

THE COMMERCE COURT'S FIRST DECADE



Photo by Paul Bencivengo

By Lee Applebaum

“Get the case into federal court.” Many a new litigation associate in Philadelphia learned this mantra from a partner or older associate, and then made it part of their own practice over the years. Business disputes simply did not get litigated in the Philadelphia Court of Common Pleas if there was an acceptable option. The controlling mindset was that the Common Pleas’ bench did not have the experience, knowledge or time to deal with cases centered on business and commercial disputes. Whether this belief was reasoned or fair, it was a hardened belief driving lawyers and clients to other forums.

In 1999, the Court of Common Pleas decided to challenge this dogma. Administrative Judge John Herron, spearheading an effort of the bench and bar, entered an order establishing the Commerce Case Management Program, now known among the bar as the “Commerce Court.” The Commerce Court would have the same set of judges (originally two, later three) hearing all business and commercial cases in Philadelphia County. If lawyers were specialists, then judges too could become specialists, knowledgeable and informed on the legal subject matter they would confront in court.

While strongly supported by many, the Commerce Court was not universally acclaimed when it began hearing cases in January of 2000. By January 2005, however, the Committee of Seventy could conclude, after study and analysis, that “the [Commerce] Program works well in its intended role: the efficient, fair and cost-effective resolution of business litigation.” Seventy further observed “the program is beginning to enjoy a well-deserved reputation as one of the preferred ways of resolving business disputes, a finding that can have only a positive effect on the perception of the business climate in Philadelphia.”

This latter point addresses the concern that just as investors flee the stock market in the face of unpredictable financial risks, businesses could flee a jurisdiction in the presence of unpredictable litigation risks. The Commerce Court thus was not created for lawyers, but to improve the court system’s operation, and to establish a reliable forum so that businesses could have confidence that, in the event of business-to-business litigation, their case would be decided

knowledgeably and reasonably. Even if a business loses its case, as long as it understands that its loss was the result of an informed and considered decision, it still can have confidence in the court making that decision.

Of course the Commerce Court is also important to Philadelphia’s legal community. Attorney Joseph C. Crawford observes that the Commerce Court “has made it possible for clients and lawyers to choose to litigate the most complex commercial cases in the Court of Common Pleas with excellent trial judges who use a broad array of case management and alternative dispute resolution techniques. The program has benefited the city by making our courts (and, by extension, our legal community) recognized national leaders in developing the best and most efficient methods for litigating business disputes.”

Attorney Dennis Suplee sees that “judges assigned to the Commerce Court develop an expertise that well serves both litigants and counsel. Because cases are assigned to an individual judge from the get-go, Commerce Court cases receive individual and expert attention that achieves a just result more efficiently and more economically. As a result, the Philadelphia Court of Common Pleas has become competitive with the country’s best-regarded go-to courts for sophisticated commercial litigation.”

So what is the Commerce Court, and how is it working?

Starting in the early 1990s, state trial courts in New York and Chicago began experimenting with specialized dockets that would



primarily hear business-to-business and intracorporate disputes. The object was to create courts with the same judges regularly hearing business cases, developing an expertise in business and commercial litigation, and the reputation for high quality decisions flowing from that expertise. Further, like federal district court, one business court judge would be assigned to each case from beginning to end.

The Delaware Court of Chancery was the motivational model, but the realities in states outside Delaware required a different, broader approach. Chancery's focus is on internal corporate disputes, not commercial litigation over damages. The new business courts encompass not only intracorporate business matters, but a complete range of commercial disputes between and among businesses.

The Commerce Court follows that broad model. It uses clear standards to delineate its jurisdiction, thus eliminating subjectivity and potential complaints that large businesses might receive favored treatment.

Assuming more than \$50,000 is at stake, the following categories of cases go to the Commerce Court:

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- First, actions involving internal corporate affairs, or “governance, dissolution or liquidation, rights or obligations between or among owners (shareholders, partners, members)” and “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...”

- Additionally, the Commerce Court has jurisdiction over business disputes “relating to transactions, business relationships or contracts between or among... business enterprises,” involving, *e.g.*, the UCC, sales of businesses or business assets, sales of good or services to businesses, non-consumer banking transactions, surety bonds, commercial leases and real property disputes, and franchise disputes.

- It also hears actions relating to trade secrets and non-competes; business torts; intellectual property disputes; securities disputes; derivative actions and class actions based on listed Commerce Court case types.

- Some may not realize that the Commerce Court handles insurance-related disputes arising from business and commercial

insurance policies, or matters where the dispute underlying the insurance claim “would otherwise be assigned to the Commerce Program....”

The Commerce Court’s output

Top-flight business courts are expected to produce written opinions. Publicly available opinions perform one of a business court’s chief functions: explaining decisions to the actual litigants, and providing a body of law for future litigants’ guidance and application.

The Commerce Court has issued more than 800 opinions in its first nine years, which are publicly available on the Court’s web site (www.courts.phila.gov), and via Lexis and Westlaw. Both the Committee of Seventy and the 2006 Annual Report of the First Judicial District observed the Commerce Court’s low reversal rate.

One example of the Commerce Program advancing the law is found in its many cases interpreting section 7.01(d) of the ALI Principles on derivative actions in the context of close corporations; a set of case law followed by the Third Circuit and lower federal courts. In other areas (*e.g.*, piercing the corporate veil, the gist of the action doctrine, fiduciary duties, non-competes, trade secrets), the Commerce Court has produced numerous opinions putting practical flesh to theoretical bone for those wanting to understand what will happen in real cases.

Another example involves the large number of opinions on insurance coverage disputes, even including bad faith claims. The Commerce Court’s presence in this field has had an effect on whether suits are brought in Common Pleas in the first instance or removed to federal court. The common wisdom had been that carriers wanted their declaratory judgment actions heard in federal court, but that is no longer automatically the case if the action is in Commerce Court.

This highlights one of the Commerce Court’s judicial innovations. In the first application of the Abramson Protocols, *see* “10 Questions for Judge Howland W. Abramson,” *The Philadelphia Lawyer* 41 (Spring 2007), a three-judge Commerce Court panel



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issued an opinion interpreting specific insurance policy language. This involved sophisticated parties' voluntarily deciding to place their legal issues before the three Commerce Court judges, knowing that the judges' decision could not be appealed. The benefit would be in obtaining an expedited and efficient resolution on the decisive legal matter at the core of the case; whereas the risk was that one side was going to lose a non-appealable decision. Thus, all rested on the judges' quality, a significant sign of faith in the Commerce Court's ability to produce rational and trustworthy results.

Judge Ben F. Tennille, North Carolina's chief business court judge since 1996, and founder of the American College of Business Court Judges, sees it this way: "Today's financial turmoil will lead to tomorrow's litigation explosion. It will be more critical than ever that companies needing capital and credit be able to resolve their commercial disputes quickly, efficiently and economically. The Commerce Case Management Program in Philadelphia offers local business that opportunity."

"This promotes a favorable platform for businesses to operate in our city, without having to go elsewhere."



Photo by Anne C. Kristensen

Judge Albert W. Sheppard, a lifelong Philadelphian and a member of the Commerce Court since its inception, says of the Commerce Court's handling of these business-to-business and intracorporate disputes in Philadelphia: "City businesses have the comfort of knowing that there is a court that they can go to charged with handling business cases, requiring that the judges be versed in corporate and business law. This promotes a favorable platform for businesses to operate in our city, without having to go elsewhere."

And the fact is that competition among court systems is both national and international. In addition to cities like New York, Chicago, Boston, Baltimore, Charlotte, Atlanta, and Miami, countries such as Canada, England, Ireland, France and the Netherlands, among many others, have specialized business tribunals. That we in Philadelphia have a nationally respected business court, which has even provided a model to some of the newer business courts, can not be viewed as a luxury, but as meeting what is becoming a standard criteria for a modern court system. And it is a standard that has been well met in Philadelphia's Commerce Court.

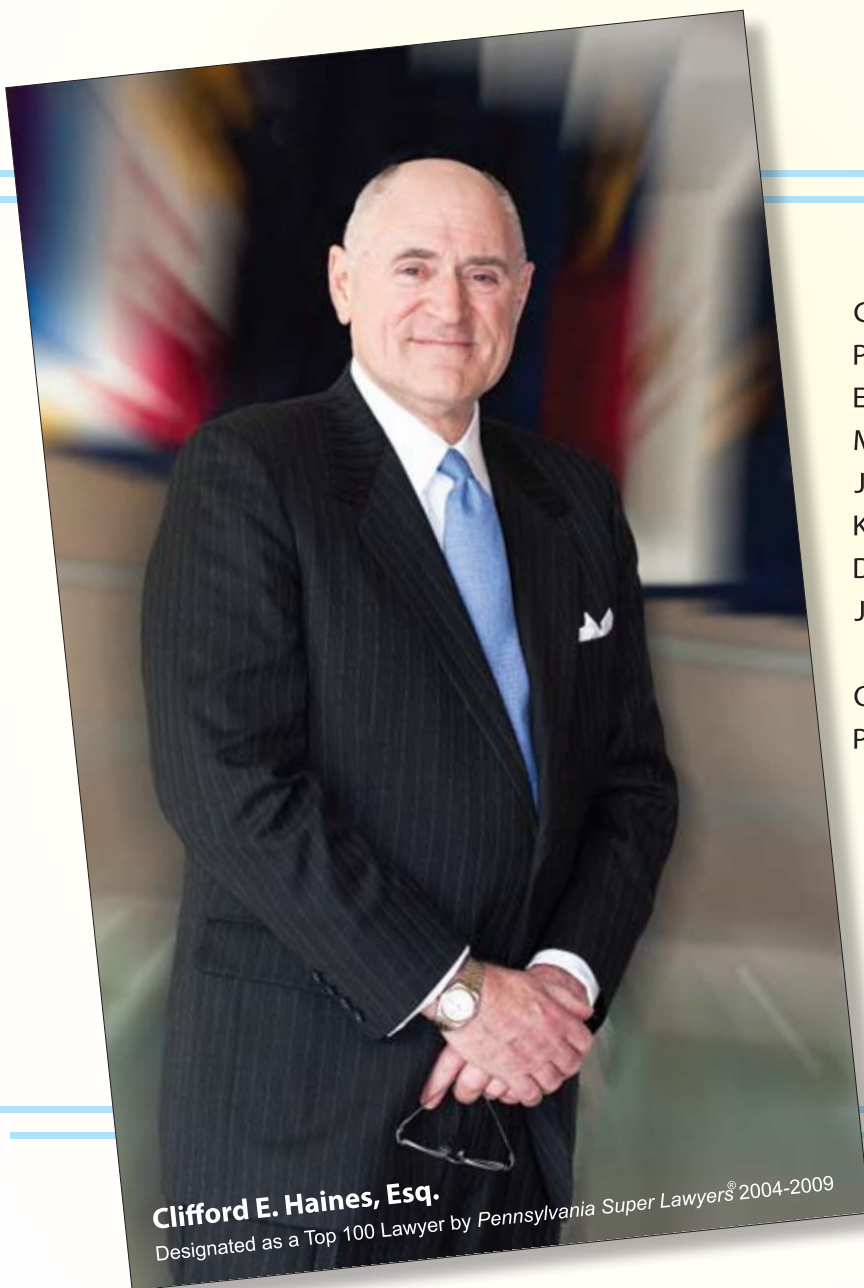
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