

Business Courts: Towards A More Efficient Judiciary

By the Ad Hoc Committee on Business Courts

INTRODUCTION

In many U.S. jurisdictions, the business and legal communities have expressed in recent years serious concerns regarding the efficiency, predictability, experience, and knowledge of courts with respect to complex corporate and commercial disputes. In a few jurisdictions, steps have been taken to create specialized judicial resources, called business or commercial courts, to mitigate this problem and such steps are being considered in additional jurisdictions.

After two and one-half years of analysis of the problem and responses to it, the American Bar Association's (ABA's) Section of Business Law (Section) acted on a report of its Ad Hoc Committee on Business Courts (Committee) in August 1996. That report: (i) identified the reasons why some jurisdictions are considering or have adopted business courts of special jurisdiction or specialized business court divisions of courts of general jurisdiction; (ii) summarized the use of specialized courts in the federal courts and in other countries; and (iii) surveyed each of the fifty states to determine the status of efforts to create any such separate courts or specialized departments.

The Section determined to recommend 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.

This report¹ examines why such an organizational step for the judiciary is far from dramatic, but rather is consistent with specialization throughout our society. Specialization of courts has been implemented successfully in

1. This report is, in substance, the same as the Report of the Ad Hoc Committee on Business Courts, dated August 1, 1996, which was presented to the Section and approved. It has been amended by the Committee chairs in minor respects to reflect more current information and to improve readability for a more general audience. The Committee members were Dennis J. Block, Helen D. Chaitman, William H. Clark, Jr., Gandolfo V. DiBlasi, Campbell A. Griffin, Jr., Robert L. Haig, James J. Hanks, Jr., Robert L. Nutt, and David R. Woodward. The Committee was chaired by R. Franklin Balotti and Roland E. Brandel.

judicial systems, both domestically and in other countries, and is necessary to enhance the substantive quality and efficiency of U.S. courts.

SUMMARY

Specialization is an increasingly common characteristic of Western societies in the late twentieth century, and that trend is likely to continue into the twenty-first century. The professions, including the legal profession, are more subject to the pressures that result in specialization than those societal activities that are less complex and involve less technical knowledge and experience. While the legal profession itself has become more and more specialized in recent decades, the judiciary, in most jurisdictions, has lagged behind in this trend. In an era of scarce judicial resources, the inefficiencies that result from a failure to specialize have become less and less tolerable.

This report describes the concept of specialization in the judiciary and sets forth instances where specialization has been implemented. It also examines reasons why specialization with respect to complex business, corporate, and commercial matters is desirable, and sets forth, in summary form, the result of a survey of all fifty states and the District of Columbia conducted by the Committee in the spring of 1996.

SPECIALIZATION IN GENERAL

SPECIALIZATION IN SOCIETY

Our complex society has experienced a dramatic, inexorable movement towards professional specialization. Society may thereby lose some of the broad perspective and insight of generalists as the movement toward specialization gains force. Yet, it is clear that in almost every field of endeavor and in every profession, the need to master a body of knowledge and to gain experience in working within that body of knowledge has created a narrower focus over time for those who work within more broadly defined fields. Specialization has been a fact of life for decades in the medical field, for instance, and, more recently, it has become an important characteristic in the legal profession, particularly in large urban areas. Those areas, of course, describe where a growing portion of the U.S. population resides. Lawyer demographics are consistent with these general trends in moving toward urban concentrations. Further, lawyers are increasingly concentrating their numbers in large law firms and corporate legal departments, where specialization is typical. In fact, in such large, urban legal organizations, a generalist is becoming a rare phenomenon.

For lawyers, one level of specialization is to practice either as a litigator or a counselor. Increasingly, a lawyer who is a counselor not only chooses to forego functions relating to dispute resolution, but also counsels on relatively narrow fields of human activity and bodies of law. One need only

take a brief look at the ABA itself to appreciate the felt need of its members for an organization that permits a narrow and intense focus in order to master a field of knowledge. The ABA has almost twenty sections, ranging in size from modest to in excess of 60,000 members, each of which focuses on a separate, substantive field of the law. One of these is the Section of Business Law. To a layperson, the designation of oneself as a "business" lawyer would seem specialization enough. We know, however, that business lawyers can be, and indeed must be, further specialized in order to deliver efficient services. Look again at the organization of the ABA's Section of Business Law for further indication of a felt need to specialize. The Section has more than thirty standing committees that focus on various specialties of business law, in addition to scores of ad hoc committees and task forces.

The litigation bar is also, by necessity, becoming specialized, although at a slower pace than other practice areas. Litigators today have added identifiers to their defined practice scope. They are becoming, for example, antitrust litigators, insurance litigators, product liability litigators, securities litigators, and criminal defense litigators.

Like it or not, specialization of the legal profession is a dominant theme today and is likely to become even more dominant because specialization is an efficient method to deliver legal services in complex matters. Courts are subject to the same powerful forces that have produced professional specialization throughout other components of our legal system. The Committee examines below what the response of the courts has been, and what it should be, to these forces in the context of complex corporate and commercial issues.

THE CONCEPT OF SPECIALIZATION IN THE COURTS

In concept, specialization at the trial court level can occur in our judicial systems in two forms. The first is a court of specialized jurisdiction, one which is appointed and managed separately to do the work assigned to it. Examples of such courts are more prevalent in judicial systems in other countries and, in the United States, are more common at the federal level than at the state level.

The second way in which courts can specialize is to administratively assign judges to hear particular categories of cases, but to maintain such judges as part of a single legal and administrative unit. Examples of this kind of specialization at the state level are criminal courts, family courts, probate courts, and small claims courts.

EXISTING JUDICIAL SPECIALIZATION IN 1996

Other Western Countries

Several other Western industrialized countries, including France and Germany, allocate some types of civil litigation to specialized courts, the

most common of which are, in fact, commercial courts. In England, for instance, the Queens Bench Division of the High Court established a specialized Commercial Court almost a century ago. Use of the Commercial Court has become a more important feature since the mid-1970s.

France maintains a judicial structure that also features various specialized courts, including specialized courts of commerce (tribunaux de commerce) and designations of particular judges from the courts of general civil jurisdiction (tribunaux de grandes instances) to sit as a commercial court. Germany, which also has created numerous specialized courts, includes a specialized commercial chamber (handelskammern) in each regional court of general jurisdiction (landgerichte). Austria has specialized commercial courts that either may be independent commercial courts (handelsgerichte) or may be set up with the courts of general jurisdiction. Other civil law jurisdictions have had separate commercial codes and courts for years, many dating back to the establishment of separate court systems by merchants and traders desirous of predictable and speedy justice.

No attempt was made as part of the preparation of this report to survey exhaustively the degree of specialization in other countries or to evaluate the results of specialization in those countries. The limited research accomplished indicates, however, that neither the concept of specialized courts nor commercial courts, in particular, is new or unusual in other Western countries.

United States of America

The United States has a number of specialized courts at the federal level. Congress has created, by way of example, the U.S. Bankruptcy Court, the U.S. Claims Court, the U.S. Court of International Trade, and the U.S. Tax Court.

At the state level, it is unusual to find separate courts of specialized jurisdiction.² Specialization nevertheless occurs through the device of establishing organizationally specialized divisions, departments, or parts within the trial courts of general jurisdiction. In addition to the jurisdictions noted below that have created business courts, other common specialized "courts" are criminal divisions, probate divisions, and family or juvenile divisions. Examples are numerous. Perhaps for urban jurisdictions, such judicial specialization not only is not unusual but may define the norm. Given the success of these specialized courts, the question perhaps should be: "why not business courts?"

WHY A BUSINESS COURT?

Before addressing the question of why, it would be useful to address what type of cases should be heard by a business court, whether one of 2. The chance... courts, which are present in a limited number of states, are an exception.

specialized jurisdiction or a division of a court of general jurisdiction. The appropriate scope of substantive matters heard by a business court is a more complex issue than it initially might appear to be. Matters potentially includable range from complex corporate governance issues to commercial transactions. This report takes no position on the appropriate scope of a business court, save one. The more complex the real-life social and economic activity that forms the basis for the dispute, and the more complex the legal doctrine dealing with that social and economic activity, the stronger the case for the identification of jurists with specialized experience to hear and act on those matters.

The particular choice of appropriate scope is likely to vary from jurisdiction to jurisdiction, depending on the size of the court, the types of economic activity, and the disputes prevalent in the region served by the court. Moreover, the question of whether a jury trial or a bench trial is the appropriate, or preferable, approach will also vary from jurisdiction to jurisdiction.

Many of the arguments in favor of business courts are the same as those for any specialized focus for jurists. As judges consistently hear particular types of cases, they develop expertise, experience, and knowledge enabling them to perform their functions more proficiently than they could without that expertise. They are more efficient and the quality of their decisions is better. Specialized judges handle every aspect of cases, from discovery to motion practice, to settlement conferences, to responding to in-court requests of counsel, to making the ultimate decision more rapidly, more confidently, and with much less use of resources.³

3. Professor Jeffrey Stempel has articulated the components of this efficiency in more detail as follows:

Specialist judges may be better, more efficient managers and may offer case processing decisions that intrude less upon litigants' substantive rights. Case management involves setting and enforcing pretrial preparation deadlines, supervising disclosure and discovery, ruling on summary judgment and other dispositive motions, and brokering settlement. A trial judge with specialized expertise would have more of an intrinsic "feel" for performing these tasks correctly, and would need less fresh research and reflection than would a generalist. Consequently, a specialist judge might well preside over case processing that is faster, less costly (in both judicial and attorney time), and more frequently correct.

Furthermore, many of a trial judge's decisions are invariably (and perhaps unavoidably) made extemporaneously, with comparatively little time for research, consultation, reflection and written articulation. Trial judges have frequent face-to-face interaction with lawyers, litigants, jurors and the public. Often they must rule orally, largely on the basis of their accumulated knowledge and judgment, rather than after painstaking study of briefs, case law or policy considerations. . . .

Perhaps most valuable will be the specialist trial judge's deep familiarity with a range of disputes involving the specialty topic. Although specialist judges possibly will become jaded or close-minded, the fact that the topic is familiar means the specialist trial judge will be able to grasp immediately the legal concept at issue as well as the nature of the dispute. . . . if the

These aspects of comparative efficiency may seem obvious to any lawyer or judge without the need for empirical verification. The opportunity for comparative performance analysis at a generalized level now exists, however, with the highly successful introductions of business courts in New York and Chicago. In New York, the disposition of trial-ready commercial cases increased thirty-five percent in 1993 (the first year specialized commercial judges heard cases) over 1992, an efficiency attributed to the introduction of the specialized jurists. The result of such efficiencies is that with the same resources, the work of more than four generalist judges can be accomplished by three specialized business judges.

Easy to predict, but perhaps less easy to evaluate, is the increase in the quality of decisions. Specialized judges who know better the law and the business context of disputes ought to be able to render decisions that are more accurate applications of governing legal principles, more consistent from case to case (and therefore more predictable), and more compatible with decisions involving related legal doctrines. All of these results should be important goals for judicial administrators.

These characteristics are of obvious benefit to those parties appearing before specialized business court judges. Less obviously, however, any efficiencies in the conduct of business cases that are part of a court of general jurisdiction can be of immense help in an era in which many states are experiencing an extraordinary scarcity of judicial resources. Those efficiencies in hearing business matters free up judicial resources to be utilized throughout a court of general jurisdiction wherever those resources are most needed. Three specialized judges assigned as members of a business court division, for example, who can handle the work of four nonspecialized judges hearing similar cases, have, for all practical purposes, added the equivalent of a new full-time judge to an otherwise beleaguered court.

There may be special reasons for moving more quickly to set up business court divisions rather than some other theoretically conceivable specialties. The first reason is the significant complexity frequently associated with business cases. That complexity puts a premium on jurist knowledge of, and experience in, the substantive legal areas and underlying relationships in dealing with such matters. Second is the effect on our larger society of cases involving business interests. More frequently than not, the impact of

court decisions in the business area affects not only a single individual or company, but also numerous persons throughout society, including employees, shareholders, creditors, suppliers, or customers of the companies involved. Consequently, it is particularly important to the vitality of our economy and to the hundreds and sometimes thousands of people who are directly affected by a single business case that such cases be handled expeditiously, efficiently, and correctly.

SOME POSSIBLE NEGATIVES AND RESPONSES THERE TO

It has been argued that a specialized business court gives a higher quality judicial resource to certain categories of cases at the expense of other cases. It is clearly the intent in establishing business courts to improve the quality and efficiency of the judiciary. This was the goal and the result when criminal, probate, family law, and juvenile divisions of courts were created. There need be no additional expense associated with business courts, however. They need no special physical or personnel resources, save a judge with a mission to specialize. Such courts also do not negatively affect the remainder of a civil calendar. Quite to the contrary. As described above, the more efficient handling of disputes by judges who understand the complex economic activity and complex legal principles applicable to that commercial activity will free up resources for other litigants. If the New York experience is duplicated in other jurisdictions, the equivalent of a trial judge, a court room, and associated administrative personnel will be freed for other trial work with the assignment of three specialized business court judges. That is so because those three judges have demonstrated the ability to absorb the case load of a now freed-up fourth judge. Further, to the extent that business cases are less likely to be assigned to judges in the general division of a court, those judges will have a better opportunity to develop a more comprehensive knowledge of the remaining types of litigation that will be brought before them.

A few have argued that no litigants should have "better" justice than others. Such a position, however, would result in the rejection of every non-universally adopted improvement in the judiciary, from specialized family courts to evening hours for traffic courts to expedited calendaring for special situations. It is not reasonable to oppose business courts for such a reason and thereby to insist on a common level of performance of the judicial system. To the extent that other litigation areas could also benefit from a degree of judicial specialization, the answer is simple. The answer is to identify that need, establish a specialized court to meet the need, and thus achieve a better level of justice.

Some members of the judiciary have also expressed concerns. Some judges do not like the idea of specialization no matter what the subject matter area. They would like the ability to hear cases that give a wide

factual controversy. The specialist trial judge will be superior to the generalists in her ability to focus more quickly on the important factual issues and to apply the law with sensitivity in light of the court's institutional memory. Finally, the specialist bench will recognize quickly how a single case disposition fits in with the fabric of the substantive area.

range of types of law, whatever their past experience or expertise. There are arguments that broad-ranging experience is valuable and, further, that the life of the jurist may be more interesting as a result of the ability to hear different categories of litigation.

Both of these positions have merit. Similar positions have been voiced loudly and frequently in the corridors of law firms throughout the country for at least the past three decades. Unfortunately, the failure to build an expertise and the cost of being a Renaissance lawyer exacts a high price which must be paid by someone. In the case of the private bar, that someone, namely the public that retains lawyers to provide services, simply refused any longer to pay the price for the nonexpert lawyer to dabble in various fields. The public has forced reluctant lawyers to develop expertise, expertise, and knowledge in the field of law in which they practice.

There are no similar direct pressures on the judiciary, but to the extent that it resists specialization, it imposes significant costs on society. It is likely to be a question, therefore, not of whether specialization should be implemented, but of how long the public will permit the failure to specialize to continue. As the cost of government increases, the pressures on the judiciary to contain costs and efficiently manage judicial resources will also increase.

Another concern that has been expressed is the loss of flexibility in administering judicial resources. There should be little, if any, loss of flexibility in a well-administered court that assigns judges to a specialized department. They can be rotated and develop more than one specialty. Such judges can be available for other assignments. The fact that they are specialized and that their highest use is in hearing cases within their field of specialty does not mean that they are less capable of handling other cases not in their specialty than those judges who have chosen not to specialize at all.

There is a further consideration for those who oppose specialized business courts in the judiciary. U.S. businesses today express great dissatisfaction with our judicial system. Increasingly, disputants seek resolution of disputes outside of the judiciary. The American Arbitration Association, for instance, reported over 62,000 cases filed with it in 1995, an increase of over 100% from 1982. That number, of course, does not reflect the establishment in recent years of numerous alternative dispute resolution (ADR) organizations, some employing ex-judges, to which thousands of additional cases are being referred. Increasingly, parties to commercial ventures enter into contractual arrangements that, from the outset, include a joint waiver of rights to file claims in courts and a commitment instead to ADR techniques.

At one level, the development of the common law may suffer as cases that might establish precedent for the guidance of all, if decided in a court, are instead decided by private parties and provide precedent for no one. At another level, a diversion of cases from a judiciary that has scarce

resources might be welcome. Further, because businesses pay taxes to support the courts and, if they employ ADR, must pay again for their own privately funded system, in effect society is achieving the equivalent of a voluntary tax to provide what is commonly thought of as a public service.

Should all be happy as this abandonment of the judiciary occurs? Perhaps not. Businesses might legitimately complain about the additional costs they incur to create a private ADR resource. Perhaps more importantly, our society may suffer, as those who can afford to pay for efficient, specialized resources abandon our public systems. Such an abandonment of public services is happening in other sectors. In many public school districts, parents who can afford to do so resort to private school systems. Moreover, in some parts of the country, private police and security forces are increasingly common. Finally, in some urban areas, merchants are even organizing to set up special funds to provide for basic sanitation services. One result is two, differentiated classes of services for a community. A second potential result is an even further deterioration of services provided by the public sector as those taxpayers and influential corporations and citizens who have opted out as consumers of public services simply lose interest in, or even oppose, allocations of resources to those public services they no longer use.

It is beyond the scope of this report to explore further whether a private system of justice for those commercial litigants who can afford it is in the best interests of society. Yet, it is important to emphasize that the abandonment of the public judicial system by litigants who prefer and can afford a private system of justice may lead to the deterioration of the judicial system. That can occur because the base of potential litigants and lawyers who are interested in engaging in efforts to maintain the resources and quality of the judicial system may decrease in numbers, as well as in economic status and political influence, as they move to ADR.

BUSINESS COURTS TODAY

In the spring of 1996, the Committee conducted a survey of all fifty states and the District of Columbia to determine what, if any, specialized business courts, both courts of special jurisdiction and those of general jurisdiction, exist today. Also, the survey examined whether the experience of such business courts has been favorable and what efforts are being made to create such courts in states where they do not today exist. A summary of the results follows.

EXISTING BUSINESS COURTS

Delaware

Delaware has nationally the best-known, most highly respected, and long-standing element in its judiciary dealing with corporate and commercial

matters, its Court of Chancery. It has existed for over 200 years and has traditional equitable jurisdiction. Its business specialization is not the result of a formal decision to specialize, but rather is a result of the incorporation of a large number of U.S. companies in Delaware and the equitable nature of so many of the disputes in which they are involved. The Delaware Court of Chancery's function as a highly expert court for corporate issues has received consistent accolades from practitioners, litigants, and academics.⁴

In addition, in April 1994, the Delaware judiciary put into place a specialized business litigation panel, consisting of trial judges from its Superior Court and, by designation, its Court of Chancery. The judges of the panel, who will provide summary proceedings and handle more efficiently business disputes in the law courts, will hear cases in which one of the parties is a Delaware citizen, the amount in controversy is \$1 million or more, and the parties agree to submit their cases to the panel and waive their rights to a jury trial and to punitive damages. No cases had been referred to this panel as of July 1996.

New Jersey

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. Generally, the cases are transferred to the law division for trial of damage claims. The Business Law Section of the New Jersey State Bar made a proposal several years ago to establish separate business courts, but the Chief Justice of New Jersey opposed the proposal.

Illinois

Illinois has a unified court system, which includes chancery courts with general equity jurisdiction. These chancery courts operate as divisions of the general courts in each county and determine damage issues, even after equitable issues are determined. In 1993, on the initiative of its chief judge, the Cook County Circuit Court, in which the city of Chicago is located, assigned three judges to a commercial litigation calendar, under which one judge handles all aspects of the case assigned: from preliminary hearings and motions to trial and jury instructions. Cases are automatically assigned to the commercial litigation judges if they involve commercial disputes and meet certain other specified criteria. The commercial litigation division

was expanded in 1995 to five judges with the expectation that the division would be handling eighty percent of all new commercial cases filed.

New York

New York was the second state, after Delaware, to create a commercial division. The movement began on January 1, 1993, when New York County established four specialized "Commercial Parts" (called departments in some states) to hear complex commercial and business cases in Manhattan. Four experienced judges were assigned to staff them. In early 1994, New York's Chief Judge praised the Commercial Parts as a success. Numerous lawyers and judges have publicly expressed similar favorable evaluations. A thirty-five percent increase in dispositions in 1993 compared to 1992 has been attributed to the productivity of the Commercial Parts.

In January 1995, the Commercial and Federal Litigation Section of the New York State Bar Association issued a comprehensive report recommending establishment of a commercial court. In February 1995, the Chief Judge of the State of New York established the Commercial Courts Task Force to create a Commercial Division. The Commercial Division began operating on November 6, 1995, and five New York state Supreme Court judges were assigned to hear exclusively commercial cases in New York County, with an additional commercial division judge designated in Monroe County (Rochester). More than 4000 new cases were filed in the Commercial Division in New York County between that date and June 30, 1996 (in addition to the several thousand pending cases transferred from the commercial parts).

Preceding the establishment of the commercial parts in 1993, Governor Mario Cuomo suggested, in September 1992, the establishment of a specialized, separate commercial court and formed a task force to study the Delaware Chancery Court as a possible model. Chief Judge Wachtler opposed the proposition and the project stalled. In January 1994, Governor Cuomo, in his State of the State address, again announced plans to develop a statewide commercial court, this time, however, with the cooperation of the chief judge in undertaking a joint study.

North Carolina

North Carolina recently created a business court in September 1995. Upon a recommendation from the state Commission on Business Laws and the Economy, the North Carolina Supreme Court created the new business court by designating a superior court judge as Special Superior Court Judge for Complex Business Cases. Cases will be assigned to the new business court by the chief justice of the state supreme court, who will decide, upon a request from a regular superior court judge or from one or both parties, whether to designate a matter as a complex business case.

4. See, e.g., William H. Rehnquist, *The Prominence of the Delaware Court of Chancery in the State-Federal Joint Venture of Providing Justice*, 48 BUS. LAW. 351 (1992). A scholarly analysis of the Delaware Court of Chancery concluded, with the concurrence of several commentators, that the functioning of that court as a highly specialized forum for corporate law issues deserves high praise. Rochelle C. Dreyfuss, *Forums of the Future: The Role of Specialized Courts in Resolving Business Law*, 61 BROOK. L. REV. 1, 5-8 (1995).

Wisconsin

Wisconsin is the most recent state to create a court that will hear complex business and commercial cases. In 1994, Governor Thompson, by Executive Order, created the Task Force on the Creation of a Wisconsin Business Court. On recommendations made by the Task Force, Chief Judge Sheedy implemented a business courts pilot project and designated two judges to the Special Business Courts in Milwaukee County in April 1996.

Virginia

Virginia does not have a business court, but certain business disputes are referred to the Virginia State Corporation Commission.⁵

PROPOSED BUSINESS COURTS

Pennsylvania

A movement to create a specialized business court in Pennsylvania began in 1988. Bills were introduced in the Pennsylvania legislature in 1991 and in subsequent legislative sessions to create a new Pennsylvania Chancery Court, which would hear cases both in law and equity that involve business and commercial matters. In 1995, Senate Bill No. 616 (S.B. 616) was introduced to establish the Pennsylvania Commerce Court. The Corporation Bureau Advisory Committee Subcommittee on the Commerce Court (Subcommittee) was established on November 3, 1995 to evaluate the concept of establishing a commerce court. On April 29, 1996, the Subcommittee favorably endorsed the concept of establishing a commerce court. Although the Pennsylvania Senate Judiciary Committee passed S.B. 616 on June 18, 1996, the bill went no further in the 1996 legislative session.

California

In California, an active effort commenced in early 1991 within the 11,000 member Business Law Section of the State Bar of California (Business Law Section) to study the feasibility of a specialized business court. The Business Law Section published a Preliminary Report on July 20, 1991, sponsored a Peppertine Law School study of the handling of business cases in the Los Angeles Court Superior Court (a trial court) (which was published in September 1992), and has advocated since 1993 the

creation, on a pilot project basis, of business courts in the state. Legislation to mandate the creation, on a pilot project basis, of a business court was sponsored by the business community and introduced in both houses of the California legislature in February 1994, but neither bill progressed. On March 22, 1996, the Chief Justice of California appointed a Task Force of the Judicial Council (Task Force) to evaluate the desirability of establishing business courts. The Task Force is to report its findings in 1997.

Florida

The 4000 member Business Law Section of the Florida State Bar began an evaluation of business courts in 1995 and determined in June 1996 to pursue the implementation of a pilot project business court in Dade County (Miami). The Business Law Section is working with the Dade County Trial Lawyers Association to create a definitive proposal for presentation to the judiciary.

Massachusetts

The Massachusetts legislature has not actively considered any proposals for separate business courts since 1988, when a bill was introduced in the Massachusetts Senate to establish a separate chancery division to handle business matters within the superior court (a trial court). The chancery division would have been a court of law and equity, with jury trials allowed to the extent they were required or permitted under Massachusetts law. The bill, however, was not enacted. The Boston Bar Association's Business Law Section and Civil Litigation Section formed a joint task force in 1997 to study and consider proposing such legislation again.

STUDY EFFORTS

There are, or have been, efforts under way in six states, in addition to those mentioned above, to study the introduction of specialized business courts. These states are:

- (i) Colorado: In 1996, the Colorado State Bar Association established a committee to study the possibility of establishing a business court.
- (ii) Michigan: The Business Law Section of the Michigan State Bar Association is evaluating business courts.
- (iii) Minnesota: In 1992, the Minnesota legislature established and funded a committee to study establishing a business court. No report has yet been made.
- (iv) Mississippi: The Secretary of State's Business Law Advisory Group has begun informal consideration of whether to sponsor business court legislation.

5. The Virginia State Corporation Commission (Virginia Commission) has three judges who have the authority to issue decisions that are appealable directly to the Virginia Supreme Court. It has jurisdiction over challenges to corporate charters, claims under state insurance regulations, and regulations governing financial institutions. The Virginia Commission does not, however, have jurisdiction over breach of contract claims or shareholder derivative suits.

(v) Ohio: In 1994, the Ohio State Bar Association appointed a special committee to study the possibility of establishing a business court. The committee expected to issue a report by the end of 1996.

(vi) Texas: The Texas Business Law Foundation, a private nonprofit corporation, created a committee to study business courts; however, that committee has not been active for more than a year. The Business Law Section of the Texas Bar Association previously had created a committee to study the issue, but no written report was produced.

In summary, as of June 1996, there were business courts in six states, five of which have formed such specialized courts since 1993. The concept is being advocated or formally studied to determine whether it is appropriate for implementation in an additional eight states. We are in an era in which the business court concept is new; it is not broadly accepted, but is being implemented in some states, debated in others, and beginning to be addressed through study in yet other jurisdictions. In evaluating the progress of the quite recent movement towards business courts, it is notable, however, that the fourteen states in which some activity with regard to business courts has been undertaken constitute twenty-eight percent of the states and account for more than half the population of the United States. Further, two of this country's three largest cities and Delaware, the most influential of all states in terms of the development of corporate and securities law doctrine, have functional, and highly successful, business courts.

CONCLUSION

It is clear that the movement toward specialized business courts in the United States is in its inception but is gaining strength. It is also clear that the movement is stimulated by strongly felt needs in the business and legal communities. Examples of support from those communities can be found in recommendations that business courts be established of the Commercial and the Federal Litigation Section of the New York State Bar (1995), the Business Law Section of the California State Bar (1993), the Business Law Section of the Florida State Bar (1996), the American Corporate Counsel Association (1996), and special commissions in North Carolina (1995) and Wisconsin (1996). The business community has also indicated strong support through its active sponsorship of legislation in Pennsylvania and California.

Action has been taken by the State of New York in expanding the New York City experiment with commercial parts (1993) and the adoption at the state level of a commercial division (1995), by Cook County in assigning judges to hear only commercial cases (1993) and expanding the num-

ber of such judges (1995), and by the states of North Carolina (1995) and Wisconsin (1996) in establishing business courts.

Only nine years ago, major efforts to establish business courts began in this country. The first formally appointed business court dates back only four years. Progress, however, has been steady. All pre-implementation analysis predicted a higher quality, more efficient judicial resource. The empirical results are very positive and there appears thus far to be no criticism in jurisdictions where business courts have been established. Where there has been criticism in states that are considering business courts, it seems based in a resistance to change and "strawman" arguments that could apply in theory to any specialized court, but in practice appear to apply to no specialized court.

Where business courts have been established they have been highly successful. Any jurisdiction with similar characteristics should carefully consider establishing a business court. Those characteristics importantly include a case load of complex commercial and corporate issues large enough to justify a specialized component of the bench and a bench consisting of enough judges to permit specialization. Conditions vary too markedly from state to state and from community to community to recommend details with regard to the establishment of business courts. The existing, pioneer business courts, however, can provide empirical data, model structures, and alternative features to facilitate the analysis and implementation by jurisdictions now considering the concept. How to get business courts established politically, whether business court judges should be rotated out of such assignments, and what should be the subject matter scope of the court are examples of issues left for resolution by the individual jurisdictions. The basic concept, however, appears to be an idea whose time has come, and well-managed urban courts should consider without delay the merits of such a specialized court in their jurisdiction.