

The History of Delaware's Business Courts

their rise to preeminence

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Today, an increasing number of states have a business court or judges assigned only to business disputes. Most of these courts were created in the past 15 years. For example, during this period Pennsylvania established a Complex Litigation Center in Philadelphia and later a Commerce Program; the Illinois Circuit Court in Cook County began assigning judges to hear only commercial cases; New York created a division of the New York State Supreme Court devoted solely to commercial litigation; Wisconsin began a pilot program in Milwaukee County and appointed two judges to a special business court; and North Carolina established a business court with judges in Greensboro, Charlotte, and Raleigh, who preside over complex corporate and commercial law cases. A few more states join this list each year.

Delaware houses the nation's oldest business court--the Delaware Court of Chancery established in 1792. The Court of Chancery has broad jurisdiction over disputes involving the internal affairs of Delaware business entities. Otherwise, its jurisdiction is generally limited to traditional equity jurisdiction. Consequently, some complex commercial disputes fall outside its purview. The Delaware Superior Court handles most of those cases, which include, for example, contract disputes where only legal remedies, such as money damages, are sought.

The Delaware Court of Chancery

In its more than 200 years, the Court of Chancery has become the forum of choice for determining disputes that involve the internal affairs of corporations and other business entities. It has developed a respected body of case law interpreting the Delaware General Corporation Law and earned a worldwide reputation for fairness, experience, and expertise in presiding over corporate disputes.

Until 1792, Delaware's Court of Common Pleas had jurisdiction over both common law and equity matters. The Delaware Constitution of 1792 divested the Court of Common Pleas of its equity jurisdiction and established a Court of Chancery and the position of chancellor to exercise that jurisdiction. By the late 1800s, most other states had consolidated their equity and law jurisdictions and moved away from having a separate equity court.

During its early years, the Court of Chancery primarily exercised equity jurisdiction and provided relief that was not available in a court of law. Most of the early volumes of the Court of Chancery reporters do not deal with corporation law issues but instead involve decisions condemning property and ordering parties to perform certain obligations or to stop doing certain things.

By the early twentieth century, however, Delaware began to emerge as the preferred forum for incorporation of the nation's businesses. In 1897, Delaware adopted a new constitution, permitting incorporation under general law instead of by special legislative mandate. Under this provision, Delaware enacted a general corporation law in 1899 calling for perpetual corporate existence and general powers. Before then, most of the country's large corporations incorporated in New Jersey. In fact, Delaware modeled its 1899 General Corporation Law largely after the relatively liberal statute New Jersey had at that time.

After the Delaware legislature's adoption of the General Corporation Law, the Court of Chancery began to render decisions dealing with corporation law issues. Because the Court of Chancery does not have jury trials, explained Lewis S. Black, a Wilmington attorney and author of numerous books and articles on corporation and securities law, the judges were called upon to write opinions explaining their reasoning and a body of law began to develop.

New Jersey remained the leading state for incorporation until 1913, when under the leadership of New Jersey Governor Woodrow Wilson, it passed antitrust and other laws inhospitable to corporations. These new laws outlawed attempts to create monopolies or suppress competition and forbade the chartering of any new holding companies. The number of corporations incorporated in New Jersey declined precipitously. Delaware, with its newly adopted General Corporation Law, stood ready to serve as the state of incorporation for the many companies fleeing New Jersey. The Court of Chancery provided an able forum in which to adjudicate and resolve internal corporate controversies.

The chancellor remained the sole judge of the Court of Chancery under the constitution of 1897. He was appointed by the governor and served a 12-year term. In 1939, the Delaware legislature created the position of vice chancellor, to be appointed by the chancellor and to serve much like a magistrate or master. In 1949, the Delaware Constitution provided for the office of vice chancellor as a judge, with nomination by the governor and confirmation by the senate, and a 12-year term. In 1951, the legislature amended the constitution again and created a three-member supreme court with appellate jurisdiction in certain criminal and civil matters, including final judgments and other orders of the Court of Chancery.

Today, the Court of Chancery consists of the chancellor and four vice chancellors. Since 2006, the court also has had two masters, who are comparable to magistrates and hear guardianship cases, real property disputes among individuals, and trust administration cases, thereby enabling the Chancery judges to spend more time on corporate and commercial disputes. With more than 60 percent of the nation's Fortune 500 companies incorporated in Delaware, the Court of Chancery, on average, receives and disposes of 800 to 1,000 civil actions a year, with the vast majority involving business disputes.

A number of features make the Court of Chancery unique. First, the court does not have jury trials, only bench trials. Litigating parties can expect one judge to handle their case from start to finish and, in most instances, to provide a well-reasoned written opinion. Second, the Court of Chancery's equity jurisdiction gives it the distinct ability to create special remedies, beyond money damages, to redress breaches of duty. Although the court generally does not have jurisdiction over matters for which there is an adequate remedy at law, the "clean-up doctrine" gives the court discretionary jurisdiction over legal claims that are joined with other claims within its jurisdiction.

The Delaware legislature expanded the Court of Chancery's jurisdiction in 2003 to include adjudication of technology disputes that arise out of agreements involving at least one Delaware business entity, even if they concern solely claims for damages. The synopsis of the bill enacting this and another statute discussed below, authorizing a separate "mediation only" docket,

explained that the legislature intended to provide "additional benefits for businesses choosing to domicile in Delaware" and to "keep Delaware ahead of the curve in meeting the evolving needs of businesses, thus strengthening the ability of the state to convince such businesses to incorporate and locate operations" in Delaware.

The second part of the 2003 legislation authorized the Court of Chancery to create a special mediation-only docket that allows parties to mediate their business disputes before a judicial officer of the court, rather than litigate them. Qualifying business disputes include complex corporate and commercial disputes, as well as certain technology disputes. The requirements to invoke the court's confidential mediation-only jurisdiction parallel those to adjudicate technology disputes: at least one of the parties must be a Delaware business entity, the amount in issue must exceed \$1 million, and all parties must consent to the mediation. There is no requirement that any litigation be pending in the Court of Chancery or anywhere else. More than a dozen such cases have been mediated over the past three years, most of them successfully. In addition, the court's voluntary mediation program, established by court rule, allows parties litigating in the Court of Chancery to submit their case for mediation to a judicial officer other than the one assigned to the matter. The success rate in this program exceeds 70 percent. The court has mediated 68 of these cases in the past three to four years, an average of about 20 cases a year.

The Court of Chancery's most notable feature, however, remains its central role in developing an efficient and predictable body of corporation law. Delaware's General Corporation Law is an enabling statute; among other things, it gives directors broad discretion to manage the corporation, subject to fiduciary duty review by the Court of Chancery. As Chancellor William B. Chandler III explained at the International Bar Association's International Mergers and Acquisitions Conference in June 2005, the court views the corporate decision maker as having a dual role of both entrepreneurial risk taker and fiduciary for his principals, the stockholders. That view is reflected in the court's ongoing effort to reach a reasonably efficient and appropriate balance between judicial intervention to protect the rights of shareholders, and judicial restraint to allow boards and officers to pursue corporate interests without meddlesome judicial interference.

The five judges of the Court of Chancery dedicate most of their time to deciding corporate law and alternative entity disputes, which are taken on direct appeal to the state supreme court, also consisting of five judges. The interaction of the Court of Chancery and the Delaware Supreme Court plays an important role in the development of Delaware's corporation law. As Professor Robert B. Thompson of Vanderbilt University Law School explains in 37 CONN. L. REV. 619, 628 (2005), "Piercing the Veil: Is the Common Law the Problem?", "One reason that Delaware fiduciary duty law is both coherent and adaptive in the classic common law tradition is that it is made by an informed group of judges who are repeat players on matters of corporate law." Those judges' "experience, both prior to and after becoming judges, gives them an unmatched expertise in the field of corporate law." This expertise enables both the Court of Chancery and the Delaware Supreme Court to respond in a matter of weeks, if not days, to requests for preliminary injunctive and other equitable relief in connection with challenges to complex mergers and acquisitions and other major corporate transactions.

Furthermore, as most recently noted in 2007 by Vice Chancellor Leo E. Strine Jr. in litigation

involving the Topps Company, Delaware has an important policy interest in having its courts speak first on emerging issues of Delaware corporate law, such as going-private transactions and options backdating, creating a jurisprudence upon which directors and stockholders may rely with confidence. The members of the Court of Chancery and the Delaware Supreme Court regularly interact with academics, shareholder groups, corporate directors, mergers and acquisitions lawyers, and corporate litigants around the country to keep current on the most recent business developments. These interactions provide valuable insights on the fast-moving business and capital markets, in which the complexity of transactions constantly evolves.

As Chancellor Chandler said in a recent address to the Delaware State Chamber of Commerce, "The Court of Chancery remains the nation's premier business court by maintaining internal standards of excellence, by working with the Executive and Legislative branches of Delaware government to improve business law itself and its application through the Court, and by interaction with our consumers, corporate owners, decision-makers and the corporate Bar." Like its business clientele, the court continues to focus on providing the best possible judicial product.

The Delaware Superior Court

While the Delaware Court of Chancery is known for its expertise in matters of corporate and business law, the Superior Court of Delaware also has an outstanding reputation in the business community for resolving commercial disputes. The Superior Court has original jurisdiction over civil matters at common law and frequently resolves business disputes where an adequate remedy at law exists. Lawyers who are considering pursuing litigation in Delaware should keep the distinction between equity and law in mind when determining in which Delaware court to bring their claims.

The members of the Delaware judiciary enjoy an atmosphere of respect and collegiality that is essential to maintaining an advantageous forum for corporate and commercial litigation. This collaboration is most evident when cases are transferred between the Court of Chancery and the Superior Court to ensure the appropriate court awards proper relief. For example, in *Candlewood Timber Group, LLC v. Pan Am. Energy, LLC*, 859 A.2d 989 (Del. 2004), the Court of Chancery transferred a case to the Superior Court upon concluding that the plaintiffs' request for specific performance would not adequately remedy the environmental damage that Pan American's oil drilling allegedly caused to Candlewood's property in Argentina. The Superior Court, likewise, will transfer matters to the Court of Chancery if it determines that the parties seek equitable relief or if the claims involve matters relating to the exercise of fiduciary duties. The transition is seamless and allows the state's bifurcated court system to thrive.

The Delaware State Constitution of 1831 established the Superior Court, which held its first session on April 9, 1832. On April 9, 2007, the 19 current statewide judges of the Superior Court held a special session to commemorate the court's one hundred seventy-fifth anniversary.

Also in 2007, for the sixth consecutive year, Delaware ranked first overall in the State Liability Systems Ranking Study of the U.S. Chamber of Commerce Institute for Legal Reform. The study polls national in-house counsel and senior corporate litigators to evaluate the performance of state court systems in creating a fair and reasonable litigation environment. Delaware ranked first in nine of the 12 categories, including its treatment of tort and contract litigation, class

action suits, and mass consolidation suits. The study results reflect the business community's confidence in the Superior Court's handling of its complex tort and commercial litigation dockets.

The Superior Court manages a diverse civil docket, including complex commercial litigation matters. In the 1990s, the court decided large-scale commercial cases involving declarations of rights under insurance coverage agreements arising from environmental and mass product liability exposures. These disputes frequently required the judges to interpret complex insurance policies while applying the law of other jurisdictions. More recently, the court has addressed several disputes involving director and officer liability coverage. Of course, the court regularly addresses claims arising from failed business relationships, including related breach of contract and business tort claims. The amounts in controversy in these disputes range from thousands of dollars to several hundred million dollars, at times reaching more than \$1 billion.

The Superior Court continually strives to implement best practices to accommodate large-scale business litigation. For instance, the court introduced the Complex Litigation Automated Docket (CLAD) in 1991. CLAD was the nation's first electronic docketing and filing system for civil cases. In 2000, the Superior Court was the first court in Delaware to allow parties to file briefs on CD-ROM, and e-filing is now available for all civil actions filed in both Superior Court and the Court of Chancery. In addition, the Delaware judiciary's Web site receives more than 2 million hits each month and provides valuable resources to attorneys and their clients, including forms, pattern jury instructions, and case management protocols. Between 2001 and 2006, more than 350 Superior Court civil decisions were made available on the Web site (without cost) each year. The Superior Court Web site also hosts a listserv that accommodates more than 1,700 subscribers and transmits updates regarding recent decisions, rules changes, and case management protocols as they are issued.

The court has experienced great success with alternative dispute resolution (ADR). ADR is mandatory in cases where the amount in controversy is less than \$100,000, and in other cases designated for mandatory ADR by the court. The Superior Court uses three forms of ADR: arbitration, mediation, and neutral case assessment. The court educates and trains local counsel to serve as mediators in ADR proceedings. It also has five commissioners appointed by the governor who, among other duties, resolve eligible disputes through appropriate ADR techniques. Superior Court judges also will serve as ADR practitioners when asked by colleagues.

The Superior Court is proud of its record for providing a sophisticated, convenient, and efficient forum for businesses to resolve their disputes. In the last five years, the average time from complaint to trial disposition in civil cases filed in Superior Court was approximately 28 months. The court also recognizes that full-blown, jury trial litigation is not always the most efficient or preferred means by which to resolve a controversy. With the expense and inherent inefficiencies of commercial litigation in mind, the court has developed "summary proceeding rules" that provide for expedited and streamlined discovery, motion practice, and trials for commercial disputes when the parties agree that a more direct approach to adversarial dispute resolution is appropriate and desirable. The President Judge of the Superior Court has appointed six Superior Court judges to the Summary Proceedings for Commercial Disputes Panel, all of whom stand

ready to manage these cases through expedited discovery, motion practice, ADR, and trial if necessary. This unique approach to dispute resolution is intended to mirror the Court of Chancery environment by providing learned judges who will facilitate expeditious resolutions of commercial disputes.

Mindful that business litigation requires special attention, the court continues to explore new avenues to accommodate business litigants. Its recently formed Complex Business Litigation Committee, comprised of Delaware's most experienced commercial litigators, is examining the possibility of a separate business court or business docket within the Superior Court. The business court would provide a forum for businesses to litigate disputes for which a legal remedy is adequate and no other basis for jurisdiction in the Court of Chancery exists. The Committee's findings and recommendations are anticipated within the next year. In addition, the court's Civil Rules Advisory Committee currently is evaluating proposed amendments to the Superior Court rules of civil procedure, specifically regarding the use of e-discovery. A report was due by the end of 2007, and the Superior Court is expected to implement any appropriate rule changes soon thereafter.

Conclusion

Both the Delaware Court of Chancery and Superior Court demonstrate a commitment to excellence in adjudication of business disputes that attracts litigants from around the country, including the nation's leading corporations. Delaware is the forum of choice for resolving complex business and commercial issues, in part, because the judiciary focuses so actively on fairness, efficiency, and expertise in corporate law and related business matters. As a result, businesses that choose to incorporate in Delaware enjoy the benefit of a reliable and consistent body of law on which they can rely when conducting their business affairs.

Delaware welcomes the trend among other states to create a business court system similar to its Court of Chancery. As Wilmington attorney Black noted, however, Delaware's system is not easily emulated. "There are elements unique to Delaware that would be very hard to replicate, particularly in big states," he says. Delaware benefits from having a unique combination of an enabling corporation statute, a legislature that keeps the statute up to date and that has developed a long and trusting relationship with the corporate bar, and judges who come from among the best and brightest attorneys in the state, he says. "Any state that can do something close will have done something quite good for itself."

A. Keys to Success of Delaware's Business Courts

The Court of Chancery is known for:

- No jury trials or punitive damages.
- Frequently handling cases on an expedited basis.
- Extensive and well-developed body of corporate law.
- Well-researched opinions by one of five judges, each of whose docket consists predominantly of business cases.
- Single level of appellate review by Delaware Supreme Court.

Together with the Delaware Supreme Court Justices, the Chancellors benefit from:

- Experience, both before and after becoming judges, that gives them an unmatched expertise in corporate law.
- Regular interactions with shareholder groups, corporate directors, deal lawyers, litigants, and academics regarding important developments in business law.

The Superior Court is known for:

- Introducing the nation's first electronic docketing and filing system for civil cases in 1991.
- Great success with alternative dispute resolution.
- Development of summary proceedings rules, available upon the consent of all parties, for expedited and streamlined discovery, motion practice, and trials for commercial disputes.

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