

# Michigan's Business Courts and Commercial Litigation

*Past, Present, and Future*

By Douglas L. Toering



The purpose of the new Michigan business courts is to resolve commercial disputes more efficiently, accurately, and predictably than when such disputes were handled in courts of general jurisdiction.<sup>1</sup> The evidence so far suggests that the business courts are accomplishing that objective.

This article briefly reviews the business court statute, examines how the statute has been implemented since its passage in October 2012, and considers what lies ahead.

## The business court legislation

In the 17 circuits with a business court, every “business or commercial dispute” (as broadly defined) goes to a special docket.<sup>2</sup>

The statute also specifically excludes certain kinds of matters from the definition of “business or commercial dispute.” But if part of the suit includes a business or commercial dispute, the entire case goes to the business court—even if it includes other claims that are specifically excluded.<sup>3</sup>

## Practice and procedure in the business courts

Statewide implementation<sup>4</sup> of the business courts began in 2013, when the Michigan Supreme Court approved the business court judges<sup>5</sup> and the local administrative orders.<sup>6</sup>

Procedurally, circuit courts must “establish specific case management practices for business court matters.” Those practices will

typically include alternative dispute resolution “with an emphasis on mediation scheduled early in the proceeding...”<sup>7</sup> For their part, 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.”<sup>8</sup>

As of January 2014, opinions from the business court judges (nonbinding on everyone except the parties) are available to the public on an indexed website.

### Business court processing times

Business courts are processing cases efficiently. For example, the case processing times from four major counties show promise for the business courts, both there and elsewhere in Michigan:<sup>9</sup>

- **Kent County** (Judge Christopher P. Yates)—March 1, 2012–May 13, 2014: 536 cases were filed, 345 cases were closed, and the average time to close those cases was 153 days. In calendar year 2013, a total of 272 cases were filed, of which 204 were closed.
- **Macomb County** (Judge John C. Foster)—November 1, 2011–April 30, 2014: 271 cases were filed, 116 cases were closed, and the average time to close those cases was 152 days.
- **Oakland County** (Judges Wendy L. Potts and James M. Alexander)—June 3, 2013–April 30, 2014: 985 cases were filed, 481 cases were closed, and the average time to close those cases was 103 days.
- **Wayne County** (Judges Susan D. Borman, Daniel P. Ryan, and Brian R. Sullivan)—July 1, 2013–April 30, 2014: 310 cases were filed, 107 cases were closed, and the average time to close those cases was 104 days.

### Looking ahead

Overall, the implementation of the business courts has gone quite smoothly and has been successful. The jury is still out, however, on several issues:<sup>10</sup>

- **The business court statute**—One major issue is jurisdiction. Must a case meet the definition of a “business or commercial dispute” in section 8031(1)(c) *and* in section 8031(2) to be assigned to the business court?<sup>11</sup> Section 8031(1)(c) generally focuses on the parties or their principals. By contrast, Section 8031(2) focuses on the kind of litigation; it includes virtually any claim involving “contractual agreements.”

Another issue is whether a plaintiff who has federal diversity jurisdiction will instead file in the business courts

## FAST FACTS

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because of the early judicial involvement and quick processing times.<sup>12</sup>

- **Processing times**—Will other courts enjoy the impressive results that Kent, Macomb, Oakland, and Wayne counties have seen in their business courts?
- **Judicial caseloads**—Given their heavy caseloads, will the larger circuits need additional business judges?
- **Local administrative orders**—Will the local administrative orders need to be tweaked?
- **Alternative dispute resolution**—How often will business judges use mediation and arbitration? The answer is, “Whenever they can.” That’s basically what the statute and the administrative order require.<sup>13</sup>

Will case evaluation play a significant role? Probably not, especially given the preference for early mediation in the business courts. Moreover, a case evaluation panel cannot investigate a “business solution.”
- **Business court opinions**—To what degree will one business court judge consider the opinion of another business judge on a similar issue?<sup>14</sup> Are any other categories needed for the indexed website?
- **Contract drafting**—Binding arbitration has long been the default in some commercial contracts, especially in buy-sell (shareholder) agreements. But given the efficient track record of the Michigan business courts, that approach may change.<sup>15</sup> Indeed, the choice of forum should be specifically considered in each commercial contract. When that is done, Michigan business courts may often emerge as a better approach than binding arbitration.
- **Other courts**—Will the business court protocol—early and active judicial involvement, accelerated discovery, early mediation—be used in nonbusiness cases?<sup>16</sup>

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## Conclusion

The rollout of the business court statute has been successful. We have every reason to believe that Michigan business courts will continue to handle commercial litigation efficiently, accurately, and predictably. ■

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## ENDNOTES

1. MCL 600.8033(3).
2. *Id.* A more complete summary of Michigan's business court statute appeared in Toering, *The new Michigan business court legislation: Twelve years in the making*, 22 *Bus L Today* 1 (January 2013), available at <[http://www.americanbar.org/publications/blt/2013/01/03\\_toering.html](http://www.americanbar.org/publications/blt/2013/01/03_toering.html)>; see also the ABA Business Law Section, *Annual Review of Developments in Business and Corporate Litigation* (ABA Publishing, 2013), pp 201–203. All websites cited in this article were accessed July 9, 2014.
3. Most claims involving individuals are specifically excluded from the definition of business or commercial disputes. So are proceedings to “enforce judgments of any kind.” MCL 600.8031(3)(i).
4. The specialized business dockets in Macomb and Kent counties began on November 1, 2011, and March 1, 2012, respectively. This occurred before the business court statute passed in October 2012.
5. A comprehensive source for statewide information on the Michigan business courts is <<http://courts.mi.gov/Administration/admin/op/Pages/Business-Courts.aspx>>.
6. The State Court Administrative Office reviewed each local administrative order to confirm that it conformed to the model local administrative order the Michigan Supreme Court had previously approved. For a compilation of all the local administrative orders, see <<http://courts.mi.gov/Administration/admin/op/Pages/Business-Courts.aspx>>.
7. Administrative Order No. 2013-6.
8. MCR 2.112(O)(1).
9. Closed cases include cases that were dismissed, settled, removed to federal court, or stayed by bankruptcy.
10. Actually, the jury is also out in another way: many business court cases are nonjury.
11. See MCL 600.8031(1)(c) and MCL 600.8031(2).
12. The same issue applies to a defendant that has the right to remove to federal court.
13. See generally MCL 600.8031(2)(c) and AO 2013-6(4). Several experts have examined the role of ADR and the business courts, including Cooper & Carroll, *Business courts, insurance coverage and indemnity disputes, and early expert evaluation*, 6 *J of Ins & Indemnity* L 9 (January 2013), available at <<http://www.michbar.org/insurance/pdfs/InsJan13.pdf>>; Hurford & Allen, *A Taxonomy of ADR* <<https://static.squarespace.com/static/50dc72c3e4b0395512960a1c/t/5277d27de4b0af356e29d432/1383584381860/ADR%20Taxonomy%20for%20the%20Courts%20-%20RHDRS.pdf>>; Rock, *ADR Spotlight: Michigan Business Courts? The expanding role of ADR* (February 28, 2014) <<http://www.legalnews.com/detroit/1386565>>; Van Epps, *Business courts and ADR: SCAO research supports early ADR interventions*, 6 *J of Ins & Indemnity* L 6 (January 2013), available at <<http://www.michbar.org/insurance/pdfs/InsJan13.pdf>>; see also SCAO Office of Dispute Resolution, *Early ADR Summit Meeting Summary* (September 4, 2013), available at <<http://courts.mi.gov/administration/scao/resources/documents/standards/odr/adr%20summit%20report%20september%204,%202013.pdf#search=%22summit%20report%22>>. Business court judges have also presented on ADR and business courts. See, e.g., Foster, Hurford, Rock & Wright, *ADR and the Business Courts: What They Mean to Litigators, Neutrals, and Their Clients*, ADR Section Webinar (April 17, 2014) <<http://www.michbar.org/odr/pdfs/businesscourtPP.pdf>>; Yates, *Specialized Business Dockets: An Experiment in Efficiency*, in Miller, Robb & Crane, eds, *Lawyers as Economic Drivers: The Business Case for Legal Services* (Lake Mary, FL: Vandeplas Publishing, 2012). Also, retired Judge William J. Caprathe chairs the Judicial Access Team of the SBM Alternative Dispute Resolution Section; part of the team's work deals with ADR and the business courts.
14. Many of the issues facing the new business courts are discussed in Akers, *Michigan's new Business Court Act presents opportunities and challenges*, 33 *Mich Bus L J* 11 (2013), available at <<http://www.michbar.org/business/Blj/Summer2013/akers.pdf>>.
15. See *id.* at 14–15.
16. Judge John Foster of Macomb uses the business court protocol for nonbusiness court cases.