

**THE MASSACHUSETTS BUSINESS LITIGATION SESSION:
DOCKET AND CASELOAD ANALYSIS**



*Business Litigation Session Resource Committee
December 2004*

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Business Litigation Session Resource Committee

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FOREWORD AND ACKNOWLEDGEMENTS

The Business Litigation Session of the Suffolk Superior Court was launched four years ago under administrative order issued by Superior Court Chief Justice Suzanne DeVecchio. Following the successful completion of a two-year pilot program, the Business Session was extended as a permanent session of the Superior Court and its reach was expanded to include cases from not only Suffolk County but also Essex, Middlesex and Norfolk Counties as well.

When the Business Session was first implemented, Chief Justice DeVecchio appointed a committee of attorneys from a variety of backgrounds to provide input and feedback to the public and the judiciary. In the past four years, the members of the Business Litigation Session Resource Committee traveled the state to meet with practitioners in every county; examined how other states have implemented specialized business tribunals; and commissioned a professional survey of attorneys with cases before the Business Session. In February 2003, the Committee issued a Status Report on the operation of the Business Session and the Committee's recommendations concerning the future of the Session.

Since that report, the Committee has undertaken the following comprehensive analysis of the cases actually filed in the Business Session since its inception, to determine the types and volume of caseload handled by the Superior Court justices in the Session. This work involved an extensive analysis of the dockets of each case pending in the Business Session, a review of the written work of the Session, and consultations with the judges appointed to the Session. This report is the written culmination of that examination.

As with any collective endeavor, this report was prepared with the assistance of numerous individuals and institutions, to whom we are grateful. In particular, we wish to acknowledge the law firms of Bingham McCutchen LLP, Holland & Knight LLP and Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C., which all provided extensive resources for the Committee and its work. In particular, we wish to thank Sarah Herlihy of Mintz Levin, who spearheaded the following analysis, assisted by Brandon Bigelow and Karen Leonard of Bingham McCutchen; Lauren Benowitz, Jean Healey, Aaliyah Nagji, and Rebeccah Weiss of Mintz Levin, and Jessica Munyon of Holland & Knight. The Committee is also grateful to Session Presiding Justice Allan van Gestel and Associate Justice Margot Botsford, who have provided valuable information and the assistance to the Committee in compiling the data for this report.

Finally, the Committee applauds Judge Del Vecchio, whose vision as Chief Justice prompted the establishment of the Business Litigation Session; whose support sustained the Session; and whose leadership helped make the Session the success that it is. The Committee also applauds Chief Justice Mulligan and Chief Justice Rouse for their commitment to continue and build the Session as a vital component of the excellent high quality of service that the Superior Court provides.

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EXECUTIVE SUMMARY

Since its establishment in October 2000, the Business Litigation Session has enjoyed well-recognized success from the perspective of the bar, the practitioners in the Session, and the business community. This Committee has previously published the results of an independent survey indicating extraordinarily high levels of satisfaction by practitioners in the Session. And, the state's reputation for handling business disputes has risen substantially since the Session began operations. As a result, the Session has expanded to include cases from Middlesex, Norfolk, and Essex counties, and the number of cases seeking acceptance into the Session continues to grow without any sign of abatement. At the same time, the Session is at a critical stage of its development: a new Chief Justice of the Superior Court (who currently has the exclusive power to shape the Session) has just been appointed; BLS Presiding Justice Allan van Gestel will reach mandatory retirement in December 2005; and fierce budgetary pressures will continue to be a fact of life for the Court.

From the outset, the Session has been budget-neutral: the existence of the Session does not materially affect the total number of Superior Court cases pending at any given time, and it does not affect the number of justices sitting on the Superior Court bench. Rather, the Session merely represents a more specialized mechanism for adjudicating some of the business disputes which already exist within the judicial system. The question, then, is whether the allocation of judicial resources into the Session is appropriate, based on the quantity and complexity of cases seeking acceptance into the Session: while it is easy to simply count cases, it is difficult to measure their complexity. Nonetheless, the Committee has undertaken the first comprehensive analysis of the docket caseload, hearing schedule, and decisional output from the Business

Session since its inception, along with qualitative descriptions of some of the typical cases found in the Session.

Committee Findings:

Based upon this analysis, the Committee found:

- As of September 30, 2004, 1,146 cases have applied for acceptance into the Session and 1,029 have actually been accepted. Most of the cases rejected from the Session have been due to lack of venue but, increasingly, rejections have been due to lack of case complexity. Given the general complexity of the caseload and the assignment of one judge over the life of each case, the Session has accepted what is in essence over 1,000 special assignments for adjudication since October 2000.
- Despite the lack of additional judges sitting in the Session, the average number of cases accepted into the Session per month has steadily increased each year, from 19 in 2002 to 23 in 2003 to 27 in 2004. Currently the Session takes in cases at a rate of about 325 per year, or about 216 per judge, per year. Most of these cases originated in Suffolk County, followed by Middlesex County; fewer cases have been transferred into the Session from Norfolk and Essex Counties.
- By (imperfect) comparison, each of the five judges appointed to the Delaware Court of Chancery manages approximately 175 new civil cases annually, in addition to their miscellaneous and estates docket. In order to handle this caseload, each judge is assigned a full-time law clerk.
- A substantial percentage of the cases accepted into the Session involve claims for breaches of contract or fiduciary duty, fraud, misrepresentation, business torts or other violations involving business relationships. Typical cases include those interpreting the state's business judgment statute, "Big Dig" disputes, and employment disputes involving alleged violations of non-competition clauses and trade secrets.
- There are an average of seven parties in a typical Business Session case. Those cases staying in the Session for over one year typically produce an average over 6 fully-briefed motions, including 1-2 "major" motions (*e.g.*, summary judgment, motion to dismiss, preliminary injunction, class certification and the like). Many of the "major" motions are accompanied by briefs in excess of 20 pages and lengthy affidavits with voluminous exhibits; the filing of reply and sur-reply memoranda is the norm rather than the exception.
- Presiding Justice Allan van Gestel conducts an average of 65 hearings per month, and the Session judges generate approximately ten published decisions per month. Decisions on motions for preliminary injunction are generally rendered within 10 days after oral argument; those on dispositive motions are rendered within 75 days; and decisions after bench trial are generally rendered within 30 days of submission. These decisions have been rendered almost exclusively without the assistance of law clerks.

- Over two-thirds of the cases accepted into the Session have been resolved to date. Slightly over half of such case resolutions have been through settlement; the remainder have been resolved through trial, dispositive motion or other action. Approximately two-thirds of the trials conducted in the Session are jury-waived.

The Committee has also continued its work surveying the “best practices” in business tribunals across the country, as well as monitoring the desirability of expanding either the geographic and/or subject matter jurisdiction of the Session. The Committee found:

- The number of business tribunals throughout the country is increasing, and those which have been in existence are steadily expanding their scope and capabilities based upon the positive reception of the tribunals among the legal and business communities.
- Many states use their business tribunals as pilot programs to test and implement technological advances within the state judicial system.
- Most business tribunals have law clerks specifically assigned to the judges sitting on the tribunal. According to one court, “it is not possible for a single judge to manage a caseload [within a complex business litigation docket]. . . without the assistance of a qualified research assistant.”
- Most, if not all, state tribunals have regularized data collection and reporting procedures and capabilities in order to consistently analyze resource allocation issues.

Ensuring that the Business Session has adequate judicial and support staff available to handle the current and projected future caseload will be crucial to the Session’s future success. The continued vitality of the Session in turn is critical to the Commonwealth’s reputation for handling business litigation within our state court system. While the establishment of the Session has at least arguably helped Massachusetts increase its ranking according to the United States Chamber of Commerce, the Commonwealth still has far to go in this regard.

Recommendations:

All of these factors suggest a number of recommendations for the future continued success of the Session:

- The number of judges assigned to the Session should be increased from 1½ to three full-time judges in the foreseeable future. After an initial “apprenticeship” period, the Court should consider locating one of these judges to Middlesex County to meet the growing demand there.
- The Judicial Nominating Commission should continue to review candidates for Superior Court positions whose background and interests would position them for selection to the Session as current judges either retire or leave the Session.
- The Superior Court should seek appropriate recall authority to encourage and allow Judge van Gestel to continue to serve in the Session after he reaches the mandatory retirement age next year.
- Judges should continue to sit in the Session continuously and without “riding circuit”: the assignment of one judge for the life of each case has been a critical factor in the success of the Session.
- The Superior Court should continue to consider whether to expand the Session into additional counties; in particular, Worcester County.
- A workable system for providing adequate law clerk support for the Session should be strongly explored. One means of financing this may be the imposition of increased filing fees for cases filed in the Session, as opposed to other civil sessions.
- The Chief Justice of the Superior Court should continue to maintain a mechanism for monitoring and reporting on the operations of the Session, which should be adequately funded so as to ensure appropriate data collection and reporting.
- Best practices in other jurisdictions should continue to be monitored. Specifically, the Superior Court should consider ways in which the Session can be used as a “pilot” session for new technologies and litigation management techniques.

Most of these recommendations have little, if any, budgetary impact. Each will be important to ensure that the Business Session continues to serve the particularized needs presented by complex commercial litigation within the state judiciary. The Session has been and can continue to be a tremendous success. The members of the Committee applaud the work of former Superior Court Chief Justice Suzanne DeVecchio in establishing the Business Litigation

Session, and look forward to the stewardship of new Chief Justice Barbara Rouse in helping the
Session continue and flourish.

THE HISTORY OF THE BUSINESS LITIGATION SESSION

The Business Litigation Session was established in the fall of 2000 following a five-year process involving input from numerous members of the bar and the judiciary.¹ In the summer of 2000, Superior Court Chief Justice Suzanne V. DeVecchio announced the creation of a special session in the Suffolk Superior Court to hear business-related cases. The Business Litigation Session was initiated as a two-year pilot program in Suffolk County commencing on October 2, 2000, with Superior Court Associate Justice Allan van Gestel presiding.

A. Criteria For Case Intake Into The Business Session

According to the Notice to the Bar issued by Chief Justice DeVecchio announcing the opening of the Session, cases involving the following issues may be admitted into the Business Session, at the discretion of the Presiding Justice:

- claims relating to the governance and conduct of internal affairs of business entities;
- claims relating to employment agreements affecting the governance or internal affairs of business entities;
- claims relating to liability of shareholders, directors, officers, partners, etc.;
- shareholder derivative claims;
- claims relating to or arising out of securities transactions;
- claims involving mergers, consolidations, sales of assets, issuance of debt, equity and like interests;
- claims to determine the use or status of, or claims involving, intellectual property;
- claims to determine the use or status of, or claims involving, confidential, proprietary or trade secret information;
- claims to determine the use or status of, or claims involving, restrictive covenants;
- claims involving breaches of contract or fiduciary duties, fraud, misrepresentation, business torts or other violations involving business relationships involving complex issues;

- claims under the U.C.C. involving complex issues;
- claims arising from transactions with banks, investment bankers and financial advisers, brokerage firms, mutual and money funds involving complex issues;
- claims for violation of antitrust or other trade regulation laws;
- claims of unfair trade practices involving complex issues;
- malpractice claims by business enterprises against professionals involving complex issues;
- claims by or against a business enterprise involving complex issues to which a government entity is a party; and
- other commercial claims, including insurance, construction, real estate and consumer matters involving complex issues.²

The Presiding Justice of the Business Session has the final authority to decide whether to accept a case into the Session, even if it meets the above criteria.

On February 12, 2003, following the successful completion of the Business Session's two-year pilot program, the jurisdictional reach of the Business Session was expanded to include Middlesex, Norfolk, and Essex Counties in addition to Suffolk County.³ Under the Administrative Order adopting this expansion, plaintiffs may file in the Session and defendants may seek to transfer into the Session cases with appropriate subject matter jurisdiction whose venue would otherwise land in Middlesex, Norfolk, or Essex Counties. Unlike cases filed in Suffolk County, cases transferred from other counties require the consent of both parties in order to satisfy statutory venue requirements. The acceptance of any cases -- whether originally filed in Suffolk or in one of the other three counties -- into the Session is at the discretion of the Presiding Justice.

Cases accepted into the Business Session are assigned to a single judge and are expected to remain with that judge throughout the life of the case. The continuity of a single judge permits ongoing management of discovery and the narrowing of legal issues throughout the case.

Shortly after assignment of a case to the Business Session, a Rule 16 Conference is scheduled to establish a case-specific tracking order. At that time, a presumptive trial date (generally within eighteen months) is scheduled by the Business Session judge in consultation with the parties.

The dates selected for trial are blocked out on the calendar of the judge, and will not be changed absent extraordinary circumstances.

B. Initial Report On Operation

In order to ascertain the progress of the Business Session, at the end of the Session's first year and a half of operation the Committee commissioned an independent survey, conducted by Atlantic Research & Consulting, of attorneys practicing in the Business Session. The survey sought to (i) measure overall satisfaction/dissatisfaction levels with the Business Session, (ii) measure satisfaction/dissatisfaction with individual aspects of the Session, (iii) determine attorneys' willingness to recommend the Session to clients and peers, and (iv) gauge interest in geographic expansion of the Session.

The survey indicated an extremely high degree of satisfaction with the Session. Among the key survey findings:

- 88% of survey respondents stated they were "extremely satisfied" or "very satisfied" with the Business Session overall;⁴
- 83% of respondents stated that the Business Session enabled them to give better legal service to their clients. When asked to describe how the Business Session allowed them to do so, respondents cited in particular the assignment of a single judge throughout the case, the timeliness of decisions and hearings, and the firm trial dates;
- 94% of respondents were "extremely satisfied" or "very satisfied" that the judge was prepared for their case;
- 91% of respondents were "extremely satisfied" or "very satisfied" with the firmness of the schedule established by the Business Session for their case;

- 55% of respondents had filed an emergency motion requiring prompt resolution, with 87% of those respondents reporting they were “extremely satisfied” or “very satisfied” with the efficiency of the Business Session’s response to that motion;
- 58% of respondents stated that their experience with the Business Session was “more favorable” than their experience with private ADR, and 60% stated that their experience in the Business Session would make them more likely in the future to recommend the Session to their clients rather than ADR;
- 97% of respondents would recommend the Business Session to their colleagues and clients; and
- 95% stated they believed the Business Session should be made permanent, with 89% favoring expansion to other counties.

Significantly, satisfaction levels among the survey respondents were consistent across all major analytic subgroups, such as practitioners from small, medium, and large firms, and those representing individuals versus corporations.

This survey was the subject of a report issued by this Committee in February 2003 and is discussed at length in that report.

C. Massachusetts’ Reputation For Handling Business Litigation

Shortly after the commencement of the Business Litigation Session, the United States Chamber of Commerce conducted a nationwide survey to capture each state’s reputation for handling business litigation, according to corporate general counsel and other senior litigators at public corporations. According to that survey, Massachusetts ranked poorly in a number of areas:

- 42nd in overall treatment of tort and contract litigation;
- 45th in timeliness of summary judgment decisions and dismissal of cases;
- 44th in juries’ predictability and 34th in juries’ fairness;
- 39th in efficiency of discovery;
- 37th in treatment of class action suits;
- 30th in judges’ impartiality; and
- 29th in judges’ competence.

U.S. Chamber of Commerce State Liability Systems Ranking Study, Final Report, Jan. 11, 2002.⁵

Two years later, the Chamber of Commerce repeated its survey, but this time with very different results. Massachusetts increased its standing substantially, jumping 6 spots - from an overall rank of 36 in 2002 to 28 in 2004 - with respect to the rating of the key elements of the state liability system. Massachusetts improved its ranking in nearly every area:

- 34th in overall treatment of tort and contract litigation;
- 39th in timeliness of summary judgment decisions and dismissal of cases;
- 36th in juries' predictability and 31st in juries' fairness;
- 35th in efficiency of discovery;
- 29th in treatment of class action suits;
- 27th in judges' impartiality; and
- 22nd in judges' competence.

U.S. Chamber of Commerce State Liability Systems Ranking Study, Final Report, March 3, 2004.⁶ An interim survey conducted by the Chamber of Commerce showed even more dramatic improvement.⁷

D. Staffing Of The Session

For the first two years of its existence, Presiding Justice van Gestel was the only specially-dedicated judge serving in the Session, with Judge Gordon L. Doerfer and then Judge Nonnie S. Burnes serving as the Session "back-up" judges, handling cases that Judge van Gestel could not adjudicate due to substantive or scheduling conflicts. The necessity for appointment of a second judge to the Session soon became apparent, and Judge Margot Botsford joined the Session in January 2002. While generally new cases accepted into the Business Session are assigned alternately between Judge van Gestel or Judge Botsford, Judge Botsford's caseload is not fully dedicated to the Session: throughout her appointment, she has managed the coordinated asbestos litigations pending in Superior Court previously supervised by Judge Hiller Zobel, sat from time to time in other civil and criminal sessions, and presided over a number of specially-assigned cases, such as the school funding litigation which culminated in a seven-month trial and

357-page decision in 2003-04. Since joining the Session, on average Judge Botsford has spent approximately 50% of her time on cases assigned to the Session.

Initially, law clerks rotated into the Session on a similar basis as other civil sessions. Given the specialized demands of the Session, utilization of law clerks through the current “pool” system generally has not proven feasible for a variety of reasons, including the fact that the frequent rotation of clerks out of the Session hinders their ability to delve thoroughly into the complex legal issues and volume of documents attendant with many significant motions in the Session (for which law clerk assistance would be most useful). Further, many clerks within the pool have neither the specialized training nor the desire to spend longer periods of time dedicated to the Session. Accordingly, the Session has essentially operated without any law clerks since the fall of 2001. As in other civil sessions, court reporters are available only sporadically; in most instances, parties desiring transcripts of hearings simply hire their own reporters.

Significant decisions rendered by justices sitting in the Session are published through a specialized database maintained by the Social Law Library. These decisions can be accessed by database subscribers through www.sociallaw.com. While not all Session decisions and orders are sent to the Social Law database, the majority of substantive decisions are; they thus provide a relatively comprehensive set of jurisprudence being developed through the Session.

The Social Law database plays a vital role in the development of case law jurisprudence on issues frequently raised in cases filed in the Business Session, such as derivative actions, majority/minority shareholder disputes, trade secret and non-compete employment litigation, to name a few. As recently noted in a report issued by the Corporate Governance Task Force of the Boston Bar Association, the Session provides specialized judicial guidance and enhances Massachusetts’ reputation as a well-equipped forum for business litigation.⁸ The Task Force

noted the significant value of the Session to the legal community and its critical role in developing corporate governance jurisprudence. Based on its findings, the Task Force recommended that “the Superior Court Business Litigation Session should be expanded and resourced sufficiently so as to enhance the state’s ability and reputation for resolving commercial disputes and contributing to the jurisprudential development of corporate governance principles.”⁹

THE WORK OF THE BUSINESS LITIGATION SESSION

A variety of policy considerations have supported the establishment of the Business Litigation Session in the Superior Court. In the same way that the legal profession has become increasingly specialized to handle complicated business litigation, so, too, must the courts follow suit in order to apply their competence adequately to such matters. The desire to develop a body of consistent trial court jurisprudence regulating business affairs is also more easily met when such cases are concentrated in one tribunal, rather than spread randomly among civil sessions or even relegated to private alternative dispute resolution. By matching judges with appropriate expertise to litigation requiring that expertise, judicial resources may be appropriately targeted through the removal of otherwise time-consuming cases from the regular docket. Accordingly, the American Bar Association Ad Hoc Committee on Business Courts in 1997 recommended that each state consider adopting a specialized business tribunal to handle such cases.¹⁰

Yet as with any decision to dedicate resources from a pooled system into a specialized tribunal, there is legitimate concern regarding whether the amount of resources so dedicated is appropriate when weighed against the resources available to the rest of the Superior Court civil and criminal sessions. Both the judiciary and litigants have an interest in ensuring that sufficient -- but not too many -- resources are dedicated to the Business Litigation Session. The resource allocation issue has become especially pointed as judicial budgets have significantly contracted

in the last few years, and as several Superior Court positions are just now being filled after many months of vacancy.

In an effort to present in a meaningful way the volume of work handled by the Business Session, this Committee has endeavored to analyze the decisions and caseload of the Session from its inception on October 2, 2000 through August 31, 2004. The Committee approached its task using three complementary methods. First, the Committee analyzed the docket of every case accepted into the Session. This analysis required the dedication of extensive resources to review every docket and decision, compile information in a uniform manner from the dockets, and then analyze the collected information. Second, the Committee reviewed every decision issued by the Session published in the Social Law Library electronic database, to determine the output of the judges in the Session. Finally, members of the Committee met with both Judge van Gestel and Judge Botsford in order to capture the tenor of cases and decision-making not necessarily reflected on the case dockets or judicial decisions issued in the Session.

Based upon this analysis, concerns that a specialized business tribunal would not carry a large enough caseload to justify the dedication of Superior Court justice(s) to it appear not to have materialized. As is described in more detail below, since its inception 1,146 cases have applied for acceptance into the Session and 1,029 have actually been accepted into it. The average case accepted into the Session has seven parties on the caption, and generates a relatively voluminous amount of paper over the life of the matter. Nearly half of the cases that have been resolved to date have done so through trial or dispositive motion, as opposed to settlement. Of those cases that go to trial, approximately two-thirds elect bench trials and one-third result in jury trials. Given the assignment of each case to one judge for the life of the case and the complexity of the average case, this amounts in essence to over 1,000 “special assignments” having been handled by one full-time justice in the Session (Judge van Gestel) and

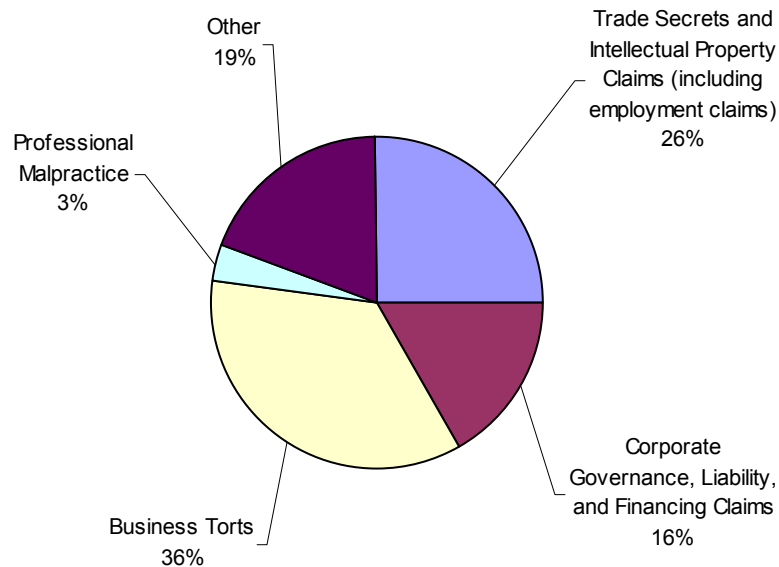
one-half of the time of another justice (Judge Botsford) since January 2002.¹¹ With brief exceptions, the Session has not utilized law clerks.

Despite the volume of cases and motions filed in the Session, the lack of law clerks, and the limited number of judges assigned full-time to the Session, the Session judges have managed to issue a noteworthy volume of decisions and opinions thereon.

The Session's workload is not expected to ease in the future, and is in fact expected to increase. The Session now receives about five new cases each week; as practitioners become more familiar with the Session and as its jurisdiction has expanded into Middlesex, Norfolk, and Essex counties, the number of new case filings has consistently and steadily increased over time, with no abatement expected.

A. Description Of The Types Of Cases Filed In The Session

Data regarding the types of cases admitted into the Business Session indicate that practitioners are using the Session for the complex types of business litigation originally contemplated by the Notice to the Bar. A substantial percentage of the cases accepted into the Business Session involved claims for breaches of contract or fiduciary duty, fraud, misrepresentation, business torts or other violations involving business relationships, followed by claims involving either restrictive covenants or the liability of shareholders, directors or officers.



In particular, there appear to be certain recurring case “types” that are both common to the Business Session and particularly well-suited to management by the Session:

- business cases involving novel questions of law or the interpretation of new or revised statutes (e.g., poison pill and shareholder demand issues)
- complex construction and land development matters, particularly those involving state and federal funding of large construction projects
- employment cases involving non-competition issues
- professional malpractice matters
- disputes between majority and minority interests concerning the governance of closely-held or family operated businesses

These categories of cases include those with complex factual and legal issues, highly sophisticated parties, time-sensitive issues that demand immediate resolution, significant potential damages and cover areas of intense government regulation or involvement. A summary of several of these cases below provides a flavor of typical Session cases.

1. *Seidman v. Central Bancorp, Inc.* (No. 2003-00547)¹²

Three consolidated cases involving the internal affairs of Central Bancorp, Inc., were brought to challenge the propriety of the implementation by Central Bancorp of a “poison pill” under the Massachusetts anti-takeover statute and the codified business judgment rule, Mass. Gen. L. 156B, §§ 32A and 65. Two of the cases were commenced in January 2003 and the third in May 2003.

The cases involved nearly 30 separate parties and over 10 separate law firms, including such firms as Skadden, Arps, Slate, Meagher & Flom, and Wilmer Cutler Pickering Hale and Dorr. The first two cases began with plaintiffs’ emergency motions for temporary restraining orders; these motions were followed by defendants’ emergency motion to dismiss under Rule 12(b)(9) because of a pending federal court action. All three cases were consolidated in the Business Session when the federal court action was stayed to permit the Business Session to address state law claims which it deemed “matters of first impression.”

With the case firmly in front of the Business Session, the parties filed multiple motions for summary judgment, nearly all of which were accompanied by motions to file memoranda in excess of 20 pages. Along with these motions, the Business Session dealt with numerous motions by the parties concerning the treatment of confidential information and other discovery disputes. In the brief seven-month period these cases were in the Session, the Court held at least three hearings on “major” motions and addressed a total of over twenty motions brought by the parties, many of which involved novel and complex issues of law.

Fewer than six months after entering the Session, the parties had fully briefed and argued summary judgment. The Business Session issued its 23-page decision shortly after oral argument. The decision addressed the interplay of two key corporate statutory provisions

relating to the business judgment rule and to shareholder rights agreements, neither of which had previously been the subject of appellate review in that context.

2. *W.B. Mason Co., Inc. v. Staples, Inc.* (No. 2000-05042)

The Business Session has accepted almost 50 cases involving restrictive covenants between employers and employees. One of the first such cases was that brought by W.B. Mason Co., which filed suit against Staples on the same day it hired two sales employees from Staples. The suit sought declaratory relief regarding the obligations of the sales employees under confidentiality and non-compete agreements that the employees had entered into while with Staples. Staples immediately cross-motivated, seeking injunctive relief on its own behalf. The Court advanced the trial to consolidate it with the cross-motions for the injunctive relief. Less than two months after the case was filed, and after a period of heavy discovery during which the Session resolved numerous discovery motions and motions *in limine*, the Business Session held a five-day jury waived evidentiary hearing. Shortly after the hearing, the Session granted Staples injunctive relief.

During the course of litigation between the parties, the Session addressed over 35 motions submitted by the parties and held six separate hearings and one five-day evidentiary hearing. Both the emergency nature of the initial filing and the flurry of ensuing litigation is not uncommon for the restrictive covenant cases that are filed in the Business Session.

3. *Munshani v. Signal Lake Venture Fund II LP* (No. 2000-05529)

The *Munshani* case illustrates the type of judicial innovation which can be facilitated by the assignment of one judge to a case for the duration of the case. In December 2000, Suni Munshani filed a complaint alleging that he was entitled to \$25 million for services rendered by Munshani in connection with raising capital for defendant's venture capital fund. Munshani also

filed a case in federal court against a potential recipient of the venture capital funding. In both the state and federal cases, the authenticity of a particular email became a key issue. Both Munshani and the purported sender of the disputed email filed affidavits, with Munshani insisting the email was authentic and the sender claiming it was fraudulent.

In order to bring the issue to a head, Judge van Gestel appointed a neutral computer forensics expert and ordered the parties to split the cost of the appointment. The forensics expert provided a 147-page expert report to the court concluding that the email was “clearly not authentic.” The court permitted the parties, as well as the non-party purported sender of the email, to file motions addressing the expert report. At this point, Munshani invoked his Fifth Amendment right. The court dismissed the action and ordered Munshani to reimburse the defendants for the costs they incurred relating to Munshani’s fraud.

In the first nine months of the case, the parties appeared before the Session on nine separate occasions. The Session’s ongoing involvement in the case and its intimacy with the facts of the case allowed it to recognize that the authenticity of the disputed email was a critical question and to devise a mechanism by which its authenticity could be tested. Once identified, the court devised a method to resolve this critical issue early in the litigation. In the process, both the litigants and the superior and federal courts benefited from the early resolution of a key evidentiary issue, and in this particular case, from the early identification of a potential fraud on the courts.

4. Other Types of Cases: Family Disputes

The Business Session has addressed a number of cases involving the internal affairs of family or other closely-held corporations. These cases are frequently brought by dissatisfied minority shareholders seeking immediate emergency injunctive relief, followed by a string of motions filed by either party in increasingly contentious proceedings. Not infrequently, the early

framing of potential outcomes by the court can encourage the parties to arrive at a resolution that may dissolve the company, but does not destroy the business.

Siegel v. Siegel (No. 2003-00292) is an example of a typical case involving a closely-held corporation. Filed in January 2003, the minority shareholders alleged breaches of fiduciary duty and other improprieties by the majority shareholder. Plaintiffs sought injunctive relief; discovery was so contentious that a discovery master was sought to address them. The Business Session addressed a number of discovery and other motions and held two hearings within the first five months of the case.

Similarly, the Session has been handling derivative litigation between the members of the Demoulas family in *Demoulas v. Demoulas Supermarkets, Inc.* (2003-03741), which was filed in August 2003. The case was accepted into the Session and commenced with a request for emergency injunctive relief, which in turn prompted an emergency motion to dismiss, several other motions to dismiss or in the alternative for summary judgment, numerous motions to exceed page limitations on the memoranda supporting these motions and motions regarding confidentiality. In the short period of time this case has been in the Session it has already generated two preliminary written decisions and a detailed final decision assessing novel issues surrounding the independence of corporate directors in a closely-held corporation.

B. Quantitative Analysis Of Cases Filed In The Session

In addition to reviewing in-depth a sampling of cases filed in the Session, the Committee also analyzed quantitatively the complexity and number of all the cases filed in the Session since its inception. This analysis was conducted by reviewing the docket sheets of every case filed therein from the beginning of the Session on October 2, 2000 through August 31, 2004.

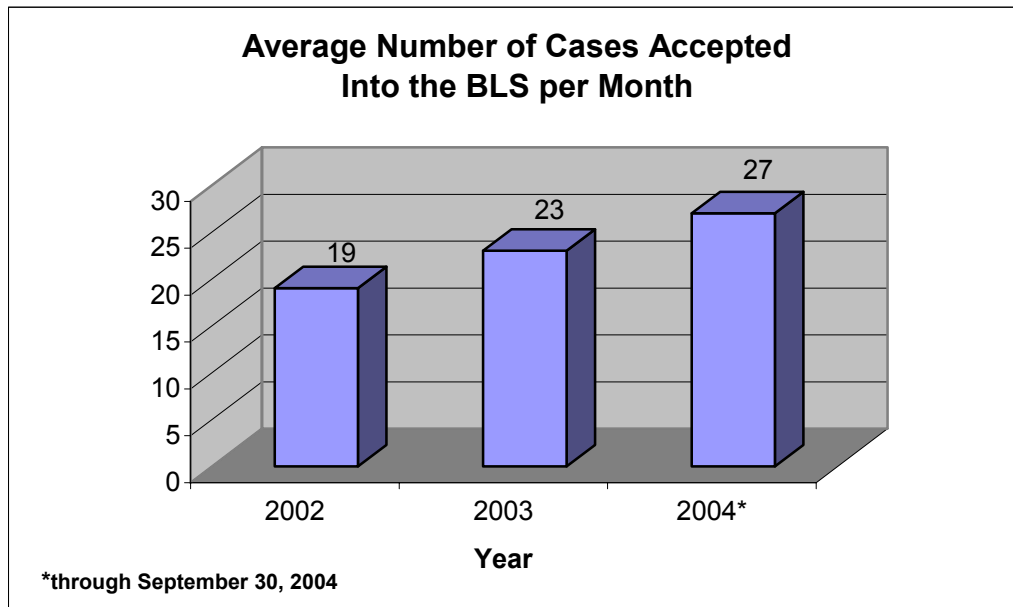
The court has maintained a running list of all cases accepted into the Business Session, along with the type or category of such case. In addition, the Suffolk County Clerk of Court maintains a list of the courtroom to which a case is assigned; this list was used to confirm the completeness of the judges' master case list.

Using the on-line docket system maintained by the Administrative Office of the Trial Court, a docket was printed for each case accepted into the Business Session. The dockets were then analyzed to determine the frequency and complexity of motions filed during the life of each case, the type of issues presented by the case, and the ultimate resolution of the case.

1. Number of Cases Filed in the Session

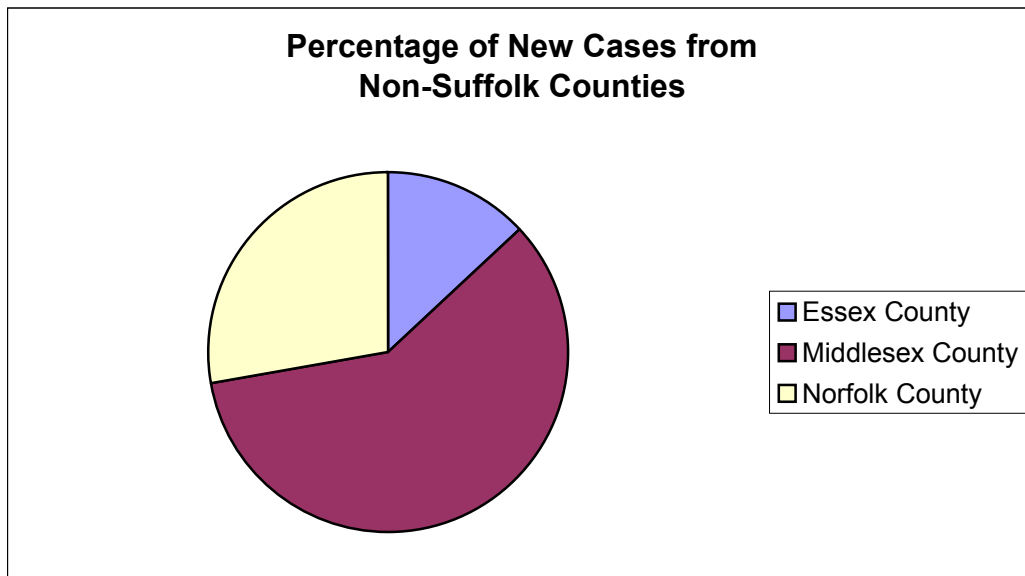
In all, 1,146 cases applied for acceptance into the Business Session and 1029 have been accepted into the Business Session from October 2, 2000 through September 30, 2004. Upon the Session's inception, 81 cases satisfying the case intake criteria that were already pending in Suffolk Superior Court were transferred into the Session either *sua sponte*, by motion of one of the parties, or on the recommendation of a judge in the regular session. As of September 30, 2004, another 948 new cases have been accepted into the Business Session and 117 cases have been rejected, mostly for venue-related reasons but increasingly due to a lack of complexity.

As the chart below depicts, the frequency of new case filings has consistently and steadily increased over time: currently, approximately 5 new cases are accepted into the Business Session each week, with that number continuing to rise as attorneys become more familiar with the Session and as the jurisdiction of the Session has expanded.



Since the expansion of jurisdiction to include cases from Essex, Middlesex, and Norfolk Counties in February 2003, the Court has accepted a total of 176 cases from those counties: 23 from Essex, 104 from Middlesex, and 49 from Norfolk. As with the number of filings from Suffolk County, the percentage of cases in the Business Session from Essex, Middlesex and Norfolk counties has slowly been increasing over time as well, despite the fact that either party can block a transfer into the Session simply by raising an objection on venue grounds.

Importantly, should an additional Session judge be located in Middlesex County, the number of cases there would most likely increase significantly, since one party's venue objection would not exclude it from the Session.



Of the 1,029 cases accepted into the Session, over two-thirds have been resolved as of September 30, 2004. Nearly 400 cases were resolved by settlement, and nearly 300 other cases have been resolved through trial, dispositive motion or other action (including a small number of cases that were removed to federal court or stayed pending arbitration). While the Committee did not calculate the average time it took to resolve a case in the Business Session, the fact that such a high percentage of the cases accepted into the Session since October 2000 have been resolved suggests that cases are moving quickly from entry into the Session to disposal. Of the cases that have reached trial in front of Judge van Gestel, approximately two-thirds of cases involve bench trials and one-third involve jury trials.

2. Complexity of Cases Filed in the Session

Each of the cases filed in the Session was reviewed to determine case complexity, as measured by such factors as the number of parties named in the litigation, and the number and

type of motions submitted in the case. In so doing, the Committee paid special attention to the number of motions filed in each case, as well as the number argued and decided by the Session in a given month. This was done by categorizing the motions filed in each case into “major” motions (e.g., motions for summary judgment, motions to dismiss, motions for class certification, and the like) and “minor” motions (e.g., discovery motions, motions to appear pro hac vice, motions to amend pleadings, and the like), depending upon the apparent and actual complexity of the motion.¹³ Finally, to the extent a case was resolved, the Committee collected information on how such resolution was achieved.

Most of the cases in the Business Session involve multiple parties and numerous sets of attorneys. Of the cases reviewed by the Committee, the number of parties averaged nearly 7 per case, thereby suggesting a relatively high degree of complexity.

The volume of motions also indicates a high level of case activity in addition to complexity. In order to determine the average number of motions filed in a case over the course of its pendency in the Session, the Committee particularly examined the Motion activity of those cases pending in the Session for at least a year. In all, 517 “major” and 2308 “minor” motions were filed in the 334 such cases reviewed by the Committee. These motions were analyzed both in terms of the number filed over the life of a particular case, as well as the number filed in any given month among all the cases pending in the Session.

An analysis of these cases indicated that the average case staying in the Session for at least one year involved the filing and adjudication of over 6 motions during the life of the case. Each case had 1.5 “major” motions on average. Over 62 of the 334 year-long cases reviewed had 3 or more major motions filed in the Business Session, and over half had 4 or more minor motions per case. The vast majority of motions filed in the Session, whether “major” or “minor”

in nature, were thoroughly briefed, often accompanied by requests to file briefs in excess of 20 pages, and with reply memorandum and multiple affidavits and supporting documents.

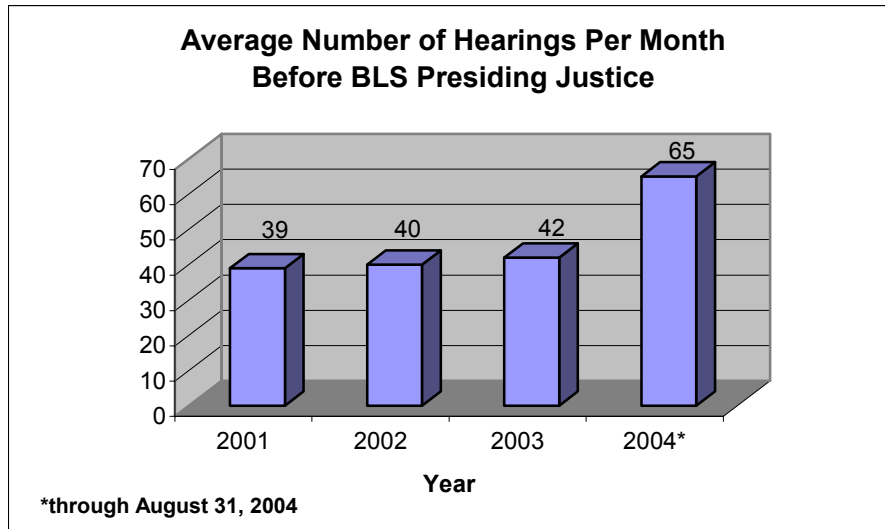
C. Analysis Of Hearing And Decisional Volume In The Session

The Committee also attempted to document the workload volume of the Session, as measured by the number of hearings conducted and the number of decisions issued in the Session over time. Again, the findings suggest that, despite the complexity of the cases and the number of motions and trials considered in any given month, the justices in the Session still produce an extraordinarily high volume of decisions on the issues presented to them, and do so at a relatively rapid pace.

1. Hearing Schedule

The Committee closely analyzed the hearing schedule maintained by Presiding Justice van Gestel, as reflected in the court calendar of Session business maintained by the Administrative Office of the Trial Court (AOTC).¹⁴ The Committee counted every hearing that was identified by the AOTC as “held as scheduled.” Four types of hearings were identified. Substantive hearings were the largest category and included all hearings on identifiable substantive topics. A large number of hearings were identified by the AOTC as “miscellaneous.” Further review of the motions pending on the dockets at the time such “miscellaneous” hearings were held suggests that these hearings addressed a mixture of substantive topics, such as discovery issues, evidentiary issues, procedural maneuvering and the like. Status hearings (including Rule 16 hearings) were identified as a separate category, as were trial days.

This analysis clearly shows that the Business Session has been managing an extensive workload and that the workload is increasing exponentially. As the chart below depicts, the average number of hearings per month -- including substantive, status, trial and miscellaneous issues -- has increased from 40 in 2001 to 65 for the first eight months of 2004.



The Business Session now handles, on average, over 16 hearings per week. Over 45% of those hearings are either substantive or miscellaneous (likely including at least one substantive motion). Status hearings account for another 45% of the hearings in the Session. While status conferences in other Sessions are routinely managed by clerks, in the Business Session such hearings can include substantive discussions regarding unique case management and discovery issues, and other significant legal issues. According to the AOTC data, status hearings in the Business Session are always heard by the judge.

The number of motions heard in the Session tells only part of the story of the work of the Business Session. The individuals who reviewed the dockets uniformly commented about the extent of briefing that was presented for even seemingly routine motions. Requests to file

memoranda in excess of 20 pages were routine, numerous affidavits with lengthy exhibits (many times several inches worth) were filed in support of motions, and reply and surreply memoranda were the norm rather than the exception. The output of the Session, discussed in the next section, confirms that the motions in turn frequently required detailed analysis and lengthy written decisions on novel issues of law.

2. Number and Length of Decisions Issued

The heavy motion and trial practice reflected in the docket sheets and the court calendar is also reflected in the number and length of decisions issued by the Session. The Committee sought to analyze the quantitative output of the Session by reviewing a specialized database maintained by the Social Law Library containing much of the substantive work of the Session, dating back to its inception in the fall of 2000. This database contains a number of categories of documents, including, among other things, memoranda and orders concerning dispositive motions or motions for injunctive relief; various interlocutory motions with significance to the underlying merits of the case; jury instructions; and findings of fact, rulings of law and orders for judgment.

The Committee generated a summary of the decisions and other documents generated by the Session and available from the Business Litigation Session database maintained by the Social Law Library, from October 16, 2000 through August 30, 2004. From its inception, it has been the policy of the Session to send electronic versions of its substantive rulings to the Social Law Library for compilation. Thus, while the Session does not publish its decisions on “minor” motions, most substantive decisions of the Session are available. The Committee gathered the following information from the Social Law Library database:

Case Name

Docket Number

Topic of Decision

Decision Date

Length of Decision¹⁵

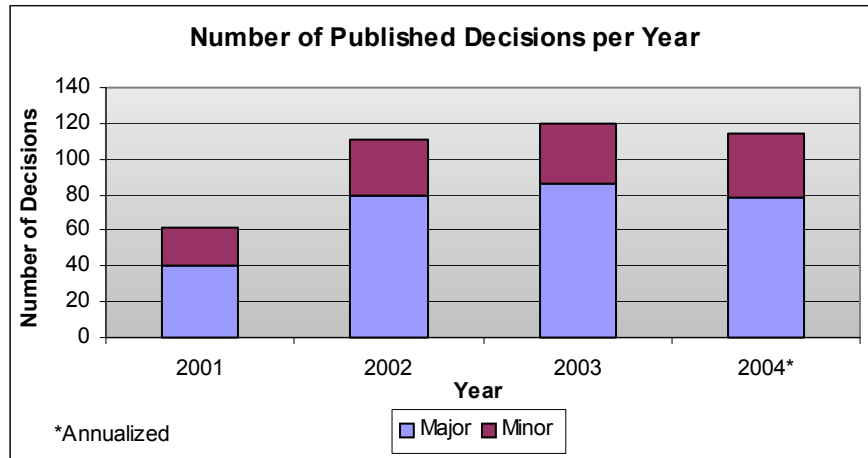
Submission Date

Days Under Consideration¹⁶

Since October 2000, the Session has generated well over 3,600 pages comprising 345 substantive decisions, orders, and other documents sent to Social Law for publication. As such, these numbers do not include ordinary, routine documents that the Session did not deem worthy of transmittal to the Social Law Library. The average memorandum and order on motions for injunctive relief has been 17 pages long; the average memorandum and order on dispositive motions has been 23 pages long; and the average findings of fact and rulings of law has been 29 pages long. The lengths of these decisions, orders, and other documents have ranged from as few as 8 pages to as many as 88 pages.

Depending upon the nature and demands of the proceeding, the Session has demonstrated an ability to resolve business disputes with remarkable speed. Motions for preliminary injunction appear to have been decided, on average, within 10 days of being submitted for decision. Dispositive motions also move with considerable speed, having been decided, on average, within 73 days of being submitted for decision. Bench trials, which require detailed findings of fact and rulings of law, have been decided by the Session, on average, within 30 days of submission. In an average month, the Session produces approximately 10 decisions totaling approximately 106 pages. And, as noted above, such output has been generated in large part without the assistance of a law clerk.

The following chart depicts the number of decisions the Business Session produced per year from 2001 to 2004.¹⁷



The Committee also explored a typical month of activity for the Session. In June 2004, for example, Judge van Gestel and Judge Botsford produced fifteen published decisions totaling 160 pages. Nine of the decisions were in response to “major motions,” including motions to dismiss, motions for summary judgment, and motions for preliminary injunction. Six of the decisions involved “minor” motions, such as motions to compel answers to deposition questions and motions to substitute the plaintiff; the Committee did not count decisions on other motions which were not published through Social Law. That same month, Judge van Gestel alone held a total of 36 hearings, including fifteen conferences, three summary judgment motions, three motions to dismiss, and three malpractice tribunals as well as fifteen hearings on other motions.

During the last week of the month alone, the Session judges rendered four decisions and heard two major motions and nine minor motions. These included, for example, an opinion and order denying a motion to dismiss in *BAE Systems v. Electronic Systems Integration, Inc.*, SUCV2003-05168, which case involved long-term lease agreements and several subsequent corporate transactions involving four defendant technology firms businesses; and cross-motions for partial summary judgment in *Boston Properties Limited Partnership v. Altid Enterprises*,

LLC, SUCV2002-05363, which involved alleged breaches of a complicated “contribution agreement” in the commercial real estate context. Judge van Gestel also heard eleven motions that week, including a motion for summary judgment in a commercial leasing dispute in *R.K. Wheeler LLC v. Moran Foods, Inc.*, SUCV2003-03053, and a motion to dismiss in *Frishman et al v. Maginn*, SUCV2004-00673, a case involving allegations of fraudulent inducement to invest in a start-up company.

“BEST PRACTICES” AMONG BUSINESS TRIBUNALS ACROSS THE U.S.

The notable increase in the number of cases filed, the number of hearings held, and the number of decisions issued by the Business Session is consistent with the marked increase in demand for business tribunals across the country. As indicated in the Committee’s initial Status Report of February 2003, the number of business tribunals throughout the country is increasing, and those which have been in existence are steadily expanding their scope and capabilities. Given the recent advances in the number and sophistication of business tribunals across the country, the Committee gathered updated information on both existing tribunals as well as those established since the last Committee report. While in February 2003 the Committee counted eight specialized business tribunals up and running, there are now fourteen states with some form of business tribunal in place.¹⁸ Moreover, these tribunals have become increasingly prevalent and technologically savvy. A number of states are just launching the specialized courts, while others continue to improve their existing business court systems with higher-functioning technology and more efficient case management mechanisms. Most courts also feature data collection and reporting functions to assist in oversight of the tribunal, and dedicated law clerk resources to assist the courts in adjudicating the often complex and novel issues of law presented by their cases.

A. New Business Tribunals

Since the Committee last reported in early 2003, several states have introduced business court initiatives. In February 2003, Florida also opened a business court, which will hear cases coming from Florida's 9th Judicial Circuit, which covers Orange and Osceola counties. The cases primarily concern mergers and acquisitions, corporate operations, accusations of officer misconduct, shareholder lawsuits, breach of fiduciary duty, the dissolution of partnerships, and a smaller number of real estate and employment cases. In just one month, the judge assigned to the Court accepted over 200 existing cases and anticipates a potential caseload several times that size.¹⁹ Florida Business Court advocates expect the Court to enable complex cases to move more quickly through the system and encourage businesses to locate in counties within the Court's jurisdiction.

The Michigan State Legislature has taken a slightly different twist on the trend, approving funding for a business-oriented CyberCourt in June 2003.²⁰ The CyberCourt enables attorneys to try cases, file briefs and view evidence electronically. Attorneys can also deliver oral argument by teleconference and electronic mail. Lawyers representing parties in business cases will not have to be physically present in Michigan or licensed to practice law in Michigan in order to appear in CyberCourt.

Based on the success of other states, the Maine Supreme Judicial Court Chief Justice has also indicated her intention to establish a court in that state for complex business litigation, which would provide greater efficiency and expertise for business cases.²¹ Although still in the discussion phase, the court would ideally make litigation a more affordable alternative for Maine's high number of small businesses and create precedent and rules for future business cases. Similarly, the Oklahoma legislature approved the "Business Court Act" in March 2004,

which would allow district courts to establish business courts similar to existing specialized dockets.²²

B. Technological Advances in Existing Tribunals

Many states with existing business tribunals are becoming progressively more reliant on technology to manage and try cases. In 2003, New York and North Carolina implemented new electronic filing procedures.²³ The new filing procedures are intended to significantly improve security, performance and overall system stability. Both states offer free training and online tutorials for their electronic systems.

North Carolina

The North Carolina system upgrade accommodates technological advances in the courtroom. Litigants will not have to bring supplemental equipment to court and Internet resources will be available to all parties. Attorneys will be able to employ video, electronic documents, electronic slide shows and three-dimensional images in their case presentations. The system maintains all of the media filed in a case right at the courtroom podium and enables attorneys to mark documents on the screen during presentations. The system also provides superior tools for judges, including jury instruction processing, bench book reference, legal research, and court communication.²⁴

New York

The New York County Commercial Division has undertaken several steps to promote electronic filing.²⁵ Law firms and attorneys were resistant to the e-filing pilot program launched in 2001 out of concern for confidentiality and work product duplication. The court responded to their concerns by implementing enhanced security features, permitting litigants to e-file certain documents under seal, and providing ongoing training programs which awarded Continuing Legal Education credits to attorneys. The court also encouraged e-filing by offering a special

incentive: although the typical Commercial Division threshold amount in controversy was \$125,000, for those willing to file electronically, the court lowered the limit to \$25,000. Electronic filing is still not mandatory in the New York Commercial Division, but due to the efforts by the Court, it has become much more prevalent: while only 35 cases were e-filed the first year of the program, several hundred were e-filed in 2003. A New York County Commercial Division announcement noted that “[e]lectronic filing represents the future for the litigation process in New York State.”²⁶

In addition to technological advances, the New York Commercial Division has expanded geographically since the first experimental division was created in 1993.²⁷ The State established branches in Erie, Nassau, and Westchester Counties in 1999 and in Albany, Kings and Suffolk Counties in 2002.

C. Recent Judicial Reports

As in Massachusetts, several states are reporting dramatic success with their business litigation tribunals. The Rhode Island Judiciary reported on their Business Calendar in their 2003 Annual Report.²⁸ In the report, the Judiciary acknowledges the Superior Court’s Business Calendar as a highly successful and efficient endeavor despite a nearly twenty-five percent increase in cases filed during 2003. The Nevada Judiciary also noted the success of their business courts in a 2003 State of the Judiciary Message. In a 2003 briefing to the Nevada Legislature, Chief Justice Deborah Agosti stated that the business court had led to more efficient case disposition despite a nearly twenty-five percent increase in cases filed.²⁹

California

The National Center for State Courts (NCSC) published a comprehensive evaluation of the California Complex Civil Litigation Pilot Program in June 2003.³⁰ The report addressed case management systems and included interviews with judges and attorneys. Based on NCSC’s

findings, the complex litigation program is a success. Ninety-seven percent of attorneys interviewed reported that cases in the complex litigation courts were managed expeditiously by judges who grasped the legal and evidentiary issues. Cases in the pilot program “received individual attention from judges who are, by all accounts, experienced, knowledgeable, and genuinely interested in complex litigation.”³¹ Compared to complex cases filed in non-pilot courts, pilot program cases had significant more activity, particularly in settlement and status conferences. Based on their findings, NCSC concluded that the complex litigation pilot program should continue and explore potentially beneficial technology to aid in case management.

Delaware

The Delaware Judiciary completed a similar report in 2003 measuring the effectiveness of its Court of Chancery.³² In 2003 there were 843 civil cases filed; with five judges appointed to the courts, each judge manages approximately 170 new civil cases annually.³³ The Delaware legislature also approved expanding Court of Chancery jurisdiction to technology disputes and gave the court the power to conduct “mediation only” programs for technology and business disputes. In October 2003 the Court of Chancery launched the LexisNexis e-filing system requiring all documents to be filed electronically, becoming the first state to adopt e-filing for its entire civil docket regardless of the amount in controversy. The new system is intended to “enhance the Court’s reputation for efficiency, speed and accessibility, as well as reduce the space needed for documents filed with the Register in Chancery.”³⁴ The court also plans to implement the commercial off-the-shelf software program (COTS) to combine the court’s entire caseload into a single case and financial management system.

D. Staffing

Most functioning business tribunals have law clerks assigned and find them to be extremely valuable. The lack of adequate law clerk resources in the Massachusetts Business

Session stands in stark contrast to the law clerk support provided in other states. The Delaware Court of Chancery has law clerks assigned to each Chancellor. In California, each Business Court Judge works with a courtroom clerk and a researching attorney. The New York Commercial Division justices each work with a law clerk. A recent report concerning the North Carolina Business Court noted the importance of law clerks in business tribunals: “The services of a law clerk are indispensable for proper functioning of a Business Court installation. Due to the extremely complex and technical nature of complex business litigation, it is not possible for a single judge to manage a caseload ... without the assistance of a qualified research assistant.”³⁵

CONCLUSION AND RECOMMENDATIONS

The Business Litigation Session has enjoyed an extraordinarily successful and productive first four years of existence. As the Committee’s February 2003 Status Report demonstrated, practitioners in the Session give it overwhelmingly positive reviews, with more than 80% indicating their belief that the Session enables them to provide better legal service to their clients, and 60% indicating that their experience in the Session would make them more likely in the future to recommend the Session to their clients over private alternative dispute resolution services. As a result, the scope of the Session has been expanded to include cases from Middlesex, Norfolk, and Essex Counties. In a sense, the Session has become a victim of its own success: as practitioners have become more familiar with the Session, and as the reach of the Session has expanded, the caseload borne by the justices in the Session has become increasingly difficult to manage.

The continued vitality of the Session is critical to the Commonwealth’s reputation for handling business litigation within our state court system. While the establishment of the Session has at least arguably helped Massachusetts increase its ability to handle business

disputes according to the United States Chamber of Commerce, the Commonwealth still has far to go in this regard.

Ensuring that the Business Session has adequate judicial and support staff available to handle the current and projected future caseload will be crucial to the Session's future success. The Boston Bar Association has recommended that the Business Session be adequately resourced so as to ensure the continued development of case law on corporate governance in Massachusetts, especially as that issue takes on greater prominence in the wake of federal reforms.

The next several years will prove critical to the future of the Business Litigation Session. On November 1, 2004, Superior Court Chief Justice Barbara Rouse took office; she has indicated her support for the Business Session and will undoubtedly bring new ideas to the table. In December 2005, BLS Presiding Justice Allan van Gestel will reach the mandatory retirement age for state judges and, unless special recall measures are adopted, will be unable to continue to serve in leadership in the Session; regardless of his recall status, a new Presiding Justice will need to be named upon Judge van Gestel's retirement. Budgetary constraints will continue. Demand for the development of state law jurisprudence on issues affecting Massachusetts corporations, including interpretation of the new Business Corporation Act and corporate governance standards in the wake of recent federal reforms, will only increase. And, new "best practices" among business tribunals around the country are being developed at an extraordinarily rapid pace. At the same time, the popularity of the Session continues unabated, with additional cases being filed for acceptance into the Session at an ever-increasing rate.

All of these factors suggest a number of recommendations for the future continued success of the Session:

- Given the projected continued increase in the number of Business Session filings, the number of judges assigned to the Session should be increased from 1½ full-time judges to three in the foreseeable future. As new judges enter the Session and become familiar with it, the Court should consider locating one of the judges in Middlesex County so as to meet the increasing level of demand there.
- The Judicial Nominating Commission should continue to include review of candidates for Superior Court positions whose background and interests would position them for rotation into the Business Session as current judges either retire or leave the Session.
- The Superior Court should seek appropriate recall authority to encourage and allow Judge van Gestel to continue to serve in the Session after he reaches the mandatory retirement age next year.
- Judges should continue to sit in the Session continuously and without “riding circuit”: the assignment of one judge for the life of each case has been a critical factor in providing consistency of results during the case, which in turn is one of the primary attractions of the Session to practitioners.
- The Superior Court should consider closely whether to expand the Session into other counties, and in particular Worcester County. While the Committee’s February 2003 Status Report recommended that complex business cases in other parts of the state be handled through the expanded use of special assignments, this system does not appear to have worked as well as had been hoped, and should be re-examined.
- A workable system for providing adequate law clerk support for the Session should be strongly explored. As noted above, the cases in the Session generate such a large volume of briefing on novel and complex issues that the availability of adequate law clerk support will significantly affect its ability to meet demand into the future.
- The Chief Justice of the Superior Court should continue to maintain a mechanism for monitoring and reporting on the operations of the Business Session, which should be provided sufficient of funding so as to ensure appropriate data collection and reporting is conducted. The court should also ensure that the Business Session is equipped with adequate case, hearing, and docket tracking systems in order to consistently analyze the workload status of the Session over time.
- Best practices in other jurisdictions should continue to be monitored. Specifically, the Superior Court should consider ways in which the Session can be used to “pilot” new technologies and litigation management techniques.

Most of these recommendations have little, if any, state budgetary impact. Each will be important to ensure that the Business Litigation Session continues to be able to serve the particularized needs presented by complex commercial litigation within the state judiciary.

We welcome input and comments on the issues raised by this report.

Respectfully submitted,

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December 2004

¹ See "A Proposal for Adjudication of Complex Commercial Cases," Boston Bar Association, citing Press Release of November 7, 1996.

² See "Superior Court Establishes Business Court Procedure," 29 Mass. Lawyers Weekly 268 (October 2, 2000).

³ See Administrative Directive No. 03-1, "Superior Court Business Litigation Session Extension and Expanded Venue."

⁴ Participants were asked to rate their satisfaction levels on a scale of 1 to 7, with 7 being "extremely satisfied" and 1 being "extremely dissatisfied." Responses of 6 on the 7-point scale were interpreted as "very satisfied."

⁵ U.S. Chamber of Commerce State Liability Systems Ranking Study, Final Report, Jan. 11, 2002, available at: <http://www.supreme.state.az.us/best/uschamb/reportchamer.pdf>.

⁶ U.S. Chamber of Commerce State Liability Systems Ranking Study, Final Report, March 3, 2004, available at: http://www.pacdelaware.com/practicegroups/IRL_HarrisPoll2004.pdf.

⁷ In the interim report, released in February 2003, Massachusetts ranked:

- 22nd in overall reputation;
- 21st in overall treatment of tort and contract litigation;
- 31st in timeliness of summary judgment decisions and dismissal of cases;
- 21st in juries' predictability and 25th in juries' fairness;
- 22nd in efficiency of discovery;
- 16th in treatment of class action suits;
- 18th in judges' impartiality;
- 12th in judges' competence; and
- 10th in treatment of scientific and technological evidence.

U.S. Chamber of Commerce State Liability System Ranking Study, Final Report, April 4, 2003, available at www.supreme.state.az.us/best/uschamb/2003uschamb.pdf.

⁸ Boston Bar Association, Task Force on Corporate Governance: Raising the Bar in the Boardroom - Massachusetts Corporate Governance Issues in the Wake of SOXA, available at: <http://www.bostonbar.org/prs/corpgov.pdf>.

⁹ *Id.* at 31.

¹⁰ Report of the ABA Ad Hoc Committee on Business Courts, "Business Courts: Towards A More Efficient Judiciary," 52 Bus. Law. 947 (May 1997), summary of contents available at: <http://www.abanet.org/buslaw/tbl/mci/litigation.html>.

¹¹ By means of (imperfect) comparison, the five chancellors of the Delaware Court of Chancery and their five clerks typically handle among them a caseload of approximately 1,000 pending civil cases, or approximately 900 new filings each year, in addition to their estates and "miscellaneous" caseload. 2003 Annual Report of the Delaware Judiciary, available at <http://courts.state.de.us/Courts/Supreme%20Court/2003%20Annual%20Report/>.

¹² This matter included two other cases, PL Capital, LLC v. Central Bancorp, Inc. (No. 2003-00554) and Central Bancorp, Inc. v. PL Capital, LLC (No. 2003-02287).

¹³ The following motions were always considered "major":

- Rule 12 - Motion to Dismiss
- Rule 23 - Class Action
- Rule 23.1 - Derivative Actions
- Rule 50 - Motion for Directed Verdict
- Rule 52 - Findings by Court
- Rule 56 - Motion for Summary Judgment
- Rule 57 - Declaratory Judgment
- Rule 65 - Injunctions

The following motions could be considered "major," depending on the extent of the briefing, whether a hearing was held and other factors reflected on the docket:

- Rule 4 - Restraining Orders/Attachments
- Rule 9 - Pleading Special Matters
- Rule 11 - Sanctions
- Rule 14 - Third-Party Practice

Rule 23.2 - Unincorporated Associations

Rule 24 - Intervention

Rule 42 - Consolidation

Rule 43 - Motions in Limine

Rule 62 - Stay Pending Appeal.

All other motions were generally presumed to be “minor,” unless accompanied by considerable briefing, a hearing or other intervention or action by the Business Session.

¹⁴ Because Judge Botsford splits her time between non-BLS cases and BLS cases, and because such division of time varies widely from month to month, the Committee focused on Judge van Gestel’s hearing schedule in order to provide a higher degree of accuracy and consistency in its analysis on this point.

¹⁵ Because the database is maintained in electronic form, the printed pages of the database do not lend themselves to determining the true length of decisions and other papers issued by the Session. A random sampling of decisions issued by the Session in typical double-space, 12-point font were compared against the electronic versions available in the Social Law Library database. Based upon this comparison, the Committee determined that in order to calculate the length of the Session’s original decision or other papers, the length of any electronic document in the Social Law Library database should be approximately doubled.

¹⁶ In order to derive the number of days under consideration, the Committee checked the docket of each case involved in this survey. Where the docket reflected a hearing date, the Committee used the hearing date on the particular motion as the “Submission Date.” If no hearing date was reflected on the docket, then the Committee looked at the decision or other court document to determine whether the Session expressly mentioned the hearing date, and derived the “Submission Date” from that date. Otherwise, the Committee measured the “Submission Date” from the last date of filing of the original motion or any responsive documents, whichever came last. The Committee then computed the number of days between the “Submission Date” and the “Decision Date” to derive the number of “Days Under Consideration.”

¹⁷ Data from January through August 2004 was annualized to estimate the total number of decisions projected for 2004.

¹⁸ House Approves Legislation to Create Business Courts, Mar. 11, 2004, available at: <http://www.lsb.state.ok.us/house/news6684.html> (last visited Oct. 17, 2004). The Committee would like to thank Mitchell L. Bach and Lee Applebaum for sharing their recent publication, “A History of the Creation and Jurisdiction of Business Courts in the Last Decade.” The Report will be published in the November issue of the American Bar Association Journal, *The Business Lawyer*.

¹⁹ New Court to Tackle Business Cases, Associated Press, Feb. 6, 2004, available at: http://www.sptimes.com/2004/02/06/Business/New_court_to_tackle_b.shtml (last visited Oct. 17, 2004).

²⁰ Michigan’s CyberCourt Gets Funded by House; Republican Vows to Fight Funding, June 6, 2003, available at: <http://www.mitechnews.com/registry/technews/breakingnews.htm?id=10548720000001> (last visited Oct. 17, 2004).

²¹ Andrew Grainger, Business Specialization in Court System a Good Idea, *MaineToday.com*, Oct. 31, 2003, available at: <http://business.mainetoday.com/yourbusiness/031031yourbiz.shtml> (last visited Oct. 17, 2004).

²² *Id.*

²³ Important Notice to All Attorneys and Applicants, Apr. 8, 2003, <http://www.ncbusinesscourt.net/new/notices/> (last visited 10/18/2004); News and Announcements of the Commercial Division of the State of New York, New York County, Progress on Electronic Filing [hereinafter *New York Progress*], Dec. 15, 2003, http://www.nycourts.gov/comdiv/news_and_announcements.htm (last visited Oct. 15, 2004).

²⁴ North Carolina Business Court Website, Courtroom Technology Center, <http://www.ncbusinesscourt.net/New/technology/> (last visited Oct. 17, 2004).

²⁵ Telephone interview with Clerk-in-Charge, New York County Commercial Division (Oct. 18, 2004).

²⁶ *New York Progress*, *supra* note 20.

²⁷ Commercial Division, New York State, available at: <http://www.courts.state.ny.us/comdiv/> (last visited Oct. 29, 2004).

²⁸ Rhode Island Judiciary 2003 Annual Report, available at: http://www.courts.state.ri.us/pdf/2003_Annual_Report.pdf (last visited Oct. 18, 2004).

²⁹ *Id.*

³⁰ Paula L. Hannaford-Agor, et. al., National Center for State Courts, California Administrative Office of the Courts, Evaluation of the Centers for Complex Civil Litigation Pilot Program, Final Report, June 30, 2003.

³¹ *Id.* at 40.

³² 2003 Annual Report of the Delaware Judiciary, 2003, available at: <http://courts.state.de.us/Courts/Supreme%20Court/2003%20Annual%20Report/?2003Chancery.pdf> (last visited Oct. 18, 2004).

³³ In 2003, there were an additional 773 miscellaneous cases (guardians for minors, guardians for infirm, trusts and other matters) and 2319 Estates cases filed in the Court of Chancery.

³⁴ *Id.* at 23.

³⁵ Chief Justice's Commission on the Future of the North Carolina Business Court, Final Report and Recommendation, Oct. 28, 2004, available at: http://www.ncbusinesscourt.net/Final%20Commission%20Report.htm#_ftnref8.