

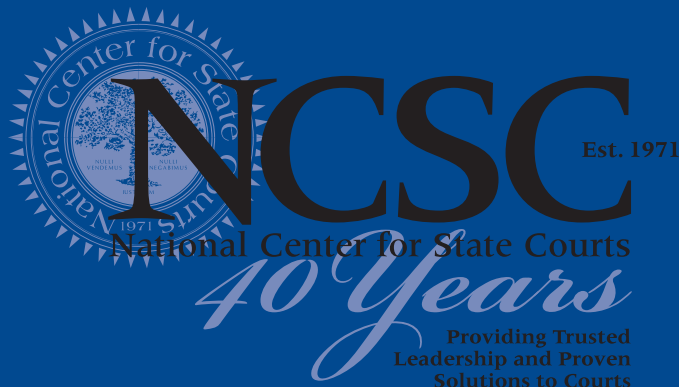
FUTURE TRENDS IN STATE COURTS

2011

Special Focus on Access to Justice

*The Steady Growth of
Business Courts*

Lee Applebaum



THE STEADY GROWTH OF BUSINESS COURTS

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There is a two-decade evolution in the creation of business and commercial dockets within state trial courts. These “business courts” assign specialist judges to manage and decide commercial and business cases and have increased from three pilot dockets in 1993 to over 40 court programs within 22 states in 2010.

The last 18 years have witnessed the creation and development of “business courts,” or “commercial courts,” within state-trial-court civil systems. These are specialized dockets, with one or more designated judges, primarily designed to provide timely and well-reasoned case management and disposition to (1) commercial disputes between businesses, sometimes involving individuals with an interest in the business, and (2) internal disputes over the management and control of business entities.

These state business courts were conceived based on the experience, or belief, that then-existing state trial courts were unable to address commercial and business disputes expeditiously, consistently, and reliably. Whether empirically warranted, the controlling belief in many large jurisdictions was that the state trial judges lacked the knowledge and experience base, as well as the facility with case-specific management tools, to ensure timely adjudication and well-reasoned decision

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- North Carolina Business Court Judge Ben F. Tennille

making in business and commercial disputes. In some jurisdictions, the concern was exacerbated by relatively slow moving general calendars with multiple judges handling different aspects of a single case, instead of having one assigned judge for the entire case.

The idea for creating specialized commercial or business dockets was the subject of serious discussion in the late 1980s and early 1990s, most notably in California, Chicago, and New York. California, after long debate, ultimately rejected the idea of a specialized business court in favor of specialized complex-litigation courts; i.e., procedural specialization in handling all forms of difficult cases was chosen over subject-matter specialization.¹ In Chicago and New York, business court dockets were developed and became operational in 1993. Since that time, state court commercial and business dockets have grown steadily, with virtually all such dockets enduring after their creation.

In seeking specialized dockets, businesses were not looking for fixed results. Nor were they seeking tort reform, as the cases at issue would most typically involve businesses or sophisticated parties as litigants, not consumers. Commercial and business litigants did not need to know that they were going to win the case or cap their losses, but simply that a decision would be made in a reasonable time and that the decision would have an articulated core of legal principles shaping the court’s ruling. Such express judicial reasoning would not only promote confidence in the process, Delaware’s Chancery Court being the aspirational model, but also provide future guidance for conducting ongoing business practices outside the courtroom. Theoretically, a business might look favorably on a city, region, or state with courts that could engender such confidence.

Further, as observed by North Carolina Business Court judge Ben F. Tennille, whose business court tenure extended from 1996 until his retirement in March 2011, the growth of modern business courts corresponds to “the rapidly increasing complexity, rate of change and globalization of business, which has driven the demand for dispute resolution processes that can accommodate the needs of modern business.” Thus, there is an evolution in the business environment to which court systems have responded by creating business courts, just as court systems have responded with other specialized court programs to address newly developing problems and conflicts.²

Business Courts Creation and Development

1993	Chicago Commercial Calendar; judge added later in year	Commercial Pilot Parts Manhattan	Complex commercial case assignment, Essex County, NJ
1994	Judge added in Chicago		
1995	Two judges added in Chicago	Commercial divisions created in Manhattan and Monroe County, NY	
1996	North Carolina Business Court	Commercial pilot projects, Bergen & Essex counties, NJ	
1997	Judge added in Chicago		
1998	Commercial divisions added in Nassau, Erie, and Westchester counties, NY	Connecticut Complex Litigation Docket	
2000	Philadelphia Commerce Court	Boston Business Litigation Session (BLS)	Reno, NV Business Court
	Judge added in Chicago	California complex-litigation pilot program in six counties	
2001	Las Vegas Business Court	Rhode Island Business Calendar	
2002	Commercial divisions added in Albany, Suffolk, and Kings counties, NY	Boston BLS assigns judge part-time (6 months) for second session	
2003	Maryland - Business & Technology Case Management Program, statewide	Delaware Chancery Court technology jurisdiction created for adjudication and mediation	Judge added in Philadelphia
	Phoenix complex-litigation pilot program		
2004	Orlando - Complex Business Litigation Court		
2005	Atlanta Business Case Division	Boston BLS expanded to surrounding counties; additional judge assigned part-time (6 months) creating two full sessions	North Carolina Business Court adds two judges in additional counties
	Commercial Division added in Queens County, NY	Third judge added in Nassau County, NY Commercial Division	
2006	Maine Business and Consumer Docket	Miami Complex Business Litigation Section	Judge added in Orlando
	Eugene, OR Commercial Court has express business and nonbusiness complex-litigation-court jurisdiction	San Mateo County, CA Complex Civil Litigation Program	
2007	Tampa Complex Business Litigation Division	Pittsburgh Commerce and Complex Litigation Center	South Carolina Business Court Pilot Program
	Gwinnett County, GA Business Court Pilot Program	Commercial Division added Onandaga County, NY	Colorado Springs, CO Commercial Docket
2008	Ft. Lauderdale Complex Business Litigation Subdivision of Complex Litigation Unit	New Hampshire Business and Commercial Dispute Docket	
2009	Ohio Court of Common Pleas Commercial Dockets pilot in five counties	Parties from any Massachusetts County may access BLS by agreement	Delaware Chancery Court given commercial arbitration jurisdiction
	South Carolina Business Court pilot extended	Birmingham, AL Commercial Litigation Docket	Judges added to Las Vegas and Reno Business Courts
2010	Delaware Superior Court Complex Commercial Litigation Division	West Virginia adopts a law to create business court divisions and Supreme Court of Appeals appears to be moving toward implementation	Oregon Supreme Court establishes Oregon Complex Litigation Court
	Michigan State Bar Judicial Crossroads Task Force adopts recommendation for specialized-business-court docket		

Business court jurisdictional formats vary, and there is no one universal model among existing business courts. This reflects the fact that different models better suit different jurisdictions' docket size, case management objectives, or both.

A common jurisdictional model in large cities, such as New York's Commercial Division, requires (1) a specific jurisdictional amount in controversy and (2) that the case's subject matter falls within a defined list of case types that set the parameters of the business court's jurisdiction. There is no additional express procedural-complexity requirement. Another paradigm is the complex business court model, such as Maryland's Business and Technology Case Management Program (BTCMP), where jurisdictional mandates include not only some form of business, technology, or commercial dispute, but also a list of criteria that a case must meet to be considered "complex."³ This is a more subjective model and requires greater exercise of the judicial gatekeeping function. There is also a hybrid model, such as now found in the North Carolina Business Court, where certain specified case types automatically fall within the business court's jurisdiction, and the inclusion of other cases outside those categories requires procedural complexity or the presence of novel issues that will make important advances in the law.

As set forth in the accompanying charts, there has been a steady trend in the creation and growth of business courts since 1993.⁴ One measure of business court development is to count the number of states in which these dockets are located.⁵ Viewed by this measure, taking 1993 as year 1 and excluding the Delaware Court of Chancery as it existed in year 1,⁶ business courts were created in four states during the first five years of the modern business court movement (1993-97). In the next five years (1998-2002), business courts were established within another four states.

In the next five years (2003-07), business courts were created within another seven states. Delaware's Court of Chancery is included within this number because its jurisdiction was transformed to accommodate a subset of purely commercial disputes without an equity component. The Lane County, Oregon, Commercial Court was not included because it could be viewed as a complex-litigation court, rather than solely as a business court, a matter addressed in more detail below. In the three years from 2008-10, business courts were added within three more states that previously had no business court dockets. Thus, in years 11 through 18 of the

modern business court movement, business courts were created within ten states, compared to eight in the first ten years. These numbers do not include states where a business court's creation was authorized but never implemented, or implemented but never genuinely used by litigants.

A more significant measure of growth, however, is the number of individual jurisdictions in which decisions had to be made to establish a business court. For example, a single (though wide and broadly collaborative) decision was made in Maryland to create the statewide BTCMP in all of Maryland's judicial circuits; but four separate and distinct decisions had to be made by administrative judges in Florida's Ninth, Eleventh, Thirteenth, and Seventeenth judicial circuits to establish business courts in those individual circuit courts. The number of decisions to create business courts, either by legislatures passing laws then signed by a governor, by administrative judges issuing orders in an individual jurisdiction within a state, or by a state's highest court creating a business court docket, is more reflective of the growing trend toward creating business courts because the choice existed in each distinct instance not to create a business court.

Viewed in this light, there were 6 business courts created in the first five years; 11 business courts created in years 6-10; 13 business courts created in years 11-15; and 5 business courts created in years 16-18. This would make 17 business courts in the first ten years, and 18 business courts in the following eight years, with West Virginia apparently on the verge of making that 19. As above, these numbers do not include circumstances where a business court was authorized but never implemented or implemented but never genuinely utilized. However, it is worth observing that under this "decision-making" standard, even in the few instances where a law was passed but not implemented, or a summary-proceeding-type docket with unusual features was adopted but not used by lawyers and litigants, there were still some constituencies that decided to create a business court.⁷

This does not end the analysis. By express or practical definition, complex-litigation-program judges (California, Connecticut, Oregon, and Phoenix) will hear complex commercial and business cases among other substantive case types. These judges may not be as specialized as those with a docket solely dedicated to business and commercial cases, but they will be handling complex business and

commercial cases more often than judges with more generalized dockets. This will increase their experience, and they will thus develop a greater degree of actual knowledge in (1) these subjects and in (2) the case management dynamics of business and commercial cases. In this regard, it is significant that a number of judges from jurisdictions with specialized-complex-litigation dockets, including some specialized-complex-litigation judges themselves, have become members of the American College of Business Court Judges.

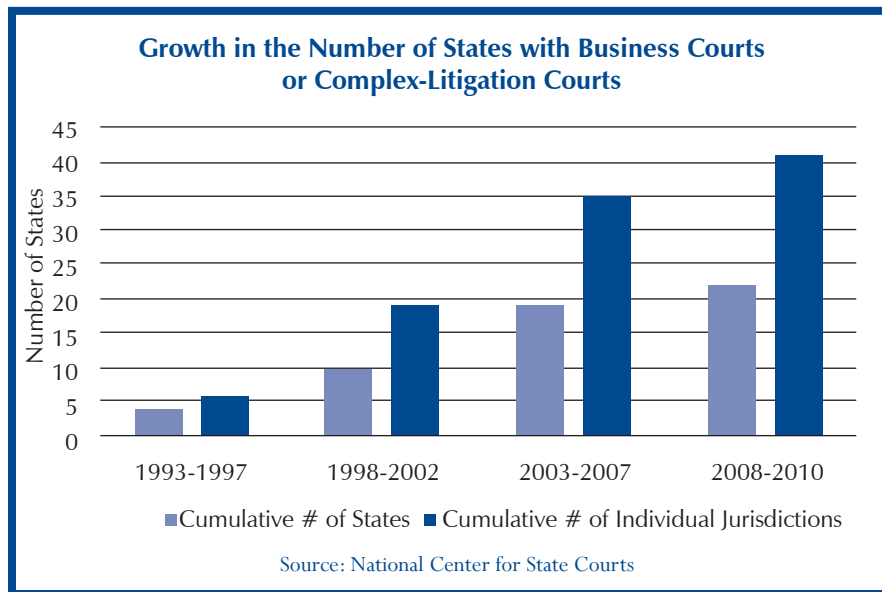
If these complex-litigation dockets are included in the measure of business court growth, then the results are as follows. Using the measure of growth by state, total business court numbers in the first five years (1993-97) remain the same at four, but the next five-year period increases to six, and years 11 to 15 increase from seven to nine. The final three years stay the same. Thus, the total in the first ten years is 10, and the total for the ensuing eight years is 12, for an 18-year total of specialized business courts being created within 22 states, with West Virginia on the verge of making that 23. Using the measure of growth by implementation decisions made: 6 business courts were created in the first five years; 13 business courts were created in years 6-10; 16 business courts were created in years 11-15; and 6 business courts

were created in years 16-18. This would make 19 business courts created in the first ten years, and 22 business courts created in the following eight years, for a total of 41, with West Virginia seemingly on the verge of making that 42.

As nearly two decades have passed, there is also some ability to measure whether business courts will survive once created and operational. Of the business courts that have been unsuccessful, including the summary proceedings in the Delaware Superior Court and Milwaukee Circuit Court, and the assignment of business court cases to chancery judges in New Jersey on an expedited nonjury basis, none (at least originally) were based upon a traditional format that was enhanced through judicial specialization alone. In other instances where business courts have been studied or created but never actually implemented or made operational, there have been political or practical issues preventing the business court from becoming operational, the analysis of which is beyond the scope of this article.

Of the business courts not relying upon atypical procedural formats, which focus instead upon enhanced judicial specialization, none have failed. The Commercial Division in New York and Commercial Calendar in Chicago have been functioning, and growing, over the last 18 years. North Carolina's Business Court is 15 years old and has expanded and developed over that decade and a half; and at least six other business courts will be ten years old or more by the end of this year. Numerous pilot programs have been extended or permanently implemented; judges have been added to a number of business courts; and the breadth of geographical jurisdiction has been expanded in some business courts.

Two other points are worth considering in evaluating future business court evolution. First, Delaware is generally perceived as preeminent in business litigation. This is based primarily on its deep history, established jurisprudence, and the high quality of its jurists. During the first ten years of the modern business court movement, Delaware Chancery Court basically remained the same 200-year-old equity court of limited jurisdiction that did not compete with the modern business courts in purely commercial cases. In the second decade, however, Delaware's three branches of government worked to expand chancery's jurisdiction twice, broadening its scope to permit the adjudication, mediation, and arbitration of some forms of commercial and technology claims otherwise not within traditional



equity jurisdiction. In 2010, Delaware went further and created a specialized-commercial-court docket in its law court, the Delaware Superior Court's Complex Commercial Litigation Docket. These steps can be reasonably understood not only as meeting competition from other states' court systems, but as part of a judicial evolution to better meet new challenges facing all courts.

The second point is the international development of commercial courts. During the same time period that modern U.S. state business courts have been evolving, various forms of commercial courts have been created or have expanded in, e.g., Abu Dhabi, Argentina, Australia, Bermuda, the British Virgin Islands, Canada, Croatia, Dubai, Egypt, England and Wales, Ghana, Guyana, Hong Kong, Ireland, Israel, Lesotho, Malawi, Malaysia, Mauritius, Morocco, New Zealand, Northern Ireland, Qatar, Rwanda, Saudi Arabia, Scotland, Serbia, South Africa, Spain, Tanzania, Thailand, Turkey, Uganda, and Ukraine. Austria, Belgium, France, England, the Netherlands, and Switzerland have long-standing commercial courts. Other nations, such as India, are currently considering commercial courts and have studied U.S. business courts, among others, in that process.

This parallel growth or enhancement in international commercial courts is consistent with the growth in the United States. It gives broad context to the view that commercial and business courts are necessary components of a region's economic health and that their absence creates a competitive disadvantage with other regions. Thus, business court development is not limited to how a business entity may view the overall economic environment in one U.S. city compared to another U.S. city, but to how that court system compares to cities or regions in other nations, as well.

ENDNOTES

¹ Some courts' civil systems have both specializations within their dockets. Thus, in practice, there is no inherent reason that a specialized business court docket must be excluded from a civil system if the court system were to include a complex-case specialization as well. Second, the jurisdictional definition of what constitutes a complex case could encompass business and commercial cases falling within that definition, as well as other subject matter. If so, designated complex-litigation judges will have repeated experience with a distinct subset of complex business/commercial cases, will develop a greater expertise in handling those cases over time compared to judges with a general docket, and will effectively become specialized-business-court judges relative to those with a general docket.

² Judge Tennille shared these observations with the author in December 2010.

³ Maryland Rule 16-205(c), governing assignment to the BTCMP, directs the assigning judge to consider the following factors in actions presenting complex or novel commercial or technological issues: "(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."

⁴ The information in these charts and concerning unsuccessful programs can be found in American Bar Association Section of Business Law's Committee on Business and Corporate Litigation, 2004-11; Bach and Applebaum, 2004; Minnesota Judicial Branch, 2001; and Toutant, 2006.

⁵ This does not mean the business court is statewide; it only means that a business court was created somewhere within a state.

⁶ Since 2003, the Delaware Chancery Court's jurisdiction has twice changed to add some entirely nonequity commercial and technology disputes.

⁷ One lesson from these unutilized dockets and nonjury programs is that a significant population of litigants and lawyers are either entrenched in the familiar litigation structures or are genuinely more interested in maintaining traditional forms of litigation for considered reasons. Some, even including judges, argue, e.g., that jury trials are inconsistent with business-docket specialization, an issue not addressed herein. For the present, for reasons not the subject of this article, it appears that litigants and lawyers using business courts are primarily seeking knowledgeable and efficient judicial operation and oversight of traditional litigation structures.

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