

**REPORT OF THE WORKING GROUP
ON BUSINESS LITIGATION**

March 2014

INTRODUCTION

In the fall of 2013 Chief Justice Stuart Rabner created a “Working Group on Business Litigation” to address the particularized needs of the parties in business related litigation. The Working Group was charged with identifying and assessing the needs of the business community; reviewing the Judiciary’s current programs and existing practices; recommending appropriate steps to be taken to address the reasonable needs of the business community; and addressing how the Judiciary might better publicize existing programs and/or any newly recommended projects.

Given the progress and improvements that have been made in New Jersey since 1947, it was initially thought the current court structure would allow for significant and necessary improvements, without the necessity of creating an entirely new business court.

All Working Group members engaged in full and frank discussions of the needs of the business community and different approaches to address those needs. Ultimately, the Working Group unanimously agreed to specific recommendations. It is the Working Group’s hope that, with the implementation of these improvements, the Judiciary will better address the reasonable concerns of the business community.

HISTORY

Before the adoption of the 1947 New Jersey Constitution, the State justice system was considered by many to be unwieldy and confusing. At that time, the system was comprised of 17 different courts which were generally considered to be badly fragmented and unmanageable. With the adoption of the 1947 State constitution, New Jersey's court system was streamlined. In 1995, a unified court system was established and since that time the New Jersey Judiciary has been recognized as a national model.

Within New Jersey's unified court system there have been various alternatives available for better management of business cases¹:

- General Equity in the Chancery Division was created as a specialized part of the judicial system to hear corporate and commercial disputes. General Equity matters include receiverships, corporate governance, shareholder suits, business valuation claims, unfair competition, non-compete agreements, non-disclosure of trade secrets or confidential information, protection of trade names and trademarks, shareholder derivative actions, minority shareholder rights, partnership and joint venture dissolutions, accounting actions, and other matters that involve the business community. Generally, these matters have been addressed from beginning to end by the General Equity judge, and in the vast majority of cases, are tried without the benefit of a jury.
- In 1996, the Supreme Court authorized a pilot commercial program in the Civil Part of the Law Division in the Bergen and Essex Vicinages. The Assignment Judge in each vicinage was to designate a judge with a business or commercial background to handle all commercial matters from inception to conclusion. Although that designated judge was afforded discretion as to how to best manage these cases, in general, a case management conference was conducted 30 to 60 days after joinder, a case management order was then entered, and the particular jurist handling the matter followed through with active case management until

¹ In 2003, the New Jersey Supreme Court adopted *R. 4:38A* to address designation and centralized management of Mass Tort cases. In 2012, the Rule was amended to replace "Mass Tort" terminology with new "Multicounty Litigation" terminology. Guidelines for handling Multicounty Litigation (MCL) cases are set forth in Administrative Directive # 08-12. The Working Group briefly discussed the MCL program. While a majority of members believed that the MCL program format was beyond the ambit of the Working Group's charge, it was noted that despite the difference between the MCL Program and the current pilot programs for commercial litigation, the use of specialized judges could help to address the concerns of the business community.

conclusion. Under the pilot program, “complex commercial matters” were appropriately tracked and provided 450 days of discovery with the goal that each such case would be concluded within two years from the date of filing the complaint.

- In 2000, the Supreme Court amended the Court Rules governing the Civil Part to implement “Best Practices” statewide. Best Practices established a four track differentiated case management system. The most complex cases, including complex commercial and complex construction cases, were provided with a Track IV designation, which mandated that a single judge was to manage the case from the beginning of the matter and was to remain with the case until its conclusion, absent exceptional circumstances.
- In 2004, the Supreme Court created a pilot program in General Equity in the Burlington, Mercer, Hudson and Ocean Vicinages allowing litigants to request the General Equity judge manage complex commercial damage actions that might otherwise be addressed in the Civil Part of the Law Division. Various criteria were created for entry into the program, specifically: a written request for entry into the program, a written waiver of jury trial signed by all parties and their counsel, a written consent to use complementary dispute resolution techniques, and a written consent to expedite discovery with the goal of ultimate resolution of the case within 12 months. The written request, with accompanying waiver and consents, were required to be submitted to the Civil Division Manager within 30 days of joinder. Thereafter, the General Equity judge would determine if the case was properly designated as “complex commercial” and determine whether the matter would be transferred back to the Law Division or maintained in General Equity.

Business/commercial cases generally address: (1) disputes between businesses, sometimes involving individuals with an interest in the business; (2) internal disputes over management and/or control of business entities, and (3) disputes to protect the interests of a business, such as non-compete agreements. Complex cases within the first category are now managed as Track IV cases (508 complex commercial and 503 complex construction). Separate Tracks are provided for contract/commercial disputes and construction matters (Track II), and book accounts and negotiable instruments (Track I). The second and third categories of business cases referenced above were historically within the jurisdiction of the Chancery Division, General Equity. Over time, case law has developed allowing General Equity judges, after

resolving equitable claims, to transfer damage claims to the Civil Part of the Law Division in cases which sought both damages and equitable relief.

THE WORKING GROUP

The Working Group membership is comprised of four distinguished jurists, two attorneys representing the New Jersey Association For Justice, the New Jersey State Bar Association, the New Jersey Defense Association, the New Jersey Business & Industry Association, private attorneys, two legislators (one Senator and one Assemblyman) and staff of the Administrative Office of the Courts.

As previously stated, the Working Group focused on assessing the needs of the business community, addressing how to better serve those needs, and recommending steps that might be implemented to meet those needs.

Needs of the Business Community

All Working Group members agreed the business community's goals of certainty, finality, timeliness, and cost effective means of addressing business disputes should be considered and addressed. The non-judicial representatives suggested the importance of having one judge, experienced in managing business issues, remain with the matter from beginning to end as a necessary component of any recommended changes.

How to better serve those needs

The Working Group assembled materials from other jurisdictions as part of its efforts to determine how to better serve the needs of the business community. It considered reports

regarding business court programs in New York, Maryland, Ohio, South Carolina and Colorado. It also considered Law Review articles and a prior New Jersey State Bar Association report on business courts (interestingly, authored by committee member, Michael R. Griffinger, Esq.).

These materials had various consistent themes:

1. Designation of a special division, part, or docket reserved for complex commercial matters;
2. Appointment or assignment of judges experienced in business matters to handle complex commercial matters, without rotation through other court divisions, for those special divisions, parts or dockets;
3. Utilization of alternate dispute resolution techniques and/or special masters;
4. Early and consistent case management;
5. Accelerated adjudication;
6. Publication of business-related decisions;
7. Jury versus non-jury adjudication, and
8. Imposition of threshold monetary levels.

The Working Group was also made aware that Working Group member Assemblyman David C. Russo had again sponsored legislation to address the business community's needs. More particularly, Assembly Bill No. 283 proposes to create a Special Business Part of the Law Division, to create twelve new Superior Court judgeships, and provide for appropriations to the Administrative Office of the Courts for the costs associated with the additional judgeships. The Assemblyman made clear the proposal was not in any way intended to circumscribe the Chief Justice's ability to administer the courts. The Working Group determined that should the

proposed legislation become law, the Working Group would revisit its thoughts and recommendations.

Based upon the information reviewed, the Working Group members made various suggestions on how to address the needs of the business community. Those suggestions included, but were not limited to, creation of a business court; utilization of the multicounty litigation program model to create regionalized courts for business cases; expansion of the General Equity non-jury program; removing foreclosure cases from the General Equity caseload; and expansion of current pilot programs.

The Working Group was compelled to acknowledge that the current volume of filed and contested foreclosure matters inhibited, to a degree, possible proposals involving General Equity because existing caseloads currently burden General Equity jurists. The Working Group determined it might be best to revisit these proposals in two to three years from the date of the Court's response to the Working Group's proposals, with the thought that, at that time, further refinements might then be considered.

Ultimately, the Working Group came to the consensus that the business community's needs could be addressed by making changes within the existing judiciary structure without the creation of a "business court." The Working Group's recommendations follow.

RECOMMENDATIONS

The Working Group presents the following recommendations for the Court's consideration:

1. Terminate the 2004 General Equity/Complex Commercial Case Pilot Program in Burlington, Mercer, Hudson, and Ocean Vicinages. After 10 years, there is sufficient information to conclude that the pilot program is drastically underutilized, possibly because of its protocol, and possibly because of lack of public knowledge concerning the program.
2. Expand the Bergen/Essex Complex Commercial Pilot Program statewide and no longer denote it as a "pilot program." In an effort to ensure that this program best addresses the needs of the business community the Working Group suggests the following:
 - a. One judge in each vicinage with business background or familiarity with complex business issues, or a judge interested in developing expertise in these areas, should be assigned to handle complex commercial cases. In multi-county vicinages at least one judge in the vicinage should be so assigned. To the extent reasonably possible this judge should not be as readily rotated as other judges within that vicinage.
 - b. A protocol should be developed to properly identify cases that should be coded with the case 508 type (complex commercial). The AOC Civil Practice Division, in consultation with the Working Group, should be charged with the responsibility to redefine the complex commercial case type so that the Bar will be notified appropriately of the importance of this

case type coding on the Civil Case Information Statement. Judges should have the discretion to remove cases that they deem inappropriate from the program.

- c.** Complex commercial cases in the program would not be subject to the court's presumptive mediation or arbitration programs. Judges, however, will encourage the parties to engage in mediation and will request counsel afford to the jurist the right to select a mediator with the parties' consent. In that manner, it is expected a judge will be more readily able to select an appropriate mediator for a particular case. In all cases, judges will inform parties and counsel that mediation will not toll the time for discovery.
- d.** The program should include jury and non-jury matters.
- e.** There should be a threshold amount for a case to be included in the program. A majority of the Working Group voted in favor of a \$200,000.00 threshold amount. The parties would be afforded the option to move before the court for inclusion in the program where a lesser amount is in dispute.²
- f.** Judges assigned to address complex commercial cases would be required to write at least two (2) opinions per year that would be posted on the Judiciary website in the Business Related Opinions webpage. Judges would be encouraged to write more opinions which address interesting or novel issues.

² The amount of the threshold was the only issue upon which the Committee was seriously divided. Some members suggested a higher threshold and other members suggested a lower threshold, including the Chair. The Committee believed, though, as long as the parties had the opportunity to petition to be included in the program and the assigned jurist had the prerogative of removing a case from the proposed program, the monetary limit as set forth was acceptable.

3. Prior to any implementation of the program statewide, the Court should present the program to the Conference of Civil Presiding Judges and the Conference of Civil Division Managers for their respective input.
4. If the program is adopted statewide it should be sufficiently publicized through a Notice to the Bar and other means such that the Bar and the business community will be informed and aware of the new program.

CONCLUSION

The Working Group wishes to express its appreciation to the Court for allowing it to consider this important issue. As Chair, I wish to recognize the contribution of each and every Working Group member whose name is listed on the following page, and express particular thanks to our legislative representatives, Senator Peter J. Barnes, III and Assemblyman David C. Russo for their assistance, and to also recognize Assemblyman Russo's long term commitment to the important issues reviewed by the Working Group.

RESPECTFULLY SUBMITTED BY:

Assignment Judge Peter E. Doyne, Chair
Bergen Vicinage

Senator Peter J. Barnes, III

Presiding Judge Chancery Division, Frank M. Ciuffani
Middlesex Vicinage

Presiding Judge Civil Division, Mary K. Costello
Hudson Vicinage

Michael R. Griffinger, Esq.
New Jersey State Bar Assoc. Designee
(Gibbons)

Michele G. Haas, Esq., President
New Jersey Defense Association
(Hoagland Longo Moran Dunst & Doukas)

Philip Kirschner, President
New Jersey Business & Industry Association

Lynne M. Kizis, Esq.
(Wilentz Goldman & Spitzer)

David R. Kott, Esq.
(McCarter & English)

Assignment Judge Julio L. Mendez
Atlantic/Cape May Vicinage

Francisco J. Rodriguez, Esq., President
New Jersey Association for Justice

Assemblyman David C. Russo

Kevin M. Wolfe, Esq., Assistant Director
Civil Practice Division, AOC

WORKING GROUP STAFF:

Antoinette Outwater, Civil Division Manager
Taironda E. Phoenix, Esq., Chief, Civil Court Programs, AOC
Jessica Lewis Kelly, Esq., Civil Practice Division, AOC