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SCAO, Trial Courts, and Delaware

For this issue, we interview the Administrator of the State Court Administrative Office ("SCAO") Honorable Thomas P. Boyd, Berrien County Business Court Judge Donna B. Howard, and former Delaware Vice Chancellor Joseph R. Slights III.

SCAO Administrator Honorable Thomas P. Boyd

Background

Before becoming SCAO Administrator, Judge Boyd served as an Assistant Attorney General beginning in 1995. He was appointed to the 55th District Court bench (Ingham County) in July 2005 and was elected to continued service in 2006, 2008, and 2014. Judge Boyd became SCAO's Administrator on March 23, 2020—the day Governor Whitmer issued the pandemic-related stay-in-place order. Judge Boyd served as the chair of the Michigan Trial Court Funding Commission, which was responsible for reviewing and recommending funding methods for Michigan's trial courts. He received the 2019 Judicial Excellence Award from the Michigan District Judges Association, the 2020 State Bar of Michigan Champion of Justice Award, and the 2021 Advocate of the Year honoree by the National Alliance on Mental Illness–Michigan. We submitted a list of written questions, which Judge Boyd graciously answered.

SCAO Generally

The Michigan Constitution, Article 6, section 3, establishes the State Court Administrator position. The relevant portion provides: "The supreme court shall appoint an administrator of the courts and other assistants of the supreme court as may be necessary to aid in the administration of the courts of this state. The administrator shall perform administrative duties assigned by the court."

Asked about his role with business courts at SCAO, Judge Boyd explained that while trial courts operate autonomously under their chief judge, SCAO offers support and resources for the administration of each state court. SCAO's work with trial courts is divided into six regions. Each region has an administrator. These administrators are each trial court's contact (liaison) with SCAO and the Michigan Supreme Court. The Regional Administrator works to support compliance with statutes, court rules, and the Supreme Court's administrative orders. Additionally, the Regional Administrator solves problems for the courts and solicits advice and feedback from judges and court staff for the betterment of the judiciary. Further, Judge Boyd noted, the SCAO Regional Administrator is also responsible for appropriate follow-up on all concerns or complaints. Follow-up on a public concern often includes a conversation with court administration and, when appropriate, the judge and/or chief judge.

SCAO Resources for Business Courts

The SCAO website is a trove of information. This includes a summary of the business court statute, the business court statute itself, and local administrative orders. It also contains published business court opinions,[1] organized by the particular business court and subject matter. The opinions are keyword-searchable and organized by county (individual courts might also post their own opinions on their own websites).[2]

Beyond this, the Michigan Supreme Court and SCAO have historically facilitated meetings of the business court judges. These meetings included 2-3 hours of substantive training. Although these sessions were suspended during the pandemic, they are expected to return in 2024.

Selection of Business Court Judges and SCAO

The State Court Administrative Office is tasked with assuring an open and fair application process for selecting business court judges. SCAO also summarizes applicants for business court judges for the Supreme Court's review. SCAO may make a recommendation if more than one judge applies. Ultimately, the Supreme Court discusses and decides which judge will be appointed, of course.

Asked if the Supreme Court or SCAO would like recommendations for business court judges, Judge Boyd said, "selection of a business court judge is not a popularity contest, and it is important to take steps to assure that it does not become one." That being said, the Supreme Court may instruct SCAO to solicit feedback.

If an attorney has a concern about a business court judge, what should that attorney do? Decisions of judges are, of course, subject to appeal. But concerns about the administration of the court or a courtroom may be directed to that court's chief judge. Concerns that are not successfully resolved with the administration of the court may be directed to the Regional Administrator.[3]

Berrien County Business Court Judge Donna B. Howard

Background

Judge Howard has an interesting background. An undergraduate economics major at the University of Michigan, she was always good at math and science, but not as much at tax or accounting. So, that realization steered her from business school toward law school. She says that today, it's "ironic that I became a business court judge where I now review ledgers." But her approach to business cases comes from that analytical background. In private practice from 1997 to 2010, she handled large property insurance subrogation, insurance defense, municipal law, and other property matters, and later became Berrien County Corporate Counsel until 2014.

Experience on the Bench

Judge Howard was elected to the 5th District Court in 2014 and appointed to the 2nd Circuit Court and the Business Court at the same time in 2018, after the retirement of Judge John Donahue. She has retained her circuit seat by elections in 2020 and 2022. Her current term on the Business Court expires in 2025. Judge Howard spent her first four years on the bench in the Criminal Division. The Berrien County Trial Court is a concurrent jurisdictional court so although Judge Howard was initially a district judge, she has handled both district and circuit matters simultaneously throughout her tenure. For example, in the Civil Division she may cover motions on a complex multi-party circuit case one day, and the next day cover 30 to 40 landlord-tenant proceedings in district court. In addition to being Presiding Judge of the Civil Division and Business Court, she also presides over the Adult Drug Treatment Court and Adult Mental Health Court for Berrien County. Judge Howard spoke at the annual Business Law Institute on October 6, 2023.

Experience with the Business Court

Judge Howard's general approach to business cases is, "time is money. You can say that about every case. But in business cases, it is ideal to get these resolved. It supports the community if business disputes can be resolved." To that end, Judge Howard provides "extra attention to the business court cases. The legislature and the Michigan Supreme Court have intended that business court cases be treated differently."

Early Scheduling Conferences

In business court cases, Judge Howard's court sets an early scheduling conference after the answer is filed. She addresses whether initial disclosures have been exchanged, the status of efforts to resolve the case, and how much discovery is needed to position the case for alternative dispute resolution. The scheduling conference also helps her understand what the dispute really is. For example, Judge Howard wants to understand the parties' circumstances, such as whether the case involves a family-owned business. If the parties want to proceed with litigation, "we will focus on getting this resolved as efficiently as possible and discuss the issues needed to accomplish this." In some cases, particularly those involving family businesses, the case may have an emotional component that needs to be considered.

Motions

As is true in many business courts, Judge Howard frequently sees motions for a temporary restraining order and a preliminary injunction. A temporary restraining order, Judge Howard observes, is "extraordinary relief. To those involved in the business, it may seem that the claim needs a TRO. But they may be missing the fact that the claim boils down to money. If you can be made whole through damages and interest, then this is not suitable for a TRO." Indeed, she notes, "I get a lot of TRO motions that boil down to money." For a TRO, the matter "had better be an emergency, such as a factory shutting down." With that, the attorneys need to remember that the reviewing judge is "coming in blind. The attorneys may have had days or weeks of conversations with their clients about this." The reviewing judge has not. So, Judge Howard reminds counsel that in filing for a TRO, remember that this is an ex parte request for relief, the judge is only hearing from one side, and therefore, it is important to present evidence of the four factors[4] in the motion, especially irreparable harm. Show that irreparable harm is not speculative.

Still, Judge Howard understands the urgency of a TRO and preliminary injunction at the early stages of litigation. Whether the TRO is granted or denied, she schedules an expedited injunction hearing to give the parties an opportunity to flesh out the immediacy of issues.

Another frequent issue is summary disposition motions under MCR 2.116(C)(8). "I don't mind (C)(8) motions in lieu of an answer." She prefers if the (C)(8) motion is filed early, rather than later with a (C)(10) motion. If a (C)(8) motion is pending, Judge Howard generally does not permit discovery except for initial disclosures. This is especially true because the plaintiff will likely amend the complaint anyway if the (C)(8) motion is successful. Nevertheless, if there is specific discovery that might facilitate resolution in the future, she is open to permitting that.

Discovery Motions

Judge Howard generally handles discovery motions herself. She has not yet had to appoint a discovery mediator. (In some cases, a receiver was appointed who also handled document production.) She is nevertheless open to appointing a discovery mediator, particularly where a discovery mediation could lead to discussions that resolve the entire case.

Early Mediation

At the early scheduling conference, Judge Howard will discuss how much discovery is needed for alternative dispute resolution. She requires the parties to participate in some kind of ADR. She believes mediation helps the parties focus the issues in the litigation. So, Judge Howard encourages early mediation or pre-suit mediation. If the parties do go to a pre-suit mediation, she usually will not order another mediation during the case. Instead, she will set a settlement conference a few weeks before trial. Along those same lines, if the parties go to early mediation but the case does not settle, she will grant additional time for discovery and motions.

Regarding case evaluation, Judge Howard no longer specifically orders case evaluation, and she rarely sees anyone requesting case evaluation now, given that there are no case evaluation sanctions.

Advice for Litigators

Judge Howard provides simple but wise advice: "Make the case make sense. I will 'Nancy Drew' the case." Judge Howard continues: "There

are elements to every claim; the evidence has to support this—regardless of whether this is a (C)(10) motion or a trial. The evidence and caselaw must support what you are saying." Judge Howard cautions, "sometimes counsel will cite a court rule but not a case that is like their case. Provide an example of how a case supports your case." Further to that point, Judge Howard observes that "under *Wilson v Taylor*,[5] it is not up to the court to find the facts or law to support your argument. Do not simply give me documents and expect me to figure this out."

Summarizing, Judge Howard states: "If you cover all your bases in your brief and make it make sense, then this is a great brief. This makes the court's job much simpler." In other words, "make the case make sense to someone who is not familiar with the case and show how the evidence supports what you say it does." Ask yourself: "Can someone who does not know the case understand the motion?"

Former Delaware Vice Chancellor Joseph R. Slights III

Background

Now a partner with Wilson Sonsini Goodrich & Rosati, Judge Slights formerly served as a judge on the Delaware Superior Court and later as a Vice Chancellor in the Delaware Court of Chancery. Here, Judge Slights explains the roles of the various Delaware courts. Given Delaware's influence in corporate governance, this is helpful for all business lawyers to know.

Structure of Delaware Courts

The structure of Delaware's court system is "very unusual." There are two constitutionally designated trial courts. The Court of Chancery's jurisdiction was originally only equity. The Superior Court, by contrast, is a court of general jurisdiction. That court hears matters at law, both civil and criminal. The two courts are separate, although the Chancery Court has concurrent jurisdiction with the Superior Court in certain instances as designated by statute.

The Court of Chancery is nearly 240 years old; it traces its history back to England. Chancery's jurisdiction has expanded by statute. Chancery may now hear legal claims regarding breach of contract, such as breach of an asset or stock purchase agreement. For many years, Chancery was the only business court in Delaware. Then in the 2000s, the bar and judiciary in Delaware understood that the Superior Court needed to offer a Commercial Division, so the Complex Commercial Litigation Division (CCLD) was created. The judges there have both civil and criminal cases on their dockets. Judge Slights was heavily involved in creating the CCLD.

Today, if a case has both equitable and legal claims, only Chancery may hear the case. Indeed, under the "cleanup doctrine," if there is a legal claim along with a bona fide claim in equity, then Chancery may hear the entire case. The purpose is, of course, to avoid having to litigate related claims in two separate courts. A simple breach of contract case (with no equitable claims) goes to the Superior Court, except in cases involving transactional contracts, which again, by statute, may be heard in Chancery as well. Although there is a right to a jury trial under the Delaware constitution, there are no jury trials in the Chancery Court.

More on the Complex Commercial Litigation Division; Expedited Cases in the Court of Chancery

At one point, the CCLD began to see more insurance cases such as disputes involving directors' and officers' insurance. The litigants viewed the CCLD's dedication to these cases as providing a forum to litigate disputes that would not be venued in Chancery. So CCLD developed a unique expertise in insurance cases.

In 2022, approximately 37% of Chancery's cases were expedited. Expedited cases are "highly intense and challenging," but at times disruptive.[6] As Judge Slights recalls, "You're working on writing an opinion, then you get an expedited case (an 'expedited hand grenade') with an expedited hearing on an injunction." In the expedited cases, there are "armies of sophisticated lawyers on each side with businesses that expect and need decisions quickly."(Despite that, the Chancery Court has only seven judges.) All of which illustrates the motto that Chancery has had for decades: The Court of Chancery "moves at the speed of business."

Judge Slights illustrates some of the statutory summary proceedings that must be adjudicated on an expedited basis:

1. Stockholder demands for books and records (these have increased dramatically in recent years);
2. Challenge to an election of directors (who are the rightful directors?); and
3. Requests to compel a timely annual meeting, when such a meeting (for whatever reason) was not held.

In addition, the Chancery Court will provide expedited scheduling in cases with a "drop dead date." In these disputes, if a decision is not rendered by a certain date, the decision won't matter. In such cases, the parties often need a decision in weeks or months.

Further to this issue, Judge Slights observes that sometimes cases are adjudicated in Chancery in four weeks that would take 18 months in an ordinary case. So, for example, 30 depositions are taken and millions of documents are produced, all in four weeks. The judges and law clerks are available around the clock. Once the discovery is complete, the case is tried, and the judge writes an opinion of, say, 60-100 pages, perhaps within days after the trial concludes.

Derivative Cases in the Court of Chancery

A derivative case essentially takes authority from the board and gives it to the shareholder. Chancery takes this seriously, and Chancery has

developed a body of law to deal with derivative cases.

Derivative cases are increasing. In the last five years or so, the Delaware Supreme Court has given more life to "oversight" or "*Caremark*" claims—claims against the board or officers for failing to oversee corporate operations. *See, e.g., In Re: Caremark Int'l Inc Derivative Litigation*, 698 A2d 959 (Del Ch 1996) and *Marchand v Barnhill*, 212 A3d 805 (Del. 2019). *See also* Gerard V. Mantese, *Corporate Law Issues from a National Perspective: An Essay on a Director's Duty of Oversight* – Caremark *and* Marchand, 43 MI Bus LJ 36 (Fall 2023).

According to Judge Slights, the oversight claims have increased the derivative demands and (not surprisingly) increased shareholder document demands. As to the latter, Judge Slights observes that "if you want to displace the board by a derivative claim, you must use the tools at hand to develop your case before you bring the case." One of these tools is the stockholder's right to demand books and records.

Also, according to Judge Slights, other kinds of *Caremark* cases include data breaches and ESG. Regarding the latter, Delaware law is clear that the board's function is to maximize shareholder value. As Judge Slights notes, Delaware has adopted the shareholder primacy doctrine. Delaware is "not a multi-constituency jurisdiction." Even so, in a case where the board's failure to account for ESG issues causes corporate trauma, there may be exposure to board members under a failure-of-oversight theory. The bounds of this theory have yet to be drawn by Delaware courts.

Advice about Practice in the Court of Chancery

Judge Slights provides helpful advice for litigators who don't customarily practice in the Chancery Court. First, as mentioned, there is no right to a jury. Second, the judges all have high levels of expertise in business litigation. "There is no need for a tutorial" for the judge to understand the issues in your case. Assume that the judge has a "level of knowledge that allows you to get to the heart of your case without spending a lot of time that can be distracting and that is not necessary."

Further, Judge Slights observes, the rules of evidence "hover." By that, he means that the judges are more flexible on admitting evidence than in a jury trial. Motions in limine are generally unnecessary. The same is true for objections, except where admitting the proffered evidence would be an egregious departure from the rules (which would rarely happen in Chancery). For example, a judge will typically allow hearsay evidence for the weight, if any, that the judge decides to give it.

In other words, a trial in Chancery is a "get-to-the-point process that is either very satisfying to trial lawyers or very frustrating to trial lawyers." Judge Slights continues: "Some lawyers who are masters of the rules of evidence are very frustrated when they come to Chancery." For instance, exhibits are presented before trial and introduced *en masse* at trial. There is no need to introduce exhibits through a witness. If there is an objection to an exhibit, argue this in your closing brief.

Finally, Judge Slights observes with great satisfaction, "there is an expectation of civility." The court "has a very low tolerance for lawyers who won't grant extensions or who make silly objections in discovery or who make motions to compel for the sake of ratcheting up the costs. There is no bandwidth for dealing with nonsense." Chancery "will come down hard" on an attorney who will not grant a reasonable extension. Reflecting further, he mentions that "lawyers of a certain age say after trying a case, 'This is the way it used to be. We fought the good fight, shook hands, and congratulated each other on a good effort.'" "This mentality is helpful and necessary, especially in a court where 35-40% of the cases are handled in an expedited manner." To all that, the authors say, "hear! hear!"

NOTES

1. *See* MCL 600.8039(3) ("All written opinions in business court cases shall be made available on an indexed website.")

2. Another resource is the interactive court data dashboard. https://www.courts.michigan.gov/publications/statistics-and-reports/interactive-court-data-dashboard/. This allows users to view a myriad of data about Michigan courts, including the business courts. This includes the number of "CB – Business Claims" filed since 2013 and the courts where such claims were filed, the counties in which business court judges are appointed, case dispositions, and cases pending at year-end. This tool provides a helpful way to view important Michigan business court statistics. Users are recommended to watch the brief videos posted below the dashboard on the website to help understand how to effectively use this resource.

3. https://www.courts.michigan.gov/administration/trial-court/.

4. *See Detroit Fire Fighters Ass'n, IAFF Local 344 v City of Detroit*, 482 Mich 18, 34, 753 NW2d 579 (2008) (irreparable harm; movant's harm outweighs harm to non-movant; likely to prevail on the merits; and harm to public interest)

5. *Wilson v Taylor*, 457 Mich 232, 577 NW2d 100 (1998).

6. Expedited cases are not on a separate docket. The Chancellor assigns cases as they come in and determines whether they are expedited cases.

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