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Ember Reichgott Junge

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## BUSINESS COURTS: EFFICIENT JUSTICE OR TWO-TIERED ELITISM?

Sen. Ember Reichgott Junge<sup>†</sup>

Supporters of a specialized business court in the state of Minnesota say its creation is long overdue. As the number and magnitude of civil lawsuits in the business sector grow incessantly, general courts are ill-equipped to efficiently resolve sophisticated commercial disputes.<sup>1</sup>

But Mary Alexander, President of the Consumer Attorneys of California (formerly the California Trial Lawyers Association), counters: "Commercial courts establish a two-tiered system of justice - one for the rich and one for the average citizen."<sup>2</sup>

Which is it?

It has been this policy dilemma that has stalled legislation in Minnesota to create even a pilot project business court. As early as

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<sup>†</sup> Senate Assistant Majority Leader Ember Reichgott Junge received her J.D. from Duke University Law School in 1977 and her M.B.A. from St. Thomas University in 1991. As past Chair of the Senate Judiciary Committee, she has been a leader in business and corporate legal issues, sponsoring laws creating limited liability companies and partnerships. An attorney with The General Counsel, Ltd., she provides part-time in-house legal services to Twin Cities corporations.

1. Commentators who advocate specialized commercial courts have become more active during the past three or four years. See e.g., Larry Smith, *All Systems Go: New York Business Courts Celebrate a First Anniversary*, INSIDE LITIG., Jan. 1997, at 1-2 (stating that New York's Commercial Division is the forum of choice because of its management and expertise, as opposed to complex cases being decided in the general court system by judges who neither enjoy nor understand the underlying issues); Diane P. Wood, *Generalist Judges in a Specialized World*, 50 SMU L. REV. 1755, 1764 (1997) (arguing that business courts will ease pressure on overcrowded state court systems and provide efficient resolution of complicated commercial cases); A.B.A. Ad Hoc Committee on Business Courts, *Business Courts: Towards a More Efficient Judiciary*, 52 BUS. LAW. 947, 955-56 (1997) (espousing the creation of specialized courts to handle those cases involving complex social, economic and legal issues); Robert L. Haig, *New York State Creates a Commercial Division*, 64 DEF. COUNS. J. 17, 17-18 (1997) (reporting that New York's commercial division has not existed at the expense of other state courts, but has eased an overcrowded state court system).

2. Elaine R. Friedman, *New Business Courts Gain Acceptance*, NAT'L L.J., Dec. 30, 1996, at B1.

1991, then-State Senator William Luther attached an amendment<sup>3</sup> to a state department's funding bill that appropriated \$10,000 to the Minnesota Supreme Court to study the need for a business court. It didn't get far. After preliminary study, the court decided not to proceed, citing lack of support in Minnesota or other parts of the country. The appropriation was never used.

Since that time, five states have established some form of business tribunal, including New York, Wisconsin, Illinois, North Carolina, and New Jersey.<sup>4</sup> With results to be evaluated, and upon urging of several business lawyers, I introduced a bill<sup>5</sup> in the 1997 legislature establishing a business court pilot project. The bill requested the Supreme Court to designate a judicial district to participate in the project and it appropriated money for that purpose.

As an in-house counsel for various Twin Cities corporations over the past decade, the business court idea intrigued me. After all, Minnesota has other specialized courts such as family courts,<sup>6</sup> drug courts,<sup>7</sup> and even teen courts.<sup>8</sup> Complex business cases are known to move at a glacial pace,<sup>9</sup> making it difficult for the busi-

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3. See Act of May 31, 1991, ch. 345, art. 1, § 3, subd. 2, 1991 Minn. Laws 2581.

4. See, e.g., Marshall H. Tanick, *Creation of 'business court' long overdue in Minnesota*, STAR TRIB. (Minneapolis), Feb. 3, 1997, at 3D (advocating that Minnesota join the growing number of states instituting business courts). North Carolina amended Rules 2.1 and 2.2 of its Rules of Practice to create a special division of its Superior Court system to hear only complex business cases. See *State Business Court Off and Running*, INSIDE LITIG., Sept. 1996, at 4. The New York division dedicated to commercial litigation commenced operations on Nov. 6, 1995. See Robert L. Haig, *New York's New Business Court*, COLO. LAW., May 1997, at 65. Wisconsin's pilot program commenced Jan. 1, 1996. See Pete Millard, *Taking care of business*, CORP. REP. WIS., April 1996, at 8. Illinois' Cook County Circuit Court in 1993 assigned three judges to a commercial litigation calendar, and bumped that number to five judges in 1995. See Ad Hoc Committee on Business Courts, *supra* note 1, at 956-57. New Jersey has a chancery court in each county. See *id.* at 956. The skilled judges and efficiency of Delaware's Court of Chancery, though technically not a specialized commercial court, are often credited with spawning the push for business courts elsewhere. See *id.* at 955-956.

5. See S.F. No. 1260, 80th Leg., 1997 Sess., MINN. S.J. 737.

6. See, e.g., MINN. STAT. §§ 484.64-.65 (1996). These are the enabling statutes for Hennepin and Ramsey counties. See *id.*

7. See, e.g., MINN. STAT. § 119A.31 (1996). The drug courts have been the subject of many news accounts. See e.g., James Walsh & Chris Graves, *U.S. and County Attorneys Attacking Drug Crime*, STAR TRIB. (Minneapolis), Dec. 4, 1997, at 1B (noting the increased case load and faster sentencing credited to the drug courts, though suggesting that major offenders were more difficult to prosecute).

8. See MINN. STAT. ch. 260 (1996).

9. See generally, Tanick, *supra* note 4, at 3D. See also Jeffrey W. Stempel, *Two*

nesses involved, and tying up the court system for other litigants.<sup>10</sup> Wouldn't it make sense for a specialized business court to hear cases ranging from general contractual disputes to massive class actions involving antitrust issues or even employment issues?

Apparently, it is not that easy. Much to my surprise, the bill introduction received considerable notice. I fielded calls - from judges, business lawyers, even prospective litigants - raising a variety of concerns. It was clear we weren't ready to legislate, but we were ready to debate the bill in the legal and business communities.

What are the policy considerations faced by lawmakers? How have other states approached the business court? How does the business court relate to other forms of a non-traditional case resolution? And what is the future of the business court in Minnesota?

Supporters of the business court tout these advantages to judges and lawmakers:<sup>11</sup>

- Cases would be resolved more quickly in the business court. Resources would be freed up for other cases, and costs for litigants would be decreased.
- Complex cases take up a disproportionate amount of time and resources (e.g., how many other non-business litigants will wait while the tobacco wars are fought in Minnesota courts?).
- A specialized business court would attract top-notch judges, with expertise and sensitivity to business issues.
- Judicial expertise and specialization will lead to more predictable, consistent and prudent case results.

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*Cheers for Specialization*, 61 BROOK. L. REV. 67, 89 (1995) (recognizing that specialized courts promote speedy litigation).

10. One commentator lauds the improved case management and discovery systems in New York's specialized commercial courts, in contrast to the former "Dickensian backlog of dormant law suits," that were common before these specialized courts were established. See Smith, *supra* note 1, at 2. See also Final Report to the Hon. Thomas C. Platt, Chief Judge, Pursuant to the Civil Justice Reform Act of 1990, *Concerning the Causes of Unnecessary Delay and Expense in Civil Litigation in the Eastern District of New York*, 142 F.R.D. 185 (1992) (asserting that increased drug related prosecution and expansion of federal subject matter jurisdiction have overwhelmed and overburdened the judicial system).

11. See, e.g., Haig, *New York's New Business Court*, *supra* note 4, at 66; Ad Hoc Committee on Business Courts, *supra* note 1, at 956-57; Tanick, *supra* note 4, at 3D.

- Judges may be available to resolve discovery and other disputes informally, by telephone conferences rather than formal motions.
- Specialized courts promote the development of technological resources and support personnel.
- The business court will offer speedier justice to small and mid-size businesses which do not have resources to hire private judges and arbitrators. These businesses suffer most from the high costs and long delays of civil litigation.
- Better resolution of business matters is often a key factor in "business climate" discussions and in attracting and retaining business.

And the concerns? They are plentiful:

- The business court provides an elite form of justice, providing a two-tiered system for corporate litigants and for the average citizen.
- The business court may function with a bias toward commercial parties as opposed to individual nonbusiness litigants involved in commercial litigation.
- A specialized business court runs contrary to the goal of court unification and simplification. The judiciary already has the inherent power to use special case management techniques to address the goals of the business court.
- Experience with business courts is still limited around the country: they are still unproven.

It is perhaps because of these policy concerns that states around the country have taken different approaches to the business court. New Jersey's system for handling complex commercial litigation is based upon a system already in place called Differentiated Case Management (DCM).<sup>12</sup> Under DCM, cases are assigned to one of three "tracks" based on the level of complexity, one track being the complex litigation track. Under the new program, a sub-track for complex commercial litigation is created within the DCM

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12. See Ronald J. Fleury et al., *How Wilentz Changed the Courts*, 7 SETON HALL CONST. L.J. 411, 422-24 (1997) (crediting former New Jersey Supreme Court Chief Justice Robert Wilentz with implementing the three-track system).

complex litigation track.<sup>13</sup> With this system, New Jersey avoids setting up a separate business court.<sup>14</sup>

By contrast, New York has set up the most comprehensive business court to date. Court officials approved a pilot project consisting of four judges in 1993,<sup>15</sup> and in 1995 the state's highest court established a commercial division under court rules.<sup>16</sup> The rules<sup>17</sup> establish simplified procedures for commercial claims, with fewer jurisdictional restrictions than other states. For example, parties may access the court by merely paying a filing fee.<sup>18</sup> No minimum amount in controversy is required, contrasting with Delaware where at least \$1 million must be in dispute before a suit can be heard in chancery court.<sup>19</sup>

Judge Benjamin Tennille<sup>20</sup> of the North Carolina Business Court prefers not to establish specific rules. He tailors procedures to each case, laying them out in an initial case management conference.<sup>21</sup> Cases are assigned to the business court only by the

13. See *id.* at 423.

14. See Ad Hoc Committee on Business Courts, *supra* note 1, at 956 (reporting that several years ago the New Jersey State Bar proposed to establish separate business courts, but the Chief Justice opposed the proposal).

15. See Robert L. Haig, *Can New York's New Commercial Division Resolve Business Disputes as well as Anyone?*, DEL. CORP. LITIG. REP., Nov. 18, 1996, available in WL, 1996 ANDECLR 19373. Haig is a partner at Kelley Drye & Warren in New York and was the Co-Chair of the Commercial Courts Task Force appointed by New York's Chief Judge to create the commercial division. See *id.* In another article, Haig describes the process which created the Commercial Division in an article published in two sources. See Haig, *New York State Creates a Commercial Division*, *supra* note 1, at 18.

16. See Haig, *New York State Creates a Commercial Division*, *supra* note 1, at 17-18.

17. See N.Y. CT. R., app. F & G. See also Haig, *New York State Creates a Commercial Division*, *supra* note 1, at 17 (reporting that the Commercial Court's task force rejected a jurisdictional threshold to prevent the commercial division from becoming elitist).

18. See N.Y. CT. R., app. F & G. Proponents argue that success can be measured already, in that disposition time for cases is down 29 percent and settlement rates have risen 85 percent. See Smith, *supra* note 1, at 2.

19. See DEL. SUP. CT. R. P. 124 (b). Delaware adopted the \$1 million minimum summary procedure in February 1994. See Margaret M. Eckenbrecht, Development, *A Commercial Venture*, A.B.A. J., Jan. 1996, at 35. In March 1996, the procedure was amended to give judges discretion to hear cases with amounts in controversy under \$1 million, subject to judicial recovery. See DEL. SUP. CT. R. Civ. P. 124 (c).

20. Tennille was appointed in 1996 by the governor and has the title "Special Supreme Court Judge for Complex Business Cases." See Smith, *supra* note 1, at 5.

21. See N.C. R. SUPER. & DIST. CTS. 2.1, 2.2.

Chief Justice or by motion to remove the case from superior court to business court.<sup>22</sup> Judge Tennille has authority to set a date certain for trial, which, he says, encourages settlement.

Wisconsin has a two-year pilot project of streamlined procedures from commercial litigation in Milwaukee County.<sup>23</sup> Participation by parties is optional, and comes with stringent parameters. There is no trial by jury, and no punitive damages.<sup>24</sup> There is limited discovery (120 days) and limited responses and motions. Trials are expedited, normally set 30 to 60 days after discovery. However, these rules may be modified by agreement of the parties.<sup>25</sup>

One question sometimes raised in the business court debate is whether we head in the wrong direction by promoting use of the traditional judicial system to resolve commercial disputes, rather than looking to alternative dispute resolution. Perhaps a business court with a viable alternative dispute resolution program offers the best of both worlds. Judges with appropriate business expertise are in a good position to recognize cases amenable to alternative dispute resolution and to supervise and manage the ADR process. Specialized panels of arbitrators and mediators could be particularly well-equipped to handle commercial disputes.

ADR is being used to settle large, complicated class actions or mass torts.<sup>26</sup> ADR is not an all or nothing process. While ADR may not eliminate a judge from a case, it can greatly reduce the time the court must spend on it.<sup>27</sup> The judge may still be actively involved in setting the parameters of the process and resolving substantive issues that arise.<sup>28</sup>

Is there a future for business courts in Minnesota? Perhaps. But they won't happen until there is a strong desire among judges, lawyers, and prospective litigants.<sup>29</sup> Business courts will be easier to

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22. See *id.*

23. See Millard, *supra* note 4, at 8.

24. See *id.*

25. See *id.*

26. See Nancy Welsh & Ann Montgomery, *Grappling the Monster Case: The Next Frontier in ADR*, BENCH & B. MINN., Sept. 1997, at 21. The authors specifically refer to the use of ADR in a complex class action alleging racial discrimination in the hiring, promotion and termination decisions of Northwest Airlines (citing *Aburime et al. v. Northwest Airlines, et al.*, 3-89 CIV 402). See *id.*

27. See *id.* at 23.

28. See *id.*

29. See, e.g., Haig, *New York's New Business Court*, *supra* note 4, at 65-69 (describing the forces and processes which helped spur the creation of business

establish if they are done in an evolutionary way, by assigning one, two or three judges to adjudicate business cases in a large, urban county. Nothing prevents our courts from moving in this direction, though additional resources are helpful to success.<sup>30</sup> An interested county need only step forward for the state legislature to begin the debate about funding a business court pilot project.

As Marshall H. Tanick noted in his February 3, 1997 *Star Tribune* Commentary<sup>31</sup> advocating business courts, Minnesota is usually in the forefront of improvements to its judicial system. Should we not continue this vanguard role by establishing a business court? Will policy makers conclude, like Tanick, that “[d]oing so will be a step forward for all litigants, business and nonbusiness alike”?<sup>32</sup> Maybe, but it won’t be in the 1998 legislative session. Let the debate continue.

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courts in New York).

30. The amount of funds need not be extravagant, however. New York’s key figure in creating that state’s commercial division claims that the resources dedicated to its creation amounted to about \$100,000—a fraction of the \$980 million courts budget.

31. See Tanick, *supra* note 4, at 3D.

32. *Id.*



