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Michigan's business courts: A decade of success

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Michigan's business court legislation took effect on Jan. 1, 2013, and was implemented in 17 circuits¹ during the first half of that year. Since then, in circuits with a business court, every "business or commercial dispute" (defined broadly) goes to a special docket.² Business courts have become so much a part of the fabric of Michigan's jurisprudence that many attorneys – those admitted to practice within the past 10 years – don't know a time when there were no such courts in the state.

This article examines the history of Michigan's business courts, the business court statute and how business courts have applied it, how innovations in business courts have changed litigation generally, and predictions for the future.

HISTORY OF MICHIGAN'S BUSINESS COURTS

Cyber Court

The business court act³ has roots that stretch back more than 20 years. In 2001, Gov. John Engler signed a bill for a "cyber court," which was intended as a high-tech court with proceedings conducted by audio, video, or internet conferencing, but it was never funded. The business court act, MCL 600.8031(1), formally repealed the cyber court statute but was modeled in part on that earlier proposal.

Early Business Court Legislation

In December 2001, the State Bar of Michigan Business Law Section Council established an ad hoc committee to study whether the state should adopt some form of a business court. In April 2002, the committee identified three purposes of business courts: enhancing the consistency, predictability, and accuracy of decisions in business cases; enhancing efficiency through proactive case management, technology, and early alternate dispute resolution; and attracting and retaining businesses in Michigan.⁴

The section subsequently formed executive committee to analyze business courts in other states, arranged for a presentation on business courts by New York attorney and noted legal editor Robert L. Haig,⁵ and met with lawyers, judges, and representatives from chambers of commerce and industry associations. The committee also reviewed a comprehensive business court study by Philadelphia attorneys Mitchell L. Bach and Lee Applebaum.⁶

In 2003, the executive committee drafted a pilot proposal for a business court for Michigan and presented it to circuit court judges in Kent, Oakland, and Wayne counties. In 2005, state Rep. Brian Palmer introduced a bill in Lansing establishing a business court, but the measure never made its way out of the House Judiciary Committee.

In 2009, the State Bar established its Judicial Crossroads Task Force, which in turn created a Business Impact Committee. In October 2010, based on that committee's recommendations, the task force urged the Michigan Supreme Court to create "pilot business dockets" in at least two circuits and "designate no more than three judges per circuit to handle the business docket[.]"⁷

PILOT PROGRAMS, PURPOSE, AND PREPARATION

Business courts finally became a reality on Nov. 1, 2011, when 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 Oct. 16, 2012, Gov. Rick Snyder signed Michigan Public Act 333, which established a business court in every Michigan county with at least three circuit judges.⁸

The purpose of business courts is to resolve commercial disputes efficiently, accurately, and predictably.⁹ The statutory mandate encouraged business courts to adopt evidence-based practices that reduce litigation waste and inefficiencies. Those practices can also serve as a model to trial courts.¹⁰

In the 17 Michigan circuits with business courts, every "business or commercial dispute" must be assigned to the business court.¹¹ The statute defines what constitutes a business or commercial dispute.¹² If at least part of the suit includes a business or commercial dispute, the entire case is assigned to the business court — even if it includes other claims that are specifically excluded as business or commercial disputes.¹³ The Michigan Judicial Institute is responsible for providing appropriate training for the business court judges.¹⁴

IMPLEMENTATION

Recipe for Success

In the 2015 budget for the judiciary, Michigan Supreme Court Chief Justice Robert P. Young Jr. noted that “[e]very 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.”¹⁵ Business courts are a prime example of how that can be done.

Two of the keys to the business courts’ success are early (and frequent) judicial intervention and early alternative dispute resolution.¹⁶ For example, many business court judges conduct an early status or case management conference which are customized to each case and often occur within 30 days of the answer date.

Early Mediation

Under Administrative Order 2013-6, circuit courts “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 scheduling conferences, alternative dispute resolution (with an emphasis on mediation scheduled early in the proceeding), discovery cutoff dates, case evaluation, and final settlement conferences.”¹⁷

Accordingly, most business judges encourage early mediation; some order it whether or not the parties agree. Early mediation generally occurs within approximately 90 days after the defendant answers the complaint, often after preliminary discovery is done. The discovery could be done informally or by initial disclosures or other formal discovery. If early mediation does not produce a settlement, courts may – and sometimes do – order a second round of mediation after discovery concludes.

For many reasons, business disputes are well-suited to early mediation. From a business standpoint, the quicker the parties can focus on settlement, the more they can save on legal fees and expenses.

Moreover, early mediation allows the parties to focus on a business solution. (“You buy all your lumber from me, and I will sell it to you at a lower price.”) Occasionally, early mediation can help parties save a relationship or even a family if the dispute is among owners of a family business.

Perhaps the most important reason to resolve cases early is avoiding lost executive time associated with litigation. Every hour that a business owner or executive spends consulting with counsel, responding to interrogatories, producing documents, or giving a deposition is an hour that is not spent on the business. The loss to the business is incalculable.

In the authors’ experience, approximately 50% of cases settle through early mediation. Increasingly, mediation occurs even earlier – perhaps prior to or shortly after suit is filed.¹⁸ Another option is “med/arb”: if mediation does not resolve the case, arbitration follows. In many settlements, the parties agree that the mediator will arbitrate any disputes arising from a breach of the settlement agreement.

Discovery

Short of trial, the most expensive – and often most contentious – aspect of commercial cases is discovery. Business courts sometimes address this through staged discovery, which is limited discovery before early mediation followed by full discovery after mediation if the case does not settle. Courts may also tailor discovery to meet the needs of the specific case.

Business Court Protocols Adopted Elsewhere

Proportionality of discovery is one major business court innovation that has carried over to the general civil dockets.¹⁹ Mediation of discovery disputes is another. In fact, various business courts have used volunteer attorneys in discovery mediation or discovery facilitation programs for years. Discovery mediation is now specifically provided for in the court rules.²⁰

BUSINESS COURT RESOURCES

An abundance of resources for counsel and parties exists for Michigan's business courts.

State Court Administrative Office

The State Court Administrative Office's comprehensive resources²¹ includes a summary of the business court statute, the full statute, and local administrative orders. It also contains published business court opinions²² organized by both business court, county, and subject matter (individual courts might also post their own opinions on their own websites) and searchable by keyword.²³ Opinions show how a judge has ruled on a particular issue in the past and can provide guidance as to potential rulings in similar cases in the future. That information may cause a party not to file suit, emphasize certain claims or defenses in the suit, or not to file particular motions.

Business Court Caseload Interactive Data

Business court caseload data²⁴ is now accessible through the Michigan Courts interactive data dashboard. It allows users to view data such as the number of business claims filed since 2013, the courts where such claims were filed, case dispositions, and cases pending at year's end. The tool is a way to quickly view important Michigan business court statistics.²⁵

Alternative Dispute Resolution

Although not limited to business courts, the "Michigan Judges Guide to ADR Practice and Procedure"²⁶ – issued by the Michigan Supreme Court, the State Court Administrative Office, and the Office of Dispute Resolution in 2015 – is a comprehensive guide to all kinds of ADR. That guide was adapted in part from the Macomb County Bar Association ADR Committee's "A Taxonomy of ADR,"²⁷ another helpful resource.

Other Resources

- **Court and Judge Protocols:** Check the protocols for individual business courts and specific judges. This step seems obvious but is sometimes ignored. In business courts with multiple judges, each judge may have different protocols.
- **Interviews with Business Court Judges:** Starting in 2018, the Michigan Business Law Journal has published a regular column called "Touring the Business Courts."²⁸ It often includes interviews with

business court judges and other authorities.²⁹

- **Advisory Committees:** The SBM Business Law Section has a business courts committee. Several business courts have advisory committees of some kind.
- **ABA Resources:** Starting in 2012, Michigan has submitted an annual report on its business courts for the American Bar Association "Review of Developments in Business and Corporate Litigation."³⁰

CHALLENGES REMAIN

Like many courts in Michigan and across the country, addressing caseloads for many business court judges continues to be a challenge given the limited resources at hand.³¹ Another challenge is continued training for Michigan's business court judges.

Speaking of training, one issue is training new trial lawyers in an era of virtual hearings and fewer trials. This isn't limited to business courts, of course. There's no perfect solution, but an intriguing possibility is a "learn by doing" training for business litigators, which is being discussed by the SBM Business Law Section.³² Nationally, Delaware Superior Court Complex Commercial Litigation Division (CCLD) judges "strongly encourage the participation of newer attorneys in all CCLD courtroom proceedings including ... oral argument on motions where the newer attorney drafted or significantly contributed to the motion's research and briefing."³³

One major uncertainty is the effect of artificial intelligence (AI) on business litigation and business courts. It is likely that in the not-too-distant future, AI will draft complaints and answers, interrogatories, and discovery motions and continue with document and privilege review, which AI programs have done for some time.

CONCLUSION

Michigan business courts changed how business litigation – and, in some ways, how other civil litigation – is handled. While business courts are a proverbial work in progress, they have spurred many innovations. This is likely to continue. The more things change, the more things change.

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ENDNOTES

1. Michigan's business courts are in Berrien, Calhoun, Genesee, Ingham, Jackson, Kalamazoo, Kent, Livingston, Macomb, Monroe, Muskegon, Oakland, Ottawa, Saginaw, St. Clair, Washtenaw, and Wayne counties.

2. Much of the history of the business courts 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 Akers, *Michigan's New Business Court Act Presents Opportunities and Challenges*, 33 Mich Bus L J 11 (Summer 2013). See also Hon. Christopher Yates, AccessKent.com, *Specialized Business Dockets: An Experiment in Efficiency* https://www.accesskent.com/Courts/17thcc/pdfs/Experiment_Efficiency.pdf.

3. MCL 600.8031 *et seq.*

4. *The New Michigan Business Court Legislation*, Bus L Today (Jan 2013).

5. Mr. Haig is editor of the monumental work, *Business and Commercial Litigation in the Federal Courts*, and the impressive treatise, *Commercial Litigation in New York State*, both in their fifth editions. See review of the former by Mantese et al, at 101 Mich B J 32 (Aug 2022) <https://www.michbar.org/journal/Details/Business-and-commercial-litigation-in-federal-courts-Fifth-edition?ArticleID=4467>.
6. See *A History of the Creation and Jurisdiction of Business Courts in the Last Decade*, 60 The Bus Lawyer 147 (Nov 2004).
7. State Bar of Mich, *Judicial Crossroads Task Force Report and Recommendations* <https://www.michbar.org/file/judicialcrossroads/judicialcrossroadsreport.pdf>.
8. MCL 600.8031 *et seq*, 600.8033(1).
9. MCL 600.8033(3).
10. *Specialized Business Dockets*.
11. MCL 600.8035(3).
12. MCL 600.8031(2)-(3).
13. MCL 600.8035(3).
14. MCL 600.8043.
15. Quoted in Toering, *Michigan's Business Courts: Experimenting with Efficiency and Enjoying the Results*, 94 Mich B J 38 (Nov 2015).
16. See discussion in *Michigan's Business Courts: Experimenting with Efficiency and Enjoying the Results*.
17. Administrative Order No. 2013-6, ___ Mich XXX (2013).
18. For a discussion of early mediation, see, e.g., Foster et al, *Business Courts, Arbitration, and Pre-suit Mediation: A Modest Proposal for the Strategic Resolution of Business Disputes*, 35 Mich Bus L J 21 (Fall 2015) <https://higherlogicdownload.s3.amazonaws.com/MICHBAR/ebd9d274-5344-4c99-8e26-d13f998c7236/UploadedImages/pdfs/journal/Fall2015.pdf#page=23>
19. MCR 2.302(B)(1). See also Fed R Civ Pro 26(b).
20. MCR 2.411(H). For a general discussion of discovery amendments, see, e.g., Quick, *The New Civil Discovery Rules*, 98 MBJ 16 (Sept 2019) <https://www.michbar.org/file/barjournal/article/documents/pdf4article3762.pdf>.
21. Michigan Courts, *Business Court* <https://www.courts.michigan.gov/administration/trial-court/trial-court-operations/business-court/>.
22. See MCL 600.8039(3) ("All written opinions in business court cases shall be made available on an indexed website.")
23. The subject matters are agriculture; antitrust, franchising, and trade regulation; attorneys; automotive; collection: debtor/creditor; construction; contracts; deadlock, dissolution, liquidation; derivative actions; directors, officers, managers, shareholders; discovery; 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.

24. Michigan Courts, *Interactive Court Data Dashboard* <https://www.courts.michigan.gov/publications/statistics-and-reports/interactive-court-data-dashboard/>.
25. Users are recommended to watch the brief videos posted below the dashboard on the website to help understand how to effectively use this resource.
26. Michigan Courts, *Michigan Judges Guide to ADR Practice and Procedure* <https://www.courts.michigan.gov/4990cf/siteassets/offices/odr/adr-guide-04092015.pdf>.
27. Macomb Co Bar Assn ADR Comm, *A Taxonomy of ADR* <http://static1.squarespace.com/static/50dc72c3e4b0395512960a1c/t/554b7b3fe4b0172baad01c53/1431010111052/Taxonomy+of+ADR+%28Revised+4-2015%29.pdf>.
28. State Bar of Mich, *Business Law Journal*, <https://connect.michbar.org/businesslaw/newsletter>.
29. For a discussion of how business court judges are selected, see Toering and Bolyea, *Touring the Business Courts: An Insight at the State Level*, 41 Mich Bus J L 11 (Fall 2011) https://higherlogicdownload.s3.amazonaws.com/MICHBAR/ebd9d274-5344-4c99-8e26-d13f998c7236/UploadedImages/pdfs/journal/MBLJ_Fall21.pdf#page=13.
30. See also Yates, *The ABA's Contribution to the Development of Business Courts in the United States*, 75 Bus Law 2077 (Summer 2020) 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). Another resource is a comprehensive business court blog with posts from U.S. and international business courts. See Mantese Honigman, *Business Court Blog* <https://www.businesscourtsblog.com>.
31. *Id.*
32. See Toering and 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>. For more, see, e.g., Basile and Gretch, *Training Trial Lawyers*, 48 Litigation 46 (2022), available at [<https://perma.cc/2UM4-9NFN>].
33. See Order, dated March 17, 2022, <https://courts.delaware.gov/forms/download.aspx?id=137818>.

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