Business Law. *Id.* at 947 n.1.

77. *Id.* at 947.

78. For example, the Committee report is cited in the Massachusetts Status Report, *supra* note 70, at 5; the Colorado Report, *supra* note 72, at 14 n.2; and by Clifford E. Haines, *It's Time to Create a Special Business Court*, LEGAL INTELLIGENCER, May 5, 1997, at 4 (Philadelphia).

79. Individual Calendar Call, General Administrative Order 92-2, In the Circuit Court of Cook County, Illinois, County Department—Law Division, Sept. 9, 2002 [hereinafter Cook County General Order]. See Appendix A, *infra* pp. 238–39.

80. *Id.* at 238.

81. John Flynn Rooney, *Individual Calendar Pilot Project to Start Next Month in Law Division*, CHI. DAILY L. BULL., Aug. 19, 1992, at 1.

82. David Bailey, *Commercial Litigation Heads to New Calendar in Law Division*, CHI. DAILY L. BULL., Aug. 27, 1993, at 1.

83. *Id.* (quoting the Law Division's then Presiding Judge Donald P. O'Connell). The first Commercial Calendar Judge, the Honorable Martin Ashman, stated the primary point of the Commercial Calendar was not speed and efficiency, but "to give substantial individual justice to individual cases." Jill Chanen,

der creating the Commercial Calendar was effective as of September 14, 1992,⁸⁴ the Commercial Calendar component did not start up immediately on that date. The Commercial Calendar was introduced in 1993, as the second phase of the Individual Calendar pilot project, which began with individual calendar assignment of tort cases in the first phase.⁸⁵ At that point, the intention was to assign hundreds of cases involving commercial litigation to three Commercial Calendar judges.⁸⁶ The Circuit Court brought in the initial three Commercial Calendar judges seriatim in 1993–94.⁸⁷

The next goal was to add three more individualized commercial calendars by the end of 1995.⁸⁸ In fact, two judges with Commercial Calendars were added in April 1995,⁸⁹ and no new positions were added until February of 1997.⁹⁰ The 1997 addition was required by the increase in commercial calendar case filings.⁹¹

Then Presiding Judge Judith N. Cohen stated in 1997 that the “[individual calendar] program has been tremendously well-received by the commercial litigation attorneys. . . .”⁹² She described the case load as involving generally “difficult cases that take a lot of time, and with the increase in commercial filings, the caseloads that the judges have must remain manageable to achieve the efficiency that we aim for.”⁹³ A month earlier, Judge Cohen called the Commercial Calendar a proven “‘success story and a favored forum’ in the business community,” with most cases being filed without a jury demand.⁹⁴ Thus, the Commercial Calendar Judges were chosen to hear most of these cases in the Law Division.⁹⁵

Judge Sees Justice, Not Speed, As Commercial Calendar Goal, 16 CHI. LAW. 19 (Nov. 1993). The Honorable Donald O’Connell, Cook County Circuit Court presiding Judge, also described his goals:

I also am hoping to foster the commercial environment in Cook County and the metropolitan Chicago area by providing the specialized courts for commercial disputes so that commercial cases won’t have to wait in line behind medical malpractice, structural work act and product liability cases, and the vast amount of time it takes to prepare those cases for trial. So, commercial cases would be given some priority toward earlier disposition.

Id.

84. See Cook County General Order, *supra* note 79.

85. Rooney, *supra* note 81 (The first phase involved the assignment of tort cases). Today there are currently four general individual calendar judges in Cook County. Among the variety of case types heard are “medical malpractice, products liability and contract actions.” John Flynn Rooney, *She Has ‘Greatest Assignment’ on Trial Court*, CHI. DAILY L. BULL., Aug. 14, 2002, at 3.

86. Bailey, *supra* note 82, at 1.

87. Mike Austin, *Law Division Adds Judge to Handle Commercial Cases*, CHI. DAILY L. BULL., Feb. 10, 1997, at 1. See also David Bailey, *2d Individual Calendar Set for Law Division*, CHI. DAILY L. BULL., Jan. 28, 1994, at 1.

88. Bailey, *supra* note 87, at 1.

89. David Bailey, *[Chief Judge Donald P. O’Connell] Puts His Stamp on Circuit Court*, CHI. DAILY L. BULL., Apr. 22, 1995, at 17.

90. See Austin, *supra* note 87, at 1.

91. *Id.* Presiding Law Division Judge Judith N. Cohen stated that “[t]he new calendar was created to alleviate the burdens on the already-operating commercial calendars and to make sure that the division remains functioning as smoothly and efficiently as it has in the past.” *Id.*

92. *Id.*

93. *Id.*

94. David Bailey, *Case Disposition Time Continues to Drop*, CHI. DAILY L. BULL., Jan. 8, 1997, at 1.

95. *Id.*

A seventh judge was added in 2000, as the Commercial Calendar case load continued to expand.⁹⁶ Then Chief Judge O'Connell observed that "[t]he success of the nearly seven-year-old Commercial Calendar Section is demonstrated by an increased caseload, which necessitated adding another calendar. . . ."⁹⁷ In September 2001, new Chief Judge Timothy C. Evans of the Circuit Court of Cook County expanded the number of judges assigned to the Commercial Calendar to eight.⁹⁸ His reasoning focused on the continued heavy workload, and the fact that judges in two of the Commercial Calendar sections were overworked.⁹⁹

B. CASE LOADS IN THE COMMERCIAL CALENDAR

Between January 1, 1991 and July 1, 1993, Cook County's Law Division had reduced its backlog from 62,000 to 36,000 cases as a result of mandatory arbitration, firm trial dates, and voluntary mediation.¹⁰⁰ As of July 1, 1993, the average time for disposition by a jury verdict was 53.6 months, and non-jury case disposition by any means was 20.46 months.¹⁰¹ Approximately 30 percent of the commercial cases included jury demands, compared to 70 percent for other actions brought in Cook County's Law Division.¹⁰²

In late August 1993, one month prior to the Honorable Martin Ashman taking on the task of becoming the first Commercial Calendar judge, there were approximately "5,000 pending cases involving breach of contract, professional malpractice, fraud, consumer fraud, breach of warranty and statutory actions. . . ."¹⁰³ Out of these 5,000 pending cases, 400 cases would be assigned immediately to

96. John Flynn Rooney, *Popularity of Commercial Calendar Necessitates New Judge*, CHI. DAILY L. BULL., July 12, 2000, at 1.

97. *Id.*

98. Press Release, Office of the Chief Judge, *Chief Judge Evans Announces New Assignments in the Law Division* (Sept. 21, 2001) (on file with authors).

99. *Id.* As stated above, Cook County also has an individual general calendar, in which complex cases are identified early and assigned to an individual judge. In early 2002, the Law Division went from a system of assigning complex cases, e.g., toxic torts, from two specific judges assigned to a complex litigation section, to assigning such cases among thirty-five judges in the Law Division; with one of those judges hearing the cases from beginning to end. John Flynn Rooney, *Law Division Chief Moves to Cut Disposition Rate*, CHI. DAILY L. BULL., Mar. 8, 2002, at 1. There remain four individual general calendar judges, who, according to the court's website "hear cases of every variety pending and filed within the Law Division in numbers as shall be from time to time designated by the Presiding Judge of the Law Division." Circuit Court of Cook County, *General Calendars*, at <http://www.cookcountycourt.org/divisions/index.html> (last visited Sept. 21, 2004). The general calendar judges do sometimes receive a commercial case assignment in addition to cases assigned to the Commercial Calendar judges. Telephone Interview with Warren Lupel, Esquire (Oct. 2, 2003) (on file with authors) [hereinafter Lupel Interview]. Mr. Lupel is with Weinberg Richmond LLP in Chicago and was the first chair of the Chicago Bar Association's Commercial Litigation Committee, a Committee that includes a number of Commercial Calendar Judges. Mr. Lupel has been a commercial litigator in Cook County for thirty-five years and is familiar with practice before and after the establishment of the Commercial Calendar.

100. Bailey, *supra* note 82, at 16.

101. *Id.*

102. *Id.*

103. *Id.* at 1.

Judge Ashman, and each month thereafter he would be assigned one-sixth of all currently pending two-year-old cases and one-sixth of the new filings.¹⁰⁴

The Commercial Calendar's case load has grown dramatically since its 1993 beginning, and its eight judge contingent is larger than any single county business court nationally. In 2000, before the appointment of a seventh judge, five of the six Commercial Calendar judges had individual dockets "ranging between 782 and 1,021 cases."¹⁰⁵ Each of these judges was to transfer one hundred of their cases to the new seventh judge. The sixth judge had 662 cases and would not be transferring cases.¹⁰⁶ At the time, there were 4,364 suits pending on the commercial calendar.¹⁰⁷

Its recent history demonstrates both the volume and movement of cases in the Commercial Calendar.¹⁰⁸ In 1998, 3,697 cases were assigned to the Commercial Calendar.¹⁰⁹ In that year, 3,532 cases assigned to the Commercial Calendar reached disposition.¹¹⁰ The average disposition age of those cases was thirteen months, with disposition of cases with jury demands averaging 18.8 months.¹¹¹ Cases going to verdict averaged thirty-four months.¹¹² In 1999, 3,632 new cases were assigned; 3,672 reached disposition in an average of 15.8 months, with jury demand cases averaging nineteen months and cases reaching a verdict averaging thirty months for disposition.¹¹³

From 2000 to 2002, the numbers of cases assigned to the Commercial Calendar were 3,642, 3,769, and 4,245 cases, respectively.¹¹⁴ During those same years, 2000 to 2002, the number of dispositions was 3,433, 3,765, and 4,278 cases; with disposition averages of 16.8, 16.0, and 15.3 months, respectively, in 2000, 2001, and 2002.¹¹⁵ In those years, the average disposition times where cases included jury demands were 20.5 months, 20.0 months, and 21.4 months, respectively, with cases actually reaching a verdict averaging forty-nine, forty-six, and forty-

104. *Id.* This was to reflect "the ratios of all commercial litigation in the division. . . ." *Id.* at 16. See also Chanen, *supra* note 83, at 19 (when Judge Ashman became the first Commercial Calendar Judge in 1993, he was assigned four hundred pending commercial cases, and would "receive one-sixth of all new commercial cases filed and one-sixth of all commercial cases reaching their second anniversary in the system.")

105. Rooney, *supra* note 96, at 1.

106. *Id.*

107. *Id.*

108. As will be set forth below, this had not yet included a court centered mediation program which has proven so effective elsewhere in resolving cases. See *infra* notes 133-134.

109. The statistics set out in the next two paragraphs in the text were provided to the authors by the Honorable William D. Maddux, Presiding Judge of the Law Division of the Cook County Circuit Court, for cases through July 3, 2003 [hereinafter Maddux] (on file with authors).

110. *Id.*

111. *Id.*

112. *Id.* The overall Law Division average in Cook County in 1998 was 43.4 months for 528 verdicts. Elizabeth Neff, *Lake County Court Web Site Up and Running*, CHI. DAILY L. BULL., Aug. 19, 1999, at 3.

113. Maddux, *supra* note 109.

114. *Id.*

115. *Id.*

three months to their conclusion from 2000 to 2002.¹¹⁶ In a little over half the year in 2003, 2,364 cases were assigned to the Commercial Calendar and 2,409 reached disposition.¹¹⁷ The average time for disposition was 15.5 months, with an average of 21.5 months in cases where a jury was requested—and an average of fifty-four months for those cases that went to verdict.¹¹⁸

C. COMMERCIAL CALENDAR JURISDICTION

Even while moving toward 4,500 new cases a year, the Commercial Calendar has a more limited jurisdiction than sister commercial courts in New York or Philadelphia, when solely looking at case types and not jurisdictional amount. This is because Cook County has a Chancery Division that hears business disputes of a type that would be heard, e.g., in New York's Commercial Division. Among other actions, the Chancery Division hears injunctions, class actions, declaratory judgments, contract matters, creditors' rights disputes, trusteeships, receiverships, and dissolutions of partnerships and corporations.¹¹⁹ Approximately 40 percent of the cases heard in the Chancery Division are business cases.¹²⁰ Cases in Cook County's Chancery Division number in the tens of thousands¹²¹ and the division includes nineteen judges.¹²²

The Law Division's Civil Action Cover Sheet includes "Commercial Litigation" as a case type heading and offers the filing party the following choices: Breach of Contract, Professional Malpractice (other than legal or medical), Fraud, Consumer Fraud, Breach of Warranty, Statutory Action, Other Commercial Litigation, and Retaliatory Discharge.¹²³ In giving more specific examples of what types of cases

116. *Id.* In early 2002, there were approximately 26,000 pending Law Division cases, taking an approximate average of 18 months from filing to disposition for all cases, and an average from filing to a jury rendering a verdict of 39.3 months. Rooney, *supra* note 99, at 1. To the extent commercial cases going to trial may have taken more time, this would have necessarily provided relief to the Law Division as a whole to address other cases.

117. Maddux, *supra* note 109.

118. *Id.*

119. See Clerk of the Circuit Court of Cook County, Chancery Division, [*Chancery Court*] *Description and Cases Held*, at http://www.cookcountyclerkofcourt.org/General_Info/Divisions/Chancery/chancery.htm (last accessed Oct. 8, 2004). Unlike Delaware, there is no separate chancery jurisdiction in Illinois' court system, the chancery division thus being, in effect, a type of defined case track or division within a single court. See, e.g., Meyer v. Murray, 387 N.E.2d 878, 885 (Ill. App. 1979) (holding that "[t]he divisions of the circuit court of Cook County, law division vis-a-vis chancery division, are for administrative purposes only and no longer constitute jurisdictional barriers.").

120. See Geoff Gallas and Tim Dibble, *Best Practices In U.S. Business Courts (Draft)*, Feb. 2004 at 3, 5-6 [hereinafter AEQUITAS, Inc., Georgia Feasibility Study] (on file with authors subject to permission of the Administrative Office of the Georgia Courts).

121. Even with a downtrend, in 1991 and 1992, the Chancery Division heard over 12,000 cases each year. David Bailey, *Law Division Case Filings Down Nearly 23 Percent in Last Year*, CHI. DAILY L. BULL., Jan. 4, 1993, at 1. There are now approximately 22,500 Chancery cases filed annually, with approximately 9,000 being equity business cases. AEQUITAS, Inc. Georgia Feasibility Study, *supra* note 120, at 5-6.

122. Sixteen judges are General Chancery Judges and three judges are designated Chancery, Mechanics' Lien. AEQUITAS, Inc., Georgia Feasibility Study, *supra* note 120, at 5-6.

123. See Appendix A, *infra* p. 239.

come onto the Commercial Calendar, one judge posted a chart¹²⁴ which included the following types of actions: (i) breach of contract, including sale of goods (U.C.C.), purchase of services, warranties and service contracts, sale of business, franchise, employment, indemnification, sale of real estate, commercial leases, construction, professional services; (ii) business torts and other tortious type claims, including professional negligence (except medical malpractice), fraud and misrepresentation, Consumer Fraud Act, tortious interference, breach of fiduciary duty/oppression, retaliatory discharge, miscellaneous statutory, securities, corporate and business law, not for profit; and (iii) collections, including notes, guaranties, and other collections.¹²⁵ One former Commercial Calendar Judge states that the existence of a “consensual relationship—some sort of contractual or other business or commercial dealing—is the key to the Commercial Calendars.”¹²⁶

D. EFFECTS OF THE COMMERCIAL CALENDAR

The Commercial Calendar has led to an improvement in the case management of commercial/business disputes and in dispositions being made with greater speed and justice.¹²⁷ This is because the judges on the Commercial Calendar have learned and developed an expertise in commercial law over time, through regularly handling commercial disputes.¹²⁸ The focus provided by serving on the Commercial Calendar leads to the development of such facility and knowledge, resulting in more expeditious and fair results.¹²⁹

The Chicago Bar has a great interest in this court program. A September 2003 symposium with Commercial Division judges speaking on litigation in the Commercial Calendar was so well attended that a second room had to be opened to accommodate all of the attendees.¹³⁰ The Chicago Bar Association’s Commercial Litigation Committee, as of June 8, 2004, had 202 members, which is well over the average of most of the association’s other 120 committees and subcommit-

124. See *id.* at 239–40. That website, www.commercialcourt.net, is no longer operating.

125. Appendix A, *infra* pp. 239–40.

126. Interview with the Honorable Peter Flynn, Circuit Court of Cook County’s Chancery Division (July 12, 2004) (on file with authors). The great majority of Commercial Calendar cases are “contract” cases, which can range from simple collection suits to multi-party high rise construction actions. A sizable number of simple collection disputes resolve by default or summary judgment; however, the Commercial Calendar also includes a considerable body of more complex cases which can demand the judges’ time and attention, from holding status conferences through motion practice and trial. Facilitating that sort of individualized case management is one of the reasons the Commercial Calendars were established. Among non-contract cases, the most numerous include consumer complaints against car dealers under the Magnuson-Moss Warranty Act and/or the Illinois Consumer Fraud Act. *Id.* This sort of individual consumer claim appears unique to Chicago’s Commercial Calendar jurisdiction, but it comports with the philosophy of addressing consensual business transactions. Moreover, it is consistent with the general goals of improving decision making and predictability by having a body of judges who repeatedly encounter and develop a specific area of the law.

127. Lupel Interview, *supra* note 99.

128. *Id.*

129. *Id.*

130. *Id.* (discussing symposium held on September 30, 2003, called Commercial Litigation Judges Roundtable).

tees.¹³¹ It appears that through the Commercial Litigation Committee, a new effort has started among the Bench and Bar in Cook County to facilitate practice before the Commercial Calendar.¹³²

Although there had been no mediation program connected to the Commercial Calendar in the past, a new court rule was implemented on April 5, 2004, establishing a mediation program in the Circuit Court of Cook County's Law Division.¹³³ In looking at the prominent role played by mediators in other business and commercial programs, it is highly likely that court-sponsored mediation in Chicago will significantly increase the overall disposition rate of cases in Cook County by leading to more expeditious settlements in cases that can be settled. "The judges who preside over the individual calendars . . . are going to take a proactive position to encourage the lawyers in major cases to obtain the help of a third-party mediator to help resolve the dispute without the need for court trials. . . ."¹³⁴

IV. NORTH CAROLINA'S BUSINESS COURT

A. CREATION OF NORTH CAROLINA'S BUSINESS COURT

North Carolina's Supreme Court established the North Carolina Business Court in 1995.¹³⁵ In 1994, North Carolina's Governor had established the North Carolina Commission on Business Law and the Economy.¹³⁶ One of the Commission's tasks included recommending changes to improve North Carolina's business climate, including "[a]ny needed new statutes, rules and regulations designed to assure that North Carolina offers a legal environment which provides the flexibility and support to allow businesses to operate successfully in [North Carolina] and which will attract [businesses] to locate and incorporate [in North Carolina]."¹³⁷

The Commission recommended creation of a business court,¹³⁸ which was achieved through North Carolina's Supreme Court amending existing state rules¹³⁹

131. Telephone Interview with Karen Stanton of the Chicago Bar Association ("CBA") (Oct. 8, 2003) (on file with authors) (at that time there were 168 members); Telephone Interview with Awilda Reyes of the CBA (June 8, 2004) (on file with authors) (at which time there were 202 members.).

132. Lupel Interview, *supra* note 99. See also Adam W. Lasker, *Bar Launching Committee on Commercial Litigation*, CHI. DAILY L. BULL., Jan. 8, 2003, at 1.

133. John Flynn Rooney, *Mediation the New Pretrial, and Arbitration Subs for the Courtroom*, CHI. DAILY L. BULL., Mar. 23, 2004, at 1. "The new court-sponsored program aims to use mandatory mediation for the more complex and high-stakes cases, like million-dollar personal injury lawsuits that can take up months of court and jury time . . ." Tom McCann, *New Program Weaves Mediation Deeper Into Legal Scene*, CHI. LAW., Apr. 2004, at 12.

134. Rooney, *supra* note 133. Under Circuit Court of Cook County Court Rule 20.02(a), "The Presiding Judge, individual calendar judge, or motion judge to whom a matter is assigned may order any contested civil matter pending in the Law Division referred to mediation by entering an Order of Referral." CIR. CT. OF COOK COUNTY CT. R. 20.02(a), available at <http://www.cookcountycourt.org/rules/>.

135. N.C. SUPER. CT. R. 2.1 (2004). See Appendix A, *infra* p. 268.

136. Carrie A. O'Brien, *The North Carolina Business Court: North Carolina's Special Superior Court for Complex Business Cases*, 6 N.C. BANKING INST. 367, 375 n.63 (2002).

137. *Id.* (quoting N.C. SUPER. & DIST. CT. R. 2.2 cmt.).

138. North Carolina Business Court, *About the North Carolina Business Court: History of the Court*, at <http://www.ncbusinesscourt.net/New/aboutcourt/> [hereinafter North Carolina History].

139. N.C. SUPER. CT. RULE 2.1. See Appendix A, *infra* p. 268.

governing North Carolina's Superior and District Courts.¹⁴⁰ The Supreme Court intended that the business court be a court where cases involving complex business litigation would be handled in their entirety by a single judge, to be known as a Special Superior Court Judge for Complex Business Cases,¹⁴¹ and that the new court generate a body of case law on corporate governance issues.¹⁴² To date, this role has been filled by the Honorable Ben F. Tennille.¹⁴³

B. CASE SELECTION IN NORTH CAROLINA'S BUSINESS COURT

Under North Carolina Superior Court Rule 2.1,¹⁴⁴ the Chief Justice determines which cases are designated for the Business Court,¹⁴⁵ though the parties may seek that designation and other judges may, and are even expected to, make recommendations.¹⁴⁶ There is not a dollar threshold, nor must any party surrender the right to a jury trial.¹⁴⁷ There is no fixed definition of what is or is not a complex case, leaving flexibility in decision making.¹⁴⁸

Complex cases suitable for the Business Court include statutory cases arising under North Carolina's Business Corporation, Professional Corporation, Limited Liability Company, Uniform Limited Partnership, Securities, Tender Offer Disclosure and Investment Adviser Acts, as well as antitrust disputes.¹⁴⁹ Also included are, "any cases involving removal of a director, dissent and appraisal, involuntary dissolution of a corporation, or other corporate governance disputes[, and] *Meiselman*¹⁵⁰ cases involving disputes in family held businesses [which] are ideal candidates for assignment as complex business cases."¹⁵¹ Further, "[p]artnership

140. O'Brien, *supra* note 136, at 376.

141. N.C. SUPER. CT. R. 2.2 states:

Rule 2.2. Designation of special superior court judge for complex business cases. The Chief Justice shall designate one or more superior court judges as special judges to hear and decide complex business cases as provided in Rule 2.1. Any judge so designated shall be known as a Special Superior Court Judge for Complex Business Cases.

142. Memorandum from I. Beverly Lake, Jr., Chief Justice, Supreme Court of North Carolina, to All Superior Court Judges (Mar. 7, 2001) [hereinafter Lake Memo]; see Appendix A, *infra* pp. 266–68.

143. North Carolina History, *supra* note 138. "In January of 1996, Governor Hunt appointed Ben F. Tennille as a Special Superior Court Judge and Chief Justice Mitchell designated him as North Carolina's first Special Superior Court Judge for Complex Business Cases. He was reappointed for a five year term in October 2001." *Id.* Among other things, Judge Tennille is part of the sixteen member ABA Presidential Task Force on Corporate Responsibility and is Chairperson of the Business and Commercial Courts Committee of the National Conference of State Trial Judges.

144. N.C. SUPER. CT. R. 2.1.

145. *Id.*

146. O'Brien, *supra* note 136, at 383.

147. North Carolina Business Court, *About the North Carolina Business Court: How a Case is Assigned to The Business Court* [hereinafter North Carolina Guidelines], at <http://www.ncbusinesscourt.net/New/aboutcourt/>. See Appendix A, *infra* pp. 264–65.

148. North Carolina Business Court, *About the North Carolina Business Court: Definition of a Complex Business Case*, at <http://www.ncbusinesscourt.net/New/aboutcourt/> [hereinafter North Carolina Case Definition].

149. Lake Memo, *supra* note 142, at 1.

150. *Meiselman v. Meiselman*, 307 S.E.2d 551 (N.C. 1983).

151. Lake Memo, *supra* note 142, at 2.

disputes, as well as shareholder derivative actions, are also usually assigned as complex business cases.”¹⁵²

The North Carolina Guidelines state that such cases must typically be recommended to be heard by the Business Court to create a consistent body of case law.¹⁵³ This comports with the idea that one key factor in determining assignment to the Business Court:

is whether the outcome will have implications for business and industry beyond the conflicts of the parties to the litigation. If a written decision on disposition of the case would provide predictability for others in the same business or industry in making their business decisions, the case will more likely be considered for designation.¹⁵⁴

The Special Superior Court Judge is required to write an opinion on final disposition of the case.¹⁵⁵

The Business Court also hears cases involving:

contractual disputes that are motion and paper intensive, involve protracted trials, and require significant judicial management; antitrust and theft of trade secret cases; and cases involving determination of legal issues that will have an impact on industry or business practices beyond the confines of the case itself. Some, but not all, class actions may be good candidates for assignment, and the decision on assignment should be made before the issue of class certification is decided.¹⁵⁶

Judge Tennille has described the three main types of cases as “corporate domestic disputes,” class actions, and paper or motion intensive cases.¹⁵⁷

C. OTHER DEVELOPMENTS IN NORTH CAROLINA’S BUSINESS COURT

Business Court opinions are posted on the Business Court website,¹⁵⁸ and reflect additional types of cases that court has addressed. These include, among others, an action brought by a former employer against its former employees and their new employer,¹⁵⁹ a dispute between an insurer and the repair shop used by its

152. *Id.*

153. *Id.* (“In order for our judicial system to build a consistent body of case law, these types of cases must be assigned to the business court on a regular basis, and early identification and assignment is preferable.”). At this point, however, the Business Court opinions do not have precedential value. North Carolina Business Court, *Report on Activities of the North Carolina Business Court 2002 to 2003*, at <http://www.ncbusinesscourt.net/ref/2002%20General%20Assembly%20Report.htm>.

154. North Carolina Case Definition, *supra* note 148.

155. North Carolina Guidelines, *supra* note 147.

156. Lake Memo, *supra* note 142, at 2–3.

157. O’Brien, *supra* note 136, at 385.

158. North Carolina Business Court, *Court Opinions*, at <http://www.ncbusinesscourt.net/New/opinions/> (last visited Oct. 8, 2004).

159. *Sunbelt Rentals, Inc. v. Head & Engquist Equip., L.L.C.*, No. 00 CVS 10358, 2002 WL 31002955, at *1 (N.C. Super. July 10, 2002).

insureds,¹⁶⁰ a breach of contract action between a hospital and an insurer,¹⁶¹ a dispute between secured creditors,¹⁶² obligations under a promissory note,¹⁶³ breach of contract claims under the U.C.C.,¹⁶⁴ and enforceability of a contractual arbitration provision.¹⁶⁵

Though created years earlier, the Business Court's defining moment most probably occurred in 2001 with the Wachovia/First Union/SunTrust merger litigation.¹⁶⁶ SunTrust's \$14.7 billion hostile takeover efforts directed at Wachovia, while Wachovia sought a friendly merger with First Union,¹⁶⁷ had spawned litigation in various forums.¹⁶⁸ In early June 2001, the three parties agreed to bring their state and federal claims into North Carolina's Business Court.¹⁶⁹ Judge Tennille rendered the key decision by August 2001.¹⁷⁰ The litigation's magnitude, the parties' recognition that the Business Court embodied a trustworthy and capable forum to resolve all of their disputes, and the speed¹⁷¹ and thoroughness with which the legal issues were addressed established a national identity for this court.¹⁷²

From its inception through its 2002 to 2003 report to state legislative committees, the Business Court had been involved in 179 cases from thirty-three different North Carolina Counties.¹⁷³ One hundred and sixteen cases were closed, seventy-three by settlement.¹⁷⁴ Twenty-four cases reached judgment, sixteen were voluntarily dismissed, and three were removed to federal court.¹⁷⁵ There were

160. Pack Bros. Body Shop, Inc. v. Nationwide Mut. Ins. Co., No. 01 CVS 805, 2003 WL 21017395, at *1 (N.C. Super. Jan. 10, 2003).

161. Novant Health, Inc., et al. v. Aetna U.S. Healthcare of the Carolinas, Inc., No. 98 CVS 12661, 2001 WL 34054420, at *1 (N.C. Super. Mar. 8, 2001).

162. Reeve & Assocs. Inc. v. United Carolina Bank, No. 96 CVS 4695, 1997 WL 33446634, at *1 (N.C. Super. Oct. 6, 1997).

163. Bradley v. U.S. Packaging, Inc., No. 95 CVS 8986, 1998 WL 34032495, at *1 (N.C. Super. Apr. 9, 1998).

164. Carastar Indus., Inc. v. Georgia Pac., Corp., No. 00 CVS 12302, 2001 WL 34000141, at *1 (N.C. Super. Jan. 26, 2001).

165. Polo Ralph Lauren Corp. v. Gulf Ins. Co., No. 00 CVS 5440, 2001 WL 34000140, at *1 (N.C. Super. Jan. 31, 2001).

166. Mike Dayton, *Specialty Commercial Courts on the Rise in Region*, ATLANTIC COAST IN-HOUSE, Apr. 2004, at 28.

167. *Id.*

168. Julia D. Gray, *Wachovia War Calls Big Firms to Attention*, FULTON CTY. DAILY REP., May 25, 2001.

169. Julia D. Gray, *Bondurant Moves From First Union to Wachovia*, FULTON CTY. DAILY REP., June 5, 2001.

170. First Union Corp. v. Suntrust Banks, Inc., No. 01-CVS-8036, slip op. at 1 (N.C. Super. Aug. 10, 2001); see generally Lijun K. Yang, *First Union v. SunTrust Banks: The Fight for Wachovia and Its Impact on North Carolina Corporate Law*, 6 N.C. BANKING INST. 335, 337-38 (2002).

171. The Wachovia takeover case was also important "because it proved to be a quick disposition to a difficult case." O'Brien, *supra* note 136, at 386.

172. On the day that Judge Tennille issued his opinion on Sun Trust's challenge to Wachovia Bank's merger with First Union, there were more than 30,000 hits on the website. *Id.* at 382.

173. *Report on Activities of the North Carolina Business Court 2002 to 2003*, *supra* note 153. The exemplary use of technology as an integrated part of this court, including electronic filing, courtroom technology, videoconferencing, and Internet access to a well-designed website with abundant practical information, undoubtedly increases the court's ability to conduct itself in this broad arena.

174. *Id.* at 2, 5.

175. *Id.* at 5.

sixty-three current cases of which fifty-three were active, five were on appeal, three reached settlement, and two were stayed.¹⁷⁶ Seventeen of the active cases were class actions.¹⁷⁷ The Business Court's jurisdiction is limited by the nature and magnitude of a single case and/or global importance of a case, which can then be used as guidance in other cases. The court also has a single judge at this time. Thus, although hearing only a limited number of cases, the program's design is more expansive in effect.

The court has enthusiastic support from the State Bar Association.¹⁷⁸ It has further proved a reference point in other jurisdictions seeking to create business courts, such as Maryland¹⁷⁹ and Georgia.¹⁸⁰ Georgia's Feasibility Study recognized that lawyers are actively seeking assignment to the North Carolina Business Court, including lawyers from adjacent states, motivated by the court's understanding of complex business matters, predictability, fairness, and impartiality.¹⁸¹ This sounds like the oft-heard description of the qualities litigants find in Delaware's Chancery Court.

The Chief Justice of North Carolina's Supreme Court has established a Commission on the Future of the North Carolina Business Court.¹⁸² The thirty-seven member commission, chaired by North Carolina Supreme Court Justice Mark Martin, will consider recommendations concerning the court's expansion.¹⁸³ This would involve both the Business Court's size and scope.¹⁸⁴

V. THE NEW JERSEY SUPERIOR COURT LAW DIVISION'S COMPLEX COMMERCIAL CASE MANAGEMENT

There are individual judges specifically assigned to handle complex commercial cases filed within the New Jersey Superior Court, Law Division, Civil Part in

176. *Id.* at 12.

177. *Id.* at 2.

178. *Id.* at 23.

179. Compare MD. R. 16-205(b), with N.C. SUPER. CT. R. 2.1(b).

180. See Debra Nesbit, State of the Judiciary Address, Jan. 31, 2003, available at http://www.ciprg.com/ss/new_detail.asp?A15xi_IdKey_h=n10313141328&rClient=aoc (last visited Nov. 29, 2004) (the Georgia Supreme Court is "considering the feasibility of a pilot project to expedite business litigation in our courts. The idea has been proposed by the Corporate Law Section of the State Bar and would be modeled on a similar effort in North Carolina.")

181. AEQUITAS, Inc., Georgia Feasibility Study, *supra* note 120, at 9.

182. Matthew Easley, *Business Court Role May Grow*, NEWS OBSERVER, Nov. 13, 2003, at <http://www.newsobserver.com/politics/dome/story/1259442p-7373436c.html>.

183. Mike Dayton, *Judge Sees Bright Future For Business Courts*, ATLANTIC COAST IN-HOUSE, Apr. 2004, at 28.

184. Mike Dayton, *Specialty Commercial Courts on The Rise in Region*, ATLANTIC COAST IN-HOUSE, Apr. 2004, at 1 ("North Carolina's chief justice, I. Beverly Lake Jr., is reportedly already considering an expansion of the business court's size and scope."). The Commissions' final report and recommendations were issued on October 28, 2004. Chief Justice's Commission on the Future of the North Carolina Business Court, Final Report and Recommendation (Oct. 28, 2004), available at <http://www.ncbusinesscourt.net/Final%20Commission%20Report.htm>. Among other things, the Commission recommends expansion of the business court, including the addition of two new business court judges; mandatory jurisdiction over certain specified case types, including "legal issues concerning the Internet, electronic commerce, and biotechnology;" giving internal precedential value to business court opinions unless overturned legislatively or on appeal; and specially assigning appellate judges to business court appeals. *Id.*

Bergen and Essex Counties.¹⁸⁵ As will be discussed below, since 2000, all New Jersey Counties now include a tracking designation for complex commercial cases (Track IV), even where there is no specially designated judge to hear such cases.

A. HISTORY OF COMMERCIAL CASE MANAGEMENT

In 1993, complex commercial matters in Essex County were assigned to specially designated judges for case management through trial,¹⁸⁶ along with some, but not all, non-complex commercial cases. This designation involved scheduling an early case management conference, which was to include a discovery schedule, a briefing schedule, a date for premarking of exhibits for trial, times for hearings of any in limine motions, and a trial date.¹⁸⁷ This program had been inspired, at least in part, by “[i]ncreas[ed] competition from alternative dispute resolution. . . .”¹⁸⁸

Early reaction to this effort was favorable; the judges’ expertise in business matters being a significant factor in that positive response.¹⁸⁹ Such positive results, and information communicated from lawyer and business groups, were brought to then Chief Justice Robert Wilentz’s attention.¹⁹⁰ He announced that a committee would be created in the future to study the specialized handling of commercial cases.¹⁹¹

In 1996, a pilot program was created in Bergen and Essex Counties’ Law Divisions. Judges with a business or commercial background were designated by the assignment judges in those two counties to handle commercial matters from a case’s inception until its conclusion.¹⁹² Those promoting creation of this commercial program were concerned that absent a means of effectively adjudicating commercial disputes, New Jersey would find itself at a disadvantage in relation to other states that had commercial courts.¹⁹³ Further, in a 1997 committee study on commercial case management in New Jersey, the committee chair wrote:

The halcyon days of laissez-faire case management in complex commercial cases are long gone . . . Unless a program is created to deal with these cases, staffed by judges with commercial experience and appropriate technological

185. Bergen and Essex are New Jersey’s two largest counties, and the pilot program addressing complex commercial cases was formally known as the “Complex Commercial Subtrack Program.” Heather MacGregor, *Bringing the Business Back In: Special Forums for Complex Business Cases Seek to Stanch Commercial Bar’s Loss of Confidence in the Courts*, N.J. L.J., Feb. 9, 1998, at 1.

186. Alvin Weiss, *Legislation Isn’t Necessary to Create a Business Court*, N.J. L.J., Oct. 15, 2001. The Honorable Burrell Ives Humphreys was Essex County’s Assignment Judge in 1993, and was replaced by then Judge Weiss in 1994, Judge Weiss having been Presiding Judge in 1993. Henry Gottlieb, *Weiss Takes Hot Seat*, N.J. L.J., July 25, 1994, at 1.

187. Weiss, *supra* note 186.

188. *Musical Benches*, N.J. L.J., Mar. 17, 1997, at 26.

189. *Id.*

190. Weiss, *supra* note 186.

191. Chief Justice Wilentz passed away in July of 1996. Ronald J. Fleury et al., *How Wilentz Changed the Courts*, N.J. L. J., July 29, 1996, at 1. As discussed below, the committee was established by his successor, Chief Justice Deborah Poritz.

192. Weiss, *supra* note 186.

193. MacGregor, *supra* note 185.

support, such cases will languish and die a slow death on the already overburdened dockets of the Law Division.¹⁹⁴

Originally, the pilot program in Essex County accepted complex commercial cases and some non-complex commercial cases, and the Bergen County Court only accepted complex commercial cases.¹⁹⁵ After the 1997 report was issued by the committee appointed by Chief Justice Deborah Poritz to study the handling of commercial cases,¹⁹⁶ both counties continued to hear complex commercial cases, with Essex County continuing to handle some non-complex cases (though not book account cases), and Bergen deciding to continue with only complex cases.¹⁹⁷

In Essex County, the judges relied upon attorney designations in the case information statements to determine what cases were heard in the pilot program, including contract, other insurance, real property, and construction; however, at that time there was still no designation for *complex* commercial cases. Initially in Bergen County, Judge Jonathan Harris reviewed the cases to be included in the pilot program. In Bergen County, cases considered to be complex could include factors such as the number of parties, the presence of third party claims and counterclaims, complexity of legal issues, and the nature of the dispute (such as U.C.C. or class action).¹⁹⁸

B. NEW JERSEY'S "BEST PRACTICES"

In 2000, New Jersey amended its rules governing civil practice, adding provisions known as "Best Practices."¹⁹⁹ This involved a system of state-wide rules governing case scheduling and management, including specific timelines and judicial involvement in case management.²⁰⁰ Best Practices established a four-tiered tracking system, with the most complex cases falling within Track IV.²⁰¹ Track IV includes complex commercial cases.²⁰² The key difference in Track IV cases is that

194. *Id.* (quoting United States District Court Judge Stephen Orloffsky who chaired that committee).

195. Telephone interview with Michelle Perone, Esquire, Chief of the Civil Court Program for the State of New Jersey (Sept. 9, 2003) [hereinafter Perone Interview] (on file with authors). See also MacGregor, *supra* note 185.

196. MacGregor, *supra* note 185.

197. Perone Interview, *supra* note 195. These pilot programs did not affect business cases otherwise heard in the Chancery Division which were getting individualized attention by the Chancery judge.

198. *Id.* As discussed below, the case information statement forms, filed with the complaint when a case is initiated, were later amended to reflect whether a case was a complex commercial case. Since that time, in Bergen and Essex Counties, the courts have relied upon counsel's designation rather than the courts' selecting cases.

199. *Id.* The two chief goals of Best Practices include greater procedural consistency among the counties and greater trial date certainty. Chief Judge Deborah T. Poritz, Report of the State of the Judiciary of the State of New Jersey, May 22, 2002, N.J. L.J., May 27, 2002.

200. See, e.g., N.J. Ct. R. 1:1-2; N.J. Ct. R. 4:5-1(b); N.J. Ct. R. 4:5A-1-3.

201. N.J. Ct. R. 4:5A.

202. The Case Information Statement to be filed in all civil actions, found at Appendix XII of New Jersey's Civil Rules, has four tracks, per Rule 4:5A-1. Track I includes, among other things, book account, actions on a negotiable instrument, contract, and commercial transactions. This track provides 150 days for discovery. Track II includes, among other claims, construction, personal injury and "other torts" and provides 300 days for discovery. Track III includes, e.g., civil rights, medical mal-

a single judge, for the most part, hears the entire case.²⁰³ Cases that involve simpler business or commercial matters such as book accounts, collections, negotiable instruments, and contracts do not have a single judge for all matters through trial, and are treated as Track I cases.²⁰⁴

Thus, there is a complex commercial designation for every New Jersey County, not only Bergen and Essex Counties, in which cases will be heard by a single judge (for the most part) throughout the case.²⁰⁵ The difference is that in Bergen and Essex Counties, the same judge will hear all complex commercial cases; whereas, in other counties, these cases will be assigned to judges within the civil law division on a rotating basis.²⁰⁶ Thus, arguably, the judges in Bergen and Essex Counties will become more experienced in the substantive law and in handling complex cases.²⁰⁷ In Bergen County, the Honorable Jonathan Harris has been hearing Complex Commercial Track cases since July of 1997.²⁰⁸

Under Best Practices, it is the lawyers bringing or defending a case in any New Jersey County who designate cases as complex commercial cases. The judges do not designate the cases.²⁰⁹ The only dollar limit on jurisdiction is that the case be in excess of \$15,000 to come within the Civil Part's jurisdiction.²¹⁰ Thus, even a large monetary damages claim would not classify a case as complex if it were a relatively straight-forward collection matter.

In New Jersey, corporate or business disputes of the type historically heard in the Delaware Court of Chancery are similarly heard by the New Jersey Superior Court's Chancery Division.²¹¹ These include business or commercial matters that would be heard in programs like New York's Commercial Division or Philadelphia's Commerce Case Management Program; e.g., unfair competition, non-

practice, professional negligence, and product liability claims and provides 450 days for discovery. Track IV includes complex commercial disputes among seven types of cases, and also provides 450 days for discovery, but mandates more case management than Tracks I-III. Track IV also includes mass torts, which are heard by three judges in the State. Perone Interview, *supra* note 195.

203. Under all four tracks, a single judge is designated to preside over pre-trial motions and conferences and discovery, with applications made after that point going to the Civil Presiding Judge. In track IV cases, however, the designated managing judge is also, "insofar as is practicable and absent exceptional circumstances" to preside at trial. N.J. Ct. R. 4:5B-1. Track IV cases also require case management conferences. Such conferences are left to the judge's discretion within the other tracks. N.J. Ct. R. 4:5B-2.

204. See Perone Interview, *supra* note 195.

205. *Id.*

206. *Id.*

207. The Complex Commercial Track judges in Essex and Bergen counties do not only hear commercial cases. *Id.*

208. MacGregor, *supra* note 185.

209. Perone Interview, *supra* note 195.

210. *Id.*

211. "New Jersey also has a long-standing Chancery Court that has developed special expertise and abilities with regard to complex corporate law matters. It consists of one chancery judge in each county." ABA Ad Hoc Committee on Business Courts, *Business Courts: Towards a More Efficient Judiciary*, 52 BUS. LAW. 947, 956 (1997). "[S]tates, such as Delaware and New Jersey, have used courts of chancery since colonial times to handle business cases for which there is no monetary remedy at law." Margaret M. Eckenbrecht, *A Commercial Venture: Supporters Portray Business Courts as White Knights Rescuing Overburdened Justice System*, 82 A.B.A. J. 35 (Jan. 1996). New Jersey's Chancery Division exists under N.J. CONST. art. VI § 3(3).

complete agreements, non-disclosure of trade secrets or confidential information, protection of trade names or trademarks, shareholder derivative actions, rights of minority shareholders, piercing the corporate veil, partnership and joint venture dissolutions, and accounting actions.²¹² In all New Jersey counties, shareholder suits or valuation claims are handled in the Chancery Division,²¹³ even in Essex County with a specifically designated complex commercial Law Division Judge.²¹⁴

Legislative efforts to create a business court have yet to succeed in New Jersey;²¹⁵ however,

The chief justice and the [New Jersey] Supreme Court have the power by assignment and rule to direct the assignment of commercial business matters in each vicinage to designated judges. Even without such action, the assignment judge in each vicinage has the authority to assign specific types of cases to designated judges for handling from inception of the case to conclusion, whether by way of trial or settlement.²¹⁶

“[T]he Administrative Office of the Courts’ plan[s] to establish complex commercial court pilot programs in the Burlington, Mercer, Hudson and Ocean vicinages²¹⁷ in September [2004].”²¹⁸ “Under the plan, general equity judges [in those counties] will be assigned to complex commercial cases involving monetary damages. . . .”²¹⁹ As set forth above, these chancery judges traditionally have only heard equity-based actions.

“[T]he judges’ respective management teams will handle the cases from start to finish.”²²⁰

Complex commercial cases will be eligible for the pilot when all of the parties: [1] request, within 30 days of joinder, management by a general equity

212. The Honorable William A. Dreir & Paul A. Rowe, Esquire, *GUIDEBOOK TO CHANCERY PRACTICE IN N.J.* 106–32 (4th ed. 1997).

213. See, e.g., *Strasburgh v. Straubmuller*, 683 A.2d 818 (N.J. 1996).

214. See, e.g., *In re PSE&G S’holder Litig.*, 726 A.2d 994 (N.J. Super. Ct. Ch. Div. 1998).

215. Thomas A. Muccifori, *Don’t Drop the Ball a Third Time In*, N.J. L.J., Nov. 4, 2002.

216. Weiss, *supra* note 186. See also Report of the Conference of Civil Presiding Judges on Standardization and Best Practices, at 10–11 (March 1999).

217. These courts are located in Mount Holly, Trenton, Jersey City, and Toms River, New Jersey, respectively.

218. John Covaleski, *Lawyers Rally Behind Plans for Expansion of Business Courts*, N.J. L.J., May 31, 2004, at 1. Chief Justice Poritz stated in her May 20, 2004 Report on the State of the Judiciary to the New Jersey State Bar Association,

attorneys handling commercial litigation have asked for a court specializing in complex commercial cases. We were able to launch a pilot focusing on such cases in Bergen and Essex some years ago that has been well-received. Although we have only about 300 of these types of cases a year statewide, we continue to hear that attorneys would like to see an expansion of specialized case handling in this area. We are responding to those requests. . . . By September, we anticipate implementing in 4 vicinages a second pilot based on a model that is somewhat different from the Bergen/Essex pilot.

See Chief Judge Deborah T. Poritz, Report of the State of the Judiciary of the State of New Jersey, May 20, 2004, available at www.njcourtsonline.com [hereinafter Poritz 2004 Report].

219. Covaleski, *supra* note 218.

220. *Id.*

judge; [2] submit a waiver of jury trial; [3] agree to use complementary dispute resolution techniques; and [4] agree to expedited discovery, with the goal of ultimate resolution of the case within one year.²²¹

The general equity judges are “typically well-experienced in [complex commercial cases] and the new programs will provide them additional commercial law training.”²²² In return for choosing the program, the parties will get the consistency that comes from a team of court professionals managing the case from start to finish. “Over a two- or three-year period, the Judiciary and the Bar should be able to evaluate” whether that consistency leads to more efficient and more effective case management.²²³

Complex commercial cases are reviewed for possible assignment to mediation early in the case, and if referred to mediation, the judge will place time limits on when the mediation must be completed.²²⁴ The mediators are trained and matched by experience to case type. Since September 2002, the Bergen and Essex County programs have sent their cases to presumptive mediation, using mediators with commercial expertise. Approximately 32 percent of cases in which mediation is completed settle at the mediation, and more settle within a short time after that mediation process.²²⁵ The mediation program has received extremely high approval ratings, including the expressed willingness to use the process again.²²⁶ Mediators are able to have the parties informally exchange information even before discovery is due, something akin to federal self-executing disclosure in effect.²²⁷ Mediators serving in the New Jersey Civil Mediation Program include lawyers as well as non-lawyers with specialized expertise in the particular area in dispute.²²⁸

From July 1, 2001 through June 30, 2002 (the 2002 Court Year), there were 276 complex commercial cases filed statewide, with 164 cases being disposed of state-wide.²²⁹ Forty-eight complex commercial track cases were filed in Bergen County.²³⁰ Twenty-six reached disposition that year, only one having gone to trial.²³¹ The median time for disposition was 218 days for those cases, compared

221. Poritz 2004 Report, *supra* note 218.

222. Covaleski, *supra* note 218. The Bergen and Essex County programs will remain with the law division judges. *Id.*

223. *Id.*

224. Perone Interview, *supra* note 195.

225. *Id.*

226. *Id.*

227. *Id.* All but four New Jersey Counties have presumptive mediation and send these cases to mediators with expertise in those types of cases; and even the counties without presumptive mediation use mediation frequently as well. Non-complex commercial disputes, e.g., book accounts and actions on negotiable instruments, are sent to non-binding arbitration before commercial arbitrators at the close of discovery. This reflects New Jersey’s use of specialized procedures for a wide type of business disputes. Telephone interview with Michelle Perone, Esquire (Oct. 23, 2003) (on file with authors).

228. *Id.*

229. Perone Interview, *supra* note 195; Civil Law Complex Commercial case statistics for Court Year 2002 provided to the authors by Michelle Perone, Esquire (on file with authors).

230. *Id.*

231. *Id.*

to 24 months in other types of cases.²³² Twenty-two complex cases were filed in Essex County, with eleven reaching disposition, and a 190 day median time for disposition.²³³ Overall, complex commercial filings were up during the year.²³⁴

The statistics for the 2003 Court Year show that 300 complex commercial cases were filed state-wide, while 243 cases were disposed of state-wide.²³⁵ Thirty-eight complex commercial cases were filed in Bergen County and thirty-nine cases were disposed of during the year.²³⁶ The median disposition time in Bergen County was 362 days.²³⁷ In Essex County, twenty-one complex commercial cases were filed, with thirteen reaching disposition during that year, with a median disposition time of 197 days.²³⁸

VI. PHILADELPHIA'S COMMERCE CASE MANAGEMENT PROGRAM

A. HISTORY OF THE COMMERCE CASE MANAGEMENT PROGRAM

By Order of its Administrative Judge, John W. Herron, Philadelphia's Court of Common Pleas initiated a Commerce Case Management Program, effective prospectively for cases filed on or after January 1, 2000.²³⁹ The public announcement of the Commerce Program included members of the bench and bar,²⁴⁰ a working relationship that has been a hallmark of the Program's creation, operation, and success.²⁴¹ In 1997, Philadelphia Bar Association Chancellor Clifford Haines described the need to create a specialized business court as an element in combating loss of jobs and business (by contrast to neighboring New Jersey and Delaware, which were growing in these areas).²⁴²

The proposal also recognized the already existent reality of specialization in other contexts and the need to take advantage of the efficiency and effectiveness

232. *Id.*

233. *Id.*

234. *Id.*

235. Civil Law Complex Commercial case statistics for Court Year 2003 provided to the authors by Michelle Perone, Esquire (on file with authors).

236. *Id.*

237. *Id.*

238. *Id.*

239. In re: Commerce Case Management Program, Administrative Docket 01-2000, First Jud. Distr. Pa. C.P. Civ. Trial Div. (Feb. 22, 2000) [hereinafter Commerce Case Order] (applicable to all cases filed as of January 1, 2000). Thus, unlike New York or Cook County, the Commerce Program was to begin with the assignment of new cases only. This Order was originally issued on November 9, 1999 and was slightly amended on the later date.

240. Lori Lichtman, *A Court of Their Own: Purely Business Disputes to be Handled by New Philadelphia C.P. Commerce Case Program*, LEGAL INTELLIGENCER, Oct. 14, 1999, at 1. Also in attendance was Governor Tom Ridge's outgoing general counsel who thanked Administrative Judge John W. Herron for his efforts in creating the Program.

241. The Honorable Albert W. Sheppard Jr., *The Philadelphia Commerce Court—Dedicated to Find the Best Solutions for Business Disputes*, METROPOLITAN CORP. COUNS. (Dec. 2002).

242. Clifford E. Haines, *It's Time to Create a Special Business Court*, LEGAL INTELLIGENCER, May 5, 1997, at 4.

that such a specialized case management system could offer.²⁴³ The proponents argued that proper address of business cases would increase the rest of the court system's time and resources to address other matters.²⁴⁴ The organized bar in Philadelphia had long championed the establishment of a state-wide business court in Pennsylvania; and when several state-wide legislative efforts failed,²⁴⁵ bar leaders worked closely with Judge Herron in designing Philadelphia's new Commerce Case Program, established by Administrative Order, in late 1999.²⁴⁶

Patterned after New York's Commercial Division, and partially inspired by Delaware's Chancery Court,²⁴⁷ the Commerce Case Management Program provides that one judge follows each commerce case from beginning to end.²⁴⁸ The Commerce Program seeks to provide efficient and expeditious resolution to business disputes and incorporates an active ADR complement to the Program.²⁴⁹ Tens of highly qualified and experienced practicing lawyers have volunteered their time to this end, and an effort is made to assign cases for settlement conferences or mediations to these "Judges *Pro Tempore*" based on the type of case and area of specialization.²⁵⁰ Removing burdensome and frequently complex business cases from the general docket and assigning them to judges accustomed to such cases works to unclog the system, and to more efficiently address other cases as well.²⁵¹

The Commerce Program started with two judges,²⁵² and a third was later added.²⁵³ The Commerce Program case volume has numbered over five hundred a year. The goal is not high volume or turnover, but in the words of one of its judges, "to provide a quality product."²⁵⁴ The idea, that quality through expertise and focus is the primary goal, with increased efficiency and expeditious treatment of cases a natural by-product, is a common theme in the creation of Business courts.²⁵⁵ Although the Commerce Program has been subject to some dis-

243. *Id.*

244. *Id.*

245. Legislative efforts to create business courts in Pennsylvania were longstanding, but ultimately no such legislation has been passed. Marilyn Wimp, *Business Court Is, Once More, High on Bar's Agenda*, PHILA. BUS. J., July 27, 1998, at <http://philadelphia.bizjournals.com/philadelphia/stories/1998/07/27/focus3.html>. Pennsylvania had been the first state nationally to propose such legislation.

246. *See supra* note 239.

247. Lichtman, *supra* note 240.

248. Sheppard, *supra* note 241.

249. Lichtman, *supra* note 240.

250. Sheppard, *supra* note 241. These lawyers act at settlement conferences or as mediators. Parties can locate them on the Court's website, at <http://courts.phila.gov/pdf/cpcvcomprg/judgesprotemlist.pdf>.

251. Sheppard, *supra* note 241.

252. Commerce Case Order, *supra* note 239.

253. Lori Lichtman, *Herron Picks Three Judges as Supervisors*, LEGAL INTELLIGENCER, Jan. 22, 2001, at 1.

254. Danielle N. Rodier, *Attorneys Impressed with Commerce Court*, LEGAL INTELLIGENCER, Aug. 6, 2003, at 1 (quoting the Honorable Gene D. Cohen).

255. *See, e.g.*, Massachusetts Status Report, *supra* note 70, at 5 stating:

[B]y matching judges with appropriate expertise to litigation requiring that expertise, judicial resources may be appropriately targeted through the removal of otherwise time-consuming cases from the regular docket: as the ABA Ad Hoc Committee observed [about the New York Supreme

sent,²⁵⁶ the court has retained its commitment to the Commerce Program.²⁵⁷ The existence of “specialized courts” in Philadelphia, including a complex litigation court,²⁵⁸ predates the Commerce Program, reflecting the fact that specialization in Philadelphia’s Court of Common Pleas is beneficial and not a new phenomenon.

B. COMMERCE CASE MANAGEMENT PROGRAM JURISDICTION

Types of cases presumptively heard in the Commerce Program include, among others: intra-corporate disputes; disputes between businesses including but not limited to U.C.C. transactions, sales of businesses, sales of services to businesses, non-consumer bank or brokerage accounts, surety bonds, purchases or sales or leases of, or security interests in, commercial, real or personal property, and franchise agreements; trade secrets; non-compete agreements; business torts; intellectual property disputes; Pennsylvania Securities Act claims; derivative actions; class actions based on claims otherwise falling within these ten types, and consumer class actions other than personal injury and products liability claims; and corporate

Court’s Commercial Division], ‘the work of four generalist judges can be accomplished by three specialty business judges.’

Chanen, *supra* note 83, at 19 (first judge in Chicago’s specialized commercial litigation docket “contemplated naming the call the ‘rocket docket’ but then thought better. ‘This is not about speed and efficiency. . . . It’s about justice. The point of the calendar is to give substantial individual justice to individual cases.’”).

256. See, e.g., *Board Applauds Efforts of C.P.’s Commerce Program*, LEGAL INTELLIGENCER, Apr. 19, 2002, at 2; *Productivity Doesn’t Match Resources*, LEGAL INTELLIGENCER, Apr. 19, 2002, at 2. Such debate is not unique to Pennsylvania. See, e.g., Chris Mahoney, *The Jury is Still Out on Creating a Business Court*, BOSTON BUS J., May 19, 2000, available at <http://boston.bizjournals.com/boston/stories/2000/05/22/story8.html> (on debated issues prior to creation of Business Litigation Session in the Suffolk Superior Court, Massachusetts). As discussed below, not only was a pilot business program eventually established in Boston, that program has now been made permanent and expanded to other counties. See *infra* notes 273–310 and accompanying text.

257. Laurie Stewart, *Jones Appointed to Commerce Court*, LEGAL INTELLIGENCER, Sept. 16, 2002, at 1 (As stated by Supervising Judge William Manfredi, upon the appointment of Judge Darnell Jones to the Commerce Program, “I think we have three of our most competent and most experienced judges in commerce court, which reflects the commitment that [Administrative] Judge Fitzgerald and I have to the success of the court.”) The National Center for State Courts recently issued its final report of a study on all civil programs in Philadelphia’s Court of Common Pleas. The study, generally finding Philadelphia’s civil trial division “one of the finest and most successful urban trial courts in the country,” includes a discussion of developments in the Commerce Program, along with topics for the Program’s further study and refinement. The overall tenor of the report reflects a fundamentally successful program “operating very effectively,” with the desire to enhance it even further. See David C. Steelman & Richard Van Duizend, National Center for State Courts, *Civil Programs in the Philadelphia Court of Common Pleas*, at ii, xi–xiii, 51–55 (Sept. 30, 2003), available at <http://fjd.phila.gov/pdf/report/NSCS-Civil-Final-Report.pdf>.

258. In Philadelphia, there are numerous specialized trial level court programs including a separate docket for complex mass tort actions (including, e.g., asbestos, DES, latex glove, lead paint, breast implant, carpal tunnel, pseudo-psychiatric, bone screw litigation, among other mass torts), a docket created well before the Commerce Case Management Program. See The Honorable John W. Herron & The Honorable Allan L. Tereshko, *Complex Litigation Center Programs*, Philadelphia Court of Common Pleas, at <http://courts.phila.gov/pdf/civil2001/clc.pdf>. This is in addition to more typical specialization into Family Court, Orphan’s Court, and Civil and Criminal trial divisions.

trust matters.²⁵⁹ All such cases must involve disputes which exceed \$50,000; cases below that amount being subject to mandatory arbitration in the Court of Common Pleas (which arbitrations are subject to de novo appeal in the Court of Common Pleas, but not to the Commerce Program).²⁶⁰

The Commerce Program also hears declaratory judgment actions brought by insurers, and coverage disputes and bad faith claims brought by insureds where the dispute arises from a business or commercial insurance policy. In addition, the Commerce Program hears third-party indemnification claims against insurance companies where the subject insurance policy is a business or commercial policy and where the underlying dispute would otherwise be assigned to the Commerce Program, not including claims where the underlying dispute is principally a personal injury claim.²⁶¹ All of the above types of actions may involve individuals as well as businesses, if the criteria are met and the essential nature of the claim is a business dispute.²⁶²

The Commerce Program has case tracking criteria, which includes expedited, standard, and complex tracks.²⁶³ Expedited matters are cases with four or less litigants and the disputes at issue involve, e.g., enforcement of contracts for goods, insurance declaratory judgment actions, other contract actions, and landlord tenant actions.²⁶⁴ Standard track cases include matters with more than four litigants in the previously described cases, as well as cases with any number of litigants

259. See Appendix A, *infra* pp. 269–70. Until January 2004, almost all class actions were coming into the Commerce Program. Sheppard, *supra* note 241. Non-commercial class actions will now be assigned to a new class action program, with the Honorable Mark I. Bernstein heading the program. Melissa Nann, *Class Action in Philadelphia Court to be Reassigned*, LEGAL INTELLIGENCER, Dec. 18, 2003, at 3 (“All class actions currently are assigned to the Commerce Case Management Program, but starting next month, they will be handled by Judge Mark I. Bernstein, who will head a new class action team in the regular civil program.”). Class actions that would otherwise come within the subject matter of the Commerce Program will remain in that program. Interview by Lee Applebaum, Esquire, with the Honorable Mark I. Bernstein (June 8, 2004) (on file with authors). See also The Honorable James J. Fitzgerald III et al., First Judicial District. Pa. Court of Common Pleas Trial Division—Civil, *Supplemental Notice to Bar Re: Class Actions* (Dec. 18, 2003), at <http://courts.phila.gov/pdf/notices/2003/notice-09clsup-03.pdf> (all class action cases filed after January 1, 2004 to be assigned to Class Action Program, but “[a]ny cases which meet the criteria for inclusion in the Commerce Program shall be assigned thereto.”). At the same time, notice was given that after January 5, 2004, all major non-jury cases other than cases involving “Torts, Rent, Lease & Ejectment and Mortgage Foreclosure matters” would “be assigned to the Commerce Program for case management and disposition.” The Honorable James J. Fitzgerald III & The Honorable William J. Manfredi, First Judicial District Pa. Court of Common Pleas Trial Division—Civil, *Supplemental Notice to Bar Re: Non-Jury Program* (Dec. 18, 2003), at <http://courts.phila.gov/pdf/notices/2003/notice-09mnsup-03.pdf>.

260. See Appendix A, *infra* p. 271.

261. *Id.* at 270.

262. *Id.*

263. See In re: Commerce Case Management Program, Administrative Docket 02 of 2003, C.P., First Judicial District Pa., Apr. 29, 2003, at Exhibit D, Commerce Program Tracking Formula [hereinafter Tracking Formula], at <http://courts.phila.gov/pdf/regs/2003/cptad02-03.pdf>.

264. *Id.* at Exhibit F. The full list includes: contracts (goods) enforcement, insurance, declaratory judgment, subrogation action, mechanics lien, negotiable instruments, other contracts, replevin, foreclosure, garnishment (land), landlord/tenant actions, mechanics lien enforcement, real property (other), title to real property, rent (lease or ejectment), equity (no real estate or real estate), franchise disputes, confession of judgment, foreign judgment, petition to stay arbitration, and petition to vacate or modify arbitration awards. *Id.*

that include a purchase/sale of business or of business assets, bad faith, construction contracts, shareholder suits, fraud, securities law claims, surety bond cases, business torts, non-compete agreements, trade secrets, corporate trust affairs, and partnership disputes.²⁶⁵ Complex cases include intellectual property claims, accounting malpractice, legal malpractice, and other malpractice claims within the Program's parameters.²⁶⁶ Expedited cases are expected to be ready for trial in thirteen months, standard cases in eighteen months and complex cases in twenty-four months.²⁶⁷

The Commerce Program's webpage, within the Court of Common Pleas' website, has much of the basic information about the Commerce Program, including relevant forms and guidelines.²⁶⁸ In addition, there are readily accessible links to written opinions issued by the Program's judges, with summaries of each opinion available through one link, and an index of each opinion with basic descriptions on another.²⁶⁹ There is also a topic search function able to go through all of the opinions by counsel inputting search terms.²⁷⁰

As of July 4, 2004, there were over 435 opinions online for the guidance of the bar and their clients.²⁷¹ These written opinions provide an opportunity to evaluate potential claims and defenses. For example, in a court hearing a significant number of injunctive actions, this readily available guidance can save precious time in formulating an argument. Further, it provides counsel and their clients with pre-filing information about the likelihood of success, and whether pursuing the action, defending the claims or seeking settlement is the soundest course.²⁷²

VII. BUSINESS LITIGATION SESSION IN THE SUPERIOR COURT OF MASSACHUSETTS

In October 2000, Superior Court Chief Justice Suzanne DelVecchio established the Business Litigation Session of the Suffolk Superior Court as a two year pilot program.²⁷³ Under this program, "a single judge, experienced in litigating complex

265. *Id.*

266. *Id.*

267. *Id.* at Exhibit D.

268. The Philadelphia Courts, First Judicial District Pa. Court of Common Pleas Trial Division—Civil, Commerce Program, at <http://courts.phila.gov/common-pleas/trial/civil/commerce-program.html>.

269. *Id.*

270. *Id.*

271. The Philadelphia Courts, Commerce Court Opinions, at <http://courts.phila.gov/cgi-bin/opinions/comctsearch.cgi?dropdown=cptcvcom>.

272. On July 4, 2004 a search of the word "injunction" provided a response including seventeen opinions with that word in their topic summary. See Commerce Court Opinions, at <http://courts.phila.gov/cgi-bin/opinions/topicsearch.cgi?topic=injunction>.

273. The Honorable Allan Van Gestel, *Why a Business Litigation Session at Suffolk Superior Court*, 45 BOSTON BAR J. 14 (Nov.–Dec. 2001). This was the result of a five year process that began in the wake of the New York Commercial Division's creation. Massachusetts Status Report, *supra* note 70, at 4. At the time the pilot program was put into effect, the Superior Court already had experience in establishing specialized sessions. Interview with Honorable Suzanne V. DelVecchio, *Making A Business Court A Reality*, METROPOLITAN CORP. COUNS., N.E. ed., May 2003, at 47.

business cases” handles the case from beginning to end.²⁷⁴ The judge becomes involved early in case management, which includes attempting to set a firm trial date at the time of the Superior Court’s analogue to a federal Rule 16 conference.²⁷⁵ Jury trials are permitted, but are not normally selected by the parties.²⁷⁶

A. CASES HEARD IN THE BUSINESS LITIGATION SESSION

Inclusion of a case before the Business Litigation Session is discretionary,²⁷⁷ though some categories of cases are presumptively included.²⁷⁸ Cases that are presumptively or otherwise included within the Business Litigation Session’s jurisdiction involve, among other claims, governance and internal affairs of corporations, partnerships and joint ventures; shareholder derivative suits; intellectual property; trade secrets; non-compete agreements; banking; investment banking; financial advisers; brokerage firm matters; mutual and money market funds; anti-trust; trade regulation laws; unfair acts or practices involving businesses; lender-borrower dealings; professional malpractice claims brought by businesses; and businesses in dispute with government agencies.²⁷⁹ Also included are claims for breach of contract, breach of fiduciary duty, fraud, misrepresentation, and business torts.²⁸⁰ Violations involving businesses, such as unfair competition, are encompassed if they “have complex factual or legal issues oar [sic] are likely to require complex case management . . .” as are U.C.C. claims involving complex factual or legal issues and commercial claims involving insurance, construction, real estate and consumer matters, that similarly have complex factual or legal issues.²⁸¹

From October 2, 2000 through mid-September 2001, the Business Litigation Session’s first year, 309 cases were accepted.²⁸² At least seventy-eight of these cases were already in the system, meaning that approximately 230 new cases came in during the first year.²⁸³ One hundred and thirty-nine of that first set of cases were resolved in the first year, and nearly one hundred temporary restraining orders and preliminary injunctions were considered.²⁸⁴

The total number of cases accepted into the Business Litigation Session reached 610 by January 28, 2003.²⁸⁵ Filing frequency increased over time with approximately five to seven cases filed each week.²⁸⁶ Three hundred and seventy-four

274. Van Gestel, *supra* note 273, at 29–30.

275. *Id.*

276. *Id.* at 30.

277. *Id.*

278. Notice to Bar, *Business Litigation Session Suffolk Superior Court*, 29 MASS. LAW. WKLY. 268 (Oct. 2, 2000) [hereinafter *Massachusetts Order*]. See Appendix A, *infra* pp. 241–42.

279. Van Gestel, *supra* note 273, at 30.

280. *Massachusetts Order*, *supra* note 278.

281. *Id.*

282. Van Gestel, *supra* note 273, at 31.

283. *Id.* See also *Massachusetts Status Report*, *supra* note 70, at 12.

284. Van Gestel, *supra* note 273, at 31.

285. *Massachusetts Status Report*, *supra* note 70, at 12.

286. *Id.*

cases reached disposition during that time; approximately half by settlement and the remainder by trial, dispositive motion or removal.²⁸⁷ “The case load that other [Superior Court] sessions would have had has been significantly reduced because the cases that go to the Business Litigation Session do not go to the other regular sessions of the court.”²⁸⁸

According to information collected by the Business Litigation Session Resource Committee, 853 cases were accepted into the BLS from its inception through November 2003.²⁸⁹ A search of the Social Law Library database²⁹⁰ reveals that Judges Allan van Gestel and Margot Botsford have issued over 300 written decisions since the Session’s inception in 2000.²⁹¹ Judge van Gestel has been assigned to the BLS full time since it began while Judge Botsford has been assigned part-time to the BLS since late 2002.²⁹²

Cases in the Business Litigation Session “generally appear to be consistently more complex” than in other Superior Court sessions.²⁹³ Approximately 30 percent of the cases primarily involve contract disputes, 13 percent non-compete agreements, 13 percent shareholder disputes, 11 percent commercial disputes, 11 percent business disputes, 10 percent partnership disputes, 9 percent employment disputes, 9 percent real estate or landlord tenant disputes, and 7 percent construction contract actions.²⁹⁴

B. RESPONSE TO THE BUSINESS LITIGATION SESSION

In Boston’s early experience with the Business Litigation Session, the court has received high marks for both “fairness and efficiency.”²⁹⁵ The same article cites the satisfaction of a single business that both won and lost non-compete cases in the Business Litigation Session.²⁹⁶ This positive attitude was borne out by a survey conducted as part of a Status Report prepared by the Business Litigation Session Status Resource Committee, which was issued in February of 2003.²⁹⁷

Among other things, the survey showed 88 percent of the lawyers responding were extremely or very satisfied with the Business Litigation Session overall; 83 percent indicated that the session improved legal services to clients; 94 percent were extremely or very satisfied with the judges;²⁹⁸ 58 percent found their expe-

287. *Id.*

288. *Focus On New England—Business Litigation Session; A Specially Suited Forum For Business Cases*, METROPOLITAN CORP. COUNS., N.E. ed., May 2003, at 50 (quoting Gael Mahony, Esquire, Co-Chair of the Business Litigation Resource Committee).

289. Email from Sarah Herlihy, Esquire, to Beth I. Z. Boland, co-chair of BLS Resource Committee (May 10, 2004) [hereinafter Herlihy-Boland email] (on file with authors).

290. This is a subscription service via www.sociallaw.com.

291. Herlihy-Boland email, *supra* note 289.

292. *Id.*

293. Massachusetts Status Report, *supra* note 70, at 12.

294. *Id.* at 15. As set forth in Appendix D, “[c]ases may be counted in more than one category.”

295. *Verdict: Business Court has Made Strong Case for Itself*, BOSTON BUS. J., Aug. 2, 2002, at 1.

296. *Id.*

297. Massachusetts Status Report, *supra* note 70, at 13–14 and Appendix E.

298. The Status Report cited the experience and wisdom of Presiding Justice Allan van Gestel, Judge Margot Botsford, Judge Nonnie Burnes and Judge Gordon Doefer as meriting much of the credit for the Session’s apparent success. *Id.* at 3.

rience more favorable than with private ADR, with 60 percent stating they would recommend the Business Litigation Session over ADR to their clients; and 97 percent stating that they would recommend the business session to other colleagues and clients.²⁹⁹ The results were consistent regardless of firm size and whether the attorneys represented individuals or corporations.³⁰⁰

Significantly, 95 percent of those responding to the Business Litigation Survey stated that the Business Litigation Session should become permanent; and 89 percent recommended expansion to other Massachusetts counties.³⁰¹ Shortly after the Status Report, Chief Justice DelVecchio issued an Administrative Directive making the Suffolk Business Litigation Session permanent and expanding the session on a pilot basis to three other counties.³⁰² Case selection in the Business Litigation Session will remain discretionary and the presumptive category of cases will remain unchanged, with “complexity and the need for case management” the principal measure for acceptance.³⁰³ One of Chief Justice DelVecchio’s accomplishments is that the Business Litigation Session has not created additional budgetary expenses.³⁰⁴

The Status Report adduces some of the historical causes for creating the Business Litigation Session.³⁰⁵ Among these was the creation and success of business courts elsewhere, including the New York County Commercial Division’s success,³⁰⁶ and the competition such courts presented. In addition, Massachusetts’ courts had received harsh rankings in a U.S. Chamber of Commerce Survey.³⁰⁷ The concern tied into the general perception in the late 1990s that businesses were fleeing Massachusetts’ state courts because of a belief that generalized courts could not handle specialized matters, e.g., derivative suits or trade secrets cases, and because “the time required from filing to disposition was taking longer than the parties needed to resolve their disputes.”³⁰⁸ Justice Allan Van Gestel, the Busi-

299. *Id.* at 13–14.

300. *Id.* at 14.

301. *Id.* at 13–14.

302. Super. Ct. Bus. Litig. Session Extension and Expanded Venue, Administrative Directive No. 03-01, Feb. 12, 2003 (on file with *The Business Lawyer*, University of Maryland School of Law). Sheri Qualters, *Business Court to Expand to Other Counties*, BOSTON BUS. J., Feb. 14, 2003, available at <http://boston.biz.journals.com/boston/stories/2003/02/17/story4.html?t=printable>.

303. *Id.*

304. *Focus On New England—Business Litigation Session; A Very Innovative Way To Handle Complex Commercial Cases*, METROPOLITAN CORP. COUNS., N.E. ed., May 2003, at 49 (quoting Beth I. Z. Boland, Esquire, Co-Chair of the Business Litigation Session Resource Committee as follows on that point: “The key point is that the business court did not cost a dime, it is a very innovative way to handle complex, commercial cases and it has been and is a smashing success. The Chief Justice has set up an independent committee to make sure the session is working well and trying to change it if it isn’t—an example of the judiciary doing an outstanding job of being innovative, cost effective and conscious of the good that can come from the judiciary taking responsibility for managing itself.”). Ms. Boland’s co-chair, Gael Mahony, Esquire, has described it as “cost neutral.” *Focus On New England—Business Litigation Session; A Specially Suited Forum For Business Cases*, METROPOLITAN CORP. COUNS., N.E. ed., May 2003, at 50.

305. Massachusetts Status Report, *supra* note 70, at 4–8.

306. *Id.*

307. *Id.*

308. *Focus On New England—Business Litigation Session; Roundtable: Corporate Counsel Applaud Session’s Success*, THE METROPOLITAN CORP. COUNS., N.E. ed., May 2003, at 56 (quoting Andrew Grainger, President of the New England Legal Foundation).

ness Litigation Session's first full time, as well as presiding, judge addressed some of these issues in a 2001 piece on the need for a business court.³⁰⁹ His article is of particular interest because it combines a sense of history and present necessity in describing the need for a business court as a matter of practical dignity.³¹⁰

VIII. NEVADA BUSINESS COURTS IN THE SECOND AND EIGHTH JUDICIAL DISTRICT COURTS

In late 2000, Nevada's Supreme Court approved local rules creating business courts in Nevada's Second and Eighth Judicial Districts.³¹¹ Rules creating the business court in the Second Judicial District, sitting in Reno, became effective as of November 20, 2000.³¹² Rules creating the business court in the Eighth Judicial District, sitting in Las Vegas, became effective January 1, 2001.³¹³

A. GOALS OF NEVADA'S BUSINESS COURTS

The Business Court's focus is on complex civil business cases.³¹⁴ A clear goal of the Business Court is expeditious resolution of cases, and minimizing the ongoing financial exposure that would otherwise occur through protracted litigation.³¹⁵ The court provides the benefits of close case management beginning with early case conferencing to address settlement, and accelerated discovery and motions. Again, the focus is on resolving disputes as early as possible and in helping the litigants avoid business disruption.³¹⁶ The Business Court thus provides another vehicle for dispute resolution, where the parties might otherwise choose private mediation or arbitration.³¹⁷

B. CREATION OF NEVADA'S BUSINESS COURTS

The process leading to the Business Court's implementation began with the creation of a legislative subcommittee to encourage business development in Nevada, and the creation of the Sub-subcommittee for the Examination of the Busi-

309. Van Gestel, *supra* note 273.

310. *Id.* at 14-15. "Should Massachusetts, a commercial and business leader since the 18th century, when sailing ships, laden with spices and tea from Java and Sumatra and other treasures from the Orient, first docked at Salem, and now a major player in high technology, sophisticated finance, medical care, insurance, and the economic aspects of higher education, be left to bask in the faded glories of its past in this emerging area of judicial activity? If so, to what end?" *Id.* at 14.

311. Letter from The Honorable Brent Adams, to Mitchell L. Bach, Esquire (June 19, 2003) (on file with authors) [hereinafter Judge Adams Letter]. Judge Adams is the presiding judge of the Business Court in Nevada's Second Judicial District in Reno, Washoe County.

312. Nev.W.D.C.R. 2.1. See Appendix A, *infra* pp. 246-47.

313. Nev. E.J.D.C.R. 1.61. See Appendix A, *infra* pp. 245-46.

314. Letter from The Honorable Gene T. Porter, to Mitchell L. Bach, Esquire (Sept. 19, 2003) [hereinafter Judge Porter Letter] (on file with authors).

315. *Id.*

316. Judge Adams Letter, *supra* note 311.

317. Judge Porter Letter, *supra* note 314.

ness Court and Business Laws.³¹⁸ As stated in the title, Nevada's Legislature and Judiciary perceived a business court's creation as part of an effort to promote business in the state by improving the justice system.

Nevada had a natural resource on the subject of business courts, Professor Jeffrey W. Stempel, who addressed the first meeting of the Sub-subcommittee on January 7, 2000.³¹⁹ Among other things, Professor Stempel is reported as stating that specialized courts "have become the fabric in the way business and modern judicial systems are handled[; and that] [t]his is a natural consequence of the division of labor generally seen in the practice of law and even government."³²⁰ He stated that limited experience with business courts has been very positive, mentioning the Delaware Court of Chancery, North Carolina's Business Court, and New York's Commercial Division (though he had no study to empirically support that conclusion at the time).³²¹ On the issue of the court's jurisdiction, he indicated that the court should go beyond a solely equitable jurisdiction and could include contract disputes, securities fraud and corporate governance matters.³²² He added that a wider jurisdiction should be more attractive to business.³²³

Nevada's Chief Justice Robert E. Rose similarly thought that the New York model would be better within Nevada's court system.³²⁴ Chief Justice Rose chaired the Supreme Court's Business Court Task Force, which suggested rules creating business courts within the Second and Eighth Judicial District Courts.³²⁵ The proposed types of cases setting the court's jurisdiction were adopted virtually as written; however, potential additions proposed by some of the judiciary did not become part of the final rules.³²⁶

C. CASES IN NEVADA'S BUSINESS COURTS

The courts were created by amending the individual District Court rules. Washoe County's Rules 2.1(a-c), governing the Business Court in Reno, provide

318. Sub-Subcommittee for the Examination of the Business Court and Business Laws, *Minutes of the Meeting of the Legislative Commission Subcommittee to Study Methods to Encourage Corporations and Other Business Entities to Organize and Conduct Business in This State* (Jan. 7, 2000) [hereinafter Nevada January Minutes], at <http://www.leg.state.nv.us/70th/Interim/Studies/Business/Minutes/IM-Business-20000107-2204.html>; see also John G. Edwards, *Committee Aims to Lure Firms*, LAS VEGAS REV. J., Nov. 28, 1999.

319. Professor Stempel teaches at the William S. Boyd School of Law at the University of Nevada at Las Vegas and prior to January 2000 had written considerably on the topic and related areas. See Jeffrey W. Stempel, *Two Cheers for Specialization*, 61 BROOK. L. REV. 67 (1995); Jeffrey W. Stempel, *A More Complete Look at Complexity*, 40 ARIZ. L. REV. 781 (1998); Jeffrey W. Stempel, *Contracting Access to the Courts: Myth or Reality? Boon or Bane?*, 40 ARIZ. L. REV. 965 (1998).

320. Nevada January Minutes, *supra* note 318.

321. *Id.*

322. *Id.*

323. *Id.*

324. *Id.*

325. Legislative Commission's Subcommittee to Encourage Corporations and Other Business Entities to Organize and Conduct Business in this State, *Overview of Business Court Proposal, Work Session Document*, June 30, 2000.

326. The language that did not make it into the final rule stated: "Complex civil cases that include the following: complaints primarily alleging professional negligence, primarily alleging products liability, constructional defects, public service commission matters, and civil trials that will last five weeks or more." *Id.*

that cases come within the business docket if the matters at issue concern corporate governance and shareholder derivative suits; trade marks or names; statutory claims for trade secrets; securities actions; deceptive trade practices or investment securities; or “any dispute among business entities if the presiding judge of the business court docket determines that the case would benefit from enhanced case management.”³²⁷ Rules 1.61(a)(1)–(3) in the Las Vegas Court are virtually the same, though Rule 1.61(a)(2) expressly includes U.C.C. claims, whereas Rule 2.1(b) does not.³²⁸

Like Washoe County Rule 2.1(b), the Eighth Judicial District’s Rule 1.61(a)(3) includes within the Las Vegas Business Court’s jurisdiction: “Disputes between two business entities where the court determines that the case would benefit from enhanced case management.”³²⁹ Rules 2.1.1(c) and 1.61(a)(3) thus broaden the range of potential case types. The practical result of this type of rule is to substantially enlarge the nature of cases that are prosecuted in the Business Court.³³⁰ As of June 7, 2003, a detail summarizing pending cases in the Reno court shows the following types of cases: anti-trust, complex class action, building and construction, construction defect, commercial instrument, contracts, defamation, employment contract, fraud, guarantee, liens, landlord/tenant, sale contract, specific performance, stockholder suits (the largest number of cases by type), U.C.C., and unfair competition.³³¹ Las Vegas’ Business Court has heard such matters as trademark actions, shareholder disputes and business to business litigation.³³²

Initially, the Business courts were not expected to have full calendars so the business judges could also hear non-business cases.³³³ In 2001, Las Vegas’ Business Court had 177 filings and thirty-three dispositions.³³⁴ In 2002, there were 155 filings and eighty-six dispositions; and through September 19, 2003 there were 144 filings and ninety-eight dispositions.³³⁵ Through the first two years and

327. NEV. W.D.C.R. 2.1. See Appendix A, *infra* pp. 246–47. The Civil Cover sheet for cases filed in Reno includes a separate section for requesting a Business Court designation, which includes categories for certain statutory harms involving, e.g., commodities, securities, investments, deceptive trade practices, and trademarks. It also includes a category of enhanced case management for business disputes and a general category “Other Business Court Matters.” A party requesting the Business Court must not only check one of these designations, but must also separately check off one of the case types found earlier in the form.

328. NEV. E.J. D.C.R. 1.61; see also Appendix A, *infra* pp. 245–46.

329. Appendix A, *infra* p. 246.

330. Judge Adams Letter, *supra* note 311. Thus, it is certainly arguable that even if Rule 1.61(a)(2) does not expressly include reference to the U.C.C., a U.C.C. case could be designated under Rule 1.61(a)(3); and in fact U.C.C. cases have been heard in Reno’s business court, as described immediately below.

331. Detailed Pending Case Report for Reopened Cases as of June 7, 2003, provided by the Honorable Brent Adams (on file with authors) [hereinafter Detailed Case Report].

332. Judge Porter Letter, *supra* note 314.

333. Sub-Subcommittee for the Examination of the Business Court and Business Laws, *Presentation Regarding the Supreme Court’s Task Force Examining the Business Court*, Minutes of the Meeting of the Legislative Commission’s Subcommittee to Encourage Corporations and Other Businesses to Organize and Conduct Business in this State (May 30, 2000).

334. Eighth Judicial District Court, Business Court Summary, provided to the authors by the Honorable Gene T. Porter (on file with authors).

335. *Id.*

almost nine months of the Las Vegas Business Court, there were 476 cases filed and 217 cases reaching disposition; the rate of disposition increasing significantly over time. As of June 7, 2003, there were fifty-seven open Business Court cases in the Second Judicial District (Reno), with twelve of these being shareholder derivative suits.³³⁶

The experience among attorneys appears positive. Reno's Business Court Judge is described as knowledgeable and prepared, and the general view is likely that the results in Reno's Business Court cases have been expeditious and handled knowledgeably.³³⁷ Attorneys are using the program and not seeking to somehow opt out.³³⁸ In his 2003 address to Nevada's legislature, the Chief Justice observed that the institution of the Business Court in Washoe County (Reno) has been one factor in significant delay reduction.³³⁹

In Las Vegas, attorneys who often litigate business and commercial matters have been very pleased with the new Business Court and find that the consistency created in having a judge focused on business litigation provides them with a comfortable alternative to federal court.³⁴⁰ This consistency arises from having a judge who is continually developing in experience with commercial and business cases, as well as developing in the practice of handling complex litigation.³⁴¹ As in Reno, the judge was described as thorough, prepared, bright, and respectful.³⁴²

Under Nevada's Rules, counsel initially choose the business track,³⁴³ and that choice typically stands.³⁴⁴ Either party can have the case assigned to the Business Court.³⁴⁵ In determining whether to request that a case be heard by the Business

336. Detailed Case Report, *supra* note 331.

337. Telephone interview with John P. Fowler, Esquire (Sept. 4, 2003) (on file with authors). Mr. Fowler is Chairperson of the Business Law Section of the Nevada Bar Association, practicing in Reno, Nevada with Woodburn & Wedge. He was an Advisory Member of Subcommittee to Encourage Corporations and Other Business Entities to Organize and Conduct Business in Nevada during the period of the Legislative inquiry into whether establishing a business court should be part of that Subcommittee's mandate. *See, e.g.*, Nevada January Minutes, *supra* note 318.

338. *Id.*

339. Chief Justice Agosti, *Chief Justice Agosti Addresses Nevada Legislature*, 11 NEV. LAW. 16 (Apr. 2003).

340. Telephone interview with Thomas F. Kummer, Esquire, Kummer Kaempfer Bonner & Renshaw (Sept. 9, 2003) (on file with authors) [hereinafter Kummer Interview]. Mr. Kummer has been litigating cases in Las Vegas for over thirty years; including business and commercial cases. He served for eight years on the Ethics and Professional Responsibility Committee of the State Bar, three years as chair; and he has been appointed by Nevada's Supreme Court to act as a Supreme Court Settlement Conference Judge.

341. *Id.*

342. *Id.*

343. EIGHTH JUD. DIST. R. 1.61(c) provides that "[e]ither party in a case may file a request in the pleadings that a case be assigned as a business matter. If the request is made by the plaintiff, the case will automatically be assigned to a full-time civil judge assigned to business matters." Reno's Rule 2.1.3 similarly provides "A party in an action assigned to another department of the court may request that the action be transferred to the business court docket. Upon filing of such a request, the clerk shall transfer the case file to the presiding judge of the business court docket who shall thereupon determine whether to assume jurisdiction of the case." SECOND. JUD. DIST. R. 2.1.3.

344. Kummer Interview, *supra* note 340.

345. Judge Porter Letter, *supra* note 314.

Court, attorneys look to what sorts of matters are excluded by Rule 1.61 from the Business Court's jurisdiction, as much as to what the Rule includes.³⁴⁶

A plaintiff's request for a hearing is automatically assigned to a Business Court judge, and a defendant's suggestion that the case should be in the Business Court results in the random assignment to a Business Court judge to make that determination.³⁴⁷ The final decision, however, does ultimately rest with the court.³⁴⁸ By including only appropriate Business Court cases, the court maintains its jurisdictional objective; additionally permitting the judges to focus upon business law, to apply it in the cases before them and to develop a more consistent body of case law through their opinions in that focused substantive region of the law.³⁴⁹

IX. RHODE ISLAND SUPERIOR COURT BUSINESS CALENDAR

On April 17, 2001, through administrative order of the Presiding Justice of the Rhode Island Superior Court, a Business Calendar was created for Providence and Bristol Counties.³⁵⁰ Shortly thereafter, Rhode Island's Chief Justice stated: "Thanks to the leadership of Presiding Justice Joseph Rodgers, the Providence Superior Court now conducts a Business Calendar under the direction of Judge Michael Silverstein, which seeks to reinsure that such legal matters that have an effect on jobs and the economy are dealt with quickly and efficiently."³⁵¹

Matters appropriate for Business Calendar assignment include breach of contract, breach of fiduciary duty, fraud, misrepresentation, business tort, statutory violations arising out of business dealings or transactions, U.C.C. transactions, complicated commercial real property transactions, shareholder derivative actions, commercial class actions, commercial bank transactions, matters going to the internal affairs or governance of businesses, business insolvencies and receiv-

346. Kummer Interview, *supra* note 340.

347. Judge Porter Letter, *supra* note 314.

348. *Id.* See EIGHTH JUD. DIST. R. 1.61(d).

The court shall decide whether a case is or is not a business matter and that decision shall not be appealable by any appeal nor reviewable upon any writ; any matters not deemed a business matter shall be randomly reassigned if it was originally assigned to the business court. If a case was remanded to the business court for determination of whether it would be handled as a business court matter and the business court deems it not to be a business court matter, that case will be remanded back to the department to which it was originally assigned.

Appendix A, *infra* p. 246. See also SECOND JUD. DIST. R. 2.1.3.

A party in an action assigned to another department of the court may request that the action be transferred to the business court docket. Upon filing of such a request, the clerk shall transfer the case file to the presiding judge of the business court docket who shall thereupon determine whether to assume jurisdiction of the case. The decision of the presiding judge of the business court docket to accept or decline jurisdiction of the action is final, and is not appealable nor reviewable upon any petition for extraordinary relief.

Appendix A, *infra* p. 247.

349. Judge Porter Letter, *supra* note 314.

350. Administrative Order No. 2001-9, State of Rhode Island and Providence Plantations, Apr. 17, 2001 [hereinafter Rhode Island Order]. See Appendix A, *infra* pp. 271-72.

351. Remarks of Chief Justice Frank J. Williams Supreme Court of Rhode Island to the Rhode Island Bar Association Annual Meeting June 8, 2001, 49 R.I. BAR J. 5 (2001).

erships.³⁵² “Simple collection matters, declaratory judgment proceedings with respect to insurance coverage, confirmation or vacation of arbitration awards, and general landlord and tenant issues shall not be assigned to the Business Calendar.”³⁵³

No matter can be finally assigned without the agreement of the Business Calendar Justice.³⁵⁴ There is no requirement that the case be complex, but the cases on the Business Calendar tend to be more complicated.³⁵⁵ In the usual Superior Court action, the same case could have a different judge for motions, special causes such as TROs and for trial; whereas there is a single judge for all matters on the Business Calendar.³⁵⁶

In line with the goal of expeditious treatment of cases, the Business Calendar Justice can require that the parties utilize non-binding mediation.³⁵⁷ The Business Calendar’s Case Opening Sheet includes questions as to whether the parties have made efforts at mediation, arbitration or other dispute resolution mechanism.³⁵⁸ Justice Silverstein has referred cases to attorneys for mediation.³⁵⁹ He has also referred mediation matters to accountants and retired business people who may be particularly suited to helping the parties resolve their differences.³⁶⁰ He has found some substantial success in using these non-lawyers in the proper case, e.g., in a shareholder valuation dispute.³⁶¹

As of July 3, 2003, there had been a total of 440 business calendar cases, of which 261 remained pending, with 179 reaching disposition.³⁶² Other than in-

352. Rhode Island Order, *supra* note 350. This last category reflects a unique aspect of Rhode Island law concerning state court insolvency proceedings, all of which go on the Business Calendar. Telephone interview with Judge Michael A. Silverstein (June 26, 2003) (on file with authors) [hereinafter Judge Silverstein Interview].

Rhode Island’s Superior Court receivership proceeding has experienced remarkable growth, and more importantly, unquestioned success in the last few years. The receivership proceeding . . . has evolved into a flexible, legal mechanism by which a stockholder and/or creditor may preserve the assets of a troubled business, including the business’ going concern value, for the benefit of all of the company’s creditors and equity holders.

Richard L. Gemma, *Rhode Island Superior Court Receiverships—Opportunities & Recent Developments*, 51 R.I. BAR J. 25 (2003).

As lawyers have recognized the utility of the receivership proceeding, the Superior Court has recognized the need to expand its mentoring program for prospective receivers . . . All receiverships in Providence County fall under the auspices of the Providence Superior Court’s business calendar. . . . Recently, the Honorable Superior Court Judge Michael A. Silverstein has reenergized the receivership mentor program through the business calendar of the Providence Superior Court.

Id.

353. Rhode Island Order, *supra* note 350.

354. *Id.* This role has been served by the Honorable Michael A. Silverstein since the Business Calendar’s inception. Judge Silverstein meets with counsel to determine placement on the Calendar. Judge Silverstein Interview, *supra* note 352.

355. Judge Silverstein Interview, *supra* note 352.

356. *Id.*

357. *Id.*

358. State of Rhode Island Superior Court, Business Calendar Case Opening Sheet (on file with *The Business Lawyer*, University of Maryland School of Law).

359. Judge Silverstein Interview, *supra* note 352.

360. *Id.*

361. *Id.*

362. State of Rhode Island and Providence Plantations, Rhode Island Judicial Systems and Sciences, Business Cases by Case Type (July 3, 2003), provided by the Honorable Michael A. Silverstein (on file with authors).

solvency matters, there were sixty-five filings between June 1, 2001 and December 31, 2001; there were eighty-six new filings in 2002 and thirty-three new filings between January 1, 2003 through July 3, 2003 during 2003.³⁶³

From the Business Calendar's inception through July 3, 2003, there had been 160 business insolvencies and receiverships on the Business Calendar, of which seventy-two were pending at the time the Calendar began operation, and seventy-six of which have reached disposition.³⁶⁴ There were 176 breach of contract cases during that time, forty-nine of which were pending and sixty-two of which have reached disposition. There were fifteen business organizations matters, three of which were pending and seven of which have reached disposition; seven commercial bank transactions, three of which were pending; five commercial class actions, three of which were pending and three of which have reached disposition; twenty commercial real property cases, twelve of which were pending and five having reached disposition; forty-two other business actions, twenty of which were pending and twenty of which have reached disposition; three in the category of other civil actions; two shareholder derivative actions, one of which has reached disposition; and ten U.C.C. cases, four of which were pending at the time of the Business Calendar's inception, five having reached disposition.³⁶⁵

X. MARYLAND'S CIRCUIT COURT BUSINESS AND TECHNOLOGY CASE MANAGEMENT PROGRAM

A. THE CREATION OF MARYLAND'S BUSINESS AND TECHNOLOGY CASE MANAGEMENT PROGRAM

Through legislation, Maryland's General Assembly created the Maryland Business and Technology Task Force "to consider the feasibility of establishing a specialized court function within Maryland's circuit courts to adjudicate business and technology disputes."³⁶⁶ The Task Force included members of the judiciary, state house and senate, bar association, business community, and academic community.³⁶⁷ In describing the background for its creation, the Task Force focused on the rapid and intense growth of cutting edge technologies as making up a vital part of Maryland's economy. Creating a business and technology program was part of an effort to overcome the perception that Maryland was anti-business, in the hope of encouraging technology companies to locate in Maryland.³⁶⁸

363. *Id.*

364. *Id.*

365. *Id.*

366. Maryland Task Force Report, *supra* note 71, at 1. This Report was submitted to Chief Judge Robert M. Bell of Maryland's Court of Appeals on December 1, 2000. Final Report, Implementation Committee, Conference of Circuit Judges, *Maryland Business and Technology Case Management Program*, at 1 (Dec. 1, 2000) [hereinafter Maryland Implementation Report]. The Court of Appeals is Maryland's highest court. Her trial courts of general jurisdiction are the circuit courts. There are eight circuit courts covering Maryland's twenty-three counties and Baltimore City. See Maryland Circuit Courts, at <http://www.mdarchives.state.md.us/msa/mdmanual/31cc/html/cc.html>.

367. Maryland Task Force Report, *supra* note 71, at 1.

368. *Id.*; see also Maryland State Bar Association, *Issue: Business and Technology Court*, 2003 State Legislative Program, at 92 ("A business court would make Maryland a more attractive state for resident businesses to stay and for corporations in other states and countries to relocate.") (on file with *The Business Lawyer*, University of Maryland School of Law).

The Task Force's objective was to consider the feasibility of not simply creating a specialized court, but of establishing "a specialized court function to effectively and efficiently administer business and technology disputes."³⁶⁹ Maryland observed a move towards specialized business courts in other states that improved efficiency and helped overcome perceptions that business cases were unsatisfactorily handled; the Task Force recognized that the additional concept of a technology court "to specialize in the administration of disputes involving complex technology issues" would be something new.³⁷⁰

Though the Task Force was a legislative creation, implementing the proposals for this new court function was up to Maryland's highest court, the Court of Appeals.³⁷¹ Thus, the Business and Technology Program within the circuit courts was ultimately implemented via the promulgation of court rules. The Task Force specifically recommended the creation of a state-wide Business and Technology Case Management Program in the existing circuit courts, rather than the creation of a separate Business and Technology Division in the circuit court.³⁷² An Implementation Committee was formed consisting of one judge from each of Maryland's judicial circuits, which in turn established working groups to study and develop the different aspects of creating the Business and Technology Program.³⁷³

The Implementation Committee developed what is now Maryland Rule 16-205, establishing the Business and Technology Case Management Program, with language uniform to each Circuit Court.³⁷⁴ In addition, there were detailed recommendations on case management, judicial education, ADR (including standards, education, training, and compensation), and the extensive use of technology in the program's operation.³⁷⁵

B. CASES HEARD IN THE BUSINESS AND TECHNOLOGY CASE MANAGEMENT PROGRAM

Maryland Rule 16-205 does not provide a specific list of cases by type in determining what cases come within the Business and Technology Court Management Program purview.³⁷⁶ The assigning judge's goal, per Rule 16-205(c), is to determine whether the action presents "commercial or technological issues of such a complex or novel nature that specialized treatment is likely to improve the administration of justice."³⁷⁷ This comports with the recommendation of the

369. Maryland Task Force Report, *supra* note 71, at 2.

370. Judge Steven I. Platt, Vice-Chairman, Business and Technology Task Force, *Remarks on Business and Technology Court Task Force*, Nov. 16, 2000, at 5 [hereinafter Judge Platt Remarks].

371. *Id.* at 3; Maryland Implementation Report, *supra* note 366, at 1.

372. Judge Platt Remarks, *supra* note 370, at 7–8.

373. Maryland Implementation Report, *supra* note 362, at 1–2. This ultimately included over 150 people. *Id.*

374. *Id.* at 1–2.

375. *See generally id.*

376. Maryland's Rule includes some language taken from North Carolina's business court rules. *See* Court of Appeals Standing Committee on Rules of Practice and Procedure, *Minutes of Meeting of Rules Committee*, Oct. 2, 2001, at 16–17 [hereinafter October Minutes].

377. *Id.* at 14.

Maryland Task Force that the court be “flexible” in assigning cases.³⁷⁸ The language of Rule 16-205(c) includes a seven factor list designed to measure the entire nature of a case in determining suitability for inclusion in the Business and Technology Program.³⁷⁹ The judges look to substantive legal issues (“whether business or technology issues predominate over other issues presented in the action”), and case management and complexity issues (“the anticipated nature and extent of pretrial discovery and motions, . . . the degree of novelty and complexity of the factual and legal issues presented, . . . and . . . the willingness of the parties to participate in ADR procedures.”)³⁸⁰ The nature of the relief requested is also considered.³⁸¹

The Maryland Task Force Report had recommended that certain types of cases be presumptively included or excluded from the new court.³⁸² Cases principally focusing on the following areas, among others, would have been presumptively included under the Task Force Report: technology development; computer software agreement disputes; Internet disputes; technology and biotechnology licensing; internal business affairs; breach of contract and fraud in relation to business dealings; shareholder derivative suits and commercial class actions; commercial bank transactions; declaratory judgment actions involving insurers; trade secret and non-compete clauses; business torts; violations of Maryland’s Trade Secret or Unfair and Deceptive Trade Practices Act; commercial real property disputes; professional malpractice claims; state law anti-trust violations; and securities law claims.³⁸³

378. Maryland Task Force Report, *supra* note 71, at 8.

379. Md. R. 16-205(c) provides in part that a case may be assigned to the Program after a judicial determination “that the action presents commercial or technological issues of such a complex or novel nature that specialized treatment is likely to improve the administration of justice.” That Rule includes:

[f]actors that the judge may consider in making the determination[which] include: (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.

Id.

380. *Id.*

381. The Maryland Task Force Report states that the “Program should be reserved for cases where there is a substantial amount in controversy.” Maryland Task Force Report, *supra* note 71, at 8. The draft version of that Report stated that in cases seeking monetary relief only, the amount sought should exceed \$75,000, but the final report set the figure at \$50,000. In the Rule as finally promulgated, there is no dollar minimum. This “nature of relief” factor apparently includes whether the plaintiff has asked for a jury. October Minutes, *supra* note 376, at 19.

382. Maryland Task Force Report, *supra* note 71, at 8. The Implementation Committee ultimately did not find this format workable. Telephone interview with the Honorable Steven I. Platt, Maryland Seventh Circuit Court (Sept. 8, 2003) (on file with authors) [hereinafter Judge Platt Interview]. Judge Platt was the Task Force vice-chair, Implementation Committee chair and is currently head of the Designated Judges Committee which includes Program judges from across the state.

383. In total, the Task Force list included fifteen categories. During the early stages of the study process, “[t]he list of what is and is not included was debated heavily and is fairly broad. . . . [T]he Implementation committee felt that the more specific criteria in the plan should be uniform throughout the State. Standards include what cases are and are not admitted, but administrative judges should not be locked in.” October Minutes, *supra* note 376, at 22.

These presumptive and exclusive lists, however, were not included in the final rule; and they are not officially part of the measure for accepting or rejecting cases into the Business and Technology Program.³⁸⁴ As set forth above, Maryland's new rule requires continuing judicial education.³⁸⁵ The judicial education requirements provide a detailed list of specific areas for judicial study. While this list is not set out as a jurisdictional statement, it does indicate at least some types of cases that will likely be heard, since they are part of the subject matter of the judicial education program.

The judicial education subject areas in the Implementation Report include, among others: the forms of business organization; piercing the corporate veil; funding and capitalization; shareholder distribution; director and officer liability; derivative suits; shareholder and director inspection rights; special issues in closely held corporations; mergers, buyouts, takeover, spin-outs; non-compete agreements; non-solicitation and confidentiality agreements; business valuations; rights of majority and minority business owners; taxation; antitrust; duties of officers, directors, or managers; software design and manufacture; Internet; economics of software networks and markets; biotechnology; telecommunications; electric power; intellectual property law; the Maryland Computer Information Transactions Act; the Maryland Electronic Transactions Act; and the Maryland Commercial Code.³⁸⁶

The Business and Technology Program is a part of Maryland's circuit courts throughout the state, and the judges in that track meet quarterly.³⁸⁷ Among other things, they discuss the criteria for accepting or rejecting cases from the Program and seek consistency in application.³⁸⁸ Judge Steven I. Platt, Chair of Maryland's Designated Judges Committee, and Supervisory Judge for the Program in Prince George's County, had yet to hear any protest on a case being accepted or rejected in the Program through the Program's first nine months.³⁸⁹

Fulfilling one Task Force goal, the Business and Technology Case Management Program has a website.³⁹⁰ The publication of informed and consistent opinions,

384. Judge Platt Interview, *supra* note 382. Speaking as a panelist during the November 7, 2003 Symposium, "Taking Care of Business: Business & Technology Courts in the Twenty-First Century," held at the University of Maryland School of Law, Judge Platt stated that judges would likely consider these case types to have some relevance in determining whether a case should be heard in the new Program. The authors were co-panel members.

385. The Implementation Report addressing the Maryland Task Force recommendations stated that it was addressing "specialized judicial education in both substantive business law and technology issues, as well as techniques for efficiently managing specialized business technology cases and dockets [as] critical to an effective Business and Technology Case Management Program." Maryland Implementation Report, *supra* note 366, at 14.

386. *Id.* at 14-17.

387. Judge Platt Interview, *supra* note 382. This comports with the Implementation Report that encouraged judges to meet regularly to share experiences in the same way that physicians meet in regular "morbidity and mortality" meetings to discuss their significant cases. Maryland Implementation Report, *supra* note 366, at 17. This is in line with the Delaware Chancery Court practice. Maryland Task Force, *supra* note 71, Appendix B, at 23.

388. Judge Platt Interview, *supra* note 382.

389. *Id.*

390. Maryland Business and Technology Case Management Program, at <http://www.courts.state.md.us/businesstech/index.html>. Judge Platt Remarks, *supra* note 370, at 11.

which can establish a basis for planning action, was an important issue raised in the Business and Technology Program's creation.³⁹¹ Program opinions can be found on the website,³⁹² and in Westlaw's database.³⁹³ In addition, the publication of opinions provides a form of communication between the various Program judges.³⁹⁴ As stated on the website:

In order to provide lawyers and litigants with a growing body of predictive information at the trial court level to advise clients on likely rulings and to encourage collegiality and consistency among judges, [it was] recommended that an opinion database of judicial opinions arising from cases in the program be created.³⁹⁵

XI. BUSINESS COURT SUBDIVISION OF THE ORANGE COUNTY, FLORIDA CIRCUIT COURT

By administrative order, the Presiding Judge of the Circuit Court in Orange County, Florida, which includes Orlando, established a Business Court Subdivision within the Court's Civil Division, effective January 2, 2004.³⁹⁶ This was preceded by the Ninth Judicial Circuit Business Court Committee's study and recommendation that a business court be created.³⁹⁷

The Order's prefatory language reflects certain principles behind the growth of business courts. These include the premises, among others, that:

- (i) "specialization within the legal profession has resulted in the more efficient delivery of high quality legal services in complex matters;"³⁹⁸
- (ii) within that Florida Circuit Court, there has been a "long recognized . . . need for specialized courts to deal effectively with diverse matters including criminal law, juvenile justice, domestic relations, probate and drugs;"³⁹⁹

391. Judge Platt Remarks, *supra* note 370, at 10.

392. Maryland Business and Technology Case Management Program, Published Opinions, at <http://www.courts.state.md.us/businesstech/opinions.html>.

393. See Westlaw Maryland Cases database, MD-CS.

394. Maryland Business and Technology Case Management Program, *Submitting an Opinion for Website Posting*, at <http://www.courts.state.md.us/businesstech/protocol.html#transform>. Published opinions should have factual and legal analysis and will encompass rulings on such matters as discovery motions, dispositive motions, conclusions of fact and law in bench trials, and decisions on injunctive actions. *Id.*

395. Maryland Business and Technology Case Management Program, *Published Opinions*, at <http://www.courts.state.md.us/businesstech/opinions.html>. "Opinions published on this site will contain factual or legal analysis that is useful to other judges, lawyers, and litigants interested in the Program." *Id.*

396. Administrative Order No. 2003-17, In the Circuit Court of the Ninth Judicial Circuit in and for Orange County, Florida, at 13, June 26, 2003. See Appendix A, *infra* pp. 231-38.

397. *Id.*

398. *Id.* at 231.

399. *Id.*

- (iii) the “litigation and resolution of complex business, corporate and commercial disputes has become an area of specialization within the legal profession;”⁴⁰⁰
- (iv) “a court that consistently hears business, corporate and other commercial disputes can be expected to develop expertise, experience and knowledge enabling it to perform its functions more proficiently, rapidly and confidently;”⁴⁰¹
- (v) “a business Court will provide consistency and predictability to litigants and counsel;”⁴⁰²
- (vi) “the more efficient handling of these cases will free judicial resources to handle other important matters;”
- (vii) “the decisions in these cases oftentimes impact not only the litigants but numerous persons throughout our community including employees, shareholders, partners, creditors and suppliers;”⁴⁰³ and
- (viii) “the establishment of a Business Court may become one more factor in helping our community to attract new businesses that are looking to re-locate.”⁴⁰⁴

The new Business Court Subdivision’s jurisdiction is most similar to that found in New York and Philadelphia, and includes a broad range of disputes.⁴⁰⁵ While there were earlier discussions of including complexity as an express part of the new court’s jurisdiction,⁴⁰⁶ the Order does not include a separate finding of complexity as a jurisdictional requirement.⁴⁰⁷

XII. OKLAHOMA BUSINESS COURT

In September 2003, Oklahoma state legislators conducted hearings on whether to establish a business court in Oklahoma.⁴⁰⁸ Proponents believed that in establishing a business court, Oklahoma would “get on the leading edge” and would be perceived as progressive.⁴⁰⁹ Further, in having experienced business judges

400. *Id.* at 232.

401. *Id.*

402. *Id.*

403. *Id.*

404. *Id.*

405. *Id.*

406. Becky Knapp, *Business Court on the Docket: Orange County Will be First in Florida to Offer Complex Litigation Court*, ORLANDO BUS. J., Mar. 24, 2003.

407. There have been efforts to create similar programs in the Eleventh Judicial Circuit, which includes Miami, and the Seventeenth Judicial Circuit, which includes Ft. Lauderdale. Telephone interview with Michael J. Higer, Esquire, Mintz, Truppman, Clein & Higer, P.A. in Miami (Sept. 11, 2003) (on file with authors). Mr. Higer is co-chair of the Business Courts Committee of the Business Law Section of the Florida State Bar, and his efforts contributed to the creation of the business court in the Ninth Judicial District.

408. Marie Price, *Lawmaker Touts Business-Only Court*, TULSA WORLD, Sept. 19, 2003, at 16; Ray Carter, *Legislators Urged to Create “Business Courts,”* J. RECORD, Sept. 19, 2003.

409. Chad Kile, *Lawmaker Proposes Specialized Business Court; Creation Could Lure Companies, Nurture Economic Growth*, OKLAHOMAN, Oct. 4, 2003, at 1-B.

developing a reliable body of law, Oklahoma would become more competitive in the global competition for business.⁴¹⁰

In March 2004, Oklahoma's House of Representatives approved *The Business Court Act*, authored by Representative Lance Cargill.⁴¹¹ On May 27, 2004, a joint Oklahoma House and Senate Conference Committee included the creation of a business court in ongoing legislative efforts, after revising the original bill.⁴¹² On May 28, 2004, after adoption by the Oklahoma House and Senate, the Governor signed the new law.⁴¹³ As enacted, the new law provides for the Oklahoma Supreme Court to create business court divisions in cities with populations greater than 300,000; and to promulgate rules and jurisdictional requirements for such court divisions within the state's district (trial) courts.⁴¹⁴

XIII. MICHIGAN BUSINESS AND TECHNOLOGY COURTS⁴¹⁵

Michigan presently has two, somewhat different, approaches to business and technology courts, although neither is operating at this time. The Michigan legislature has passed a statute creating a technology court,⁴¹⁶ called the Cyber Court, and the Michigan Supreme Court has published proposed court rules governing proceedings in the Cyber Court. The Cyber Court is awaiting a final decision on funding.⁴¹⁷

410. *Id.*

411. Oklahoma House of Representatives Media Division, *House Approves Legislation to Create Business Courts*, Mar. 11, 2004, at <http://www.lsb.state.ok.us/house/news6684.html>.

412. Ryan McNeil, *House Approves Lawsuit Reform*, OKLAHOMAN, May 28, 2004.

413. The new law was adopted by the Oklahoma House on May 27, 2004, the Senate on May 28, 2004, and signed by the Governor on May 28, 2004. See 2003 OK H.B. 2661, First Session of the 49th Legislative Session, House Bill 2661, available at 2003 Bill Tracking OK H.B. 2661, <http://www.lexis.com>.

414. The new law provides that:

A. The Oklahoma Legislature finds that, due to the complex nature of litigation involving highly technical commercial issues, there is a need for a court in Oklahoma's most populated counties with specific jurisdiction over actions involving such commercial issues.

B. The Supreme Court is authorized to create a business court division within the district court of any judicial district containing a municipality with a population in excess of three hundred thousand (300,000), according to the latest Federal Decennial Census.

C. The Supreme Court shall promulgate rules for the establishment and jurisdiction of the business court divisions.

2003 OK H.B. 2661, Oklahoma Second Session of the 49th Legislative Session, Sections 16 and 17, enacted May 28, 2004, available at <http://www.lexis.com>.

415. This section on Michigan's Cyber Court and efforts at creating a business court was chiefly prepared by Diane L. Akers of Bodman, Longley & Dahling LLP in Detroit. Ms. Akers is the Chair of the Business Court Ad Hoc and Business Court Executive Committees of the State Bar of Michigan's Business Law Section.

416. MICH. COMP. LAWS ANN. §§ 600.8011-.8029 (West 2004).

417. In late 2001, the Michigan House of Representatives and Senate passed a bill creating a Cyber Court, which was to take effect as on January 9, 2002. *Id.* While there was initially funding for the Cyber Court, that funding was placed on hold later in 2002 (an election year). Thereafter, the Michigan Legislature passed an amended bill, modifying somewhat the provisions of the original Cyber Court statute. For further history, see, e.g., Amy Lane Lansing, *Lack of Funding Keeps Cyber-Court Offline*, CRAIN'S DETROIT BUS., July 15, 2002, at 12; *What Other States Are Doing*, DEL. L. WKLY., Feb. 5, 2003, at 5; Kimberly Koscielniak and Brian Wassom, *Practice Tips: Cyber Court*, 82 MICH. BAR. J. 48 (2003).

The Business Law Section of the State Bar of Michigan has created a Business Court Ad Hoc Committee, which has proposed that a pilot Business Court be established in one or two circuit courts in Michigan. Three circuit courts have expressed interest in exploring the issue. While there are differences between the Cyber Court, as enacted, and a Business Court, as proposed, supporters of both initiatives believe that the two are complementary and are working together to achieve shared objectives.

A. MICHIGAN'S CYBER COURT

Under Michigan Compiled Laws section 600.8001(2), the Cyber Court has several purposes, most of which relate to technology and Michigan's economy: (i) to establish judicial structures that help to revitalize Michigan's economy; (ii) to resolve business or commercial disputes with the expertise, technology, and efficiency required in an information age economy; (iii) to assist the judiciary in responding to technology; (iv) to establish a technology-rich system to serve the judicial system in a global economy; (v) to maintain the integrity of the judicial system while applying new technologies; (vi) to make Michigan attractive to technology-driven businesses; (vii) to permit ADR to benefit from technology; and (viii) to establish virtual courtrooms.⁴¹⁸ All parties in Cyber Court case are deemed to have waived the right to a jury trial.⁴¹⁹

B. CYBER COURT JURISDICTION

The Cyber Court has concurrent jurisdiction with Michigan's circuit courts over "business or commercial disputes" in which the amount in controversy exceeds \$25,000.⁴²⁰ The Cyber Court also has jurisdiction over claims that are not commercial or business disputes,⁴²¹ as long as the case is "primarily" a commercial or business dispute.⁴²² Participation in the Cyber Court is entirely voluntary.⁴²³ Parties, however, cannot by stipulation or agreement keep a case in Cyber Court if the case does not belong there.⁴²⁴ If the case is not "primarily" a business or commercial dispute, it may not be heard in the Cyber Court. The Cyber Court

418. MICH. COMP. LAWS ANN. § 600.8001(2) (2004).

419. *Id.* § 600.8013; *see also* § 600.8019, which provides, "An action in the cyber court shall be heard by the judge without a jury."

420. *Id.* § 600.8005(1). *See* Appendix A *infra* p. 244.

421. MICH. COMP. LAWS ANN. §§ 600.8005, 600.8011(3).

422. *Id.* § 600.8011(4).

423. *Id.* § 600.8007(1). A plaintiff may file an action in the Cyber Court. Thereafter, any party, including a defendant, a plaintiff against whom a counterclaim has been asserted, parties added by motion and third party defendants may cause the case to be transferred from the Cyber Court to a circuit court in which venue would be proper merely by filing a notice of transfer. *Id.* § 600.8011(1). Procedurally, the proposed court rule is somewhat different in that it provides that a case "shall" be removed or transferred to "the" (rather than "a") circuit court in which venue is proper upon motion filed by "the defendant." MICH. COMP. LAWS ANN. § 2.712(A)(1) (proposed). A party having the right to intervene in a matter pending in Cyber Court may also file a motion for removal to circuit court.

424. This is determined by the review called for by MICH. COMP. LAWS ANN. § 600.8011(2), (3).

judge's determination is final and may not be reviewed by the circuit court.⁴²⁵ The requirement of judicial review continues throughout the case.⁴²⁶

When it passed the amended Cyber Court statute, the Michigan Legislature revised the definition of "business or commercial dispute." Under the current version of the statute, "business or commercial dispute means any of the following actions": (i) actions in which all parties are business enterprises; (ii) actions between a business enterprise and its owners, managers, employees, etc.; (iii) actions in which a party is a non-profit entity and the dispute arises from the organization's structure, governance, finances, etc.; and (iv) actions arising from the sale, merger, organizational structure, governance, finances, etc. of a business enterprise.⁴²⁷

The Cyber Court statute provides that the following kinds of disputes are included within the definition of a "business or commercial dispute": (a) disputes involving technology, websites, etc.; (b) disputes over the internal organization or governance of business entities; (c) contract disputes; (d) disputes over commercial transactions, including bank transactions; (e) disputes over business or commercial insurance; and (f) disputes over commercial real property.⁴²⁸

The Cyber Court statute also excludes certain kinds of actions, including: (a) personal injury or wrongful death actions; (b) product liability matters with individual claimant(s); (c) family division cases; (d) probate proceedings; (e) proceedings involving estates or protected persons; (f) criminal matters; (g) condemnation matters; (h) appeals from lower courts or administrative tribunals; (i) enforcement of judgments; and (j) landlord-tenant matters involving residential property.⁴²⁹

C. MICHIGAN'S EFFORT AT CREATING A BUSINESS COURT

At about the same time the Michigan legislature passed the first version of the Cyber Court statute, the Business Law Section of the State Bar of Michigan created the Business Court Ad Hoc Committee (the "Committee"), which was charged with the responsibility to study and make recommendations whether Michigan should establish some form of business court.⁴³⁰

From the outset, the Committee was aware that the Cyber Court statute had been passed and that a Cyber Court, if established, would focus on business or commercial disputes. The Committee also made early contact with supporters of

425. *Id.* § 600.8011(4) (2004).

426. Whenever parties or claims are added or deleted, the Cyber Court judge is required to again review the pleadings to determine whether the case is "primarily a business or commercial dispute," either notifying the plaintiff to transfer the case or affecting the transfer under the statute. *Id.* § 600.8011(3).

427. *Id.* § 600.8005(3)(b). See Appendix A, *infra* pp. 244-45.

428. MICH. COMP. LAWS ANN. § 600.8005(4).

429. *Id.* § 600.8005(5).

430. See also State Bar of Michigan, Business Law Section, Business Court Ad Hoc Committee Meeting, *Report of Business Court Executive Committee*, at 1 (Apr. 22, 2002), at <http://www.bodmanllp.com/publications/articles/pdfs/BusinessCourtExecutiveCommittee.pdf>.

the Cyber Court initiative to determine what synergies might be achieved and to ensure that efforts were not being duplicated.⁴³¹

The Committee views the purposes for a Business Court in Michigan to be: (i) to enhance the consistency, predictability, and accuracy of decisions in business cases, and (ii) to enhance the efficiency with which business cases are resolved through pro-active case management, technology, and early ADR.⁴³² The Committee also concluded that neither a new statute nor amendment to the existing Cyber Court statute was necessary to achieve its goals for commercial litigation.⁴³³ Rather, the Committee has focused on the concept of assigning a sitting circuit court judge to serve as a Business Court judge through the assignment power of the chief judge of each circuit.⁴³⁴

The Committee also considered what kinds of cases should be heard in a Business Court and concluded that, at least initially, the definition of commercial or business dispute contained in the Cyber Court statute should be used. A Business Court would require that damages exceed \$25,000, the general requirement for all civil cases filed in circuit courts in Michigan. In May 2003, the Business Law Section Council agreed to fund some further exploration of a pilot Business Court and, in particular, a review of the quantity of business litigation filed in each county.⁴³⁵ The Committee then prepared a proposal for a pilot business court, which has been presented to representatives of one of the metropolitan Detroit counties.⁴³⁶ The matter is still under discussion. The Committee intends to continue to pursue its efforts to establish a Business Court in Michigan, regardless of whether the Cyber Court is funded.

XIV. COLORADO AND GEORGIA

An extensive study was made in Colorado, ultimately leading to a recommendation for the creation of a business court. For reasons discussed below, neither a separate court division nor court track have been created. More recently, efforts to study the feasibility of a business court in Georgia have been pursued with some vigor. This result has produced a unique kind of study created by a consulting firm engaged to make best practices recommendations to the Administrative Office of Georgia's Courts and its Supreme Court.⁴³⁷

431. During 2002 and 2003, the Committee conducted a number of meetings and study sessions designed to gather information and explore how litigation of business cases could be improved. The Committee also sought the views of various legal and business organizations to determine what would best meet the needs of commercial litigators and their clients.

432. *Report of Business Court Executive Committee, supra* note 430, at 1.

433. *Id.*

434. The Committee believes that, while technological advances should be utilized where appropriate, electronic filing and appearances should be available but not, at this stage, mandatory. The Committee has also considered the advantages of a system that would be entirely voluntary, but is concerned that few cases would remain in the Business Court if the litigants can "veto" use of the Business Court.

435. *See supra* note 415.

436. *Id.*

437. A private consultant was used to study London's existing commercial courts to determine methods of improvement. *See infra* Section XV.

A. THE COLORADO GOVERNOR'S TASK FORCE ON CIVIL JUSTICE REFORM

In 2000, the Governor's Task Force on Civil Justice Reform issued its final report, recommending the establishment of "a specialized business court system within the existing Colorado courts to handle commercial cases more quickly, less expensively, and with greater expertise."⁴³⁸ The Task Force observed that there was "rapid growth in Colorado's commercial and professional services sectors," recognizing Colorado as a national leader in information technology with a concomitant growth in jobs in that sector.⁴³⁹ The recommended business court would "be located within an existing District Court in the Denver metropolitan area. Such a business court could develop the expertise and specialized procedures needed to help Colorado attract and retain world-class employers and employees alike."⁴⁴⁰

The Final Report included a lengthier Report of the Committee on Business Courts to the Governor's Task Force.⁴⁴¹ The Business Courts Committee stated that "a well-functioning business community is dependent on an effective judiciary equipped to handle the disputes of that community."⁴⁴² It stated that business law expertise in judges would make them more adept at hearing commercial cases.⁴⁴³ A specialized commercial court was particularly appropriate because such cases are frequently complex and draw upon a body of law developed to address the unique nature of commercial disputes; and that in the normal course of affairs these cases can create judicial back log and run the risk on inconsistency in result.⁴⁴⁴

It was ultimately determined that the number of expected business court cases that could be generated in Denver could not justify the time and expense necessary to establish a specialized business court; nor could the funding be obtained for special tracking for business cases.⁴⁴⁵ Because of the depth and effort put into the study, which those interested in business courts should read in full, its jurisdictional criteria have been included for discussion in this paper even though Colorado has not adopted a business court.

438. Governor's Task Force on Civil Justice Reform, *Executive Summary, Final Report of Governor's Task Force on Civil Justice Reform*, at 2 (Sept. 6, 2000), at <http://www.state.co.us/cjrtf/report/download/executiv.doc>.

439. *Id.*

440. *Id.* "More generally, and as detailed in the Report, Colorado should strengthen the ability of all Colorado courts to resolve complex business disputes with less cost and reduced delay." *Id.* Minutes of the Business Court Committee's meeting can be found at <http://www.state.co.us/cjrtf/min/minutes.htm>.

441. Colorado Report, *supra* note 72.

442. *Id.*

443. *Id.*

444. *Id.*

445. Michael Becker, *Businesses Praise Colorado Courts; Legal System Earns Recognition for Overall Efficiency*, J. ADVOC., Mar. 1, 2002; see also C.J. Mary J. Mullarkey, *State of the Judiciary*, Jan. 12, 2001, Recent Selected "State of the Judiciary" Addresses Delivered by State Chief Justices, at <http://www.abanet.org/justice/pdf/speech01-02b.pdf>.

The Colorado Business Court Committee recommended the following types of cases for a business court track:

- a. The rights, duties, or liabilities of equity owners, managers, or agents of any form of business entity;
- b. The formation, sale or purchase, or merger or conversion of any form of business entity;
- c. Conduct invoking antitrust laws or law governing unfair competition or interference with business or contractual relations; or agreements or arrangements among businesses, or between businesses and their agents or employees restraining competition;
- d. Commercial transactions *not* involving a consumer party; or
- e. Intellectual property.⁴⁴⁶

B. THE GEORGIA FEASIBILITY STUDY

Funded by the Corporate Counsel, Business Law and Technology Sections of the Georgia State Bar, a committee was formed to study the creation of a business court in Georgia.⁴⁴⁷ This effort gained the support of the Administrative Office of the State Courts of Georgia. Working with the consulting firm AEQUITAS, Inc., a Feasibility Study with specific recommendations has been created and presented by the Administrative Office of the Courts to Georgia's Supreme Court.⁴⁴⁸ The study recommends the creation of a business court along the lines of North Carolina's Business Court.⁴⁴⁹ It also recommends that the court be sponsored state-wide, but functionally be county-based; and that the effort begin with pilot program(s) in a county or counties with sufficiently high business volume.⁴⁵⁰ The Supreme Court is supportive of the effort, and the Georgia State Bar itself has become increasingly interested in assisting in creating such a court program.⁴⁵¹

The Georgia Study itself includes an analysis of other states' business courts and a recommendation for best practices for a business court in Georgia.⁴⁵² The

446. See Appendix A, *infra* p. 229.

447. The information in this paragraph was provided in an interview with Raymond Fortin, Esquire, General Counsel of SunTrust Banks, Inc., on October 1, 2003 and later confirmed by Mr. Fortin to the authors. Mr. Fortin is one of the driving forces behind developing a business court in Georgia, and he was one of the attorneys in the Wachovia Bank takeover case in North Carolina's Business Court, which is one of that Court's most nationally prominent cases to date.

448. AEQUITAS, Inc., Georgia Feasibility Study, *supra* note 120.

449. *Id.*

450. *Id.* at 8.

451. See Chief Justice Norman S. Fletcher, *State of the Judiciary Address*, Jan. 31, 2003, at <http://www.georgiacourts.org/aoc/statejudiciary.html> (the court is "considering the feasibility of a pilot project to expedite business litigation in our courts. The idea has been proposed by the Corporate Law Section of the State Bar and would be modeled on a similar effort in North Carolina. Mindful of budgetary constraints, we are looking for financial resources outside the state's budget."). *Highlights from the Executive Committee of the Technology Law Section*, TECH. L. ST. B. GA., Winter 2002, at 5. *Summary of Executive Committee Meeting on February 6, 2003*, TECH. L. ST. B. GA., Spring 2003, at 6. (Now complete, that feasibility study proposes a three year pilot program based on North Carolina's business court).

452. AEQUITAS, Inc., Georgia Feasibility Study, *supra* note 120. The authors of AEQUITAS, Inc. Georgia Feasibility Study have since published a more general paper on best practices for business courts nationally. Tim Dibble and Geoff Gallas, *Best Practices in U.S. Business Courts*, COURT MANAGER, Volume 19, Issue 2, 2004, at 25.

Study lists and analyzes twelve different “functional categories” in which recommendations are made, including, e.g., objectives to be achieved, case types, and judicial management.⁴⁵³ It provides a somewhat distinct perspective in that it was created by professional court consultants.

The first category analyzed, “Core Business Court Objective,” is critical in determining the shape of the remaining recommendations. The summary description set forth in the report, encapsulating the proposed objectives into a maxim is, “[a]ssigns business cases to specialized judges in order to manage them more effectively and expeditiously and to more efficiently use judicial resources both within the business court and in the court system as a whole.”⁴⁵⁴ As to the case types assigned, a complex North Carolina Business Court type jurisdiction is recommended to achieve this goal for Georgia: “Only complex business cases and business cases with novel legal precedents are assigned to a business court.”⁴⁵⁵

In his January 16, 2004 State of the Judiciary Address, Georgia Chief Justice Fletcher stated that “[t]he proposed pilot project for a business court will soon be on the table for consideration.”⁴⁵⁶

XV. SOME INTERNATIONAL COURTS⁴⁵⁷

England has numerous specialized courts, including the Commercial Court, Admiralty Court, and the Technology and Construction Court in the Queens Bench Division; and the Patents and Companies Court in Chancery. These courts were the subject of a March 2001 Feasibility Study by Cap Gemini Ernst & Young (“CGEY”) on modernizing London’s commercial courts.⁴⁵⁸ The purpose was “to evaluate the business case for a new commercial court handling a wide range of high value commercial litigation and housed in a separate building. Such a project was seen as a means of further enhancing the position of London as a provider

453. *Id.* at 8.

454. *Id.* Each summary point is developed at length later in the Study.

455. *Id.* at 12. By contrast, Colorado’s Business Committee found that: “Defining what constitutes a ‘commercial case’ is fundamental to the operation of a business court. While the court will be particularly suitable for complex cases, commercial cases of all levels of complexity will benefit from adjudication by experienced business jurists.” Colorado Report *supra* note 72, at 12.

456. Chief Justice Norman S. Fletcher, *State of the Judiciary Address*, Jan. 16, 2004, available at http://www2.state.ga.us/Courts/Supreme/2004_judiciary_speech.htm; *State of the Judiciary Address: Georgia Courts at Work*, GA. CTS. J., Feb. 2004, at 3, available at <http://www.georgiacourts.org/aoc/publications/CJ-Feb-2004.pdf>. The business court proposal was to be presented to the State Bar’s Board of Governors for consideration in early November 2004. Steven H. Pollak, *Fulton Moves Forward with Plans for New Business Court*, FULTON COUNTY DAILY REPORT, Oct. 8, 2004, at 1.

457. We are not including a lengthy history of other nations’ commercial court programs. The following discussion sets forth some details of business courts in England, Ireland and Toronto, Canada. There are parallels with the creation of American business courts which adduce the presence of similar causes and objectives. This reflects the global nature of conditions that have impelled the creation of commercial courts.

458. See *Modernisation of the Commercial Court—Consultation Paper*, at 1.4 and Annex B (Dec. 10, 2001), available at [http://www.courtservice.gov.uk/cms/media/consult_paper_commsrt\(1\).pdf](http://www.courtservice.gov.uk/cms/media/consult_paper_commsrt(1).pdf) [hereinafter *Consultation Paper*].

of legal services to the international business community.”⁴⁵⁹ Shortly after the CGEY Report was published, “the Lord Chancellor announced that he accepted the consultants’ proposals and studies had already begun into the manner in which they could be implemented; the objective of the decision to modernise was to ‘make sure that London maintains its position as the premier centre for settling commercial disputes in the future.’”⁴⁶⁰ The Commercial Court’s jurisdiction includes:

any claim arising out of the transaction of trade and commerce and includes any claim relating to—(a) a business document or contract; (b) the export or import of goods; (c) the carriage of goods by land, sea, air or pipeline; (d) the exploitation of oil and gas reserves or other natural resources; (e) insurance and re-insurance; (f) banking and financial services; (g) the operation of markets and exchanges; (h) the purchase and sale of commodities; (i) the construction of ships; (j) business agency; and (k) arbitration.⁴⁶¹

Ireland has recently created a Commercial Division of the High Court. Its jurisdiction includes proceedings of:

a commercial nature involving claims of at least €1m. The type of proceedings covered by the definition include disputes over a business document or contract, the purchase and sale of commodities, the import or export of goods and the carriage of goods by land, sea, air or pipeline. In addition, proceedings under the Arbitration Acts, Intellectual Property disputes and Judicial Review cases involving a substantial commercial law dimension also fall within the jurisdiction of the Court.⁴⁶²

The establishment of a Commercial Court had been recommended, “as a matter of urgency” by the Committee on Court Practice and Procedure.⁴⁶³ Prior to the commercial court’s creation there were growing complaints about delays, inefficient pre-trial practices, and a lack of specialist judges for complex commercial matters; and the government recognized “the need to provide an infrastructure which supports every aspect of doing business in Ireland; including the Courts.”⁴⁶⁴

459. The Commercial Court/The Admiralty Court 2001–02, *Report on the Year Ending 30th September 2002* ¶ 53(a), available at http://www.courtservice.gov.uk/using_courts/guides_notices/notices/comm/commreport_02.htm.

460. *Id.* ¶ 53(b).

461. THE ADMIRALTY & COMMERCIAL COURTS GUIDE, at B1.1 (6th ed. 2002), available at http://www.courtservice.gov.uk/using_courts/guides_notices/notices/comm/guide/com_crt_guide.htm#cases.

462. See Minister for Justice Michael McDowell T.D., *Equality & Law Reform Address; The Commercial Court and Mediation Conference* (Mar. 24, 2004), available at <http://www.justice.ie/80256E01003A02CF/vWeb/peJUSQ5XLD4H-en>.

463. Committee on Court Practice and Procedure, 27th Interim Report, *A Commercial Court in Ireland, Establishing Connections to Domestic and International Arbitration Centers, The Courts of e Government—Meeting the e Commerce Challenge* (Feb. 27, 2002), available at <http://www.courts.ie/press.nsf/a3b752e69d6a613e802568350067c46e/7755e7355444367480256b6d0055e1e0?OpenDocument> (“[t]he Committee recommends that a pilot project Commercial Court be developed in Dublin as a matter of urgency.”). *Id.*

464. William Fry, Solicitors, *A Commercial Court in Ireland*, at <http://www.williamfry.ie/files/indexfile.asp?id=97>.

Under the prior system, “any judge, regardless of his or her background and experience, c[ould] be assigned a complex case involving corporate litigation. A judge d[id] not know, until the last moment, what case he or she w[ould] be assigned, which rule[d] out the possibility of pre-preparation.”⁴⁶⁵

In 1991, the Superior Court of Justice in Toronto, Ontario established a “Commercial List” as an informal court division.⁴⁶⁶ Given the province’s business and financial focus, the court wanted “to be able to deal in an effective manner with complicated corporate, commercial and bankruptcy/insolvency related cases.”⁴⁶⁷ The Commercial List may include bankruptcy matters, various statutes, and “such other commercial matters as a judge presiding over the Commercial List may direct to be listed on the Commercial List. . . .”⁴⁶⁸ This last “basket clause” permits such other commercial matters as the presiding judge may direct.⁴⁶⁹ In 2001, there were five or six assigned judges, with a “solid cadre of them . . . experienced as commercial judges.”⁴⁷⁰ The Commercial List is voluntary, except for bankruptcy matters; and “[t]he special procedures adopted for the hearing of matters on the Commercial List expedite the hearing and determination of these matters and they have met with considerable approval.”⁴⁷¹ It is considered a very successful program.⁴⁷²

XVI. COMPLEX LITIGATION PROGRAMS⁴⁷³

A number of jurisdictions have established complex litigation programs. In developing such programs, the debate among the bench, bar, legislature, and

465. *Plans for a Specialist Commercial Division with the Circuit Court*, IRISH EXAMINER (Aug. 4, 2003), at <http://archives.tcm.ie/irishexaminer/2003/08/04/story408999439.asp> (“The proposal for the Commercial Court arose out of a report . . . by the Committee on Court Practice and Procedure. . . . According to the committee, ‘there is merit in establishing a more specialized approach to commercial cases.’”).

466. The Honorable Robert A. Blair, *The Commercial List—Handling Business Cases Effectively*, THE METRO. CORP. COUNS., NE ED., May 2001, at 36 [hereinafter Blair Interview].

467. *Id.*

468. *Practicing Direction Concerning the Commercial List*, Superior Court of Justice, Toronto Region at http://www.ontariocourts.on.ca/superior_court_justice/notices/commercial.htm [hereinafter *Practicing Direction*]. (These may include: “applications, motions and actions which in essence involve the following: a) Bankruptcy and Insolvency Act; b) Bank Act, relating to realizations and priority disputes; c) Business Corporations Act (Ontario) and Canada Business Corporations Act; d) Companies’ Creditors Arrangement Act; e) Limited Partnerships Act; f) Pension Benefits Act; g) Personal Property Security Act; h) receivership applications and all interlocutory motions to appoint, or give directions to, receivers and receiver/managers; i) Securities Act; j) Winding-Up and Restructuring Act; k) Credit Unions and Caisses Populaires Act, relating to credit unions and caisses populaires under administration or that are being wound up or liquidated.”).

469. Blair Interview, *supra* note 466.

470. *Id.*

471. *Practicing Direction*, *supra* note 468. In describing its general procedures, *Practicing Direction* 5 states “Co-operation, communication and common sense shall continue to be the principles of operation on the Commercial List.” *Id.*

472. Blair Interview, *supra* note 466.

473. Although the focus of this Article is on business and commercial courts, we have added this general section on complex courts. We have not focused on a number of issues that an article on complex litigation would normally provide; rather, we include the instant discussion in the context of complex commercial and business cases. It is our view that the objectives in establishing a successful

public has often been framed as a choice between having a complex litigation program or a commercial/business litigation program.

The authors, who practice primarily in the Philadelphia region, observe that the Philadelphia Court of Common Pleas has separate and distinct programs for complex tort cases,⁴⁷⁴ class actions,⁴⁷⁵ as well as commercial cases.⁴⁷⁶ Similarly, in Chicago, the general calendar program began with the individual assignment of tort cases, not commercial cases.⁴⁷⁷ In Las Vegas, which has a business court, there is also a complex litigation program which now includes a special court to hear construction defect cases.⁴⁷⁸

Thus, we raise the question as to whether the apparent “either/or” conflict between complex litigation programs and commercial programs is a true conflict. While there may arguably be competitive budgetary concerns in some instances, this putative conflict may actually reflect a belief that is neither empirically supported nor necessary.⁴⁷⁹ We suggest that a single court system can address both

business court are not coextensive with the objectives of a court focused on handling all types of complex cases; though there may be some overlap in the areas of competent and effective case management and limited specialization. As to the meaning of complexity, an issue not addressed herein, see, e.g., R. George Wright, *The Illusion of Simplicity: An Explanation of Why the Law Just Can't Be Less Complex*, 27 FLA. ST. U. L. REV. 715 (2000); Jeffrey W. Stempel, *A More Complete Look at Complexity*, 40 ARIZ. L. REV. 781 (1998); Neil Vidmar, *The Performance of the American Civil Jury: An Empirical Perspective*, 40 ARIZ. L. REV. 849, 855–61 (1992); Jay Tidmarsh, *Unattainable Justice: The Form of Complex Litigation and Limits of Judicial Power*, 60 GEO. WASH. L. REV. 1683 (1992); Peter H. Schuck, *Legal Complexity: Some Causes, Consequences, and Cures*, 42 DUKE L.J. 1 (1992); Stephen B. Burbank, *The Costs of Complexity*, 85 MICH. L. REV. 1463 (1987).

474. See *supra* note 246.

475. See *supra* note 247.

476. See *supra* pages 176–78.

477. See *supra* note 85.

478. The Clark County District Court has a Complex Litigation Center. This facility was “converted for use in extremely complicated multiple party cases, primarily the construction defect cases . . . [to] accommodate up to 50 counsels, along with their clients, and has a public seating gallery of 100.” Chief Justice Agosti Addresses Nevada Legislature, 11 NEV. LAW. 16 (Apr. 2003); Joe Wheeler, *Packed House Hears Judge Explain Construction Litigation Process*, THE CONSTR. ZONE (Feb. 2004), available at http://www.nvzone.com/NSA_Judges_On_CDlitigation_Feb_2004.htm (“The Complex Litigation Program in Clark County created a special court to hear construction defect cases.”); Hubble Smith, *CONSTRUCTION DEFECT LAWSUITS: Falling Between the Cracks*, LAS VEGAS REV. J., Feb. 2, 2003, at http://www.reviewjournal.com/lvrj_home/2003/Feb-02-Sun-2003/news/20226050.html.

479. One challenge raised is that the best judges will go into business court programs. This proposition is not axiomatic. Judges may go where their interest, experience or ability suits them. Thus, there may be judges who excel in handling the dynamics of courtroom interactions, who want to be trying cases as often as possible and who detest the long paperwork of motion intensive cases. Such judges may be of the highest caliber, and yet would never want to participate in a commercial, or complex, litigation program. Moreover, under the theory that the best judges will necessarily go into the specialized court, those judges would similarly go into complex court program. This would likewise take the best judges from the average person’s case, e.g., in favor of the class action bar or the construction defect bar; and would make it more likely that large businesses, whose cases would more often be complex, would get more attention than cases involving small businesses.

Another doubt is raised via the argument that a business court will have an inherent pro-business bias. On this issue, most commercial program cases involve businesses litigating against each other; and, thus, the issue of consumer vs. business will not typically arise. Even where it has, however, the cases have not been pre-determined for corporate victory. For example, in *Zwiercan v. General Motors Corp.*, No. 3235 (Phila. Ct. Com. Pl. Mar. 18, 2003), available at <http://courts.phila.gov/cgi-bin/opinions/comctsearch.cgi?dropdown=cptvcvcom> (Mar. 18, 2003), the court ruled that the consumers’ claims for reliance were sufficient under Pennsylvania’s Unfair Trade Practices and Consumer Protec-

needs as distinct, rather than as two objects seeking to occupy the same space.⁴⁸⁰ Apart from budgetary limitations, a court faced with significant commercial litigation and other types of complex cases might very well want to consider specialized programs to address both sets of needs and requirements.

A. CALIFORNIA'S COMPLEX CIVIL LITIGATION PILOT PROGRAM

In 1990, California's State Bar "appointed an ad hoc Business Court Committee to study the question of whether specialized business tribunals should be established in California trial courts."⁴⁸¹ After years of varied efforts and strong debate, that inquiry ended in May of 1997 when the Business Court Study Task Force, created by the Judicial Council of California⁴⁸² in 1996, issued a lengthy report recommending against the creation of a business court.⁴⁸³ The Task Force instead concluded that California should take action "to improve the quality of decision-making in complex cases, including [but not limited to] business and commercial disputes."⁴⁸⁴

The Task Force Report observed and concluded that "[t]he concept of a business court or division is not supported by important constituencies whose support would be necessary to make the concept viable."⁴⁸⁵ By way of example, in June 1993, the State Bar's Business Court Committee issued a status report proposing

tion Law, even though new appellate case law was argued to support a dismissal. In *Tomlin v. Dylan Mortgage, Inc.*, No. 99 CVS 3551 (N.C. Super. Ct. Feb. 1, 2002), available at <http://www.ncbusinesscourt.net/opinions/Tomlin%20v.%20Dylan%20Mortgage%20Inc.%202002%20NCBC%201.htm>, Judge Tennille certified a class in a case involving allegedly improper real estate loans and refinancing to high risk applicants. Again, if the business courts were inherently anti-consumer, one would not expect such a result; but rather an effort to protect the business by any means. These cases are adduced not to substitute for a body of exhaustive research, but to point out that allegation of bias must be put to the test.

480. In addition to a specialized Commercial Court, England has a specialized Technology and Construction Court. See *supra* Section XV. This Court's jurisdiction includes, e.g.,

Building and other construction disputes, . . . ; Engineering disputes; Claims by and against engineers, architects, surveyors, accountants and other specialised advisers relating to the services they provide; . . . Claims relating to the design, supply and installation of computers, computer software and related network systems; Claims relating to the quality of goods sold or hired, and work done, materials supplied or services rendered; . . . Claims relating to the environment (for example, pollution cases); . . . [and] Claims involving the taking of accounts where these are complicated

The Technology and Construction Court Guide, ¶ 1.7, at 11–12, at http://www.courtservice.gov.uk/cms/media/tcc_guide.doc. "In reality, the TCC is the specialist court of the High Court which deals with all those complicated and technical civil disputes which are not the province of some other specialist tribunal." *Id.* at 7–8.

481. California Judicial Council Business Court Study Task Force, *Final Report of the California Judicial Council Business Court Study Task Force* (May 16, 1997), at 2 [hereinafter 1997 Final Report] (on file with *The Business Lawyer*, University of Maryland School of Law).

482. The Judicial Council "is the policymaking body of the California courts. . . ." Judicial Council of California, News Release, *State Courts Resolve Complex Cases More Efficiently National Report Finds* (Aug. 29, 2003) [hereinafter August 2003 News Release].

483. 1997 Final Report, *supra* note 481.

484. *Id.* at 7.

485. *Id.* at 3.

the creation of a business and commercial law division within the Superior Court as a pilot project.⁴⁸⁶ Eight months later, “the State Bar Board of Governors passed a resolution forbidding the Business Court Committee from pursuing or supporting legislation to establish a specialized court for business cases.”⁴⁸⁷ The primary opposition was on the basis that a business court would be “elitist,” taking the best judges and other resources, and would potentially favor business interests.⁴⁸⁸ The Task Force believed that its complex court recommendations could assuage concerns about perceived inequality, lack of predictability, and the quality of decision making in business and commercial litigation.⁴⁸⁹

After the Business Court Task Force Report, in 1997, California’s Chief Justice Ronald M. George appointed the Complex Civil Litigation Task Force to “identify[] ways for trial courts to manage complex cases more efficiently and effectively.”⁴⁹⁰ Complex litigation included cases requiring “exceptional management to avoid placing unnecessary burdens on the court or the litigants and involve such areas as antitrust, securities claims, mass torts, and class actions.”⁴⁹¹ The Complex Litigation Task Force included subcommittees focusing on pretrial practice; trial; specialized areas (e.g., antitrust, construction, environmental, insurance, intellectual property, mass torts, securities, and class actions); ADR; technology; and judicial education.⁴⁹² The Complex Litigation Task Force developed a judicial deskbook for managing complex litigation.⁴⁹³

In January 2000, the Judicial Council established the complex case management programs in six California Superior Courts.⁴⁹⁴ Known as the Complex Civil Litigation Pilot Program, it was “designed to improve judicial management of complex cases and to expedite case resolution, keeps costs reasonable, and promote effective decision making by the courts, parties, and counsel.”⁴⁹⁵ Los Angeles began with six judges, Orange County had five judges and the Northern California courts had one judge each.⁴⁹⁶

In June 2003, the National Center for State Courts (“NCSC”), which had contracted with the California Administrative Office of the Courts to study the Complex Civil Litigation Pilot Program, issued a lengthy study evaluating the pro-

486. Business Court Committee of the Business Law Section of the State Bar of California, *Status Report of the Business Court Committee of the Business Law Section of the State Bar of California*, at 2 (June 30, 1993) (Draft) (on file with authors).

487. 1997 Final Report, *supra* note 481, at 2.

488. *Id.* at 5–6. *But see supra* note 479.

489. Final Report 1997, *supra* note 481, at 7.

490. Judicial Council of California, *Complex Civil Litigation, Fact Sheet*, at 2 (Sept. 2004) [hereinafter September 2004 Fact Sheet], at <http://www.courtinfo.ca.gov/reference/documents/complit.pdf>.

491. *Id.* at 2.

492. *Id.* at 1–3.

493. *Id.* at 2.

494. August 2003 News Release, *supra* note 482. These included the Alameda, Contra Costa, Orange, Los Angeles, San Francisco, and Santa Clara Superior Courts. *Id.* The pilot program was created and funded by the 1999 Budget Act. June 2004 Fact Sheet, *supra* note 490, at 3. The total annual allocation for the pilot program is \$2,885,000. *Id.* at 4.

495. August 2003 News Release, *supra* note 482.

496. September 2004 Fact Sheet, *supra* note 490, at 3.

gram.⁴⁹⁷ Before the pilot program, the chief complaints (as in other courts) included the problems associated with case assignment to a master calendar, accompanied by a complaint of “over-reliance on referees.”⁴⁹⁸ The pilot program uses individual calendar assignments, with a single responsible judge, from inception to resolution of the case.⁴⁹⁹

The NCSC Evaluation identifies three basic types of complexity, any one or more of which might exist in the same case. These include legal complexity, involving difficult legal issues that will create numerous motions; evidentiary complexity, both in terms of the specialized expertise required to understand the evidence and the volume of evidence; and logistical complexity, involving large numbers of parties and counsel, and large volumes of evidence.⁵⁰⁰

The NCSC Evaluation states that the pilot program includes purely commercial cases⁵⁰¹ that are deemed complex, but these constitute only about one-fourth of the total caseload.⁵⁰² Approximately one-third of the pilot cases are complex torts⁵⁰³ and the remainder “could be classified in either category.”⁵⁰⁴ Half of the pilot cases fall into the categories pre-designated by Court Rule as “provisionally complex.”⁵⁰⁵ The single largest category of cases involves construction defects (26.3 percent), followed by class actions (16.4 percent), and breach of contract/warranty (10.8 percent). On the other end of the spectrum are antitrust/trade cases (0.5 percent); asbestos mass torts (0.7 percent); medical malpractice (1.0 percent); mandamus (1.0 percent); professional negligence (1.1 percent); securities (1.2 percent); other personal injury/wrongful death (1.3 percent); other real property (1.6 percent); fraud (1.7 percent); product liability (1.8 percent); insurance claims from complex cases (2.2 percent); toxic tort/environmental (3.5 percent); eminent domain (4.0 percent); insurance coverage (4.3 percent) and business torts (5.7 percent).⁵⁰⁶

California Court Rule 1800 provides a general definition for complexity, and then gives a list of factors to weigh in determining if a case is complex. Thus, Rule 1800(a) states: “[a] ‘complex case’ is an action that requires exceptional judicial management to avoid placing unnecessary burdens on the court or the

497. Paula L. Hannaford-Agor, Nicole L. Mott, & Timothy F. Fautsko, *Evaluation of the Centers for Complex Civil Litigation Pilot Program*, National Center for State Courts and California Administrative Office of the Courts, at v (June 30, 2003) [hereinafter NCSC Evaluation], at http://www.ncsconline.org/WC/Publications/Res_ComLit_ComplexCivilLitigationPub.pdf.

498. *Id.* In the master calendar system, multiple judges hear and address different stages of the same case “resulting in the lack of a single point of judicial accountability for case supervision, insufficient judicial involvement in pretrial management of complex cases, and lack of judicial knowledge about and experience in specific areas of substantive law.” *Id.* at vi.

499. *Id.*

500. *Id.* at 5–6.

501. The NCSC includes securities, antitrust, breach of contract/warranty, and business torts in this category. *Id.* at 46.

502. *Id.* at vii.

503. *Id.* These are defined as construction defect, toxic torts, mass torts, products liability, fraud, medical malpractice, professional negligence, and other personal injury type suits. *Id.* at 46 n.53.

504. *Id.* at vii.

505. *Id.* See CAL. CT. R. 1800(c)–(d) (West Supp. 2004).

506. NCSC Evaluation, *supra* note 497, at 46.

litigants and to expedite the case, keep costs reasonable, and promote effective decision making by the court, the parties, and counsel.⁵⁰⁷ Under Rule 1800(b), the factors “the court shall consider, among other things” in making the complexity determination, include:

- (1) [the likelihood of] Numerous pretrial motions raising difficult or novel legal issues that will be time-consuming to resolve;
- (2) Management of a large number of witnesses or a substantial amount of documentary evidence;
- (3) Management of a large number of separately represented parties;
- (4) Coordination with related actions pending in one or more courts in other counties, states, or countries, or in a federal court;
- or (5) Substantial postjudgment judicial supervision.⁵⁰⁸

The Court Rules do recognize certain case types as “provisionally complex,” meaning that the case will be found complex unless a judge determines otherwise, after a review of the initial pleadings.⁵⁰⁹ Thus, by Rule, a case is provisionally complex if it involves:

- (1) Antitrust or trade regulation claims;
- (2) Construction defect claims involving many parties or structures;
- (3) Securities claims or investment losses involving many parties;
- (4) Environmental or toxic tort claims involving many parties;
- (5) Claims involving mass torts;
- (6) Claims involving class actions;
- or (7) Insurance coverage claims arising out of any of the [aforementioned] claims . . .⁵¹⁰

This rule, however, is subject to the caveat that no case is provisionally complex “if the court has significant experience in resolving like claims involving similar facts and the management of those claims has become routine.”⁵¹¹ Moreover, “[a] court may declare by local rule that certain types of cases are or are not provisionally complex pursuant to this subdivision.”⁵¹²

507. CAL. CT. R. 1800(a).

508. *Id.* at 1800(b).

509. NCSC Evaluation, *supra* note 497, at vii; CAL. CT. R. 1800(c).

510. CAL. CT. R. 1800(c). Rule 1800(c)(2) is apparently the basis for considerable litigation in Orange County. NCSC Evaluation, *supra* note 497, at 18. The California Deskbook on the Management of Complex Civil Litigation defines complex construction defect litigation as follows:

Construction defect litigation typically involves plaintiff owners of various property interests affected by alleged defects. Plaintiffs may include a large number of unit owners and a homeowners association. Defendants commonly include the primary builder or developer of the project, many or all of the subcontractors that performed work on the project, design professionals such as architects and engineers, and the real estate agents or brokers who marketed the project. Claims frequently include breach of contract, strict liability and tort, and negligence in general terms without identifying the specific defects. Frequently there are numerous cross complaints for indemnification. Identifying the specific defects, the parties related to these defects, the costs of repair, and the specific damages for each plaintiff is frequently difficult. The number and difficulty of factual issues create special problems for settlement.

Judicial Council of California, Deskbook on the Management of Complex Civil Litigation § 3.10 (2000).

511. CAL. CT. R. 1800(d).

512. *Id.*

In Contra Costa County, the clerk will automatically refer a case for review to the presiding judge if there are more than seven parties and the cover sheet designates the case as complex.⁵¹³ In Santa Clara County, if one of the parties designates a case as complex, the pilot judge determines if it is actually complex.⁵¹⁴ San Francisco uses a similar method.⁵¹⁵ In Oakland, Alameda County, after a party designates a case as complex, there is a hearing to determine whether it will be included in the program.⁵¹⁶ In Orange County, if a case is designated as complex by a party, it is randomly assigned to one of the program judges, but will be reassigned upon a successful challenge.⁵¹⁷ Cases not originally treated as complex can later be reassigned to the program.⁵¹⁸

Los Angeles County, with a population of over 9.8 million and a decentralized Superior Court, has a dramatically different approach than the other counties.⁵¹⁹ All class actions are filed in a single division and then immediately assigned to the pilot program, with other cases designated as complex being assigned to a civil court judge who reviews the case and has the discretion to keep it or send it to the pilot program for case management.⁵²⁰ One third of the cases referred have been sent back to the regular docket as they were determined not to be complex.⁵²¹ The supervising judges in Los Angeles and Orange County, and the single judges in the other four pilot programs, review cases before accepting them into the program, using objective procedures and criteria.⁵²²

The judges view themselves as pro-active case managers. They use a variety of skills and techniques to move the parties toward identifying key areas of dispute and investigation, so that they can make informed judgments to facilitate settlement, and to make dispositive rulings, as necessary, to resolve cases.⁵²³ Only a small number of cases went to trial.⁵²⁴

The large portion of construction defect cases raises a number of issues, such as to what extent these cases might be treated as commercial cases in some instances in other jurisdictions.⁵²⁵ A broader, and yet more pointed issue, is raised

513. NCSC Evaluation, *supra* note 497, at 13.

514. *Id.* at 14. Only an estimated 8 to 10 percent of the cases are returned. *Id.*

515. *Id.* at 15.

516. *Id.* at 17.

517. *Id.* at 18.

518. *Id.*

519. *Id.* at 19.

520. *Id.* at 19–20.

521. *Id.* at 20.

522. *Id.* at 10. In Los Angeles, however, a judge can opt to retain a complex case that might otherwise go into the program. *Id.*

523. *Id.* at 12. One complaint the program judges had was that their effectiveness was hampered by procedural rules limiting their ability to grant partial summary judgments. *Id.* at 21.

524. *Id.*

525. In Massachusetts, the Business Litigation Session will hear commercial claims including real estate matters “which have complex factual or legal issues or are likely to require complex case management.” See Appendix A, *infra* p. 242. If a homeowners association is the plaintiff, suing a corporate builder, this section may be implicated. If the case is viewed as a body of residential homeowners or a mass tort, then this may not be the case. In New York, similar ambiguity may be resolved as part of the ongoing case guideline study; although at least some judges have been willing in the past to hear construction defect cases in the Commercial Division. See *Kerusa Co. LLC v. W10Z/515*

by the potential for treating this huge swath of construction defect cases in a specialized forum. These cases not only appear to take up a disproportionate amount of the complex pilot case load,⁵²⁶ but construction defect cases have unique characteristics which may permit such specialized treatment.⁵²⁷

Although some might argue that a construction defect litigation program would cater to one segment of litigants and to the bar, and divert resources, etc., as was argued against a business court in California, such an option certainly seems rational. It is akin to court programs dedicated to asbestos litigation, and it is a route taken in Clark County, Nevada.⁵²⁸ This reflects the fact that the needs and objectives of substantively specialized courts can be different from, yet not in conflict with, the objectives of a specialized complex litigation program.

B. CONNECTICUT'S COMPLEX LITIGATION DOCKET

In April 1997, The Corporate Bar issued a "rare" policy statement calling for the creation of a business court in Connecticut.⁵²⁹ In January 1997, a bill had been introduced before Connecticut's House of Representatives to establish a business court.⁵³⁰ The following winter, the Connecticut Trial Lawyers Association voted to oppose a business court, and there was editorial opposition as well.⁵³¹ During that same time period, there was advocacy for Connecticut to develop and implement a complex litigation program for the twelve judicial districts of Connecticut's Superior Court.⁵³² Framing the debate as a choice between one court program or the other, Connecticut did not adopt a business court, but launched

Real Estate Ltd. P'ship, No. 04 CIV.708-10(GEL), 2004 WL 1048239, at *4 (S.D.N.Y. May 7, 2004) (in a construction defect case pending in bankruptcy court, the federal court observed that the cases started in the commercial division and could be efficiently resolved there, rather than being transferred to another bankruptcy court).

526. As things now stand, the resources of the complex litigation program provide an exceptional and unique forum to this single segment of litigants and their lawyers, at least in some counties. NCSC Evaluation, *supra* note 497, at 14 n.22, 17-18, 22 n.28 (Contra Costa and Orange Counties).

527. The NCSC Evaluation repeatedly observes that these cases reflect a unique use of referees, the prevalence of the construction defect bar involved in the complex case program (37 percent of surveyed lawyers with complex practices), and the need for less management because of counsel's familiarity with each other. NCSC Evaluation, *supra* note 497, at viii, 12, 14, 18, 25, 28.

528. See *supra* note 478.

529. Lynne J. Tomeny, *The Corporate Bar Issues a Policy Statement Supporting Creation of A Connecticut Business Court*, METROPOLITAN CORP. COUNS., Apr. 1997, at 53. Lynne Tomeny was the Corporate Bar's President at the time and issued a letter setting forth reasons for creating business court.

530. *Create a Complex Business Docket—Not a Business Court*, CONN. L. TRIB., May 25, 1998 [hereinafter Law Tribune Editorial].

531. Susan D. Etkind, *Attorneys Debate Simplifying Complex Litigation*, CONN. L. TRIB., Feb. 9, 1998; see also Law Tribune Editorial, *supra* note 530 (advocating that a complex litigation program would provide a flexibility that more accurately met the needs of Connecticut's court system and huge jury backlog). The complex docket was also advocated by the Citizens' Conference on the Connecticut Courts in November 1997. Peter L. Costas, *Complex Litigation Docket A First Step Toward Better Civil Litigation Management*, CONN. LAW. Dec. 1999-Jan. 2000, at 14. The debate in Connecticut clearly reflected (i) a belief that there had to be a choice between these two types of courts; and (ii) strong passions on which choice should be made.

532. Etkind, *supra* note 531.

its complex litigation program on June 1, 1998.⁵³³ This program is known as the Complex Litigation Docket or CLD.

The complex litigation program's hallmark is to assign one judge to each case.⁵³⁴ The judge becomes involved upon assignment, and develops a case plan at an early case management conference.⁵³⁵ Either the parties or the court can request a complex litigation designation.⁵³⁶ The bench urges the bar to use the Complex Litigation Docket "in any type of case that has intricate issues or unique concerns which would benefit from the specialized attention available in this program."⁵³⁷ The Chief Administrative Judge of the Civil Division is the ultimate gatekeeper on whether or not a case is accepted in the CLD.⁵³⁸

Currently there are eight complex litigation judges,⁵³⁹ with each judge responsible for an average of 143 cases.⁵⁴⁰ ADR is an important component of the program, with the judges acting as mediators in each other's cases, giving at least a full day to the mediation process.⁵⁴¹ In an important case for the CLD, Connecticut's Supreme Court reversed a lower appellate court decision, and found that "as a matter of law, no case is too complex for summary judgment."⁵⁴²

The original categories of case types were broad, including class actions, securities fraud, mass torts, medical malpractice, products liability, construction contracts, intellectual property, and a catch-all category provision,⁵⁴³ and matters "where the multiplicity of parties or issues suggests special procedures."⁵⁴⁴ Case types had been expanded to fifteen categories, from a more narrow original proposal of class actions, product liability, construction contracts, and claims under Connecticut's Unfair Trade Practices Act.⁵⁴⁵ Cases can be designated complex

533. Scott Brede, *Streamlining the Backlog of Knotty Cases*, CONN. L. TRIB., Apr. 19, 1999. Those advocating the complex court program believed that some goals sought in a business court could be achieved, such as developing case law, but business court advocates expressed concern that the complex court would not meet such objectives, as achieved in New York's Commercial Division, and asserted that concerns over a business court being "elitist" or taking assets away from the handling of other litigation were not accurate. Etkind, *supra* note 531.

534. Law Tribune Editorial, *supra* note 530. This is not the typical judicial assignment pattern in Connecticut. Brede, *supra* note 533.

535. Peter L. Costas, *The Complex Litigation Docket, Try It, You'll Like It*, CONN. LAW., Feb. 2000, at 18.

536. Sheila Anne Denton, *Resolving Complex Cases: The One-Judge Solution*, CONN. LAW., Mar. 2004, at 16 ("Currently, approximately forty CLD applications are received each month . . . 43 percent are from the presiding judge, 32 percent are from the defendant, and 25 percent are from the plaintiff.")

537. *Id.*

538. Notice to Attorneys re: Complex Litigation Docket, Superior Court, Civil Division (June 3, 2002), available at <http://www.jud.state.ct.us/external/super/ComplexLitigationNotice.pdf>.

539. Denton, *supra* note 536, at 17. State budget concerns have limited reaching the goal of twelve judges.

540. *Id.* These are not permanent assignments, as judges can be transferred to the normal docket. *Id.* The CLD is available in five court locations. Notice to Attorneys re: Complex Litigation Docket, Superior Court, Civil Division (June 3, 2002), available at <http://www.jud.state.ct.us/external/super/ComplexLitigationNotice.pdf>.

541. Denton, *supra* note 536, at 17.

542. *Gould v. Mellick & Sexton*, 819 A.2d 216, 220 (Conn. 2003).

543. Denton, *supra* note 536, at 16.

544. Brede, *supra* note 531.

545. *Id.*

based on various factors, including the number of parties, the size of the claim and the length of the trial.⁵⁴⁶

During its first year of operation, the assigned cases were “evenly divided between business and tort cases.”⁵⁴⁷ Between June 1998 and November 2003, 2,585 cases had been designated to the complex litigation docket.⁵⁴⁸ As of March 2004, 46 percent of the cases involved non-vehicular torts such as medical malpractice, wrongful termination, and product liability.⁵⁴⁹ Twenty-one percent are contract cases, while vehicle cases are 7 percent and property damage cases 6 percent of the caseload.⁵⁵⁰ There are small percentages of housing matters, administrative appeals, and probate appeals, with the remaining 13 percent including other miscellaneous matters.⁵⁵¹ The program is considered by most to be a success.⁵⁵²

C. ARIZONA’S COMPLEX LITIGATION PILOT PROGRAM

On November 22, 2002, Arizona Supreme Court Chief Justice Charles E. Jones issued an order establishing a Complex Litigation Program in the Superior Court of Maricopa County on an experimental basis.⁵⁵³ The Supreme Court had previously created the Committee to Study Complex Litigation in Arizona courts, and that body produced a report which the Arizona Judicial Council unanimously approved in October 2002.⁵⁵⁴ Originally, the pilot program was to operate in Maricopa for a period that is no longer than January 1, 2003 to December 31, 2004.⁵⁵⁵ The program is monitored by the simultaneously created Complex Civil Litigation Court Evaluation Committee.⁵⁵⁶

The new rules defining cases that are appropriate for complex designation focus on case management issues, and not the subject matter of cases.⁵⁵⁷ These include such factors as: the number of pre-trial motions expected; the number of witnesses; the amount of evidence; the numbers of separately represented parties; coordination with related cases in other forums; the need for post-judgment judicial supervision; whether the case would benefit from a single judge having knowledge of the specific area of law at issue; inherently complex legal issues;

546. *Id.*

547. Costas, *supra* note 531, at 14 (as reported by Chief Administrative Judge Joseph H. Pelligrino).

548. Denton, *supra* note 536, at 16.

549. *Id.*

550. *Id.*

551. *Id.*

552. *Id.* at 17.

553. In the Matter of Authorizing a Complex Litigation Program Applicable in Maricopa County, Administrative Order No. 2002-107 (Ariz. Nov. 22, 2002) [hereinafter *Arizona Order*]. Phoenix is located in Maricopa County.

554. *Id.*

555. *Id.* As discussed herein, this date was extended.

556. *Id.* The Court Evaluation Committee has its own website, at <http://www.supreme.state.az.us/courtserv/ComplexLit/default.htm>.

557. ARIZ. R. CIV. P. 8(i)(1) (2004) (rule made applicable under the *Arizona Order*), *supra* note 553, at Appendix A. The text of ARIZ. R. CIV. P. 8(i)(1) currently provides: “[A] ‘complex case’ is a civil action that requires continuous judicial management to avoid placing unnecessary burdens on the court or the litigants and to expedite the case, keep costs reasonable, and promote an effective decision making process by the court, the parties, and counsel.”

and the need for expeditious resolution of a complex matter and designation when the interests of justice would be served.⁵⁵⁸

The Committee to Study Complex Litigation reviewed materials on complex and commercial case programs nationally, and concluded that Arizona should follow California's model, rather than a commercial case program.⁵⁵⁹ The Committee recognized the California pilot program as targeting substantively and procedurally complex cases, and that the Arizona program would include not only traditional commercial cases, but cases such as mass and toxic torts.⁵⁶⁰ Unlike California, Arizona courts would not get new funding but would rely on a reallocation of existing court resources, or fees generated by that court.⁵⁶¹ Continuing judicial education is an important part of the program.⁵⁶²

One judge handles the entire case, and is to take a hands-on approach, with case management "aimed at encouraging early resolution of cases or parts of cases."⁵⁶³ There are to be court-annexed mediators and arbitrators, and program judges will be able to handle discovery disputes on short notice.⁵⁶⁴ The parties may move and seek to certify cases for complex designation, but it is the presiding judge of the court, or that judge's designee, who makes the decision.⁵⁶⁵ The application process is serious as it requires certification under the strictures of Arizona Rule 11;⁵⁶⁶ and the gatekeeper function is not to merely be a rubber stamp to anyone asking for inclusion in the program.⁵⁶⁷

558. ARIZ. R. CIV. P. 8(i)(2), *supra* note 553, at Appendix A. Factors considered in determining complexity are whether:

(A) Numerous pretrial motions raising difficult or novel legal issues that will be time-consuming to resolve; (B) Management of a large number of witnesses or a substantial amount of documentary evidence; (C) Management of a large number of separately represented parties; (D) Coordination with related actions pending in one or more courts in other counties, states or countries, or in a federal court; (E) Substantial post judgment judicial supervision; (F) The case would benefit from permanent assignment to a judge who would have acquired a substantial body of knowledge in a specific area of the law; (G) Inherently complex legal issues; (H) Factors justifying the expeditious resolution of an otherwise complex dispute; (I) Any other factor which in the interests of justice warrants a complex designation or as otherwise required to serve the interests of justice.

Id.

559. Committee to Study Complex Litigation, *Final Report of the Committee to Study Complex Litigation* (Sep. 2002), available at www.supreme.state.az.us/courtserv/complexlit/final.pdf at 3-4 [hereinafter *Arizona Final Report*]. The Court Evaluation Committee's minutes for March 18, 2004 indicate that the issue of a New York style business court was raised, but the consensus was not to include non-complex business cases, though the Committee would investigate if there were complex business cases that were not being placed into the program. Complex Civil Litigation Court Evaluation Committee Minutes, Mar. 18, 2004 (Draft) [hereinafter *March 2004 Minutes*], available at <http://www.supreme.state.az.us/courtserv/ComplexLit/Min-04-03.pdf>.

560. *Arizona Final Report*, *supra* note 559, at 4.

561. *Id.*

562. *March 2004 Minutes*, *supra* note 559, at 2.

563. *Arizona Final Report*, *supra* note 559, at 4.

564. *Id.*

565. *Arizona Order*, *supra* note 553 (appending new Rule 8(i)(3, 6)). See ARIZ. R. CIV. P. 8(i)(3)-(7).

566. *Id.* at 8(i)(3).

567. The Evaluation Committee's August 2003 minutes indicate that while fourteen cases had been assigned to the program, twelve applications were denied, with some concern expressed over forum

As of March 18, 2004, there were twenty-six cases in the program, with three designations pending.⁵⁶⁸ The complex litigation pilot program judges have had to maintain a full civil caseload, and there have been budget constraints affecting the pilot program.⁵⁶⁹ In light of the slow start up of the program, the Evaluation Committee anticipated asking for an extension of the pilot program beyond December 2004 so that the program's impact can be better measured.⁵⁷⁰ Similar to concerns expressed by those favoring complex courts over business courts, one judge expressed a concern that the complex litigation program might be viewed as "elitist."⁵⁷¹ The purpose of the program is to relieve congested calendars for the judges hearing more routine cases, thus removing the time consuming complex cases from their dockets and re-assigning the complex cases "to a dedicated panel of judges specially trained in complex case management;" ideally cutting down on litigation time and saving costs and resources of both the court and the litigants.⁵⁷²

D. PITTSBURGH'S COMPLEX CASE ASSIGNMENT

Through local rules, the Court of Common Pleas of Allegheny County, Pennsylvania (Pittsburgh) has a format for assigning complex cases to a single judge.⁵⁷³ The rule provides that application for complex designation be made to the "Complex Case Judge."⁵⁷⁴ Cases may be considered complex if the case cannot be tried within ten days, involves complex questions of law and fact, "or when the orderly administration of justice requires that the case be assigned to a single judge."⁵⁷⁵ The parties must file a motion with the complex case judge to obtain that assignment.⁵⁷⁶

Judge R. Stanton Wettick, Jr. has been the complex case judge since 1990.⁵⁷⁷ He has described most complex cases as being in the areas of medical malpractice, products liability, and commercial litigation.⁵⁷⁸ Cases coming to him as complex case judge include "large cases involving the kinds of complex issues that char-

shopping. Complex Civil Litigation Court Evaluation Committee Minutes, Aug. 26, 2003 (Draft), available at <http://www.supreme.state.az.us/courtserv/ComplexLit/Min-03-08.pdf>.

568. March 2004 Minutes, *supra* note 559, at 1. More recent figures are set out in Complex Civil Litigation Court Evaluation Committee Minutes, Aug. 23, 2004 (Draft) [hereinafter August 2004 Minutes], available at <http://www.supreme.state.az.us/courtserv/ComplexLit/Min-04-08.pdf>.

569. Complex Civil Litigation Court Evaluation Committee Minutes, Dec. 17, 2003 (Draft), at 1-2, available at <http://www.supreme.state.az.us/courtserv/ComplexLit/Min-03-12.pdf>.

570. *Id.* at 2. Arizona's Chief Justice has since "approved a two-year extension of the pilot program and the [Evaluation] Committee's term." August 2004 Minutes, *supra* note 568, at 1.

571. March 2004 Minutes, *supra* note 559, at 3.

572. News Release, Arizona Supreme Court Administrative Office of the Courts, *New Complex Litigation Program Promises to Reduce Time and Cost of Going to Court* (Jan. 7, 2003) (on file with *The Business Lawyer*, University of Maryland School of Law).

573. ALLEGHENY CO. PA. CIV. AND FAM. R. 249 IV (1999).

574. *Id.* at IV(A).

575. *Id.* at IV(B).

576. Allegheny County Civil Practice Manual § 9-1.0, at 91.

577. *A Conversation With Judge Stanton Wettick, Allegheny County Common Pleas Court*, PENN. LAW WKLY., Apr. 17, 1995, at 7 [hereinafter Wettick 1995 Interview]; *Conversation With Judge John L. Musmanno, Allegheny County Common Pleas Court*, PENN. L. WKLY., July 25, 1994, at 7.

578. Wettick 1995 Interview, *supra* note 577.

acterize corporate governance, complicated commercial transactions and insurance coverage issues”⁵⁷⁹ From seeing so many of these cases he has developed an expertise in handling them.⁵⁸⁰ When responding to a question about Pittsburgh’s hospitality to high-tech business, one federal judge said of Judge Wettick: “Judge Wettick of the Common Pleas Court does an outstanding job of handling discovery motions and complex business litigation. The results compare favorably with those in the new commercial or business courts that are being set up elsewhere.”⁵⁸¹ Approximately ninety percent of the cases are settled or otherwise reach disposition before trial.⁵⁸²

XVII. DELAWARE COURT OF CHANCERY AND SUPERIOR COURT⁵⁸³

A. COURT HISTORY

The most well known of the courts that are considered business courts is the Delaware Court of Chancery, which historically is an equity court.⁵⁸⁴ It hears numerous kinds of corporate disputes,⁵⁸⁵ as well as other equitable matters wholly unrelated to corporations.⁵⁸⁶ The Delaware Superior Court is Delaware’s trial level court of general jurisdiction for non-equity cases.⁵⁸⁷ That court hears cases involving money disputes between businesses that could fall in the jurisdiction of

579. *The Hon. R. Stanton Wettick: Effectively Handling Business And Other Complex Disputes*, METROPOLITAN CORP. COUNS., N.E. ed., May 2001, at 48 [hereinafter Wettick 2001 Interview].

580. *Id.*

581. The Hon. Robert Cindrich, *A Quality Court Attracts Business To Pittsburgh*, METROPOLITAN CORP. COUNS., N.E. ed., July 2001, at 50. He is “involved in cases involving complex issues that businesses care about in which only one party may be a business.” Wettick 2001 Interview, *supra* note 579.

582. *Id.*

583. Delaware’s Supreme Court is not addressed herein as a “business court,” but the frequency with which it renders important rulings on the matters of corporate law that were first before the Chancery Court mark its place as a pre-eminent “business court” in its own right. *See, e.g., Smith v. Van Gorkom*, 488 A.2d 858 (Del. 1985). While only five percent of the Supreme Court’s cases are business cases on appeal from Chancery, the precedential importance of many of those cases may result in commanding twenty percent of the Supreme Court’s time. E. Norman Veasey, *The Drama of Judicial Branch Change in this Century*, 17 DEL. LAW. 4, 5 (Winter 1999–2000), available at 17-WTR DELAW 4, <http://www.westlaw.com>.

584. DEL. CODE ANN. tit. 10, § 341 (2002). Under section 342, “The Court of Chancery shall not have jurisdiction to determine any matter wherein sufficient remedy may be had by common law, or statute, before any other court or jurisdiction of this State.” *Id.* § 342. As discussed *infra*, the inclusion of a new technology jurisdiction permits the Chancery Court to decide or mediate purely monetary matters in some cases.

585. The Chancery Court’s five judges (one Chancellor and four Vice-Chancellors) handle approximately 500 business cases a year, including “typical corporate cases—derivative, class actions, injunctions, internal corporate affairs, and the like.” *The Drama of Judicial Branch Change in this Century*, *supra* note 583, at 5. These often complex and important cases constitute approximately 75 percent of the Chancery Court’s case load. *Id.*

586. For example, in *Anolick v. Holy Trinity Greek Orthodox Church, Inc.*, 787 A.2d 732 (Del. Ch. 2001), the court was faced with the issue of whether the plaintiff had an easement in an alley way. While this case does not implicate, in the slightest, the issues popularly associated with the Delaware Court of Chancery, the thoroughness and detail with which the case was considered, and the opinion rendered, demonstrate a quality in decision making that is esteemed when considering the Chancery Court as the premier business court.

587. O. Francis Biondi et al., *The Commission on Delaware Courts 2000: A Work in Progress*, 13 DEL. LAW. 28 (Winter 1995), available at 13-WTR DELAW 28, <http://www.westlaw.com>.

developing business courts in other states.⁵⁸⁸ The Superior Court handles a significant volume of commercial cases, is a national forum for commercial insurance coverage disputes, spends significant time on complex civil litigation, and finds major corporations as parties on its docket.⁵⁸⁹

The prestige of Delaware's Chancery Court, i.e., the esteem in which it is widely held, is an integral part of that court. The Chief Justice of the U.S. Supreme Court celebrated the Chancery Court as "an important contributor to our national system of justice."⁵⁹⁰ He identified some of the sources for the Chancery Court's preeminence as the opportunity to obtain quick and effective action,⁵⁹¹ expertise, economies of scale that have lent themselves for efficiency, and "[p]erhaps most importantly," a refined body of law allowing businesses the prescience to avoid suits.⁵⁹²

Lawyers have "praised the depth and precision of the written opinions generated by the Delaware Court of Chancery as that court's greatest strength."⁵⁹³ In testifying before the Maryland Task Force studying implementation of a business and technology court, Chancellor William Chandler left the Task Force with the understanding that the Chancery Court's "effectiveness" and "national reputation" is "brought on by a thorough understanding of corporate issues."⁵⁹⁴ This thoroughness includes mutual respect, collaborative effort and cooperation, Chancellor Chandler also having testified that: "Members of the Court of Chancery also discuss complex issues among themselves, and review opinions prior to release to the parties and the public to insure consistency."⁵⁹⁵

The Chancery Court is also a model because it represents high institutional aspirations. The attention to detail, cooperation, and care in seeking a proper and thoroughgoing result reflect a judicial body that commands respect because the court and its judges demand that they give respect to the cases before them. Although the rich history of an over 200 year old court cannot be duplicated, its

588. See, e.g., *Edge of the Woods, L.P. v. Wilmington Sav. Fund Soc'y*, 2001 Del. Super. LEXIS 304, at *1 (Del. Super. Ct. Aug. 16, 2001) ("This case involves alleged breaches of loan agreements arising out of years of commercial loan transactions and dealings between the Plaintiffs and the Defendant."); see also *Outdoor Techs. v. Allfirst Fin., Inc.*, 2000 Del. Super. LEXIS 16 (Del. Super. Ct. Jan. 24, 2000); *Pfizer Inc. v. Advanced Monobloc Corp.*, 1999 Del. Super. LEXIS 330 (Del. Super. Sept. 2, 1999); *S&R Assocs., L.P. v. Shell Oil Co.*, 725 A.2d 431 (Del. Super. Ct. 1998).

589. *Henry duPont Ridgely: The Superior Court, Offering an Ideal Forum for Resolution of Business Disputes*, METROPOLITAN CORP. COUNS., N.E. ed., Mar. 2001, at 45.

590. William H. Rehnquist, *The Prominence of the Delaware Court of Chancery in the State-Federal Joint Venture of Providing Justice*, 48 BUS. LAW. 351, 354 (1992) [hereinafter Rehnquist].

591. *Id.* Chief Justice Veasey describes Chancery's adjudicating a large stakes dispute, involving an issue of New York contract law, in a matter of weeks; culminating in a fifty-five page opinion by Chancellor Chandler issued five days after the 4 day plenary trial ended. *The Hon. E. Norman Veasey—An Efficient Court System: A Factor to Consider in Selecting a Business Location*, METROPOLITAN CORP. COUNS., N.E. ed., Mar. 2001, at 1. The losing trial counsel commended the expeditious and close attention received in the Chancery Court. *Id.*

592. Rehnquist, *supra* note 590, at 354.

593. *Focus on Business and Complex Courts*, *supra* note 11.

594. Maryland Task Force, *supra* note 71, Appendix B, at 24.

595. *Id.*

ethic and sense of responsibility can be emulated.⁵⁹⁶ One of the court's greatest Chancellors, Collin J. Seitz, Jr., made this essential point when asked about the nationwide prominence of some of his Chancery decisions: "I don't want to be modest, but all cases are transitory. I would rather be remembered for fair treatment in handling the cases rather than any particular case."⁵⁹⁷

B. SUMMARY PROCEEDINGS IN THE SUPERIOR COURT

In 1993, Delaware's Governor established a Commission on Major Commercial Litigation Reform.⁵⁹⁸ The Commission recommended creating procedures for expediting resolution of business disputes.⁵⁹⁹ The recommendation was endorsed by the Governor and General Assembly in 1994.⁶⁰⁰ The Joint Resolution of the General Assembly observed the large number of corporations and financial institutions in the state, which came to the state in part because of the quality of Delaware's courts and their reputation for "swift and predictable judicial action."⁶⁰¹ The new procedures were recommended, and endorsed, in light of concerns over the high costs and delays associated with litigation, including business and com-

596. One reads of the extraordinary groupings of judges like Cardozo's New York Court of Appeals or Hands' and Thomas Swan's Second Circuit, as kinds of golden ages; but it is not necessary for a court to be extraordinary to be hardworking, fair, capable and effective.

It is further interesting to observe that these judges served on pre-eminent commercial courts. Judge Posner observes that in the late 19th and for decades into the 20th Centuries, "[t]he New York Court of Appeals was the nation's premier commercial court." RICHARD A. POSNER, *CARDOZO: A STUDY IN REPUTATION* 129 (1993). The Second Circuit has been described as "the country's leading commercial court during the 1940s and 1950s" Margaret V. Sachs, *Judge Friendly and the Law of Securities Regulation: The Creation of a Judicial Reputation*, 50 *SMU L. REV.* 777, 791 (1997). Judge Posner's own court has been studied as a commercial or corporate law court. Richard A. Booth, *The Seventh Circuit as a Commercial Court*, 65 *CHI.-KENT L. REV.* 667, 672 (1989) ("There can be little doubt that the Seventh Circuit has been a leader in the development of corporation and securities law. Some of the very biggest names in the pantheon of Supreme Court cases have been reversals of Seventh Circuit decisions. While some might regard that as embarrassing, it also indicates that the court has been innovative. And this tendency predates the advent of Judges Posner and Easterbrook on the court by several years.").

597. Edmund N. Carpenter II, *A Conversation with Judge Collins J. Seitz, Jr.*, 16 *DEL. LAW.* 24, 28 (Fall 1998) available at 16-FALL DELAW 24, <http://www.westlaw.com> (wherein one of Delaware's great lawyers interviewed one of its great judges). Justice Rehnquist's piece on the Chancery Court includes what "in the eyes of many . . . is the Court of Chancery's 'proudest accomplishment.'" Rehnquist, *supra* note 590, at 353. That accomplishment was "Chancellor Collins Seitz' 1952 decision in *Belton v. Gebhart* . . . [where] Chancellor Seitz courageously held that black schoolchildren suffered from state-imposed segregation." *Id.* (footnote omitted). In the group of cases decided by the United States Supreme Court three years later in *Brown v. Board of Education*, 349 U.S. 294 (1955), only *Belton* was an affirmed decision. *Id.* at 301. The Delaware Supreme Court affirmed Chancellor Seitz' decision, though carrying out its own exhaustive analysis about whether the racially segregated schools were equal or not. *Belton v. Gebhart*, 91 A.2d 137 (Del. 1952), *aff'd sub. nom.*, *Brown v. Board of Educ.*, 349 U.S. 294 (1955).

598. Supreme Court of Delaware, Administrative Directive No. 96, Feb. 28, 1994 (on file with *The Business Lawyer*, University of Maryland School of Law).

599. *Id.*

600. *Id.*

601. *Id.*

mercial litigation.⁶⁰² An expedited summary procedure in the Superior Court⁶⁰³ was suggested for business and commercial cases in excess of \$1,000,000.⁶⁰⁴ The judiciary put these recommendations into effect in 1994.⁶⁰⁵

The new rules for summary proceedings were little used, and the jurisdictional amount was subsequently changed from \$1,000,000 to \$100,000.⁶⁰⁶ Both the Superior and Chancery Courts were encouraged to increase efforts at creating mediation programs.⁶⁰⁷ Superior Court Rule 124 now provides for summary proceedings for cases within the Superior Court's jurisdiction exceeding \$100,000, excluding personal, physical, or mental injury, where at least one party is a Delaware citizen, corporation, or other business entity.⁶⁰⁸ In choosing the summary proceeding process, parties surrender the ability to seek punitive damages or jury trials.⁶⁰⁹ Since July 1997, there have only been four filings as summary proceedings in the Superior Court.⁶¹⁰

This effort nevertheless reflects Delaware's active awareness of the importance of specialized court programs to address unique business dispute needs, and the nature of that need as part of an ongoing process. In 2001, Delaware Supreme Court Chief Justice E. Norman Veasey observed that "Corporate decisionmakers are very interested in, and carefully consider, the quality of the courts (and now their technology) when choosing where to incorporate and to litigate."⁶¹¹

[T]he conventional wisdom around the nation is that the expertise, stable body of judicial decisions, prompt service and modern techniques of the Court of Chancery, Supreme Court and Superior Court are largely credited with maintaining Delaware's preeminence as the corporate domicile of choice

602. *Id.*

603. Less widely known than Chancery, the Delaware Superior Court is the State's trial court of general, non-equity, jurisdiction. There has been increased national attention on the Superior Court as Delaware's "commercial litigation center for claims involving money damages." Chief Justice E. Norman Veasey, *Problem Solving in Judicial Management*, The State of the Delaware Judiciary, First Session of the 141st General Assembly, May 1, 2001, at 6 [hereinafter 2001 State of the Judiciary] (on file with *The Business Lawyer*, University of Maryland School of Law). Civil filings in Superior Court went from 5,644 in 1990 to 9,523 in 2000. *Id.*

604. *Id.*

605. Administrative Directive No. 96, *supra* note 598.

606. See DEL. CT. R. 124-31 (2004).

607. Supreme Court of Delaware, Administrative Directive 117, April 1, 1998. Delaware Superior Court Rule 16.1 addresses mediation and other ADR. DEL. CT. R. 16.1.

608. Summary Proceedings for Commercial Disputes, at http://courts.state.de.us/Courts/Superior%20Court/ADR/ADR/summary_proc.htm ("The Superior Court has adopted rules and procedures specifically designed to allow major commercial litigation to be resolved expeditiously and cost-effectively.")

609. *Id.*

610. Telephone interview with Ellen Davis, Civil Deputy in the Prothonotary's Office of the Superior Court of Delaware (Sept. 11, 2003). Summary Proceedings were initiated in July 1997, October 2000, January 2001, and June 2001. These matters were resolved without trial. The limited number of summary proceeding cases is reminiscent of the Milwaukee County Circuit Court's efforts at establishing a voluntary summary proceeding process for business disputes, which did not attract sufficient cases. See Appendix B, *infra* p. 275. The authors have not studied either phenomenon in detail; however, one possibility is that if parties are seeking resolution in a business court, rather than, for example, through private commercial arbitration or mediation, they may expect, or want, the full panoply of court powers and jurisdiction to be available.

611. 2001 State of the Judiciary, *supra* note 603, at 6.

for over 300,000 corporations, including a substantial majority of the Fortune 500 companies. We cannot be smug, or take for granted this enormous economic benefit. Other states are taking aggressive steps to compete with Delaware by improving their business courts with the goal of attracting incorporations, businesses, and business litigation to their states. We need to maintain our competitive national position as well to continue to enhance the trust and confidence of our residents.⁶¹²

C. CREATION OF TECHNOLOGY COURT JURISDICTION WITHIN THE CHANCERY COURT

On May 29, 2003, Delaware expanded the Court of Chancery's jurisdiction to include technology disputes⁶¹³ of greater than one million dollars.⁶¹⁴ Delaware's Governor Ruth Ann Minner actively sought a technology court in Delaware.⁶¹⁵ This was in line with one of the top recommendations of her Strategic Economic Council as a means to promote economic growth.⁶¹⁶ The Governor perceived the new technology court as joining "two of the mainstays of Delaware's economy—technology development and the expert and efficient dispute resolution provided by Delaware's courts . . ."⁶¹⁷ Delaware Senate Bill 58 creating such jurisdiction within the Chancery Court was introduced on April 1, 2003, passed the Senate on April 3, 2003 and the House on May 14, 2003; in both instances without any negative votes. It was signed into law by Governor Minner in late May 2003.⁶¹⁸

Under Delaware Code, title 10, section 346(a), the Chancery Court has been given the power "to hear and determine technology disputes" if, among other criteria, the parties agree to that jurisdiction.⁶¹⁹ This is a significant change in

612. *Id.* at 11. There is considerable debate as to whether business courts are being developed to attract incorporations as such, rather than to simply keep or attract business operations. See, e.g., Marcel Kahan & Ehud Kamar, *The Myth of State Competition in Corporate Law*, 55 STAN. L. REV. 679 (2002).

613. Under DEL. CODE ANN. tit. 10, § 346(c)(1) (Supp. 2004), technology dispute includes,

the purchase or lease of computer hardware; the development, use, licensing or transfer of computer software; information, biological, pharmaceutical, agricultural or other technology of a complex or scientific nature that has commercial value, or the intellectual property rights pertaining thereto; the creation or operation of Internet web sites; rights or electronic access to electronic, digital or similar information; or support or maintenance of the above.

Under section 346(c)(3), the nature of a "technology dispute" is to be interpreted liberally. See Appendix A, *infra* pp. 229–30 for full statutory text.

614. DEL. CODE ANN. tit. 10, § 346(a)(5). See Appendix A, *infra* p. 230.

615. Darrel W. Cole, *Technology Court Could Place Delaware Courts at Top*, DEL. L. WKLY., Feb. 5, 2003, at D1.

616. *New Law Expands Del. Chancery Court Jurisdiction to Technology Cases*, DEL. CORP. LITIG. REP., June 9, 2003, at 11.

617. *Id.*

618. Sean O'Sullivan, *Chancery Court Expands: New Rules Designed to Attract More Business to State*, NEWS J., May 30, 2003, available at <http://www.delawareonline.com/newsjournal/local/2003/05/30/chancerycourtex.html>.

619. DEL. CODE ANN. tit. 10, § 346(a). Neither punitive damages nor a jury trial are available for parties choosing to litigate a technology dispute in the Court of Chancery. *Id.* See Appendix A, *infra* pp. 229–30.

Chancery Court jurisdiction because it includes jurisdiction to hear and decide solely monetary disputes that fall into the technology category, which includes matters involving computer hardware and software, Internet disputes, and “information, biological, pharmaceutical, agricultural or other technology of a complex or scientific nature that has commercial value, or the intellectual property rights pertaining thereto”⁶²⁰ The term technology dispute is to be given a liberal interpretation.⁶²¹

As set forth above, the 1998 administrative directive from the Supreme Court directed the Superior and Chancery Courts to vigorously pursue mediation programs, and the Chancery Court drafted an elaborate rule to that affect, Chancery Court Rule 174.⁶²² In creating the Chancery Court’s new technology jurisdiction, further provision for mediation was created,⁶²³ including the mediation of solely monetary business disputes with at least \$1,000,000 at issue.⁶²⁴ Again, this is by the parties’ choice, so the parties could elect mediation options that do not include adjudication.⁶²⁵ Unlike section 346, which expands the Chancery’s ability to adjudicate non-equity matters in technology cases, section 347 empowers the Chancery to mediate business disputes, without the limitation that they be technology business disputes.⁶²⁶ “This mediation option will provide a new type of service to Delaware businesses, at a time when businesses are more interested than ever in cost-effective and confidential methods to resolve litigable controversies consensually.”⁶²⁷

Section 347 does not limit the Superior Court’s jurisdiction, but it gives the parties defined options to choose the Chancery Court, which is “expert in handling business matters.”⁶²⁸ Technology disputes may often center on commercial relationships that require rapid decision on issues of great complexity; and many will involve injunctions or specific performance which fall into Chancery’s traditional function.⁶²⁹

Senator Adams’ legislative synopsis to sections 346 and 347 explains the new Act’s goal: “The State of Delaware wishes to remain preeminent in its ability to meet the needs of its business community, including the needs of all business entities domiciled in Delaware.”⁶³⁰ The new Act is intended to:

permit businesses to have the certainty that any future technology disputes that arise between them may be heard in the Court of Chancery. Thus, the

620. DEL. CODE ANN. tit. 10, § 346(c).

621. *Id.* § 346(c)(3).

622. Administrative Directive 117, *supra* note 607; DEL. CT. R. 174 (2004).

623. DEL. CODE ANN. tit. 10, § 346(a).

624. *See id.* § 347; Appendix A, *infra* p. 231.

625. DEL. CODE ANN. tit. 10, § 346(d).

626. *Id.* § 347. The Synopsis to the Act states: “Consistent with the overall objectives of the Act, the Act also enables the Court of Chancery, by rule, to permit parties to request mediation in order to resolve high-stakes, complex business disputes.” S. 58, 142nd Gen. Assem. (Del. 2003).

627. *Id.*

628. *Id.*

629. *Id.*

630. *Id.*

Act enables businesses, at least one of which is domiciled in Delaware, to contract to have any future technology disputes between them to be adjudicated in the Court of Chancery.⁶³¹

This puts expression to the Court of Chancery's well-recognized preeminence for legal stability and expertise in business matters that brings businesses to incorporate, and litigate, in Delaware.⁶³²

Delaware's Legislature has the authority to enact statutes expanding the Court of Chancery's jurisdiction beyond equity's traditional bounds.⁶³³ This has provided the means to expand Chancery's availability to resolve corporate governance disputes, and the option to center more of these disputes in Chancery.⁶³⁴ The jurisdictional breadth created by title 10, sections 346 and 347, reflects an expansion into broader business and commercial disputes, not merely in traditional equity cases or in equity matters where the court has ancillary jurisdiction over legal matters that may arise therein.⁶³⁵ Delaware's Legislature has taken steps to create a qualitatively broader jurisdiction in the Chancery Court by including commercial court type legal claims solely based upon money damages. This provides a new specialized jurisdiction for a court that already has the most respected level of specialization and expertise in equity based business disputes.⁶³⁶

631. *Id.*

632. "In sum, the Act provides additional benefits for businesses choosing to domicile in Delaware. It seeks to keep Delaware ahead-of-the curve in meeting the evolving needs of businesses, thus strengthening the ability of the State to convince such businesses to incorporate and locate operations here." *Id.*; see also July 2003 Archives, *Legislation Aims to Bring More Tech Cases to State*, BUS. LEDGER (July 2003), available at <http://www.ncbl.com/archive/07-03law.html> ("The legislation, part of Minner's legislative agenda for 2003, strengthens the Delaware Court of Chancery's place as a venue for corporate litigation and will likely have an economic impact on Delaware due to additional corporate litigation taking place in Wilmington.")

633. See *Clark v. Teeven Holding Co.*, 625 A.2d 869 (Del. Ch. 1992), observing that the Court of Chancery has the same jurisdiction that the English High Court of Chancery had in 1776, but that such jurisdiction could be expanded by recognition of new rights, recognition of injunctive powers, and by the passage of statutes, e.g., DEL. CODE ANN. tit. 8, § 225 (Repl. Vol. 1999) "granting authority to Court of Chancery to adjudicate results of corporate elections." *Clark*, 625 A.2d at 875-76. Other examples of the Legislature expanding jurisdiction through statute are section 111, providing that "[a]ny action to interpret, apply or enforce the provisions of the certificate of incorporation or the bylaws of a corporation may be brought in the Court of Chancery," and section 220 regarding stockholders rights to compel inspection of corporate books and records. DEL. CODE ANN. tit. 8, §§ 111, 220. Under section 145, the Court of Chancery has exclusive jurisdiction to make a fairness determination as to whether a corporation can indemnify officers and directors who are found liable to that corporation. *Id.* § 145.

634. Email from Professor Lawrence Hamermesh to Lee Applebaum, Esquire (Oct. 2, 2003) (on file with authors).

635. The Court of Chancery can exercise jurisdiction over claims for money damages or declaratory relief, where there are also claims for equitable relief over which it has jurisdiction, for example, an injunction. See, e.g., *Kerns v. Dukes*, 707 A.2d 363, 368 (Del. 1998).

636. During the first six months after the statute's enactment, the technology based jurisdiction had not been used to bring new litigation, but at least one matter had gone to mediation. Josy W. Ingersoll & Matthew P. Denn, *Delaware Debuts Technology Court, Mediation State Remains on Cutting Edge in Handling Business Disputes*, DEL. L. WKLY., Feb. 25, 2004, at D5. As of June 18, 2004, three cases had gone to mediation under section 347. Email from Chancellor William B. Chandler III of the Delaware Court of Chancery to Lee Applebaum, Esquire (June 18, 2004) (on file with authors). In light of the jurisdictional amount at issue, and the specific nature of the type of claims permitted under section 346, it will likely take some time to take measure of that statute's use.

XVIII. JURISDICTIONAL COMPARISONS

Generally, two basic jurisdictional patterns emerge in existing or proposed business courts: (i) inclusion of all cases that fall within explicitly defined case types; or (ii) inclusion only of complex cases or cases with novel legal issues (the resolution of which will have a broadly instructive effect), with the virtually automatic inclusion of a very limited number of case types, such as shareholder derivative suits.⁶³⁷ This second approach typically involves more judicial involvement and scrutiny as to what cases will and will not be heard in the business court.⁶³⁸

A. BROAD JURISDICTION BUSINESS COURTS

Although New York County's Commercial Division currently has a \$125,000 jurisdictional minimum,⁶³⁹ some provisions requiring that a matter be complicated,⁶⁴⁰ and provision that cases may be culled based upon the court's case load,⁶⁴¹ it is the model for the first type of jurisdiction. Thus, thousands of cases are filed in the Commercial Division annually. Cook County's Commercial Calendar, which itself is approaching 4,500 annual filings, Philadelphia's Commerce Program, and now Orlando's Business Court, have a similar design.⁶⁴² Colorado's Business Committee would likewise have adopted an approach of presumptively

637. The Delaware Court of Chancery certainly provides another model, but it does not appear that other jurisdictions are looking to establish an equity court model for their business courts; at least where a Chancery Division does not already exist. (As set forth *supra*, New Jersey is experimenting in four Counties by assigning all complex business cases to Chancery judges.) On a more fundamental level, however, the Delaware Court of Chancery sets forth the basic concept that a business court should address a large number of business disputes via a highly capable set of judges hearing individual cases from beginning to end.

638. The AEQUITAS, Inc., Georgia Feasibility Study refers to this as the "Gatekeeper" function and recommends it for Georgia. AEQUITAS, Inc., Georgia Feasibility Study, *supra* note 120, at 15. Courts with lists of specific case types can include judicial review of whether cases do or do not come within the specified criteria, and this can include judicial intervention to determine what falls within the specified criteria. This appears to be a much more black-and-white process, however, than determining whether a case, even a dispute between two businesses, is sufficiently complex or important. Further, there are some complex type courts where the lawyer first designates the case, subject to judicial review.

639. Jurisdictional amounts perform a filtering function, reflecting a pre-made generalized judgment about case volume management, rather than the case by case measure of complexity factors. In Philadelphia's Court of Common Pleas all matters below \$50,000 must go to arbitration. In Cook County, there is only a \$30,000 limit, but the fact that business disputes sounding in equity go to the Chancery Division limits the Commercial Calendar's sizable case volume. Erie County, New York provides a \$25,000 minimum with the express qualification that the amount may be changed depending on the case load. New York County itself encourages electronic filing by reducing the jurisdictional amount to \$25,000, and expanding cases types. *See supra* notes 60–61.

640. *E.g.*, in commercial real property transactions and environmental insurance coverage litigation.

641. *See* Appendix A, *infra* p. 248 ("Due to caseload considerations, the Justices of the Division are empowered to transfer out of the Division cases which, in their judgment, do not fall within this category notwithstanding that a party has described the case as 'commercial' on the Request for Judicial Intervention.").

642. Cook County's Chancery Division, like New Jersey's Chancery Division or Delaware's Chancery Court, must hear cases that fall within its jurisdiction; putting aside the issue of mixed questions of law and equity for present purposes. The new Delaware Court of Chancery jurisdiction in technology cases is discussed above.

including all cases within defined categories, without a complexity or other selection component beyond type.⁶⁴³

As reflected in the descriptions above, and in more detail in Appendix A, courts listing jurisdiction by case type vary in the length of the list, and in specificity. Although Florida's Ninth Judicial Circuit's recent order establishing a business court subdivision expressly includes U.C.C. transactions between businesses within the new court's jurisdiction,⁶⁴⁴ Colorado's proposed list states more broadly, "Commercial transactions *not* involving a consumer party."⁶⁴⁵ Colorado's broad language encompasses a U.C.C. dispute between businesses, but also encompasses a broader array of specific disputes, that would also be in the Florida court's list. Thus, it is not fully possible to do a one-to-one mapping of what types of claims are or are not in comparable business court programs because there is no uniform nomenclature; however, a close look at each shows a virtual identity in the significant majority of case types.

In courts without a complexity requirement (including those courts such as Massachusetts Superior Court that include some case types without an additional express complexity requirement), the following subject areas are common or almost always common among the business courts:⁶⁴⁶ intracorporate type governance disputes (whether for corporations, non-profits, partnerships, joint ventures, etc.); corporate sales/purchases; securities transactions; shareholder derivative actions; corporate officer and director liability; U.C.C.; non-compete/restrictive covenant agreements; unfair competition and antitrust; trade secrets; interference with contractual or business relationships; fraud/misrepresentation in business contract context; sales of goods or services between businesses; non-consumer bank transactions; and insurance or indemnification disputes where the underlying action involves a business dispute and the insurance policy at issue is commercial. Most, if not all, of these courts will also expressly hear intellectual property matters, business matters involving sales of good or services, and commercial class actions.

Some of these courts will also hear malpractice actions brought by businesses, but the professionals included within the scope of those claims differ. For example, New York County and Nassau County expressly include malpractice actions against accountants and actuaries and exclude lawyer malpractice; Monroe County will not hear medical, legal, or accounting malpractice; Erie County will hear professional malpractice claims other than legal or medical; and Albany County is silent as to both including or excluding malpractice claims.⁶⁴⁷ Florida includes "[m]alpractice claims involving business enterprises and attorneys, accountants, actuaries, architects, or other professionals in connection with the ren-

643. Colorado Report, *supra* note 72, at 12.

644. Administrative Order No.: 2003-17, In the Circuit Court of the Ninth Judicial Circuit in and for Orange County, Florida, June 26, 2003 at II.B.1. See Appendix A, *infra* p. 233.

645. See Appendix A, *infra* p. 229 (Colorado Report excerpt).

646. This is also said with the understanding that the Cook County Commercial Calendar does not hear business disputes seeking equitable relief, e.g., enforcement of non-compete agreements, internal corporate governance disputes, etc.

647. See Appendix A, *infra* pp. 248-60.

dering of professional services to the business enterprise,” and Massachusetts similarly has a presumptive category for “malpractice claims brought by business enterprises and not-for-profit institutions against professionals relating to rendering of professional service.”⁶⁴⁸ In light of the New York Commercial Division’s long history before expansion into new counties, and in light of the available information on business courts possessed by the Massachusetts and Florida courts, these differences demonstrate the different needs and/or different opinions held as to what should be included in a business court’s jurisdiction and not some haphazard array.

Other categories that are found in more than one court include surety bonds (Florida and Philadelphia); franchise disputes (Florida, Illinois, Albany County, Kings County, Westchester County, Philadelphia); some types of employment disputes (Cook County, Albany County, Erie County, Kings County, Monroe County, Westchester County); and business disputes involving commercial leases or purchase/sale/lease/security interests in real or personal property (Florida, Philadelphia, Cook County, Albany County, Nassau County, Westchester County, Michigan Cyber Court; and New York County, Suffolk Counties, Massachusetts, and Rhode Island, if complicated or complex).

B. COMPLEX JURISDICTION BUSINESS COURTS

North Carolina’s Business Court is a model for the second type of jurisdiction, focusing on the business or commercial case’s complexity. Cases must be recommended and then meet with the Chief Justice of the Supreme Court’s approval to become Business Court cases.⁶⁴⁹ Inclusion is based upon complexity; the presence of a novel legal issue, the resolution of which has broader implications; and/or whether the cases fall within certain statutory areas of North Carolina business law where decisions will provide guidance to North Carolina businesses on corporate governance issues.⁶⁵⁰ In the typical commercial case under the U.C.C. or for a business tort, however, the case will not come before the Business Court, absent complexity or a cutting edge legal issue.

A complexity component is also included in New Jersey’s Complex Commercial tracking designation (in both the more specialized Bergen and Essex County programs, as well as state-wide), and in the Maryland Business and Technology Case Program, though the lawyers first designate the case as complex in New Jersey. Massachusetts’ Business Litigation Session has a presumptive list of case types, but also includes a complexity component within that presumptive list. Thus, although shareholder derivative claims are presumptively included, breach of contract or business tort cases are included only “if they have complex factual or legal issues or are likely to require complex case management”⁶⁵¹ The Georgia

648. *Id.* at 233, 242.

649. *Id.* at 264.

650. *Id.* at 264–65. In light of new recommendations, North Carolina may increase the number of presumptive categories for business court cases. *See supra* note 184.

651. Massachusetts Order, *supra* note 278.

Feasibility Study recommends a model assigning only complex business cases and selected cases dealing with novel legal theories to the business court as well.⁶⁵²

C. OTHER JURISDICTIONAL MANAGEMENT

Rhode Island does not have a complexity requirement, but Judge Silverstein must approve any case coming onto the Business Calendar. The Nevada Rules list some presumptive case types and permit the Judges to hear a wider range of cases within their discretion, if they believe those cases would benefit from enhanced case management, indicating an emphasis on complex litigation. In Nevada, it is counsel that seeks a business court assignment in the first instance, subject to judicial review.

Delaware has created a voluntary jurisdiction in Chancery if one party is from Delaware, a technology dispute is at issue, and over one million dollars is at stake. Michigan's Cyber Court jurisdiction is likewise voluntary, but provides a general description within that jurisdiction by case types, where the dispute exceeds \$25,000.⁶⁵³ In both instances, if the criteria are met, and the parties choose that jurisdiction, then there is no further judicial filtering analysis required as to the complexity of the case or novelty of the legal issue.

As set forth in section XVI above, California, Connecticut, and Arizona have chosen to pursue the development of courts for "complex civil litigation" and not to create business or commercial courts.⁶⁵⁴ These complex civil courts will hear complex business disputes, but exclude "business and commercial litigation that is managerially uncomplicated."⁶⁵⁵

D. JURISDICTIONAL OBJECTIVES

A court's jurisdictional parameters depend upon the objectives to be achieved in creating a business court, and available resources. As stated above, Colorado's Business Court Committee recommended the broader type of jurisdiction on the basis that: "Defining what constitutes a 'commercial case' is fundamental to the operation of a business court. While the court will be particularly suitable for

652. AEQUITAS, Inc. Georgia Feasibility Study, *supra* note 120, at 12–13. ("Best practice for a new business court is tight focus on only complex business cases and selected business cases with novel legal issues.")

653. MICH. COMP. LAWS ANN. § 600.8005 (West Supp. 2004).

654. The California Standards of Judicial Administration for Complex Litigation define complex litigation as "those cases that require specialized management to avoid placing unnecessary burdens on the court or the litigants." The scope of this definition is immediately qualified, in that the Standards go on to state that complex litigation "is not capable of precise definition" and that it "may involve multiple . . . related cases, extensive pretrial activity, extended trial times, [and] difficult or novel issues." The Standards state further that "no particular criterion is controlling and each situation must be examined separately."

Scott A. Steiner, *The Case Management Order: Use and Efficacy in Complex Litigation and the Toxic Tort*, 6 HASTINGS W.-N.W. J. ENV'T L. & POL'Y 71, 74 (1999) (footnotes omitted). A complex litigation format is also followed in Pittsburgh and a majority of New Jersey's counties.

655. *Focus on Business and Complex Courts*, *supra* note 11.

complex cases, commercial cases of all levels of complexity will benefit from adjudication by experienced business jurists.”⁶⁵⁶

This analysis reflects an objective that all business/commercial disputes be heard, at every step of the process, by judges who specialize in hearing business and commercial cases. Judges hearing these cases will continuously develop experience and knowledge in the substantive law; and in the process of writing opinions, they may develop a body of law for broad guidance in the community. They will also develop a variety of case management skills to address the cases before them. For example, business courts include a significant number of plaintiffs seeking temporary restraining orders and preliminary injunctions that call for the rapid address of often difficult matters, as well as cases posing long-term complex legal and procedural matters. In between these temporal extremes, these judges will presumably develop a greater facility in managing and resolving standard commercial disputes, as well.

The complex business court provides litigants with both judges that have expertise in business and commercial law, and judges and courts that are constantly developing their skill and resources in complex case management. It provides added focus to give full address to the most complex cases, while removing those cases as impediments to the expeditious resolution of other cases on a court’s overall docket. The complex business court can also establish a body of law by rendering opinions that give guidance beyond its courtroom. Thus, with this guidance, future business cases may be resolved more simply and expeditiously without the need for specialized complex address. In such circumstances, the complex court has already wrestled with and determined the issue, and reduced it from a complex to a manageable form.

A common factor in both business court models is the principle that judges be knowledgeable in resolving business and commercial disputes (with the addition of technology disputes arising more recently). This distinguishes both models from the pure complex litigation court model, where the focus is more upon the judge’s and court’s ability to capably manage a complex case in terms of efficiency and procedure, with less emphasis on the subject matter. Although it is likely that certain types of cases will repeat in the more generalized complex litigation courts, the functional ability to manage cases properly will not necessarily increase the ability to address substantive issues more fully. As stated in Georgia’s Feasibility Study on establishing a business court, the idea of a mixed complex litigation court dilutes the primary purpose of addressing business law issues.⁶⁵⁷ Under this

656. Colorado Report, *supra* note 72, at 12.

657. AEQUITAS, Inc., Georgia Feasibility Study, *supra* note 120, at 10 (“The long-term assignment of judges to [complex civil litigation divisions] fosters judicial commercial expertise, except that both [California and Connecticut] divisions have burgeoning mass torts and class actions, which dilute the commercial case law experience.”); *id.* at 12–13 (“Dilution of focus by expanding jurisdiction to equity or other complex civil cases undermines the court’s primary purpose.”). The NCSC Evaluation uses statistics showing that commercial cases only amount to approximately 25 percent of the complex case load, to support the proposition that the complex court pilot program had not become a “boutique” court for business. NCSC Evaluation, *supra* note 497, at 47. The perception reflected in this use

theory, even if the disposition time of cases or case management efficiencies were similar between a complex court and a business court, a jurisdiction with an objective of maximizing the development of judicial business expertise would not achieve that goal by adopting a mixed complex litigation model.⁶⁵⁸

XIX. CONCLUSION

Ultimately, a successful business court depends in each instance on the actual judge hearing business court cases. Judges presented daily with a field of law in which to cultivate their understanding, knowledge, and ability are more likely to come to deeper understandings about the inner workings of the legal principles they face; the patterns that may reveal themselves in the conduct of business cases; and the patterns of thinking and behavior that may appear in parties and counsel. The judge without that experience, faced with business disputes, typically may have to rely upon a less developed understanding of these factors in rendering decisions.⁶⁵⁹

of language, not limited to California, is a source of debate which has not ultimately prevented some jurisdictions from finding that developing judicial specialization in business/commercial courts has a benefit that serves a broad community of interests worth addressing.

658. As set forth above, New Jersey has a complex commercial track in every one of its counties, but in only two counties, Essex and Bergen, is there a single judge hearing all complex commercial cases. *See supra* notes 205–206 and accompanying text. Court statistics show that, in the Court Year for 2002, Middlesex County had thirty-nine complex commercial track cases filed, twenty-three resolved with a median disposition time of 187 days. During the 2003 court year, forty-nine complex commercial track cases were filed—more than in any other New Jersey County—twenty-two were resolved, with a median disposition time of 308 days. *See supra* notes 229, 235. These numbers are comparable in many ways to the same categories and figures for Essex and Bergen Counties. Having practiced in New Jersey's Superior Court, the authors are also aware of the fine quality of judges on that court. Still, for the jurisdiction seeking to create a business court, the presence of quality judges who can manage difficult cases capably does not necessarily provide the continually growing and evolving level of experience and knowledge concerning substantive business and commercial matters which is a key component in creating such programs.

659. The fact that same judge or set of judges is deciding cases within a specialized jurisdiction does not, in our view, inexorably lead to a false stability and predictability in the form of biased opinion followed by cookie cutter application of precedent. The specialized court is an opportunity for the opposite phenomenon; an enriched understanding and a cultivated application of precedent and growth of the law.

APPENDIX A

WRITTEN PARAMETERS OF BUSINESS COURT JURISDICTION

COLORADO (Proposal of Business Committee, not Implemented)

Colorado's Business Committee reported its recommendations as follows:

After extensive consideration of these issues, and a review of the experience in other states, the Committee defined categories of cases it believes are suitable for filing in the business court. Those categories include disputes involving:

- a. The rights, duties, or liabilities of equity owners, managers, or agents of any form of business entity;
- b. The formation, sale or purchase, or merger or conversion of any form of business entity;
- c. Conduct invoking antitrust laws or law governing unfair competition or interference with business or contractual relations; or agreements or arrangements among businesses, or between businesses and their agents or employees restraining competition;
- d. Commercial transactions *not* involving a consumer party; or
- e. Intellectual property.

While some of these disputes involve the application of statutory rights, the majority require analysis of consensual relationships and the application of contractual and fiduciary principles or of concepts of property.

Cases involving the rights and duties of employers and employees under State or Federal statutes are not proposed for inclusion as "commercial cases" in the pilot project stage. Although closely debated, the Committee believes the number of such cases is likely to overwhelm the business court, thereby depriving it of the opportunity to prove its worth in handling of the types of cases listed above. Furthermore, such statutorily based cases do not necessarily draw on the same learning and expertise in judges and lawyers as the proposed categories of cases.

Report of the Committee on Business Courts to Governor's Task Force on Civil Justice Reform, at 12-13, *available at* <http://www.state.co.us/cjrtf/report/report.htm> (last visited on Oct. 7, 2004).

DELAWARE

Delaware Code title 10, section 346.
Technology Disputes.

- (a) Notwithstanding any other provision in this Code, and without limiting the jurisdiction vested in any court in this State, the Court of Chancery shall have power to mediate and jurisdiction to hear and determine technology disputes as defined herein when:

- (1) The parties have consented to the jurisdiction of or mediation by the Court of Chancery by agreement or by stipulation;
- (2) At least one party is a "business entity" as defined herein;
- (3) At least one party is a business entity formed or organized under the laws of this State or having its principal place of business in this State;
- (4) No party is a "consumer," as that term is defined in § 2731 of Title 6, with respect to the technology dispute; and
- (5) In the case of technology disputes involving solely a claim for monetary damages, the amount in controversy is no less than \$1,000,000 or such greater amount as the Court of Chancery determines by rule.

Neither punitive damages nor a jury trial shall be available for a technology dispute heard and determined by the Court of Chancery pursuant to this section. Mediation proceedings shall be considered confidential and not of public record.

- (b) A "business entity" means a corporation, statutory trust, business trust or association, a real estate investment trust, a common-law trust, or any other unincorporated business, including a partnership (whether general (including a limited liability partnership) or limited (including a limited liability limited partnership)) or a limited liability company.
- (c)
 - (1) A "technology dispute" means a dispute arising out of an agreement and relating primarily to: the purchase or lease of computer hardware; the development, use, licensing or transfer of computer software; information, biological, pharmaceutical, agricultural or other technology of a complex or scientific nature that has commercial value, or the intellectual property rights pertaining thereto; the creation or operation of Internet web sites; rights or electronic access to electronic, digital or similar information; or support or maintenance of the above.
 - (2) The term "technology dispute" does not include a dispute arising out of an agreement:
 - a. That is primarily a financing transaction; or
 - b. Merely because the parties' agreement is formed by, or contemplates that communications about the transaction will be by, the transmission of electronic, digital or similar information.
 - (3) The Court shall interpret the term "technology dispute" liberally so as to effectuate the intent of this section to provide an expeditious and expert forum for the handling of technology disputes involving parties who have agreed to resolve their disputes in the Court of Chancery:
 - a. Mediate the dispute only;
 - b. Mediate the dispute initially, and if that fails, adjudicate the dispute;
or
 - c. Adjudicate the dispute.

The court shall adopt rules to facilitate the efficient processing of technology disputes, including rules to govern the filing of mediation only technology disputes, and to set filing fees and other cost schedules for the processing of technology disputes.

Delaware Code title 10, section 347.

Mediation Proceedings for Business Disputes.

- (a) Without limiting the jurisdiction of any court of this State, the Court of Chancery shall have the power to mediate business disputes when:
- (1) The parties have consented to the mediation by the Court of Chancery by agreement or by stipulation;
 - (2) At least one party is a business entity as defined in § 346 of this title;
 - (3) At least one party is a business entity formed or organized under the laws of this State or having its principal place of business in this State;
 - (4) No party is a consumer, as that term is defined in § 2731 of Title 6, with respect to the business dispute; and
 - (5) In the case of disputes involving solely a claim for monetary damages, the amount in controversy is no less than one million dollars or such greater amount as the Court of Chancery determines by rule.

A mediation pursuant to this section shall involve a request by parties to have a member of the Court of Chancery, or such other person as may be authorized under rules of the Court, act as a mediator to assist the parties in reaching a mutually satisfactory resolution of their dispute. Mediation proceedings shall be considered confidential and not of public record.

- (b) By rule, the Court of Chancery may define those types of cases that are eligible for submission as a business dispute mediation. This section is intended to encourage the Court of Chancery to include complex corporate and commercial disputes, including technology disputes, within the ambit of the business dispute mediation rules. The Court of Chancery should interpret its rule-making authority broadly to effectuate that intention.

FLORIDA

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA

ADMINISTRATIVE ORDER

NO.: 2003-17-1

AMENDED ORDER CREATING SPECIALIZED BUSINESS COURT
SUB-DIVISION OF THE CIVIL DIVISION OF THE CIRCUIT COURT

WHEREAS, specialization is common in almost every profession including the law and it is increasingly common for lawyers to narrow and focus their practices and increase their mastery of distinct substantive areas of the law; and

WHEREAS, specialization within the legal profession has resulted in the more efficient delivery of high quality legal services in complex matters; and

WHEREAS, this Circuit has long recognized the need for specialized courts to deal effectively with diverse matters including criminal law, juvenile justice, domestic relations, probate and drugs; and

WHEREAS, the litigation and resolution of complex business, corporate and commercial disputes has become an area of specialization within the legal profession; and

WHEREAS, a court that consistently hears business, corporate and other commercial disputes can be expected to develop expertise, experience and knowledge enabling it to perform its functions more proficiently, rapidly and confidently; and

WHEREAS, a business Court will provide consistency and predictability to litigants and counsel;

WHEREAS, these cases often require a high degree of case management including the handling of discovery disputes and motion practice wherein the services of a Special Master would be beneficial; and

WHEREAS, the more efficient handling of these cases will free judicial resources to handle other important matters; and

WHEREAS, the decisions in these cases oftentimes impact not only the litigants but numerous persons throughout our community including employees, shareholders, partners, creditors and suppliers; and

WHEREAS, the establishment of a Business Court may become one more factor in helping our community to attract new businesses that are looking to re-locate; and

WHEREAS, the need for a Business Court has been studied by the Ninth Judicial Circuit Business Court Committee and it has passed its resolution urging the establishment of a Business Court; and

WHEREAS, a review of the current case load in the Civil Division of the Circuit Court in Orange County, Florida indicates that there are more than 3,000 cases currently pending that are suited for referral to a Business Court;

NOW, THEREFORE, I, Belvin Perry, Jr., pursuant to the authority vested in me as Chief Judge of the Ninth Judicial Circuit of Florida under Florida Rule of Judicial Administration 2.050, Order that:

- I. Business Court Established. Effective January 2, 2004, the Business Court Sub-Division of the Civil Division of the Circuit Court of the Ninth Judicial Circuit of Florida is hereby established to hear complex business cases, as hereinafter defined.
- II. Cases Subject to Business Court. The principles set out below shall guide the parties and the Court in the designation of cases for the Business Court. Notwithstanding anything to the contrary in any prior general Administrative Order or Court procedure, all jury, non-jury, injunction and class action cases filed on or after December 1, 2003 shall be assigned to the Business Court if they are among the following types of actions:
 - A. Actions relating to the internal affairs or governance, dissolution or liquidation rights or obligations between or among owners (shareholders, partners, members), or liability or indemnity of managers (officers, directors, managers, trustees, or members or partners functioning as managers) of corporations, partnerships, limited partnerships, limited lia-

bility companies or partnerships, professional associations, business trusts, joint ventures or other business enterprises;

- B. Disputes between or among two or more business enterprises relating to transactions, business relationships or contracts between or among the business enterprises, including the following examples:
 - 1. Uniform Commercial Code transactions;
 - 2. Purchases or sales of businesses or the assets of businesses;
 - 3. Sales of goods or services by or to business enterprises;
 - 4. Non-consumer bank or brokerage accounts, including loan, deposit, cash management and investment accounts;
 - 5. Surety bonds;
 - 6. Purchases or sales or leases of, or security interests in, commercial, real or personal property; and
 - 7. Franchisor/franchisee relationships;
- C. Actions relating to trade secret or non-compete agreements;
- D. "Business torts," such as claims of unfair competition, or interference with contractual relations or prospective contractual relations;
- E. Actions relating to intellectual property disputes;
- F. Actions relating to securities, or relating to or arising under the state securities laws or antitrust;
- G. Shareholder derivative actions and class actions based on claims otherwise falling within these types, and consumer class actions other than personal injury and products liability claims;
- H. Actions relating to corporate trust affairs;
- I. Malpractice claims involving business enterprises and attorneys, accountants, actuaries, architects, or other professionals in connection with the rendering of professional services to the business enterprise;
- J. Declaratory judgment actions brought by insurers, and coverage disputes and bad faith claims brought by insureds, where the dispute arises from a business or commercial insurance policy, such as a commercial general liability policy;
- K. Third-party indemnification claims against insurance companies where the subject insurance policy is a business or commercial policy and where the underlying dispute would otherwise be assigned to the Business Court, not including claims where the underlying dispute is principally a personal injury claim; and
- L. Such other cases where the primary issue(s) are commercial in nature.

All of the above types of actions may involve individuals named as parties, in addition to business enterprises, so long as all other criteria are met and the essential nature of the litigation is a business dispute. For example, a dispute over a commercial loan may include individual guarantors as either plaintiffs or defendants, as the case may be, but such a lawsuit would still be a commercial dispute.

- III. Cases Not Subject to the Business Court. The following types of matters are not ordinarily to be assigned to the Business Court:

- A. Appeals from the County Court;
 - B. Personal injury, survivor or wrongful death matters;
 - C. Individual (non-class) consumer claims against businesses or insurers, including products liability and personal injury cases;
 - D. Matters involving occupational health or safety;
 - E. Environmental claims not involved in the sale or disposition of a business and other than those addressed in Business Court types II (J) or (K) above;
 - F. Matters in eminent domain;
 - G. Malpractice claims, other than those brought by business enterprises against attorneys, or accountants, architects or other professionals in connection with the rendering of professional services to the business enterprise;
 - H. Employment law cases, other than those referenced in Business Court type II (C) above;
 - I. Administrative agency, tax, zoning and other appeals;
 - J. Petition actions in the nature of change of name, mental health act, guardianship, or government election matters;
 - K. Individual residential real estate and non-commercial landlord-tenant disputes;
 - L. Suits to collect professional fees;
 - M. Cases seeking a declaratory judgment as to insurance coverage for a personal injury or property damage action;
 - N. Proceedings to enforce a judgment regardless of the nature of the underlying case;
 - O. Actions by insurers to collect premiums or rescind policies;
 - P. Domestic relations matters, and actions relating to distribution of marital property, custody or support;
 - Q. Any matter required by statute or other law to be heard in some other Court or Division;
 - R. Any criminal matter other than criminal contempt in connection with a Business Court action;
 - S. Such other cases which are appropriately transferred out of the Business Court pursuant to Section V of this Order.
- IV. Assignment of Cases to Business Court.
- A. Effective August 1, 2003, the Civil Cover Sheet shall include an additional line and box with which the party or attorney signing the Civil Cover Sheet must certify whether the action is appropriate for assignment to the Business Court. A "Business Court Addendum to Civil Cover Sheet," a sample of which is attached as Exhibit "A," is hereby required to be filed with all initial filings which meet the Business Court criteria and which are filed on or after August 1, 2003. The filing party or attorney shall indicate on the Business Court Addendum the applicable type or types of action which make the case appropriate for assignment to the Business Court. A party's or an attorney's signature on the Civil

Cover Sheet shall constitute certification that the matter is or is not subject to the Business Court, as indicated on the Civil Cover Sheet and Addendum. A copy of the Civil Cover Sheet and Business Court Addendum shall be served with the original process served on all parties.

All actions designated into the Business Court pursuant to the Business Court Addendum shall be assigned to the Business Court and to the individual calendar of the Business Court Judge effective December 1, 2003.

- B. Cases meeting the criteria to qualify as Business Court cases pursuant to this Administrative Order shall be assigned to Subdivision 32 in the Circuit Civil Division in Orange County.
 - C. Effective October 1, 2003, the Clerk of Court shall cease assigning any newly filed cases to Subdivision 32 and instead, the Clerk of Court shall begin randomly and equally assigning all newly filed cases to the other Subdivisions 33, 34, 35, 37, 39, and 40 in the Circuit Civil Division.
 - D. The pending cases currently assigned to Subdivision 32 which were filed prior to October 1, 2003 shall remain assigned to Subdivision 32 and the Business Court Judge will continue to handle these cases.
 - E. Effective December 1, 2003, the Clerk of Court shall begin assigning all newly filed cases which meet the criteria as Business Court cases to Subdivision 32.
 - F. The Judges assigned to the other Subdivisions in the Circuit Civil Division and/or litigants may initiate and submit a request to the Administrative Judge of the Circuit Civil Division that a pending case which meets the criteria of the Business Court be re-assigned/transferred to Subdivision 32 per the Administrative Judge's discretion.
 - G. Controversies which may arise concerning the re-assignment/transfer of any cases in the Circuit Civil Division, including, but not limited to, Business Court cases, shall be resolved by the Administrative Judge of the Circuit Civil Division.
- V. Disputes Arising From the Civil Cover Sheet Designation. If any party disagrees with the designation or lack of designation of a case into the Business Court, that party shall file with the initially-assigned Judge a "Motion to Transfer Divisions" and the motion will be resolved by the Administrative Judge of the Circuit Civil Division in accordance with the Ninth Judicial Circuit Administrative Procedures for case re-assignment.
- VI. Case Management Procedures. Unless otherwise ordered by the Business Court Judge these procedures will apply to all cases which are assigned to the Business Court. Those existing cases which are transferred to the Business Court will be subject to these procedures at the discretion of the Business Court Judge.
- A. The Case Management Conference. Typically, notice of a Case Management Conference ("CMC") will be sent to counsel and unrepresented parties sixty days after filing of the Complaint, scheduling the CMC for approximately ninety days after filing. In certain circumstances, the

CMC may be scheduled through the Business Court Judge. Prior to the CMC, it shall be the obligation of the parties to confer concerning all of the following matters, for the purposes of reaching agreements. The following subjects, along with other appropriate topics including those set forth in Fla R. Civ. P. 1.200 (a), will be discussed at the CMC:

1. Pleadings issues, including service of process, venue, joinder of additional parties, theories of liability, damages claimed and applicable defenses;
2. Timing and potential forms of Alternative Dispute Resolution (ADR);
3. Scheduling dispositive motions and scheduling limited-issue discovery in aid of early dispositive motions;
4. The possibility of settlement;
5. Preparation and issuance of a Case Management Order ("CMO"), which will set forth a target trial date, deemed the earliest trial date;
6. A discovery plan and schedule based on the CMO date for the completion of discovery; and
7. Anticipated areas of expert testimony, timing for identification of experts, responses to expert discovery, exchange of expert reports (reference to the CMO).

The Business Court Judge, in his/her discretion, may, upon application of any party or upon his/her own initiative, modify these procedures. The Business Court Judge may establish any informal procedures to achieve expeditious resolution of discovery disputes and other non-dispositive issues.

- B. Case Management Order. After the CMC, the Business Court Judge shall issue a Case Management Order ("CMO") setting forth dates for mediation and for a pretrial conference (with pretrial statements typically to be filed in advance), and for trial. The CMO will also address the other matters discussed or developed at the CMC, including cut-off dates for completion of discovery, for the service of expert reports and for the filing of motions.

Based upon the nature and complexity of the case, the Business Court Judge, with input from the parties at the CMC, shall assign the case to a track. The Business Court shall typically employ the following management tracks: Business Expedited (Target Trial Date within 13 months of Complaint) and Business Standard (Target Trial Date within 18 months of Complaint). Only exceptionally complicated cases should be designated Business Complex (Target Trial Date within Two Years of Complaint). In the latter instance, the Business Court Judge may schedule status conferences at six month intervals or at any other times upon application of the parties, if appropriate.

The Business Expedited Track shall consist of matters in which minimal discovery is needed and legal issues are anticipated to be routine. Examples of such actions, in the absence of complicating factors, are actions relating to commercial loans, and contract, UCC and foreclosure

matters. Other matters should presumptively be designated Business Standard. Actions in which preliminary injunctive relief is sought may be appropriate for any of the tracks depending upon the circumstances.

- C. Pretrial Conference. A Pretrial Conference shall be held in all Business Court actions pursuant to this Order and Fla R. Civ. P. 1.200 (b). The pretrial conference will typically be set approximately sixty (60) days prior to the target trial date. The Business Court shall exercise its best efforts to try the matter as soon after the target trial date as practicable.

Typically, the CMO will require the filing of pretrial statements in advance of the pretrial conference. Prior to the pretrial conference, principal trial counsel shall confer on the matters set forth in Fla R. Civ. P. 1.200 (b), and attempt to reach agreement on such matters.

Following the pretrial conference, the Business Court Judge shall enter a Pretrial Order pursuant to Fla R. Civ. P. 1.200 (b), identifying the date by which the matter should be prepared for trial and otherwise controlling the conduct of trial. The Pretrial Order may further provide specific dates for such matters as:

1. Exchange of proposed stipulations and filing of stipulations to facts and issues of law about which there can be no reasonable dispute;
2. Pre-marking and exchanging copies of all documents or other exhibits to be offered in evidence at trial;
3. Service and filing of written objections to any documents or other exhibits as to which a party intends to object at trial, together with the legal basis for such objections;
4. Identification in writing of all deposition testimony, by page and line number, intended to be read into the record at trial, followed by counter-designations and objections to deposition designations;
5. Exchange of trial briefs and proposed findings of fact and conclusions of law (nonjury) or proposed jury instructions; and
6. Such other matters as the Court deems appropriate.

At such time prior to trial as may be fixed by the Court, it shall rule on all matters placed in issue under this procedure. In addition, the Court may establish procedures consistent with the requirements of each case to ensure close interaction with the parties in order to minimize trial time.

VII. Appointments.

- A. The Honorable Renee A. Roche currently assigned to Subdivision 32 in the Circuit Civil Division shall remain assigned to Subdivision 32 and is designated the Business Court Judge until further notice.
- B. The Chief Judge may appoint a Business Court Special Master to hear all matters referred to him or her by the Judge of the Business Court Sub-Division pursuant to Fla. R. Civ. P. 1.490, and to make recommendations and proposed findings of fact and conclusions of law for the Judge's consideration. The Special Master's compensation and source of funding shall be addressed in future Orders of the Chief Judge.

VIII. Administrative Order No. 2003-17 dated June 26, 2003 and Administrative Order No. 2003-25 dated September 25, 2003 are vacated and set aside.

DONE AND ORDERED at Orlando, Orange County, Florida this 26th day of November, 2003. Nunc pro tunc to August 1, 2003.

/s/ Belvin Perry, Jr.
Belvin Perry, Jr.
Chief Judge

Amended Order Creating Specialized Business Court Sub-Division of the Civil Division of the Circuit Court, No. 2003-17-1, *available at* <http://www.ninja9.org/adminorders/orders/2003-17-1.pdf> (last visited Oct. 25, 2004).

ILLINOIS

Circuit Court of Cook County, Law Division, Commercial Calendar

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT—LAW DIVISION

GENERAL ADMINISTRATIVE ORDER 92-2
Individual Calendar Call

Effective September 14, 1992, and Individual Calendar Call pilot program shall be instituted in the Law Division and designated cases now pending and hereafter filed therein shall be randomly assigned by electronic process to the Individual Calendars.

A. STRUCTURE

1. The number of Individual Calendars and the judges assigned thereto shall be as the Presiding Judge of the Law Division shall from time to time designate.
2. There shall be two sections of Individual Calendars, namely: General Calendar Section and Commercial Calendar Section.
 - a) General Calendars shall have assigned to them cases of every variety pending and filed within the Law Division in numbers as shall be from time to time designated by the Presiding Judge of the Law Division.
 - b) Commercial Calendars shall have assigned to them cases, whether based upon theories of tort, contract or otherwise, that involve a commercial relationship between the parties. The number of cases assigned to each Commercial Calendar shall be as the Presiding Judge of the Law Division may from time to time designate.

B. PROCEDURE

1. Once a case has been assigned to an individual Calendar, all proceedings subsequently initiated and the ultimate trial of the case shall be heard by the judge presiding over the Individual Calendar to which the case has been assigned.

.....

IT IS HEREBY ORDERED that this Order is effective September 14, 1992 and will be spread upon the records of this court.

Dated at Chicago, Illinois this 9th day of September, 1992

ENTER: _____
Donald P. O'Connell
Presiding Judge
Law Division

The Civil Action Cover Sheet for Law Division Cases in the Circuit Court of Cook County provides the following choices for the filing party to mark off under the heading "COMMERCIAL LITIGATION":

- 002 Breach of Contract
- 070 Professional Malpractice (other than legal or medical)
- 071 Fraud
- 072 Consumer Fraud
- 073 Breach of Warranty
- 074 Statutory Action
- 075 Other Commercial Litigation
- 076 Retaliatory Discharge

During the research for this paper, a website posted at www.commercialcourts.net by one of the Commercial Calendar Judges, included a webpage, no longer active, stating as follows, concerning matters heard on the Commercial Calendar:

Cases assigned to the Commercial Section Judges include commercial claims in excess of \$30,000.00, including, but not limited to, the following:

<u>Breach of Contract</u>	<u>Business Torts & Other</u>	<u>Collections</u>
Sale of Goods (Uniform Commercial Code)	Professional Negligence (Except Medical Malpractice)	Notes
Purchase of Services	Fraud & Misrepresentation	Guaranties
Warranties & Service Contracts	Consumer Fraud Act	Other Collection
Sale of Business	Tortious Interference	
Franchise	Breach of Fiduciary Duty/ Oppression	
Employment	Retaliatory Discharge	
Indemnification	Miscellaneous Statutory	

Sale of Real Estate	Securities
Commercial Leases	Corporate & Business Law
Construction	Non-for-Profit
Professional Services	Other

MARYLAND

Maryland Rule 16-205 provides:

Rule 16-205. Business and technology case management program.

- (a) Definitions. The following definitions apply in this Rule:
- (1) ADR. "ADR" means "alternative dispute resolution" as defined in Rule 17-102.
 - (2) Program. "Program" means the business and technology case management program established pursuant to this Rule.
 - (3) Program judge. "Program judge" means a judge of a circuit court who is assigned to the program.
- (b) Program established. Subject to the availability of fiscal and human resources, a program approved by the Chief Judge of the Court of Appeals shall be established to enable each circuit court to handle business and technology matters in a coordinated, efficient, and responsive manner and to afford convenient access to lawyers and litigants in business and technology matters. The program shall include:
- (1) a program track within the differentiated case management system established under Rule 16-202;
 - (2) the procedure by which an action is assigned to the program;
 - (3) program judges who are specially trained in business and technology; and
 - (4) ADR proceedings conducted by persons qualified under Title 17 of these Rules and specially trained in business and technology.

Cross References.—See Rules 16-101 a and 16-103 a concerning the assignment of a judge of the circuit court for a county to sit as a program judge in the circuit court for another county.

- (c) Assignment of actions to the program. On written request of a party or on the court's own initiative, the Circuit Administrative Judge of the circuit in which an action is filed or the Administrative Judge's designee may assign the action to the program if the judge determines that the action presents commercial or technological issues of such a complex or novel nature that specialized treatment is likely to improve the administration of justice. Factors that the judge may consider in making the determination include: (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.

- (d) Assignment to program judge. Each action assigned to the program shall be assigned to a specific program judge. The program judge to whom the action is assigned shall hear all proceedings until the matter is concluded, except that, if necessary to prevent undue delay, prejudice, or injustice, the Circuit Administrative Judge or the Circuit Administrative Judge's designee may designate another judge to hear a particular pretrial matter. That judge shall be a program judge, if practicable.
- (e) Scheduling conference; Order. Promptly after an action is assigned, the program judge shall (1) hold a scheduling conference under Rule 2-504.1 at which the program judge and the parties discuss the scheduling of discovery, ADR, and a trial date and (2) enter a scheduling order under Rule 2-504 that includes case management decisions made by the court at or as a result of the scheduling conference. (Added Oct. 31, 2002, effective Jan. 1, 2003.)

MASSACHUSETTS

Cases would presumptively qualify as complex commercial cases for the BLS, whether the litigants are individuals or entities, when issues come within, or meet the qualifications for inclusion in, one or more of the following categories:

- a. claims relating to the governance and conduct of internal affairs of all business enterprises and not-for-profit institutions, however organized, including, without limitation, employment agreement disputes, liability of officers, directors, partners, managers and trustees under statutes and common laws arising out of the governance and conduct of affairs of the enterprise or institution;
- b. shareholder derivative claims and claims relating or arising out of securities transactions;
- c. claims involving mergers, consolidations, sales of assets, issuance of debt, equity and other like interests of business enterprise and not-for-profit institutions;
- d. claims to determine the use or status of or claims involving, intellectual property, confidential, proprietary or trade secret information; claims involving restrictive covenants;
- e. claims involving alleged breaches of contract or fiduciary duties, fraud, misrepresentation, business torts or other violations involving business relationships (e.g. unfair competition), if they have complex factual or legal issues or are likely to require complex case management;
- f. claims under the uniform Commercial Code, if the claims involve complex factual or legal issues or are likely to require complex case management;
- g. claims arising from transactions with banks, investment bankers, financial advisers, brokerage firms, mutual and money funds of all kinds, if the claims

- involve complex factual or legal issues or are likely to require complex case management;
- h. claims for alleged violations of antitrust and other restraint of trade laws; claims of unfair trade practices if the claims involve complex factual or legal issue or are likely to require complex case management;
 - i. malpractice claims brought by business enterprises and not-for-profit institutions against professionals relating to rendering of professional service;
 - j. claims to which a governmental entity or authority is a party if the claims are described by any of the above categories and are not excluded from the Business Litigation Session as set out in the next section; and
 - k. Other commercial claims, including those involving insurance, construction, real estate and consumer matters, which have complex factual or legal issues or are likely to require complex case management.

Cases involving the following would not be eligible for assignment to the BLS unless (except for cases within clause (a) below) there were issues in a case where one or more of the other issues qualifies for the BLS:

- (a) matters subject to compulsory arbitration or to the exclusive jurisdiction of the Probation and Housing Courts, the District Courts or the Boston Municipal Court;
- (b) personal injury survival or wrongful death matters;
- (c) individual (non-class) consumer claims against businesses or insurers, including product liability and personal injury cases;
- (d) environmental claims not involved in the sale or disposition of a business;
- (e) eminent domain matters;
- (f) malpractice claims other than those designated above for the BLS;
- (g) employment disputes not involving written contracts and employment discrimination cases;
- (h) administrative agency review under G.L. c. 30A, zoning and other appeals from administrative agency order;
- (i) residential real estate and non-commercial landlord-tenant disputes; and
- (j) occupational health or safety matters.

1) As to cases filed on and after October 2, 2000:

A plaintiff who claims that the case fits one or more of the criteria listed above should use a special cover sheet which is available at the office of the Clerk of Civil Business and indicate thereon which criteria apply. The case shall be thereupon initially assigned to the BLS for review by the presiding justice.

At any time thereafter any party who claims that the case fits one or more criteria should serve and file a motion under rule 9A in the BLS requesting assignment to the BLS and state with particularity why the case meets one or more of the criteria.

The presiding Justice of the BLS will review all cases initially assigned thereto and all motions requesting such assignment thereafter and determine in his or her discretion which cases shall continue in the BLS. Any

case assigned or referred to the BLS may, in the discretion of the presiding justice of the BLS be referred out of the BLS at any time if, in his or her judgment, it is not suitable of the BLS. Those cases will be then assigned by the clerk's office to one of the regular time standards sessions.

....

3) As to all cases:

No party shall have a right of referral of a pending case to the BLS. A case will not be assigned to or retained in the BLS unless it meets one or more of the criteria listed above. Case on the excluded list will not be assigned to or retained in the BLS. All decisions to refer or retain a case in the BLS shall be at the discretion of the presiding justice of the BLS.

As a case progresses, the presiding justice of the BLS may determine that the case does not involve complex factual or legal issues, or does not require complex case management, even though the subject matter of the controversy otherwise qualifies as a business litigation case. In such case the presiding justice of the BLS may return the case to the clerk's office for assignment to a regular time standards session.

September, 2000

Signed: Chief Justice Suzanne V. DeVecchio

Superior Court Establishes Business Court Procedure, Notice to Bar, Business Litigation Session, Suffolk Superior Court, Massachusetts Lawyers Weekly, October 2, 2000

MICHIGAN

Michigan Compiled Laws Annotated § 600.8001 (West Supp. 2004).

600.8001. Creation; court of record; purpose; location; electronic communications; session; staff and support services; funding

Sec. 8001. (1) The cyber court is created and is a court of record.

(2) The purpose of the cyber court is to do all of the following:

- (a) Establish judicial structures that will help to strengthen and revitalize the economy of this state.
- (b) Allow business or commercial disputes to be resolved with the expertise, technology, and efficiency required by the information age economy.
- (c) Assist the judiciary in responding to the rapid expansion of information technology in this state.
- (d) Establish a technology-rich system to serve the needs of a judicial system operating in a global economy.
- (e) Maintain the integrity of the judicial system while applying new technologies to judicial proceedings.
- (f) Supplement other state programs designed to make the state attractive to technology-driven companies.

- (g) Permit alternative dispute resolution mechanisms to benefit from the technology changes.
- (h) Establish virtual courtroom facilities, and allow the conducting of court proceedings electronically and the electronic filing of documents.
- (3) The cyber court shall be located in 1 or more counties as determined by the supreme court. The cyber court shall sit in facilities designed to allow all hearings and proceedings to be conducted by means of electronic communications, including, but not limited to, video and audio conferencing and internet conferencing.
- (4) The cyber court shall hold session and shall schedule hearings or other proceedings to accommodate parties or witnesses who are located outside of this state. A cyber court facility is open to the public to the same extent as a circuit court facility. When technologically feasible, and at the discretion of the judge, pursuant to the court rules, all proceedings of the cyber court shall be broadcast on the internet.
- (5) The cyber court shall maintain its staff and support services at the seat of government.
- (6) The cyber court shall be funded from annual appropriations to the supreme court.

Michigan Compiled Laws Annotated § 600.8005 (West Supp. 2004).

600.8005. Jurisdiction

- Sec. 8005. (1) The cyber court has concurrent jurisdiction over business or commercial disputes in which the amount in controversy exceeds \$25,000.00.
- (2) An action that involves a business or commercial dispute may be maintained in the cyber court although it also involves claims that are not business or commercial disputes.
 - (3) For purposes of this section:
 - (a) "Business enterprise" means a sole proprietorship, partnership, limited partnership, joint venture, limited liability company, limited liability partnership, for-profit or not-for-profit corporation or professional corporation, business trust, real estate investment trust, or any other entity in which a business may lawfully be conducted in the jurisdiction in which the business is being conducted. Business enterprise does not include an ecclesiastical or religious organization.
 - (b) "Business or commercial dispute" means any of the following actions:
 - (i) An action in which all of the parties are business enterprises.
 - (ii) An action in which 1 or more of the parties is a business enterprise and the other parties are its or their present or former owners, managers, shareholders, members, directors, officers, agents, employees, suppliers, customers, or competitors, and the claims arise out of those relationships.
 - (iii) An action in which 1 of the parties is a nonprofit organization, and the claims arise out of that party's organizational structure, governance, or finances.

- (iv) An action involving the sale, merger, purchase, combination, dissolution, liquidation, organizational structure, governance, or finances of a business enterprise.
- (4) Business or commercial disputes include, but are not limited to, the following types of actions:
 - (a) Those involving information technology, software, or website development, maintenance, or hosting.
 - (b) Those involving the internal organization of business entities and the rights or obligations of shareholders, partners, members, owners, officers, directors, or managers.
 - (c) Those arising out of contractual agreements or other business dealings, including licensing, trade secret, noncompete, nonsolicitation, and confidentiality agreements.
 - (d) Those arising out of commercial transactions, including commercial bank transactions.
 - (e) Those arising out of business or commercial insurance policies.
 - (f) Those involving commercial real property.
- (5) Notwithstanding subsections (3) and (4), business or commercial disputes expressly exclude the following types of actions:
 - (a) Personal injury actions involving only physical injuries to 1 or more individuals, including wrongful death and malpractice actions against any health care provider.
 - (b) Product liability actions in which any of the claimants are individuals.
 - (c) Matters within the jurisdiction of the family division of circuit court.
 - (d) Proceedings under the probate code of 1939, 1939 PA 288, MCL 710.21 to 712A.32.
 - (e) Proceedings under the estates and protected individuals code, 1998 PA 386, MCL 700.1101 to 700.8102.
 - (f) Criminal matters.
 - (g) Condemnation matters.
 - (h) Appeals from lower courts or any administrative agency.
 - (i) Proceedings to enforce judgments of any kind.
 - (j) Landlord-tenant matters involving only residential property.

NEVADA

RULES OF PRACTICE FOR THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

PART I. ORGANIZATION OF THE COURT AND ADMINISTRATION

Rule 1.61. Assignment of business matters.

Unless otherwise provided in these rules, business matters must be divided evenly among those full-time civil judges deemed necessary to handle all business matters.

- (a) "Business Matters" shall be deemed as follows:

- (1) Disputes concerning the validity, control, operation, or governance of entities created under NRS Chapters 78-88, including shareholder derivative suits;
 - (2) Disputes concerning trademarks asserted under Nevada law, causes of action asserted pursuant to the Nevada Trade Secrets Acts, the Nevada Securities Act, involving investment securities described in Article 8 of the Nevada Uniform Commercial Code; or commodities described in NRS Chapter 90;
 - (3) Disputes between two business entities where the court determines that the case would benefit from enhanced case management.
- (b) The following shall not be deemed business matters:
- (1) Matters where the primary claim is an action for personal injury;
 - (2) An action based on products liability;
 - (3) An action brought by a consumer against a business;
 - (4) An action for wrongful termination of employment; or
 - (5) Landlord-tenant disputes shall not be deemed a business matter.
- (c) Either party in a case may file a request in the pleadings that a case be assigned as a business matter. If the request is made by the plaintiff, the case will automatically be assigned to a full-time civil judge assigned to business matters. If the request is not made by the plaintiff, but is made by a defendant in its answer, the case shall be randomly reassigned to a business court judge for determination whether the case should be handled as a business court matter.
- (d) The court shall decide whether a case is or is not a business matter and that decision shall not be appealable by any appeal nor reviewable upon any writ; any matters not deemed a business matter shall be randomly reassigned if it was originally assigned to the business court. If a case was remanded to the business court for determination of whether it would be handled as a business court matter and the business court deems it not to be a business court matter, that case will be remanded back to the department to which it was originally assigned.

Rules of Practice for the Eighth Judicial District Court of the State of Nevada, Rule 1.61, *available at* http://www.co.clark.nv.us/district_court/EDCR.pdf (last visited Oct. 7, 2004).

RULES OF PRACTICE FOR THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

Rule 2.1. Business court docket

1. A civil action shall be assigned to the business court docket if, regardless of the nature of relief sought, the primary subject matter of the action is:
 - (a) A dispute concerning the validity, control, operation or governance of entities created under NRS Chapters 78-88, including shareholder derivative actions;

- (b) A dispute concerning a trade-mark or trade name; a claim asserted pursuant to the Nevada Trade Secrets Act, NRS 600A.010, et seq.; a claim asserted pursuant to the Nevada Securities Act, NRS 90.211, et seq.; a claim asserted pursuant to the Nevada Deceptive Trade Practices Act, NRS 598.0903, et seq.; a claim involving investment securities governed by NRS 104.8101, et seq.; or,
 - (c) Any dispute among business entities if the presiding judge of the business court docket determines that the case would benefit from enhanced case management.
2. Actions in which the primary claim alleges personal injury or products liability, damage of a consumer by a business, wrongful termination of employment, or actions arising from a landlord-tenant relationship shall not be included in the business court docket.
 3. A party in an action assigned to another department of the court may request that the action be transferred to the business court docket. Upon filing of such a request, the clerk shall transfer the case file to the presiding judge of the business court docket who shall thereupon determine whether to assume jurisdiction of the case. The decision of the presiding judge of the business court docket to accept or decline jurisdiction of the action is final, and is not appealable nor reviewable upon any petition for extraordinary relief.
 4. The presiding judge of the business court docket may hear and decide all other civil and criminal actions assigned to such judge as any other general jurisdiction district court judge.
 5. The presiding judge of the business court docket shall be appointed by the chief judge. The judge so selected shall serve for a term of two years unless reappointed. Management of the business court docket shall be the highest case management priority of the presiding judge of the business court docket, who may request reassignment by the chief judge of civil or criminal cases, as necessary, consistent with this case management priority.
 6. Subject to approval by the presiding judge of the business court docket and the chief judge, an action filed in any other judicial district may be transferred to the business court docket of this district if all parties and the district judge assigned to the case consent.
 7. The presiding judge of the business court docket may transfer a business action to another judge of this district for any and all proceedings, subject to the consent of the judge to whom the action is transferred.
 8. If the presiding judge of the business court docket is the subject of a peremptory challenge pursuant to S.C.R. 48.1, the clerk shall randomly reassign the case to another department of the court. [Added; effective November 20, 2000.]

Rules of Practice for the Second Judicial District Court of the State of Nevada, Rule 2.1, available at <http://www.leg.state.nv.us/courtrules/SecondDCR.html> (last visited on Oct. 7, 2004).

NEW YORK

The Commercial Division handles complicated commercial cases. In the various counties the Division has issued guidelines or rules defining the cases that are accepted for filing in the Division. These guidelines and rules can be found at http://www.courts.state.ny.us/comdiv/general_information.htm under the listing for each county.

NEW YORK COUNTY

In general, the Commercial Division entertains complex commercial and business disputes in which a party seeks compensatory damages totaling \$125,000 or more (exclusive of interest, costs, and attorney's fees). Due to caseload considerations, the Justices of the Division are empowered to transfer out of the Division cases which, in their judgment, do not fall within this category notwithstanding that a party has described the case as "commercial" on the Request for Judicial Intervention. The principles set out below will guide the exercise of this authority. Parties should adhere to these principles when designating a case type on the RJI.

- (A) The following will presumptively be transferred out of the Division even if the monetary threshold is met:
 - (1) Suits to collect professional fees;
 - (2) Cases seeking a declaratory judgment as to insurance coverage for a personal injury or property damage action;
 - (3) Landlord-tenant matters, uncomplicated Yellowstone applications and other real estate disputes;
 - (4) Proceedings to enforce a judgment regardless of the nature of the underlying case;
 - (5) First-party insurance claims and actions by insurers to collect premiums or rescind policies; and
 - (6) Attorney malpractice actions.
- (B) Actions in which the principal claims involve the following will presumptively be retained in the Division provided that the monetary threshold is met:
 - (1) Breach of contract or fiduciary duty, fraud, misrepresentation, business tort (e.g., unfair competition), or statutory violation arising out of business dealings (e.g., sales of assets or securities, corporate structurings, partnership, shareholder, joint venture, and other business agreements, trade secrets and restrictive covenants);
 - (2) Transactions governed by the Uniform Commercial Code (exclusive of those concerning individual coop units);
 - (3) Complicated transactions involving commercial real property;
 - (4) Shareholder derivative actions and commercial class actions;
 - (5) Commercial bank transactions;
 - (6) Internal affairs of business organizations or liability to third parties of officials thereof;

- (7) Malpractice by accountants or actuaries; and
 - (8) Complicated environmental insurance coverage litigation.
- (C) (i) Attorneys who wish to file an RJI seeking assignment to the Commercial Division must, prior to purchase of the Request for Judicial Intervention and filing with any back office, present the RJI and initial papers to the appropriate back office for preliminary review, as follows. The papers to be filed with the RJI, including a request for a preliminary conference, must include or be accompanied by a copy of the pleadings (the complaint and other pleadings, if any, that have been served and filed as of that point). If attorneys do not submit a copy of the pleadings, processing will be delayed until the pleadings are submitted. If the RJI is accompanied by a motion on notice, the RJI and motion papers shall be submitted to the Motion Support Office (Room 119) for a preliminary review. In other instances, the RJI and accompanying papers shall be submitted to the Commercial Division Support Office for preliminary review. The appropriate Support Office will review the pleadings to determine the amount of damages claimed to be at issue in the case. If the case is alleged to involve compensatory damages of less than \$125,000 (exclusive of interest, costs, and attorney's fees), the Support Office will make a notation that the matter shall be assigned at random to a non-Commercial Justice. If the case is alleged to involve compensatory damages of \$125,000 or more (exclusive of interest, costs, and attorney's fees), a notation will be made that the case shall be assigned at random to a Division Justice. The attorney shall then pay for the RJI and file the papers with the appropriate office, which will assign the case in accordance with the aforesaid notation. Cases in which equitable relief only is sought or the amount of damages is not specified in the pleadings will be assigned to the Division if the RJI so requests subject to screening by the assigned Justice. If a party believes that the Support Office mistakenly directed assignment of a matter to a non-Division Justice, a request shall be made of that Justice for a transfer into the Division.
- (ii) Notwithstanding that a case is assigned to a Commercial Division Justice after the preliminary review, the Justice may thereafter determine that the matter is, in fact, not appropriate for treatment in the Division, pursuant to the principles set forth in Paragraphs A and B above, and may direct that the case be transferred out of the Division. The determination by a Commercial Justice as to whether a case should be retained in the Division will be made as soon as a matter is assigned to that Justice. Retained cases will remain in the Division thereafter.
- (D) Notwithstanding the foregoing, commercial cases in which compensatory damages of \$ 25,000 or more are sought will not be transferred out of the Division if filed in accordance with the procedures governing the Division's Filing by Electronic Means program. For this purpose, "commercial cases" include commercial real property disputes and the types of matters identified in Paragraphs (A) 1-2 and 4-6 and (B) 1-8 (without regard to the monetary threshold referred to in the second line of these Guidelines).

Guidelines for Assignment of Cases to the Commercial Division, Supreme Court, New York County, available at http://www.nycourts.gov/comdiv/Guidelines_for_Assignment_of_CasesNYC.htm (last visited Oct. 7, 2004).

ALBANY COUNTY

As determined by the Commercial Division of Supreme Court, Commercial Cases are defined as:

All business and commercial disputes in which the amount at issue generally involves damage claims in a minimum amount of \$25,000.

- or -

Claims for unspecified amounts where the value of the commercial asset(s) in dispute exceeds \$25,000.

....

One or more of the following criteria must be satisfied for the assignment of a case to the Commercial Court:

1) CONTRACT:

Breach of contract, fraud or misrepresentation actions involving:

- (a) Purchase or sale of securities
- (b) Uniform Commercial Code transactions
- (c) Purchase or sale of the assets of a business or merger, consolidation or recapitalization of a business
- (d) Providing of goods or services by or to a business entity
- (e) Purchase or sale or lease of, or security interest in, commercial real property or personal property
- (f) Partnership, shareholder o/r [sic] joint venture agreements
- (g) Franchise, distribution or licensing agreements

2) BUSINESS CORPORATION LAW:

- (a) Shareholder derivative actions
- (b) Actions involving Judicial Dissolution
- (c) Actions involving liability and indemnity of corporate directors and officers
- (d) Actions involving the internal affairs of corporations, such as voting and inspection rights of shareholders or directors, authorization of corporate acts or interpretations of articles or bylaws
- (e) Actions involving foreign corporations authorized to do business in the State of New York
- (f) Actions involving appointment of a Receiver of property of domestic or qualified Foreign corporations.

3) PARTNERSHIP LAW:

- (a) Actions involving property rights of general and limited partners and partnerships.
- (b) Actions involving partnership, general business operation, dissolution and creditor's rights.

- 4) UNIFORM COMMERCIAL CODE:
 - (a) Commercial loans (including failures to make commercial loans), negotiable instruments, letters of credit and bank transactions
 - (b) Actions involving allegations of business torts, including unfair competition, interference with business advantage or contractual relations.
- 5) OTHER COMMERCIAL MATTERS:
 - (a) Actions involving employment agreements or employee incentive or retirement plans (not including qualified retirement plans) in which the business or commercial issues predominate and discharge, modification or foreclosure of mechanics' liens.
 - (b) Declaratory judgment actions and third-party indemnification claims versus insurance companies where the underlying cause of action is contract in nature or would otherwise fall within the guidelines set forth herein. (Specifically not included are Declaratory Judgment Actions and third-party claims relating to fire loss, motor vehicle actions and Tort claims).
 - (c) Commercial Class actions
 - (d) Opening of default judgments where the underlying cause of action is commercial in nature and would otherwise fall within the monetary and jurisdictional guidelines set forth herein
 - (e) Actions may involve individuals, as well as business entities, as long as all other criteria are satisfied.

MATTERS SPECIFICALLY EXCLUDED FROM COMMERCIAL DIVISION

- Real estate foreclosure actions.
- Proceedings to enforce a judgment.
- Products liability claims, including claims based upon warranty of merchantability and/or fitness for a particular use.
- Declaratory judgment actions involving indemnification claims under insurance policies relating to underlying actions which are not commercial in nature, including, but not limited to, underlying claims for fire loss, motor vehicle actions and tort claims.
- Actions by or against Medicare, Medicaid, or the Department of Social Services.
- Discrimination cases.
- Collection matters involving legal, medical, accounting, architectural fees or other professional fees.

Guidelines for Cases Assigned to the Commercial Division, *available at* http://www.courts.state.ny.us/comdiv/Albany_guidelines_for_cases_assigned.htm (last visited on Oct. 7, 2004).

ERIE COUNTY

II. CRITERIA FOR COMMERCIAL COURT

The definition of a “*commercial case*,” as determined by the Commercial Division of Supreme Court, is as follows:

All business and commercial disputes in which the amount at issue exceeds \$25,000,¹ exclusive of punitive damages, costs, and attorney fees; and exclusive of any non-commercial claims, non-commercial cross-claims, or non-commercial counterclaims.

If a commercial case does not meet the monetary threshold but may be especially suited to resolution in the Commercial Division, a motion may be made to the presiding Judge of the Division, on notice to opposing counsel, to waive said monetary threshold.

Such business and commercial disputes shall include the following types of cases:

CONTRACT

1. Breach of contract, fraud or misrepresentation actions involving:
 - (a) Purchase or sale of securities.
 - (b) Uniform Commercial Code transactions.
 - (c) Purchase or sale of the assets of a business, or merger, consolidation or recapitalization of a business.
 - (d) Providing of goods or services by or to a business entity.
 - (e) Purchase or sale or lease of, or security interest in, commercial real property or personal property.
 - (f) Partnership, shareholder or joint venture agreements.
 - (g) Franchise, distribution or licensing agreements.

BUSINESS CORPORATION LAW

2. Shareholder derivative actions.
3. Dissolution or liquidation of corporations.
4. Actions involving liability and indemnity of corporate directors and officers.
5. Actions involving the internal affairs of corporations, such as voting and inspection rights of shareholders or directors, authorization of corporate acts or interpretations of articles or by-laws.

PARTNERSHIP LAW

6. Actions involving general and limited partners and partnerships.

UNIFORM COMMERCIAL CODE

7. Commercial loans (including failures to make commercial loans), negotiable instruments, letters of credit and bank transactions.
8. Actions involving allegations of business torts, including unfair competition and interference with business advantage or contractual relations.

OTHER COMMERCIAL MATTERS

9. Actions involving employment agreements or employee incentive or retirement plans (not including qualified retirement plans) in which the business or commercial issues predominate.

1. It should be noted that the dollar amount at issue to qualify a case as Commercial may be changed from time to time in order to adjust the workload of the Court.

10. Declaratory judgment actions and third party indemnification claims against insurance companies where the underlying cause of action is contract in nature or would otherwise fall within the guidelines set forth herein. (Specifically *not* included are Declaratory Judgment Actions and third party claims relating to fire loss, motor vehicle actions and tort claims.)
11. Commercial class actions.
12. Opening of default judgments where the underlying cause of action is commercial in nature and would otherwise fall within the monetary and jurisdictional guidelines set forth herein.
13. Professional malpractice other than legal or medical.
14. Upon application and with prior approval of the Court, commercial foreclosure actions involving commercial buildings where the amount in controversy exceeds Five Hundred Thousand Dollars (\$500,000.00).
15. Actions under New York Debtor and Creditor Law for fraudulent conveyance.
16. Actions may involve individuals, corporations, partnerships, trusts, joint ventures or other forms of legal entities as long as all other criteria are met.

MATTERS NOT INCLUDED AS COMMERCIAL COURT CASES:

- Non-commercial landlord/tenant disputes.
- Matrimonial disputes.
- Consumer credit transactions involving individuals who are not part of corporate, partnership, etc. entity.
- Residential foreclosure actions.
- Commercial foreclosure actions which do not meet the criteria set forth in Item 14.
- Matters falling under the provisions of the Real Property Actions and Proceedings Law.
- Proceedings to enforce a judgment, including applications for information subpoenas and contempt, without regard as to whether or not the underlying action is commercial in nature.
- Products liability claims, including merchantability and fitness for some particular purpose claims.
- Discharge, modification or foreclosure of mechanics' or other liens.
- Declaratory judgment actions involving indemnification claims under insurance policies relating to underlying actions which are *not* commercial in nature, including, but not limited to, underlying claims for fire loss, motor vehicle actions and tort claims.
- Opening/vacating or modifying default judgments on actions which are *not* commercial in nature, including all matters which do not fall within the monetary and jurisdictional guidelines set forth under these criteria.
- Actions by or against Medicare, Medicaid, or the Department of Social Services or enforcement of legal rights under law.
- Discrimination cases (age, sex etc.) except when part of or under the terms of a contract.

- Collection matters involving the collection of legal, medical, accounting, or architectural fees.

Rules and Practices for Cases Assigned to the Commercial Division, Supreme Court, Erie County, The Honorable Joseph G. Makowski, J.S.C. Presiding, March 1, 2001, *Commercial Litigation in New York State Courts*, Vol. 4, Appendix E-1 at 368–370, (Robert L. Haig Editor in Chief, 2002 Cumulative Supplement).

KINGS COUNTY

These guidelines apply to RJIs filed on commercial cases on or after December 2, 2002.

In general, the Commercial Division of the Kings County Supreme Court will entertain commercial and business disputes in which a party seeks compensatory damages totaling \$50,000 or more (exclusive of punitive damages, interests, costs and attorney fees).

A Request for Judicial Intervention which is marked “Commercial” and is accompanied by a “Commercial Division Certification” identifying the nature of the lawsuit and the reason for the assignment to the Commercial Division will initially be assigned to a Commercial Division Part. The Certification requires verification by counsel that the case meets the eligibility requirements set forth in these Rules. A complete set of pleadings must accompany such certification and be annexed to the RJI.

Justices of the Commercial Division are empowered to transfer cases out of the Commercial Division which in their judgment do not fall within the eligibility requirements set forth in these Rules. A Commercial Division Judge may order a transfer notwithstanding that a party has described the case as commercial. An Order will be issued stating the reason for such transfer. A party claiming to be aggrieved by such transfer may seek review by letter application to the Administrative Judge (two pages maximum including a copy of the Commercial Division Justice’s Order with a copy to all parties). If such application to the Administrative Judge is not made within ten days of notification of the transfer order or the denial of transfer, the decision of the Commercial Division Judge becomes final. The order of the Administrative Judge is final and subject to no further review or appeal.

A case already pending in a non-commercial IAS part may be transferred into the Commercial Division upon application to the assigned IAS Judge and with the consent of a Commercial Division Judge within three months of the initial RJI. Any objections to such transfer must be raised before the IAS Judge who will rule thereon in consultation with a Commercial Division Justice or the Administrative Judge. Review of the IAS Judge’s decision may be obtained by application to the Administrative Judge in writing on notice to all parties within ten days of entry. Thereafter, the decision of the IAS Judge becomes final.

Business and Commercial actions in which the principal claims involve the following matters will be presumptively retained in the Commercial Division provided that the monetary threshold has been met:

Business Corporation Law

1. Shareholder derivative actions.
2. Dissolution or liquidation of corporations, professional corporations and limited liability corporations.
3. Actions involving liability and indemnity of corporate directors and officers.
4. Actions involving the internal affairs of corporations, such as voting and inspection rights of shareholders or directors, authorization of corporate acts or interpretations of articles or by-laws.
5. Actions involving appointment of a receiver of property of domestic or qualified foreign corporations.

Contract

1. Breach of contract, fraud or misrepresentation actions involving:
 - (a) Purchase or sale of securities.
 - (b) Purchase or sale of the assets of a business or merger, consolidation or recapitalization of a business.
 - (c) Providing of goods or services by or to a business entity.
 - (d) Partnership, shareholder or joint venture agreements.
 - (e) Franchise, distribution or licensing agreements.

Partnership Law

1. Actions involving general and limited partnerships.

Uniform Commercial Code

Transactions governed by the Uniform Commercial Code (exclusive of those concerning individual co-op units).

Other Commercial Matters

1. Actions involving employment agreements, trade secrets, restrictive covenants or employee incentive or retirement plans in which business or commercial issues predominate.
2. Declaratory judgment actions and third party indemnification claims by or against insurance companies where the underlying cause of action is contract in nature or would otherwise fall within these guidelines.
3. Commercial class actions.
4. Professional malpractice involving commercial or business matters.
5. Complicated environmental insurance litigation.
6. Commercial bank transactions.

The following will presumptively be transferred out of the Division even if the monetary threshold is met:

1. Suits to set professional fees.
2. Attorney or medical malpractice actions.
3. Real estate foreclosures even if they involve commercial buildings and commercial parties.
4. Discharge, modification, or foreclosure of mechanics' or other liens.
5. Discrimination cases except when part of or under the terms of a contract.

6. Consumer collection matters.
7. Products liability claims including claims based upon warranty of merchantability and/or fitness for a particular use.
8. Proceedings to enforce a judgment regardless of the nature of the underlying dispute.
9. Cases seeking a declaratory judgment as to insurance coverage for a personal injury or property damage action.
10. Landlord tenant matters, Yellowstone Injunctions, purchase, sale or lease of, or security interest in commercial real property or personal property, and other real estate disputes.
11. First party insurance claims and actions by insurers to collect premiums or rescind policies.

[Revised April 1, 2004, by replacement of previous third through sixth (unnumbered) paragraphs with current third through fifth paragraphs.]

Guidelines for Assignment for Cases to Kings County, Supreme Court Commercial Division, *available at* http://www.courts.state.ny.us/comdiv/Kings_Guidelines.htm (last visited Oct. 7, 2004).

MONROE COUNTY

GUIDELINES FOR ASSIGNMENT OF CASES TO THE COMMERCIAL DIVISION

In general, the Commercial Division, Monroe County, entertains complex commercial and business disputes in which a party seeks compensatory damages totaling \$25,000 or more, exclusive of punitive damages, costs, and attorney fees; and exclusive of any non-commercial claims, non-commercial cross-claims, or non-commercial counterclaims.

- A) Such business and commercial disputes shall include the following types of cases:

CONTRACT

1. Breach of contract, fraud or misrepresentation actions involving:
 - (a) Purchase or sale of securities.
 - (b) Uniform Commercial Code transactions.
 - (c) Purchase or sale of the assets of a business, or merger, consolidation or recapitalization of a business.
 - (d) Providing of goods or services by or to a business entity.
 - (e) Purchase or sale or lease of, or security interest in, commercial real property or personal property.
 - (f) Partnership, shareholder or joint venture agreements.
 - (g) Franchise, distribution or licensing agreements.

BUSINESS CORPORATION LAW

2. Shareholder derivative actions
3. Dissolution or liquidation of corporations.

4. Actions involving liability and indemnity of corporate directors and officers.
5. Actions involving the internal affairs of corporations, such as voting and inspection rights of shareholders or directors, authorization of corporate acts or interpretations of articles or by-laws.

PARTNERSHIP LAW

6. Actions involving general and limited partners and partnerships

UNIFORM COMMERCIAL CODE

7. Commercial loans (including failures to make commercial loans), negotiable instruments, letters of credit and bank transactions.
8. Actions involving allegations of business torts, including unfair competition, interference with business advantage or contractual relations.

OTHER COMMERCIAL MATTERS

9. Actions involving employment agreements or employee incentive or retirement plans (not including qualified retirement plans) in which the business or commercial issues predominate.
 10. Declaratory judgment actions and third party indemnification claims versus insurance companies where the underlying cause of action is contract in nature or would otherwise fall within the guidelines set forth herein. (Specifically not included are Declaratory Judgment Actions and third party claims relating to fire loss, motor vehicle actions and tort claims.)
 11. Commercial class actions.
 12. Opening of default judgments where the underlying cause of action is commercial in nature and would otherwise fall within the monetary and jurisdictional guidelines set forth herein.
 13. Actions may involve individuals, and business entities, as long as all other criteria are met.
- (B) Matters Not Included as Commercial Court Cases Include the Following:
- Non-commercial landlord/tenant disputes
 - Matrimonial disputes; including the enforcement of Separation Agreements or Divorce Decrees
 - Foreclosures, even if they involve commercial buildings and commercial parties
 - Matters falling under the provisions of the real property actions and proceedings law
 - Proceedings to enforce a judgment, including applications for information subpoenas and contempt, without regard as to whether or not the underlying action is commercial in nature.
 - Products liability claims, including merchantability and fitness for some particular purpose claims
 - Discharge, modification or foreclosure of mechanics' or other liens
 - Declaratory judgment actions involving indemnification claims under insurance policies relating to underlying actions which are NOT commercial

in nature, including, but not limited to, underlying claims for fire loss, motor vehicle actions and tort claims.

- Opening/vacating or modifying default judgments on actions which are NOT commercial in nature, including all matters which do not fall within the monetary and jurisdictional guidelines set forth under Criteria.
 - Actions by or against Medicare, Medicaid, or the Department of Social Services or enforcement of legal rights under law.
 - Discrimination cases (age, sex etc.) except when part of or under the terms of a contract.
 - Collection matters involving the collection for legal, medical, accounting, or architectural fees.
 - Legal, medical, or accounting malpractice actions even where a contract cause of action is also stated.
- (C) The determination as to whether a case should be assigned to the Commercial Division is made by the Clerk of the Supreme Court, based upon the criteria for commercial cases established by the Court. For this purpose, counsel must annex a copy of the summons and complaint to any submission of an RJI seeking assignment to the Commercial Division.
- (D) Any special proceedings under the CPLR which are clearly commercial in nature (including dissolution proceedings and applications relating to CPLR Article 75 in a commercial setting) should be marked as a special proceeding but should also indicate (on the form or by separate cover) that the matter is commercial in nature.
- (E) The Commercial Division Justice or an assigned IAS Justice may request that an assignment of a matter be reconsidered by the Clerk. Since the assignment of any case in the Supreme Court is based on various criteria, including the balancing of case loads among the civil Supreme Court Justices, there is no appeal by litigants or attorneys of the case assignment. The decision of the Supreme Court Clerk/Administrative Judge regarding assignment of a case is final and is not subject to review or appeal.

Guidelines for Assignment of Cases to the Commercial Division, *available at* http://www.courts.state.ny.us/comdiv/guidelines_for_assignment_of_casesMC.htm (last visited Oct. 7, 2004).

NASSAU COUNTY

GUIDELINES FOR ASSIGNMENT OF CASES TO THE COMMERCIAL PARTS

In general, the Commercial Parts of the Supreme Court, Nassau County, entertain complex commercial and business disputes in which a party seeks compensatory damages totaling \$75,000 or more. Due to caseload considerations, the Justices are empowered to transfer out of the Division cases which, in their judgment, do not fall within this category notwithstanding that a party has described the case as "commercial" on the RJI. The principles set out below will guide the exercise of this authority. Parties should adhere to these principles when designating a

case type on the RJI. (See Paragraph (c) for documentation which should accompany the RJI).

- (a) The following will presumptively be transferred out of the Division even if the monetary threshold is met:
 - (1) Suits to collect professional fees;
 - (2) Cases seeking a declaratory judgment as to insurance coverage for a personal injury or non-commercial property damage action;
 - (3) Residential real estate disputes, including landlord-tenant matters;
 - (4) Proceedings to enforce a judgment regardless of the nature of the underlying case;
 - (5) First-party insurance claims and actions by insurers to collect premiums or rescind policies; and
 - (6) Attorney malpractice actions.
- (b) Actions in which the principal claims involve the following will presumptively be retained in the Division provided that the money threshold is met:
 - (1) Breach of contract or fiduciary duty, fraud, misrepresentation, business tort (e.g., unfair competition), or statutory violation arising out of business dealings (e.g., sales of assets or securities, corporate structurings, partnership, shareholder, joint venture, and other business agreements, trade secrets and restrictive covenants);
 - (2) Transactions governed by the Uniform Commercial Code (exclusive of those concerning individual coop units);
 - (3) Transactions involving commercial real property;
 - (4) Shareholder derivative actions and commercial class actions;
 - (5) Commercial bank transactions;
 - (6) Internal affairs of business organizations or liability to third parties of officials thereof;
 - (7) Malpractice by accountants or actuaries;
 - (8) Environmental insurance coverage litigation; and
 - (9) Corporation or Partnership dissolutions.
- (c) The determination as to whether a case should be retained in a Commercial Part will be made as soon as a matter is assigned to a Justice. For this purpose, counsel must annex a brief sworn statement justifying the Commercial designation, and a copy of the summons and complaint or summons with notice, if any, to any submission accompanying an RJI. Retained cases will remain in the Commercial Part.
- (d) Special proceedings (including applications pursuant to CPLR 3102(c) and (e) relating to CPLR Article 75) and foreclosures are randomly assigned among all Justices in the Supreme Court, Nassau County. Even when parties believe that a special proceeding or foreclosure has a “commercial” character, the “special proceedings” or “foreclosure” portion of the RJI should be completed by the filing party, not the “commercial” section. However, prior to the actual assignment of the matter to a Justice, a party to a commercial special proceeding may apply to the Administrative Judge to override the computer and

designate the matter as “commercial” for treatment if it raises issues of extraordinary complexity.

- (e) An order of transfer issued by a Justice of a Commercial Part is an administrative matter. A party claiming to have been aggrieved by such an order may seek review by letter application (two pages maximum, with a copy to all parties) to the Administrative Judge. Any such application that is not made promptly after the issuance of the transfer order will be denied as untimely irrespective of its merits. The order of the Administrative Judge is final and subject to no further review or appeal.

Guidelines for Assignment of Cases to the Commercial Parts, *available at* <http://www.courts.state.ny.us/comdiv/nassauguidelines.htm> (last visited Oct. 7, 2004).

SUFFOLK COUNTY

GUIDELINES FOR ASSIGNMENT OF CASES TO THE COMMERCIAL PART

In general, the Commercial Part of the Supreme Court, Suffolk County, entertains complex commercial and business disputes in which a party seeks compensatory damages totaling \$25,000 or more. The Justice assigned is authorized to transfer out of the Division cases which, in his or her judgment, do not fall within this category notwithstanding that a party has described the case as “commercial” on the RJI. The principles set out below will guide the exercise of this authority. Parties should adhere to these principles when designating a case type on the RJI (See Paragraph (C) for documentation which should accompany the RJI).

- (A) The following will presumptively be transferred out of the Division even if the monetary threshold is met:
 - (1) Suits to collect professional fees;
 - (2) Cases seeking a declaratory judgment as to insurance coverage for personal injury or property damage action;
 - (3) Landlord-tenant matters, Yellowstone applications and other real estate disputes;
 - (4) Proceedings to enforce a judgment regardless of the nature of the underlying case;
 - (5) First-party insurance claims and actions by insurers to collect premiums or rescind policies; and
 - (6) Attorney malpractice actions.
- (B) Actions in which the principal claims involve the following will presumptively be retained in the Division, provided that the money threshold is met:
 - (1) Breach of contract or fiduciary duty, fraud, misrepresentation, business tort (e.g., unfair competition), or statutory violation arising out of business dealings (e.g., sales of assets or securities, corporate structurings, partnership, shareholder, joint venture, and other business agreements, trade secrets and restrictive covenants);
 - (2) Transactions governed by the Uniform Commercial Code (exclusive of those concerning individual coop units);

- (3) Complicated transactions involving commercial real property;
 - (4) Shareholder derivative actions and commercial class actions;
 - (5) Commercial bank transactions;
 - (6) Internal affairs of business organizations or liability to third parties of officials thereof;
 - (7) Malpractice by accountants or actuaries;
 - (8) Complicated environmental insurance coverage litigation; and
 - (9) Corporate or Partnership dissolutions.
- (C) The determination as to whether a case should be retained in the Commercial Part will be made as soon as possible. For this purpose, counsel must annex an affirmation form . . . justifying the Commercial designation, and a copy of the summons and complaint or summons with notice, if any, to any submission accompanying an RJI. Retained cases will remain in the Commercial Part.
- (D) Special proceedings (including applications pursuant to CPLR 3102(c) and (e) relating to CPLR Article 75) and foreclosures are randomly assigned among all Justices in the Supreme Court, Suffolk County. Even when parties believe that a special proceeding or foreclosure has a “commercial” character, the “special proceedings” or “foreclosure” portion of the RJI should be completed by the filing party, not the “commercial” section. However, prior to the actual assignment of the matter to a Justice, a party to a commercial special proceeding may apply to the Administrative Judge to override the computer and designate the matter as “commercial” for treatment if it raises issue [sic] of extraordinary complexity.
- (E) An order of transfer issued by the Justice of the Commercial Part is an administrative matter. A party claiming to have been aggrieved by such an order may seek review by letter application (two pages maximum, with a copy to all parties) to the Administrative Judge. Any such application that is not made promptly after the issuance of the transfer order will be denied as untimely irrespective of its merits. The order of the Administrative Judge is final and subject to no further review or appeal.

Guidelines for Assignment of Cases to the Commercial Part, *available at* http://www.courts.state.ny.us/comdiv/Suffolk_guidelines_for_assignment.htm (last visited Oct. 7, 2004).

WESTCHESTER COUNTY

COMMERCIAL DIVISION PART RULES

January, 2002

[COMMERCIAL COURT ASSIGNMENT PROCEDURES MODIFIED, AND RULE 21 AND APPENDIX A ADDED, EFFECTIVE MAY 1, 2004.]

The following are the procedures and rules governing practice in the Commercial Division-Westchester County.

COMMERCIAL COURT ASSIGNMENT PROCEDURES

The Clerk of the Supreme Court shall review and determine assignments of actions to the Commercial Division, based upon the designation contained in the Request for Judicial Intervention, and upon the facts and circumstances of each case as stated in the summons and complaint. A request for Judicial Intervention which is marked "Commercial" must be accompanied by a "Commercial Division certification" (Rule 21) identifying the nature of the lawsuit and the reason for the assignment to the Commercial Division. A complete set of pleadings must accompany such certification and be annexed to the RJI. Since the assignment of any case in the Supreme Court is based on various criteria, including the balancing of case loads among Supreme Court Justices, there is no appeal of the case assignment by litigants or attorneys.

CRITERIA FOR COMMERCIAL COURT

The definition of a "commercial case", as determined by the Commercial Division of Supreme Court, is as follows:

All business and commercial disputes in which the amount at issue generally involves damage claims in a minimum amount of \$100,000.00, or claims for unspecified amounts where the value of the commercial asset in dispute exceeds \$100,000.00.

Such business and commercial disputes shall include, without limitation, the following types of cases:

CONTRACT

1. Breach of contract, fraud or misrepresentation actions involving:
 - (a) Purchase or sale of securities.
 - (b) Purchase or sale of the assets of a business, or merger, consolidation or recapitalization of a business.
 - (c) Purchase or sale or lease of, or security interest in, commercial real property or personal property.
 - (d) Partnership, shareholder or joint venture agreements.
 - (e) Franchise, distribution or licensing agreements.

BUSINESS CORPORATION LAW

2.
 - (a) Shareholder derivative actions.
 - (b) Actions involving Judicial Dissolution.
 - (c) Actions involving liability and indemnity of corporate directors and officers.
 - (d) Actions involving the internal affairs of corporations, such as voting and inspection rights of shareholders or directors, authorization of corporate acts or interpretations of articles or by-laws.
 - (e) Actions involving foreign corporations authorized to do business in the State of New York.

- (f) Actions involving appointment of a Receiver of property of domestic or qualified foreign corporations.

PARTNERSHIP LAW

3. Actions involving property rights of general and limited partners.
4. Actions involving partnership, general business operation, dissolution and creditors' rights.

UNIFORM COMMERCIAL CODE

5. Actions involving the provisions of the Uniform Commercial Code.

OTHER COMMERCIAL MATTERS

6. Actions involving employment agreements or employee incentive or retirement plans (not including qualified retirement plans) in which business or commercial issues predominate.
7. Declaratory judgment actions and third party indemnification claims against insurance companies where the underlying cause of action is contract in nature.
8. Commercial class actions.

MATTERS EXCLUDED FROM THE COMMERCIAL DIVISION

- Real Estate foreclosure actions.
- Proceedings to enforce a judgment.
- Products liability claims, including claims based upon warranty of merchantability and/or fitness for a particular use.
- Discharge, modification or foreclosure of mechanics' liens.
- Declaratory judgment actions involving indemnification claims under insurance policies relating to underlying actions which are not commercial in nature, including, but not limited to, underlying claims for fire loss, motor vehicle actions and tort claims.
- Actions by or against Medicare, Medicaid, or the Department of Social Services.
- Discrimination cases.
- Collection matters involving legal, medical, accounting, architectural fees or other professional fees.

....

Rule 21 Commercial Division Attorney's Certification. The certification requires verification by counsel that the case meets the eligibility requirements set forth in these Rules. (See Appendix A).

APPENDIX A

FORM OF COMMERCIAL DIVISION ATTORNEY'S CERTIFICATION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

-----X
Plaintiff(s)
COMMERCIAL DIVISION ATTORNEY'S
CERTIFICATION
- against -
Index No.
Defendant(s).
-----X

_____, an attorney duly admitted to practice law before the Courts of the State of New York, hereby affirms the following statements to be true under the penalties of perjury:

1. I am the attorney for the _____ and submit this affirmation in support of assignment of this action to the Commercial Division.
2. This case involves _____.
3. I am fully familiar with the facts and pleadings in this action and have reviewed the Rules of the Commercial Division, Westchester County, including the Guidelines for the Assignment of Cases to a Commercial Part.
4. I believe that this case complies with the Guidelines for the Assignment of Cases to a Commercial Part and should be assigned to the Commercial Division.

Dated: _____

Commercial Division Part Rules, *available at* http://www.nycourts.gov/comdiv/WestChester_guidelines_for_cases.htm (last visited Oct. 7, 2004).

NORTH CAROLINA

All cases are assigned to the Business Court by the Chief Justice of the North Carolina Supreme Court. . . . [T]he Memorandum to Senior Resident Superior Court Judges from Chief Justice Lake . . . containing his "Guidelines for Assignment of Cases to the North Carolina Business Court" [is included below]. It is a useful document which explains the policies the Chief Justice follows. You are not required to waive a jury trial in order to have a case assigned and the case will be tried in the county in which it is filed.

Under Rule 2.1, the Chief Justice may designate any case [or group of cases] as complex business. The Rule provides that a senior resident superior court judge, chief district court judge, or presiding superior court judge may *ex mero motu*, or on motion of a party, recommend to the Chief Justice that a case or cases be designated as complex business. Thus, the procedure for initial designation as complex business does not differ from the procedure for having cases designated as exceptional. Cases may be assigned over the objection of one or all of the parties. However, once a case is designated as complex business, it is automatically assigned to a Special Superior Court Judge for Complex Business Cases. In this

respect the procedure differs from previous practice for exceptional cases in that heretofore the parties had generally agreed upon a superior court judge to hear the case as exceptional and secured his or her prior agreement to handle the case. That flexibility is not available with the complex business designation. Also, the Special Superior Court Judge for Complex Business Cases must write an opinion on final disposition of the case. Once a case is designated as complex business, it stays with the business court for all purposes, including trial.

The process for appeals from a decision of the Special Superior Court Judge for Complex Business Cases does not differ from appeals from other superior court orders and judgments.

Definition of a Complex Business Case

The Supreme Court purposefully chose not to define the term “complex business case” in Rule 2.1. It believed the absence of a definition would allow litigants to seek designation with respect to any business issue that they believed required special judicial expertise in business matters. It also provided the court with the flexibility to respond to requests that might not have been anticipated when the rule was amended.

Both the Commission and the Supreme Court contemplated that cases involving significant issues under certain chapters of the North Carolina General Statutes would be designated as complex business. Those chapters include:

- Chapter 55 Business Corporation Act
- Chapter 55B Professional Corporations
- Chapter 57C Limited Liability Companies
- Chapter 59 Partnerships
- Chapter 78A Securities Act
- Chapter 78B Tender Offer Disclosure Act
- Chapter 78C Investment Advisors Act

One of the key factors in assessing whether or not a case should be designated as complex business is whether the outcome will have implications for business and industry beyond the conflicts of the parties to the litigation. If a written decision on disposition of the case would provide predictability for others in the same business or industry in making their business decisions, the case will more likely be considered for designation.

There are also other procedural indicators of complex business cases. Such cases may be time sensitive, paper intensive or laden with discovery disputes. They may have complex legal and evidentiary issues, multiple parties and jurisdictions, and have a significant impact on the parties’ business, whether it be from a monetary or a corporate governance standpoint.

How a Case is Assigned to the Business Court, *available at* <http://www.ncbusinesscourt.net/New/aboutcourt/> (last visited Oct. 7, 2004).

MEMORANDUM

TO: All Superior Court Judges

FROM: I. Beverly Lake, Jr.
Chief Justice
Supreme Court of North Carolina
David F. Hoke
Assistant Director
Administrative Office of the Courts

DATE: March 7, 2001

RE: Guidelines for Assignment of Cases to the North Carolina Business Court

When the North Carolina Business Court was established by amending Rule 2 of the General Rules of Practice for the Superior and District Courts, the Supreme Court had two goals in mind. The first was the establishment of a court where complex business litigation could be handled by one judge from beginning to end, thus reducing the problems of discontinuity created by the normal rotation system. Secondly, the business court was established to generate a body of case law in our State on corporate governance issues. The Supreme Court envisioned that cases arising under Chapter 55 (North Carolina Business Corporation Act), Chapter 55B (Professional Corporation Act), Chapter 57C (North Carolina Limited Liability Company Act.), Chapter 59 (Uniform Limited Partnership Act), Chapter 78A (North Carolina Securities Act), Chapter 78B (Tender Offer Disclosure Act), and Chapter 78C (Investment Advisers) would be assigned to the business court so that opinions could be written which would provide uniform guidance on corporate governance issues for North Carolina companies. Antitrust was another area in which the Supreme Court believed a business court would prove beneficial.

This memorandum will explain the policies that the Chief Justice will follow in assigning cases to the business court under Rule 2. In addition, the questions of how cases are assigned to the business court and what criteria should be used in deciding which cases to recommend for assignment to the business court as a complex business case or as a regular Rule 2.1 case will be addressed.

At the outset, some common misconceptions about the business court may need to be dispelled. First, cases assigned to the business court are tried in the county in which they are filed. They are not moved unless the parties request it. Second, there is no dollar threshold that must be alleged in order to support assignment. Third, right to a jury trial is not eliminated by assignment to the business court. And fourth, although the business court has advanced technology and e-filing capability, attorneys are not required to use the technology.

Rule 2 affords you discretion in recommending cases be assigned as either complex business cases or exceptional cases under Rule 2.1. You may recommend assignment on your own motion or motion of a party; consent is not required. Your recommendation may be made over the objection of one or more parties.

Judge Ben Tennille is currently the only Special Superior Court Judge designated for assignment to complex business cases. With respect to regular Rule 2.1 exceptional case designations, the policy remains the same: In order to obtain exceptional case designation, the parties should secure the prior agreement of a Superior Court Judge to handle the case as exceptional before requesting such designation. Judge Tennille is assigned regular Rule 2.1 exceptional cases in addition to complex business cases.

Based upon current records of complex business case assignments, the Chief Justice holds the opinion that the business court can be more accurately utilized for complex business cases. If there is any uncertainty about the proper classification of a case, the case assignment recommendation may be either complex business or exceptional, and the Chief Justice will determine which classification is appropriate. Normally, cases arising under the chapters of the General Statutes referenced above will be assigned as complex business cases. Additionally, please recommend assignment of any cases involving removal of a director, dissent and appraisal, involuntary dissolution of a corporation, or other corporate governance disputes. Also, Meiselman cases involving disputes in family held businesses are ideal candidates for assignment as complex business cases. Partnership disputes, as well as shareholder derivative actions, are also usually assigned as complex business cases. In order for our judicial system to build a consistent body of case law, these types of cases must be assigned to the business court on a regular basis, and early identification and assignment is preferable.

Other examples of cases that are good candidates for assignment to the business court include: contractual disputes that are motion and paper intensive, involve protracted trials, and require significant judicial management; antitrust and theft of trade secret cases; and cases involving determination of legal issues that will have an impact on industry or business practices beyond the confines of the case itself. Some, but not all, class actions may be good candidates for assignment, and the decision on assignment should be made before the issue of class certification is decided.

Requests for assignment of cases to the business court should be addressed to the Chief Justice, but sent to the attention of David F Hoke, Assistant Director, Administrative Office of the Courts, at Post Office Box 2448, Raleigh, NC 27602. The request should include a statement of the nature of the case, the reasons why it should be assigned, whether the parties have consented to assignment, and the names and addresses of counsel for the parties. In lieu of a detailed statement of the reasons for assignment, any pleadings or motions setting forth those reasons may be attached to the request. Any objections to assignment should also be included. To help expedite the process, please send a copy of the recommendation of assignment simultaneously to Judge Tennille at Suite 200, 200 S. Elm Street, Greensboro, NC 27401.

If you have any questions, please do not hesitate to contact Judge Tennille at (336) 334-5252 or Mr. Hoke at (919) 733-7107.

Memorandum from the Chief Justice of the Supreme Court of North Carolina, to North Carolina Superior Court Judges (March 7, 2001), *available at* <http://www.ncbusinesscourt.net/New/aboutcourt/> (last visited Oct. 7, 2004).

North Carolina Superior Court Rule 2.1 states:

Rule 2.1. Designation of exceptional civil cases and complex business cases.

- (a) The Chief Justice may designate any case or group of cases as (a) “exceptional” or (b) “complex business.” A senior resident superior court judge, chief district court judge, or presiding superior court judge may ex mero motu, or on motion of any party, recommend to the Chief Justice that a case or cases be designated as exceptional or complex business.
- (b) Such recommendation for exceptional cases may include special areas of expertise needed by the judge to be assigned and may include a list of recommended judges. Every complex business case shall be assigned to a special superior court judge for complex business cases, designated by the Chief Justice under Rule 2.2, who shall issue a written opinion upon final disposition of the case.
- (c) Such recommendation shall be communicated to the Chief Justice through the Administrative Office of the Courts.
- (d) Factors which may be considered in determining whether to make such designations include: the number and diverse interest of the parties; the amount and nature of anticipated pretrial discovery and motions; whether the parties voluntarily agree to waive venue for hearing pretrial motions; the complexity of the evidentiary matters and legal issues involved; whether it will promote the efficient administration of justice; and such other matters as the Chief Justice shall deem appropriate.
- (e) The Chief Justice may enter such orders as are appropriate for the pretrial, trial, and other disposition of such designated case or cases. (Adopted January 5, 1988; amended August 28, 1995.)

OKLAHOMA

SECTION 16. AMENDATORY 20 O.S. 2001, Section 91.2, is amended to read as follows:

Section 91.2 A. To facilitate the trial and disposition of cases, actions filed in the district court shall be assigned to various dockets by the clerk of the court pursuant to the direction and supervision of the presiding judge of the district. Until changed by order of the Supreme Court, only the following dockets are established: . . . and a business docket for business court divisions of the court created pursuant to Section 17 of this act.

. . . .

SECTION 17. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 91.7 of Title 20, unless there is created a duplication in numbering, reads as follows:

- A. The Oklahoma Legislature finds that, due to the complex nature of litigation involving highly technical commercial issues, there is a need for a court in Oklahoma's most populated counties with specific jurisdiction over actions involving such commercial issues.
- B. The Supreme Court is authorized to create a business court division within the district court of any judicial district containing a municipality with a population in excess of three hundred thousand (300,000), according to the latest Federal Decennial Census.
- C. The Supreme Court shall promulgate rules for the establishment and jurisdiction of the business court divisions.

2003 Okla. H.B. 2661, Oklahoma Second Session of the 49th Legislative Session, Sections 16 and 17, enacted May 28, 2004, *available at* http://www2.lsb.state.ok.us/2003-04hb/hb2661_enr.rtf (last visited Oct. 7, 2004).

PENNSYLVANIA

PHILADELPHIA COUNTY

ASSIGNMENT OF CASES SUBJECT TO COMMERCE PROGRAM

1. *Cases Subject to Commerce Program.* Notwithstanding anything to the contrary in General Court Regulation 95-2 (Day Forward Program) or any other General Court Regulation, Jury, Non-Jury & Equity, and Class Action cases filed on or after January 1, 2000, but not Arbitration cases, shall be assigned to the Commerce Program if they are among the following types of actions:

1. Actions relating to the internal affairs or governance, dissolution or liquidation, rights or obligations between or among owners (shareholders, partners, members), or liability or indemnity of managers (officers, directors, managers, trustees, or members or partners functioning as managers) of business corporations, partnerships, limited partnerships, limited liability companies or partnerships, professional associations, business trusts, joint ventures or other business enterprises, including but not limited to any actions involving interpretation of the rights or obligations under the organic law (e.g., Pa. Business Corporation Law), articles of incorporation, by-laws or agreements governing such enterprises;
2. Disputes between or among two or more business enterprises relating to transactions, business relationships or contracts between or among the business enterprises. Examples of such transactions, relationships and contracts include:
 - a. Uniform Commercial Code transactions;
 - b. Purchases or sales of businesses or the assets of businesses;
 - c. Sales of goods or services by or to business enterprises;
 - d. Non-consumer bank or brokerage accounts, including loan, deposit cash managements and investment accounts;
 - e. Surety bonds;

- f. Purchases or sales or leases of, or security interests in, commercial, real or personal property; and
 - g. Franchisor/franchisee relationships.
3. Actions relating to trade secret or non-compete agreements;
 4. "Business torts," such as claims of unfair competition, or interference with contractual relations or prospective contractual relations;
 5. Actions relating to intellectual property disputes;
 6. Actions relating to securities, or relating to or arising under the Pennsylvania Securities Act;
 7. Derivative actions and class actions based on claims otherwise falling within these ten types, and consumer class actions other than personal injury and products liability claims;
 8. Actions relating to corporate trust affairs;
 9. Declaratory judgment actions brought by insurers, and coverage disputes and bad faith claims brought by insureds, where the dispute arises from a business or commercial insurance policy, such as a Comprehensive General Liability policy, and;
 10. Third-party indemnification claims against insurance companies where the subject insurance policy is a business or commercial policy and where the underlying dispute would otherwise be assigned to the Commerce Program, not including claims where the underlying dispute is principally a personal injury claim.

All of the above types of actions may involve individuals named as parties, in addition to business enterprises, so long as all other criteria are met and the essential nature of the litigation is a business dispute. For example, a dispute over a commercial loan may include individual guarantors as either plaintiffs or defendants, as the case may be, but such a lawsuit would still be a commercial dispute.

2. *Cases Not Subject to the Commerce Program.* The following types of matters are not to be included in the Commerce Program:

1. Matters subject to Compulsory Arbitration in this Court or to the jurisdiction of the Municipal Court, including any appeals.
2. Personal injury, survival or wrongful death matters.
3. Individual (non-class) consumer claims against businesses or insurers, including products liability and personal injury cases.
4. Matters involving occupational health or safety.
5. Environmental claims not involved in the sale or disposition of a business and other than those addressed in Commerce Program types 9 or 10 above.
6. Matters in eminent domain.
7. Malpractice claims, other than those brought by business enterprises against attorneys, or accountants, architects or other professionals in connection with the rendering of professional services to the business enterprise.
8. Employment law cases, other than those referenced in Commerce Program type 3 above.
9. Administrative agency, tax, zoning and other appeals.

10. Petition Actions in the nature of Change of Name, Mental Health Act Petitions, Petitions to appoint an Arbitrator, Government Election Matters, Leave to Issue Subpoena, Compel Medical Examination.
11. Individual residential real estate and non-commercial landlord-tenant disputes.
12. Domestic relations matters, and actions relating to distribution of marital property, custody or support.
13. Any matter required by statute, including 20 Pa.C.S. Chapter 7, §§ 711 & 713, to be heard in the Orphans' Court or Family Court Division of the Philadelphia Court of Common Pleas, or other matter which has heretofore been within the jurisdiction of the Orphans' Court of Family Court Division of this Court.
14. Any criminal matter other than criminal contempt in connection with a Commerce Program action.
15. Such other matters as the Court shall determine.

Administrative Docket No. 01-2000, 30 Pa.B. 1362, *available at* http://www.aopc.org/judicial-council/local-rules/philadelphia/philadel_chg_010100a.pdf (last visited Oct. 7, 2004).

RHODE ISLAND

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
PROVIDENCE, SC.

SUPERIOR COURT

ADMINISTRATIVE ORDER NO. 2001-9

RE: BUSINESS CALENDAR

There is hereby established for the Counties of Providence and Bristol, a "Business Calendar."

- I. Civil actions in which the principal claim or claims involve the following are appropriate matters to be assigned to the Business Calendar for all purposes, including motion practice, discovery disputes, injunctive relief and hearing on the merits (with or without a jury);
 - (a) Breach of contract or fiduciary duties, fraud, misrepresentation, business tort or statutory violations arising out of business dealings and/or transactions;
 - (b) Transactions governed by the provisions of the Uniform Commercial Code;
 - (c) Complicated transactions involving commercial real property;
 - (d) Shareholder derivative actions;
 - (e) Commercial class actions;
 - (f) Commercial Bank transactions;
 - (g) Matters affecting the internal affairs or governance of business organizations or entities;
 - (h) Business insolvencies and receiverships.

- II. Simple collection matters, declaratory judgment proceedings with respect to insurance coverage, confirmation or vacation of arbitration awards, and general landlord and tenant issues shall not be assigned to the Business Calendar.
- III. New matters shall be assigned to the Business Calendar at the request of the plaintiff upon the filing of the Complaint, or of the defendant, not later than ten days following the filing of defendant's entry of appearance, but only with the assent of the Justice designated to be in charge of the Business Calendar. In this connection, the party moving shall set up, as soon as practicable, a chambers conference with said Justice.
- IV. In connection with cases presently pending, but not yet assigned to a trial date, either party may request assignment to the Business Calendar with the assent of such Justice procured at a conference to be set up as aforesaid.
- V. It is the intent of the Superior Court to process matters on the Business Calendar in as expeditious a manner as possible. To that end, the Justice in charge of the Calendar is vested with the power to require mandatory submission of the dispute to non-binding mediation. Failure to comply with an Order to that effect may be sanctionable.
- VI. The Justice in charge of the Business Calendar may establish generally, or in a particular case, informal procedures not inconsistent with law which he/she believes will be helpful in achieving prompt resolution of discovery disputes or other preliminary matters.
- VII. In the event of the absence of the Justice in charge of the Business Calendar, any application or motions with respect to matters on the Business Calendar should be taken up with the Justice in charge of the Formal and Special Cause Calendar.
- VIII. The Business Calendar to commence operation on Monday, June 4, 2001, in Courtroom No. 17. Justice Michael Silverstein will be in charge of said Calendar from June 4, 2001, through Tuesday, December 18, 2001.

BY ORDER OF:

JOSEPH F. RODGERS, JR.
PRESIDING JUSTICE

DATED: April 17, 2001

R.I. Super Ct. Admin. Order No. 2001-9, *available at* <http://www.courts.state.ri.us/superior/pdfadministrativeorders/2001-9.pdf> (last visited Oct. 7, 2004).

APPENDIX B

EXPERIENCES IN SOME OTHER JURISDICTIONS WITH EFFORTS TO ESTABLISH BUSINESS COURTS

HAWAII

Hawaii's Chapter of the American Judicature Society, has assembled a fifteen member "Special Committee on Business Courts" to make an inquiry into "whether Hawaii should or should not have a business court." Erika Engle, *New Hawaii Business Court Gets Gaveled Into Possibility*, HONOLULU STARBULLETIN, Apr. 11, 2003, available at <http://starbulletin.com/2003/04/11/business/engle.html> (last visited Oct. 7, 2004).

MAINE

After her appointment, Maine's current Chief Justice, the Honorable Leigh Saufley, made the following comments in response to an interviewer's question concerning the idea of a separate business court or docket:

Another thing Chief Justice Wathen talked about was the creation of a business court. Is that a proposal likely to survive during your leadership?

We've already undertaken a number of things that will help us to address issues of businesses in the courts. I think what [former Chief Justice Wathen] was talking about is a docketing system as opposed to a separate court. Several states have done pilot projects with special docketing for certain kinds of complex business cases. In Maine, we've undertaken the single justice project in those areas most likely to get complex business litigation. And then we have focused on complex litigation; in fact, we have one judge who's headed off for more training at one of the national conferences on complex litigation. All those things will come together in a more cohesive docketing system which essentially responds to what [former Chief Justice Wathen] was concerned about: that business cases may tend to get lost in the rush of everything else the courts are trying to do.

Meet Maine's New Chief Justice, 17 ME. B. J. 14, 16 (2002). More recently, the Chief Justice indicated that a business court in Maine is probably three to five years away. Email from George F. Burns, Esquire, Bernstein, Shur, Sawyer & Nelson, P.A., to Lee Applebaum, Esquire, Fineman, Krekstein & Harris, P.C. (Oct. 2, 2003, 08:39 EST) (on file with authors) (Mr. Burns is an attorney with Bernstein, Shur, Sawyer & Nelson, P.A. in Portland, Maine and has been involved in working towards the creation of a business court in Maine).

MINNESOTA

Efforts at creating a business court have not proved successful. Docketing changes have been made in court procedures in some of the larger Minnesota

counties with a view to handling complex litigation matters of various sorts. Letter from Thomas D. Feinberg, Esquire, to Lee Applebaum, Esquire, Fineman, Krekstein & Harris, P.C. (Sept. 15, 2003) (on file with authors).

MISSISSIPPI

“The Mississippi Secretary of State’s Business Law Advisory Group has discussed the issue of business courts on several occasions and continues to explore the feasibility of a business court. At the most recent meeting of the Business Law Advisory Group the procedures in other states were discussed, as well as issues unique to Mississippi.” Email from Henry Chatham, Esquire, Wise Carter Law Firm, to Lee Applebaum, Esquire, Fineman, Krekstein & Harris, P.C. (Sept. 11, 2003, 11:16 EST) (on file with authors) (Mr. Chatham is with the Wise Carter Law Firm in Jackson, Mississippi and is Mississippi’s State Bar Liaison to ABA Committee on Corporate Laws).

OHIO

The Ohio State Bar Association approved proposed legislation to establish a business court in Ohio in 1998; however, the legislation was not introduced in the legislature. In January 2003, the Corporation Law Committee of the OSBA established a subcommittee to review again the issue of establishing a business court in Ohio. The Business Court subcommittee, chaired by Harry Mercer, has been meeting and made an interim report to the Corporation Law Committee in September detailing the status of business courts in a number of states. The subcommittee is expected to make recommendations in a more detailed report to the Corporation Law Committee in January 2004.

Email from Harry D. Mercer, Esquire, to Lee Applebaum, Esquire, Fineman, Krekstein & Harris, P.C. (Sept. 11, 2003, 09:48 EST) (on file with authors); *see also* Dan Crawford, *Ohio Bar Considers Push for Separate Business Court*, BUS. FIRST OF COLUMBUS, January 6, 1997, available at <http://columbus.bizjournals.com/columbus/stories/1997/01/06/story2.html> (last visited Oct. 7, 2004) (reflecting efforts toward establishing a business court as early as 1996); Cliff Peale, *Business Courts Proposed*, CINCINNATI POST, Apr. 10, 1998, available at <http://www.cincypost.com/news/1998/court041098.html> (last visited Oct. 7, 2004) (indicating Ohio Bar Association committee recommended a form of state-wide business court for the purpose of seeking more expeditious case resolution, efficiency, consistency in decisions, and decreasing backlog in the trial courts of general jurisdiction).

VIRGINIA

Although there were some efforts within the Virginia Bar Association suggesting that inquiry be made into the creation of a business court in Virginia, it was decided in October 2003 not to pursue such an effort. Email from David G.

Shuford, Esquire, to Lee Applebaum, Esquire, Fineman, Krekstein & Harris, P.C. (June 3, 2004, 16:10 EST) (on file with authors).

WISCONSIN

In April of 1996, on recommendations made by a Special Task Force appointed by then Governor Thompson, Chief Judge Patrick Sheedy of the Milwaukee County Circuit Court implemented a business court pilot project and designated two judges to the Special Business Court in Milwaukee. The court implemented a set of summary proceeding rules limiting pleadings and calling for expedited discovery. A party had to petition to be placed within the business court and a decision was issued by a judge, whose decision could not be appealed. Milwaukee County had revised its rules in 1998, eliminating monetary limitations and adding the right to join third parties, pursue summary judgments and request a jury. The process was voluntary, and still aimed at a highly expeditious resolution, though not as streamlined as the original rules for summary proceedings. Due to the lack of use, however, the Milwaukee Circuit Court business track is no longer active. See generally Jane C. Schlict, *Milwaukee's New Business Court Rules*, MBA MESSENGER, Vol. 6, No. 5, May 1998; Pete Millard, *Reworking the Business Courts*, THE BUS. J. OF MILWAUKEE, March 31, 1997; *Maryland Business and Technology Court Task Force Report*, at appendix B, available at <http://www.courts.state.md.us/finalb&treport.pdf> (last visited Oct. 7, 2004).

The Milwaukee Circuit Court's Rules for Summary Proceedings for Business Disputes, Milwaukee County Circuit Court Rules 330-338, however, can still be located on the court's web site: <http://www.wisbar.org/rules/mil/mil3.html>. Under Milwaukee County Circuit Court Rule 330.D., business disputes are generally defined as "any claim arising out of a commercial relationship, excluding claims for personal, physical or mental injuries." MILWAUKEE COUNTY CIR. CT. R. 330D, available at <http://www.wisbar.org/rules/mil/mil3.html> (last visited Oct. 7, 2004). Examples include securities disputes, asset sales, commercial leases, partnership agreements, construction contracts, shareholder disputes, letters of credit, unfair competition, and interference with business relations. See *The Business Court Rules, New and Speedy Options for Business Litigation*, April 14, 1998, (provided for a seminar presented by the Milwaukee Bar Association's Civil Litigation Section on Revised Business Court Rules on April 14, 1998 in Milwaukee).

