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A National Perspective

In this column, we shift from focusing exclusively on the Michigan business courts to what is happening nationally (including Michigan). For that, we separately interviewed three preeminent national authorities on business courts, esteemed Michigan Court of Appeals Judge Christopher P. Yates, renowned New York business litigator Robert Haig,¹ and national business court expert Lee Applebaum of Philadelphia.² Their perspectives were different. Yet, in their separate observations of the current state of business courts and the future of those courts, they focused on many of the same issues. For a future installment of this column, we expect to focus on the Delaware Court of Chancery as well as continuing to interview Michigan business court judges.

Judge Yates was only the second business court judge in Michigan, having served on the Kent County Business Court for over 10 years from March 2012 until April 2022 when he was appointed to the Court of Appeals. In addition to serving as Vice Chair of the State Bar of Michigan's Business Law Section and as a Council member of the Alternative Dispute Resolution Section, Judge Yates is Senior Vice President of the American College of Business Court Judges and will be installed as President in 2025. In 2020, he authored *The ABA's Contribution to the Development of Business Courts in the United States*.³

Mr. Haig is the editor of the monumental work, *Business and Commercial Litigation in Federal Courts*, and the impressive treatise, *Commercial Litigation in New York State Courts*, which specifically addresses New York's business court. Both in their fifth edition, these treatises comprise 16⁴ and 10⁵ volumes respectively. Since 2013, Mr. Haig has chaired the New York Commercial Division Advisory Council.⁶ He also has a connection to Michigan: When interest in business courts in Michigan was at its infancy (about 2001), Mr. Haig spoke to a large gathering of Michigan business

litigators who were interested in developing business courts in Michigan.

For his part, Mr. Applebaum is an honorary charter member of the American College of Business Court Judges and has spoken on business courts across the United States over the last 20 years. Since December 2018, his business court blog has served as a clearinghouse of all kinds of materials on business courts nationwide.⁷ He has authored a number of major works on business courts between 2004 and 2020, including articles or book chapters published by the ABA and the National Center for State Courts, among others. For many years, he was editor or co-editor of the business courts chapter in the ABA's annual *Review of Developments in Business and Corporate Litigation*.⁸

Michigan: Today

January 1, 2023 marks the 10-year anniversary of the effective date of the business court legislation.⁹ A history of the development of the Michigan business courts may be found in the January 2013 issue of the ABA's *Business Law Today*.¹⁰ In 2017, business court jurisdiction was refined. Still, a few jurisdictional issues remain, such as whether litigation involving municipal corporations should be in the business courts.

Michigan's business court statute requires that "[a]ll written opinions in business court cases be made available on an indexed website."¹¹ Lee Applebaum reports that in 2022, the Michigan business courts produced more publicly-available opinions than any other business court other than New York's Commercial Division, and possibly as many business or commercial decisions as the Delaware Court of Chancery.¹² Although Michigan's business court statute has been in place for only 10 years,¹³ the business courts are already ingrained in Michigan's jurisprudence to the point where many lawyers don't know a time when business cases were not in the business courts.

Overall, Judge Yates observes that the Michigan business courts are "delivering on the promise of making business cases a priority," even though many business court judges have heavy dockets and handle general civil or criminal cases (or both).

Michigan: Tomorrow

According to Judge Yates, one of the challenges going forward will be to continue to provide training for Michigan's business court judges.¹⁴ And, like many business courts elsewhere, addressing the caseload for many of the business court judges continues to be a challenge given the resources available.

Many business litigators would also like business court opinions distributed with the same frequency as appellate opinions are in the State Bar of Michigan's daily e-journal.¹⁵ Efforts are currently underway to accomplish this. This could further the development of jurisprudence among the various business courts on difficult issues.

National: Today

According to Lee Applebaum, about 25 states have business courts, either in a single city, multiple cities or counties, or statewide. Other states have "complex litigation courts," which include business cases among other complex cases such as mass torts. Including complex litigation courts, at least 29 states have business courts in one form or another.

"Generally, the experience across the country is that business courts are making the state court system as attractive as the federal courts for business litigation," and sometimes more attractive, according to Judge Yates. He continues, "business courts are also cost-effective compared to arbitration." That said, business court judges also have to be sensitive that business lawyers are sophisticated and will "vote with their feet". So it is incumbent on the business courts to be sensitive to the needs of commer-

cial litigators.¹⁶ That is largely happening, Judge Yates reports.

From his vantage point in New York and nationally, Robert Haig concurs. In New York, the Commercial Division¹⁷ strives to provide cost-effective, predictable, and expeditious dispute resolution services.¹⁸ The Commercial Division features business-minded judges with commercial expertise; a docket exclusively for commercial cases; a well-developed body of commercial law leading to greater predictability in outcomes; efficient discovery procedures including proportionality requirements and limits on depositions and interrogatories; commitment to innovation and advanced technology; and implementation of new procedures and rules responsive to evolving business needs. In fact, business courts can promote economic development for a state, observes Mr. Haig. The lure of providing an attractive, efficient, and predictable forum for resolving business disputes as a way to encourage economic development can also be seen on the international level. New York law, Mr. Haig explains, generally allows disputes between foreign companies to be litigated in New York if their contract provides for this even if the parties' transaction does not have any other connection to New York. If those companies like what they see while litigating in New York, this can be a factor in whether a company decides to locate there as opposed to, for example, Paris or another international city.¹⁹

Generally, virtual proceedings are becoming increasingly accepted and are used by courts throughout the nation.²⁰ According to Mr. Haig, the Commercial Division has recently amended several of its rules to facilitate the efficiencies and cost savings made possible by virtual evidentiary hearings and non-jury trials and remote depositions. From his standpoint, Lee Applebaum agrees that remote proceedings are a hot issue. Indeed, in interviews of many Michigan business court judges for this column over the past couple years, the judges agreed: "Zoom proceed-

ings are here to stay."²¹ While remote court proceedings certainly provide benefits, there's a downside, too: For the less experienced lawyer, the new era of virtual hearings means fewer opportunities to gain courtroom experience.

National: Tomorrow

The challenge of continued training of business court judges is not unique to Michigan. Due to the loss of funding, the National Judicial College no longer provides training to business court judges. As a result, reports Judge Yates, training across state lines is not as uniform and sophisticated as it once was, but the American College of Business Court Judges is working to take up the slack. Another way to address this issue is to invite independent expert groups to present to the business court judges. This could be done remotely, with each of the judges participating in their own chambers.

Another exciting development on training is providing judicial interns and summer associates at law firms a taste of what the business courts are doing.²² The New York Commercial Division is doing just that with its lunchtime lecture series.²³ This lunchtime series will be presented virtually in June 2023 to Commercial Division summer interns and to summer associates throughout the United States. Those who aren't able to attend will be able to access the recorded lectures on a delayed basis.

A related issue touched on above is training new business litigators: How can new business trial attorneys get courtroom experience, when so few cases are tried and many hearings are done virtually? With a cooperative effort by experienced trial lawyers and business court judges, newer business litigators can get courtroom experience,²⁴ and some states have made concerted efforts to address training of newer lawyers. Delaware's Complex Commercial Litigation Division, for example, jumped into action with its March 17, 2022 Standing Order Regarding Courtroom Opportunities for New

Lawyers. This order adopted guidelines designed to "encourage the participation of newer attorneys in all [Complex Commercial Litigation Division] courtroom proceedings including but not limited to oral argument on motions where the newer attorney drafted or significantly contributed to the motion's research and briefing."²⁵

Improving dissemination of business court opinions is a national challenge, as Lee Applebaum and Robert Haig observe. Thus, business courts throughout the nation should work to increase the publication of their opinions. Echoing Judge Yates, Lee Applebaum believes one way to accomplish this is to make business court opinions more readily available online either through a comprehensive website or through commercial providers such as Lexis or Westlaw.²⁶

As always, the focus of any business court should remain how the court can continue to improve its service to litigants, lawyers, and the community. To that end, the New York Commercial Division Advisory Council studies best practices on how to adjudicate cases more efficiently and in a more informed manner. For its part, Indiana not only published a Commercial Courts Handbook in 2018, which was recently modified, it also recently issued a separate substantive Commercial Court Treatise in late 2022.²⁷

Going forward, Judge Yates observes, a worthy goal is the uniform adoption of business courts in every state. But, as Robert Haig reminds us, business courts are not limited to the United States. Indeed, many new business courts have developed on the international scene in recent years during the same time-period that business courts were developing in the United States, joining the longstanding London-based business courts. Enter the Standing International Forum of Commercial Courts, created in 2017. Its events bring "the judiciary of the world's commercial courts together to promote best practice and further the Rule of Law."²⁸

It is helpful to remember, as Lee Applebaum noted, “In this highly-divisive politicized world we live in, the business courts have been the subject of common ground in many places... Business courts have support across the political spectrum, and this can be unifying.”

It’s an exciting time for business courts, both in Michigan and nationally. And even internationally. Stay tuned.

NOTES

1. Mr. Haig is a partner at Kelley Drye & Warren LLP in New York City.

2. Mr. Applebaum is a partner at Fineman Krekstein & Harris, P.C. in Philadelphia.

3. 75 Bus Law 2077 (Summer 2020).

4. The August 2022 issue of the Michigan Bar Journal contained a review of this work. See Mantese and Toering, <https://www.michbar.org/journal/Details/Business-and-commercial-litigation-in-federal-courts-Fifth-edition?ArticleID=4467>.

5. The Business Courts Blog reviewed the state treatise, focusing on business courts. See <https://www.businesscourtsblog.com/commercial-litigation-in-new-york-state-courts-fifth-edition/>.

6. The Advisory Council advises the Chief Judge of New York State (who also serves as the Chief Judge of the New York Court of Appeals) on an ongoing basis about all matters involving and surrounding the Commercial Division of the New York State Supreme Court and matters that generally affect the business community and the courts in New York. In Michigan, the Business Law Section has a Business Courts Committee composed of a number of business court judges and several excellent business litigators. Some of the individual business courts have had their own advisory committees.

7. <https://www.businesscourtsblog.com/>.

8. Mitchell L. Bach & Lee Applebaum, *A History of the Creation and Jurisdiction of Business Courts in the Last Decade*, 60 Bus Law 147 (2004) and Bach, Applebaum, et al, *Through the Decades: The Development of Business Courts in the United States of America*, 75 Bus Law 2053 (Summer 2020). Perhaps the earliest major work on business courts is *Business Courts: Toward a More Efficient Judiciary*, 52 Bus Law 947 (May 1997) from the ABA’s Ad Hoc Committee on Business Courts.

9. MCL 600.8031 et seq.

10. 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. See also Toering, *Michigan’s Business Courts: Experimenting with Efficiency and Enjoying the Results*, 94 Mich B J 38 (Nov. 2015), <https://www.google.com/url?sa=t&rcct=j&q=&esrc=s&source=web&cd=&ved=2ahUKÉwinyZCd>

hZP9AhWWiWoFHceNBP8QFnoECBkQAQ&url=https%3A%2F%2Fwww.michbar.org%2Ffile%2Fbarjournal%2Farticle%2Fdocuments%2Fpdf4article2755.pdf&usq=AOvVaw0oae85KhR4cWXhty5h3jzn.

11. MCL 600.8039(3).

12. See also <https://www.businesscourtsblog.com/2022-business-court-opinions-posted-on-publicly-available-websites/>.

13. The Macomb County Specialized Business Docket opened in November 2011, and the Kent County Specialized Business Docket opened March 2012. Both were implemented before the business court legislation was passed in October 2012.

14. This is done through the Michigan Judicial Institute. MCL 600.8043.

15. The Michigan Lawyers Weekly does report certain key business court opinions.

16. As Lee Applebaum comments, the Philadelphia Commerce Court, which began in 2000, has “revolutionized the practice of business litigation in Philadelphia.”

17. For general information on the Commercial Division, see <https://www.nycourts.gov/courts/comdiv/index.shtml#:~:text=The%20Commercial%20Division%20handles%20complicated,Court%20of%20New%20York%20State.>

18. Further to this, the Michigan business court statute (MCL 600.8033) provides:

(3) The purpose of a business court is to do all of the following:

(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.

19. Other factors are likely more important, such as the tax and regulatory climate, an educated workforce, the cost of living and doing business, and so forth. Nevertheless, the presence of a business court is perceived as an advantage. For example, in April 2002, the ad hoc business courts committee of the State Bar of Michigan’s Business Law Section 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.” *The New Michigan Business Court Legislation: Twelve Years in the Making*, Bus L Today. In any event, as Lee Applebaum commented, regardless of whether business courts attract new business, they do provide efficient resolution of business cases for the business located in the state.

20. See, e.g., MCR 2.407. See also <https://info.courts.mi.gov/virtual-courtroom-info>.

21. Judges in Michigan state courts use Zoom. This is not an endorsement of Zoom over any other digital platform.

22. The ABA Section of Business Law has a Diversity Law Clerk Program that has been placing law students with business court judges as summer clerks for nearly a decade. https://www.americanbar.org/groups/business_law/initiatives_awards/diversity/.

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23. Robert Haig reports that the Commercial Division Advisory Council presented a lecture series for summer interns working with New York Commercial Division Justices and summer associates at New York law firms during June 2022. Because of the success of the 2022 lecture series, the 2023 series is being offered nationwide.

24. See, e.g., Douglas L. Toering and Ian Williamson, *Virtual Hearings and Vanishing Trials: A Modest Proposal for Training New Business Litigators in the Virtual Era*, 42 Mich Bus L J 19, (Spring 2022), <https://higherlogicdownload.s3.amazonaws.com/MICHBAR/ebd9d274-5344-4c99-8e26-d13f998c7236/UploadedImages/pdfs/journal/Spring22.pdf#page=21>; James F. Basile and Robert Gretch, *Training Trial Lawyers*, 48 Litigation no. 3, (Spring 2022), <https://www.kirkland.com/-/media/publications/article/2022/04/trainingtriallawyers.pdf?rev=8487e3e7d5f141eeb1b60fca5f1e0089>; and Haig, *Business and Commercial Litigation in Federal Courts*, (5th ed), Frederick L. McKnight and Michael H. Ginsberg, *Teaching Litigation Skills*, vol 7, ch 83.

25. <https://courts.delaware.gov/forms/download.aspx?id=137818>.

26. Michigan’s business courts opinions may typically be found at the website for the court in question or at a state website, <https://www.courts.michigan.gov/business-court-search/?page=1>.

27. <https://www.businesscourtsblog.com/indiana-commercial-court-treatise-and-modified-indiana-commercial-court-handbook/>.

28. <https://sifocc.org/events-portal/>.



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