

It's My First Business Court Case

What Should I Expect?

By Douglas L. Toering

You have met with the client. It's a business dispute, but this is your first business court case. What should you do? What should you expect? You know the protocol in an ordinary civil case: complaint, answer, standard scheduling order, written discovery, depositions, dispositive motions, case evaluation, mediation, settlement conference, and then trial (for the roughly 1.5 percent of civil cases that go to verdict.) But in the business court, things are far different.

This article provides an overview of what is unique about business courts—jurisdiction, procedure, discovery, judicial involvement, and alternative dispute resolution. This should help you prepare for your first case in the business court.¹ And based on the experiences of other litigators and their clients, you will likely find it satisfactory, too.

Subject-matter jurisdiction

One of the first issues to address when you have a potential business dispute is whether the business court has subject-matter jurisdiction. If the case involves a “business or commercial dispute,” the court has jurisdiction. The business court is not a separate court; rather, it is a separate docket within the circuit court. Sixteen Michigan circuit courts have established business courts.² The statute defines what constitutes a business or commercial dispute and what does not. Therefore, carefully review MCL 600.8031. Also, MCL 600.8035(3) provides that if part of the case 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.

One key issue is whether a case must meet the definition of a “business or commercial dispute” in MCL 600.8031(1)(c) and MCL 600.8031(2) to be assigned to the business court. The former generally focuses on the parties: are the parties to the lawsuit either businesses or principals in the business? In contrast, the latter section focuses on the kinds of claims involved in the litigation: are the claims the classic kinds of business disputes? Different business courts interpret these sections differently. Some courts require that a case meet both MCL 600.8031(1)(c) and MCL 600.8031(2) to go to the business court; other courts require that the case meets either one. In practice, some business courts have a “notice of assignment” or similar document that must be completed before a case will be assigned to the business court.

If the circuit has a business court and you have concluded that there is business court jurisdiction, the case must be assigned to the business court. (As an aside, most business court judges also have a docket of nonbusiness cases, either civil or criminal or both.) If, however, the business court does not have jurisdiction, the case cannot go to the business court—even if the

parties want to be there. In other words, jurisdiction is mandatory.

Forum: arbitration, business court, or federal court

Arbitration

Suppose your client's case is clearly subject to binding arbitration, as many commercial cases are. Unless all parties agree to waive the arbitration agreement, the case should not be filed in the business court.³ If it is, the business court judge will dismiss the case under MCR 2.116(C)(7).⁴

Business court or federal court

There are advantages to filing in federal district court where there is federal court jurisdiction.⁵ But if you prefer early and active judicial intervention, expedited discovery, and early mediation and would like a judge trained in business issues, then the business court may be a preferable jurisdiction for your case.⁶ Also, because business court opinions are posted on an indexed website,⁷ you can learn how a particular judge might rule on some of the issues in your client's case. Given that business court opinions are posted, attorneys should present their legal arguments (both in their briefs

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¹“Trial Practice” is designed to provide advice and guidance on how to effectively prepare for and conduct trials.

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and on the record) in a way that helps the judge draft the written opinion.

On the other hand, federal judges have experience in certain kinds of cases that state court judges (including business court judges) might not.

Filing in the business court

Having considered the above, you decide to file in the business court. Check the court's local administrative order and website for particular filing requirements, such as a notice of assignment. All business court cases must now carry a "CB" suffix.⁸ In addition, the face of the complaint must state that "the case meets the statutory requirements to be assigned to the business court."⁹ Moreover, the filing attorney must check the box on the summons stating that "all or part of the action includes a business or commercial dispute under MCL 600.8035." Also, your client has the same right to a jury trial as in any other circuit court case.

Early case management conference means know your case

Many business courts will hold an early case management conference. At that time, the court will probably discuss the timing and amount of discovery, a date for an early mediation, the status of settlement negotiations, and whether a business solution is possible.¹⁰ The court may require counsel to submit a joint case management plan before the conference. The result is a customized scheduling order that meets the needs of the parties.

This, in turn, requires that counsel know their case before the early case management conference. Whether required or not, it will be helpful for counsel to agree on as much as possible—discovery, deadlines, identity

of the mediator, and so forth—before the early case conference.

Local administrative orders; local protocol

Each business court has a local administrative order approved by the Michigan Supreme Court.¹¹ In addition, some business courts may have other protocols that apply to those particular courts. Oakland County, for example, has a model protective order and a case management protocol on its website.¹²

Discovery

Before serving discovery, check whether the court has initial discovery protocols. Some business courts apply principles of proportionality to discovery. In that regard, amended Federal Rule of Civil Procedure 26(b) may provide guidance.¹³ In many business courts, the days of "standard" interrogatories and requests for production documents and unlimited depositions are gone. Rather, the business court will probably focus the parties on how much discovery is needed for *their particular case* and *when* that discovery should occur (before or after mediation). In any event, business court judges (like all judges) strongly encourage the parties to resolve discovery disputes without motion practice. Some courts use volunteer attorneys, who act as "discovery facilitators." Before a discovery motion is heard, the discovery facilitator tries to help the parties reach an agreement.

Early alternative dispute resolution

As mentioned above, counsel should expect early mediation or other early alternative dispute resolution procedures in most

cases. Therefore, counsel should be prepared to discuss ADR at the early case management conference. Other ADR possibilities include summary jury trials, involvement of an early neutral expert, conference between the parties' experts, and a variety of other methods.¹⁴ If the first mediation does not produce a settlement, the court might order a second mediation after discovery has concluded. If case evaluation occurs at all, it will probably occur after mediation.¹⁵

That said, this is a business case. The parties have probably worked together for some time, perhaps decades if the matter involves a family business. Thus, the parties should discuss settlement before filing suit. Failing that, pre-suit mediation may be an option.¹⁶

Early and active judicial involvement

The business courts require a great deal of judicial involvement. Not only is the business court judge involved early in the case, he or she may remain frequently involved as the case progresses depending on the nature of the case. This can require a great deal of the judge's time. Overall, judges employ "evidence-based practices,"¹⁷ which reduce litigation waste. This helps lead to efficient resolution of business disputes, just as the business court statute requires.¹⁸

Motion practice

Many business cases involve complex motions with voluminous exhibits. Given that the business court judges are required to publish opinions, this can result in some delay in issuing opinions. For many (if not all) judges, the caseload is very heavy. Be patient.

Your role

You are an attorney and a counselor. As part of representing your client, constantly think about creative ways to resolve the dispute. For most businesses and business owners, litigation is loss mitigation. Seldom is litigation a profit center. ■

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the author.) His practice includes commercial litigation, shareholder disputes, insurance litigation, and business ADR. Since 2012, he has authored or coauthored the section on Michigan's business courts for the ABA Annual Review of Developments in Business and Corporate Litigation.

ENDNOTES

- For a broader discussion of Michigan's business courts, see Toering, *Michigan's Business Courts: Experimenting with Efficiency and Enjoying the Results*, 94 Mich B J 38 (November 2015) <<http://www.michbar.org/file/barjournal/article/documents/pdf4article2755.pdf>>. All websites cited in this article were accessed May 12, 2016.
- MCL 600.8035(3). A more comprehensive summary of Michigan's business court statute appeared in Toering, *The New Michigan Business Court Legislation: Twelve Years in the Making*, Bus L Today (2013) <http://www.americanbar.org/publications/blt/2013/01/03_toering.html>; see also ABA, *Annual Review of Developments in Business and Corporate Litigation* (2013), pp 201–203.
- An analysis of business courts and arbitration appears in Foster, Hurford & Toering, *Business Courts, Arbitration, and Pre-suit Mediation: A Modest Proposal for the Strategic Resolution of Business Disputes*, 35 Mich Bus LJ 21 (Fall 2015) <http://www.manteselaw.com/cm/dpl/downloads/content/114/business_courts_2c_arbitration_2c_and_pre-suit_mediation-toering__28mbl_fall....pdf>.
- See also MCL 600.8031(2)(c). Of course, if your client needs a temporary restraining order or a preliminary injunction, you may need to file in the business court. After those issues are resolved, the case can then go to arbitration.
- The same issue faces a defendant who is served with a business court lawsuit that could be removed to federal court.
- Oakland County, for example, has cases that could have been filed in federal court, but the parties opted for the business court instead.
- Michigan Courts, *Business Courts* <<http://courts.mi.gov/Administration/admin/op/Pages/Business-Courts.aspx>>.
- The "CB" case suffix now applies to "all claims in which all or part of the action includes a business or commercial dispute under MCL 600.8035." SCAO Memorandum (May 28, 2015) <<http://courts.mi.gov/Administration/SCAO/OfficesPrograms/TCS/Documents/TCS%20Memoranda/TCS-2015-16.pdf>>.
- MCR 2.112(O)(1).
- See AO 2013-6 (stating that circuit courts "shall establish specific case management practices for business court matters. These practices should reflect the specialized pretrial requirements for business court cases, and will typically include provisions relating to scheduling conferences, alternative dispute

resolution (with an emphasis on mediation scheduled early in the proceeding), discovery cutoff dates, case evaluation, and final settlement conferences").

- The local administrative orders for all the business courts are available at <<http://courts.mi.gov/Administration/admin/op/Business-Courts/Pages/Business-Courts.aspx>>. It will also be helpful to check the website for the particular business court.
- Oakland County Michigan, *Oakland County Business Court* <<https://www.oakgov.com/courts/businesscourt/Pages/default.aspx>>.
- Factors to consider are "the importance of the issues at stake . . . , the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." FR Civ P 26(b)(1).
- See generally SCAO, *Michigan Judges Guide to ADR Practice and Procedure* (2015) <<http://courts.mi.gov/Administration/SCAO/OfficesPrograms/ODR/Documents/ADR%20Guide%2004092015.pdf>>; Macomb County Bar Association ADR Committee, Hurford & Allen, *A Taxonomy of ADR: A Guide to ADR Practices & Processes for Counsel* (2015) <<http://premiadr.com/wp-content/uploads/2015/05/Taxonomy-of-ADR-Revised-4-2015.pdf>>.
- SCAO commissioned a comprehensive study on the effectiveness of case evaluation and mediation, which found that mediation appeared to be more effective than case evaluation in disposing of cases more quickly and in achieving settlements. *The Effectiveness of Case Evaluation and Mediation in Michigan Circuit Courts* (October 31, 2011), p 57 <<http://courts.mi.gov/Administration/SCAO/Resources/Documents/Publications/Reports/The%20Effectiveness%20of%20Case%20Evaluation%20and%20Mediation%20in%20MI%20Circuit%20Courts.pdf>>.
- A protocol for pre-suit or other early mediation (especially geared to shareholder disputes) may be found in *Business Courts, Arbitration, and Pre-suit Mediation*, 35 Mich Bus LJ 21.
- Evidence-based practices have become increasingly important to all courts, not just the business courts. In fact, the judicial dashboard developed by SCAO incentivizes the use of evidence-based practices. Michigan Courts, *Judiciary Dashboard* <<http://courts.mi.gov/education/stats/dashboards/Pages/default.aspx>>. Also, the Michigan Supreme Court has called on all courts to become laboratories in developing practices that will increase efficiency. In the 2015 budget for the judiciary, Chief Justice Robert P. Young Jr. stated, "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." Chief Justice Robert P. Young Jr., Remarks at the FY 2015 Budget Presentation (March 12, 2014) <<http://courts.mi.gov/News-Events/NewsSummary/Documents/ChiefJusticeYoungFY2015BudgetRemarks.pdf>>; see also Yates, J., *Specialized Business Dockets: An Experiment in Efficiency* <https://www.accesskent.com/Courts/17hcc/pdfs/Experiment_Efficiency.pdf>.
- MCL 600.8033(3).

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