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CONTENTS

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Section Matters

From the Desk of the Chairperson	1
Officers and Council Members	2
Committees and Directorships	3

Columns

Taking Care of Business: FinCEN Is Now Accepting Beneficial Ownership Information Reports <i>Alexis Lupo</i>	5
Tax Matters: Government Debt? Expect Aggressive Enforcement <i>Eric M. Nemeth</i>	6
Technology Corner: California Privacy Agency “Stands Ready” to Enforce – Are Your Clients Ready for CPRA? <i>Jennifer A. Dukarski and Maya Smith</i>	8
Touring the Business Courts: Kent County, Livingston County, and North Carolina <i>Douglas L. Toering and Matthew Rose</i>	10

Articles

On Using Collateral Estoppel to Deny Discharge <i>Stephen J. Brown and Aleanna B. Siacon</i>	14
Anatomy of Cryptocurrency – What You Need to Know to Understand the 2022 UCC Amendments <i>Ronald A. Spinner</i>	21
Crypto Under Control: The 2022 UCC Amendments <i>Ronald A. Spinner</i>	26

Case Digests

Index of Articles	33
	36



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Kent County, Livingston County, and North Carolina

For this issue, we interview Kent County Business Court Judge Curt A. Benson, Livingston County Business Court Judge Michael P. Hatty, and retired North Carolina Business Court Judge Ben F. Tennille. We think you will benefit from their insight.

Interview with Judge Curt A. Benson

Background

For Judge Benson, becoming a judge felt like a natural progression in his career path. He started practicing law in 1986, primarily in insurance defense. From 2003 to 2014, Judge Benson was a full-time professor at Thomas M. Cooley Law School, where he taught mostly evidence and civil procedure. Thereafter, he handled FINRA securities arbitrations and mediations in New York City and then returned to private practice, representing cities and counties in civil rights actions in federal court. Suffice to say, Judge Benson brings a seasoned, versatile perspective to the bench.

Experience with the Business Court

In 2018, Judge Benson was elected to the Kent County Circuit Court and was assigned to the general civil/criminal docket. Upon his appointment to the business court on July 27, 2022, Judge Benson's docket transitioned to a general civil/business court docket. Judge Benson characterizes his adjustment to the business court as "almost a cultural shift." Criminal cases were "controlled chaos," while life on the business court bench is comparatively "like a monastery" because a greater proportion of Judge Benson's time is now spent in his chambers reading briefs and writing opinions.

Compared to general civil, Judge Benson finds that he is "much more involved" in business court cases. For instance, in general civil cases, the first time Judge Benson hears the parties' perspectives on the case is typi-

cally at the first motion hearing. In business court cases, however, prior to the initial case conference, Judge Benson issues a preliminary scheduling order with questions the parties must answer about the dispute—this helps frame the case going forward.

Before the initial case conference, Judge Benson allows "very limited discovery," consisting of requests for production and twenty interrogatories, along with the parties' initial disclosures. While the parties are free to stipulate to additional discovery, this has not yet occurred in any of Judge Benson's cases. Rather, he finds that attorneys appreciate the limited discovery, and the parties typically proceed to mediation after the limited discovery concludes.

Motions

With respect to motions for temporary restraining orders ("TROs"), Judge Benson reminds litigators that ex parte TROs are extraordinary remedies: "The right to notice and an opportunity to be heard in a civil action is a constitutional right. Both the United States Supreme Court and Michigan Supreme Court allow trial judges to issue such orders without notice or a hearing only in the most extraordinary circumstances." Accordingly, ex parte TRO motions should "meticulously observe" the governing court rule, MCR 3.310(B). Judge Benson currently finds that attorneys commonly move for ex parte TROs in cases where notice could readily be given to the other side, and many ex parte TRO motions do not include the required certification that the movant attempted to notify the other party.¹

Additionally, Judge Benson notes that attorneys include the "likelihood to prevail on the merits" preliminary injunction factor² in their TRO motions. That's understandable, given that TRO motions are often coupled with a request for a preliminary injunction. But, he asks, "How can I find that one party is likely to prevail when the other side hasn't even ap-

peared?" MCR 3.310(B) does not mention this factor, and no Michigan case requires courts to make this finding in order to grant a TRO. Judge Benson would like to see MCR 3.310(B) amended to provide greater clarity to litigants. Presently, he advises attorneys to clearly demonstrate irreparable harm in their TRO motions.

Regarding other types of motions, Judge Benson generally stays discovery when there is a pending motion for summary disposition under MCR 2.116(C)(8),³ absent extraordinary circumstances. He believes that doing so is consistent with the purpose underpinning MCR 2.116(C)(8)—avoiding the expense of discovery if the plaintiff has failed to state a claim.

If parties seek an adjournment, they should file a motion; Judge Benson liberally grants adjournments, except when it comes to trials. He is unlikely to adjourn a trial once the trial date has been scheduled.

Alternative Dispute Resolution

Judge Benson has no set policy requiring that parties engage in ADR; however, early mediation is encouraged. He has found that "mediation is a very good way to settle cases," though nothing settles a case like a "firm trial date without a hope of adjournment." Judge Benson has not had any business court litigants request case evaluation, and he does not order it.

Virtual vs. In-Person

Like many judges, Judge Benson has come to accept that virtual proceedings are "the way of life now." All business court proceedings in Judge Benson's courtroom now occur via Zoom, except for evidentiary hearings and trials. While Zoom provides various benefits, Judge Benson regrettably notes that there are now fewer opportunities to have personal, informal conversations with attorneys.

Advice for Lawyers

Judge Benson offers practical advice that litigators would be wise to take

to heart: “Be brief. Present your case professionally and avoid personal attacks and sarcasm.” While litigators must advocate for their clients, they should do so while presenting the law fairly and objectively. When writing a dispositive brief, “start with a three-paragraph summary of the argument that presents the gist of the case so that the judge knows what he or she is looking for.” Transactional attorneys should strive to “be clear, so some overworked, underpaid judge five years later can know exactly what you meant.”

Interview with Judge Michael P. Hatty

Background

Livingston County Chief Judge Michael Hatty has brought a wealth of experience to the bench. Before he was appointed to the Livingston County Circuit Court in 2009, Judge Hatty spent nearly three decades in private practice, handling a wide variety of cases in practice areas as diverse as criminal law, family law, and municipal law. He was also a township’s general counsel for more than two decades and taught a collegiate-level business law class for ten years. On March 17, 2024, Judge Hatty will retire from his bench seat, leaving behind a legacy of success and a robust, well-functioning business court docket for his successor to take over. Judge Hatty’s “retirement” will include serving as a mediator and arbitrator, sitting as a visiting judge upon request, and mentoring.

Experience with the Business Court

In 2019, Livingston County added a third circuit-court bench seat and established a business court.⁴ Judge Hatty was appointed to preside over the program. Reflecting on the business court cases he has adjudicated during his tenure, Judge Hatty observes: “Business court cases aren’t simply run-of-the-mill cases. These are fact-intensive, high-stakes cases with a lot of money on the table and many different parties. They’re also often highly emotional because they

involve businesses that were built on years of sweat and equity, and for many of these litigants, their professional reputations are on the line.”

Over the past five years, Judge Hatty and his staff have worked diligently to design and operate a business court docket centered on efficiency, predictability, and communication. The business court achieves these objectives through various practices and policies that are tailored to the needs of business litigants. For example, at the outset, Judge Hatty requires the parties to sign a stipulated protective order, and soon after the defendant responds to the complaint, the parties must prepare a joint statement of facts to “crystallize the issues.” Additionally, Judge Hatty schedules check-in dates and frequent status conferences to promote collaborative dispute resolution.

Motions

Except in extraordinary circumstances, Judge Hatty is reluctant to grant *ex parte* TROs: “No matter how convincing the supporting brief sounds, there is always another side to the story.” Instead, he typically prefers to give the other side a chance to respond; then he will review the filings and set a hearing date.

If there is a pending motion for summary disposition under MCR 2.116(C)(8), Judge Hatty is generally inclined to deny requests to stay discovery. He believes that granting a discovery stay in these instances would “make the case grind to a halt” since the plaintiff will presumably amend the complaint should the motion succeed. That said, Judge Hatty does not disfavor (C)(8) motions, which can be an effective way to resolve a case and avoid extended, costly litigation. As to summary disposition under (C)(10),⁵ he cautions against premature motions, noting that the vast majority of the time, a (C)(10) should only be brought *after* discovery has closed so that the record is fully developed.

Discovery

When Judge Hatty is asked to resolve a discovery dispute, he first asks

whether the parties have made a good-faith effort to confer and resolve the dispute beforehand. If the answer is “no,” he will deny the motion. A motion to compel hearing reflects that there was a “breakdown in the attorney-to-attorney communication somewhere. I’ll hear the motion and rule if I have to. But I encourage the attorneys to sit down and collaborate to solve the problem, and I find that often they do.”

In some instances, though—such as in cases involving massive amounts of electronically stored information—the discovery disputes are more complex, and it may be helpful to appoint a special master to resolve the disputes. Judge Hatty usually assigns the cost of the special master to the party who caused the communication breakdown or who withheld discoverable information.

ADR

Judge Hatty notes that his business court prioritizes negotiations and efforts to settle cases. Early mediation is especially beneficial in business court cases; it can narrow or resolve complex issues and instill within the parties a “mindset of facilitation” that helps frame the trajectory of the case moving forward. In the business court, mediation is more beneficial than case evaluation since business cases often require careful attention from mediators. Judge Hatty thus exempts business court litigants from case evaluation.

Virtual vs. In-Person

While recognizing that virtual proceedings can promote efficiency, Judge Hatty has found that parties (through their counsel) typically make more progress resolving a dispute when they appear in person. When each side is physically present, they have more opportunities to talk with one another and work together to achieve creative solutions.

Motion hearings may be held either via Zoom or at the courthouse; however, evidentiary hearings and trials must take place in person. Judge Hatty also requires settlement conferences to occur in person because

“settlement conferences over Zoom rarely settle cases—the parties need the immediacy and gravity of being at court to bring home resolutions.”

Advice for Lawyers

Judge Hatty stresses the importance of communicating with the other side: “So many of the little pretrial motions could be so easily resolved with a phone call, or even an email. It would be a cost savings for the parties too if the attorneys would communicate more.” He also urges litigators to offer reasonable proposals for resolution instead of playing hardball: “The Court can see through the artifice of taking outrageous positions just to perform for the clients or to try to bully the other side. I won’t allow gamesmanship to be an effective technique.”

Judge Hatty believes that transactional attorneys can benefit from observing a motion day every now and then to better understand how contractual disputes are litigated and the Court’s approach to contract interpretation. This way, transactional attorneys can better anticipate future disputes and draft accordingly.

Interview with Retired Judge Ben F. Tennille

Background

Retired judge Ben Tennille is nothing short of a business court pioneer. In the mid-1990’s—after he had spent successive decades first as a private practitioner in a wide array of practice areas (e.g., IP, tax, white collar, etc.) and then as lead corporate counsel for a Fortune 500 company—North Carolina’s governor tapped Judge Tennille to develop and oversee the state’s business court program. While a couple of other states had already created commercial dockets within their existing civil courts, North Carolina’s business court would be a novel, standalone system with state-wide jurisdiction.⁶

For several years, Judge Tennille was the state’s only business court judge, responsible for adjudicating cases throughout North Caro-

lina. The resources allocated to the nascent program did not match the magnitude of the task, as the legislature had only appropriated funds for Judge Tennille to buy a laptop—he did not have a courtroom or any staff. As such, during the business court’s infancy, Judge Tennille was essentially a travelling judge; the base of his operations was a combination of his dining room and the trunk of his car.⁷

Under Judge Tennille’s guidance, North Carolina’s business court thrived and expanded. Two additional judges were appointed, and in the early 2000’s, the legislature provided additional funding. Judge Tennille and the other business court judges were provided offices, courtrooms, and law clerks. Witnessing the success of the state’s business court system, numerous other states eventually instituted business court programs modelled on North Carolina’s business court.

Career Achievements

Reflecting on his fifteen and a half years as a business court judge, Judge Tennille recalled some of his proudest accomplishments (after some prodding from the authors). First, he developed North Carolina’s business court from “a clean sheet of paper” and guided its growth into a robust program that has been emulated by numerous states throughout the country. Second, Judge Tennille assembled and oversaw a coalition of plaintiff and defense lawyers who developed a set of rules to govern North Carolina’s business court cases. Third, he created the first high-tech courtroom in the state and established an e-filing system that was the first of its kind in the United States.⁸ Fourth, he helped secure law clerks for the North Carolina business court judges, who were the only trial court judges in the state with law clerks. Assistance of law clerks was particularly important because North Carolina business court judges are required to publish their opinions.

Future of Business Courts

Judge Tennille predicts that more states and metropolitan areas will

establish their own business courts within the next five to ten years. He also believes that business courts generally will lead the charge to incorporate more technology into judicial proceedings, specifically when it comes to artificial intelligence: “Business courts will be the courts to deal with A.I. first. They are the logical place to deal with A.I. because business court judges have the time to learn the issues and deal with them.” Accordingly, he urges business courts to proactively draft rules addressing the proper use of A.I. in litigation.

Life After Retirement

Judge Tennille retired from the bench in 2011, serving as an ADR facilitator for some time thereafter. In 2014, Judge Tennille and his wife started a local nonprofit (H.O.P.E. of Winston-Salem), which he describes as “the most satisfying work” he has done in his long career. The organization’s mission is to feed children in neighborhoods that are “food deserts.” Since its creation, H.O.P.E. has fed over 500,000 children and distributed more than one million pounds of fresh produce to families.

Advice for Lawyers

Judge Tennille cautions that “every lawyer will at some point hit a crossroads and have an opportunity to sell their soul. If you do it once, it’s gone. It’s absolutely critical to get over that hurdle with your soul intact.” To excel, litigators should be adept listeners, obsessively devoted to detail, of the highest integrity, and great storytellers who *lead* the jury to choose the right result for itself, rather than *tell* the jury what result it should find. Transactional attorneys must not lose sight of process in corporate governance decisions—if the underlying process was unfair, the court is likely to take a “dim view” of the result. As for directors, Judge Tennille recommends that they possess “Five I’s”: independence, integrity, inquisitiveness, intelligence, and involvement. He then offers another piece of advice for business owners and their advisors. Most business breakups, Judge

Tennille notes, arise out of lack of succession planning.

NOTES

1. MCR 3.310(B)(1)(b) (requiring that for ex parte TRO motions, “the applicant’s attorney certify[] to the court in writing the efforts, if any, that have been made to give the notice and the reasons supporting the claim that notice should not be required[.]”).

2. *See Detroit Fire Fighters Ass’n, LAFF Local 344 v City of Detroit*, 482 Mich 18, 34, 753 NW2d 579 (2008) (stating the “traditional four elements” a party must establish to obtain a preliminary injunction, including that “the moving party showed that it is likely to prevail on the merits.”).

3. MCR 2.116(C)(8) authorizes parties to move for summary disposition if the “opposing party has failed to state a claim on which relief can be granted.”

4. *See MCL 600.8033(1)* (“Every circuit with not fewer than 3 circuit judges shall have a business court[.]”).

5. Under MCR 2.116(C)(10), a party may move for summary disposition where “[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law.”

6. Lee Applebaum & Mitchell Bach, et al., *Through the Decades: The Development of Business Courts in the United States of America*, 75 Bus. Law. 2053, 2060 (2020).

7. Hayley Fowler, *How a Real-Life ‘Lincoln Lawyer’ Hatched NC’s Business Court*, Law360 (June 5, 2023, 4:40 PM), <https://www.law360.com/pulse/articles/1681851/how-a-real-life-lincoln-lawyer-hatched-nc-s-business-court>.

8. N.C. Business Court Launches New eFiling System, North Carolina Judicial Branch (June 28, 2017), <https://www.nccourts.gov/news/tag/general-news/nc-business-court-launches-new-efiling-system>.



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