

## **BUSINESS COURTS – COMING TO A STATE NEAR YOU**

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Sometimes an old idea becomes a new and emerging idea, especially in challenging economic times. This is the case with business courts. Delaware instituted a Court of Chancery in 1792, designed to deal specifically with commercial oriented questions of law<sup>1</sup>. To this day, over half of American companies are incorporated in Delaware, including over 60% of last year's Fortune 500 index. And now, more than 200 years later, as courts of general civil jurisdiction labor under the weight of escalating caseloads, proliferating technical and specialized issues, and diminishing budgets, and litigants, lawyers, and legal observers alike decry the inefficiencies, costs, and delays of our civil system, many other States are beginning to follow in Delaware's steps and establishing their own variants of business courts.

This 200-year old idea is gaining renewed vitality in the current economic crisis. The economic crunch has spurred a record number of cases in Business Courts. For example, the filings in North Carolina's Business Court were up by a third in 2008 (150 filed in 2008, compared to 112 in 2007), attributed to widespread economic problems.

### **Introduction: What Are Business Courts?**

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<sup>1</sup> For an excellent history of the 200+ year old Delaware Court of Chancery, go to: <http://courts.delaware.gov/courts/court%20of%20chancery/?history.htm>.

Basically, business courts are specific judicial bodies with legislatively-granted jurisdictional mandates to decide large, complex, or commercially important cases, within an existing State court system. The permutations of this basic structure vary broadly from State to State. Currently, business courts operate in approximately 18 States and counties.

Jurisdictions with business courts encompassing a docket for simple business disputes as well as complex business litigation (depending on jurisdictional limitations or statutes under which the court is established) include:

- Boston, Massachusetts;
- Cook County (Chicago), Illinois;
- Fulton County (Atlanta), Georgia;
- Maine;
- Maryland;
- Las Vegas and Reno, Nevada;
- New York;
- Miami, Orlando, and Tampa, Florida;
- Oregon (2<sup>nd</sup> Judicial District);
- Philadelphia, Pennsylvania;
- North Carolina, South Carolina, and Rhode Island.

Jurisdictions with business courts hearing primarily “complex” business disputes are:

- Arizona;
- California;
- Connecticut (four counties);
- Broward County, Florida; and
- Allegheny County (Pittsburgh), Pennsylvania.

Some States, like North Carolina, provide specific criteria and mandatory jurisdiction for cases involving the law governing business entities, as well as all securities, intellectual property and internet, technology and biotechnology

cases.<sup>2</sup> Other States, like Illinois, provide broad jurisdictional mandates and the authority to hear any case “involving a commercial relationship between the parties.”<sup>3</sup> Although the scope of a business court’s jurisdiction varies based upon its enabling legislation, business courts generally have several characteristics in common.

The fundamental idea behind a business court is to assign large, complex or important commercial matters to a single, experienced judge with the particular interest, expertise and understanding of commercial law necessary to handle the matter efficiently. The advantage is obvious, as compared to a typical case in many jurisdictions that may go through a number of judges depending on what motions are filed, or what judges are on the docket at any given time. The hope is to enhance the consistency, predictability and accuracy of decisions on business issues, while promoting judicial economy and bringing about a prompt resolution of the claim.

Again, the various States pursue these goals using various methods. But the general tools consist of empanelling a group of experienced business judges onto a separate docket and calendar, creating a technologically savvy court with an internet based filing and management system, the institution of early and proactive case management, the exploration of various (and many times required) forms of alternative dispute resolution, and the creation of tailor drafted rules and procedures.

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<sup>2</sup> N.C. Gen. Stat § 7A-45.4(a) (2008).

<sup>3</sup> Cook County General Administrative Order 92-2.

The objective is to provide an efficient and consistent court that business entities (and their attorneys) can depend upon for predictable results. In turn, that predictability and efficiency may provide a lure attracting more businesses to the State, increase tax revenue, employment, construction, and infrastructure. The added benefit is removing complex and time consuming cases from overworked judge's dockets and placing these matters with a single, informed decision-maker. Likewise, in courts of general (*i.e.* civil and criminal) jurisdiction, a separate business court unshackles these large, important civil matters from the criminal defendant's constitutional due process right to a speedy trial, providing a docket and trial date that will not be trumped by criminal due process concerns.

### **Getting Into Business Court: Initial Filing, Removal and *Sua Sponte* Methods**

There are three basic ways a party can gain access to a business court: initially filing the matter there, removal of the case by one or more parties, or (in some jurisdictions) a judge may petition the business court *sua sponte* and request that the matter be moved, with or without the parties consent. First, cases that qualify as "business" oriented are eligible for filing in a business court. Each jurisdiction has separate rules for what qualifies, and does not qualify as a business case, but basically any commercial oriented litigation is eligible.

Several States institute monetary limitations (such as Delaware and New York), but most do not. Some also use verified filings to ensure the case is truly eligible (for instance, designation papers that require counsel's verification, in

North Carolina). As noted above, each State has its own enabling legislation that sets out its own jurisdictional mandate that should be consulted.

Second, if a business case is filed in a general jurisdiction court, the parties have the opportunity to remove the case to business court in some States. For instance, North Carolina provides that any party can remove a case to the business court by filing a Notice of Designation with the Clerk of Superior Court in the county where the case is filed, and the Chief Special Superior Court Judge for Complex Business Cases, within thirty days of service. If another party opposes the removal, they have thirty days to respond to opposition, after which time the Chief Business Court Judge makes a determination. Finally, a ruling on the opposition may be appealed to the Chief Judge of the North Carolina Supreme Court.

Third, in exceptional instances (particularly when the parties may have missed their deadline to remove), some jurisdictions actually permit the sitting trial court judge to petition *sua sponte* and recommend that the matter be moved to business court. For instance, North Carolina Business Court Rules 2.1 and 3 permit a sitting district or superior court judge to recommend to the Chief Judge that the case be assigned to the Business Court if it is exceptional, complex or otherwise an important matter to the state's commercial jurisprudence. The Chief Judge then determines if the case should remain in Business Court as either complex case or an exceptional case under Rule 2.1. If the case is accepted and assigned to a business court judge, it remains with that judge until conclusion.

## **What To Expect Once You're There**

Once inside business court, most litigants are anxious about their procedural remedies and rights. As a preliminary matter, most business courts do not require a jury waiver, and permit litigants to try their case to either bench or jury. However, some courts, such as Delaware's Summary Business Proceeding Court and certain portions of New York's Commercial Division, require a bench trial, so litigants should be careful to make sure their case fits the specific business court's requirements.

Perhaps most important, each business court requires the case to be handled by a single, experienced judge, with particular background in business matters, along with the staff and facilities to efficiently handle large and complex matters. For general jurisdiction courts with rotating dockets, this is a large and many times welcome change. Further, it adds consistency both to the individual case and to the State's commercial case law as a whole.

In the same vein, business courts are meant to be technically advanced, utilizing electronic filing and presentation devices, along with rules for presenting witnesses via internet, arguing motions by teleconference and generally taking advantage of technology to enhance the efficiency of the court. These tools can, of course, also lower the cost of litigation for the parties.

Further, almost all business courts require early and pro-active case management, including detailed docketing and case management schedules. For instance, North Carolina Business Court Rule 17 requires a seven page form Case Management Order for each case setting out the specifics of

communication between the Court and the parties, the nature of jurisdiction and venue, the explanation of any threshold issues, the scope of discovery, the existence of any preliminary motions and the anticipated nature of the trial.

Business courts are also known for their mandatory use of alternative dispute resolution services, and many actually require mediation as a prerequisite to trial. Further, some (such as Delaware's Summary Business Proceeding Court) permit the parties to narrow their dispute down to a single agreed question of law, for discrete resolution by the court without intense discovery, development or trial. Again, the cost and time benefits of this sort of efficient handling can be attractive to litigants.

Finally, most business courts include some form of independent rules of procedure, and are set up to issue formal written opinions of their substantive and procedural rulings to assist future parties in determining how various principles of business law may be applied to the specific issues in their case - the key principle being the expansion and shaping of a State's commercial common law to achieve the consistency and predictability that businesses seek.

As noted above, each State has its own idiosyncrasies, and counsel would be wise to review those rules prior to instituting or removing litigation to business court.

### **Conclusion: The Advantages of Specialty and the Risk of Myopia**

Despite many proponents, business courts do have their detractors. Many argue that this sort of specialization inherently creates "tunnel vision" in State

court judges and impairs the “cross-pollination” of practical experience from other fields that judges bring with them to the bench.

Proponents counter that specialization is key to the advancement of both business and the law – after all, one does not go to a family law attorney to handle a stock fraud case. Thus, if legal specialization works for attorneys in front of the bench, it should work for those behind the bench as well.

These proponents also note that the failure to permit judicial specialization could create an undesirable situation in which lawyers and litigants with decades of experience in a particular area of commerce have their cases decided by judges with no experience at all in the relevant field. (As every lawyer knows, no client gladly accepts the explanation that the judge ruled against them because he simply did not understand the law.) This situation can lead to a perception among commercial litigants that they cannot, in fact, obtain a fair trial under our legal system – a perception which can be very destructive if allowed to take root and spread.

For detractors, the inverse is true: judicial specialization creates myopia, and the law suffers when the same judge hears the same cases year after year. Part of what makes a great judge is broad specialization and the ability to draw on a diverse and rich variety of experience in order to craft a just and reasonable conclusion. The argument is that judges exercise a specialty of law in and of themselves: the art of judging. Further forcing them to specialize their art into specific categories would then only impede this task and create cadres of legal clerks, not judges.

However, this argument is resolved, business courts are here to stay and, given that the modern legal profession is becoming more specialized, seem to be on the move. Thus, the experienced commercial litigator should research his local State's law and bar association to learn more about business courts, find out if one exists in his practice area, and see if such a court may be in the works. After all, 200 years of Delaware's Chancery Court can't be all wrong.

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