



The Michigan Business Law

JOURNAL

Volume 45
Issue 1
Spring 2025

CONTENTS

Section Matters

From the Desk of the Chairperson	1
Officers and Council Members	3
Committees and Directorships	4

Columns

Taking Care of Business: The Corporate Transparency Act's Legal Tug-of-War – Recent Court Rulings and Implications <i>Alexis Lupo</i>	6
Tax Matters: IRS Staffing and Budget – The Only Certainty Is Disruption <i>Eric M. Nemeth</i>	8
Technology Corner: Deeply Seeking an Understanding of DeepSeek <i>Jennifer A. Dukarski and Kristina Pedersen</i>	10
Touring the Business Courts: Interviews with Judge James S. Jamo and Judge Carol Anne Kuhnke; Status of Business Court Judges Statewide <i>Douglas L. Toering and Ian Williamson</i>	12

Articles

Winning Your UCC Article 2 Case Before It Starts <i>Alexander Blum and Noah Nathan</i>	15
Adjudicating Prevailing Party Attorney Fees Provisions: Problems, Traps and a Modest Proposal <i>Daniel D. Quick</i>	19
Noncompete Agreements and Other Restrictive Covenants <i>Douglas L. Toering and Emily S. Fields</i>	24

Case Digests	32
---------------------	----

Index of Articles	35
-------------------	----



Published by THE BUSINESS LAW SECTION, State Bar of Michigan

Interviews with Judge James S. Jamo and Judge Carol Anne Kuhnke; Status of Business Court Judges Statewide

For this issue, we interview two newly appointed business court judges, Judge James S. Jamo of Ingham County and Judge Carol Anne Kuhnke of Washtenaw County. We also include a reminder of the expiration of terms of the business court judges.

Judge Carol Anne Kuhnke

Background

Judge Kuhnke was elected to the bench in 2012 and took the bench on January 1, 2013. The Michigan Supreme Court appointed her Chief Judge of the Washtenaw County Trial Court effective January 1, 2019, and she was the Chief Judge until the end of 2023. The Supreme Court appointed her as the business court judge for Washtenaw County effective January 1, 2025. She also serves as the Presiding Judge of the Civil/Criminal Division and Chief Judge Pro Team of the Washtenaw County Trial Court.

Prior to being elected judge, Judge Kuhnke practiced civil litigation for 19 years. She practiced in large and small firms before founding her own firm, Davis and Kuhnke, PC, in 1997. She also served on the Washtenaw County Board of Election Canvassers and the Ann Arbor Zoning Board of Appeals.

Business Court Generally

Judge Kuhnke replaces the prior business court judge, Judge Timothy P. Connors, who retired effective January 1, 2025. Judge Kuhnke's docket includes criminal, general civil, and business court cases. She also presides over cases in the recovery court. The recovery court involves persons charged with felonies who have a substance disorder. This hands-on approach focuses on treatment. Judge Kuhnke sees the participants every two weeks until they graduate.

Asked about the difference between general civil and the business court cases, Judge Kuhnke notes that

protective orders play a much more prominent role in the business court. She also observes that the standard of practice in the business court is "very high. I's are dotted; T's are crossed." This may be partly because business litigators have fewer cases than other litigation attorneys. So "when you have only ten cases, you know them very well."

Scheduling

At this time, Judge Kuhnke does not routinely hold early case management conferences. She will conduct such a conference if the case needs hands-on management. For cases that had scheduling orders with Judge Connors, she will not issue new scheduling orders. At the status conference, she will set a trial date and a settlement conference to occur six weeks before the trial date. If she is persuaded that the case cannot settle, she will forego the settlement conference.

As to mediation, Judge Kuhnke requires that this be conducted six to eight weeks before the summary disposition filing deadline. She encourages early mediation, and plans to begin ordering it. She does not order case evaluation in business court cases, but will order case evaluation if the parties wish.

Motions: Generally

Motion day is Wednesday afternoons. General civil motions are heard at 1:30 p.m.; business court motions are set for 2:30 p.m., although the general civil docket may extend beyond 2:30 p.m.. For hearings, counsel may appear in person or by Zoom. Judge Kuhnke's courtroom is open. She commonly has hybrid hearings, where one counsel appears in person and another attorney appears by Zoom.

As to motions for a temporary restraining order (TRO) or a preliminary injunction, Judge Kuhnke recommends that counsel "make sure

that everything is in order in your motion and that you have given me enough information. The more information I have and the more well supported it is, the more likely your motion will be granted." More specifically, she recommends showing that the requested order or injunction is the least disruptive way to protect the various interests. "Do not shade the facts," she advises. This is particularly important for ex parte motions. In any event, when she reads an ex parte motion, she endeavors to consider the other side's likely arguments.

Judge Kuhnke is very cautious in granting a TRO. She will typically set a hearing date quickly, often within a couple days. While she recognizes that parties can use a TRO or a preliminary injunction for gamesmanship, Judge Kuhnke has found this to be unusual in her experience. More commonly, she finds that counsel seeking TROs are responsibly representing their clients and are filing the motion out of a real concern that if notice is given to the other party, it will precipitate the very action the motion seeks to avoid.

Discovery

Before filing a discovery motion, Judge Kuhnke asks that counsel do everything they can to narrow the issues. "Bring me only what you can't agree on." She encourages counsel to have direct communications (phone, Zoom) to resolve discovery disputes.

Generally, Judge Kuhnke does not order discovery mediation. On the rare occasions that she has done so, it involved a case with protracted conflict among counsel.

Summary Disposition

For a MCR 2.116(C)(8) motion, Judge Kuhnke recommends "stick to the pleadings. A motion under (C)(8) must be based on the pleadings. If you include facts, this gives an opening to the other side to argue that discovery is necessary." Speaking of

discovery, if a party who files a (C) (8) motion seeks to halt discovery until that motion is decided, Judge Kuhnke will decide such a request on a case-by-case basis.

One common question (usually in connection with summary disposition motions) is whether the judge would like the entire document (or an entire deposition transcript) for an exhibit, or just an excerpt of the relevant portions. For Judge Kuhnke, an excerpt is fine “so long as you are being fair with what you are quoting.” If possible, include the brief and the exhibits in one filing. But if that cannot be done, consolidate the exhibits as much as possible to minimize the number of filings for any one motion.

Trials

Motions in limine must be heard before trial. For jury trials, proposed jury instructions are due at noon on the Friday before trial. Jury selection occurs on Monday mornings. Judge Kuhnke does a brief voir dire and then turns this over to the attorneys. She gives the attorneys wide latitude on voir dire unless they are wasting time.

Advice

Judge Kuhnke respects the time of the parties and counsel, and she encourages litigators to provide any suggestions on she can better manage their case.

As to civility, Judge Kuhnke states that personal attacks “get in the way of your actual mission, which is to further your client’s interests. This is unfortunate to see.” If one is resorting to personal attacks, this “is not doing right by your client. If this occurs in trial, this is unseemly. It is counter-productive; try to let the attacks go; rise above this.”¹

Judge James S. Jamo

Background

Judge Jamo began his legal career in 1984 handling civil litigation, including personal injury defense, school law, construction disputes, product liability, and pharmaceutical malpractice along with some business

transactional matters and shareholder litigation. Judge Jamo was elected to the Ingham County Circuit Court in November 2012 and took the bench in January 2013. The Michigan Supreme Court appointed him as the business court judge effective January 1, 2025.

In addition to serving as a business court judge, Judge Jamo serves as the Presiding Judge of the Ingham County Circuit Court General Trial Division. He also presides over the mental health court program for felony offenders. At the end of 2024, Judge Jamo finished his second term on the bench.

Business Court Generally

Judge Jamo replaces Judge Joyce A. Draganchuk, who retired effective January 1, 2025. His primary docket will be criminal matters, business court cases, and some administrative appeals. His experience with the business court has been positive so far.

Scheduling

After an answer is filed, Judge Jamo’s office sends a scheduling conference order form for parties to prepare and submit via stipulation. This includes dates for identification of experts, lay witness disclosure, whether the parties will submit a written discovery plan and whether they will hold an ESI (electronically stored information) conference, discovery cutoff, date to amend pleadings, dispositive motion cutoff, date for mediation or other alternative dispute resolution proceeding, and trial date. As for mediation, Judge Jamo encourages early mediation, but he does not order it. He also does not order case evaluation. Parties must agree on a mediator on or before the witness disclosure date, or one will be assigned from the court’s list.

That being said, lawyers are “welcome at any time to request a status conference. I’m always happy to do a status conference. If the lawyers think it will be helpful, it will probably be helpful.”

Motions

Motions in business court cases (and any other civil cases that Judge Jamo still has) will typically be heard on Wednesday afternoons. To schedule a motion, parties should contact Judicial Assistant Janell Liles by phone. Motions not properly scheduled with Judge Jamo’s office will not be heard—in other words, don’t plan to “piggy-back” a motion onto a previously set hearing date.

As for motions for a TRO or preliminary injunction, Judge Jamo will grant these motions if appropriate. On the general civil docket, the most common reason to deny such a motion is procedural rather than substantive.

For example, if a party is seeking a TRO, the party must comply with the court rules about notice. Judge Jamo asks, “Why can’t you give notice” if you have been communicating with the opposing party or opposing counsel? And, “Why is this an emergency when you have been working on this for weeks or months?”

Summary Disposition

One common question is whether discovery will be put on hold if a motion under MCR 2.116(C)(8) is pending. To that, Judge Jamo responds that a (C)(8) motion itself is not sufficient to shut down discovery. If the discovery will be burdensome or expensive, counsel should bring this to Judge Jamo’s attention in a separate motion.

As to a motion under MCR 2.116(C)(10), Judge Jamo recommends that counsel make sure that additional discovery is not needed. In the response to the motion, make sure to include admissible evidence.

Regarding exhibits, “less is more.” Counsel may attach excerpts from deposition transcripts or the entire transcript. If the former, include enough of the transcript to be fair. If counsel has not fully disclosed the relevant testimony, “this is unfair, and it leaves me unprepared.” If counsel wants to attach an entire deposition transcript, then counsel should direct the court to the specific parts to review. Regarding other exhibits, focus

on the relevant sections, but be fair to the other side in doing so.

Discovery

Echoing what many business court judges have said, Judge Jamo observes that communication is often key to resolving discovery disputes. “There are tense times in litigation. But communication can often resolve these issues.” Sending an email an hour before filing a motion is not meaningful communication.

If a motion to compel is required, Judge Jamo recommends, “If you can state the basis for your position and the basis for the other side’s position,” this shows that you have probably communicated with the other side, and it helps Judge Jamo to understand both parties’ positions.

Generally, Judge Jamo does not order discovery mediation. But if a case is particularly contentious, he may do so.

Regarding protective orders, Judge Jamo does not use a model protective order. If a party does wish to seal something from the record, comply with the court rule.² Judge Jamo has specific language to use for such a motion. Counsel can obtain this from his staff.

Settlement Conferences; Final Pretrial Conferences; Trials

Judge Jamo typically does not order a settlement conference. If a skilled mediator is not able to resolve the case, he generally finds it is unlikely that he can. Nevertheless, Judge Jamo will keep an open mind about whether settlement conferences might be helpful in business cases.

At the final pretrial conference, Judge Jamo will focus on trial logistics—dates for witnesses to testify, evidentiary issues, trial schedule, etc. Because settlement will not be discussed, clients need not spend their time to attend.

As for trials, Judge Jamo will work closely with lawyers to accommodate witness schedules. “My general rule is to do whatever I can to help the lawyers represent their clients in trial.” Trial days will typically be

Monday, Tuesday, Thursday morning, and Friday.

Zoom vs. In Person

Most motions are heard in person, although Judge Jamo will handle some motion practice by Zoom if agreed by both parties and if practicable in the court’s schedule. That being said, a motion must be either “all Zoom or all in person.”

Advice

Avoid personal attacks, urges Judge Jamo. If a response to a motion attacks the other side, “this completely puts you at a disadvantage ... If all I get are attacks, I don’t want to hear them. I want to hear what the two sides’ substantive positions are on the issues.” Indeed, civility is a “big issue,” and “lack of decorum is a big issue” (although he has not found this to be true in business cases.) Notes Judge Jamo, “I am not afraid to clamp down on somebody who is being less than civil and where this causes problems in moving the case along.” In those cases, Judge Jamo will probably set a status conference to work through those issues.

With regard to motion hearings, Judge Jamo is “fairly active in motion hearings. Anticipate that I am more likely than not to ask a lot of questions.” He adds, “More likely than not (especially in summary disposition motions), I will ask questions, ask for clarification, or test you on your position. I will be involved and active in the discussion and at the hearing. You can hold me to be prepared.”

Status of Business Court Judges Statewide

The business court legislation became effective January 1, 2013.³ The terms for the business court judges are six years.⁴ The terms for all business court judges (regardless of when they were appointed) will expire April 1, 2025. On March 6, 2025, the Michigan Supreme Court announced who is reappointed and who is appointed as new judges.⁵

NOTES

1. See AO 20-2023; 12 Principles of Professionalism, https://www.michbar.org/generalinfo/professionalism_principles; and the Lawyer’s Oath, <https://www.michbar.org/generalinfo/lawyersoath>.

2. MCR 1.109(D)(8), 2.302(C). Judge Jamo notes that if a judge enters an order sealing part of the record, this is reported to the Michigan Supreme Court.

3. MCL 600.8031 et seq.

4. MCL 600.8037(2).

5. https://www.courts.michigan.gov/siteassets/rules-instructions-administrative-orders/proposed-and-recently-adopted-orders-on-admin-matters/recent-court-appointments/2025-01_2025-03-06_formor_assign-busct.pdf.



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. He is a 2021 recipient of the Stephen H. Schulman Outstanding Business Lawyer Award. His practice includes commercial litigation including shareholder litigation, business transactional matters, and health-care law.



Ian Williamson is a partner at Mantese Honigman, PC, and concentrates his litigation practice on commercial and shareholder disputes. He is also experienced in appellate practice and certain healthcare and land use matters. Mr. Williamson currently serves as the Chair of the Business Law Section of the State Bar of Michigan.