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The New Michigan Business Court Legislation: Twelve Years in the Making

By [Douglas L. Toering](#)

On October 16, 2012, Michigan's Governor Rick Snyder signed Michigan Public Act 333 (2012), which will require business courts in every Michigan county with at least three circuit judges. In those circuits, every "business or commercial dispute" will be assigned to a special docket. The law is effective January 1, 2013. In this article, we will examine the nearly 12-year effort to establish business courts in Michigan, the business dockets (in three circuits) that preceded the new law, the statute itself, and the future of business courts in Michigan.

History of the Business Courts in Michigan

The "Cyber Court": No Money, No Court

To understand the new business court act, it is helpful to hark back over 11 years. In 2001, Michigan's then Governor John Engler signed a bill for a "cyber court."

Among the purposes of the cyber court were to: (1) "[e]stablish judicial structures that will help to strengthen and revitalize the economy of this state"; (2) allow "business or commercial disputes to be resolved with the expertise, technology, and efficiency required by the information age economy;" (3) assist the judiciary in "responding to the rapid expansion of information technology in this state"; and (4) supplement "other state programs designed to make the state attractive to

technology-driven companies."

The cyber court was limited to "business or commercial disputes" over \$25,000. In a dramatic departure from traditional courts, the cyber court's proceedings would be conducted by audio, video, or Internet conferencing. In fact, the cyber court judge had the discretion to broadcast proceedings on the Internet. But one of the most controversial parts of the cyber court was the waiver of jury trials.

The main problem was money; or more precisely, the lack of it. The cyber court was to be funded by the Michigan Supreme Court. With a tight state budget, extra money for the cyber court was not available, and it was never funded.

Finally, the new business court act, Mich. Comp. L. § 600.8031(1), has formally repealed the cyber court statute and given it a proper burial. Nonetheless, much of the business court statute was patterned after the cyber court.

Early History of Business Court Legislation

In December 2001, the State Bar of Michigan's Business Law Section Council set up an ad hoc committee to study whether Michigan should establish some form of a business court. The ad hoc committee knew about the cyber court legislation, of course. Over 200 Michigan attorneys either joined or expressed interest in working with that committee.

In April 2002, the committee identified three purposes of business courts: (1) enhancing the consistency, predictability, and accuracy of decisions in business cases; (2) enhancing efficiency through proactive case management, technology, and early alternate dispute resolution; and (3) attracting and retaining businesses in Michigan. Due to the size of the group, an executive committee was formed, chaired by Diane L. Akers of Detroit.

The executive committee analyzed business courts in other states, arranged for a presentation on business courts from Robert L. Haig of New York City, and met with lawyers, judges, and representatives of chambers of commerce and industry associations. The comprehensive study by Mitchell L. Bach and Lee Applebaum, both of Philadelphia and members of the ABA's Business and Corporate Litigation Committee, was also helpful. See *A Brief History of the Creation and Jurisdiction of Business Courts in the Last Decade* (2003).

As a result, in 2003, the executive committee drafted a pilot proposal for a business court for Michigan and presented this to judges in three circuit courts: two in the Detroit area (Wayne County, which includes Detroit and its suburbs to the east and west; and Oakland County, an affluent county north of Detroit that has the most business litigation of any county in the state) and another in Grand Rapids (Kent County).

Over the next couple of years, the executive committee continued its work. In 2005, the then majority whip of the Michigan House of Representatives, Brian Palmer of Macomb County, introduced a bill to establish a business court. That bill never made its way out of the House Judiciary Committee.

In 2009, the State Bar of Michigan established a Judicial Crossroads Task Force, born largely from a concern about how the legal system had been “struggling to deliver justice in the face of diminishing resources and rising needs.” (Sound familiar?) As part of its work, the task force created a Business Impact Committee. That committee’s task was to “review the ways in which Michigan’s court system serves the business community and to determine whether there are procedural or structural changes that would improve the system.”

In October 2010, the Judicial Crossroads Task Force adopted the Business Impact Committee’s recommendations. Specifically, the task force recommended to the state that the Michigan Supreme Court should create “pilot business dockets” in at least two circuits and “designate no more than three judges per circuit to handle the business docket. . . .” Ever cost conscious, the task force concluded that a business docket should require little or no cost and could result in “savings in time and expense to businesses and other court users.” The seeds for the business court were planted.

Specialized Business Dockets Adopted

A year later, the seeds started to germinate. On November 1, 2011, Macomb County began its “Specialized Business Docket,” the first of its kind in Michigan. Now a year later, Judge John C. Foster remains the designated business docket judge. On March 1, 2012, Kent County started its Specialized Business Docket. Both the Macomb and the Kent Specialized Business Dockets are modeled after the Business Impact Committee’s recommendations.

Indeed, both dockets emphasize active case management, such as initial pretrial disclosures (with a follow up pretrial report) along with an early court conference and a detailed case management plan. In addition, the courts’ opinions are available online.

Launched on July 1, 2012, Oakland County’s Specialized Business Docket is much different from Kent’s or Macomb’s. In Oakland, every judge is an eligible business judge. So depending on the blind draw, any judge on any given day can receive an Specialized Business Docket case. Moreover, Oakland has set a threshold of \$500,000, far higher than the \$25,000 threshold in Macomb or Kent.

As of November 1, 2012, both Macomb’s and Kent’s Specialized Business Dockets have enough experience to report meaningful statistics.

- Macomb County: 12 months of operation; 24 cases assigned to the Specialized Business Docket; 11 cases closed, all without going to trial. The closed cases were open for an average of 150 days.
- Kent County: 8 months of operation; 112 cases assigned to the Specialized Business Docket; 28 cases closed, all without going to trial. The closed cases were open for an average of 104 days.
- Oakland County: The business docket there was launched only four months ago, so Oakland does not have meaningful data to report at this early stage.

The Business Court Statute

Purpose

Signed October 16, 2012, the purposes of the new business court act hark back to the cyber court. Business courts are designed to do all of the following (Mich. Comp. L. § 600.8033(3)):

- (a) Establish judicial structures that will help all court users by improving the efficiency of the courts.
- (b) Allow business or commercial disputes to be resolved with the expertise, technology, and efficiency

required by the information age economy.

- (c) Enhance the accuracy, consistency, and predictability of decisions in business and commercial cases.

In a signing statement, Governor Rick Snyder said, “Establishing business courts helps solve complex business cases and provides an important tool for ensuring a strong economic climate.”

Procedure

The business court is not a separate court. Rather, it is a “special docket,” described and administered under the business court statute.

So what’s in? Jurisdiction is limited to a “business or commercial dispute,” which is broadly defined. Specifically, a case shall go to the business court if:

- All parties are “business enterprises.” That term is also broadly defined and includes both for-profit or nonprofit entities (except for ecclesiastical or religious organizations). § 8031(1)(b), (c)(i).
- One party is a business enterprise and the other parties are present or former owners, officers, directors, or employees and the claims arise out of those relationships; or the dispute involves internal organization of the business and the rights or obligations of its owners, officers, directors, or managers. § 8031(1)(c)(ii), (2)(b).
- One party is a nonprofit and the claims arise out of the nonprofit’s organizational structure, governance, or finances. § 8031(1)(c)(iii).
- The matter involves organic changes to a business (sale, merger, dissolution, etc.) or the organizational structure, governance, or finances of the business. § 8031(c)(iv).
- The dispute involves classic kinds business litigation. This includes claims arising from “contractual agreements or other business deal-

ings” (including intellectual property, antitrust, securities, non-competes, and the like) – if all “administrative remedies are completely exhausted including . . . alternative dispute resolution processes provided in the agreements.” Likewise, “business or commercial disputes” include claims arising from information technology, “commercial transactions including commercial bank transactions,” “business or commercial insurance policies,” and commercial real estate. § 8031(2)(a), (c), (d), (e), (f).

And what’s out? Generally, claims involving individual consumers. Specifically excluded from the business court are cases such as: personal injury, product liability (if any claimant is an individual), family law, probate, criminal, landlord-tenant involving only residential property, condemnation, land contract or mortgage foreclosures involving residential property, insurance coverage disputes involving an individual, employment discrimination, or wrongful discharge (except for actions involving corporate officers or directors). Proceedings to “enforce judgments of any kind” are likewise excluded.

But what about a case that is “part in, part out”? If a suit includes a business or commercial dispute, it will be assigned to a business court even if the case also involves excluded claims. Moreover, a case that does not initially include a business or commercial dispute but later does (as a result of cross-claim, counterclaim, third-party complaint, amendment, and so forth) will be assigned to the business court. On the other hand, if a case no longer involves a business or commercial dispute, it may be transferred out of the business court.

Procedurally, the plaintiff will state on the summons or complaint that the case involves a business or commercial dispute. The case then goes to the business court. On motion, the chief judge may review the decision to transfer a case to (or from) the business court. That decision is not appealable. Like any circuit court case in Michigan, jurisdiction begins at \$25,000.

Generally, the business court will consist of sitting circuit judges assigned by the Michigan Supreme Court “in a number reasonably reflecting” the business court’s caseload. Accommodating the needs of less populous counties, the law requires that only those circuits with a minimum of three judges have business courts. (That includes at least 17 of Michigan’s 57 circuits.) Each of those circuits must submit a plan to the Michigan State Court Administrative Office and the Michigan Supreme Court for approval. Circuits with two or fewer judges may, if they wish, submit a proposal for a business court to the State Court Administrative Office and the Michigan Supreme Court, as part of a plan for “concurrent jurisdiction.” In Michigan, concurrent jurisdiction is designed to save money by allowing lower courts (circuit, probate, and district courts) to agree that a judge in one court may act as judge in another court. Here, a smaller circuit could propose a business docket and designate a probate or district judge to serve as the business judge under a concurrent jurisdiction plan.

In any event, a business court judge is assigned for a six-year term and may be reassigned after the term expires. Written opinions from business court judges will be available on an indexed website. This allows both litigants and their lawyers to know how the judge has ruled on business-related issues (perhaps even including discovery disputes) in the past. The Michigan Supreme Court may adopt special rules for the business court; apart from that, however, the Michigan Court Rules and the Michigan Rules of Evidence will apply. Cases pending on pilot business dockets – the Specialized Business Dockets in Kent, Macomb, and Oakland Counties – will remain there.

The business court must meet “minimum standards” set by the State Court Administrative Office. Those will probably include electronic filing, telephone or video conferencing, and “early alternative dispute resolution intervention.”

And who’s upstairs? Like other circuit court cases, the Michigan Court of Ap-

peals will hear appeals from the business courts.

The Future

The legislation is effective January 1, 2013. The State Court Administrative Office expects to submit minimum business court standards, a model plan (called a “local administrative order”), and proposed court rules to the circuits in January 2013; the circuits, in turn, will nominate their judges by March 1, 2013, and submit their individual plans for approval by May 1, 2013. The Michigan Supreme Court will then approve those plans and judges. Cases will be placed on the business dockets by July 1, 2013. See <http://www.courts.michigan.gov/Administration/SCAO/Documents/General-Administrative/BusinessCourts.pdf>.

What about training for the newly-minted business court judges? That’s the responsibility of the Michigan Judicial Institute. What that will consist of, when, and where, are yet to be decided. Who will conduct the training sessions? That, too, is not decided, but it will presumably include judges from the existing Specialized Business Dockets.

As for the cost, the Michigan Senate Fiscal Agency concludes that the law would have a “minor, perhaps negligible fiscal impact on State and local government.” Why? The business courts will be run by current judges and current staff. Of course, the training for the judges will involve some expense. That would be primarily travel, so it should be insignificant.

What about the pilot Specialized Business Dockets in the three counties? Existing cases will remain on those dockets, of course. For Kent and Macomb, the only major change involves the definition of the cases that will go to their business dockets. Other than that, their Specialized Business Dockets will look a lot like they do now. Oakland’s business docket will change, however. In fact, Oakland is already making plans to lower its jurisdictional minimum from \$500,000 to the required \$25,000; Oakland will also designate specific judges for its business court.

But Will It Work?

Done right, business courts will help improve efficiency of the courts, will allow business disputes to be resolved efficiently by judges with expertise in those kinds of disputes, and will enhance the accuracy and predictability of decisions in business cases.

But what does “done right” mean, in the context of a business court in Michigan? That remains to be seen. Undoubtedly, though, it includes early and active judicial intervention. That can include, for example, an early initial conference with the judge, customized scheduling orders, limited or expedited discovery, and follow up conferences (electronically or in-person) with the court as needed. The statute does not require any of this, although Kent’s and Macomb’s business dockets emphasized these strategies. Individual circuits will probably implement such protocol as well. Online opinions, which are required under the new law, will also help. All indications are that the business court system in Michigan will, in fact, be “done right.”

Why Now?

After nearly a dozen years of effort, why does Michigan finally have a business court statute? Good question. Generally, the main factors include: persistence; rallying support in the business, legal (both bench and bar), and legislative communities; and resolving good faith objections by the business court’s opponents (primarily, by making business courts cost-neutral and by excluding cases involving individual consumers).

But what finally drove this home was Governor Snyder. With a strong business background, the governor saw this as a way to promote Michigan as a “go to” state for business. With strong tailwinds, including the governor’s support and a favorable state senate and house, the business court bill sailed through both chambers.

Conclusion

Michigan’s new law seeks the best of all worlds – a business court in many of the

state’s circuits, including all those with even a modicum of business litigation; designated business judges; procedures designed specifically for business cases; and supervision by Michigan State Court Administrative Office and the Michigan Supreme Court – all at virtually no cost to taxpayers. True, it did take nearly dozen years to get this done. Will it be worth it? Stay tuned.

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Please consult with these materials for additional information:

Toering, *Discovery in Cyber Space: The New Michigan Cyber Court, ABA Pretrial Practice & Discovery Committee 12, Vol. X, No. 2 (Spring 2002).*

Mitchell L. Bach and Lee Applebaum, *A Brief History of the Creation and Jurisdiction of Business Courts in the Last Decade (2003).*

That work was later published in 60 *Bus. Law.* 147 (2004) and is hailed as “by far the most authoritative text on the history and development of business courts.” It also provides an excellent history of the cyber court and the early effort to establish a business court in Michigan.

Diane Akers and Andrew S. Doctoroff, both of Detroit, were members of the task force and co-chaired the Business Impact Committee.

<http://www.scribd.com/doc/47935286/State-Bar-of-Michigan-Judicial-Crossroads-Task-Force-Business-Impact-Committee-Recommendations-2011>.

The Judicial Crossroads Task Force concluded that a business docket should require little or no cost and could result in “savings in time and expense to

businesses and other court users.”
<http://www.michbar.org/judicialcrossroads/JudicialCrossroadsReport.pdf>.

See also ABA Annual Review of Developments in Business and Corporate Litigation 281–282 (2012).

Judge Christopher Yates has written on Kent’s Specialized Business Docket. See Yates, *Specialized Business Dockets: An Experiment in Efficiency*, in Nelson P. Miller et al., *Lawyers as Economic Drivers – The Business Case for Legal Services 207 (2012).*

Macomb County’s Specialized Business Docket

<http://www.macombcountymi.gov/circuitcourt/sbd.htm>.

Kent County’s Specialized Business Docket

<http://www.accesskent.com/CourtsAndLawEnforcement/17thCircuitCourt/eFiling.htm>.

Oakland County’s Specialized Business Docket

<http://www.oakgov.com/courts/circuit/Documents/ao/12-03.pdf>.