



Fostering a Business-Friendly Climate

Is It Time for Colorado to Consider
Specialized Courts of Chancery?

BY DANIEL W. GLASSER AND MARK WALKER

Every politician in Colorado understands the immutable correlation between thriving corporate growth and the state budget. Hence, Colorado Governor Jared Polis proudly points to the effort his administration has made to foster a business-friendly climate: “Colorado has one of the best economies in the country and we continue working to ensure it remains the best place to launch and grow a business.”¹ But while Colorado chases this dream of becoming an incubator for innovation, Delaware remains the preferred venue for corporate formation—primarily because of its legal framework, its

specialized chancery courts, and its expansive body of jurisprudence on business issues.

So, what is Colorado doing to compete? Unfortunately, very little. Colorado’s published jurisprudence on business questions remains vanishingly small. And the judges who are randomly assigned to adjudicate corporate cases at the trial court level are typically trained in criminal law and domestic relations. And even if a corporate litigant is lucky enough to draw a judge with training somewhat relevant to the substantive business issues, the Colorado district courts require that judge to rotate their docket. In other words, the assigned judge has

already spent or will spend a substantial amount of time on the bench deciding matters utterly irrelevant to Colorado corporate law.

If Colorado really wants to be the “best place to launch and grow a business,” it must look closely at the ways its judicial system impacts that objective. Other jurisdictions have already taken steps to compete with Delaware for corporate citizens. This article explores exactly what those states are doing, reviews what Colorado has attempted to do, and makes the case for specialized courts of chancery in Colorado.

Recent History of Business Courts

On September 1, 2024, Texas became the most recent state to institute a business court. Around half of all states now have courts specially designed to adjudicate business and commercial disputes.² Even Delaware, where the Court of Chancery has long been the national gold standard forum for commercial litigation, recently added a Complex Commercial Litigation Division to its superior court.³ Despite the growing number of states recognizing the value of specialized business courts, Colorado has not followed suit.

The Centennial State last considered the formation of a business court in 2000, when the Governor’s Task Force on Civil Justice Reform established a Committee on Business Courts (the Committee).⁴ The Committee recommended that “the State Judicial Department consider the establishment of a business court for the exclusive purpose of hearing commercial cases.”⁵ At the time, however, Chief Justice Mullarkey concluded that too few qualifying business cases existed in Denver to justify piloting such a court.⁶ Opting instead for a “specialized case management” approach, Colorado launched the Civil Access Pilot Project Applicable to Business Actions in District Court (CAPP) in 2012.⁷ While CAPP attempted to imitate some distinctives of business courts to streamline litigation, the new rules did not have the desired impact, and Colorado discontinued the experiment in 2015.⁸

The landscape has changed dramatically since the Committee made its recommendations in 2000. In addition to Texas and Delaware,

20 states have established and/or expanded business courts, six have made existing pilot business courts permanent, and three have initiated new pilot programs.⁹ Given this broad trend over the last quarter-century, it is time for Colorado to revisit the concept of chancery or specialized business courts.

What Is a Business Court?

While details vary from state to state, most business courts are characterized by some or all of the following key features: limited jurisdiction based on the nature of the dispute and the amount in controversy; a single judge with extensive expertise in commercial litigation who presides over the case from beginning to end; and published written opinions at the trial court level.¹⁰

To be eligible for business court, a dispute must usually involve:

- the formation, dissolution, governance, or liquidation of businesses;
- obligations between, and liability or indemnity of, businesses or their owners, officers, directors, or partners;
- breach of contract, fraud, misrepresentation, or statutory violations between businesses;
- intellectual property, trade secrets, or non-solicitation, confidentiality, or licensing agreements;
- shareholder derivative or commercial class actions;
- commercial real property; or
- antitrust and securities.¹¹

Several states also specify the types of cases *not* eligible for business courts, including:

- personal injury, survivorship, and wrongful death;
- product liability and consumer protection;
- discrimination and civil rights;
- individual residential real estate disputes and foreclosures;
- domestic relations, probate, juvenile, and criminal matters; and
- consumer debts.¹²

While some states define eligible disputes through statutory categories, others permit varying degrees of judicial discretion in assigning matters to business courts.¹³ Many

also require a specified minimum amount in controversy for eligibility.¹⁴

Business court judges are usually volunteers who are more often appointed than elected, although the mechanism of appointment varies.¹⁵ Selection criteria typically include a combination of educational background and significant experience with complex commercial litigation.¹⁶ Having a single expert judge preside over an entire case from beginning to end is a key feature of every business court.¹⁷ By regularly interacting with corporate and academic leaders, business court jurists are able to remain abreast of current developments in business law.¹⁸ Moreover, while a majority of business courts retain the right to a jury trial, some try cases exclusively to the bench, ensuring that decisions are made by an expert and experienced fact finder.¹⁹

Finally, many states publish written opinions from business courts, creating a body of publicly accessible commercial law precedent.²⁰ In some states, judges also have the discretion “to write opinions on non-dispositive matters of first impression or novel issues.”²¹

Benefits of a Business Court

The purpose of business courts “is to provide an efficient forum for the just, expeditious, and consistent resolution of complex commercial or business cases.”²² The argument in favor of such courts is that they create a more attractive environment for business entities to form, headquarter, operate, and litigate disputes.²³ The internal affairs doctrine motivates corporations to incorporate in jurisdictions offering a specialized forum for resolving internal governance disputes.²⁴ More important, a superior forum for external litigation would make Colorado a more attractive location for businesses to headquarter and operate.²⁵ Access to business courts has also been associated with a statistically significant increase in corporate performance.²⁶

Business courts create a more efficient, lower cost forum for complex commercial litigation.²⁷ Having a single, knowledgeable judge presiding produces more efficient case management and increases the likelihood of pretrial settlement.²⁸ Moreover, expert judges publishing opinions would generate a robust body of case law and

provide businesses greater certainty regarding Colorado law and confidence in the consistency and predictability of litigation outcomes.²⁹ Colorado would enjoy obvious economic benefits from attracting sophisticated businesses and becoming a preferred incubator for new cutting-edge enterprises. A business court could also influence business law precedent nationwide, as more businesses in states without such a court may elect to litigate in Colorado.³⁰

Answering Critics of Business Courts

Critics often point to a lack of hard evidence that business courts actually produce the benefits proponents claim.³¹ However, 25 years of experience across numerous states has begun to produce such evidence, particularly regarding one of the most attractive features to businesses: increased efficiency in commercial litigation.³² The introduction of New York’s business court yielded a 35% increase in the disposition of commercial cases with no investment of additional judicial resources.³³ Georgia’s business court reported in 2012:

On average, the Business Court is able to administer a complex contract case in **608 days**, compared to an estimated **1,746 days** on the general docket—a **65% faster disposition time**. With respect to complex tort cases, the Business Court is able to move cases through resolution in **566 days** on average, compared to an estimated **1,284 days** on the general docket—a **56% faster disposition time**.³⁴

A recent survey in Iowa found that over 65% of responding attorneys believed cases were resolved more quickly by the business court, and more than 56% said the cost of litigation was probably lower.³⁵ Around 72% thought the growing body of published case law would increase predictability in business litigation.³⁶ Significantly, over 87% also said the business court improved the quality of business litigation in Iowa, and nearly 90% thought it improved Iowa’s court system as a whole.³⁷ Moreover, research demonstrating that businesses benefit from access to specialized courts, combined with the ongoing dominance of Delaware as the preferred state for incorporation, supports the assertion that “business courts help to attract

and retain businesses and therefore generate tax revenues and provide jobs.”³⁸

Critics complain that business courts are funded by taxpayers, many of whom receive no direct benefit.³⁹ Yet government operations are often funded by taxpayers who benefit, not directly, but through broader positive effects on society. Indeed, Colorado taxpayers already fund specialized courts (e.g., probate, juvenile) that they may never personally use.⁴⁰ Finally, by relieving general district courts of the burden of slow and complex commercial litigation, a body of specialized judges would empower their colleagues to decide other cases (e.g., personal injury, construction, criminal) more efficiently and thereby benefit everyone engaged with the judicial system.⁴¹

Another critique is that business courts isolate their judges and legal subject matter from the remainder of the judiciary and other areas of law.⁴² This argument, however, provides no justification for the presumption that judicial specialization is problematic rather than beneficial.⁴³ Moreover, existing business court models have found ways to mitigate this problem.⁴⁴ Opponents also object that business courts create an elitist two-tiered court system where businesses enjoy preferential treatment and judges who may be biased in their favor against nonbusiness litigants.⁴⁵ As noted above, however, business courts benefit all litigants, and the experience of jurisdictions with established business courts has allayed fears of bias.⁴⁶

Critics rightly point out that states other than Delaware do not have the tax structure to realize significant financial benefits from increased incorporation business, making incorporations a weak motivation for establishing business courts.⁴⁷ Yet a properly designed business court can make a state more attractive for businesses to headquarter and operate, which does offer real economic benefits.⁴⁸

The final common response to proposed business courts is that they simply are not needed. Alternative dispute resolution, federal courts, and state courts of general jurisdiction are fully capable of resolving commercial disputes.⁴⁹ Alternative dispute resolution, however, is hardly less expensive or time-consuming

than traditional litigation, and its confidential nature means that it cannot produce the consistent precedent that is one benefit of business courts.⁵⁰ Moreover, federal courts do not always have jurisdiction where a business court would.⁵¹ And, as noted above, general dockets benefit from the elimination of slow and burdensome business cases.

Conclusion

“As a testament to specialized business courts’ value, nearly all business courts that started as pilot projects have become full-time fixtures in state judicial systems.”⁵² Despite the arguments of naysayers, it appears many states are deriving significant benefits from expanding the number and caseloads of these specialized courts.⁵³ Yet Colorado continues to randomly

assign its complex commercial and business cases to judges who may or may not have any experience in this unique area of the law. If Colorado hopes to build a stable body of corporate jurisprudence, we have a lot of work to do. To position Colorado as “the best place to launch and grow a business,” our judicial system must function more effectively. CL

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NOTES

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