



# Business Courts in Michigan

## Seven Years and Counting

By Douglas L. Toering and Ian M. Williamson

**T**he statewide implementation of business courts is only seven years old. How was the business court legislation implemented? Are the business courts functioning as expected? What does the future hold? These are some of the questions we will address here.

### Business court legislation passes

Michigan's business court legislation was the culmination of a nearly 12-year effort to establish business courts in the state, led by the State Bar of Michigan's Business Law Section with later study by the State Bar's Judicial Crossroads Task Force and its Business Impact Committee. Macomb County adopted its specialized business docket beginning November 1, 2011 (under Judge John C. Foster) and Kent County adopted its

business docket beginning March 1, 2012 (under Judge Christopher P. Yates).<sup>1</sup> The business court statute took effect statewide January 1, 2013.<sup>2</sup>

The business courts were designed to do the following:

- Establish judicial structures that will help all court users by improving the efficiency of the courts.
- Allow business or commercial disputes to be resolved with the expertise, technology, and efficiency required by the information age economy.
- Enhance the accuracy, consistency, and predictability of decisions in business and commercial cases.<sup>3</sup>

The business court statute requires that all "business or commercial disputes" filed in the 17 Michigan circuits with a

## At a Glance

Michigan's business court legislation has been implemented for seven years, and many of the initial business court judges have served full six-year terms.

Business court opinions in 24 categories are available online.

Business courts have helped provide increased predictability and specialized understanding of the needs of business disputes.

business court be assigned to a special docket and presided over by a designated business court judge.<sup>4</sup> The statute defines what constitutes a business or commercial dispute and what does not. If part of the suit includes a business or commercial dispute, the entire case will be assigned to the business court—even if it includes other claims specifically excluded as business or commercial disputes.<sup>5</sup>

### Statewide implementation of business court legislation

As part of implementing the business court statute, the Michigan Supreme Court approved local administrative orders for each circuit with a business court. The Supreme Court also approved the business court judges for each circuit.<sup>6</sup> The initial terms were for six years and expired April 1, 2019.<sup>7</sup> All business court judges have business cases and either general civil or criminal cases (or both), except for Kent County (Judge Yates's docket is solely business or commercial cases).

On June 5, 2013, the Supreme Court amended MCR 2.112 to address business court cases.<sup>8</sup> Under MCR 2.112(O), attorneys filing a business court case must verify on the face of the complaint that the case “meets the statutory requirements to be assigned to the business court.” All business cases must bear a “CB” case code.<sup>9</sup> Some courts also require the parties to complete a form designating the case as a business court case.

Administrative Order 2013-6, also issued on June 5, 2013, requires circuits with business courts to establish specific case management practices for business court matters. These practices will include a focus on alternative dispute resolution, with an emphasis on mediation scheduled early in the proceeding. The Michigan Judicial Institute provides comprehensive training opportunities for business court judges.

### The business court statute is amended; judges' terms are extended

Effective October 11, 2017, the Michigan legislature amended the business court statute. In general, the amendments refined the business court jurisdiction but did not make significant changes to the overall statute.<sup>10</sup> The amendments conferred business court jurisdiction for “business and commercial disputes in which equitable or declaratory relief is sought” or for actions that otherwise meet the jurisdictional requirements of the circuit court.<sup>11</sup>

In addition, various kinds of claims were *excluded* from the definition of a “business or commercial dispute,” such as:

- Construction and condominium lien foreclosure matters;<sup>12</sup>
- Actions involving enforcement of condominium and homeowners' governing documents;<sup>13</sup> and
- Motor vehicle insurance coverage disputes, even if the dispute is between insurers.<sup>14</sup>

But as previously mentioned, even these excluded claims will proceed in the business court if they are contained in an action that includes a business or commercial dispute as defined in the statute.

In 2019, the Michigan Supreme Court extended the terms of the business court judges through April 1, 2025.<sup>15</sup>

### Individual business courts implement their own protocols

With the foundation laid at the state level, it became incumbent on the individual business courts to achieve the intended goals. As part of their efforts to promote efficiency, some business courts have adopted their own specific protocols. Some business courts (including Macomb and Oakland counties) have established advisory committees where members of the bar work with the business court judges to set up protocols for a particular court. For instance, Oakland County posted a model protective order and case management protocol on its website.<sup>16</sup> Among other things, the Oakland County Case Management Protocol considers principles of proportionality in discovery and requires initial disclosures.<sup>17</sup>

Two case management techniques that most business court judges emphasize are early mediation and early judicial involvement (often by a case management, scheduling, or status conference). At that early case conference, the court and counsel typically discuss the overall nature of the case, which will often result in a customized scheduling or case management order. In many, but not all, cases, the judge will recommend (if not order) early mediation, perhaps after some discovery has occurred.

Since fall 2017, the *Michigan Business Law Journal* has included a regular column called “Touring the Business Courts.” These columns have included interviews with business court judges and discussions of the protocols of specific courts. In customizing their courts to meet the needs of litigants, business judges are helping to achieve what then Chief Justice Robert P. Young said in 2014: “Every trial court in this state can be a little laboratory of new ideas—a fertile ground for discovering new and better ways of doing things.”<sup>18</sup>

### Summary of business court opinions

The business court statute requires business court judges to publish their opinions. Since January 2014, opinions from business court judges have been available to the public on an indexed website.<sup>19</sup> The Michigan State Court Administrative Office (SCAO) organizes those opinions into 24 different categories described in the table at right. Searches may include both a circuit designation and a category or keyword.<sup>20</sup>

This growing body of online opinions (albeit nonbinding on anyone but the litigants) appears to help foster consistency among the business court judges. If a judge has issued one or more opinions addressing a specific issue or fact pattern in the past, this will provide guidance to counsel and the parties in their particular case. Business court judges have mentioned they are beginning to see counsel cite their previous opinions (or opinions from another business court judge) in briefs and oral arguments. Reference to a judge’s previous opinions or to approaches that other similarly situated business court judges have employed can prove persuasive.

Although empirical data is not currently available to demonstrate this, it is also likely that the availability of business court opinions has reduced motion practice. Why file a motion (or oppose a motion) if the judge has already ruled on a similar issue in another case? With guidance available to counsel on both sides, resolving contested pretrial issues should be easier, at least in theory. Researching opinions from business court judges in the relevant circuit could also increase the likelihood of either pre-suit settlements or settlements occurring early in litigation.

As of October 14, 2019, the business court opinion database held 5,333 records in SCAO’s 24 categories for business court opinions; this does not equate to total number of opinions, as some opinions may be assigned to multiple categories. The allocation of opinions to each SCAO category is as follows:<sup>21</sup>

Category	Total Records
Agriculture	10
Antitrust, Franchising, Trade Regulation	18
Attorneys	193
Automotive	106
Collection: Debtor/Creditor	126
Construction	308
Contracts	1,570
Deadlock, Dissolution, Liquidation	84
Derivative Actions	39
Directors, Officers, Managers, Shareholders	341
Environmental	40
Finance and Capital Structure	35
Healthcare	35
Information Technology	25
Insurance	289
Intellectual Property	70
Jurisdiction	541
Labor and Employment	132
Organizational Structure	210
Real Estate	351
Restrictive Covenants	81
Tax	115
Torts	557
Uniform Commercial Code	57

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Not surprisingly, the contracts category leads the pack with 1,570 records. Torts comes in next at 557, and jurisdiction is a close third at 541. Automotive has only 106 records, but it is likely that opinions on automotive cases (supplier disputes, for example) are included elsewhere, particularly in contracts.

## Filings and processing times in the business courts

SCAO has compiled the following data reflecting the number of cases filed in each of the 17 business courts between 2016 and 2018:<sup>22</sup>

County	2016	2017	2018
Berrien	44	46	25
Calhoun <sup>23</sup>	16	21	20
Genesee	56	82	74
Ingham <sup>24</sup>	102	76	109
Jackson <sup>25</sup>	9	15	16
Kalamazoo <sup>26</sup>	25	35	31
Kent <sup>27</sup>	86	215	257
Livingston	20	12	15
Macomb <sup>28</sup>	304	306	239
Monroe	14	15	22
Muskegon	12	16	6
Oakland <sup>29</sup>	960	932	931
Ottawa <sup>30</sup>	61	61	44
Saginaw <sup>31</sup>	23	35	34
St. Clair	21	20	20
Washtenaw	101	93	102
Wayne	630	734	805 <sup>32</sup>

With respect to processing times, SCAO's data from 2018 shows the following:

- Percent of cases disposed within 364 days:
  - All circuit civil cases: 63 percent
  - Business court cases: 74 percent
  - Time guideline: 70 percent
- Percent of cases disposed within 728 days:
  - All circuit civil cases: 93 percent
  - Business court cases: 96 percent
  - Time guideline: 95 percent

Although processing time was somewhat lower for business court cases than all circuit civil cases for 364 days, business cases tend to require more judicial time per case. For 728 days, the processing time for all circuit civil cases and business cases was nearly the same (93 percent vs. 96 percent, respectively).<sup>33</sup>

## Business court trials (or not)

It is no secret that fewer and fewer civil cases go to verdict; generally, that figure hovers around 1 percent.<sup>34</sup> Business cases are no exception. SCAO data shows no jury or bench verdicts between 2016 and 2018 in the business courts in Berrien, Calhoun, Genesee, Jackson, Monroe, and Muskegon counties. Business court judges in Ingham, Kalamazoo, Macomb, Ottawa, St. Clair, and Washtenaw counties issued bench verdicts during these same years but had no business court jury verdicts during that time.<sup>35</sup>

In all business courts, from 2016 to 2018, there were 19 jury verdicts and 46 bench verdicts.<sup>36</sup> The seemingly low number of jury verdicts may be, in part, because parties in business cases are less likely to demand jury trials, either because they prefer a bench trial or because they do not have the right to a jury trial based on the claims asserted.

Given how few civil cases go to verdict statewide and the overall emphasis in business courts on early judicial involvement and early mediation (both of which contribute to early resolutions), the business court statistics are no surprise.

## Going forward

As of this January, business courts in Michigan have been functioning for seven years. Based on feedback from business law attorneys and business court judges, the business courts are functioning largely as planned and are helping to provide increased predictability and specialized understanding of the specific needs of business disputes.

Questions for the future include: To the degree they have not already done so, how will the business courts implement the discovery amendments to the Michigan Court Rules? Will further amendments to the business court statute (jurisdiction, most likely) be appropriate? Stay tuned. ■

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## ENDNOTES

1. A more complete summary of the history of Michigan's business court statute appeared in Toering, *The New Michigan Business Court Legislation: Twelve Years in the Making*, Business Law Today, ABA (January 2013) <[https://www.americanbar.org/groups/business\\_law/publications/blt/2013/01/03\\_toering/](https://www.americanbar.org/groups/business_law/publications/blt/2013/01/03_toering/)> [https://perma.cc/2ZFNC5H2]. See also Toering, *It's My First Business Court Case: What Should I Expect?*, 95 Mich B J 46 (June 2016) <<http://www.michbar.org/file/barjournal/article/documents/pdf4article2881.pdf>>. Additionally, annual summaries of significant business court developments in Michigan from 2011 through 2018 have been published by the ABA (e.g., *Recent Developments in Business and Corporate Litigation* (Chicago: ABA Publishing, 2019)). All websites cited in this article were accessed November 27, 2019.
2. MCL 600.8031 *et seq.*
3. MCL 600.8033(3).
4. MCL 600.8033(1) and MCL 600.8037(1). All circuits with at least three circuit judges are required to have a business court, and the business court must be administered by at least one sitting circuit court judge assigned by the Michigan Supreme Court.
5. MCL 600.8035(3).
6. *Business Courts*, Michigan Courts, is an excellent website about Michigan business courts <<https://courts.michigan.gov/administration/admin/op/business-courts/pages/business-courts.aspx>> [https://perma.cc/5XZA-VVN9].
7. MCL 600.8037(3).
8. Administrative Order No 2013-6 (2013), available at <<https://www.oakgov.com/courts/businesscourt/Documents/ao-2013-6.pdf>> [https://perma.cc/7WR3-B8AN].
9. *Michigan Trial Court Records Management Standards—Case Type Codes*, SCAO, Michigan Courts (July 2019) <[https://courts.michigan.gov/Administration/SCAO/Resources/Documents/standards/cf\\_casetype\\_codes.pdf](https://courts.michigan.gov/Administration/SCAO/Resources/Documents/standards/cf_casetype_codes.pdf)> [https://perma.cc/XZS8-TQB].
10. Toering, *Touring the Business Courts*, 37 Mich Bus L J 13 (2017), available at <<https://higherlogicdownload.s3.amazonaws.com/MICHBAR/ebd9d274-5344-4c99-8e26-d13f998c7236/UploadedImages/pdfs/journal/Fall17.pdf#page=15>> [https://perma.cc/M9KW-RR77].
11. MCL 600.8035(1). The previous version required an amount in controversy exceeding \$25,000. By its terms, that meant that a declaratory judgment case that did not seek damages could be excluded from the business court.
12. MCL 600.8031(3)(k).
13. *Id.*
14. MCL 600.8031(3)(l) and House Legislative Analysis, SB 0333 (August 3, 2017).
15. Administrative Order No 2019- ; ADM File No. 2019-01 (2019), available at <[https://courts.michigan.gov/Courts/MichiganSupremeCourt/rules/court-rules-admin-matters/Adopted/2019-01\\_2019-03-20\\_FormattedOrder\\_BusCJudges.pdf](https://courts.michigan.gov/Courts/MichiganSupremeCourt/rules/court-rules-admin-matters/Adopted/2019-01_2019-03-20_FormattedOrder_BusCJudges.pdf)> [https://perma.cc/CD51-4TCY] and *Business Courts*. The current business court judges are (in alphabetical order by county): Hon. Donna B. Howard (Berrien); Hon. Brian K. Kirkham (Calhoun); Hon. F. Kaye Behm (Genesee); Hon. Joyce A. Draganchuk (Ingham); Hon. Richard N. LaFlamme (Jackson); Hon. Alexander C. Lipsey (Kalamazoo); Hon. Terence J. Ackert and Hon. Christopher P. Yates (Kent); Hon. Michael P. Hatty (Livingston); Hon. Richard L. Caretti and Hon. Kathryn A. Viviano (Macomb); Hon. Daniel White (Monroe); Hon. Timothy Hicks (Muskegon); Hon. James M. Alexander and Hon. Martha D. Anderson (Oakland); Hon. Jon A. Van Allsburg (Ottawa); Hon. M. Randall Jurens (Saginaw); Hon. Daniel J. Kelly (St. Clair); Hon. Archie C. Brown (Washtenaw); and Hon. David J. Allen, Hon. Muriel D. Hughes, Hon. Edward Ewell Jr., Hon. Lita Masini Popke, and Hon. Brian R. Sullivan (Wayne).
16. *Business Court*, Courts, Oakland County, Michigan <<https://www.oakgov.com/courts/businesscourt/Pages/default.aspx>>.
17. *Case Management Protocol, Oakland County Circuit Court, Business Court Cases*, Courts, Oakland County, Michigan <<https://www.oakgov.com/courts/businesscourt/Documents/ocbc-pro-case-management.pdf>> [https://perma.cc/RT33-JMU6]. The Federal Rules of Civil Procedure have required initial disclosures (FR Civ P 26(a)) and have included proportionality in the scope of discovery (FR Civ P 26(b)(1)) for some time. As of January 1, 2020, MCR 2.302(B)(1) will modify the scope of discovery to include "nonprivileged matter that is relevant to any party's claims or defenses and proportional to the needs of the case..." Amended MCR 2.302(A)(5) will require initial disclosures.
18. FY 2015 Budget Presentation by Chief Justice Robert Young, available at <<https://courts.michigan.gov/News-Events/Newssummary/Documents/ChiefJusticeYoungFY2015BudgetRemarks.pdf>> [https://perma.cc/KJG4-36YF]. See also Yates, *Specialized Business Dockets: An Experiment in Efficiency*, available at <[https://www.accesskent.com/Courts/17thcc/pdfs/Experiment\\_Efficiency.pdf](https://www.accesskent.com/Courts/17thcc/pdfs/Experiment_Efficiency.pdf)> [https://perma.cc/522B-XP09].
19. *Business Courts Opinion Search*, Michigan Courts <[http://courts.mi.gov/opinions\\_orders/businesscourtssearch/Pages/default.aspx](http://courts.mi.gov/opinions_orders/businesscourtssearch/Pages/default.aspx)>. SCAO has provided guidance on the form of business court opinions; see Memorandum from SCAO Administrator John Hohman Jr. to Business Court Judges and Administrators (February 27, 2014) <<https://courts.michigan.gov/Administration/SCAO/Resources/Documents/Administrative-Memoranda/2014-02.pdf>> [https://perma.cc/92XT-3EJG].
20. *Business Courts*.
21. *Id.*
22. *Caseload Reports*, Michigan Courts <<https://courts.michigan.gov/education/stats/Caseload/Pages/default.aspx>> [https://perma.cc/JA64-VW46].
23. Through October 31, 2019, Calhoun County had 5 cases filed in its business court in 2019.
24. Through October 31, 2019, Ingham County had 81 cases filed in its business court in 2019.
25. Through October 31, 2019, Jackson County had 13 cases filed in its business court in 2019.
26. Through October 31, 2019, Kalamazoo County had 51 cases filed in its business court in 2019.
27. Through October 31, 2019, Kent County had 216 cases filed in its business court in 2019.
28. Through October 31, 2019, Macomb County had 258 cases filed in its business court in 2019.
29. Through October 31, 2019, Oakland County had 785 cases filed in its business court in 2019.
30. Through October 31, 2019, Ottawa County had 39 cases filed in its business court in 2019.
31. Through October 31, 2019, Saginaw County had 26 cases filed in its business court in 2019.
32. Through October 31, 2019, Wayne County had 747 cases filed in its business court in 2019.
33. October 11, 2019, email from SCAO Statistical Research Director Laura Hutzel to authors (on file with authors).
34. *Caseload Reports*.
35. *Id.*
36. *Id.*