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

By Mitchell L. Bach and Lee Applebaum*

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The bulk of this Article was originally presented on November 7, 2003 at the Symposium “Taking Care of Business: Business & Technology Courts in the Twenty-First Century,” sponsored by the University of Maryland School of Law and the Business and Corporate Litigation Committee of the ABA Section of Business Law.

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EXPERIENCES IN SOME OTHER JURISDICTIONS WITH EFFORTS TO ESTABLISH BUSINESS COURTS

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What follows is a history and description of business courts established or contemplated throughout the United States. We have included some statistical information, with our chief focus being on the various courts' respective jurisdictional parameters. 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. 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. Mo. 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. Michigan has created a “Cyber Court,” which, however, remains unfunded.

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, with Colorado and Georgia having conducted extensive studies into the merits and potential parameters of creating a business court.

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. This effort is a critical point of origin for the decade long trend in creating business and commercial courts. 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)].”

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-
ating consistency in case management, and creating judicial expertise in business and commercial matters.\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{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.\textsuperscript{16}

\section*{B. The Commercial Division’s Evolution}

The pilot parts\textsuperscript{17} 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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{20} The Commercial Division was initially established in New York and

\begin{itemize}
\item \textsuperscript{13} Focus on Business and Complex Courts, supra note 11, at 3.
\item \textsuperscript{14} NYS Unified Court System, supra note 10, at III.1.
\item \textsuperscript{15} The Council on Judicial Administration, Report on the Chief Judge’s Court Restructuring Plan, 52 RECORD 929, 948 (1997) [hereinafter Restructuring Plan].
\item \textsuperscript{17} See NYS Unified Court System, supra note 10.
\item \textsuperscript{18} ABA Ad Hoc Committee on Business Courts, Business Courts: Towards a More Efficient Judiciary, 52 BUS. LAW. 947, 957 (1997).
\item \textsuperscript{19} Id. Originally, there were four judges, but this number was later reduced to three.
\item \textsuperscript{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
\end{itemize}
Monroe Counties. 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.”

Success in New York and Monroe Counties “led the bar and business community to call for Commercial Division expansion to other counties.” 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.” In December 1998, Chief Judge Kaye announced the expansion of the Commercial Division to Nassau, Erie, and Westchester Counties. In 2002, the Commercial Division expanded to Albany, Suffolk, and Kings Counties.

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. By the end of 2000, that disposition time had fallen to 412 days, a 36 percent improvement from the pre-pilot days. 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.

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.” Currently, seven justices sit in the Commercial Division.


22. Id.
23. Id.
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).

30. Tamara Loomis, Commercial Division: High-Profile Case Cases Spotlight on Well-Regarded Court, N.Y. L.J., June 20, 2002, at 5.
Division in New York County, two in Nassau County, two in Kings County, and one justice each in Monroe, Erie, Suffolk, Albany, and Westchester Counties.

The Commercial Division’s design is for “hands-on” judicial involvement, occurring early in the case and continuing through to disposition. This includes the ability to refer cases to the Commercial Division’s own ADR program. The New York County Commercial Division established an ADR process in early 1996. This program includes more than 250 volunteer neutrals who handle mediation or other forms of ADR that the parties might seek. 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. The number was similar two years later. In 2002, over 60 percent of cases referred to the Commercial Division’s mediation program in New York County settled. 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. Commercial Division ADR has expanded to other counties as well.

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). 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.
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.
40. Id.
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).
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).


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 reassigned 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
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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 RJI.

Appendix A, infra p. 248


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.

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.  

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;
3. Proceedings to enforce a judgment regardless of the nature of the underlying case;
4. First-party insurance claims and actions by insurers to collect premiums or rescind policies; and
5. Attorney malpractice actions.

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. Albany County’s guidelines also expressly exclude real estate foreclosures, products liability claims, Medicare or Medicaid actions, and discrimination cases. Kings County excludes even commercial leases; however, its Commercial Division will hear discrimination claims if based on a contract, as will Monroe County.

D. THE COMMERCIAL DIVISION’S EFFECT AND INFLUENCE

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

[The 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. These achievements have been brought about by the

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.
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:

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/bcmn120299.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, which was published in The Business Lawyer. 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.” The words in the Ad Hoc Committee’s Report resonate through the later national dialogue on the creation of business courts.

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. This pilot program for “Individual Calendars” included an individual General Calendar Section and a Commercial Calendar Section. 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.”

Thus, Individual Calendar judges were to hear cases at every phase, from the start of the case to its finish.

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 . . .” Although Presiding Judge O’Connell’s Or-
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The creation of the Commercial Calendar was effective as of September 14, 1992. 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. At that point, the intention was to assign hundreds of cases involving commercial litigation to three Commercial Calendar judges. The Circuit Court brought in the initial three Commercial Calendar judges seriatim in 1993–94.

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

Then Presiding Judge Judith N. Cohen stated in 1997 that the “individual calendar” program has been tremendously well-received by the commercial litigation attorneys. 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.” 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. Thus, the Commercial Calendar Judges were chosen to hear most of these cases in the Law Division.

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.
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.
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
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.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{106} At the time, there were 4,364 suits pending on the commercial calendar.\textsuperscript{107}

Its recent history demonstrates both the volume and movement of cases in the Commercial Calendar.\textsuperscript{108} In 1998, 3,697 cases were assigned to the Commercial Calendar.\textsuperscript{109} In that year, 3,532 cases assigned to the Commercial Calendar reached disposition.\textsuperscript{110} The average disposition age of those cases was thirteen months, with disposition of cases with jury demands averaging 18.8 months.\textsuperscript{111} Cases going to verdict averaged thirty-four months.\textsuperscript{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.\textsuperscript{113}

From 2000 to 2002, the numbers of cases assigned to the Commercial Calendar were 3,642, 3,769, and 4,245 cases, respectively.\textsuperscript{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.\textsuperscript{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-nine months for disposition.

\textsuperscript{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.”).

\textsuperscript{105} Rooney, supra note 96, at 1.

\textsuperscript{106} Id.

\textsuperscript{107} Id.

\textsuperscript{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.

\textsuperscript{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).

\textsuperscript{110} Id.

\textsuperscript{111} Id.

\textsuperscript{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.

\textsuperscript{113} Maddux, supra note 109.

\textsuperscript{114} Id.

\textsuperscript{115} Id.
three months to their conclusion from 2000 to 2002. In a little over half the year in 2003, 2,364 cases were assigned to the Commercial Calendar and 2,409 reached disposition. 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.

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. Approximately 40 percent of the cases heard in the Chancery Division are business cases. Cases in Cook County’s Chancery Division number in the tens of thousands and the division includes nineteen judges.

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. 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.”).


121. Even with a downturn, 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 chart\(^{124}\) 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, guarantees, 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).
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.

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. 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. . . .”

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. In 1994, North Carolina’s Governor had established the North Carolina Commission on Business Law and the Economy. 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].”

The Commission recommended creation of a business court, which was achieved through North Carolina’s Supreme Court amending existing state rules.

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.).
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.” CHI. CT. OF COOK COUNTY CT. R. 20.02(a), available at http://www.cookcountycourt.org/rules/.
137. Id. (quoting N.C. SUPER. & DIST. CT. R. 2.2 cmt.).
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] Meiselman150 cases involving disputes in family held businesses [which] are ideal candidates for assignment as complex business cases.”152 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.
149. Lake Memo, supra note 142, at 1.
151. Lake Memo, supra note 142, at 2.
disputes, as well as shareholder derivative actions, are also usually assigned as complex business cases.”

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. 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.

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

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.

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

C. Other Developments in North Carolina’s Business Court

Business Court opinions are posted on the Business Court website 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, 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.
156. Lake Memo, supra note 142, at 2–3.
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

167. Id.
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. Seventeen of the active cases were class actions. 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. It has further proved a reference point in other jurisdictions seeking to create business courts, such as Maryland and Georgia. 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. 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. The thirty-seven member commission, chaired by North Carolina Supreme Court Justice Mark Martin, will consider recommendations concerning the court’s expansion. This would involve both the Business Court’s size and scope.

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.
180. See Debra Nesbit, State of the Judiciary Address, Jan. 31, 2003, available at http://www.ciprg.com/ss/new_detail.asp?A13x_idKey_h=n10313141328&Client=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.”).
Bergen and Essex Counties. 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, 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. This program had been inspired, at least in part, by “[i]ncreas[ed] competition from alternative dispute resolution. . . .”

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

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. 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. 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.
187. Weiss, supra note 186.
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 Orlofsky 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.
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-
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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. 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. Thus, arguably, the judges in Bergen and Essex Counties will become more experienced in the substantive law and in handling complex cases. In Bergen County, the Honorable Jonathan Harris has been hearing Complex Commercial Track cases since July of 1997.

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. The only dollar limit on jurisdiction is that the case be in excess of $15,000 to come within the Civil Part’s jurisdiction. Thus, even a large monetary damages claim would not classify a case as complex if it were a relatively straightforward 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. 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, 32 Bus. Law. 947, 956 (1997). “[States, 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).
compete 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. In all New Jersey counties, shareholder suits or valuation claims are handled in the Chancery Division, even in Essex County with a specifically designated complex commercial Law Division Judge. However, legislative efforts to create a business court have yet to succeed in New Jersey.

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.

“The Administrative Office of the Courts’ plan[s] to establish complex commercial court pilot programs in the Burlington, Mercer, Hudson and Ocean vicinages in September [2004].” Under the plan, general equity judges in those counties will be assigned to complex commercial cases involving monetary damages.

“The judges’ respective management teams will handle the cases from start to finish.”

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 judge;
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. Twenty-six reached disposition that year, only one having gone to trial.230 The median time for disposition was 218 days for those cases, compared

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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. Twenty-two complex cases were filed in Essex County, with eleven reaching disposition, and a 190 day median time for disposition. Overall, complex commercial filings were up during the year.

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. Thirty-eight complex commercial cases were filed in Bergen County and thirty-nine cases were disposed of during the year. The median disposition time in Bergen County was 362 days. 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.

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. The public announcement of the Commerce Program included members of the bench and bar, a working relationship that has been a hallmark of the Program’s creation, operation, and success. 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).

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.
that such a specialized case management system could offer. 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. 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, bar leaders worked closely with Judge Herron in designing Philadelphia’s new Commerce Case Program, established by Administrative Order, in late 1999.

Patterned after New York’s Commercial Division, and partially inspired by Delaware’s Chancery Court, the Commerce Case Management Program provides that one judge follows each commerce case from beginning to end. The Commerce Program seeks to provide efficient and expeditious resolution to business disputes and incorporates an active ADR complement to the Program. 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. 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.

The Commerce Program started with two judges, and a third was later added. 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.” 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. Although the Commerce Program has been subject to some dis-
The court has retained its commitment to the Commerce Program. The existence of "specialized courts" in Philadelphia, including a complex litigation court, 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.'
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-O3.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.


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. Complex cases include intellectual property claims, accounting malpractice, legal malpractice, and other malpractice claims within the Program’s parameters. Expedited cases are expected to be ready for trial in thirteen months, standard cases in eighteen months and complex cases in twenty-four months.

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. 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. There is also a topic search function able to go through all of the opinions by counsel inputting search terms.

As of July 4, 2004, there were over 435 opinions online for the guidance of the bar and their clients. 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.

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. Under this program, “a single judge, experienced in litigating complex
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 or 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

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275. Id.
276. Id. at 30.
277. Id.
280. Massachusetts Order, supra note 278.
281. Id.
283. Id. See also 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. 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.

According to information collected by the Business Litigation Session Resource Committee, 853 cases were accepted into the BLS from its inception through November 2003. A search of the Social Law Library database reveals that Judges Allan van Gestel and Margot Botsford have issued over 300 written decisions since the Session’s inception in 2000. 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.

Cases in the Business Litigation Session “generally appear to be consistently more complex” than in other Superior Court sessions. 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.

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.” The same article cites the satisfaction of a single business that both won and lost non-compete cases in the Business Litigation Session. 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.

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; 58 percent found their expe-
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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.
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.
306. Id.
307. Id.
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. 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.

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


A. GOALS OF NEVADA’S BUSINESS COURTS

The Business Court’s focus is on complex civil business cases. 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. 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. The Business Court thus provides another vehicle for dispute resolution, where the parties might otherwise choose private mediation or arbitration.

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 Business Court in Nevada’s Second Judicial District in Reno, Washoe County.

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.
315. Id.
ness Court and Business Laws. 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. 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.” 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). 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. He added that a wider jurisdiction should be more attractive to business.

Nevada’s Chief Justice Robert E. Rose similarly thought that the New York model would be better within Nevada’s court system. 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. 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.

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


320. Nevada January Minutes, supra note 318.

321. Id.

322. Id.

323. Id.

324. Id.


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.


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].


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

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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.
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.
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 reemphasize 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.
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.
erships. “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.”

No matter can be finally assigned without the agreement of the Business Calendar Justice. There is no requirement that the case be complex, but the cases on the Business Calendar tend to be more complicated. 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.

In line with the goal of expeditious treatment of cases, the Business Calendar Justice can require that the parties utilize non-binding mediation. 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. Justice Silverstein has referred cases to attorneys for mediation. He has also referred mediation matters to accountants and retired business people who may be particularly suited to helping the parties resolve their differences. He has found some substantial success in using these non-lawyers in the proper case, e.g., in a shareholder valuation dispute.

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

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. 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. 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.

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. 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.

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. 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.” This comports with the recommendation of the

371. Id. at 3; Maryland Implementation Report, supra note 366, at 1.
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.
377. Id. at 14.
Maryland Task Force that the court be “flexible” in assigning cases. 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. 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.”) The nature of the relief requested is also considered.

The Maryland Task Force Report had recommended that certain types of cases be presumptively included or excluded from the new court. 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.

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:

[[factors 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.

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. As set forth above, Maryland’s new rule requires continuing judicial education. 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.

The Business and Technology Program is a part of Maryland’s circuit courts throughout the state, and the judges in that track meet quarterly. Among other things, they discuss the criteria for accepting or rejecting cases from the Program and seek consistency in application. 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.

Fulfilling one Task Force goal, the Business and Technology Case Management Program has a website. 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.

which can establish a basis for planning action, was an important issue raised in the Business and Technology Program’s creation.\textsuperscript{391} Program opinions can be found on the website,\textsuperscript{392} and in Westlaw’s database.\textsuperscript{393} In addition, the publication of opinions provides a form of communication between the various Program judges.\textsuperscript{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.\textsuperscript{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.\textsuperscript{396} This was preceded by the Ninth Judicial Circuit Business Court Committee’s study and recommendation that a business court be created.\textsuperscript{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;”\textsuperscript{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;”\textsuperscript{399}

\textsuperscript{391} Judge Platt Remarks, supra note 370, at 10.

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

\textsuperscript{393} See Westlaw Maryland Cases database, MD-CS.

\textsuperscript{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.

\textsuperscript{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.”

\textsuperscript{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.

\textsuperscript{397} Id.

\textsuperscript{398} Id. at 231.

\textsuperscript{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.
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.
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.\textsuperscript{410}

In March 2004, Oklahoma’s House of Representatives approved The Business Court Act, authored by Representative Lance Cargill.\textsuperscript{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.\textsuperscript{412} On May 28, 2004, after adoption by the Oklahoma House and Senate, the Governor signed the new law.\textsuperscript{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.\textsuperscript{414}

XIII. MICHIGAN BUSINESS AND TECHNOLOGY COURTS\textsuperscript{415}

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,\textsuperscript{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.\textsuperscript{417}

\textsuperscript{410}. Id.
\textsuperscript{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.


\textsuperscript{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.

\textsuperscript{416}. MICH. COMP. LAWS ANN. §§ 600.8011–8029 (West 2004).
\textsuperscript{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, DET. L. W.KY., Feb. 5, 2003, at 5; Kimberly Koscielnik and Brian Wässom, 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).
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 be-
tween a business enterprise and its owners, managers, employees, etc.; (iii) ac-
tions 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 in-
cluded 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 commer-
cial transactions, including bank transactions; (e) disputes over business or com-
mercial 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) pro-
ceedings involving estates or protected persons; (f) criminal matters; (g) con-
demnation matters; (h) appeals from lower courts or administrative tribunals;
(i) enforcement of judgments; and (j) landlord-tenant matters involving residen-
tial 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.
429. Id. § 600.8005(5).
430. See also State Bar of Michigan, Business Law Section, Business Court Ad Hoc Committee
llp.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.


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 infra 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 backlog 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.

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.
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.  

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.  

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. The study recommends the creation of a business court along the lines of North Carolina’s Business Court. It also recommends that the court be sponsored statewide, but functionally be county-based; and that the effort begin with pilot programs in a county or counties with sufficiently high business volume. 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.

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

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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/aue/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).
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. 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.” 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.”

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.”

XV. SOME INTERNATIONAL COURTS

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. 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.
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.
of legal services to the international business community." 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.'" 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.

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.

The establishment of a Commercial Court had been recommended, "as a matter of urgency" by the Committee on Court Practice and Procedure. 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."

460. Id. ¶ 53(b).
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/pressid/a3b752e69d6e6138e02e83500067c46e7775c735444367480256b6d0053e1e7/openDocument ("[t]he Committee recommends that a pilot project Commercial Court be developed in Dublin as a matter of urgency"). Id.
Under the prior system, “any judge, regardless of his or her background and experience, could be assigned a complex case involving corporate litigation. A judge did not know, until the last moment, what case he or she would be assigned, which rule out the possibility of pre-preparation.”

In 1991, the Superior Court of Justice in Toronto, Ontario established a “Commercial List” as an informal court division. 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.”

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. . . .” This last “basket clause” permits such other commercial matters as the presiding judge may direct. In 2001, there were five or six assigned judges, with a “solid cadre of them. . . . experienced as commercial judges.” 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.” It is considered a very successful program.

XVI. Complex Litigation Programs

A number of jurisdictions have established complex litigation programs. In developing such programs, the debate among the bench, bar, legislature, and
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, class actions, as well as commercial cases. Similarly, in Chicago, the general calendar program began with the individual assignment of tort cases, not commercial cases. 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.

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. We suggest that a single court system can address both


474. See supra note 246.
475. See supra note 247.
476. See supra pages 176–78.
477. See supra note 85.
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=ctpcvcom (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 California\(^{482}\) 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...
the creation of a business and commercial law division within the Superior Court as a pilot project. 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." 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. 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.

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." 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." 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. The Complex Litigation Task Force developed a judicial deskbook for managing complex litigation.

In January 2000, the Judicial Council established the complex case management programs in six California Superior Courts. 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." Los Angeles began with six judges, Orange County had five judges and the Northern California courts had one judge each.

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-

487. Id. at 5–6. But see supra note 479.
488. Id. at 7.
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

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.
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litigants and to expedite the case, keep costs reasonable, and promote effective decision making by the court, the parties, and counsel.” 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.

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. 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 . . .

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.” Moreover, “[a] court may declare by local rule that certain types of cases are or are not provisionally complex pursuant to this subdivision.”

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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).
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...
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, but construction defect cases have unique characteristics which may permit such specialized treatment.

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. 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. In January 1997, a bill had been introduced before Connecticut’s House of Representatives to establish a business court. The following winter, the Connecticut Trial Lawyers Association voted to oppose a business court, and there was editorial opposition as well. 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. 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.


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. 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. The judge becomes involved upon assignment, and develops a case plan at an early case management conference. Either the parties or the court can request a complex litigation designation. 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.”

The Chief Administrative Judge of the Civil Division is the ultimate gatekeeper on whether or not a case is accepted in the CLD.

Currently there are eight complex litigation judges, with each judge responsible for an average of 143 cases. 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. 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.”

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, and matters “where the multiplicity of parties or issues suggests special procedures.” 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. 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.


536. Sheila Anne Denton, Resolving Complex Cases: The One-Judge Solution, CONN. L. aw., 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.


539. Id., 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.

541. 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


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.  

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

**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.\(^\text{553}\) 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.\(^\text{554}\) Originally, the pilot program was to operate in Maricopa for a period that is no longer than January 1, 2003 to December 31, 2004.\(^\text{555}\) The program is monitored by the simultaneously created Complex Civil Litigation Court Evaluation Committee.\(^\text{556}\)

The new rules defining cases that are appropriate for complex designation focus on case management issues, and not the subject matter of cases.\(^\text{557}\) 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;
and the need for expeditious resolution of a complex matter and designation when the interests of justice would be served.\footnote{558 {A RIZ.R .CIV.P .8(i)(2), supra note 553, at Appendix A. Factors considered in determining complexity are whether:}

\begin{enumerate}
\item [(A)] Numerous pretrial motions raising difficult or novel legal issues that will be time-consuming to resolve;
\item [(B)] Management of a large number of witnesses or a substantial amount of documentary evidence;
\item [(C)] Management of a large number of separately represented parties;
\item [(D)] Coordination with related actions pending in one or more courts in other counties, states or countries, or in a federal court;
\item [(E)] Substantial post judgment judicial supervision;
\item [(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;
\item [(G)] Inherently complex legal issues;
\item [(H)] Factors justifying the expeditious resolution of an otherwise complex dispute;
\item [(I)] Any other factor which in the interests of justice warrants a complex designation or as otherwise required to serve the interests of justice.}
\end{enumerate}

\footnote{Id.}

\footnote{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.}

\footnote{560. Arizona Final Report, supra note 559, at 4.}

\footnote{561. Id.}

\footnote{562. March 2004 Minutes, supra note 559, at 2.}

\footnote{563. Arizona Final Report, supra note 559, at 4.}

\footnote{564. Id.}

\footnote{565. Arizona Order, supra note 553 (appending new Rule 8(i)(3, 6)). See A RIZ.R .CIV.P .8(i)(3)–(7).}

\footnote{566. Id. at 8(i)(3).}

\footnote{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 designation when the interests of justice would be served.}
As of March 18, 2004, there were twenty-six cases in the program, with three designations pending. The complex litigation pilot program judges have had to maintain a full civil caseload, and there have been budget constraints affecting the pilot program. 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. 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.” 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.

### 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. The rule provides that application for complex designation be made to the “Complex Case Judge.” 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.” The parties must file a motion with the complex case judge to obtain that assignment.

Judge R. Stanton Wettick, Jr. has been the complex case judge since 1990. He has described most complex cases as being in the areas of medical malpractice, products liability, and commercial litigation. Cases coming to him as complex case judge include “large cases involving the kinds of complex issues that char-
acterize corporate governance, complicated commercial transactions and insurance coverage issues. From seeing so many of these cases he has developed an expertise in handling them. 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.” Approximately ninety percent of the cases are settled or otherwise reach disposition before trial.

XVII. DELAWARE COURT OF CHANCERY AND SUPERIOR COURT

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. It hears numerous kinds of corporate disputes, as well as other equitable matters wholly unrelated to corporations. The Delaware Superior Court is Delaware’s trial level court of general jurisdiction for non-equity cases. That court hears cases involving money disputes between businesses that could fall in the jurisdiction of

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580. Id.
581. The Hon. Robert Cindrich, A Quality Court Attracts Business To Pittsburgh, METROPOLITAN CORP. CONS., 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.
developing business courts in other states. 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.

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.” He identified some of the sources for the Chancery Court’s preeminence as the opportunity to obtain quick and effective action, 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.

Lawyers have “praised the depth and precision of the written opinions generated by the Delaware Court of Chancery as that court’s greatest strength.” 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.” 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.”

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

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.
595. Id.
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The 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 Swart’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 DELAW. 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 333. 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.
commercial 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.
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 corporations, 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.


617. Id.


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 . . . ” The term technology dispute is to be given a liberal interpretation.

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 effect, Chancery Court Rule 174. In creating the Chancery Court’s new technology jurisdiction, further provision for mediation was created, including the mediation of solely monetary business disputes with at least $1,000,000 at issue. Again, this is by the parties’ choice, so the parties could elect mediation options that do not include adjudication. 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. “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.”

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.” 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.

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.” 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
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. Dunn, 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. This second approach typically involves more judicial involvement and scrutiny as to what cases will and will not be heard in the business court.

A. BROAD JURISDICTION BUSINESS COURTS

Although New York County’s Commercial Division currently has a $125,000 jurisdictional minimum, some provisions requiring that a matter be complicated, and provision that cases may be culled based upon the court’s case load, 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. 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 13. 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: 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.
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, 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.”).
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.”
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.\textsuperscript{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.\textsuperscript{657} Under this

\textsuperscript{656} Colorado Report, \textit{supra} note 72, at 12.

\textsuperscript{657} AEQUITAS, Inc., Georgia Feasibility Study, \textit{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, \textit{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.


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, whether the parties are seeking to have 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-
The Creation and Jurisdiction of Business Courts in the Last Decade

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. Franchisee/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.

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


ILLINOIS

Circuit Court of Cook County, Law Division, Commercial Calendar

STATE OF ILLINOIS )
COUNTY OF COOK ) SS

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:

<table>
<thead>
<tr>
<th>Breach of Contract</th>
<th>Business Torts &amp; Other</th>
<th>Collections</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sale of Goods (Uniform Commercial Code)</td>
<td>Professional Negligence (Except Medical Malpractice)</td>
<td>Notes</td>
</tr>
<tr>
<td>Purchase of Services</td>
<td>Fraud &amp; Misrepresentation</td>
<td>Guaranties</td>
</tr>
<tr>
<td>Warranties &amp; Service Contracts</td>
<td>Consumer Fraud Act</td>
<td>Other Collection</td>
</tr>
<tr>
<td>Sale of Business</td>
<td>Tortious Interference</td>
<td></td>
</tr>
<tr>
<td>Franchise</td>
<td>Breach of Fiduciary Duty/Oppression</td>
<td></td>
</tr>
<tr>
<td>Employment</td>
<td>Retaliatory Discharge</td>
<td></td>
</tr>
<tr>
<td>Indemnification</td>
<td>Miscellaneous Statutory</td>
<td></td>
</tr>
</tbody>
</table>
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.

(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 pre-dominate 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 no 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 Land 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, §14.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. DelVecchio

Superior Court Establishes Business Court Procedure, Notice to Bar, Business Litigation Session, Suffolk Superior Court, Massachusetts Lawyers Weekly, October 2, 2000

MICHIGAN


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.


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:
The Business Lawyer; Vol. 60, November 2004

(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 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.]

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).

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.


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, 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.

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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).


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.


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.

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.
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.]


**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.


**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.


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 sub-
mission 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 com-
pleted 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 ad-
ministrative 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 vis-

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 Com-
mmercial 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
COMMERCIAL DIVISION ATTORNEY’S CERTIFICATION

- against -

Index No.

Defendant(s).

Plaintiff(s) , 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: 


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
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.

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.

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.


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.
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.


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.”

1. 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.


BY ORDER OF:

JOSEPH F. RODGERS, JR.
PRESIDING JUSTICE

DATED: April 17, 2001

APPENDIX B

EXPERIENCES IN SOME OTHER JURISDICTIONS WITH EFFORTS TO ESTABLISH BUSINESS COURTS

HAWAII


MAINE

After her appointment, Maine’s current Chief Justice, the Honorable Leigh Saffley, 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

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.


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).
