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In this issue, we interview newly appointed Michigan Court of Appeals Judge Christopher P. Yates. We will look back on his distinguished ten-year career on the Kent County Specialized Business Docket and look forward to his new position on the Court of Appeals. Following that, we summarize the landmark Michigan Supreme Court decision in *Murphy v Inman* and the Business Law Section's involvement in filing an amicus curiae brief in that business court case.

Michigan Court of Appeals and Former Kent County Business Court Judge Christopher P. Yates

Beginning of the Kent County Business Court

The Kent County Business Court (Specialized Business Docket) started March 1, 2012. This was the second business court in Michigan. (The Macomb County Specialized Business Docket, which opened November 1, 2011, was the first.) Judge Yates was the first business court judge on the Kent County Business Court. He served as a business court judge there until April 15, 2022, when Governor Gretchen Whitmer appointed him to the Court of Appeals.

Recalling how the Kent County Business Court started, Judge Yates states that Donald A. Johnston, III, then the Chief Judge for the Kent County Circuit Court, really drove the process. Judge Johnston drafted an administrative order, which was approved by the Michigan Supreme Court. The administrative order included the criteria for business court cases. Unlike the current business court statute, high-asset divorce cases were included in the business court there. Otherwise, the local administrative order was similar to the current business court statute.[1]

Approach to Business Court Cases

One goal of the Kent County Business Court was to create a docket dedicated to complex business cases. This was particularly important because such cases tended to clog the general civil docket due to their more complicated and time-consuming nature. Another goal of moving such cases off the general civil docket onto a specialized docket was to resolve those cases swiftly. So when Judge Yates was appointed to the business court, he sought to be proactive on business cases in order to resolve them quickly. To that end, Judge Yates strived to resolve business cases "on the front end." Failing that, he sought to set up a process to move the cases to conclusion as quickly and inexpensively as possible. Overall, Judge Yates, Judge Johnston, and the Kent County Circuit Court staff "set up a good process."

But there were stumbling blocks to early resolution of cases. It turned out that few business cases in Kent County have a jury demand, so Judge Yates could not always hold early settlement conferences, because he might be the ultimate finder of fact. Indeed, he presided over only a "handful" of jury trials while on the business court bench, but he tried many bench trials. Also, Judge Yates observed, it was often difficult to isolate and decide the controlling issues early in the case. Instead, parties would usually need to get through the discovery phase before a central issue could be resolved. If a critical issue was impeding resolution, Judge Yates encouraged counsel to engage in the limited discovery needed to resolve that particular issue. But parties were often hesitant to do so.

Successes

Looking in the rearview mirror, what were Judge Yates's major accomplishments? Two things immediately came to Judge Yates's mind. First, he endeavored to address emergency matters (for example, preliminary injunction motions) quickly. To that end, he worked to provide opinions within a week. As part of a preliminary injunction motion, the moving party sets forth its view of likelihood of success on the merits. Thus, Judge Yates's opinion on such a motion gave good guidance to the parties on the likely outcome of the case.

His second success was his focus on initial status conferences. (These have become common in business courts throughout the state and have been one of the major reasons for the success of the business courts.) In Judge Yates's view (and undoubtedly in the views of other business court judges), initial status conferences provide a customized plan to "get to the finish line." This includes deciding the amount and timing of discovery. In some cases, however, the lawyers didn't want discovery; they just wanted a trial date. (A firm trial date settles cases, observes Judge Yates.) Thus, Judge Yates would set a quick trial date. Overall, many complex cases were resolved, in part, through the use of the initial status conferences.

Difficulties

But there were also difficulties. Early on, Judge Yates was able to provide written opinions on most everything. But the crush of motion practice (which is a large part of business litigation) made that difficult, so Judge Yates had to decide more motions from the bench. ("It doesn't do lawyers any good to wait four to six months for an opinion," he notes.) As the success of the business courts in resolving cases became more widely known, business courts received more filings. That's fine, of course. But this made it tougher to provide written opinions for every ruling.

Another disappointment was COVID-related. Prior to the pandemic, Judge Yates would meet informally with attorneys and obtain their input on how the business court was operating. (This became difficult during the pandemic.) It helped him when lawyers would "gently tell me what I could do differently." He added, "It is so important for judges to get feedback."

Training New Trial Lawyers

Judge Yates shares a concern that many in Michigan and nationwide have expressed. How can we train trial lawyers, when so few cases are tried? Weighing in, Judge Yates mentions that preliminary injunction

hearings can provide good courtroom experience—the stakes are lower and less scary than being in front of a jury. Also, use the opportunity to try bench cases, when that opportunity presents itself. You can "learn on the fly better" than if there is a jury. Indeed, Judge Yates did not mind going off the record in a bench trial to explain to a new attorney how something should be done. Overall, Judge Yates agrees with the "learning by doing" approach.[2]

Bench, Bar, and More

Apart from serving on the Court of Appeals, Judge Yates serves as President of the Michigan Judges Association, Vice President of the American College of Business Court Judges, an officer of the Business Law Section, and a council member of the Judicial Section and the Alternative Dispute Resolution Section. He also presides over mock trials for the Michigan Center for Civic Education. Despite the time and effort these require, Judge Yates reflects that, "My career and my ability have been tremendously increased by outside activities." He seldom turns down a speaking opportunity with lawyers, because "it is helpful for them to hear from the bench." Indeed, "we never stop learning in this business. What we encounter on a day-by-day basis is what a lot of practitioners would like to know. If you don't get out, you can't get the word out."

Overall

On the business court bench, "I felt like an NBA referee," says Judge Yates. "Every day I got to watch the best in the business and all I had to do was make the calls."

Advice

Judge Yates provides a few words of practical advice: (1) Feel free to attach relevant opinions from other business court judges; he found those very instructive. (2) Think hard before filing an early summary disposition motion under MCR 2.116(C)(10), which courts usually don't grant without discovery. (3) Be flexible in your argument at the hearing. Listen to where the judge is going and adjust your argument accordingly. (4) Some briefs filed in the business court are so voluminous as to be intimidating. Ask yourself whether you really need all of those exhibits to support your motion. If so, then, yes, attach all of them. But some motions arrive with boxes of exhibits, and it is rarely necessary to include that many exhibits. (5) As to appeals, it can often be more effective to submit a tight, 15-page brief, rather than including everything in 50 pages. A case almost never requires a 50-page brief. Quoting a supervising attorney he had earlier in his career, Judge Yates states, "On appeal, bring a rifle not a shotgun."

Going Forward

Judge Yates' investiture will likely occur in July 2022. Until the Michigan Supreme Court appoints a replacement for Judge Yates, Judge Johnston has returned from retirement to assist with Judge Yates's former docket. Judge Johnston will serve along with Judge Terence J. Ackert on the Kent County Business Court bench.

Murphy v Inman

In early 2021, the Michigan Supreme Court invited input from the Business Law Section (BLS) as *amicus curiae* in a business court case concerning fiduciary duties owed to shareholders. That case, *Murphy v Inman*,[3] involved litigation over a "cash-out"[4] merger between two corporations, Covisint Corporation and OpenText Corporation. After the merger was completed and Covisint's shareholders were cashed out, the plaintiff brought a putative class action charging Covisint's former directors with breaching their statutory and common law fiduciary duties by, *inter alia*, accepting a too-low per share price in the merger.[5]

The dispute on appeal dealt with both the fiduciary duties owed to shareholders and the direct/derivative distinction in shareholder actions. The business court granted summary disposition for the defendant directors, holding that the plaintiff lacked standing to bring the suit as a direct shareholder action; instead, his claim was derivative because the alleged harm affected Covisint and the plaintiff in the same way, and because the plaintiff's harm was not distinct from Covisint's shareholders at large. However, the plaintiff could not bring the suit derivatively on behalf of Covisint because he had not met the requirements for bringing a derivative action.[6] The Court of Appeals affirmed, holding that the plaintiff's claims were derivative under common law fiduciary duty principles and under the Business Corporation Act's fiduciary duty provisions in MCL 450.1541a.[7]

Plaintiff filed an application for leave to appeal to the Michigan Supreme Court, on which the Court ordered a mini-oral argument on the application.[8] The Court requested supplemental briefing from the parties on two issues: "(1) whether, with respect to Covisint Corporation's cash-out merger with OpenText Corporation, corporate officers and directors owed cognizable common law fiduciary duties to the corporation's shareholders independent of any statutory duty; and (2) whether the appellant has standing to bring a direct cause of action under either the common law or MCL 450.1541a."[9] The Court also invited briefs *amicus curiae* from the BLS and the Litigation Section.

The BLS convened an ad hoc *amicus* committee to consider the questions presented.[10] The committee, comprising eight excellent business litigators of varying backgrounds, reached a consensus and prepared a brief arguing the following positions:

1. The plaintiff had standing to bring a direct action under the common law and MCL 450.1541a;
2. The Court should adopt Delaware's "*Tooley* test"[11] to clarify Michigan's caselaw on the direct/derivative determination;
3. Directors owe shareholders common law fiduciary duties, which MCL 450.1541a's statutory duties did not abrogate; and

4. Directors have a specific duty to maximize shareholder value in cash-out mergers.

The BLS's Council approved the brief. After the parties' oral argument on the application, the Court dispensed with full merits briefing and argument and instead made its decision on the mini-oral argument on application. The Court issued an opinion adopting substantially all of the BLS's positions. First, the Court found that under Michigan's "common law, directors owe fiduciary duties first and foremost to the shareholders of the corporation,"[12] and that MCL 450.1541a did not abrogate those duties.[13] And, "in the context of a cash-out merger transaction, directors of the target corporation must disclose all material facts regarding the merger and must discharge their fiduciary duties to maximize shareholder value by securing the highest value share price reasonably available."[14] The Court also agreed that Michigan's existing direct/derivative tests were problematic, and, as the BLS suggested, adopted Delaware's *Tooley* test to clarify the existing tests and streamline the inquiry to two simple questions: "(1) who suffered the harm, and (2) who will receive the benefit of any remedy."[15]

Applying these principals and its newly clarified direct/derivative test, the Michigan Supreme Court found that because shares are personal property, any harm resulting from an inadequate cash-out price would directly injure the plaintiff.[16] Moreover, characterizing plaintiff's claim as derivative "defies logic"—the per-share price received by shareholders does not involve any corporate interest; recovery by the acquiring corporation (here, OpenText), would provide it with a windfall; and the plaintiff would be left "with no avenue for relief."[17] Accordingly, the Court held that the plaintiff had standing to bring his shareholder action directly and remanded the case back to the business court.[18]

NOTES

1. MCL 600.8301 *et seq*. The business court statute was signed October 2012 and became effective January 1, 2013. The current local administrative order for the Kent County Business Court may be found at https://www.accesskent.com/Courts/17thcc/efiling.htm.

2. *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 MI Bus LJ 19 (Spring 2022), and James F. Basile and Robert Gretch, *Training Trial Lawyers*, Litigation Journal (Spring 2022), https://www.americanbar.org/groups/litigation/publications/litigation_journal/2021-22/spring/training-trial-lawyers/.

3. *Murphy v Inman*, No 161454, ___ Mich. ___, ___ NW2d ___ (Apr 5, 2022), 2022 WL 1020127.

4. In a cash-out merger, the target corporation's shareholders are divested of their ownership interests, for which they receive cash as consideration. *See id.* at *5.

5. Michigan's dissenters' rights statute, MCL 450.1754-.1774, was not available to the plaintiff by virtue of the Covisint-OpenText merger's cash-out nature. *See* MCL 450.17462(2)(b).

6. Specifically, the plaintiff had not met the "demand requirement" for bringing a derivative suit, which requires that a would-be derivative plaintiff first demand that the corporation take action on his allegations. MCL 450.1493a. Other standing requirements for derivative suits are found in MCL 450.1492a.

7. *Murphy v Inman*, unpublished per curiam opinion of the Court of Appeals, issued April 20, 2020 (Docket No. 345758). All citations to *Murphy* in this article are to the Michigan Supreme Court decision unless expressly noted.

8. Under MCR 7.305(H)(1), the Supreme Court may "direct argument on the application" in lieu of making the ultimate decision whether to grant leave to appeal. Per the Court's Internal Operating Procedures, a mini-oral argument on application "allows the Court to explore the issues in a case without the full briefing and submission that apply to a grant of leave to appeal." IOP 7.305(G)(1).

9. *Murphy*, 2022 WL 1020127 at *5.

10. Full disclosure: Mr. Toering and Mr. Markham served on the BLS's *amicus* committee, and Ms. Bolyea served on the Litigation Section's committee.

11. *Tooley v Donaldson, Lufkin & Jenrette, Inc*, 845 A2d 1031 (Del 2004).

12. *Murphy*, 2022 WL 1020127 at *7.

13. *Id.* at *10.

14. *Id.* at *8.

15. *Id.* at *12.

16. *Id.* at *13.

17. *Id.* at *13–14 ("[L]abeling plaintiff's claim as derivative would result in a windfall for OpenText, as it would have paid a reduced price for the Covisint shares and received a damage award payable to itself as a result of defendants' breach.").

18. *Id.* at *14.

Douglas L. Toering of Mantese Honigman, PC, is a past chair of the SBM's Business Law Section, for which he chairs the Commercial Litigation Committee and Business Courts Committee. His practice includes commercial litigation including shareholder litigation and insurance litigation, business transactional matters, healthcare law, and business mediation.

Fatima M. Bolyea is a partner at Mantese Honigman, PC, and is the current Chair of the Litigation Section of the State Bar of Michigan. Her practice includes complex commercial litigation, including shareholder, member, and partnership disputes.

Brian P. Markham is an associate in the Troy, Michigan office of Mantese Honigman, PC. He focuses his practice on complex business litigation, including divorces and environmental litigation, and state and federal appeals.