

**STATE BAR OF MICHIGAN
BUSINESS LAW SECTION**

BUSINESS COURT AD HOC COMMITTEE MEETING

**Livonia, Michigan
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REPORT OF BUSINESS COURT EXECUTIVE COMMITTEE

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Formation and Purpose of Business Court Ad Hoc Committee

In December 2001, the Business Law Section Council authorized creation of the Business Court Ad Hoc Committee for the purpose of studying whether Michigan should establish a business court and making recommendations regarding such a business court to the Council.

On January 2, 2002, all members of the Business Law Section were invited to join the Business Court Ad Hoc Committee. Since that time, approximately 170 members of the Section have either joined the committee or expressed interest in working with the committee. Due to the large number of responses, the Executive Committee was established.

The Executive Committee has met to consider issues that should be raised in pursuing the formation of a business court, has researched and reviewed the operations and success of business courts around the country, has made initial contacts with organizations that may have implications for a business court including courts, bar and business organizations and representatives of the Cyber Court initiative and has prepared this report for presentation to the entire Business Court Ad Hoc Committee.

What is a Business Court?

While business courts around the country vary in a number of important ways, there are some general areas on commonality. In particular, business courts all have similar objectives, *i.e.*, all strive to improve the quality of decisions made in business litigation by increasing the consistency, predictability and accuracy of the application of principles of business law to specific disputes. Business courts also seek to enhance the efficiency with which business disputes are resolved by focusing on early settlement or ADR, streamlining procedures and, in many jurisdictions, utilizing

technology to reduce cost and expedite resolution of the matter. Establishing a business court also benefits the entire court system because it helps to alleviate the burdens that can be imposed on judges by large and complex commercial cases, which often involve significant discovery disputes or proceedings and extensive motion practice with commensurate briefing.

Assignment of Business Court Judges. All business courts focus on assigning cases to judges who have particular interest and expertise in commercial litigation. By focusing on business cases rather than the full panoply of civil and criminal matters Michigan circuit court judges are generally expected to handle, business court judges quickly develop additional expertise in issues that arise repeatedly in business cases.

Published Decisions. In many jurisdictions, business court judges are expected or required to publish their decisions in some form. There is little question that this significantly increases the work load of the business court judges, at least initially. However, jurisdictions that provide such publication have found that business litigants benefit greatly because they can more accurately assess how various principles of law will be applied to their cases. Over time, this has had the effect of increasing early settlement or ADR, reducing the number of pretrial motions litigants file in cases that are not resolved early, for example, and ultimately reducing the work load of the business court judges, even with the requirement that decisions be published.

Pro-active Case Management. Judges in business courts take a very active role in managing cases assigned to them and become familiar with the specific facts, claims, defenses, theories and issues in the case at a very early stage. As with the publication of decisions, this may increase the work load of business court judges. However, it also allows early and often effective exploration of settlement or ADR and, where those efforts fail, allows issues to be narrowed much sooner than is generally achieved in ordinary litigation. The parties can determine what discovery is necessary and participate in the preparation of a discovery plan as well as a comprehensive schedule for all aspects of the litigation. Business courts elsewhere have found that, over time, pro-active case management leads to reducing the work load of business court judges because cases are settled or otherwise resolved much earlier in the process and litigants file fewer motions when they can review the judge's earlier decisions on similar issues and more accurately assess how the judge may be inclined to rule.

Emphasis on ADR. As part of their case management responsibilities, business court judges actively try to identify which cases would be suited to arbitration, mediation, facilitation, case evaluation or other form of ADR at a very early stage. In fact, some people consider business courts to be a form of ADR. Many people believe that business cases are particularly well suited for ADR because they generally involve money damages that can be calculated much more readily than, for example, damages in personal injury cases. Further, the decision makers are business executives who are not anticipating recovery of damages for mental distress or exemplary damages so that the amount of likely recovery is easier to estimate than in some other cases. Moreover, without the possibility of exemplary or mental distress damages, which are notoriously unpredictable, parties have less incentive to wait to see how a jury will evaluate the parties' claims and defenses. Issues in business cases are more readily and frequently resolved on documents and briefs rather than on testimony or credibility. Therefore, business disputes generally provide less incentive to await the development of, for example, substantial deposition testimony than do cases that will be decided in significant part on witness credibility and intangible factors. Settlement can sometimes be more readily achieved early in litigation before the parties have committed themselves to their positions or become embroiled in litigation strategy. Early settlement also

maximizes the chances that the relationship between the businesses, which often are adversaries in court, can be preserved or restored at some point in the future.

Use of Technology. Business courts in other states often try to encourage the use of technology to enhance efficiency and electronic procedures are often most helpful in managing business cases. For example, pro-active case management may call for more frequent court conferences than are generally conducted in other cases. Technological advances such as video conferencing can make such proceedings more convenient and less expensive for the court and counsel and may afford greater opportunity for representatives of the litigants to participate without requiring them to appear personally at the courthouse. Technology can be used to increase the parties' understanding of and participation in the ultimate resolution of the litigation.

Structure and Authority of Business Courts. Some business courts have been established through legislation. It is more common, however, for business court judges to be assigned to hear business cases through the rule-making authority of local or state administrators or chief judges.

Selection of Cases in Business Courts. Jurisdictions vary in their approach to how cases are assigned to the business court. In some cases, the plaintiff may designate a case as suited for the business court when the complaint is filed, which designation controls unless the defendant takes some action to remove the case from the business court. In some states, a defendant's objection is sufficient. In others, the defendant can merely request such removal. States also vary as to whether a defendant or some group of defendants can cause a case to be transferred into the business court or can merely request such a transfer. Sometimes an administrator or chief judge assigns cases to a business court without the input of the parties. (This may be similar to the Michigan Court of Appeals' internal operating rule regarding complex cases in which the court makes the determination based on the record it receives rather than the parties' requests.)

Opposition to Business Courts. In a number of jurisdictions, efforts at establishing a business court have failed and jurisdictions with successful business courts have had to overcome predictable challenges. Opposition to business courts generally arises from the concern that a business court is "elitist" and affords a higher quality of "justice" to wealthy corporations at the expense of individuals. People argue that judicial resources are limited and other constituencies need those resources more than businesses do. Some people are opposed to specialization in the law in general and so see a business court as a step in the wrong direction.

Jurisdictions that have been successful in establishing business courts have emphasized that business court judges are not "better" than judges who handle other kinds of cases; they are merely focused on business issues. Further, business court judges often take on an increased work load when they are assigned to a business court, particularly where they are required to publish most or all of their decisions. Moreover, freeing other judges from the sometimes inordinate demands imposed by even a few large, cumbersome commercial cases allows them to devote more time to other cases that are not heard in the business court. Business cases often involve significant motion practice and may require an inordinate amount of the court's time reviewing briefs and exhibits and conducting motion hearings. Trials of large, commercial cases can tie up a courtroom for weeks or even months. Handling such cases elsewhere makes the court facilities and services available for other cases. Many people believe that having programs that effectively resolve business disputes early in litigation encourages businesses to locate or remain in that particular jurisdiction because businesses have greater confidence that their legitimate claims and defenses will be decided correctly and expeditiously and believe the existence of such courts tends to demonstrate that the jurisdiction is committed to bringing in and retaining businesses.

Nature of Cases in Business Courts. All jurisdictions with business courts have had to define the types of cases that would be appropriate for resolution in that jurisdiction's business court. While some jurisdictions require a certain amount in controversy before a case qualifies for a business court, others have taken the view that a business court can resolve "small" cases as long as they are business disputes.

Cost of Business Courts. One of the advantages of a business court is that it often does not require additional new resources; rather, it may require principally a reallocation of existing resources. Some jurisdictions, especially those that require business court judges to publish all decisions, have provided one or more additional law clerks to assist business court judges whose work load has been increased solely because of their assignment to a business court.

Jury trials. Some jurisdictions have retained the right to a trial by jury. In others, the jurisdiction of the business court has been limited to non-jury matters or the parties may be required to waive the right to a jury trial in order to have their case heard in a business court.

Business Courts Around the Country

Some form of business court has already been established in California, Delaware, Illinois, North Carolina, Maryland, Massachusetts, Nevada, New Jersey, New York, Pennsylvania, Rhode Island and Wisconsin. Other states presently considering whether to establish a business court include Arizona, Colorado, Georgia, Maine, Ohio and Minnesota.

Following is a brief overview of the general types of business courts that have been established.

New York. In 1993, New York's Supreme Court assigned four justices to hear commercial cases. Their courtrooms were called Commercial Parts. The program was a great success and, in 1995, New York established the Commercial Division, which presently operates in five counties. The Commercial Division entertains a broad range of commercial and business disputes. Certain judges within each county are assigned to the Commercial Division. A litigant may designate a case as a commercial case when the case is filed. A defendant also may file a Request for Judicial Intervention explaining why the case should be assigned to the Commercial Division. The operating rules for the Commercial Division identify certain kinds of cases that are to be presumptively retained or transferred out and the justice assigned to the case retains the ability to transfer the case out if the justice determines that the case is not appropriate for the Commercial Division.

Maryland. Maryland has just created a statutory Business and Technology Court that focuses on resolving business disputes in general and issues important to companies in the technology industry. In each circuit, the chief judge assigns one judge to be trained in business issues and that judge must commit to spend five years in the Business and Technology Court. All decisions must be published and participation is not voluntary. Maryland is presently in the process of implementing its program and expects it to be operational by July 2002.

Pennsylvania. After a two-year battle, proposed legislation establishing a business court in Pennsylvania failed. Thereafter, the chief judge in the Philadelphia Court of Common Pleas created a Commerce Program and established guidelines for determining which cases should or should not be adjudicated in the program. Initially, two judges were assigned to oversee the

program. When a case is filed, the plaintiff states whether it should be assigned to the Commerce Program and the defendant can contest that designation. The administrative judge determines whether the case should remain in the program. Commerce Program judges are expected to publish all of their decisions, including rulings on discovery motions, motions *in limine* and motions for summary judgment. The program has expanded to other courts.

Delaware. Although Delaware does not have a separate “business court,” Delaware is frequently cited as an example of successful management of business litigation because of its Court of Chancery, which has existed for many years. Delaware courts have many years of experience in resolving business and commercial disputes, which many people think contributes to Delaware’s reputation as a state that is attractive to businesses. Litigants who seek relief in the Court of Chancery, however, cannot seek money damages but are limited to equitable relief.

North Carolina. The North Carolina Supreme Court created a business court and assigned a judge to that court. Cases are transferred to the business court by the Chief Justice of the Supreme Court transfers cases to the business court based on requests either from a regular judge to whom the case has been assigned or the parties. The Court has special rules of practice and procedure, including rules promoting the use of technology. There are also procedures for real time transcription and posting of transcripts of Business Court proceedings on the Business Court’s web site, at the discretion of the Business Court judge.

Illinois. Several years ago, the chief judge of the Cook County Circuit Court assigned several judges to handle all aspects of commercial cases. If the case satisfies certain criteria, it is automatically assigned to the commercial calendar. Otherwise, the case is handled just like other cases not assigned to the commercial calendar and there are no special rules for the commercial calendar.

California. California decided not to create a separate business court or business track. Instead, California instituted a pilot project under which parties can request assignment to the Complex Litigation Program, which is intended to serve many of the same purposes as a separate business court. There are no special rules or requirement of any particular amount in controversy. The Complex Litigation Program also applies to complex non-business litigation such as mass torts.

Michigan’s Cyber Court Statute

Michigan is unique among the jurisdictions that have considered establishing a business court because Michigan has an existing, statutorily created Cyber Court. MCL 600.8001, *et seq.* Some of the purposes of the Cyber Court, stated at MCL 600.8001(2), are the same as the purposes for a business court. Both seek to provide an expeditious means to resolve business disputes and both seek to enhance Michigan as a jurisdiction in which businesses should locate or remain. The Cyber Court statute also seeks to enhance the use of technology throughout the litigation process, and business courts often encourage the use of technology.

Having cases resolved in the Cyber Court is voluntary. To be heard in the Cyber Court, a plaintiff must file in that court and pay a fee and the defendant has the ability to remove the case to Circuit Court.

The statute contains a definition of “business and commercial actions.” MCL 600.8005(2). The Business Court Ad Hoc Committee may want to borrow from or even adopt that definition. The Cyber Court Working Group is proposing rules of procedure for the Cyber Court.

The Cyber Court working Group is preparing rules of procedure for the Cyber Court.

A Business Court in Michigan

Following are some considerations and questions the Committee may want to consider in order to formulate its recommendation to the Business Law Section Council.

1. Do we need a business court in Michigan? If so, why? What needs are not being addressed adequately by our current system? What prompted you to want to become involved with the Business Court Ad Hoc Committee?

2. The Cyber Court statute has passed and the Cyber Court is being implemented. Will the Cyber Court adequately address the concerns of businesses and business lawyers? How might a business court operate in conjunction with the Cyber Court? Can a business court and the Cyber Court work together to improve the quality of business litigation in the state courts?

3. What individuals and organizations would likely support an effort to establish a business court? Why would they lend support? Should those individuals and groups be approached to gather their ideas? Their support? How, by whom and when should they be approached?

4. What individuals and organizations would likely oppose an effort to establish a business court? What would be their concerns? Should those individuals/organizations be approached to gather their ideas and listen to their concerns? To attempt to garner support or defuse opposition? If so, what kind of approach should be made, to whom and by whom?

5. What form of business court would best accommodate the litigation needs of Michigan businesses? What would be the charge of a business court and who would evaluate its success? How would cases be assigned or filed in the business court? What kinds of cases would the business court handle? How would business court judges be selected? What would be their caseload? Would it involve jury trials? What rules of procedure would apply? In addition to the assignment of business court judges, what resources would be necessary to establish a business court and where would those resources come from?

6. If the Business Law Section Council approves a recommendation from the Ad Hoc Committee, how would such a recommendation be implemented? What would be a realistic time line?