

**“The Philadelphia Court of Common Pleas’
Commerce Case Management Program
in the Context of the Nationwide Development of Business Courts”**

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Business Courts: A National Phenomenon Reaching for the Routine

The idea of specialized “business courts” has become a nationwide reality over the last ten years.² These are typically, though not always, court programs within existing state trial court systems. These business courts’ jurisdictions are limited to claims of a business or commercial nature, and may be further limited by a requirement that the case be complex.

Business courts exist or are soon to exist in Chicago, Maryland (state wide), Massachusetts (Boston and two other counties), Nevada (Las Vegas and Reno), New Jersey (six counties), New York (Manhattan and seven other counties), North Carolina (state wide), Oklahoma (state wide), Philadelphia and Rhode Island (two counties). Courts designed to hear only complex civil litigation, which jurisdiction includes but is not limited to complex business disputes, exist in California, Connecticut, Phoenix, Pittsburgh and New Jersey. Business courts

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²A history of business courts is set out in greater detail in an upcoming article in *The Business Lawyer*. See Mitchell L. Bach and Lee Applebaum, *A History of the Creation and Jurisdiction of Business Courts in the Last Decade*, 60 Bus. Law. Vol. 147 (2004). We refer the readers to that publication for a more in depth picture of these developments. Thus we are not setting out more detail or footnotes on courts outside Philadelphia.

have been or are being considered or promoted in at least Colorado, Georgia, Hawaii, Maine, Michigan and Ohio.

While these programs are of recent vintage, the inspiration for all business courts, the Delaware Court of Chancery, has existed for over 200 years. Yet, even that court has evolved in the last year, with an expanded jurisdiction for solely monetary cases involving technology matters. In addition, the Court of Chancery' jurisdiction expanded to include the power to mediate all business disputes where the claim exceeds one million dollars.

The key component in every business court is a single judge hearing the case from beginning to end. This not only provides familiarity with the case, but the intention is to create a bench that becomes experienced with the legal issues in business and commercial disputes and becomes experienced in handling these types of cases procedurally. This should result in greater predictability in development of the law and in what the parties can expect when they have a case in a business court.

In the dialogue over creating business courts, various beneficiaries have been identified. If these cases can move more smoothly, they decrease a crowded docket, which should then permit a greater opportunity to address other litigation on that docket more fully. This benefits the courts and all litigants.

In addition, creating a dedicated forum for business disputes with a more predictable body of law and judicial practices provides a value to local businesses or entities doing business in those locations. One of the reasons given for the seminal pilot program in Manhattan, which has become the Commercial Division of the Supreme Court of New York County, was that businesses were too often choosing ADR options to resolve their disputes, rather than litigating

in Manhattan's courts. The situation is now such that some businesses include the Commercial Division in contractual choice of forum clauses.

There is potentially a very tangible value to the entire community when businesses have a sense of predictability and measure in understanding the scope of litigation risks in a court. While there has been no study on whether a business is more or less likely to stay in a region, or move to or from a region because of its courts, these rationales have been raised by some among the bench, bar and legislatures considering the creation of business courts.³

This is not to be confused with the idea that a business court is being created to favor businesses over consumers, and that businesses favor these courts being created for some sort of "home cooking." The majority of claims, if not the entirety, in most business courts never involve consumers. In those courts that permit consumer claims, e.g., those including consumer class actions, we have seen business court opinions rendering decisions in favor of the consumer plaintiffs.

³The belief that commercial courts are a necessary part of a successful business climate has also found an international home. In Toronto, one of Canada's business centers, a "Commercial List" has existed as an informal division of the Superior Court of Justice since 1991. Canada – The Courts, *The Hon. Robert A. Blair: The Commercial List, Handling Business Cases Effectively*, The Metropolitan Corporate Counsel, Northeast Edition, May 2001, Vol. 9, No. 5 at 36. Ireland's High Court has recently expanded with a new Commercial Division, *see* Address by Mr. Michael McDowell T.D., Minister for Justice, Equality & Law Reform at the Commercial Court and Mediation Conference on 24 March 2004, at <http://www.justice.ie/80256E01003A02CF/vWeb/pcJUSQ5XLD4H-en>; created to improve its business infrastructure. William Fry Solicitors, *A Commercial Court in Ireland*, www.williamfry.ie/files/indexfile.asp?id=97. And while England has longstanding specialized commercial courts, these were recently modernized "as a means of further enhancing the position of London as a provider of legal services to the international business community." *See The Commercial Court/The Admiralty Court 2001-2002, Report on the year ending 30th September 2002* at ¶ 53a, www.courtservice.gov.uk/using_courts/guides_notices/notices/comm/commreport_02.htm.

There may also be a competitive component in creating business courts. Looking at the East Coast alone, there are now business courts in Delaware, Maryland, Philadelphia, New York, some New Jersey counties, Boston and Rhode Island. In Connecticut, there is no dedicated business court, but there is a complex litigation court which should hear complex business litigation within its case load. Not too far south, North Carolina has created a court of growing renown, Atlanta may have a court in the near future, and Orlando has a new court; with more expansion likely to be considered in Florida.

The expansion of the Court of Chancery's jurisdiction in May 2003, culminating a process that only began a few months earlier, was unquestionably influenced by Maryland's January 2003 creation of a state wide court program to hear business and technology disputes -- making Delaware's neighbor the first state in the nation to have a working court dedicated to disputes over computer related or bio-technology claims. Thus, whether perception or reality, the presence of a business court may become a *sine qua non* of a modern state court system.

The Philadelphia Court of Common Pleas Commerce Case Management Program

The suggestions for some form of business court in Pennsylvania arose in the early 1990s and periodically thereafter.⁴ In 1997, reflective of a more local effort, 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. He contrasted Pennsylvania's loss of jobs and business with neighboring New Jersey and Delaware, which were growing in these areas.⁵

⁴Marilyn Wimp, *Business Court is, Once More, High on Bar's Agenda*, Philadelphia Business Journal, July 27, 1998 (Pennsylvania had been the first state nationally to propose such legislation), at

<http://philadelphia.bizjournals.com/philadelphia/stories/1998/07/27/focus3.html>.

⁵Clifford E. Haines, *It's Time to Create a Special Business Court*, The Legal Intelligencer, May 5, 1997 at 4.

By Administrative Order in the Fall of 1999, the Commerce Case Management Program was created in the Court of Common Pleas, effective January 1, 2000.⁶ The public announcement of the Commerce Program included members of the bench and bar,⁷ a working relationship that has been integral to the Program's creation and development.⁸ Today, over 90 well seasoned attorneys have offered their services as mediators to the Commerce Program.⁹

The Commerce Program provides that one judge follows each commerce case from beginning to end.¹⁰ The Program started with two judges,¹¹ and a third was later added.¹² While there are hundreds of cases entering the Program each year, the goal is not high volume or turnover, but "to provide a quality product" in the words of one of its judges.¹³

Court leaders have expressed their commitment to the Program.¹⁴ It may be fairly said that this not only reflects the value of the Commerce Program, but the Philadelphia Court's

⁶The Order was originally issued by the Honorable John W. Herron on November 9, 1999, which was later amended on February 22, 2000. See In Re: Commerce Case Management Program, Administrative Docket 01 of 2000.

⁷Lori Lichtman, *A Court of Their Own: Purely Business Disputes to be Handled by New Philadelphia C.P. Commerce Case Program*, The Legal Intelligencer, October 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).

⁸The Honorable Albert W. Sheppard Jr.: *The Philadelphia Commerce Court – Dedicated to Find the Best Solutions for Business Disputes*, The Metropolitan Corporate Counsel, Northeast Edition (December 2002) [hereinafter Judge Sheppard].

⁹Such mediators are known as judge *pro tempore*, and the list of participants can be found at the Court of Common Pleas web site, <http://courts.phila.gov/pdf/cpcvcomprg/judgesprotemlist.pdf>

¹⁰Judge Sheppard, *supra* note 6.

¹¹Commerce Case Order, *supra* note 2.

¹²Lori Lichtman, *Herron Picks Three Judges as Supervisors*, The Legal Intelligencer, January 22, 2001 at 1.

¹³Danielle N. Rodier, *Attorneys Impressed with Commerce Court*, The Legal Intelligencer August 6, 2003 at 1 (quoting the Honorable Gene D. Cohen).

¹⁴Laurie Stewart, *Jones Appointed to Commerce Court*, The Legal Intelligencer, September 16, 2002 (As stated by Supervising Judge William Manfredi, upon the appointment of Judge Darnell Jones to the Commerce Program, "I think we have three of our most competent and most experienced judges in commerce court, which reflects the commitment that [Administrative] Judge Fitzgerald and I have to the success of the court.").

broader understanding of the valuable role specialization has in providing for a superior court system. Thus, the Court of Common Pleas has also created a complex litigation court for certain types of mass torts, predating the Commerce Program,¹⁵ and more recently a class action program.¹⁶ We have asserted that the Court of Common Pleas provides a model for other jurisdictions for successfully creating a complementary body of specialized programs; thus demonstrating that there is no inherent conflict between having a complex litigation program and a commercial litigation program. Where the presence of a distinct business court program is becoming a measure of a court system's maturity, and a valuable part of a community's overall business climate; this vision may well provide an advantage over those jurisdictions refusing to accept the value of distinct business court program.¹⁷

Like New York, Philadelphia's business court program provides a jurisdictional list of case types to determine inclusion, without a further requirement that the case be legally or

¹⁵See Philadelphia Court of Common Pleas, Complex Litigation Center, at <http://courts.phila.gov/pdf/civil2001/clc.pdf> (including e.g., asbestos, DES, latex glove, lead paint, breast implant, carpal tunnel, pseudo-psychiatric, bone screw litigation, among other mass torts).

¹⁶See *Supplemental Notice to Bar Re: Class Actions*, First Judicial District Court of Common Pleas Trial Division - Civil (December 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.").

¹⁷While Philadelphia provides a broad model that should be well-considered by any jurisdiction, and has certainly had an impact on the creation of the business court in Orlando, Florida and in Oklahoma, the presence of a business court program in Philadelphia approaches an expected norm in the region. Among the mid-Atlantic states, New York's pilot business court program has now become embedded as the Supreme Court of New York's Commercial Division, with six full time judges and one additional judge having a part time role as a judicial hearing officer. Michael Bobelian, *Commercial Part Experiments With Category, Caseload*, New York Law Journal, April 26, 2004 at 1. Seven other New York county court system have Commercial Divisions, including courts in Brooklyn and Long Island. There are or will shortly be some form of business court programs in Baltimore, Wilmington, Newark, Hackensack, Mount Holly, Trenton, Jersey City and Toms River, New Jersey. In New England, Providence and Boston have commercial court programs.

procedurally complex. Such broad jurisdiction achieves the additional goals of developing a larger body of case law for guidance; and in assuring businesses that all disputes will be heard in that forum. By contrast, a “simple” UCC contract action would not be heard in some complex programs, even if millions of dollars were at stake. While there is no complexity requirement, the levels of complexity are reflected in case tracking assignments. The Program has expedited (13 months), standard (18 months) and complex (24 months) tracks.¹⁸

Commerce Program cases include a wide range of business and commercial matters. The specific list of what types of cases are or are not included in the Program can be found on the Commerce Program website.¹⁹ Case types subject to the program include, e.g., intra-corporate disputes; disputes between businesses including but not limited to UCC 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; insurance disputes arising from a business or commercial insurance policy; 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 trust matters.²⁰

¹⁸See In re: Commerce Case Management Program, Administrative Docket 02 for 2003, In the Court of Common Pleas, First Judicial District of Pennsylvania, April 29, 2003, Exhibit F Commerce Program Tracking Formula, <http://courts.phila.gov/pdf/regs/2003/cptad02-03.pdf>.

¹⁹<http://courts.phila.gov/pdf/cpevcomprg/criteria.pdf>.

²⁰As set forth above, class actions will be heard in the Program if its criteria are otherwise met. Prior to the implementation of the class action program, the Commerce Program was in fact hearing all class action. On the same day that notice of the new class action program was provided, notice was also given that after January 5, 2004, all major non-jury cases other than cases involving “Torts, Rent, Lease and Ejectment and Mortgage Foreclosure matters” would “be assigned to the Commerce Program for management and disposition.” *Supplemental Notice*

The Commerce Program has a valuable and informative web page,²¹ within the Court of Common Pleas' excellent web site. It includes numerous links with information about the Program, including relevant orders, guidelines, standards and a list of judges *pro tem*.²² This web page also provides links to the Program judge's opinions, using a variety of categorization methods and a means to search the opinions. This is probably the most important part of the Program's web site, as it embodies the goal of improving predictability by providing a guide to parties and counsel through development of the law. As of October 1, 2004, there were nearly 450 opinions on line.²³

Some of these specifics will be filled out in other materials; and we highly encourage a thorough inspection of the Program's web site and the opinions to be found there. Most importantly, we re-iterate that the Commerce Program is an integral part of our legal community and our region; and is something that other states and their courts can admire in Philadelphia.

to Bar Re: Non-Jury Program, First Judicial District Court of Common Pleas Trial Division - Civil (December 18, 2003), at <http://courts.phila.gov/pdf/notices/2003/notice-09mnsup-03.pdf>.

²¹<http://courts.phila.gov/common-pleas/trial/civil/commerce-program.html>.

²²The Philadelphia Courts, First Judicial District of Pennsylvania, *Trial Division - Civil - Commerce Program*, at <http://courts.phila.gov/common-pleas/trial/civil/commerce-program.html>.

²³An index of opinions can be found at <http://courts.phila.gov/cgi-bin/opinions/comcertsearch.cgi?dropdown=cptcvcom>. Interestingly, there are also links to web sites including access to opinions from the Delaware Court of Chancery and the New York, North Carolina and Maryland business courts. In novel areas of the law, or maybe not so novel areas, the ready accessibility of opinions from similar courts on similar subjects may ultimately result in a cross-pollination of ideas between business courts. *See, e.g.*, Mitchell L. Bach, Lee Applebaum, Jason B. Schaeffer, Chapter 5 *Business Courts*, Annual Review of Developments in Business and Corporate Litigation at § 5.7.4 p. 145 (ABA Committee on Business and Corporate Litigation 2004 Edition) (observing that an on-line Maryland Business and Technology Case Management Program opinion on that state's securities statutes could have a broader national affect in other states' courts as the statute is based on a widely used model act).