

**COMMERCIAL LITIGATION COMMITTEE
REPORT FOR THE BUSINESS LAW SECTION COUNCIL MEETING**

1. Next Scheduled Meeting of the Committee

Next scheduled meeting of the Committee: December 2

2. Council Approval

None.

3. Membership

On October 27, 2008, we held a Commercial Litigation Committee meeting. Attending in person were Doug Toering, Alan Taylor, and me. Attending by phone were David Frank, Jay VandeWyngearde, Eric Buikema, Kevin Fanning and Diane Akers.

4. Accomplishments Toward Committee Objectives

See below.

5. Meetings and Programs

At our October 27 meeting, we discussed topics for our spring program. Committee ideas:

- a) small business divorces, including shareholder disputes of closely held businesses, misappropriation and the shape of what an agreement should look like to allow one shareholder to exit the business;
- b) litigation growth areas and what areas are hot, which ones are not;
- c) receiverships: when are they appropriate and when are they not?
- d) post-judgment remedies, self-help execution, all those types of things in a commercial context;
- e) white collar criminal practice or internal investigations; and
- f) automotive supply chain disputes.

These ideas were based on what is hot in our individual practice areas. At the end of the meeting, I believe we came to a consensus that we were going to try to do a smorgasbord of three or four of those topics, perhaps in 40-45 minute segments, which would make up a two-to-three hour program. We were going to shoot for a location somewhere in Novi or Plymouth or on the west side of Detroit metro area, and a date sometime in April 2009. We decided to have another meeting sometime around the first week of December to try to confirm this idea, and get someone to step up as program chair and try to line up speakers and get the program running.

6. Publications

We are working with Dan Kopka of ICLE on articles for the Spring 2009 journal. David Frank has agreed to step up to lead this effort.

7. Legislative/Judicial/Administrative Developments

Acemco v. Ryerson Tull Coil, Michigan Supreme Court order released September 26, 2008. As many of you know, suppliers and their lawyers have been waiting for years for the Court to clarify the muddled law on what qualifies as a quantity term sufficient to constitute an enforceable requirements contract. The Michigan Court of Appeals has issued several decisions (many of which are, in my view, wrong), and the federal district courts in Michigan have issued a couple of decisions (which are, in my view, right) critical of the Court of Appeals decisions.

The Michigan Supreme Court has the final say on Michigan law, which governs most automotive contracts by virtue of choice-of-law clauses in OEM and Tier I terms and conditions, so I was excited to read it. Because the Court of Appeals opinion in this case was (again, in my opinion) so off-base, I figured that this baby could be a real bombshell.

Unfortunately, it's a dud. First, it's only a one-page, one-paragraph order (second attachment), not even an opinion [the lone concurring statement of Justice Kelly in the order has zero effect]. While Supreme Court orders are technically precedent, it's not nearly as persuasive to a trial judge as an opinion, especially because the Court of Appeals opinion that it reverses (third attachment) was unpublished. Second, and more importantly, the court ruled on an extremely narrow issue: a contract with a definite quantity range. In this "volume shortfall" environment, I see very few contracts (purchase orders, LTAs, or otherwise) whereby a customer states a definite quantity range, guaranteeing a minimum volume to its supplier. Hence I just don't see this case as big news.

So, while the publicity in the Automotive News was exciting, the actual effect (at least in the Chair's view) to those of us in the trenches is minimal. I think that we continue to await a definitive ruling by the Michigan Supreme Court to tidy up the mess.

Until we get clarity, my advice to buyers continues to be simple: if you want a requirements contract, use the word "requirements." "Blanket," "all," "999,999" may or not suffice, but "requirements" does. And if you're a supplier, before you accept a true requirements contract with your customer, be sure you can really withstand the volume roller-coaster, which lately has mostly gone down.

8. Miscellaneous

None.