

## *THE “NEW” BUSINESS COURTS*

by

Lee Applebaum<sup>1</sup>

Lawyer 1: “I’ll say a phrase and you name the first court that comes to mind.”

Lawyer 2: “Ok, go.”

Lawyer 1: “Business Court.”

Lawyer 2: “Delaware Court of Chancery.”

Fifteen years ago, the over two hundred year old Delaware Court of Chancery would have been the *only* response; but today other possibilities exist. If this same word association test was conducted in New York, Chicago, Philadelphia, Boston or Charlotte, to name a few cities, the subconscious link from the phrase “business court” would no longer inexorably lead to Delaware.

For nearly 15 years, various states’ trial courts have incorporated specialized business and commercial tracks within their dockets, often starting as pilot programs. Some of these experiments have become institutionalized, with “business courts” operating for over a decade in Manhattan, Chicago and North Carolina. Other business courts -- in Rhode Island, Philadelphia, Las Vegas, Reno, and Boston -- are on their way to the ten year mark; and a new generation has arisen in the last few years.

Delaware’s Court of Chancery remains the bright star in this firmament, and it sets the standard to which other courts aspire: to institutionalize the qualities that make Chancery a great court. Hard work, long development and study of legal issues, intelligence and integrity are the foundation of its excellence, forming the qualitative archetype for the new business courts.

Chancery’s “aspirational model” goes more to the essence than the attributes of these “new” business courts, however, which have taken a distinctly different form. They are not courts of equity focusing on corporate governance and constituency issues, though these issues form part of their jurisdiction. Rather, their jurisdiction covers non-equity actions for money damages, as well as intra-corporate matters that come under traditional equity jurisdiction. Thus, some call these new courts “commercial courts” or “commercial and business courts,” reflecting this broader jurisdictional model that includes both law and equity matters.

Along with not fully capturing this commercial distinction, the rubric “business court” does not precisely describe each state’s jurisdictional development. In most states, the word “court” itself is a misnomer. Rather, specialized dockets or programs with a defined jurisdiction have been created within many states’ trial courts or their civil divisions. Thus, *e.g.*, Philadelphia’s colloquially known “Commerce Court” is actually designated the Philadelphia Court of Common Pleas’ Commerce Case Management

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Program; a case track created by an administrative order assigning two (later three) judges to hear a specific subset of cases taken from the trial court's general docket.

Whatever the name, manner of creation, or breadth as a program or court division, however, the new business courts have one central common ground: a specific set of judges, assigned to hear a body of business and commercial cases, individually handling a case from beginning to end.

### ***Why Business Courts Now?***

The modern business courts' popular history goes something like this.

In some significant part, the business court phenomenon arose because business litigants and their counsel wanted to avoid court – more specifically state trial courts. In the early 1990s, commercial litigants' frustration independently reached boiling points in, at least, New York City and Chicago. Unlike federal courts, cases were placed in master calendar systems with the possibility of multiple judges handling different aspects of the same case as the litigation wended its way through the system. This limited optimal case management, and it also limited the development of judicial expertise in the procedural and substantive aspects of commercial and business disputes. Many believed, whether true or not, that this led to an unpredictable, uninformed and unreliable process. Doubt and disrespect were said to be evidenced by lawyers advising their clients to litigate in other venues if at all possible.

In 1993, New York City and Chicago began pilot programs assigning business and commercial disputes to an individual judge for a case's duration. In New York, this has become known as the New York County Supreme Court's Commercial Division, and in Chicago it is the Circuit Court of Cook County Law Division's Commercial Calendar. Even earlier, in 1990, California's State Bar established an ad hoc committee to study the creation of specialized business courts. That effort ended in 1997, with California eventually opting to create pilot programs to address varied forms of complex litigation, whether or not involving business or commercial law, *i.e.*, California created a specialized case management court rather than a specialized subject matter court. This article focuses solely on those jurisdictions taking the specialized business court route.

As of today, post-1993 business courts are located chiefly on the East Coast, from Maine to Florida. There is some form of business court statewide, county specific or in a major city in Maine, Rhode Island, Massachusetts, New York State, New Jersey, Pennsylvania, Delaware, Maryland, North Carolina, South Carolina, Georgia and Florida. Other business courts are located in Chicago, Reno, Las Vegas, Honolulu and Eugene; and business courts are or have been the subject of serious study and effort in at least Colorado, Michigan, Ohio and Wisconsin.

### ***Are These "New" Courts Simply Imitating Delaware's "Original" Business Court?***

The Delaware Court of Chancery is a trial court of equity. During the last 100 years, it has been arguably the Nation's leading trial court on issues of corporate governance; and it remains pre-eminent -- or at least penultimate in pre-eminence to Delaware's Supreme Court – on corporation law. It has, however, no historical jurisdiction over commercial disputes at law solely involving money damages. Rather, multi-million dollar contract or tort actions involving Delaware corporations, litigated in Delaware state court, historically are heard in Delaware's Superior Court, not Chancery.

The distinct commercial and business court models first witnessed in New York City and Chicago are quite different from the Chancery Court model. However, because

the Circuit Court of Cook County retains a separate Chancery Division which also hears business cases, this somewhat limits the jurisdictional scope of the Law Division's "Commercial Calendar." Thus, we'll begin the discussion of new business courts with New York's Commercial Division; a model that includes both law and equity cases, unlike the Court of Chancery (equity only) or Cook County Law Division (law only).

The New York Supreme Court's Commercial Division, which now operates in 10 counties or judicial districts, has a broad jurisdictional model. This is not only because it includes both law and equity cases, but because of the quantity and types of cases it hears. Assuming that a jurisdictional minimum amount in dispute is met, the Commercial Division entertains cases that fall within a specified list of business and commercial case types. There is no express requirement that a case falling within this jurisdictional list must be complex in nature to find its way into the Commercial Division; the case must simply be one among delineated categories of business or commercial disputes. Each case is then assigned to an individual judge from beginning to end.

A different, more selective, model was adopted for the North Carolina Business Court, another of the seminal "new" business courts. As in New York, North Carolina's Business Court is designed to have a single judge hear business and commercial disputes, at equity or law, from beginning to end. However, as originally established in 1995, there were no presumptive case categories defining its jurisdiction; rather, the North Carolina Business Court would only hear business and commercial cases if those cases were *complex*. The Court's protocols set forth criteria as to what made a case complex, along with a judicial gatekeeping mechanism for case selection, which was necessarily more subjective than New York's broad jurisdiction model.

North Carolina's jurisdiction has subsequently been amended to include certain specific categories of cases to be presumptively included on the Business Court's docket, including technology based disputes; but a large swath of unlisted case types must still meet the complexity requirement to find their way into North Carolina's Business Court. By its nature, there will be less cases in such a business court; but those should all be complex cases, providing the Business Court judges with an equally demanding individual case load as those found in broad jurisdiction courts like New York's Commercial Division with a greater variety of case types.

The broad jurisdiction model that defines jurisdiction by case type has been followed in Philadelphia, Rhode Island, Massachusetts, Orlando, Miami and Tampa. Chicago's Commercial Calendar uses a similar standard. The complex business dispute model has been adopted in Maryland, Las Vegas, Reno, Atlanta and Pittsburgh. None of the new business courts follow an equity only model as found in the Delaware Court of Chancery.

Most recently, Maine's newly implemented Business and Consumer Docket provides its designated judges with the gatekeeping function as to what cases come within its specialized program; and there will likely be a flexible evolution to shaping that court's jurisdiction. The focus is on claims involving "matters of significance to the transactions, operations or governance of a business entity and/or the rights of a consumer arising out of transactions or other dealings with a business entity," and that "the case requires specialized and differentiated judicial management." Eugene, Oregon's Commercial Court includes a long list of permissible case types (including types going beyond most business court jurisdictional lists), but leaves the decision on whether to

accept a case to the Presiding Judge. In South Carolina's new statewide business court pilot program, jurisdiction exists over 6 specific statutes and "such other cases as the Chief Justice may determine."

### ***The "New" Court of Chancery***

A fascinating development among the new business courts is a change in the "old" business court, the Delaware Court of Chancery. In 2003, Maryland implemented its statewide Business and Technology Case Management Program ("BTCMP"). In doing so, it became the first state with a functioning business court to expressly include technology disputes, *e.g.*, computer technology, biotech, *etc.*, in its jurisdiction. While technology disputes are typically business based, and thus arguably within a business court's jurisdiction in any event, Maryland's express use of the term, coupled with extensive plans on judicial education, made a statement that Maryland intended to become especially capable in handling cases that would mark the new 21<sup>st</sup> century economy.

Within a few months of the BTCMP's implementation, Maryland's neighbor made significant changes in Chancery's historic jurisdiction to reach over into the law-side, *i.e.* to permit the Chancery Court to become a commercial court as well as a business court. Through executive and legislative effort, the Chancery Court's statutory jurisdiction was expanded to include some forms of solely monetary disputes within its original jurisdiction, expressly including technology disputes. This jurisdiction over purely law-side matters was a significant innovation. Additionally, the new statutes provided that Chancery Judges could mediate certain types of commercial disputes, including technology-based disputes; again, even if the disputes involved solely monetary claims. This was the fruition of a "mediation-only" jurisdiction concept, originally conceived in 2001, that would lend the expertise of these business court jurists to commercial litigants in assisting in the resolution of purely monetary disputes; another significant innovation on the historic equity only jurisdiction.

These expansive statutes were not so dramatic, however, as to give Chancery concurrent jurisdiction with Delaware's Superior Court over all business disputes. Further, the new jurisdiction includes a minimum amount in dispute of \$1 Million; and it does not permit for jury trials, unlike the new business courts. It does signal that Delaware is making the extraordinary bench and resources of the Chancery Court available in a wider range of case types, including technology based disputes. Thus, by including some purely commercial actions within its ambit, we might say that Chancery has become part of the new business court trend.

### ***Why Have Specialized Business Courts At All?***

There is a perceived need to create a stable and reliably informed system for administering and deciding business and commercial cases. In this respect, business courts are part of a greater movement toward specialization. While there are some estimable opponents of judicial specialization, the theory is that a judge who is consistently hearing a limited – though not small -- universe of case types will develop a greater knowledge and expertise in both the subject matter of these cases and in their procedural management. This will permit these specialist judges to make more reliable and informed decisions, and to do so with greater efficiency.

While many analogies may be offered – "you wouldn't go to a thoracic surgeon for lower back surgery" – the most common point offered in support of judicial

specialization is the fact that lawyers specialize in the areas of the law that they practice. Thus, if it is working for lawyers it will work behind the bench as well.

From another angle, there is also a concern over appearances, *i.e.*, it won't do to have lawyers with decades of experience in an area of the law having their cases decided by judges who have little or no experience with the subtleties of that subject. It theoretically undermines the system when a lawyer on the losing side can tell the client – whether true or not -- that the judge simply did not understand the law; implying that the lawyer is an expert in the field so the judge must be wrong, and therefore a court system that allows judges who don't know the law to decide cases must be unreliable.

There are arguments against judicial specialization, *e.g.*, risks of myopia, lack of cross-pollinating ideas from learning other fields of the law, having the same judge hearing all cases in the same subjects for too long, *etc.* Further, there is the argument that all judges already have a specialization that goes beyond any single subject area and encompasses all subjects, *i.e.*, judging itself.

In light of the number of criminal cases federal judges have on their dockets, and non-business statutory or diversity matters they hear having nothing to do with business disputes, there is yet no great outcry against federal judges hearing business cases. It remains to be seen if the specialized business court judges will start taking cases from federal courts because they pose a lower risk of unpredictable results. If an out-of-state business is sued in one of the business courts, it can remove to federal court. A study on removal, or the lack thereof, in these circumstances would prove useful; as well as a study on out-of-state businesses as business court plaintiffs. There is some anecdotal evidence that contracting parties are including state business courts in choice of venue provisions.

#### ***Why Are More Business Courts Being Created?***

A core of business courts have survived their initial pilot phases, and developed roots within their court systems. These programs have garnered respect locally, and sometimes regionally or nationally for their expertise, efficacy and internal efficiencies, as well as because of the belief that taking business and commercial cases off of the general docket allows other kinds of cases to move more efficiently as well. Such results have merited, and continue to merit, emulation and consideration by other states.

This is not simply a “you've got one so I better get one” attitude, or a competition over which state can have the best court system *qua* court system. However, competitive implications between cities and states are undeniable. The business court becomes a means to give businesses and their lawyers confidence that business and commercial disputes will be decided with informed and deliberate reasoning. This adds a component of stability to a state, region or city that wants to keep or attract businesses. If a city or state has such a court, and its neighbor does not, that neighboring city or state may come to sense a potential disadvantage. The concentration of business courts along the East Coast may be explained, in some part, by this potential for competitive disadvantage.

Still, not every state court system has adopted a business court when presented with the possibility. In New Jersey, which has had business court pilot programs in Bergen and Essex Counties for over ten years, the Supreme Court rejected legislative efforts to create a commercial division within the state trial court. Oklahoma's Supreme Court has not acted on 2003 legislative authorization to create business courts in Oklahoma City and Tulsa, though it has not rejected that concept either. In Colorado, the

projected case numbers did not justify a business court, and in Milwaukee, an unusually streamlined business case set of procedures was not utilized by the local bar. Michigan's legislative authorization for a "Cyber Court" was quickly passed, but that program was never funded. As stated above, California chose a complex case management model over any form of business court model, as have Connecticut and Arizona; though there are arguments that such programs need not be mutually exclusive. *See* Mitchell L. Bach and Lee Applebaum, *A History of the Creation and Jurisdiction of Business Courts in the Last Decade*, 60 *Bus. Law.* 147, 204-206 (2004). In all of these circumstances, however, the effort to create a business court has evoked considerable thought, attention and even soul searching in some instances.

### ***The Experiment Continues***

One consistent argument for business courts is that they may assist the rest of the court system in a number of ways. Business and commercial cases, whether procedurally complex or not, are removed from the general docket which should improve case flow for other areas of litigation.

Further, the business courts may become laboratories for innovations that can be used system-wide. There is clear evidence in New York, where the Commercial Division has been such a "laboratory" in the words of business court pioneer Robert L. Haig, and some of its innovations have been recommended for general use in the New York Supreme Court's Trial Division. A visit to the North Carolina Business Court's website, <http://www.ncbusinesscourt.net/>, shows cutting edge uses of technology on the internet and in the courtroom that could provide general models. And, back to the source, the Court of Chancery's "mediation only" jurisdiction provides a model that other trial courts may consider.

There is also a potential for interesting synergies as individual business courts reach beyond their borders. The American College of Business Court Judges' national membership includes judges from numerous business and complex litigation courts, who meet at least once a year. Opinions are issuing from a number of business courts which are readily available on-line nationally. These are just becoming the subject of legal scholarship, initially with the University of Maryland's *Journal of Business and Technology Law*. More obviously, and most significantly, some business court judges' decisions are having regional or national impact beyond the City or County in which they sit.

In sum, the growth of business courts has been and remains a dynamic process, both within the existing business courts themselves and in relation to other courts and communities.

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