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Recent Developments in BUSINESS AND CORPORATE LITIGATION

BUSINESS COURTS

Business and Corporate Litigation Committee

AMERICAN BAR ASSOCIATION
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Business Courts

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also more closely scrutinize confidentiality agreements that allow designation of documents for "attorneys' eyes only"; such provisions will be approved "only when the need for such a provision is carefully explained," when there is no reasonable alternative, and the number of documents so designated is limited.

Michigan

History and Purpose. On November 1, 2011, Macomb County Circuit Court launched the state's first Specialized Business Docket. Just four months later, Kent County Circuit Court established its Specialized Business Docket on March 1, 2012. Then on October 16, 2012, Michigan Governor Rick Snyder signed Michigan Public Act 333 (2012), which established a business court in every Michigan county having at least three circuit judges.[61] The legislation was effective January 1, 2013, although it was actually implemented in most of the affected counties during the first half of 2013. Thus, in the 16 circuits[62] with a business court, every "business or commercial dispute" (as broadly defined) is assigned to a special docket.[63]

The purpose of the business courts is to resolve commercial disputes efficiently, accurately, and predictably.[64] The experience so far suggests that the business courts are accomplishing that objective.[65]

Evidence-Based Practices. To implement the statutory mandate, the business courts are encouraged to adopt "evidence-based practices"[66] that reduce litigation waste and inefficiencies. Evidence-based practices are those that are

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61. Mich. Comp. L. 600.8031 *et seq.*

62. As of November 20, 2015, the business court judges are (in alphabetical order by county): Hon. Kenneth W. Schmidt (Bay); Hon. John M. Donahue (Berrien); Hon. Brian K. Kirkham (Calhoun); Hon. Judith A. Fullerton (Genesee); Hon. Joyce A. Draganchuk (Ingham); Hon. Richard N. LaFlamme (Jackson); Hon. Pamela L. Lightvoet (Kalamazoo); Hon. Christopher P. Yates (Kent); Hon. Richard L. Caretti and Hon. Kathryn A. Viviano (Macomb); Hon. Daniel White (Monroe); Hon. Neil G. Mullally (Muskegon); Hon. James M. Alexander and Hon. Wendy L. Potts (Oakland); Hon. Jon A. Van Allsburg (Ottawa); Hon. M. Randall Jurrens (Saginaw); Hon. Daniel J. Kelly (St. Clair); Hon. Archie C. Brown (Washtenaw); and Hon. Maria L. Oxholm, Hon. Lita Masini Popke, and Hon. Brian R. Sullivan (Wayne). Bay County no longer has a business court.

63. A fuller summary of Michigan's business court legislation appeared in: Toering, *The New Michigan Business Court Legislation: Twelve Years in the Making*, Bus. L. Today (Jan. 2013), http://www.americanbar.org/publications/blt/2013/01/03_toering.html; and Diane L. Akers, *Michigan's New Business Court Act Presents Opportunities and Challenges*, 33 Mich. Bus. L. J. (no. 2) 11 (Summer 2013), https://higherlogicdownload.s3.amazonaws.com/MICHBAR/ebd9d274-5344-4c99-8e26-d13f998c7236/UploadedImages/pdfs/journal/MBLJ_Summer2013.pdf#page=13.

64. Mich. Comp. L. 600.8033(3).

65. For processing times in certain business courts, see Toering, *Michigan's Business Courts and Commercial Litigation: Past, Present, and Future*, 93 Mich. Bar. J. (no. 8) 26 (August 2014). Washtenaw County also reports very impressive processing times.

66. "Evidence-based practices" have become increasingly important to all courts in Michigan, not just the business courts. In fact, the judicial dashboard developed by Michigan's State Court Administrative Office encourages the use of "evidence-based practices." *Michigan Judges Guide to ADR Practice and Procedure*, p. 15; http://courts.mi.gov/Administration/SCAO/OfficesPrograms/ODR/Documents/ADR Guide 04092015.pdf.

tested and evaluated in actual litigation contexts. Those practices can also serve as a model to all trial courts.[67] An excellent summary of these practices is the presentation made at the 2015 Michigan Judicial Conference on October 27 and 28, 2015.

Indeed, the Michigan Supreme Court has called on all courts to become laboratories to develop more efficient practices. In the 2015 budget for the judiciary, Chief Justice Robert P. Young, Jr. stated: "Every trial court in this state can be a little laboratory of new ideas—a fertile ground for discovering new and better ways of doing things."[68]

So what are the business courts doing in their own laboratories? What specifically are the business courts doing to help resolve cases efficiently? What practices have they adopted regarding discovery, alternate dispute resolution, motion practice, and the like? For answers, the business court judges were asked a series of questions. The responses from the judges in Ingham, Kent, Macomb, Oakland, Ottawa, Saginaw, Washtenaw, and Wayne Counties provide answers.[69] Among other things, they confirm that two of the keys to the success of the business courts are early and frequent judicial intervention and early alternative dispute resolution or ADR.

Overall, as Judge Jon A. Van Allsburg of Ottawa County aptly put it, "Early judicial intervention has been the hallmark of business court litigation..." And as Judge M. Randall Jurrens of Saginaw County noted, "[S]everal themes have emerged" in business court litigation: "the advantages of early and frequent judicial intervention (e.g., early case management conference and regular status conferences), the utility of early facilitative mediation, the benefits of easy judicial access (e.g., expedited conference calls to resolve minor issues), and the quality of legal representation."

Early Case Management and Scheduling Conferences. Generally, the business courts employ early case management conferences. Of course, counsel wishing to know the practices of a particular business court should consult the local administrative order for that court as well as the judge's own protocol. To serve the litigants, the Michigan State Court Administrative Office posts online the local administrative orders for each business court.[70]

Alternative Dispute Resolution: Early Mediation. Under Administrative Order 2013-6, each business court "shall establish specific case management practices for business court matters. These practices should reflect the specialized pretrial requirements for business court cases, and will typically include provisions relating to . . . alternative dispute resolution (with an emphasis on mediation scheduled early in the proceeding)...."

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67. Hon. Christopher P. Yates, *Specialized Business Dockets: An Experiment in Efficiency.*

68. http://courts.mi.gov/News-Events/Newssummary/Documents/ChiefJusticeYoung-FY2015BudgetRemarks.pdf.

69. Participation in this informal questionnaire was entirely optional. The judicial responses are summarized in Toering, *Michigan's Business Courts: Experimenting with Efficiency and Enjoying the Results*, 94 Mich. Bar J. 38 (Nov. 2015), http://www.michbar.org/file/barjournal/article/documents/pdf4article2755.pdf.

70. http://courts.mi.gov/Administration/admin/op/Pages/Business-Courts.aspx.

Thus, as one would expect, the business courts encourage (if not require) early mediation.[71] In that regard, both the judges and practitioners have a wide variety of resources at their disposal. Two in particular are the *Michigan Judges Guide to ADR Practice and Procedure* published by the Michigan State Court Administrative Office (SCAO)[72] and *A Taxonomy of ADR: A Practical Guide to ADR Practices & Processes for Counsel.* The *Taxonomy* details a variety of ADR practices beyond mediation for counsel to consider.[73] In addition, SCAO has established a kind of clearinghouse of ADR materials called the "Michigan Online Guide to ADR Procedures."[74]

After the parties complete the initial discovery deemed necessary to support a meaningful ADR event, if mediation does not produce a settlement, the parties will conduct further discovery to prepare for a trial in the matter (i.e., staged discovery). Even where early mediation does not settle a case, this does not mean that the process was a "failure." Rather, the parties can use mediation to narrow the issues in dispute, limit or focus the scope of further discovery, and construct an effective litigation plan. The litigation plan can, in turn, lead to continued settlement discussions or the development of other ADR strategies.

In fact, business disputes are well suited to early mediation.[75] First, often the parties have done business with each other for years—as vendor and customer or perhaps as business partners. The quicker the parties can focus on settlement, the more money they can save on litigation expenses. Said differently, money is fungible: Every dollar spent on litigation is a dollar that is not available to settle the case, to invest in the business, or to save for the college education of the owners' children.

Moreover, early mediation allows the parties to focus on "business solutions," such as: "You buy more steel from me, and I will sell it to you at a lower price." And an early mediation—where parties can air their grievances to a neutral mediator (and perhaps directly to each other), and where the parties can construct their own solution—can help save a relationship, maybe even a family. Indeed, the owners of small businesses have typically worked together for years, and in some cases decades (especially in the case of a family business).[76]

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71. The authors would like to thank ADR expert Richard L. Hurford for his ideas on mediation and staged discovery, which have been helpful here. Some of his thoughts are also included in Hon. John C. Foster, Richard L. Hurford, and Douglas L. Toering, *Business Courts, Arbitration, and Pre-suit Mediation: A Modest Proposal for the Strategic Resolution of Business Disputes* (to be published in the *Michigan Business Law Journal*).

72. http://courts.mi.gov/Administration/SCAO/OfficesPrograms/ODR/Documents/ADR%20Guide%2004092015.pdf.

73. The *Taxonomy* was developed by the Macomb County Bar Association's ADR Committee including ADR experts Richard L. Hurford and Tracy L. Allen. http://static1.squarespace.com/static/50dc72c3e4b0395512960a1c/t/554b7b3fe4b0172baad01c53/1431010111052/Taxonomy+of+ADR+%28Revised+4-2015%29.pdf.

74. http://courts.mi.gov/Administration/SCAO/OfficesPrograms/ODR/Pages/default.aspx.

75. Several experts have examined the role of ADR and the business courts. See a summary of this in note 13 of *Michigan's Business Courts and Commercial Litigation.*

76. The rationale for early mediation along with a protocol for early mediation of shareholder disputes may be found in *Business Courts, Arbitration, and Pre-suit Mediation: A Modest Proposal for the Strategic Resolution of Business Disputes.*

Overall, early mediation is successful. As Judge Archie C. Brown of Washtenaw County observed, it has led to a significant decrease in the average days a case is open before closing. Given that about 1.4 percent of civil cases in Michigan go to verdict, early settlement discussions and early ADR should always be considered.

ADR: Other Options? Although mediation and arbitration remain the favorites in the business courts (and for good reason), both judges and attorneys are considering other options. In fact, the *Taxonomy of ADR* explores 25 ADR processes and when each of those might be appropriate.

Some of the alternatives include mediation followed by arbitration ("med/arb"), early neutral fact finding, early neutral evaluation, an expert hearing (aka "hot tubbing"), mini-trial to an advisory jury, summary jury trial (which may include a "high/low limitation"[77]), arbitration followed by mediation ("arb/med"), and Michigan's unique process called "case evaluation."[78]

Judges Acting as Both Judges and Dispute Resolution Advisors. To promote efficiency, Michigan's State Court Administrative Office has suggested that judges (including business court judges) consider serving as both dispute resolution advisors and, of course, as traditional trial court judges. SCAO summarized those two roles:[79]

Traditional Trial Judge	Trial Judge and Dispute Resolution Advisor
Short-term and long-term goals: Focuses the parties on a trial date and prepares the parties for a trial. But only about 1.4% of civil cases go to verdict.	Short-term and long-term goals: Assists the parties in resolving their dispute, if possible (short-term), and prepares for trial as necessary (long-term).
Typically relies on a computer-generated scheduling order.	Conducts an early case conference with counsel to establish a differentiated case management plan.
Presides over discovery disputes and motion practice.	Stages proportional discovery and motion practice to support the agreed ADR strategies.

77. http://courts.mi.gov/Courts/MichiganSupremeCourt/rules/court-rules-admin-matters/Court%20Rules/2014-24_2015-03-25_formatted%20order_AO%202015-1_Summary%20Jury%20Trial.pdf.

78. See Mich. Ct. R. 2.403 regarding case evaluation. http://courts.mi.gov/Courts/MichiganSupremeCourt/rules/Documents/CHAPTER%202.%20CIVIL%20PROCEDURE%20%28entire%20chapter%29.pdf.

79. http://courts.mi.gov/Administration/SCAO/OfficesPrograms/ODR/Documents/ADR%20Guide%2004092015.pdf. *See also, A Taxonomy of ADR: A Guide to ADR Practices & Procedures for Counsel, supra.*

Traditional Trial Judge	Trial Judge and Dispute Resolution Advisor
Orders case evaluation just prior to the trial date as the first ADR activity in the case (with mediation to follow in some cases).	Explores multiple and early ADR strategies throughout the life of the case and conducts periodic, moderated settlement conferences to determine the impediments to a voluntary resolution.
Determining legal rights and remedies of the parties is the sole focus.	In addition to determining legal rights and remedies, judges (and neutrals) explore the parties' interests and needs-based solutions.
Result: The vast majority of cases resolve later in the litigation.	**Result:** The vast majority of cases resolve earlier in the litigation.

Discovery and Motion Practice: Staged and Proportional Discovery. The most expensive—and often the most contentious—aspect of many commercial cases is usually discovery. To address this, business court judges have several tools in their toolbox. One common approach is "staged discovery"—allowing limited discovery before early mediation.

In fact, sometimes the court will order a case to mediation with no discovery having been taken. (A suit on a promissory note is an example. Many such cases can probably be mediated with no discovery.) In the authors' opinion, the majority of business court cases can be effectively mediated after 90–120 days of discovery.

Another frequently used strategy is proportional discovery—tailoring discovery to meet the particular circumstances of the case.[80] In that regard, Oakland County's business court has adopted a case management protocol. The protocol states: "The Court will consider principles of proportionality with regard to all discovery disputes."[81] The case management protocol requires that basic case information be disclosed within 30 days of the responsive pleading.[82]

Likewise, Macomb County has established discovery protocols for disputes involving breach of contract, business organizations (shareholder disputes), employment, and non-compete cases.[83] Elsewhere, Oakland County has approved a model protective order.[84]

Other. On November 12, 2015, eight business court judges from four counties along with three practitioners presented on business courts, early ADR, and evidence-based practices. The event sold out weeks in advance. The business

80. See, e.g., F. R. Civ. Pro. 26(b)(1).

81. Oakland Case Management Protocol, Oakland County Circuit Court, Business Court Cases ¶ (2)(c)(i). https://www.oakgov.com/courts/businesscourt/Documents/ocbc-pro-case-management.pdf.

82. Oakland Case Management Protocol ¶ (2)(c)(ii). This part of the protocol was patterned after the initial disclosures in F. R. Civ. Pro. 26(A)(1)(A).

83. http://circuitcourt.macombgov.org/CircuitCourt-BusinessDocket.

84. https://www.oakgov.com/courts/businesscourt/Documents/mod-bc-pro_ord.pdf.

court judges present emphasized the importance of early judicial involvement, active case management and early ADR as previously discussed. The Oakland County business court judges also discussed the court's new practice of having counsel discuss discovery motions with volunteer, experienced neutrals during the morning of the scheduled hearing before entertaining oral argument on the motions. The judges noted as a result of this facilitated "meet and confer" opportunity, many of the discovery disputes were significantly narrowed or totally resolved. Also, the State Bar of Michigan's Business Law Section has established a Business Courts Committee.

So How Are We Doing? What Are the Challenges in the Michigan Business Courts? Overall, the Michigan business courts are a proverbial "work in progress." But the work is progressing quite well. As the business courts continue to experiment with evidence-based practices, this is likely to continue.

Still, challenges remain. Here are some:

1. ***Resources.*** The caseload for some of the business courts—Kent, Macomb, Oakland, and Wayne Counties, for example—is heavy. Most business court judges have a docket of both business court and other circuit court cases (other civil cases, criminal cases, or both). Combine that with the fact that business court cases tend to have a large number of discovery issues and motions (especially discovery motions and motions to dismiss), and the challenge becomes even greater. Add to that the requirement that business court judges publish their opinions,[85] and all this adds up to a major challenge for at least some business court judges. Additional staffing may be necessary in some business courts. As an aside, business court judges are finding their previous opinions (along with opinions of other business court judges) cited in later cases.[86]

2. ***Business Court Statute.*** A case that has one "business or commercial dispute" goes to the business court—even if it includes claims that are specifically excluded from the definition of "business or commercial dispute."[87] This means that, for various reasons, cases that are not really business disputes are ending up in the business courts.[88] Should the statute be amended to address that? Stay tuned.

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85. Mich. Comp. L. 600.8039(3). As of January 2014, opinions from the business court judges (non-binding on everyone except the parties) are available to the public on an indexed website. The 24 categories are agriculture; antitrust, franchising, trade regulation; attorneys; automotive; collection: debtor/creditor; construction; contracts; deadlock, dissolution, liquidation; derivative actions; directors, officers, managers, shareholders; environmental; finance and capital structure; healthcare; information technology; insurance; intellectual property; jurisdiction; labor and employment; organizational structure; real estate; restrictive covenants; tax; torts; and Uniform Commercial Code. *See* http://courts.mi.gov/opinions_orders/businesscourtssearch/pages/default.aspx.

86. As trial court opinions, those opinions have no precedential value, but they can be persuasive.

87. Mich. Comp. L. 600.8035(3).

88. Given the reputation of the business courts for efficiency, the authors believe that some cases that would ordinarily have been filed in (or removed to) federal court may be in the business courts. If so, that adds to the caseload of the business courts.

3. Forum Shopping. Yes, forum shopping does occur, and judges know it. In many of Michigan's 16 business courts, one knows who will be the business court judge. (Only three courts—Macomb, Oakland, and Wayne—have more than one business judge. Wayne has three judges and Macomb and Oakland have two each.) So take non-competes, for example. Suppose Judge A in one county is believed to be more favorable to the employer than Judge B in a different county. Might counsel for the employer file in one county to get Judge A? Or might the employee's counsel try to "win the race to the courthouse" and file in a different county to be assigned to Judge B?[89] Similarly, some parties are providing forum selection provisions in their contracts that call for the resolution of business disputes in counties with business courts as opposed to those counties without business courts.

What About Non-Business Court Cases? Expect to see other circuit courts experiment with the business court protocols—especially early judicial involvement, periodic (and as-needed) judicial involvement thereafter, and early ADR. To some degree, certain courts (Ottawa and Saginaw, for example) apply the protocols to at least some non-business court cases.

Final Advice to Litigators. Every business court has a local administrative order; the court may also have default discovery protocols, business court forms, a protective order template, and so forth. Check the court's website.

Also, before filing (or opposing) a motion, check whether the assigned judge has already addressed that issue. If not, find out whether another business judge has decided a similar issue. As mentioned above, all business court opinions are posted at the Michigan State Court Administrative Office's website;[90] this helps with predictability. Know the business court statute: Is your case really a business court case?[91]

Finally, learn what the judges are being advised as to the efficacy of various ADR processes set forth in the judges' bench book on ADR published by SCAO. In this bench book, the judges are advised of broad array of ADR processes and when each process might be indicated and the optimal timing of each process.[92]

No More Business as Usual. Overall, as Judge Joyce A. Draganchuk of Ingham County stated, "Don't expect your case to proceed in the traditional way. There will be more judicial management than you may be accustomed to and it is not necessarily 'business as usual.'" From all of the evidence thus far, this is a great development for efficiency and predictability, and it has enhanced our system of justice.

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89. This, of course, assumes that venue is proper in both courts.

90. http://courts.mi.gov/Administration/admin/op/Pages/Business-Courts.aspx.

91. Be especially careful if the case involves both claims that are defined as a "business or commercial dispute" and claims that are specifically excluded from that definition. Mich. Comp. L. 600.8035(3). Also, the "CB" case suffix now applies to "all claims in which all or part of the action includes a business or commercial dispute under Mich. Comp. L. 600.8035."

92. http://courts.mi.gov/Administration/SCAO/OfficesPrograms/ODR/Documents/ADR%20Guide%2004092015.pdf. *See also* Guide to ADR Processes, http://www.adrprocesses.com/.

Defendant can enforce the arbitration clause despite not being a signatory to the employment contract.

In *Vassalluzzo*, the Court refused to allow a new employer to enforce an arbitration provision in the new employee's prior employment agreement because (1) it was not a signatory to the contract containing an arbitration provision, and (2) the claims did not arise from the contract. It did, however, express a willingness to allow a non-signatory defendant to enforce an arbitration provision if (1) the plaintiff's claims solely arose from the contract and (2) the contract required arbitration of claims arising from it. The very same rationale of the *TIBCO* decision was adopted by the Massachusetts Supreme Judicial Court less than two weeks later in *Machado v. System4 LLC*.[154]

Employers faced with employment contracts governed by Massachusetts law—whether they are signatories or non-signatories—should take several points away from these cases. In drafting employment agreements governed by Massachusetts law, employers should consider requiring arbitration of claims brought against them but not by them, or they should consider carve-outs if they foresee the need or advantage of seeking immediate injunctive relief or litigating a claim arising from the contract. Companies hiring employees with non-compete agreements governed by Massachusetts law should determine whether it can force arbitration under those agreements under the test articulated in *Vassalluzzo* and now adopted by the Supreme Judicial Court in *Machado*. If claims would not exist but for the contract, Massachusetts courts may allow the new employer to force the old employer to arbitrate those claims.

III.5 Michigan Business Court

The business court opinions below (all trial court decisions) may be accessed at http://courts.mi.gov/Administration/admin/op/Pages/Business-Courts.aspx.

State of Michigan v. HP Enterprise Service, LLC[155] (Ordering Defendant to Turn Over Source Code to the Plaintiff).

In this case, the court considered whether the state was entitled to an injunction requiring HP to turn over the software code for the state's ExpressSOS system.[156] In 2003, the state began contracting for an enterprise application for the secretary of state's website and online services kiosk. In 2008, the contract was awarded to the Saber Corporation, which was later purchased by HP. After the initially successful launch of some applications, problems with the electronic services and the website began. The problems were not fixed, and the contractual

154. 471 Mass. 204 (Mass. 2014).

155. *State of Michigan v. HP Enterprise Service, LLC*, Kent County Cir. Ct.Case No. 15-08662-CKB (Nov. 16, 2015).

156. Judge Yates began his opinion with a touch of creativity by announcing that "An Injunction Shall Issue" in Morse code. The court was appropriately pointing out that encoded information was not useful to the owner, unless the owner has access to the code.

relationship between the state and HP soured. Ultimately, the state terminated the contract.

Upon learning that the contract was terminated, HP "pulled its implementation team out of Michigan, leaving the state to fend for itself." The state filed suit, and in addition to its contract remedies, requested that the court grant injunctive relief directing HP to: (1) return its project staff to the project; (2) fulfill certain contractual obligations during the post-termination period; and (3) surrender the source code for the ExpressSOS website. Prior to the hearing, HP and the state reached an agreement that resolved both the project staffing issue and the post-termination contractual obligations. However, the parties could not resolve the source code issue.

The court ordered HP to turn over the ExpressSOS source code. The court applied the familiar three-part test for injunctive relief: (1) likelihood of success on the merits; (2) irreparable harm; and (3) balance of harms to opposing parties. The court began by noting that the State of Michigan had paid HP "millions of dollars," but yet "HP has failed to meet critical milestones prescribed by the contractual agreement." Thus, the court reasoned, the state's likelihood of success was high—although the court observed in a footnote that the state pled a second count, for conversion, which was "more debatable." Second, the court found that the state would suffer irreparable harm because the state had recently passed a law that imposed enhanced registration fees beginning January 1, 2017; therefore, the SOS software must be modified to handle the changes "by a legislatively mandated deadline." Without the source code for the ExpressSOS system, the state could not make the necessary changes.

Finally, the court weighed the potential harm to HP, which it described as "some vague prospect of damage to its reputation if it provides the source code to the State of Michigan, which in turn fouls up the implementation process on its own." The court wryly dismissed HP's argument by declaring that, should the State of Michigan make changes on its own that cause problems, HP would be able to "proudly announc[e], 'We told you so.'" The court went on to point out that HP had already delivered several batches of source code to the state during the course of performance of the contract, and "yet no adverse consequences have resulted from the State of Michigan's access to source code on any of those occasions." Thus, the court ruled that there was little potential harm to HP, and issued the injunction directing HP to turn over the source code to the state.

McLaren Health Corp. v. Detroit Medical Center[157] (Rejecting the Tort of Intentional Infliction of Economic Harm).

In *McLaren*, the business court addressed complicated issues arising out of the Michigan Antitrust Reform Act (MARA). Specifically, the plaintiffs alleged that the agreement between McLaren and the Detroit Medical Center, which

157. *McLaren Health Corp. v. Detroit Medical Center*, Oakland County Cir. Ct. Case No. 2013-137031-CB (Jan. 30, 2015); *appeal denied* Mich. Ct. App., Doc. No. 320846 (Sept. 9, 2015).

prohibited McLaren from affiliating with other hospitals without the medical center's consent, was an illegal restraint on trade and a violation of MARA. The original complaint, which claimed that the agreement was an unreasonable restrictive covenant, was dismissed because the operative sections of the agreement did not constitute a noncompetition agreement.

The court did, however, grant leave to amend the complaint. While that ruling was on application for appeal, the plaintiffs amended their complaint to include several new theories. Those included an allegation that the Detroit Medical Center had intentionally inflicted economic harm—which would be a brand new cause of action under Michigan law. In support, the plaintiffs cited the only case in Michigan law to mention that theory of liability, *Trepel v. Pontiac Osteopathic Hosp.*, 135 Mich. App. 361, 354 N.W.2d 341 (1984).

The business court noted that in *Trepel*, that cause of action was only referenced in passing, and that the Michigan Court of Appeals did not analyze the elements or even the existence of such a claim under Michigan law. Further, the business court observed that no other Michigan decision, either published or unpublished, recognized such a tort. Accordingly, the court stated that "the decision to recognize a whole new common-law tort claim rests with the Michigan Supreme Court, not this court." Therefore, the court dismissed that claim.

Scottsdale Insurance Co. v. Charter Township of Orion.[158] (Privity of Contract Is an Essential Element of an Insurance Breach of Contract Claim).

After the "Basketball America" facility in Orion Township flooded, Scottsdale Insurance paid several hundred thousand dollars for repairs to its insured, Basketball America. In its subrogation action, Scottsdale sued the general contractor, several subcontractors, and the township. Scottsdale alleged that the flood was caused by a leak in a water meter on a water supply line that connected the building to the township's water service. The general contractor and the subcontractor who installed the device asserted the township gave them the water meter, fully formed, and that they did not "disassemble the meter or otherwise inspect it."

The court dismissed Scottsdale's breach of contract claim because Basketball America, the insured, was neither a party to, nor an intended third-party beneficiary of, the building contracts; thus, Basketball America lacked the necessary privity of contract. Express warranty and implied warranty claims were dismissed on a similar analysis.

In addition, the court considered Scottsdale's *res ipsa loquitur* claim. The court noted that *res ipsa* is not "a cause of action," but rather a means of "proving a negligence claim with circumstantial evidence." Thus, the court dismissed that count as well.

158. *Scottsdale Insurance Co. v. Charter Township of Orion, et al.*, Oakland County Cir. Ct. Case No. 2013-134852-CB (Mar. 12, 2015).

NatureRipe Foods LLC v. Siegel Egg Co.[159] (Large Attorney Fee Warranted by Complicated Case).

In November of 2014, NatureRipe Foods LLC obtained a "sizable" verdict against Siegel Egg Co., Inc. Subsequently, NatureRipe filed a motion for final judgment, which included the verdict amount plus costs, prejudgment interest, and attorney fees. Attorney fees were recoverable because of a contractual attorney fee provision. The court approved the entry of the final judgment, except for the attorney fees. The court noted that under Michigan law, it was required to review the fees for reasonableness. After doing so, the court found the case particularly complex. Thus, the large attorney fee award (over $200,000), which the court noted "might seem excessive to the untrained eye," was reasonable because of the "deft handling of factual and legal issues alike." The court approved the fees.

Dillon v. 3D ScanIT, Inc.[160] ("Goods" and "Services" Defined for the Purpose of the Michigan Sales Representative Commissions Act).

The issue was the definitions of "goods" and "professional services" for the purpose of the Michigan Sales Representative Commissions Act ("MSRCA").[161] The defendant, 3D ScanIT, Inc., was in the business of using technology to develop highly accurate 3D blueprints of existing custom products. Plaintiff Dillon claimed that he worked for 3D ScanIT from 2007 through November 3, 2014, and that he was paid a base salary and a commission on all his sales. He alleged that 3D ScanIT consistently withheld commissions during his employment and thus violated the MSRCA. The company moved for summary disposition arguing that MSRCA only applies to the sale of goods, whereas Plaintiff earned commissions for selling Defendant's services.

The business court agreed that the MSRCA applies only to the salesperson who "contracts with or is employed by a principal for the solicitation of orders or sale of goods and is paid, in whole or in part, by commission." The more difficult question was whether Dillon was selling "goods" (and was therefore covered by the MSRCA), or "professional services" (and was therefore was not protected by the Act).

Ultimately, the court distinguished selling "goods" from selling "services" by the amount of skill involved. Even though the finished product Dillon provided to customers was a set of blueprints or measurements, the actual business was the "the skill in creating the blueprint, and not the actual blueprint. And this means that the essential character of their business is one as a service provider." The court drew an analogy to architectural services: even though

159. *NatureRipe Foods LLC, v. Siegel Egg Co.*, Kent County Cir. Ct. Case No. 2012-10585-CKB (April 3, 2015).

160. *James Dillon v. 3D ScanIT, Inc.*, Oakland County Cir. Ct. Case No. 2015-145990-CK (Aug. 26, 2015).

161. Mich. Comp. L. 600.2961.

architects provide a finished, tangible set of blueprints, people hire architects for design services. To hold otherwise would mean "every architect is in the business of selling goods as opposed to services. But this is not the case." The court therefore dismissed MSRCA claim.

Karamanos v. Compuware Corp.[162] (Difficulty of Setting Aside Arbitration Award with No Findings of Fact).

In 2013, Peter Karamanos sued his former company, Compuware Corporation, for breach of contract, conversion and unjust enrichment. The parties agreed to arbitrate their dispute. They agreed that the arbitrator would issue an award without findings of fact. But when the arbitrator issued an award of $16.5 million in favor of Karamanos, Compuware first filed a motion with the arbitrator to clarify his award. When the arbitrator refused, Compuware filed a motion with the business court to vacate or modify the arbitration award.

Compuware argued that the only reasonable basis for the award was a treble damages award on a theory of conversion. The court found that interpretation appeared "[f]acially ... reasonable." Nevertheless, the court noted that under Michigan law, the "Court may not invade the province of the arbitrator." The court observed that where the arbitrator does not issue a fact-finding report, "it is extremely difficult if not impossible to meet the burden of proving the existence of a substantial error by the arbitrator." Since the court found that there were other possible theories on which the arbitrator could have decided that Karamanos was entitled to the amount of compensation at issue, the court would not investigate further. Accordingly, the court denied Compuware's motion to vacate the award.

III.6 New Hampshire Superior Court Business and Commercial Dispute Docket

Hooksett Sewer Commission v. Penta Corporation, I Kruger, Inc. d/b/a Kruger, Inc. and Graves Engineering, Inc.[163] (Applicability of Article 2 of the UCC in Mixed Sales and Services Contracts).

The plaintiff sewer commission hired the defendant to design and build a waste water treatment facility. The contract between the parties included the design, equipment, and construction of the new system. Because the contract included both goods and services, the defendant argued that Article 2 of the

162. *Karamanos v. Compuware Corp.*, Wayne County Cir. Ct. Case No. 2013-013776-CK (May 11, 2015) *appeal pending* Mich. Ct. App. Case No. 327476.

163. No. 13-CV-540 (August 12, 2015) *available at* http://www.courts.state.nh.us/superior/orders/bcdd/Hooksett-Sewer-Commission-v-Penta-Corp-et-al.pdf.