

BUSINESS LITIGATION COMMITTEE

A COMMITTEE OF THE BUSINESS LAW SECTION OF THE MARYLAND STATE BAR ASSOCIATION

On August 3, 1996, the Business Law Section of the American Bar Association formally endorsed the establishment of "specialized court divisions to provide the expertise needed to improve substantially the quality of decision making and the efficiency of the courts with respect to business cases." Since the early 1990's, a number of states have created specialized court divisions, known in legal circles as "business courts." The oldest and foremost "business court" is the Delaware Court of Chancery, which has been in existence for over 200 years and is well-known for producing influential corporate law decisions. Although some states, such as California, have initially rejected the business court concept, the trend seems to favor their formation. New York and Illinois, in the early 1990's, implemented specialized business courts which have proven to be highly successful. Several other states, including New Jersey, North Carolina and Wisconsin, have created different forms of specialized business courts, and yet other states, such as Florida, are considering similar action.

This Committee believes that the creation of an experimental business court in Maryland warrants exploration for the following reasons:

1. A business court could improve the quality of business decision-making.

A business court in Maryland could substantially improve the quality of decision-making in, and efficiency with which Maryland courts decide, business cases. By specially assigning business cases to particular judges who have interest, experience or background in business matters or cases and over time become more specialized in deciding business cases the quality of decision-making in business cases could improve. Moreover,

having the one judge assigned to a case who would hear and decide all issues arising in that case could improve judicial efficiency by eliminating the need to repeatedly educate different judges on the often extensive and complex facts of a business case. A business court might not only make Maryland more attractive to companies either looking to relocate here or considering a departure, it might make Maryland a better place for existing local companies to operate. Indeed, a business court could raise the level of predictability in the court system which is, of course, vital to business.

2. A business court could help alleviate burdens on court systems and processes that result from the complex nature of business cases.

Business litigation is often much more complex than other forms of litigation. As a result of their nature, business cases often involve significantly more motions, memoranda and briefs and review of many more documents than other forms of litigation. These factors often result in complex, lengthy discovery, hearings and trials that burden judicial time and court systems and processes. A business court could be designed to accommodate these differences and to facilitate the complex business litigation process. The features of business court could contribute to more cost-effective resolution of business disputes by employing advanced case management techniques, alternate dispute resolution and increased use of technology. Moreover, a business court might include litigants who have greater access to technology and therefore might be more willing and able to experiment with advanced technology, test its use for the benefit of the entire system and, ultimately, take full advantage of its use in the litigation process. This use of technology might dramatically improve efficiency.

The American Corporate Counsel Association ("ACCA") endorsed the concept of specialized business courts in 1996, explaining that specialized business courts would enable the legal system to handle complex litigation more efficiently. The ACCA statement

provided: "The American Corporate Counsel urges states to consider wherever appropriate the advantages of specialized procedures for resolution of business disputes. ACCA believes that the most effective way to realize such advantages is for states to create business courts or specialized court divisions or parts dedicated to business litigation. . . . "

3. A business court could improve judicial efficiency for all cases.

If judges with business backgrounds adjudicate business disputes, the experience in other states has proven that business disputes are likely to settle faster. By settling business disputes faster, efficiency of the entire court system is also improved. Thus, a specialized business court should help to process all Maryland cases, civil and criminal, faster and more efficiently, thus relieving Maryland's already overcrowded judges and their dockets. Recently, there has been a great deal of publicity regarding the release of several criminal defendants in Baltimore City due to their inability to obtain a speedy trial. A business court could help improve the efficiency of the criminal dockets as well, by making more judges available for criminal cases, and might help prevent similar overcrowding from occurring in the future.

4. A business court could increase the number of business entities formed in Maryland.

People often select a state in which to incorporate or domesticate their business based upon the advantages offered by the state's laws. Under what is known as the "internal affairs" doctrine, the laws of a company's state of organization will govern the internal operation of that company, even though the company may be operating in other states. The quality of a state's court system can have an impact on the selection of the state of incorporation or formation because of the increased likelihood that legal action involving that company will be brought in the selected state. Delaware's court system, for example, is one of the primary

reasons that Delaware leads the nation in incorporations. Having a business court system in place in Maryland may make incorporation or formation in Maryland more attractive. More importantly, perhaps, not having a business court in Maryland may make formation in Maryland less attractive.

5. A business court could help Maryland resolve increased litigation from new entities more efficiently.

In recent years, Maryland has become a leader in specialized corporate entities such as real estate investment trusts, investment companies and limited liability entities. Maryland's reputation as a favored state for these types of entities is based upon its cutting-edge statutes. These statutes, however, may only be as beneficial for businesses as the reputation of the State's court system for resolving disputes that arise in dealing with these entities. Limited liability entities, such as limited liability companies, are still in their relative infancy and have not yet generated much litigation nationwide. Nonetheless, limited liability companies are rapidly becoming the entity of choice for many businesses. Having a business court in place in Maryland could help to improve the efficiency with which the increased litigation, likely to occur as limited liability entities mature, gets resolved and could establish Maryland as the leader in limited liability company formations, much as Delaware leads the nation in incorporations.

6. A business court could help Maryland resolve year 2000 litigation more efficiently.

With the dawn of the new millennium, the anticipated flood of litigation surrounding year 2000 problems could significantly increase the number of business cases (such as breach of duty claims against directors) brought in Maryland, as in other states, and might challenge already overcrowded state courts. Having a business court in place might help minimize the impact of these cases on Maryland's judicial system.

Maryland should not allow these opportunities and challenges to pass without sufficient investigation. A Maryland business court system could (i) enhance the state's reputation as business friendly and, hence, provide economic development benefits; (ii) help alleviate the impact of the year 2000 problem; (iii) result in more consistent, well-reasoned decision making; and (iv) result in more open publication of decisions which would serve to educate participants and to improve the consistency of decisions. These latter two improvements could also serve to make Maryland's judicial decisions regarding Maryland businesses more predictable. Specialized business courts might, therefore, provide many benefits to all of Maryland's citizens business and non-business alike.

Moreover, a Maryland business court might be able to provide all of these significant benefits without any additional expense to the state or the court system. Indeed, if access to the business court required payment of a user fee, it is possible that such a court could be revenue generating. Consequently, this committee recommends the exploration of an experimental business court. An experimental court would permit the state to observe directly the benefits that such a system would bring if implemented state-wide, with little disruption to the current system. We, therefore, hope you will join us in exploring experimental business courts for Maryland.