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Recent Developments in Business Courts 2024

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By: [Business and Corporate Litigation Committee, Business Law Section, American Bar Association](#) (</author/businesscorplitcommittee/>).

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§ 2.1. INTRODUCTION

The 2024 *Recent Developments* describes developments in business courts and summarizes significant cases from a number of business courts with publicly available opinions.^[1] There are currently functioning business courts of some type in cities, counties, regions, or statewide in twenty-five states: (1) Arizona; (2) Delaware; (3) Florida; (4) Georgia; (5) Illinois; (6) Indiana; (7) Iowa; (8) Kentucky; (9) Maine; (10) Maryland; (11) Massachusetts; (12) Michigan; (13) Nevada; (14) New Hampshire; (15) New Jersey; (16) New York; (17) North Carolina; (18) Ohio; (19) Pennsylvania; (20) Rhode Island; (21) South Carolina; (22) Tennessee; (23) West Virginia; (24) Wisconsin; and (25) Wyoming.^[2] States with dedicated complex litigation programs encompassing business and commercial cases, among other types of complex cases, include

California, Connecticut, Minnesota, and Oregon.^[13] The California and Connecticut programs are expressly not business court programs as such.^[14] Utah and Texas will begin operating business courts in 2024.^[15]

§ 2.2. RECENT DEVELOPMENTS

§ 2.2.1. Business Court Resources

American College of Business Court Judges. The American College of Business Court Judges (ACBCJ) provides judicial education and resources, in terms of information and the availability of its member judges, to those jurisdictions interested in the development of business courts.

^[16] The ACBCJ's Eighteenth Annual Meeting will take place in Reno, Nevada, from April 24, 2024, to April 26, 2024.^[17]

Section, Committee, and Subcommittee Resources. The ABA Business Law Section provides a Diversity Clerkship Program that sponsors second-year law students of diverse backgrounds in summer clerkships with business and complex court judges.^[18] The ABA Business Law

Section has created a pamphlet, *Establishing Business Courts in Your State*, which is available among other resources in the online library for the Business and Corporate Litigation Committee's community web page.^[19] The Business and Corporate Litigation Committee's

Subcommittee on Business Courts provides documents and/or hyperlinks to business court resources.^[10] This includes links to public sources and legal publications, as well as business court related materials and panel discussions presented at ABA Business Law Section

meetings. The Section also has established a Business Courts Representatives (BCR) program,^[11] where a number of specialized business, commercial, or complex litigation judges are selected to participate in and support Section activities, committees, and subcommittees.

These BCRs attend Section meetings, and many have become leaders within the Section. Judge Elizabeth Hazlitt Emerson of the Supreme Court of the State of New York Commercial

Division and Judge John E. Jordan of Florida's Ninth Judicial Circuit served as BCRs for the 2021-2023 term, and Judge Julianna Theall Earp of the North Carolina Business Court and

Judge Anne C. Martin of the Chancery Court of Davidson County, Tennessee, serve as BCRs for the 2022-2024 term.^[12] Finally, this publication has included a chapter on updates and

developments in business courts every year since 2004.

Other Resources. "The National Center for State Courts (NCSC) and the Tennessee Administrative Office of the Courts (AOC) developed an innovative training curriculum^[13] and faculty guide^[14] – along with practical tools – to help state courts establish and manage

business court dockets more efficiently and effectively."^[15] The Business Courts Blog^[16] aims

to serve as a national library to those interested in business courts, with posts on past, present, and future developments. This includes posts on reports and studies going back

twenty years,^[17] as well as recent developments in business courts. In 2023, there were articles and reports addressing aspects of business courts.^[18] There are also various legal

blogs with content relating to business courts in particular states.^[19]

§ 2.2.2. Developments in Existing Business Courts

§ 2.2.2.1. Arizona Commercial Court

The Arizona Rule of Civil Procedure governing Arizona's commercial court, Rule 8.1, was amended slightly in March 2023 to fix an incorrect cross-reference. The previous version of Rule 8.1(d)(4), which governed assignment of cases to the commercial court, was amended to correctly cross-reference another subsection of the Rule. The previous version of Rule 8.1(d)(4) provided as follows:

Assignment. Upon the filing of a complaint by a plaintiff requesting assignment to the commercial court under (e)(2), or the filing by another party of a Notice Requesting Assignment to the Commercial Court under (e)(3), the case will be assigned to the commercial court.

Judge Schilling earned his undergraduate degree, with honors, from the University of Iowa in 1973 and his law degree, with distinction, from the University of Iowa College of Law in 1976.^[36] Following his law school graduation, Judge Schilling served as a VISTA volunteer lawyer on three Native American reservations in Nebraska and as an Assistant Public Defender.^[37] Judge Schilling practiced criminal and civil trial work for almost 30 years, was appointed to the bench in 2006, and took senior status in 2023.^[38] Judge Schilling has served on several committees including the Iowa Supreme Court's Civil Justice Reform Task Force and the Eighth Judicial District's Mediation Committee.^[39] Judge Schilling served as a drug court judge for several counties for nine years and is a member of the Des Moines County Bar Association, Iowa State Bar Association, American Bar Association, American Judicature Society, and the Iowa Judges Association.^[40]

Iowa Business Specialty Court will be Evaluated by State Court Administration Every Two Years. Starting in 2023, the Iowa Business Specialty Court will be evaluated by state court administration every two years.^[41] The evaluation is expected to ensure the court continues to accomplish its mission and to identify opportunities to improve its operations.^[42] The first report, prepared in December 2023, will evaluate the court for calendar years 2021 and 2022.^[43] Subsequent reports will be prepared by state court administration every two years.^[44]

§ 2.2.2.4. Indiana Commercial Court

The Indiana Office of Court Services continues to maintain a beta search engine for substantive Indiana Commercial Court Orders.^[45] The database allows users to narrow their search by date and the specific commercial court. Users are encouraged to provide feedback, as the Commercial Court staff works to identify and build historical content.

Additionally, the Indiana Commercial Courts Handbook, which is updated regularly, continues to be an aid for both judges and attorneys, covering procedural topics such as case management conferences, discovery, class actions, and trial preparation, and including sample case documents and forms.^[46] The Indiana Commercial Court Treatise also covers substantive topics such as non-compete covenants, fiduciary duties, piercing the corporate veil, preliminary injunctions, and receiverships.^[47]

On October 20, 2023, it was announced that Marion County Commercial Court Judge Heather A. Welch would retire effective February 2, 2024.^[48] She is one of 10 commercial court judges in Indiana and serves as the co-chair of the Commercial Courts Committee.^[49] Additionally, on November 15, 2023, President Biden nominated St. Joseph County Commercial Court Judge Cristal C. Brisco to fill a vacancy on the U.S. District Court for the Northern District of Indiana.^[50] Pursuant to Rule 7 of the Indiana Commercial Court Rules, the Commercial Courts Committee will review applications to fill the expected vacancies from current judges in each respective county, and will then provide the Indiana Supreme Court with a list of up to three recommended nominees for each vacancy.^[51] Three judges have applied for the Marion County vacancy: Judge Kurt M. Eisgruber, Judge James Joven, and Judge Christina Klineman. It is unclear whether any applications have been received for the St. Joseph County vacancy.

§ 2.2.2.5. Massachusetts Business Litigation Session (BLS)

Business Litigation Session ("BLS") Judge Michael D. Ricciuti has been appointed Chief Justice of the Superior Court. He will begin his five-year term on December 22, 2023. The Court will announce Judge Ricciuti's replacement in the next few weeks.

There were no new procedural orders for the BLS in 2023.

§ 2.2.2.6. Michigan Business Courts

Michigan's Adoption of Continuing Judicial Education Rules. On November 1, 2023, the Michigan Supreme Court announced its adoption of the Michigan Continuing Judicial Education Rules, effective January 1, 2024.^[52] These rules require every judicial officer in the state to complete at least 24 hours^[53] of continuing judicial education every two years. A judicial officer's credited hours must consist of 6 hours of education related to integrity and demeanor and 18 hours of education within the subject area of "judicial practice and related

areas.” The CJE program will be overseen by a 12-member board, which will comprise two appellate court judges, two circuit court judges, two district court judges, two probate court judges, three quasi-judicial officers, and one retired judge.

Although these new rules apply to all Michigan state judges, Michigan’s business court statute has always required training for business court judges.^[54] Judge Thomas P. Boyd, Administrator of Michigan’s State Court Administrative Office, recently announced that judicial training sessions, which were suspended during the COVID-19 pandemic, are expected to return in 2024.^[55]

2023 Business Court Appointments. The business court bench remained largely the same in 2023, with only two new appointments: Curtis J. Bell (Kalamazoo County)^[56] and B. Chris Christenson (Genesee County). Both new appointees will serve for a term expiring April 1, 2025.

§ 2.2.2.7. New York Commercial Division

Commercial Division Updates Rules on Motion Papers. On December 16, 2022, Acting Chief Administrative Judge Amaker announced amendments to Commercial Division Rule 16, Motions in General, effective January 3, 2023.^[57] The amendments provide for the following:

1. Counsel submitting exhibits to motion papers should clearly separate them with divider pages with the exhibit numbers, instead of tabs.
2. Counsel shall follow the hyperlinking guidance under Commercial Division Rule 6 for motion papers.
3. The Court may direct counsel to submit hard copies of decisions or other authorities not readily available, instead of such hard copy submissions being mandatory.

These amendments to Rule 16 are identical to the language proposed by the Commercial Division Advisory Council in February of 2022.^[58] In the request for public comment on the proposed amendments, the Advisory Council explained that these revisions were aimed at modernizing the language of Rule 16 “to reflect the widespread use of electronic filing”—with the use of divider pages instead of tabs and the inclusion of hyperlinking.

Commercial Division Updates Rules on Motions in Limine. Effective June 5, 2023, Commercial Division Rule 27 regarding motions in limine was amended. The amended rule now provides a deadline for oppositions to any such motions, which must be filed no later than two days before the return date of the motion unless otherwise directed by the court.^[59] The amended rule further clarifies which issues are appropriately addressed via motion in limine, rather than via objections to pre-trial disclosures. Specifically, the rule states that basic threshold issues such as lack of foundation or hearsay should be made via objections to pre-trial disclosures, whereas “[m]otions in limine should be used to address broader issues [including] (1) the receipt or exclusion of evidence, testimony or arguments of a particular kind or concerning a particular subject matter, (2) challenges to the competence of a particular witness, or (3) challenges to qualifications of experts or to the receipt of expert testimony on a particular subject matter.”^[60] The amended rule similarly cautions that “[m]otions in limine should not be used as vehicles for summary judgment motions.”^[61]

§ 2.2.2.8. South Carolina Business Court Program

Business Court Program Amended for First Time in Four Years. On July 14, 2023, the South Carolina Supreme Court entered an administrative order narrowing the Business Court Program’s jurisdiction and replacing retired judges.^[62]

This order supersedes the previous one from January 30, 2019, which provided the program with jurisdiction over the following matters:

- Title 33—South Carolina Business Corporation Act of 1988;
- Title 35—South Carolina Uniform Securities Act of 2005;
- Title 36, Chapter 8—South Carolina Uniform Commercial Code: Investment Securities;
- Title 39, Chapter 3—Trade and Commerce: Trusts, Monopolies, and Restraints of Trade;
- Title 39, Chapter 8—Trade and Commerce: The South Carolina Trade Secrets Act; and
- Title 39, Chapter 15—Trade and Commerce: Labels and Trademarks.^[63]

§ 2.2.3.2. Utah Business and Chancery Court

Like Texas, Utah enacted legislation in 2023 to establish its own business court.^[87] Utah named its new court the business and chancery court. It launches fall 2024 with a single judge.^[88]

Key features of Utah's new court follow.

- The business and chancery court will conduct bench trials only, transferring cases to district court when a party requests a jury trial.^[89]
- The court will have limited, statewide, jurisdiction, concurrent with Utah's district courts. It will handle disputes seeking monetary damages of at least \$300,000, or seeking solely equitable relief, and with claims arising from specific causes of action related to business and commercial activities.^[90] These include: breach of contracts and fiduciary duties; internal business governance; sale, merger, dissolution, receivership, or liquidation of a business; liability or indemnity disputes among owners; indemnification of officers or owners; tortious interference or other unlawful act against a business; commercial insurance coverage disputes; the UCC; the Uniform Trade Secrets Act; misappropriation of intellectual property; non-compete, non-solicitations, and nondisclosure or confidentiality agreements; franchise disputes; securities; blockchain and DAO disputes; antitrust; certain malpractice claims; forum selection clauses that identify Utah or other states' business courts; and shareholder derivative claims.^[91]
- Notably, at least 48 hours before an oral argument, the court must provide parties with tentative rulings on the motion.^[92] Final decisions and orders will be published and available on the Utah Court's website.^[93]

§ 2.3. 2023 CASES

§ 2.3.1. Delaware Superior Court Complex Commercial Litigation Division

In re CVS Opioid Litigation^[94] (Claims seeking generalized economic damages to redress the opioid crises are not covered under liability insurance policies). Liability insurers filed suit against retail pharmacy giant, CVS Health Corporation ("CVS"), for a declaratory judgment that they owed no duty to defend or indemnify CVS in suits brought by nine governments to recover costs associated with the opioid epidemic. The insurers argued that they had no duty to defend or indemnify CVS because the policies required allegations of physical injuries for coverage and that the governments did not claim that they suffered bodily injury and did not seek damages on behalf of opioid users.

The court held that the liability policies cover only "damages because of bodily injury," and not the negligence and public- nuisance claims brought by the state and local governments. Specifically, it held that the claims "must directly relate to and be predicated upon a particular bodily injury" to be covered, but "none of the complaints seek to recover for damages because of the individual injuries sustained by a person." Rather, the governments' complaints sought redress for the communal economic losses suffered. Therefore, the court granted the insurers' motion for partial summary judgment and declared that the insurers were not required to defend CVS against lawsuits seeking only economic damages.

BCORE Timber EC Owner, LP v. Qorvo US, Inc.^[95] (Granting motion to dismiss on the basis of *forum non conveniens*). The court held that this is "one of those rare cases" in which the defendant met its high burden of showing that the *forum non conveniens* factors weighed so heavily in its favor that it would face "overwhelming hardship" were the case to proceed in Delaware. This dispute involved a commercial property in Greensboro, North Carolina, which was leased to Qorvo US, Inc. ("Qorvo"). The lease provided that, subject to certain restrictions, tenants could make alterations to the property, but, at the option of the landlord, they may be required to remove any or all alterations or improvements at their expense. When Qorvo refused to remove alterations it made to the property, BCORE Timber EC Owner, LP ("BCORE") brought suit for waste, breach of contract, and a declaration that Qorvo is

In its initial decision, the court denied the plaintiffs' motion for sanctions on the grounds that the defendants would not reasonably have expected to be sued until October 1, 2019, and that the plaintiffs failed to show they suffered any prejudice from spoliation that occurred between October 1 and October 23, 2019. The court reasoned that the duty to preserve evidence arises once litigation becomes "probable" and "not merely possible." Here, litigation became "probable" upon the defendants' receipt of the October 1 settlement offer, at which point any reasonable person would have understood there to be a clear threat of litigation.

On appeal, a single justice held that the lower court had applied the wrong legal standard and remanded with an order that the court "determine if the defendants knew or reasonably should have known that evidence might have been relevant to a possible action." On remand, the lower court stated that it understood the phrase "possible action" to mean something materially different than "likely" litigation. It concluded that a future lawsuit is "possible" if it is within the limits of ability, capacity, or realization but "likely" only if it has a high probability of occurring. Under this standard, sanctions were warranted based on the defendants' spoliation of evidence after their receipt of the August 20, 2019, notice. Because the plaintiffs were prejudiced by the destruction of evidence during this time period, the court held that the plaintiffs would be permitted to offer evidence of the spoliation at trial and found that the jury should be instructed as to an unfavorable inference against the defendants regarding the contents of the deleted messages.

§ 2.3.9. Michigan Business Courts

Thomas A. Robinson and The Mack Shop, LLC v. Gretchen C. Valade Revocable Living Trust^[114] (Arbitration, deadlock, dissolution, operating agreements). In 2012, Plaintiff Thomas Robinson established Plaintiff The Mack Shop, LLC with Gretchen Valade. Robinson and Valade were 50/50 owners and co-managers of the company. The company owned a commercial building, of which Valade occupied 20% and Robinson occupied 80%. Each paid below-market rent of \$1,000 per month and shared the building's operating expenses. Nearly a decade later, Valade transferred her interest in the company to the Defendant Trust and granted authorization to her son and to her business representative to manage the company on behalf of the trust. At that time, Valade also relinquished her tenancy and leased her 20% of the building to a third party, who continued to pay the \$1,000 rental rate.

Then, in December 2021, the trust's representatives called a member/manager meeting and submitted two resolutions, one that would require the company to increase its rental rates for both tenants and another that would require the company to sell the building before March 2022. Robinson voted against both resolutions, prompting the trust to submit a third resolution to dissolve the company. Robinson voted against this resolution as well. Consequently, the trust filed a demand for arbitration claiming that the members were at an impasse and seeking dissolution pursuant to Michigan's LLC Act. Robinson countered that the company had operated the same way for a decade, and that so long as it maintained its historical operations, there was no deadlock. The arbitrator agreed with the trust and ordered a dissolution.

Robinson and the company filed a complaint in the Wayne County Business Court seeking to vacate the arbitrator's ruling. The trust moved to dismiss and to confirm the award. Robinson argued that the arbitrator erred by applying the LLC Act's dissolution provision instead of a provision in the company's operating agreement that prohibited the company's members from seeking to "compel dissolution of the company, even if such power is otherwise conferred by law." Given the conflict between the provision and the statute, the court considered the question of which should prevail. After reviewing the caselaw and the particulars of the case, the court agreed with the arbitrator's harmonization of the statute and the operating agreement and found that the statute permits dissolution where, as here, an operating agreement has no mechanism for resolving an impasse. Thus, the court upheld the arbitration award.

Graczyk Holdings, LLC, Offshore Spars Co., and Eric Graczyk v. Steven King^[115] (Breach of contract; fraud; economic loss doctrine). In September 2021, Plaintiff Eric Graczyk and Defendant Steven King executed a letter of intent ("LOI") for Graczyk's company, Graczyk Holdings ("GH"), to purchase King's company, Offshore Spars ("Offshore") The LOI provided for due diligence review by Graczyk and required King to make disclosures concerning Offshore's finances and operations. In December 2021, Graczyk and King executed a stock

purchase agreement (“SPA”) by which GH purchased all of Offshore’s shares for \$3,000,000. The SPA required King and Offshore to make further disclosures to GH. The sale closed in January 2022, and was financed by a bank loan, two promissory notes, and a personal guaranty from Graczyk.

Plaintiffs alleged that just months after closing, they discovered that King made multiple misrepresentations and omissions during the LOI’s due diligence and disclosure period and breached the representations and warranties he made during that period. Plaintiffs further alleged that King made multiple misrepresentations and omissions in the SPA’s required disclosures. Plaintiffs sued in the Macomb County Business Court, raising claims for breach of contract and unjust enrichment as well as multiple fraud claims, including misrepresentation, silent fraud, and fraudulent inducement. King moved to dismiss all of Plaintiffs’ claims, which the court granted for the fraud claims only.

The court first considered King’s arguments based on the economic loss doctrine, which precludes tort claims based on a breach of a duty arising out of a contractual obligation. The court found that Plaintiffs’ misrepresentation and silent fraud allegations (such as the claim that King “falsely represented that all disclosures required under the [SPA] were fully, accurately, and completely made”) related directly to King’s disclosure obligations under the SPA, and in fact were the same allegations underlying Plaintiffs’ breach of contract claims. The court rejected Plaintiffs’ argument that the SPA’s indemnification provision excepted fraud and thus created a carve-out for the doctrine. The court stated that allowing parties to contract around the doctrine would undermine its purpose to keep contract and tort law distinct. Furthermore, the court rejected Plaintiffs’ assertion that their fraudulent inducement claim is exempt from the economic loss doctrine. The court stated that while there is an exemption for inducement claims relating to fraud extraneous to the contract, Plaintiffs’ inducement claims all concerned King’s performance of the contract. Accordingly, the court held that Plaintiffs’ fraud claims were barred by the economic loss doctrine.

Pinnacle North, LLC v Keith A. White^[116] (*Voidable transactions, capital contributions, distributions*). Non-party Marketplace Home Mortgage, LLC (“MHM”) leased office space from Plaintiff. In October 2019, Plaintiff obtained a default judgment against MHM of approximately \$53,000, plus interest, costs, and attorneys’ fees. Plaintiff was unable to collect on the judgment, and brought a subsequent suit in the Oakland County Business Court against Defendant’s former owner, seeking to pierce the corporate veil and recover the default judgment. The matter went to a bench trial, where the central dispute was the characterization of a \$50,000 payment Defendant made from MHM to himself in December 2019. If the payment was a distribution to Defendant, then it would be a voidable transfer under the Voidable Transactions Act that Plaintiff could collect to satisfy the judgment; but if it was a loan repayment as Defendant contended, then it would not be a transfer under the Act and therefore would not be collectible.

The court first considered whether Defendant had made any loan to MHM at all. Defendant claimed to have deposited \$275,000 in order to use a line of credit for the company and claimed that this deposit was a loan to the company. However, the deposit was characterized differently on different documents: MHM’s books and records showed it as a capital contribution made on November 30, 2018; a separate loan document and security agreement showed it as a loan made on December 3, 2018; tax documents did not show it as a liability; and MHM’s balance sheet did not show it as a loan. Defendant, for his part, testified that the deposit was both a loan and a capital contribution. The court did not find Defendant credible and found that the books and records unambiguously proved the \$275,000 deposit to be a capital contribution.

Turning to the \$50,000 payment, the court found that it was a distribution from MHM to Defendant, and not a repayment of the alleged loan, because the check: (1) was made to MHM’s sole owner; (2) was made at the end of the year; (3) did not identify any consideration; (4) did not correspond to any loan schedule; (5) did not correspond to any loans on MHM’s books; (6) had no description of the payment; and (7) was shown on MHM’s books as a return of a capital contribution. Additionally, Defendant had sworn to the IRS that there were no outstanding loans from MHM officers. Accordingly, the payment was a distribution, and because it was made after Plaintiff’s claim against MHM and while MHM was insolvent, it was

voidable under the Voidable Transactions Act. The court found Defendant responsible for the entirety of Plaintiff's default judgment against MHM, including nearly \$70,000 in attorneys' fees pursuant to the underlying contract.

Fastenal Company v. Kurt Patrick Gross and Hi-Tech Fasteners, LLC^[117] (Noncompete, trade secrets, preliminary injunctions). Defendant Kurt Gross was an employee of Plaintiff Fastenal Company. Gross had a confidentiality and noncompetition agreement that prohibited Gross from soliciting Fastenal's customers for a year after leaving Fastenal's employ. On June 3, 2022, Gross resigned from Fastenal. On that same day, Gross began employment with Defendant Hi-Tech Fasteners, LLC, a competitor of Fastenal. Upon exiting Fastenal, Gross emailed to himself a "rolodex" spreadsheet listing Fastenal customers and confidential customer information. Fastenal alleged that while at Hi-Tech, Gross used his connections with Fastenal's customers and Fastenal's confidential customer information to solicit numerous Fastenal customers to buy parts from Hi-Tech, and that Hi-Tech could not have secured those customers without Fastenal's proprietary and confidential information. Believing Gross breached his agreement, Fastenal filed suit in the Ottawa County Business Court, alleging breach of the confidentiality and noncompetition agreement, misappropriation of trade secrets, and tortious interference. Fastenal sought a preliminary injunction prohibiting Gross from failing to maintain the confidentiality of Fastenal's customer information and from soliciting Fastenal's customers and prohibiting Hi-Tech from causing Gross to violate the confidentiality and noncompetition agreement.

The court held an evidentiary hearing, after which it considered the traditional injunction factors. First, the court found that Fastenal showed a substantial likelihood of success on its breach of contract claim because Gross took employment with a direct competitor, emailed himself a customer list with proprietary information, and an email exchange proved at least one incident of impermissible solicitation. However, the court found that there was not a likelihood that Fastenal would succeed on its misappropriation of trade secrets claim, as Fastenal provided only speculative and circumstantial allegations of improper disclosure, which Gross denied.

Next the court stated that a breach of a noncompetition agreement can establish irreparable injury in the form of the "loss of consumer goodwill and the weakened ability to fairly compete that would result from disclosure of trade secrets and breach of a non-compete." Gross argued that his agreement with Fastenal was not actually a noncompetition agreement because it did not totally prohibit him from working for a direct competitor, but instead prohibited him from soliciting customers and sharing information. The court disagreed, noting that the agreement's narrow employment restrictions merely complied with Michigan's statutory requirement that a noncompete agreement be reasonable.

The court then looked to the balance of hardships and found that while Fastenal had established it would suffer some irreparable harm, the proposed injunction would not subject Gross or Hi-Tech to comparable harm. Under the proposed injunction, Gross could still continue working at Hi-Tech, and Hi-Tech had other salespeople that are not subject to Gross's agreement and thus could do business with Fastenal's customers.

Finally, the court considered the public interest, and found that the public has a general interest in the courts' enforcement of contracts, which support the legitimate business interests of all contracting parties. The court further found that the proposed injunction was a limited and reasonable restriction on Gross, who would still be able to utilize his years of experience.

Having found all of the preliminary injunction factors in Fastenal's favor, the court issued the requested preliminary injunction pending final judgment on Fastenal's claims.

Franks v. Franks^[118] (Shareholder oppression, business judgment rule, dividends; buyout).^[119] Plaintiffs owned 50% of the non-voting shares of Defendant Burr Oak Tool, Inc. The individual Defendants were officers and directors who made a low offer to redeem Plaintiffs' shares, which they followed up by refusing to pay dividends despite the company having ample funds to do so. Plaintiffs brought a claim for, among other things, shareholder oppression.

A Kent County Business Court judge, sitting by designation, conducted a Zoom trial over 11 days. After trial, the court found that Defendants had committed intentional shareholder oppression and had acted in bad faith by withholding dividends, and that because of that bad faith, Defendants could not avail themselves of the protection of the business judgment rule. ^[120] The court ordered four of the individual Defendants and the company to pay damages to the Plaintiffs in the form of a dividend totaling \$2,100,000, including interest. However, the court declined to order a buyout, finding that because of Plaintiffs' substantial holdings, such a remedy would have an adverse effect on the company and third parties who rely on the company. Instead, the court ordered damages and the appointment of an independent outside director, which the court believed would improve the corporate culture.

§2.3.10. New Hampshire Commercial Dispute Docket

Under the following case headings, you will find direct excerpts from the respective opinions of the New Hampshire Commercial Dispute Docket, featuring key language from the court's decision.

Scott Komaridis v. Kevin D'Amelio, et al.^[121] (*Minority shareholder freezeout claims*). "The New Hampshire Supreme Court has not explicitly adopted the tort of corporate freezeout but has assumed its existence *arguendo*. See *Thorndike v. Thorndike*, 154 N.H. 443, 446 (2006). Another superior court, as part of the Business and Commercial Dispute Docket, 'has previously held that if the question were squarely presented, the New Hampshire Supreme Court would find that majority shareholders owe an actionable fiduciary obligation to minority shareholders.' *Ronzio v. Tannariello*, No. 226-2019-CV-00671, 2019 WL 678358, at *7 (N.H. Super. Ct. Dec. 19, 2019) (*McNamara, J.*); see also *Meehan v. Gould*, No. 218-2017-CV-1322, 2019 WL 3519455, at *5 (N.H. Super. Ct. July 31, 2019) (*McNamara, J.*). '[T]he assumed existence of the freeze-out claim under New Hampshire law is based on the existence of a fiduciary duty between shareholders in a closely held corporation.' *Ronzio v. Tannariello*, No. 226-2019-CV-671, 2020 WL 13663046, at *5 (N.H. Super. Ct. Dec. 11, 2020).

"The Court finds that the nature of a member-managed LLC, perhaps the most common form of a closely held corporation, supports Plaintiff's position. See *Pointer v. Castellani*, 918 N.E.2d 805, 808 (Mass. 2009) (describing an LLC as 'a closely held corporate entity'). 'Only in the close corporation does the power to manage carry with it the de facto power to allocate the benefits of ownership arbitrarily among the shareholders and to discriminate against a minority whose investment is imprisoned in the enterprise.' *Meiselman v. Meiselman*, 307 S.E.2d 551, 559 (N.C. 1983) (quotation omitted). The unequal power inherent in a closely held corporation leaves minority shareholders in an especially vulnerable situation because they cannot readily sell off their shares to recoup their investment. See *Donahue v. Rodd Electrotype Co. of New England, Inc.*, 328 N.E.2d 505, 514-15 (Mass. 1975) (explaining that compared to a large public corporation where a dissatisfied shareholder could sell off shares, the minority shareholder in a closely held corporation does not have a ready market to reclaim capital). Additionally, courts' general reluctance to become involved with business decisions of a corporation have also left minority shareholders susceptible to majority shareholders' oppressive conduct. See *id.* at 513-14."

Atlantic Anesthesia, P.A. v. Ira Lehrer, et al.^[122] (*Common interest doctrine*). "It is well settled that '[w]here legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications related to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure by himself or by the legal adviser unless the protection is waived by the client or his legal representatives.' *Riddle Spring Realty Co. v. State*, 107 N.H. 271, 273 (1966). The burden to prove the existence of the attorney-client relationship lies with the party asserting the privilege. *McCabe v. Arcidy*, 138 N.H. 20, 25 (1993).

"Although occasionally termed a privilege itself, the common interest doctrine is really an exception to the rule that no privilege attaches to communications between a client and an attorney in the presence of a third person.' *United States v. BDO Seidman, LLP*, 492 F.3d 806, 815 (7th Cir. 2007). The common interest doctrine applies when two or more clients consult or retain the same attorney to represent them on a matter of common interest. *Cavallaro v. United States*, 284 F.3d 236, 249 (1st Cir. 2002). 'In such a situation, the communications between each of them and the attorney are privileged against third parties.' *Id.* '[T]he privilege

49. INDIANA JUDICIAL BRANCH, <https://www.in.gov/courts/iocs/committees/commercial-courts/#members> (<https://www.in.gov/courts/iocs/committees/commercial-courts/#members>). ↑
50. THE INDIANA LAWYER, *Brisco, Lund nominated to IN Northern District Court*, Nov. 15, 2023 <https://www.theindianalawyer.com/articles/brisco-lund-nominated-to-in-northern-district-court> (<https://www.theindianalawyer.com/articles/brisco-lund-nominated-to-in-northern-district-court>). ↑
51. See Indiana Commercial Court Rule 7, https://www.in.gov/courts/rules/commercial/index.html#_Toc62198784 (https://www.in.gov/courts/rules/commercial/index.html#_Toc62198784). ↑
52. The full text of the Order adopting these rules can be found at https://www.courts.michigan.gov/siteassets/rules-instructions-administrative-orders/proposed-and-recently-adopted-orders-on-admin-matters/adopted-orders/2019-33_2023-11-01_formor_mcjrules.pdf (https://www.courts.michigan.gov/siteassets/rules-instructions-administrative-orders/proposed-and-recently-adopted-orders-on-admin-matters/adopted-orders/2019-33_2023-11-01_formor_mcjrules.pdf). ↑
53. Retired judges taking assignment are also required to complete CJE, albeit they need only complete 8 hours. ↑
54. MCL 600.8043 (“The Michigan judicial institute shall provide appropriate training for all circuit judges serving as business court judges.”). ↑
55. Toering & Lockhart, *Touring the Business Courts*, 43-3 Mich. Bus. LJ 10 (Fall 2023). ↑
56. Judge Bell’s appointment came in December 2022. ↑
57. See Administrative Order 286/22, N.Y.S. Unified Court Sys. (Dec. 16, 2022). ↑
58. See Request for Public Comment on Proposal to Amend Commercial Division Rules 2, 5, 15, 16, and 19, N.Y.S. Unified Court Sys. (Feb. 18, 2022). ↑
59. See Administrative Order 147/23, N.Y.S. Unified Court Sys. (May 15, 2023). ↑
60. *Id.* ↑
61. *Id.* ↑
62. Administrative Order, In Re Amended Business Court Program (S.C. July 14, 2023) (C.J. Beatty). ↑
63. Administrative Order, In Re Amended Business Court Program (S.C. Jan. 30, 2019) (C.J. Beatty). ↑
64. *Id.* ↑
65. Administrative Order, In Re Amended Business Court Program (S.C. July 14, 2023) (C.J. Beatty). ↑
66. *Id.* ↑
67. H.B. 19, 88th Leg., R.S. (2023); S.B. 1045, 88th Leg., R.S. (2023). ↑
68. H.B. 19, §§ 5, 8; S.B. 1045, §§ 1.14, 1.15. ↑
69. H.B. 19, § 1; Tex. Gov’t Code § 25A.003. ↑
70. H.B. 19, § 1; Tex. Gov’t Code § 25A.003(c)-(m). ↑

99. *OZ Media, LLC v. Greenberg Film and TV Studio Holdings, LLC*, No. 22-GSBC-0006, 2023 WL 2466118 (Ga. Bus. Ct. Feb. 27, 2023). [↑](#).
100. No. 49D01-2212-PL-044296, (Ind. Comm. Ct., Marion Cnty., Jan. 9, 2023), <https://public.courts.in.gov/mycase/#/vw/Search> (<https://public.courts.in.gov/mycase/#/vw/Search>) or <https://public.courts.in.gov/CCDocSearch> (<https://public.courts.in.gov/CCDocSearch>). [↑](#).
101. No. 82D07-2207-PL-003441, (Ind. Comm. Ct., Vanderburgh Cnty., Mar. 16, 2023), <https://public.courts.in.gov/mycase/#/vw/Search> (<https://public.courts.in.gov/mycase/#/vw/Search>) or <https://public.courts.in.gov/CCDocSearch> (<https://public.courts.in.gov/CCDocSearch>). [↑](#).
102. No. 82D07-2212-PL-005678, (Ind. Comm. Ct., Vanderburgh Cnty., Nov. 10, 2023), <https://public.courts.in.gov/mycase/#/vw/Search> (<https://public.courts.in.gov/mycase/#/vw/Search>) or <https://public.courts.in.gov/CCDocSearch> (<https://public.courts.in.gov/CCDocSearch>). [↑](#).
103. No. 71D04-2209-PL-000161, (Ind. Comm. Ct., St. Joseph Cnty., Jan. 19, 2023), <https://public.courts.in.gov/mycase/#/vw/Search> (<https://public.courts.in.gov/mycase/#/vw/Search>) or <https://public.courts.in.gov/CCDocSearch> (<https://public.courts.in.gov/CCDocSearch>). [↑](#).
104. No. 02D02-2301-PL-000026, (Ind. Comm. Ct., Allen Cnty., Apr. 11, 2023), <https://public.courts.in.gov/mycase/#/vw/Search> (<https://public.courts.in.gov/mycase/#/vw/Search>) or <https://public.courts.in.gov/CCDocSearch> (<https://public.courts.in.gov/CCDocSearch>). [↑](#).
105. No. 49D01-2302-PL-008564, (Ind. Comm. Ct., Marion Cnty., Jun. 2, 2023), <https://public.courts.in.gov/mycase/#/vw/Search> (<https://public.courts.in.gov/mycase/#/vw/Search>) or <https://public.courts.in.gov/CCDocSearch> (<https://public.courts.in.gov/CCDocSearch>). [↑](#).
106. No. LACV098830 (Iowa Dist. Ct. Linn Cnty. May 1, 2023). [↑](#).
107. No. BCD-CIV-2023-00028, 2023 WL 6309681 (Me. B.C.D. August 31, 2023). [↑](#).
108. No. 24-C-22-000531, 2023 WL 8582354 (Md. Cir. Ct. Mar. 30, 2023). [↑](#).
109. No. 24-C-21-004813, 2023 WL 8582355 (Md. Cir. Ct. Jan. 4, 2023). [↑](#).
110. No. 24-C-23-001344, 2023 WL 8582356 (Md. Cir. Ct. Aug. 29, 2023). [↑](#).
111. Case No. 2084CV00735-BLS2, 2023 WL 3792880 (May 16, 2023) (Salinger, J.). [↑](#).
112. No. 22-2509-BLS1, 2023 WL 4456956 (June 21, 2023) (Krupp, J.). The authors of this section note that members of their Firm represent BJ's Wholesale Club, Inc. in connection with this matter. The authors are not personally involved in the litigation. [↑](#).
113. No. 1984CV03317-BLS2, 2023 WL 1804376 (Jan. 6, 2023) and 2023 WL 1804375 (Jan. 30, 2023) (Salinger, J.). [↑](#).
114. Wayne County, Case No. 23-001951-CB, Hon. Annette J. Berry, Sept. 21, 2023. [↑](#).
115. Macomb County, 22-004565-CB, Hon. Kathryn A. Viviano, May 10, 2023. [↑](#).
116. Oakland County, 20-183261-CB, Hon. Victoria A. Valentine, Mar. 27, 2023. [↑](#).
117. Ottawa County, 22-007065-CB, Hon. Jon A. Van Allsburg, May 8, 2023. [↑](#).
118. St. Joseph County, 13-809-CBB, Hon. T.J. Ackert (Kent County Business Court Judge sitting by assignment), June 12, 2023. [↑](#).

119. The authors' firm, Mantese Honigman, P.C., was counsel for Plaintiffs in this matter. ↑.
120. Prior to trial, the case generated the appellate decision of *Franks v. Franks*, 330 Mich. App. 69, 944 N.W.2d 388 (2019), where the Michigan Court of Appeals held that the business judgment rule defense is inapplicable where oppression is shown. ↑.
121. No. 216-2023-cv-00094, 2023 N.H. Super. LEXIS 8, at *5-6 (Super. Ct. Hillsborough Cnty. Aug. 23, 2023). ↑.
122. Nos. 218-2019-cv-933, 218-2019-cv-1683, 219-2019-cv-424 (April 19, 2023), at 19-20, *available at* <https://www.courts.nh.gov/sites/g/files/ehbemt471/files/documents/2023-08/april-19-2023-order-redacted.pdf> (<https://www.courts.nh.gov/sites/g/files/ehbemt471/files/documents/2023-08/april-19-2023-order-redacted.pdf>).
- ↑.
123. No. 216-2020-cv-00312, 2023 N.H. Super. LEXIS 1, at *10-11 (Super. Ct. Hillsborough Cnty. Jan. 3, 2023). ↑.
124. No. MRS-L-1530-22 (N.J. Super. Law Div., Complex Business Litigation Program, Oct. 23, 2023 (unpublished)). ↑.
125. No. MON-L-1518-20 (N.J. Super. Law Div., Complex Business Litigation Program, Nov. 16, 2023 (unpublished)). ↑.
126. 175 N.Y.S.3d 713, 2022 NY Slip Op. 50986(U) (Sup. Ct. Bronx Cnty. Oct. 11, 2022). ↑.
127. 77 Misc. 3d 1220(A) (Sup. Ct. N.Y. Cnty., Jan. 5, 2023). ↑.
128. 174 N.Y.S.3d 825, 76 Misc. 3d 1213(A) (Sup. Ct. N.Y. Cnty. Sept. 26, 2022). ↑.
129. 180 N.Y.S.3d 524, 77 Misc. 3d 1222(A) (Sup. Ct. N.Y. Cnty. Jan. 6, 2023). ↑.
130. 2022 BL 479595, 76 Misc. 3d 1220(A), 175 N.Y.S.3d 714 (Sup. Ct. N.Y. Cnty., Oct. 12, 2022). ↑.
131. 183 N.Y.S.3d 727, 78 Misc. 3d 1202 (Sup. Ct. N.Y. Cnty. Feb. 27, 2023). ↑.
132. 184 N.Y.S.3d 591, 78 Misc. 3d 1212(A) (Sup. Ct. Bronx Cnty. March 17, 2023). ↑.
133. 192 N.Y.S.3d 891 (Sup. Ct. N.Y. Cnty. June 9, 2023). ↑.
134. No. 21-CVS-10487, 2023 NCBC 7 (Mecklenburg Cnty. Super. Ct. Jan. 24, 2023) (Bledsoe, C.J.), <https://www.nccourts.gov/documents/business-court-opinions/cutter-v-vojnovic-2023-ncbc-7> (<https://www.nccourts.gov/documents/business-court-opinions/cutter-v-vojnovic-2023-ncbc-7>). ↑.
135. No. 23-CVS-20101, 2023 NCBC 65 (Wake Cnty. Super. Ct. Sept. 22, 2023) (Conrad, J.), <https://www.nccourts.gov/documents/business-court-opinions/visionary-ed-tech-holdings-grp-inc-v-issuer-direct-corp-2023-ncbc-65> (<https://www.nccourts.gov/documents/business-court-opinions/visionary-ed-tech-holdings-grp-inc-v-issuer-direct-corp-2023-ncbc-65>). ↑.
136. No. 22-CVS-5279, 2023 NCBC 68 (Forsyth Cnty. Super. Ct. Oct. 10, 2023) (Robinson, J.), https://www.nccourts.gov/assets/documents/opinions/2023%20NCBC%2068.pdf?VersionId=XXYCaBlal6hKoU_fYcrd5Y4oxUFIBOAe (https://www.nccourts.gov/assets/documents/opinions/2023%20NCBC%2068.pdf?VersionId=XXYCaBlal6hKoU_fYcrd5Y4oxUFIBOAe). ↑.
137. 600 U.S. 122 (2023). ↑.
138. 243 U.S. 93 (1917). ↑.