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## *IS LEGISLATION NECESSARY TO CREATE A BUSINESS COURT ?*

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A-1137, approved by the Assembly Judiciary Committee on June 7, 2001, and sent to the Assembly for action, would create a Business Court within the Law division of the Superior court. The proposed legislation would assign the following matters to the new Business Part of the Law division; business and commercial disputes involving contracts; the Uniform Commercial; banking; insurance; commodities; securities; corporations; non-profit corporations; partnerships; limited liabilities and associations; business trusts; competition among businesses; business reorganizations; dispositions of businesses; business combinations; shareholder, partner and member disputes; intellectual property matters; the termination of services to a business or an agreement not to compete; employment agreements with an executive officer or manager; and other commercial disputes as provided by the rules of court; certain private federal causes of action where federal law gives state court concurrent jurisdiction and business and commercial disputes where the parties have agreed should be heard in the Business Part. Matters cognizable in the Business Part would be heard by a judge without a jury. The proposed legislation authorizes the creation of 12 additional judgeships for the Business Part.

I respectfully suggest that the proposed legislation is both unnecessary and unresponsive to the alleged problem said to exist. Under the 1947 New Jersey Constitution, a unified court system was created. The Superior Court, which was divided into three divisions, an Appellate Division, a Law Division and a Chancery Division, has original general jurisdiction throughout the State. Assignment to the different divisions is made by the Chief Justice. The creation of the new court system was hailed as model and lauded "as America's best". Among the reasons for the praise of our court system was the flexibility which proceeded from the power of the Chief justice to assign judges in the trial court according to ability, experience and need and apportion case types among the different divisions of the trial court. As an example, we have a family part which handles all matters relating to families.

The Chief Justice and the Supreme Court have the power by assignment and rule to direct the assignment of all commercial /business matters in each vicinage to specifically designated judges. Even without action by the Chief Justice and the Supreme Court, the Assignment Judge in each vicinage has the authority to assign specific types of cases to designated judges for handling from inception of the case to final conclusion, whether by way of trial or settlement. Thus the proposed legislation is superfluous and unnecessary.

In 1993, at the same time that the New York County Supreme Court was experimenting with a commercial calendar in New York County, all identified commercial matters in the Essex Vicinage were assigned to one judge for management and trial. As soon as issue was joined, a case management conference was scheduled. At the case management conference a discovery schedule was established, a briefing schedule, a date for premarking of exhibits for trial, the hearing of any *in limine* motions was fixed and the matter assigned a trial date.. The assigned

trial date was determined by the court and counsel. To a large degree, it was counsel who determined when the case would be tried.

The results of this program in the Essex Vicinage, together with other information by lawyer and business groups, was brought to the attention of Chief Justice Wilentz, who created a pilot program in the Bergen and Essex Vicinages for the handling of complex commercial matters. Specific judges with a business or commercial background were designated by the Assignment Judges in those vicinages to handle all commercial matters from inception of the case until its conclusion. The speed with which these cases went through the court system depended on the lawyers handling those cases , rather than the court. Many cases were concluded in their early stages because of the hands on treatment by the designated “commercial” judge. At no time did the author ever hear a complaint from any lawyer or client about the assignment of a commercial matter to the designated “commercial” judge or the speed with which the matter proceeded through the court system. The same is true of the pilot program in Bergen Vicinage.

From the experience in the Bergen and Essex Vicinages, it is clear that the court system has the ability to target specific types of cases for individual treatment by designated judges with out the need of additional legislation. If there is a demonstrated need for the designation of judges to handle commercial/business matters in the vicinages, this can be accomplished under the existing court system by rule and the action of the Chief Justice. Thus, the pending assembly bill is superfluous.

The real question I submit is twofold; first, the failure by the Governor and the Senate to fill the existing **30** judicial vacancies; and, second, the failure to appoint people to the bench who have the requisite background to be designated to handle commercial/business cases.

With respect to the existing vacancies, as an example, Bergen County has **5** vacancies, the oldest vacancy being 4 ½ years. Morris County has **3** vacancies, Middlesex County has **3** vacancies and Essex County has **6** vacancies. In order to get these vacancies filled all the State Senators from the counties involved have to agree on the person to fill the vacancy. If one of the senators disagrees on a proposed nominee for the bench, that person will not get appointed. Even unrestricted judgeships have to be approved by all the senators from a potential nominee's county. A better solution than the proposed legislation would be a rule of the State Senate that unrestricted judgeships do not require the local senator's approval. This would give the Governor the ability to nominate lawyers with experience, but without political connections, in fields for which there is a need to the bench. With the Chief Justice's power to assign judges where they are most needed, the needs of the business community could be easily met. The proposed legislation does not answer these problems.

An additional concern is the types of matters which would be assigned to the new Business Part of the Law Division. Included in case types are cases which are presently assigned to the Chancery Division such as partnership matters, certain corporate matters, agreements not to compete etc. No complaints have been raised that the matters which are presently assigned to the Chancery Division are not being handled in an expeditious and satisfactory manner. Our Chancery judges are selected by the Chief Justice because of their proven ability and experience. The proposed legislation would remove a large number of cases from the Chancery Division without any reason or purpose. Our Chancery Division which is recognized and cited nationally would be reduced to a shadow of its former self for no reason.

Finally, those matters which are presently tried by a jury would no longer be tried by a jury under the proposed legislation. The elimination of the Constitutional right to a trial by jury

for those cases covered by the proposed legislation may not be in the best interest of the litigant. Under the pilot programs in Bergen and Essex Vicinages, the right to a jury trial in a commercial/business matter was preserved. This has not delayed trial of those commercial/business matters nor has it resulted in any complaints from lawyers or their clients. The speed with which a commercial/business matter was reached for trial depended to a large degree upon the lawyers who were involved in those cases being ready to try their case on the trial date fixed at the first case management conference. Nothing in the proposed legislation would alter the way the existing pilot programs are operating.

Based upon the experience of the pilot programs in Bergen and Essex Vicinages relating to commercial cases and the power of the Chief Justice to assign judges where needed based upon the judges experience, the proposed legislation is unneeded. What is needed is the will to fill judicial vacancies with qualified people, not more legislation.

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