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Recent Developments in

BUSINESS AND CORPORATE LITIGATION

BUSINESS COURTS

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I. Introduction

The 2016 *Annual Review* describes activities in the creation and expansion of business courts and summarizes significant cases from a number of business courts with publicly available opinions.[1]

There currently are functioning business courts of some type in cities, counties, regions, or statewide in several states: (1) Alabama; (2) Arizona; (3) Colorado; (4) Delaware; (5) Florida; (6) Georgia; (7) Illinois; (8) Iowa; (9) Maine; (10) Maryland; (11) Massachusetts; (12) Nevada; (13) New Hampshire; (14) New Jersey; (15) New York; (16) North Carolina; (17) Ohio; (18) Pennsylvania; (19) Rhode Island; (20) South Carolina; (21) Michigan; (22) Tennessee; and (23) West Virginia.[2] States with dedicated complex litigation programs that encompass business and commercial cases, among other types of complex cases, include California, Connecticut, and Oregon. The California and Connecticut programs are expressly not business court programs as such.

1. For a more detailed discussion on what may be defined as a business court, *see generally* Mitchell L. Bach & Lee Applebaum, *A History of the Creation and Jurisdiction of Business Courts in the Last Decade*, 60 Bus. Law. 147 (2004). Messrs. Bach and Applebaum's magnum opus is by far the most authoritative text on the history and development of business courts.

2. For an overview of business courts in the United States, *see* The Honorable Ben F. Tennille, Lee Applebaum, & Anne Tucker Nees, *Getting to Yes in Specialized Courts: The Unique Role of ADR in Business Court Cases*, 11 Pepp. Disp. Resol. L. J. 35 (2010), as well as John Coyle, *Business Courts and Inter-State Competition*, 53 Wm. & Mary L. Rev. 1915 (2012); Lee Applebaum, *The "New" Business Courts*, BUS. L. TODAY (March/April 2008); Ralph Peeples & Hanne Nyheim, *Beyond the Border: An International Perspective on Business Courts*, BUS. L. TODAY (March/April 2008); Vice Chancellor Donald F. Parsons & the Honorable Joseph F. Slights, III, *The History of Delaware's Business Courts: Their Rise to Preeminence*, BUS. L. TODAY (March/April 2008); Mississippi Business Courts Study Group, *Survey of the Structure of Business Courts by State of Local Jurisdiction* (August 2008) (on file with authors); Ann Tucker Nees, *Making a Case for Business Courts: A Survey of and Proposed Framework to Evaluate Business Courts*, 24 Ga. St. U. L. Rev. 477 (2007); *Business Court History, supra* note 1; Tim Dibble & Geoff Gallas, *Best Practices in U.S. Business Courts*, Court Manager, Vol. 19, Issue 2, 2004; *Chief Justice's Commission on the Future of the North Carolina Business Court, Final Report and Recommendation* (Oct. 28, 2004), http://www.ncbusinesscourt.net/ref/Final%20Commission%20Report.htm; Business Litigation Session Resource Committee, *The Business Litigation Session—Massachusetts Superior Court: A Status Report* (February 2003); Maryland Business and Technology Court Task Force, *Maryland Business and Technology Court Task Force Report* (2001), http://www.msba.org/sec_comm/sections/business/committees/courtlit/docs/MDBusandTechCourtTaskForceReport.PDF; ABA Ad Hoc Committee on Business Courts, *Towards a More Efficient Judiciary*, 52 Bus. Law. 947 (1997). *See also Business Courts*, in the 2004-2015 volumes of this publication.

II. Recent Developments

II.1 Business Court Resources

American College of Business Court Judges: The eleventh annual meeting of the American College of Business Court Judges (ACBCJ) took place from December 6–8, 2015, in Las Vegas, Nevada, and was held in conjunction with the Judicial Symposium on the Economics and Law of Public Pension Reform. Both programs were part of the Judicial Education Program at the George Mason University School of Law's Law and Economics Center.[3] In addition to judicial education, the ACBCJ provides resources, in terms of information and its member judges, to those jurisdictions interested in the development of business courts.

Section, Committee, and Subcommittee Resources: The Business Law Section has created a pamphlet, *Establishing Business Courts in Your State.*[4] The Committee on Business and Corporate Litigation's Subcommittee on Business Courts provides a business court resources web page, with links and documents on both national and international business courts that is likely the most comprehensive effort of its kind.[5] In addition to numerous links to public sources, the web page includes business court materials and resources presented at ABA meetings that are not published elsewhere.

The University of Maryland School of Law's *Journal of Business & Technology Law* continues to provide a very detailed online business court resource page, including links and information with respect to business and complex litigation courts.[6]

The National Center for State Courts (NCSC) has an online resource link to specialized business courts as well.[7]

3. Professor Henry N. Butler, George Mason University Foundation Professor of Law and Executive Director, Law & Economics Center, has played a vital role in planning and organizing all of the ACBCJ's annual meetings.

4. American Bar Association, Business Law Section, *Establishing Business Courts in Your State*, *available at* http://meetings.abanet.org/webupload/commupload/CL150011/sitesofinterest_files/establishing-business-courts0809.pdf.

5. American Bar Association, Business Law Section, Business and Corporate Litigation Committee, Subcommittee on Business Courts, *available at* http://www.apps.americanbar.org/dch/committee.cfm?com=CL150011.

6. University of Maryland School of Law, Journal of Business & Technology Law, *available at* http://www.law.umaryland.edu/academics/journals/jbtl/bus_tech_res.html. The JBTL also can be found at http://www.law.umaryland.edu/academics/journals/jbtl/.

7. National Center for State Courts, Business/Specialty Courts State Links, *available at* http://www.ncsc.org/Topics/Special-Jurisdiction/Business-Specialty-Courts/State-Links.aspx?cat=Business%20Courts%20and%20Complex%20Litigation.

Various blogs address business courts in particular states.[8] In addition, as was the case in recent years, law review and journal articles have made significant reference to business courts over the years.[9]

II.2 Developments in Existing Business Courts

Iowa

The Iowa Business Specialty Court Pilot Project ("Pilot Project" or "Business Court") is a three-year experiment dedicated to hearing complex business disputes.[10] In May 2013, the Pilot Project began accepting qualifying cases.[11] The Iowa Civil Justice Reform Task Force, which was established by the Iowa Supreme Court, recommended the establishment of the Pilot Project after a two-year review of innovative litigation procedures and programs across the country.[12] The Pilot Project aims to move complex business disputes through Iowa's court system in a more efficient and cost-effective manner.[13] The Pilot

8. Delaware Business Litigation Report, http://www.delawarebusinesslitigation.com; Delaware Corporate & Commercial Litigation Blog, http://www.delawarelitigation.com; Mass Law Blog, http://www.masslawblog.com; New York Business Divorce Blog, http://www.nybusinessdivorce.com; New York Commercial Division Case Compendium, http://www.nycommdivcompendium.com; Duane Morris Delaware Business Law Blog, http://blogs.duanemorris.com/delawarebusinesslaw/; Commercial Division Blog: Current Developments in the Commercial Division of the New York State Courts, http://schlamstone.com/commercial/; and the North Carolina Business Litigation Report, http://www.ncbusinesslitigationreport.com.

9. Douglas L. Toering, *The New Michigan Business Court Legislation: Twelve Years in the Making*, 2013-Jan. Bus. L. Today 1 (Jan. 2013); Judge Christopher C. Wilkes, *West Virginia's New Business Court Division: An Overview of the Development and Operation of Trial Court Rule 29*, 20130-Mar. W. Va. Law. 40 (Jan.-Mar., 2013); Brian JM Quinn, *Arbitration and the Future of Delaware's Corporate Law Franchise*, 14 Cardozo J. Conflict Resol. 829 (Spring 2013); John Coyle, *Business Courts and Inter-State Competition*, 3 Wm. & Mary L. Rev. 1915 (2012); Andrew W. Jurs, *Science Court: Past Proposals, Current Considerations, and a Suggested Structure*, 15 Va. J.L. & Tech. 1 (2010); Andrew A. Powell, *It's Nothing Personal, It's Just Business: A Commentary on the South Carolina Business Court Pilot Program*, 61 S.C. L. Rev. 823 (2010); The Honorable Ben F. Tennille, Lee Applebaum, & Anne Tucker Nees, *Getting to Yes in Specialized Courts: The Unique Role of ADR in Business Court Cases*, 11 Pepp. Disp. Resol. L. J. 35 (2010).

10. *Memorandum of Operation*, Iowa Judicial Branch (Dec. 21, 2012), at 1, http://www.iowacourts.gov/wfdata/files/Committees/BusinessCourts/MemorandumOfOperation.pdf.

11. *Iowa Business Specialty Court Pilot Project Initial Evaluation*, Iowa Judicial Branch (Aug. 2014), at 1, http://www.iowacourts.gov/wfdata/files/Business%20Court/Business%20court%20evaluation%208.25.14.pdf.

12. *See Reforming the Iowa Civil Justice System: Report of the Iowa Civil Justice Reform Task Force*, Iowa Judicial Branch (Jan. 30, 2012), at 93-107, http://www.iowacourts.gov/wfdata/files/Committees/CivilJusticeReform/FINAL03_22_12.pdf.

13. *Memorandum of Operation*, *supra* note 1, 1.

Project also foresees additional benefits, such as the development of business court case law and innovative court practices.[14]

Parties may voluntarily opt-in to the Pilot Project by transferring their qualifying cases to the Business Court docket from the district court where the case was filed.[15] All parties, however, must agree to assign the case. This is accomplished by filing a Joint Consent for Assignment to the Business Court Pilot Project with the State Court Administrator, which requires the parties to certify the case meets the Pilot Project's eligibility requirements.[16] To qualify for the Business Court docket, the dispute must satisfy two core requirements. First, the amount in controversy must meet or exceed $200,000 in compensatory damages or the claim must primarily seek injunctive or declaratory relief.[17] Second, the case must meet one of the following dispute types:

- Technology licensing agreement;
- Internal affairs of a business;
- Breach of contract, fraud, or misrepresentation arising out of business transactions;
- Shareholder derivative or commercial class action;
- Commercial bank transactions;
- Trade secrets, non-compete clause in a contract, or confidentiality;
- Commercial real property;
- Anti-trust or securities; or
- Business tort claims between or among two or more business entities.[18]

Alternatively, certain matters such as criminal cases, employment disputes, professional fee disputes, and cases involving administrative agencies are presumptively excluded from the Business Court docket.[19]

The Pilot Project is designed to operate within the framework of the existing Iowa court system. The Business Court generally applies the state's regular

14. *Iowa Business Court Pilot Program Second Annual Evaluation*, Iowa Judicial Branch (July 13, 2015), at 1, http://www.iowacourts.gov/wfdata/files/Business%20Court/IA%20Business%20Ct%20Eval%20Report%20Yr%202%20(7-13-15)-FINAL.pdf.

15. *Memorandum of Operation*, *supra* note 1, 3.

16. *Joint Consent for Case Assignment to the Business Court Pilot Project*, Iowa Judicial Branch (December, 2013), http://www.iowacourts.gov/wfdata/files/Committees/BusinessCourts/jointConsent_busCourt.pdf.

17. *Memorandum of Operation*, *supra* note 1, at 2-3.

18. *Id.*

19. *See e.g.*, *Reforming the Iowa Civil Justice System*: *Report of the Iowa Civil Justice Reform Task Force*, *supra* note 3, at 106. Other matters that are excluded include: (1) personal injury or wrongful death; (2) medical malpractice matter; (3) landlord tenant matters; and (4) residential foreclosures.

rules of civil procedure and evidence, including other applicable court rules.[20] A notable feature of the Pilot Project is that parties are not subject to additional filing fees and the case is heard in the county where the case was filed and properly venued.[21] The parties also may elect to streamline discovery and other pretrial procedures with the consent of the presiding judge.[22]

The Iowa Supreme Court selected three district court judges to preside over the Business Court.[23] The judges were selected based on their education, familiarity with complex commercial cases, and desire to participate in the three-year experiment.[24] Two judges are assigned for each case. A primary judge handles litigation matters and another judge handles settlement negotiations.[25] The Business Court judges have each served as a primary judge.[26] Business Court judges are required to balance the Pilot Project with their regular caseload.[27] Therefore, the State Court Administrator seeks to distribute the cases fairly among the judges to avoid burdening the judges' districts.[28] It is general practice, however, for the State Court Administrator to assign the cases on a random basis.[29]

The Iowa Supreme Court requires the State Court Administration to conduct an annual assessment of the Pilot Project's progress and development.[30] The most recent report shows that 21 cases have been assigned to the Pilot Project in the past two years.[31] Ten cases were assigned in the inaugural year, and 11 cases were assigned during the second year.[32] Within the first two years of the Pilot Project, the three judges collectively spent 942 hours on Business Court cases, which is approximately 25 percent of their general caseload.[33] The cases assigned to the Business Court docket meet various subject matter criteria. Most cases, however, fall into three main categories: (1) business torts; (2) internal affairs; and (3) business transactions, such as breach of contract claims.[34]

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20. *Memorandum of Operation*, *supra* note 1, at 4.

21. *Business Court Website FAQ*, Iowa Judicial Branch, at 15. http://www.iowacourts.gov/About_the_Courts/Specialty_Courts/Business_Court/FAQs/.

22. *Memorandum of Operation*, *supra* note 1, at 4.

23. *In the Matter of Appointment of Judges to the Iowa Business Specialty Court Pilot Project*, Iowa Judicial Branch (Mar. 4, 2013), http://www.iowacourts.gov/wfdata/files/Committees/BusinessCourts/30413_Ord_Apptg_Business_Judges.pdf; *see also* Iowa Judicial Branch, at 6. http://www.iowacourts.gov/About_the_Courts/Specialty_Courts/Business_Court/Judges/.

24. *Id.*

25. *Iowa Business Specialty Court Pilot Project Initial Evaluation*, *supra* note 2, at 2.

26. *Iowa Business Court Pilot Program Second Annual Evaluation, supra* note 5, at 4.

27. Vanessa Miller, *Iowa Business Specialty Court Pilot Project Now Accepting Cases* (March 28, 2014), http://thegazette.com/2013/05/02/iowa-business-specialty-court-pilot-project-now-accepting-cases/.

28. *Iowa Business Court Pilot Program Second Annual Evaluation*, *supra* note 5, at 2.

29. *Id.*

30. *Memorandum of Operation*, *supra* note 1, at 4; *see also Iowa Business Specialty Court Pilot Project Initial Evaluation*, *supra* note 2, 3-4.

31. *Iowa Business Court Pilot Program Second Annual Evaluation*, *supra* note 5, at 2-3.

32. *Id.* at 3.

33. *Id*. at 7-8.

34. *Id.* at 2-3.

Within the last two years of the Pilot Project, the Business Court has resolved ten cases.[35] Eleven cases, however, are pending.[36] Among the ten cases resolved, nine cases settled and one resulted in a bench trial and a written ruling.[37] It took the Business Court an average of 8.75 months to resolve the cases.[38] The Business Court has proven, however, to be able to settle cases in as little as three months and conduct a trial within four and a half months.[39] The cases assigned to the Business Court invariably involve multiple parties.[40] The Business Court has a pending case involving forty-one plaintiffs, which is the largest number of plaintiffs assigned to the Business Court.[41]

The State Court Administrator has obtained feedback from thirty attorneys who have participated in the Pilot Project. The attorneys were given a questionnaire regarding the following topics: (1) factors that led the attorney to assign their case to the Business Court; (2) the Business Court's performance; (3) the judges' qualities; and (4) overall evaluation and approval of the Pilot Project.[42] The attorneys found that the Business Court judges had experience with managing complex business cases, were flexible in developing a case management plan, and effectively handled discovery-related issues.[43] Moreover, the attorneys highly rated the primary and settlement judge's display of civility and fairness toward all the parties in the case.[44] As an overall assessment, the attorneys agreed they would assign their cases to the Business Court in the future and believed the Business Court should become a permanent fixture in Iowa's judicial system.[45]

The State Court Administrator also questioned all three judges on their opinions of the Business Court's policies and practices.[46] The judges responded that they were impressed, among other things, with the scheduling collaborations between the districts, the utilization of settlement judges, the ability of litigants to communicate with each other remotely, and the prompt scheduling of motions and trial.[47] Alternatively, the judges noted features of the Pilot Project they would change, such as expanding the selection criteria for cases assigned to the Business Court, removing the voluntary opt-in requirement, and designating a judge from each district to serve on the Business Court.[48]

The Business Court's second annual report shows that litigants and the three appointed judges are extremely satisfied with the Pilot Project and strongly

35. *Id.* at 4-5.
36. *Id.* at 3, 5.
37. *Id.* at 4-5.
38. *Id.* at 6.
39. *Id*. at 4-6.
40. *Id.* at 4-5.
41. *Id.* at 5-6.
42. *Id.* at 9-10.
43. *Id.* at 10-12.
44. *Id.*
45. *Id.* at 10.
46. *Id.* at 12.
47. *Id.* at 12-13.
48. *Id.* at 13.

support making the Business Court a permanent feature in Iowa's judicial system. The three-year experiment's end date is soon approaching. Therefore, the Iowa Supreme Court will have to decide whether a permanent business court docket should be added to Iowa's court system.

Massachusetts

The Massachusetts Business Litigation Session ("BLS") was created in 2000. It is not a separate court among the Massachusetts trial courts, but a special session of the Massachusetts Superior Court that hears business and commercial disputes. While originally limited geographically to cases filed in Suffolk County (Boston) and surrounding counties, in 2009 the reach of the BLS was expanded to allow litigants in any county of the Commonwealth to originate or transfer their cases to the BLS.[49] Cases must also be sufficiently complex to qualify for admission into the BLS, as determined by the BLS Administrative Justice in his or her discretion. Examples of cases heard in the BLS are shareholder derivative claims, business torts, intellectual property and insurance coverage disputes, and claims arising from the sale of assets, corporate mergers, and restrictive covenants in employment disputes.[50] The BLS also hears cases brought by the Massachusetts Attorney General on behalf of consumers alleging unfair and deceptive business practices.

There are two sessions of the BLS; in each session, Superior Court Judges work together in groups of two, with each judge sitting in a session for six months at a time. For appropriate cases, the session judge may agree to remain assigned to a case even after he or she rotates out of the session in order to ensure continuity. In addition, each session of the BLS has a dedicated court clerk and two research attorneys. All decisions of the BLS are made available via the Social Law Library's Business Litigation Session of the Superior Court database.[51] In addition, select BLS decisions are also available through LexisNexis, Westlaw, and the *Massachusetts Law Reporter*.

The BLS takes a customized approach to case management. Generally, within several months after the filing of a complaint, and in all events shortly after issue has been joined, one of the judges will hold a litigation control conference and will work with counsel to create a tailored scheduling order for the completion of discovery, filing of dispositive motions, and a final pre-trial conference. Depending on the factual circumstances of the case, the scheduling order may impose shorter faster deadlines if the matter needs to be resolved quickly, or longer deadlines if the matter is highly complex.

The BLS has adopted certain special rules in order to streamline case management. For example, parties wishing to file motions for partial summary judgment are required to confer with the other parties and with the presiding judge, who will then decide to permit such motion if it will narrow the issues for

49. Superior Court Administrative Directive 09-1 (Jan. 19, 2009), *available at* http://www.mass.gov/courts/docs/courts-and-judges/courts/superior-court/09-1.pdf.

50. A complete listing of cases eligible for acceptance into the BLS is included in Superior Court Administrative Directive 09-1.

51. http://sociallaw.com/research/research-databases (subscription required).

trial.[52] In an attempt to reduce the number of partially dispositive motions that do not narrow the issues for trial, the BLS reaffirmed the basic requirements for filing a partial dispositive motion and added an additional requirement. Effective July 1, 2015, the moving party must file a "Certificate of Compliance," detailing the steps taken by the parties to comply with the procedural order.[53]

In 2010, the BLS developed an eDiscovery pilot program (now referred to as the Discovery Project), which litigants can enter into voluntarily and which adopts an automatic discovery process and an e-discovery cost-benefit "weighing" standard similar to that utilized in federal court.[54] To further reduce discovery costs, parties can agree to not require the preparation of a privilege log or limit a privilege log to only certain types of documents.[55] In addition, the BLS allows for a teleconference or an immediate court appearance with a judge to resolve discovery disputes without the need for motion practice.[56] Parties may also request in advance to attend certain proceedings such as Rule 16 Conferences, status conferences, and hearings on non-dispositive matters scheduled on short notice by telephone.[57] Unlike in other Superior Court sessions, parties in the BLS are also allowed to file reply briefs without seeking leave of court,[58] and in an effort to conserve resources, guidance from the BLS makes it clear that parties will be sanctioned if they file motions for reconsideration when there is no intervening change in the law, newly discovered evidence that was not previously available, or a clear error of law.[59]

Lastly, the BLS has adopted formal guidance for confidentiality agreements; that guidance provides that while parties may specify documents as "confidential" in the course of discovery, filing such documents under seal must be approved by the court and only after a "particularized showing" is made.[60] The BLS will

52. Procedural Order of the Business Litigation Session Regarding Partial Dispositive Motions, *available at* http://www.mass.gov/courts/docs/courts-and-judges/courts/superior-court/procedural-order-partial-dispositive-motions.pdf.

53. Amended Procedural Order of the Business Litigation Session Regarding Partial Dispositive Motions, *available at* http://www.mass.gov/courts/docs/courts-and-judges/courts/superior-court/procedural-order-partial-dispositive-mtns-june-1-2015.pdf.

54. Introduction to BLS Pilot Project, *available at* http://www.mass.gov/courts/docs/press/superior-bls-pilot-project.pdf.

55. Procedural Order of the Business Litigation Session Regarding Privilege Logs, *available at* http://www.mass.gov/courts/docs/courts-and-judges/courts/superior-court/bls-privilege-log-order.pdf.

56. Procedural Order of the Business Litigation Session Regarding Appearances by Telephone, *available at* http://www.mass.gov/courts/docs/courts-and-judges/courts/superior-court/procedural-order-appearances-by-telephone.pdf.

57. *Id.*

58. Procedural Order of the Business Litigation Session Regarding Reply Memoranda, *available at* http://www.mass.gov/courts/docs/courts-and-judges/courts/superior-court/bls-order-regarding-reply-memoranda.pdf.

59. Procedural Order of the Business Litigation Session Regarding Motions for Reconsideration, *available at* http://www.mass.gov/courts/docs/courts-and-judges/courts/superior-court/bls-guidance-motions-for-reconsideration.pdf.

60. Procedural Order of the Business Litigation Session Regarding Confidentiality Agreements, *available at* http://www.mass.gov/courts/docs/courts-and-judges/courts/superior-court/bls-formal-guidance-confidentiality.pdf.

also more closely scrutinize confidentiality agreements that allow designation of documents for "attorneys' eyes only"; such provisions will be approved "only when the need for such a provision is carefully explained," when there is no reasonable alternative, and the number of documents so designated is limited.

Michigan

History and Purpose. On November 1, 2011, Macomb County Circuit Court launched the state's first Specialized Business Docket. Just four months later, Kent County Circuit Court established its Specialized Business Docket on March 1, 2012. Then on October 16, 2012, Michigan Governor Rick Snyder signed Michigan Public Act 333 (2012), which established a business court in every Michigan county having at least three circuit judges.[61] The legislation was effective January 1, 2013, although it was actually implemented in most of the affected counties during the first half of 2013. Thus, in the 16 circuits[62] with a business court, every "business or commercial dispute" (as broadly defined) is assigned to a special docket.[63]

The purpose of the business courts is to resolve commercial disputes efficiently, accurately, and predictably.[64] The experience so far suggests that the business courts are accomplishing that objective.[65]

Evidence-Based Practices. To implement the statutory mandate, the business courts are encouraged to adopt "evidence-based practices"[66] that reduce litigation waste and inefficiencies. Evidence-based practices are those that are

61. Mich. Comp. L. 600.8031 *et seq.*

62. As of November 20, 2015, the business court judges are (in alphabetical order by county): Hon. Kenneth W. Schmidt (Bay); Hon. John M. Donahue (Berrien); Hon. Brian K. Kirkham (Calhoun); Hon. Judith A. Fullerton (Genesee); Hon. Joyce A. Draganchuk (Ingham); Hon. Richard N. LaFlamme (Jackson); Hon. Pamela L. Lightvoet (Kalamazoo); Hon. Christopher P. Yates (Kent); Hon. Richard L. Caretti and Hon. Kathryn A. Viviano (Macomb); Hon. Daniel White (Monroe); Hon. Neil G. Mullally (Muskegon); Hon. James M. Alexander and Hon. Wendy L. Potts (Oakland); Hon. Jon A. Van Allsburg (Ottawa); Hon. M. Randall Jurrens (Saginaw); Hon. Daniel J. Kelly (St. Clair); Hon. Archie C. Brown (Washtenaw); and Hon. Maria L. Oxholm, Hon. Lita Masini Popke, and Hon. Brian R. Sullivan (Wayne). Bay County no longer has a business court.

63. A fuller summary of Michigan's business court legislation appeared in: Toering, *The New Michigan Business Court Legislation: Twelve Years in the Making*, Bus. L. Today (Jan. 2013), http://www.americanbar.org/publications/blt/2013/01/03_toering.html; and Diane L. Akers, *Michigan's New Business Court Act Presents Opportunities and Challenges*, 33 Mich. Bus. L. J. (no. 2) 11 (Summer 2013), https://higherlogicdownload.s3.amazonaws.com/MICHBAR/ebd9d274-5344-4c99-8e26-d13f998c7236/UploadedImages/pdfs/journal/MBLJ_Summer2013.pdf#page=13.

64. Mich. Comp. L. 600.8033(3).

65. For processing times in certain business courts, see Toering, *Michigan's Business Courts and Commercial Litigation: Past, Present, and Future*, 93 Mich. Bar. J. (no. 8) 26 (August 2014). Washtenaw County also reports very impressive processing times.

66. "Evidence-based practices" have become increasingly important to all courts in Michigan, not just the business courts. In fact, the judicial dashboard developed by Michigan's State Court Administrative Office encourages the use of "evidence-based practices." *Michigan Judges Guide to ADR Practice and Procedure*, p. 15; http://courts.mi.gov/Administration/SCAO/OfficesPrograms/ODR/Documents/ADR Guide 04092015.pdf.

tested and evaluated in actual litigation contexts. Those practices can also serve as a model to all trial courts.[67] An excellent summary of these practices is the presentation made at the 2015 Michigan Judicial Conference on October 27 and 28, 2015.

Indeed, the Michigan Supreme Court has called on all courts to become laboratories to develop more efficient practices. 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."[68]

So what are the business courts doing in their own laboratories? What specifically are the business courts doing to help resolve cases efficiently? What practices have they adopted regarding discovery, alternate dispute resolution, motion practice, and the like? For answers, the business court judges were asked a series of questions. The responses from the judges in Ingham, Kent, Macomb, Oakland, Ottawa, Saginaw, Washtenaw, and Wayne Counties provide answers.[69] Among other things, they confirm that two of the keys to the success of the business courts are early and frequent judicial intervention and early alternative dispute resolution or ADR.

Overall, as Judge Jon A. Van Allsburg of Ottawa County aptly put it, "Early judicial intervention has been the hallmark of business court litigation…" And as Judge M. Randall Jurrens of Saginaw County noted, "[S]everal themes have emerged" in business court litigation: "the advantages of early and frequent judicial intervention (e.g., early case management conference and regular status conferences), the utility of early facilitative mediation, the benefits of easy judicial access (e.g., expedited conference calls to resolve minor issues), and the quality of legal representation."

Early Case Management and Scheduling Conferences. Generally, the business courts employ early case management conferences. Of course, counsel wishing to know the practices of a particular business court should consult the local administrative order for that court as well as the judge's own protocol. To serve the litigants, the Michigan State Court Administrative Office posts online the local administrative orders for each business court.[70]

Alternative Dispute Resolution: Early Mediation. Under Administrative Order 2013-6, each business court "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 . . . alternative dispute resolution (with an emphasis on mediation scheduled early in the proceeding)...."

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67. Hon. Christopher P. Yates, *Specialized Business Dockets: An Experiment in Efficiency.*

68. http://courts.mi.gov/News-Events/Newssummary/Documents/ChiefJusticeYoung-FY2015BudgetRemarks.pdf.

69. Participation in this informal questionnaire was entirely optional. The judicial responses are summarized in Toering, *Michigan's Business Courts: Experimenting with Efficiency and Enjoying the Results*, 94 Mich. Bar J. 38 (Nov. 2015), http://www.michbar.org/file/barjournal/article/documents/pdf4article2755.pdf.

70. http://courts.mi.gov/Administration/admin/op/Pages/Business-Courts.aspx.

Thus, as one would expect, the business courts encourage (if not require) early mediation.[71] In that regard, both the judges and practitioners have a wide variety of resources at their disposal. Two in particular are the *Michigan Judges Guide to ADR Practice and Procedure* published by the Michigan State Court Administrative Office (SCAO)[72] and *A Taxonomy of ADR: A Practical Guide to ADR Practices & Processes for Counsel.* The *Taxonomy* details a variety of ADR practices beyond mediation for counsel to consider.[73] In addition, SCAO has established a kind of clearinghouse of ADR materials called the "Michigan Online Guide to ADR Procedures."[74]

After the parties complete the initial discovery deemed necessary to support a meaningful ADR event, if mediation does not produce a settlement, the parties will conduct further discovery to prepare for a trial in the matter (i.e., staged discovery). Even where early mediation does not settle a case, this does not mean that the process was a "failure." Rather, the parties can use mediation to narrow the issues in dispute, limit or focus the scope of further discovery, and construct an effective litigation plan. The litigation plan can, in turn, lead to continued settlement discussions or the development of other ADR strategies.

In fact, business disputes are well suited to early mediation.[75] First, often the parties have done business with each other for years—as vendor and customer or perhaps as business partners. The quicker the parties can focus on settlement, the more money they can save on litigation expenses. Said differently, money is fungible: Every dollar spent on litigation is a dollar that is not available to settle the case, to invest in the business, or to save for the college education of the owners' children.

Moreover, early mediation allows the parties to focus on "business solutions," such as: "You buy more steel from me, and I will sell it to you at a lower price." And an early mediation—where parties can air their grievances to a neutral mediator (and perhaps directly to each other), and where the parties can construct their own solution—can help save a relationship, maybe even a family. Indeed, the owners of small businesses have typically worked together for years, and in some cases decades (especially in the case of a family business).[76]

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71. The authors would like to thank ADR expert Richard L. Hurford for his ideas on mediation and staged discovery, which have been helpful here. Some of his thoughts are also included in Hon. John C. Foster, Richard L. Hurford, and Douglas L. Toering, *Business Courts, Arbitration, and Pre-suit Mediation: A Modest Proposal for the Strategic Resolution of Business Disputes* (to be published in the *Michigan Business Law Journal*).

72. http://courts.mi.gov/Administration/SCAO/OfficesPrograms/ODR/Documents/ADR%20Guide%2004092015.pdf.

73. The *Taxonomy* was developed by the Macomb County Bar Association's ADR Committee including ADR experts Richard L. Hurford and Tracy L. Allen. http://static1.squarespace.com/static/50dc72c3e4b0395512960a1c/t/554b7b3fe4b0172baad01c53/1431010111052/Taxonomy+of+ADR+%28Revised+4-2015%29.pdf.

74. http://courts.mi.gov/Administration/SCAO/OfficesPrograms/ODR/Pages/default.aspx.

75. Several experts have examined the role of ADR and the business courts. See a summary of this in note 13 of *Michigan's Business Courts and Commercial Litigation*.

76. The rationale for early mediation along with a protocol for early mediation of shareholder disputes may be found in *Business Courts, Arbitration, and Pre-suit Mediation: A Modest Proposal for the Strategic Resolution of Business Disputes*.

Overall, early mediation is successful. As Judge Archie C. Brown of Washtenaw County observed, it has led to a significant decrease in the average days a case is open before closing. Given that about 1.4 percent of civil cases in Michigan go to verdict, early settlement discussions and early ADR should always be considered.

ADR: Other Options? Although mediation and arbitration remain the favorites in the business courts (and for good reason), both judges and attorneys are considering other options. In fact, the *Taxonomy of ADR* explores 25 ADR processes and when each of those might be appropriate.

Some of the alternatives include mediation followed by arbitration ("med/arb"), early neutral fact finding, early neutral evaluation, an expert hearing (aka "hot tubbing"), mini-trial to an advisory jury, summary jury trial (which may include a "high/low limitation"[77]), arbitration followed by mediation ("arb/med"), and Michigan's unique process called "case evaluation."[78]

Judges Acting as Both Judges and Dispute Resolution Advisors. To promote efficiency, Michigan's State Court Administrative Office has suggested that judges (including business court judges) consider serving as both dispute resolution advisors and, of course, as traditional trial court judges. SCAO summarized those two roles:[79]

Traditional Trial Judge	Trial Judge and Dispute Resolution Advisor
Short-term and long-term goals: Focuses the parties on a trial date and prepares the parties for a trial. But only about 1.4% of civil cases go to verdict.	Short-term and long-term goals: Assists the parties in resolving their dispute, if possible (short-term), and prepares for trial as necessary (long-term).
Typically relies on a computer-generated scheduling order.	Conducts an early case conference with counsel to establish a differentiated case management plan.
Presides over discovery disputes and motion practice.	Stages proportional discovery and motion practice to support the agreed ADR strategies.

77. http://courts.mi.gov/Courts/MichiganSupremeCourt/rules/court-rules-admin-matters/Court%20Rules/2014-24_2015-03-25_formatted%20order_AO%202015-1_Summary%20Jury%20Trial.pdf.

78. See Mich. Ct. R. 2.403 regarding case evaluation. http://courts.mi.gov/Courts/MichiganSupremeCourt/rules/Documents/CHAPTER%202.%20CIVIL%20PROCEDURE%20%28entire%20chapter%29.pdf.

79. http://courts.mi.gov/Administration/SCAO/OfficesPrograms/ODR/Documents/ADR%20Guide%2004092015.pdf. *See also, A Taxonomy of ADR: A Guide to ADR Practices & Procedures for Counsel, supra*.

Traditional Trial Judge	Trial Judge and Dispute Resolution Advisor
Orders case evaluation just prior to the trial date as the first ADR activity in the case (with mediation to follow in some cases).	Explores multiple and early ADR strategies throughout the life of the case and conducts periodic, moderated settlement conferences to determine the impediments to a voluntary resolution.
Determining legal rights and remedies of the parties is the sole focus.	In addition to determining legal rights and remedies, judges (and neutrals) explore the parties' interests and needs-based solutions.
Result: The vast majority of cases resolve later in the litigation.	**Result:** The vast majority of cases resolve earlier in the litigation.

Discovery and Motion Practice: Staged and Proportional Discovery. The most expensive—and often the most contentious—aspect of many commercial cases is usually discovery. To address this, business court judges have several tools in their toolbox. One common approach is "staged discovery"—allowing limited discovery before early mediation.

In fact, sometimes the court will order a case to mediation with no discovery having been taken. (A suit on a promissory note is an example. Many such cases can probably be mediated with no discovery.) In the authors' opinion, the majority of business court cases can be effectively mediated after 90–120 days of discovery.

Another frequently used strategy is proportional discovery—tailoring discovery to meet the particular circumstances of the case.[80] In that regard, Oakland County's business court has adopted a case management protocol. The protocol states: "The Court will consider principles of proportionality with regard to all discovery disputes."[81] The case management protocol requires that basic case information be disclosed within 30 days of the responsive pleading.[82]

Likewise, Macomb County has established discovery protocols for disputes involving breach of contract, business organizations (shareholder disputes), employment, and non-compete cases.[83] Elsewhere, Oakland County has approved a model protective order.[84]

Other. On November 12, 2015, eight business court judges from four counties along with three practitioners presented on business courts, early ADR, and evidence-based practices. The event sold out weeks in advance. The business

80. See, e.g., F. R. Civ. Pro. 26(b)(1).

81. Oakland Case Management Protocol, Oakland County Circuit Court, Business Court Cases ¶ (2)(c)(i). https://www.oakgov.com/courts/businesscourt/Documents/ocbc-pro-case-management.pdf.

82. Oakland Case Management Protocol ¶ (2)(c)(ii). This part of the protocol was patterned after the initial disclosures in F. R. Civ. Pro. 26(A)(1)(A).

83. http://circuitcourt.macombgov.org/CircuitCourt-BusinessDocket.

84. https://www.oakgov.com/courts/businesscourt/Documents/mod-bc-pro_ord.pdf.

court judges present emphasized the importance of early judicial involvement, active case management and early ADR as previously discussed. The Oakland County business court judges also discussed the court's new practice of having counsel discuss discovery motions with volunteer, experienced neutrals during the morning of the scheduled hearing before entertaining oral argument on the motions. The judges noted as a result of this facilitated "meet and confer" opportunity, many of the discovery disputes were significantly narrowed or totally resolved. Also, the State Bar of Michigan's Business Law Section has established a Business Courts Committee.

So How Are We Doing? What Are the Challenges in the Michigan Business Courts? Overall, the Michigan business courts are a proverbial "work in progress." But the work is progressing quite well. As the business courts continue to experiment with evidence-based practices, this is likely to continue.

Still, challenges remain. Here are some:

1. Resources. The caseload for some of the business courts—Kent, Macomb, Oakland, and Wayne Counties, for example—is heavy. Most business court judges have a docket of both business court and other circuit court cases (other civil cases, criminal cases, or both). Combine that with the fact that business court cases tend to have a large number of discovery issues and motions (especially discovery motions and motions to dismiss), and the challenge becomes even greater. Add to that the requirement that business court judges publish their opinions,[85] and all this adds up to a major challenge for at least some business court judges. Additional staffing may be necessary in some business courts. As an aside, business court judges are finding their previous opinions (along with opinions of other business court judges) cited in later cases.[86]

2. Business Court Statute. A case that has one "business or commercial dispute" goes to the business court—even if it includes claims that are specifically excluded from the definition of "business or commercial dispute."[87] This means that, for various reasons, cases that are not really business disputes are ending up in the business courts.[88] Should the statute be amended to address that? Stay tuned.

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85. Mich. Comp. L. 600.8039(3). As of January 2014, opinions from the business court judges (non-binding on everyone except the parties) are available to the public on an indexed website. The 24 categories are agriculture; antitrust, franchising, trade regulation; attorneys; automotive; collection: debtor/creditor; construction; contracts; deadlock, dissolution, liquidation; derivative actions; directors, officers, managers, shareholders; environmental; finance and capital structure; healthcare; information technology; insurance; intellectual property; jurisdiction; labor and employment; organizational structure; real estate; restrictive covenants; tax; torts; and Uniform Commercial Code. *See* http://courts.mi.gov/opinions_orders/businesscourtssearch/pages/default.aspx.

86. As trial court opinions, those opinions have no precedential value, but they can be persuasive.

87. Mich. Comp. L. 600.8035(3).

88. Given the reputation of the business courts for efficiency, the authors believe that some cases that would ordinarily have been filed in (or removed to) federal court may be in the business courts. If so, that adds to the caseload of the business courts.

3. Forum Shopping. Yes, forum shopping does occur, and judges know it. In many of Michigan's 16 business courts, one knows who will be the business court judge. (Only three courts—Macomb, Oakland, and Wayne—have more than one business judge. Wayne has three judges and Macomb and Oakland have two each.) So take non-competes, for example. Suppose Judge A in one county is believed to be more favorable to the employer than Judge B in a different county. Might counsel for the employer file in one county to get Judge A? Or might the employee's counsel try to "win the race to the courthouse" and file in a different county to be assigned to Judge B?[89] Similarly, some parties are providing forum selection provisions in their contracts that call for the resolution of business disputes in counties with business courts as opposed to those counties without business courts.

What About Non-Business Court Cases? Expect to see other circuit courts experiment with the business court protocols—especially early judicial involvement, periodic (and as-needed) judicial involvement thereafter, and early ADR. To some degree, certain courts (Ottawa and Saginaw, for example) apply the protocols to at least some non-business court cases.

Final Advice to Litigators. Every business court has a local administrative order; the court may also have default discovery protocols, business court forms, a protective order template, and so forth. Check the court's website.

Also, before filing (or opposing) a motion, check whether the assigned judge has already addressed that issue. If not, find out whether another business judge has decided a similar issue. As mentioned above, all business court opinions are posted at the Michigan State Court Administrative Office's website;[90] this helps with predictability. Know the business court statute: Is your case really a business court case?[91]

Finally, learn what the judges are being advised as to the efficacy of various ADR processes set forth in the judges' bench book on ADR published by SCAO. In this bench book, the judges are advised of broad array of ADR processes and when each process might be indicated and the optimal timing of each process.[92]

No More Business as Usual. Overall, as Judge Joyce A. Draganchuk of Ingham County stated, "Don't expect your case to proceed in the traditional way. There will be more judicial management than you may be accustomed to and it is not necessarily 'business as usual.'" From all of the evidence thus far, this is a great development for efficiency and predictability, and it has enhanced our system of justice.

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89. This, of course, assumes that venue is proper in both courts.

90. http://courts.mi.gov/Administration/admin/op/Pages/Business-Courts.aspx.

91. Be especially careful if the case involves both claims that are defined as a "business or commercial dispute" and claims that are specifically excluded from that definition. Mich. Comp. L. 600.8035(3). Also, the "CB" case suffix now applies to "all claims in which all or part of the action includes a business or commercial dispute under Mich. Comp. L. 600.8035."

92. http://courts.mi.gov/Administration/SCAO/OfficesPrograms/ODR/Documents/ADR%20Guide%2004092015.pdf. *See also* Guide to ADR Processes, http://www.adrprocesses.com/.

South Carolina

On January 1, 2016, new Chief Justice Costa Pleicones amended the order setting forth the structure of South Carolina's Business Court Pilot Program ("2016 Order").[93] Rather than have the motions for Business Court assignment go through the Chief Justice's office, motions filed as of January 1, 2016, are first handled by the Chief Business Court Judge, a new designation recognized in the 2016 Order. Charleston County Circuit Court Judge Roger M. Young, Sr. was appointed to be the first Chief Business Court Judge. He then can forward the motion to another of the seven Business Court judges to decide whether the case should be assigned to Business Court. The pilot program was extended to December 31, 2016.

II.3 Other Developments

Arizona Establishes Pilot Commercial Court

On February 18, 2015, Arizona's Supreme Court issued Administrative Order No. 2015-15, which established a pilot commercial court in the Superior Court of Maricopa County.[94] The pilot program shall run for three years beginning on July 1, 2015.[95]

The commercial court will hear commercial cases that have been designated by the parties (or the court itself). Cases that will qualify as a commercial case shall have the following traits: (a) at least one plaintiff and one defendant are a business entity; (b) the primary issues of law and fact concern a "business organization;" or (c) the primary issues of law and fact concern a "business contract or transaction."[96]

The experimental rules define a "business contract or transaction" as "one in which a business organization sold, purchased, licensed, transferred, or otherwise provided goods, materials, services, intellectual property, funds, realty, or other obligations."[97] The experimental rules expressly carve out from this definition a "consumer contract or transaction," which is "one that is primarily for personal, family, or household purposes."[98]

The experimental rules also set forth certain subject matter jurisdictional thresholds that must be met. The pilot commercial court may hear cases—of any amount in controversy—if they: (a) involve a dispute over the internal affairs

93. *See* Administrative Order 2016-01-01-01, In re: Amended Business Court Pilot Program (Jan. 1, 2016), *available at* http://www.sccourts.org/courtOrders/displayOrder.cfm?orderNo=2016-01-01-01.

94. *See* In the Matter of: Authorizing a Commercial Court Pilot Program in the Superior Court in Maricopa County, Administrative Order No. 2015-15, (Supreme Court Feb. 18, 2015), *available at* http://www.azcourts.gov/Portals/22/admorder/Orders15/2015-15F.pdf.

95. *See id.*

96. *See id.*

97. *Id.*

98. *Id.*

of a business organization; (b) arise out of claims by or between owners of a business organization; (c) involve the sale, merger or dissolution of a business organization (or the sale of all or substantially all of its assets); (d) involve certain intellectual property or trade secret disputes; (e) are a shareholder derivative suit; (f) involve a commercial real estate transaction; (g) arise from a relationship between a franchisor and a franchisee; (h) involve the purchase or sale of securities; or (i) concern a claim under state antitrust law.[99] Certain other cases, however, are subject to having an amount in controversy of at least $50,000. Those include cases that: (a) arise from a contract or transaction governed by the Uniform Commercial Code; (b) involve the sale of services by, or to, a business organization; (c) involve a malpractice claim (other than medical malpractice) against a professional providing services to a business organization; (d) involve certain business torts; or (e) arise under a surety bond or any type of commercial insurance policy purchased by a business organization.[100]

The directive also specifically notes that the following types of disputes are not eligible to be heard by the pilot commercial court: (a) evictions; (b) eminent domain or condemnation actions; (c) civil rights actions; (d) motor vehicle or personal injury torts; (e) administrative appeals; (f) domestic relations matters; or (g) wrongful termination of employment.[101]

Tennessee Establishes Business Court Pilot Program

On March 16, 2015, the Tennessee Supreme Court entered an order establishing the Tennessee Business Court Pilot Project (the "Business Court") and designated Davidson County [Nashville] Chancery Court Part III as the Business Court.[102] The Tennessee Supreme Court order "creates a specialized trial court to provide expedited resolution of business cases by a judge who is experienced and has expertise in handling complex business and commercial disputes, and who will provide proactive, hands-on case management with realistic, meaningful deadlines and procedures adapted to the needs of each case for customized, quality outcomes."[103] Davidson County Chancery Court Chancellor Ellen Hobbs Lyle is the assigned trial court judge for the Business Court.[104]

A state website, www.tncourts.gov/bizcourt, has been created with news, forms, recent orders, and information related to the Business Court. Opinions of Tennessee state trial courts are generally not available electronically until the appellate level, so the special website is currently the best source for trial court orders originating from the Business court. The Business Court is also not limited to cases pending in Davidson County as cases pending in other

99. *Id.*
100. *Id.*
101. *Id.*
102. http://www.tsc.state.tn.us/news/2015/03/16/supreme-court-introduce-tennessee-business-court-pilot-project-davidson-county (last accessed November 9, 2015).
103. Order Establishing the Davidson County Business Court Pilot Project, No. ADM2015-00467, Supreme Court of Tennessee (filed March 16, 2015).
104. https://www.tncourts.gov/chancellorlyle (last accessed November 9, 2015).

Tennessee judicial districts can request designation to the Business Court.[105] A Guide to the Business Court has been published, which includes a checklist and related special rules and procedures.[106]

To be eligible for the Business Court, "[a] party to a case filed on or after May 1, 2015 which meets eligibility criteria files a *Request for Designation* to have the case transferred to the Business Court. The Chief Justice signs off on the *Request* and orders transfer to the Pilot Project."[107] The eligibility criteria includes that the complaint was (a) filed after May 1, 2015; (b) seeks at least $50,000 in compensatory damages or asserts primarily injunctive or declaratory relief; and (c) meets one of eight criteria for matters related to internal affairs of businesses. The types of cases eligible for the Business Court include shareholder derivate suits, business divorces, corporate accountings, corporate dissolution, non-competition/non-solicitation issues, declaratory/injunctive relief involving corporate governance, business trade secret actions, indemnification, piercing the corporate veil, receivership, mergers/acquisitions, breach of fiduciary duty of corporate actors, and technology licensing, intellectual property, and patent issues.[108]

Cases excluded from the business court include personal injury or wrongful death, professional malpractice claims, residential landlord-tenant or residential foreclosure actions, employee/employer disputes [with a narrow category allowed], health care liability, cases where the sole claim is a professional fee dispute, cases in which the State of Tennessee is a party, and administrative appeals.[109]

On July 7, 2015, the Tennessee Supreme Court launched a commission to provide input for rules, processes and procedures for the Business Court.[110] The eight-person commission included a Tennessee Court of Appeals Judge, several business leaders, and distinguished practicing attorneys from across Tennessee.[111]

Since the Tennessee Business Court is less than a year old, information related to cases actually litigated is limited. However, in the October 2015 *Nashville Bar Journal*,[112] Chancellor Lyle authored a *Report from the Business Court*, which provided a summary of approximately the first six months of the pilot program. According to Chancellor Lyle, since May 1, 2015, until approximately October 2015, 25 cases had been requested to be transferred, of which 23 had been approved for transfer, but only 2 cases have final orders

105. http://www.tncourts.gov/bizcourt (last accessed November 9, 2015).

106. http://chanceryclerkandmaster.nashville.gov/business-court/ (*see* Non-Davidson County Request for Designation Form) (last accessed November 9, 2015) (see link to Guide to the Pilot Project).

107. *See* FN 2.

108. http://www.tba.org/journal/tennessee-is-open-for-business (last accessed November 9, 2015).

109. *See* FN 2.

110. https://www.tncourts.gov/news/2015/07/07/supreme-court-launches-rules-commission-business-court (last accessed November 9, 2015).

111. http://www.tba.org/journal/tennessee-is-open-for-business.

112. Ellen Hobbs Lyle, *Report from the Business Court*, Nashville Bar Journal (October 2015, Vol. 15, No. 8).

entered, but both cases were resolved without substantive involvement from the Business Court.[113]

III. 2015 Cases

III.1 Delaware Superior Court Complex Commercial Litigation Division (CCLD)

Reads, LLC v. WBCMT 2006-C29 NC Office, LLC (Enforcing a Contractual Forum Selection Clause That Identified Florida as the Venue for Disputes Under the Contract).

In *Reads, LLC v. WBCMT 2006-C29 NC Office, LLC, et al.*,[114] the Delaware Superior Court granted Defendants' motion to dismiss the complaint for failure to state a claim and enforced a forum selection clause in a Pre-Negotiation Letter Agreement, ("PNL Agreement"), which it decided was operative.

In November 2006, Wachovia Bank loaned Plaintiff $18,800,000. The loan documents included a promissory note and mortgage and the loan was secured by a commercial property in Delaware (the "Property"). The loan was later assigned and reassigned several times, ultimately landing in the hands of Defendant WBCMT. The loan was transferred and deposited into a securitized pool (the "Pool"), of which Defendant LNR Partners was *the* special servicer.

Plaintiff failed to make payments under the Loan and Defendant LNR issued a notice of default in April 2013. Shortly thereafter, Plaintiff and Defendant LNR executed the PNL Agreement, which was to govern the loan status and any potential modifications. After signing the PNL Agreement, Plaintiff invested in the Property, secured additional tenants and paid rents and profits to Defendant LNR.

Approximately seven months after executing the PNL, Plaintiff sent Defendant LNR a proposal to modify the loan. LNR rejected the proposal and did not present a counterproposal. Shortly thereafter, Defendant WBCMT moved to foreclose on the Property in a separate case also filed in the Superior Court, prompting Plaintiff to file this action, alleging lender misconduct and seeking declaratory relief. Plaintiff attacked Defendants' conduct under the PNL Agreement and the validity of that agreement.

Plaintiff contended it was coerced into signing the PNL Agreement and that it relied on LNR's assurances that the parties would be reasonable in discussing modifications to the Loan and related documents. The Court concluded that despite

113. *Id.*
114. C.A. No. N14C-03-117- WCC CCLD (Del. Super. Ct. Feb., 3, 2015).

any financial pressures on Plaintiff and what it *hoped* would transpire, the parties were sophisticated business entities capable of entering into a contract such as the PNL Agreement. The PNL Agreement provided only the framework for settlement discussions, not assurances regarding how those conversations would proceed.

Likewise, the Court quickly dispatched Plaintiff's attacks on the validity of the PNL Agreement. Plaintiff argued that the forum selection clause identifying Florida as the venue for disputes under the PNL Agreement was invalid because that state had no material relationship to the transaction. However, the Court noted that Defendant LNR is a Florida LLC with its principal place of business in Florida, which it concluded was sufficient to fulfill the material relationship requirement. Addressing a public policy exception to Delaware's recognition of the forum selection clause, the Court rejected Plaintiff's argument that, because Delaware and Florida may interpret the concept of good faith and fair dealing differently, the forum selection was unenforceable as repugnant to public policy. The Court found the dispute would be better handled in Florida. A critical element of the Court's analysis was that the dispute arose under the PNL Agreement and therefore its forum selection provision was determinative.

Ricerca Biosciences, LLC v. Nordion Inc. (Interpreting the Parties' Indemnification Obligations in a Stock Asset Purchase Agreement).

In *Ricerca Biosciences, LLC v. Nordion Inc.*,[115] the Delaware Superior Court's Complex Commercial Litigation Division was called upon to interpret the terms of a Stock Asset Purchase Agreement ("SAPA") on cross motions for summary judgment. Finding the terms of the SAPA to be plain and unambiguous, the Court held that Plaintiff/Counterclaim Defendant Ricerca Biosciences, LLC ("Ricerca") was obligated to indemnify Defendant/Counterclaim Plaintiff Nordion Inc. ("Nordion").

Nordion, a global health science company that manufactures products for the prevention, diagnosis, and treatment of disease, launched a full-service contract research organization in 2000. In 2003, Nordion's Discovery and Pre-Clinical business group opened a new biopharmaceutical facility in Washington State and established a Biopharmaceuticals Unit to be operated out of that facility. In March 2003, BioAxone Biosciences, Inc. ("BioAxone") retained Nordion to manufacture a Bacterial Master Cell Bank to assist BioAxone in the production of a new drug. The cell bank subsequently was manufactured by the Biopharmaceuticals Unit at the Washington facility.

In 2006, Nordion closed its Biopharmaceuticals Unit and in 2009, Nordion announced that it would be selling its various business groups, including the Discovery and Pre-Clinical business group. In late 2009, Ricerca, a contract research organization, and Nordion began negotiating the terms of the SAPA. Under the SAPA, executed by the parties in early 2010, Ricerca agreed to purchase all of the assets of Nordion's Discovery and Pre-Clinical business

115. 2015 WL 353930 (Del. Super. Ct. Jan. 23, 2015).

group. Among other things, the SAPA required certain liabilities to be retained by Nordion, and other liabilities to be assumed by Ricerca. The SAPA also contained indemnification provisions for the benefit of both Nordion and Ricerca. Under these provisions, the right to indemnification was dependent on whether the damages related to a retained or an assumed liability. The closed Biopharmaceuticals Unit was not specifically addressed in the SAPA.

In April 2012, BioAxone initiated litigation against Nordion and Ricerca alleging that the cell bank Nordion manufactured in 2003 was contaminated with animal origin products, which created the risk that the FDA could find any drug BioAxone derived from the cell bank to be unfit for testing or use. Accordingly, BioAxone sought damages in tort from both Nordion and Ricerca. During the BioAxone litigation, Ricerca and Nordion each made a demand for indemnification upon the other. Both parties refused the other's demand, and Ricerca ultimately settled with BioAxone for $150,000, while Nordion settled with BioAxone for $200,000.

Thereafter, Ricerca initiated this litigation alleging that Nordion breached the parties' SAPA by refusing to indemnify Ricerca during the litigation with BioAxone. Nordion counterclaimed alleging that Ricerca breached the SAPA by refusing to indemnify Nordion for the same BioAxone litigation. The parties filed cross motions for summary judgment.

Finding the terms of the SAPA to be unambiguous, the Court concluded that the liability of the Biopharmaceuticals Unit was assumed by Ricerca. According to the Court, the SAPA unambiguously provides that the Biopharmaceuticals Unit was intended to be included as part of the Discovery and Pre-Clinical group at the time of closing. As the Court explained, although the SAPA did not specifically identify the Biopharmaceuticals Unit as an "Assumed Liability," the work and services offered by that unit fit squarely within the description contained in the "Purchased Business" definition. Additionally, the Court noted that, per the SAPA, all liabilities arising from the Discovery and Pre-Clinical Business were assumed by Ricerca. Because the Biopharmaceuticals Unit was included as part of the Discovery and Pre-Clinical Business, all liabilities stemming from it were also transferred to Ricerca. Thus, the Court held that under the SAPA, Ricerca was obligated to indemnify Nordion for the costs Nordion incurred during the BioAxone litigation.

Verizon Communications Inc. v. Illinois National Insurance Co. (Denying Summary Judgment and Requesting Additional Discovery to Determine Scope of Insurance Policy).

In *Verizon Communications Inc. v. Illinois National Insurance Co.*,[116] the Delaware Superior Court denied Plaintiff Verizon Communication Inc.'s ("Verizon") motion for summary judgment finding that additional discovery was necessary in order to determine the scope of the applicable insurance policy.

116. 2015 WL 1756423 (Del. Super. Ct. Mar. 20, 2015).

In November 2006, Verizon completed a "spin-off" of its domestic print and online directories business into Idearc, a stand-alone company. This transaction involved the transfer of the business directory company from Verizon to Idearc in exchange for cash and shares of Idearc common stock, Idearc Notes, and a term loan delivered to Verizon by Idearc. In connection with this transaction, Verizon purchased a series of insurance policies (the "Idearc Runoff Policy") to cover any liability that might arise from the spin-off. Defendant Illinois National Insurance Company ("Illinois National") issued the primary policy with a $15,000,000 limit of liability subject to a self-insured $7,500,000 deductible or retention ("Idearc Primary Policy"). Verizon also purchased additional policies providing an additional $80,000,000 in coverage (the "Idearc Excess Policy").

After the transaction, Idearc operated as an independent company before filing for Chapter 11 bankruptcy in March 2009. The Bankruptcy Plan established a Litigation Trust Agreement to pursue claims relating to the spin-off. In September 2010, the Trustee, U.S. Bank National Association, filed a complaint naming Verizon, Verizon Financial Services ("VFS") and GTE Corporation ("GTE") as defendants, as well as John Dierckson, Idearc's sole director at the time of the spin-off (the "U.S. Bank Action"). Verizon, VFS, GTE and Dierckson mounted a joint defense and ultimately, the court granted judgment in their favor in the U.S. Bank Action. During that litigation, Verizon incurred significant costs. Verizon, VFS and GTE (collectively, "Plaintiffs") attempted to recover its defense costs from Illinois National, but Illinois National disputed that Verizon had coverage under the Primary Policy asserting that the U.S. Bank Action was not a securities claim covered by the Idearc Primary Policy.

After filing suit against Illinois National, Plaintiffs moved for partial summary judgment. The Court denied Plaintiffs' motion for summary judgment, finding that discovery would be beneficial to the Court's determination. According to the Court, the Idearc Runoff Policy was a directors and officers coverage policy intended to cover damages, settlement and defense costs for which a director or officer may have liability—the policy was *not* intended to generally cover losses of Plaintiffs or Idearc. However, the policy appeared to recognize that there were certain occasions when it would be difficult to distinguish between the costs associated with defending the corporation and those for directors or officers. To avoid any dispute in this area, the policy allowed for payment for defense costs when the underlying claim was jointly maintained against the company and its directors and/or officers. When this occurs, the policy allows for 100 percent coverage of the defense costs, but, only when the underlying claim is a "securities claim" as defined in the policy.

The Court reasoned that, at this early stage of the proceedings, it was too early to make a decision as to whether the underlying litigation fit within the definition of a "securities claim." Indeed, as the Court explained, discovery would be beneficial to the Court to aid it in making a decision as to whether the underlying U.S. Bank Action fit within the definition of a securities claim. Further, the Court noted that there was sufficient ambiguity in the policy language such that prior communications and the dealings between the parties may become relevant. Thus, the Court requested that the initial discovery focus on

the negotiations and communications that occurred regarding the formation of the Idearc Runoff policy and the nature of the underlying U.S. Bank litigation. Finally, the Court reasoned that because the parties' dispute has been ongoing for five years, there was no need to resolve it expeditiously. According to the Court, "[w]hile the amount is significant, Verizon will not go out of business tomorrow if the Court's decision is delayed for the purposes of discovery."

III.2 Florida Complex Business Litigation Courts

Infinity Home Care, L.L.C. v. Amedisys Holding, LLC (Referral Sources Are a Protectable, Legitimate Business Interest Covered by Non-Compete Agreements).

In *Infinity Home Care, L.L.C. v. Amedisys Holding, LLC*,[117] the appellate court affirmed a temporary injunction enforcing non-compete and non-solicitation provisions in an employment contract, and determining that referral sources for home health services were legitimate business interests entitled to protection under Section 542.335, Florida Statutes.[118] In reaching this determination, Florida's Fourth District Court of Appeal declined to follow the precedent set forth in *Florida Hematology & Oncology v. Tummala*,[119] which held that referring physicians were not a legitimate business interest protected by Section 542.335, Florida Statutes, because the statute required that prospectively referred patients be specific and identifiable. In declining to follow *Tummala* and affirming the injunction, the court certified the conflict with *Tummala* to the Florida Supreme Court.

Amedisys Holding, LLC ("Amedisys") provided home health care services such as in-home nursing and hospice care. Before Sylvie Forjet ("Forjet"), a registered nurse began working for Amedisys, she worked with one of Amedisys' competitors, Gentiva, where she developed a substantial relationship with referral sources at the Cleveland Clinic. In 2013, Forjet was hired at Amedisys, in part based on her relationships at the Cleveland Clinic. As a condition of her employment with Amedisys, Forjet was required to sign a Protective Covenants Agreement (the "Agreement") containing a non-compete provision and a non-solicitation clause, in which Forjet agreed that during her employment with Amedisys, and for a period of one year after, she would not provide, manage, or supervise services within Broward County for any of Amedisys' competitors,

117. No. 4D14-3872, 2015 WL 4927257 (Fla. 4th DCA 2015).

118. Section 542.335, Florida Statutes, governs the enforceability of non-compete agreements and restrictive covenants. Section 542.335(1)(b), Florida Statutes requires that a restrictive covenant be justified by a "legitimate business interest," and provides a non-exclusive list of legitimate business interests, which includes "substantial relationships with specific prospective or existing customers, patients, or clients."

119. 927 So. 2d 135 (Fla. 5th DCA 2006).

that were the same or similar to the services that she provided to Amedisys. In the Agreement, Forjet also agreed that during her employment with Amedisys, and for a year after her employment with Amedisys ceased, she would not contact, solicit, or communicate with any of Amedisys' clients, customers, patients, or referral sources, to divert business from Amedisys to a competing business.

When Forjet was hired, Amedisys required that she honor her non-compete agreement with Gentiva, and that she not solicit referrals from any of her case-manager contacts at the Cleveland Clinic, until her non-compete agreement with Gentiva expired. Upon expiration of the non-compete agreement with Gentiva, Forjet solicited referrals from the Cleveland Clinic on behalf of Amedisys, and Amedisys considered these referral sources as a vital source of business and spent substantial time and money developing and maintaining the referral sources.

In June, 2014, Forjet left Amedisys to work with Infinity Home Care, LLC ("Infinity"), another of Amedisys' competitors. Immediately, Forjet began soliciting referral sources at the Cleveland Clinic, which had previously referred business to Amedisys. Amedisys filed suit against Infinity and Forjet for temporary and permanent injunctions, alleging that Forjet had violated the restrictive covenants in the Agreement, and suing Forjet for breach of the Agreement, and suing Infinity for tortious interference with an advantageous business relationship.

Infinity moved to dismiss the case citing *Tummala*,[120] for the proposition that referral sources were not a protectable legitimate business interest under Section 542.335, Florida Statutes. The trial court held an evidentiary hearing on Infinity's motion to dismiss, during which Forjet testified that she believed that the restrictive covenants in the Agreement only prevented her from using referral sources that she had first developed while working at Amedisys, and not those sources that she had brought with her to Amedisys. During her testimony, Forjet conceded that case manager turnover at the Cleveland Clinic resulted in her developing new relationships at the Cleveland Clinic while she worked for Amedisys.

The trial court granted Amedisys a one-year temporary injunction, finding that the restrictive covenants in the Agreement were enforceable to protect Amedisys' relationships with referral sources in Broward County, and that Forjet had violated them.[121] In making this determination, the trial court declined to follow *Tummala*, and relied instead on *Southernmost Foot & Ankle Specialists, P.A., v. Torregrosa*,[122] which held that referral sources were a legitimate business interest subject to protection by Section 542.335, Florida Statutes.

Infinity and Forjet appealed. In affirming the injunction on appeal, the court examined whether referral sources for home health services were a protectable, "legitimate business interest" under Section 542.335, Florida Statues.

The *Tummala* court opined that referral sources should be recognized as a legitimate business interest subject to protection in Florida non-compete agreements, but that recognizing referral sources for prospective *unidentified*

120. 927 So.2d 135.
121. *Id.* at *3.
122. 891 So. 2d 591, 593 (Fla. 3d DCA 2004).

patients as a legitimate business interest would be inconsistent with the statute, which required a "substantial relationship" with a "specific" prospective patient.[123] The Fourth District Court of Appeal disagreed, opining that the statute should not be construed so narrowly as to exclude referral sources as a legitimate business interest. It reasoned that the statute did not expressly exclude referral relationships, the legitimate business interests listed in the statute were not exclusive, that the referral relationships were the "lifeblood" of Amedisys' home care business, and that Amedisys carefully cultivated those relationships over time, and Amedisys' business depended on them.[124] Moreover, "referral sources" were specifically mentioned as a valuable business interest in the Agreement, and Amedisys hired Forjet because of her experience and her contacts with the Cleveland Clinic, she was compensated accordingly, and Amedisys supported her in maintaining and expanding those contracts, in exchange for Forjet's agreement not to solicit them for a competitor once she left Amedisys.

The court rejected Infinity's argument that even if referral sources were a protectable business interest, that Amedisys failed to meet the statutory proof and pleading requirements to obtain relief. In rejecting this argument, the appellate court relied on testimony that Forjet was soliciting the same referral sources for Infinity as she had for Amedisys, and that Amedisys' referrals from the Cleveland Clinic declined after Forjet left. Determining that the restrictive covenant and non-compete agreement was limited in scope and reasonable, the appellate court affirmed the entry of the temporary injunction, and certified conflict with *Tummala*.

CT Miami, LLC v. Samsung Electronics Latinoamerica Miami, Inc. (Trial Court Was Required to Rule on Enforceability of Arbitration Clause Prior to Compelling Arbitration but Was Not Required to Hold an Evidentiary Hearing).

In *CT Miami, LLC v. Samsung Electronics Latinoamerica Miami, Inc.*,[125] CT Miami, LLC ("CT") appealed the trial court's order denying its motion to stay arbitration without an evidentiary hearing. The appellate court determined that CT did not raise a substantial issue regarding the agreement to arbitrate, and affirmed the trial court's ruling.

CT is an open-market distributor of smart phones, selling them to wholesale and retail establishments, rather than cellular service providers. Samsung Electronics Latinoamerica Miami, Inc. ("SELA") is a Miami-based subsidiary of cell phone manufacturer, Samsung Electronics, Ltd. In 2009, CT approached SELA to discuss wholesale distribution plans for many of SELA's phones. Prior to entering into any deals, SELA required CT to enter into a distributor agreement (the "distributor agreement"), which established the general terms of

123. *Id.* at *4.
124. *Id.*
125. Case No. 3D15-641, 2015 WL 5247160 (Fla. 3d DCA 2015).

the parties' relationship and set expectations for future dealings. The distributor agreement stated that its effective date was the date on which all parties signed and dated it, and provided that it would automatically renew yearly, unless terminated pursuant to its provisions. The distributor agreement also contained an arbitration clause providing that any controversy or claim arising out of the agreement would be resolved by the American Arbitration Association (the "AAA") in Miami, Florida.

CT executed the distributor agreement and returned it to SELA. Despite subsequent requests, SELA never executed the distributor agreement. From 2009 to 2014, the parties' business arrangement was successful, until, in 2014, the Samsung Galaxy S5 had significantly lower sales than anticipated, and the market retail value of the phone plummeted. CT was forced to sell the phones at a loss, and resultantly, CT owed SELA approximately $21 million. CT refused to pay its past-due invoices, and SELA filed a statement of claim with the AAA, citing the distributor agreement as the operative contract and the basis for the AAA's jurisdiction over the dispute.[126] No alternative documents appeared to govern the parties' relationship, several emails between officers in both companies referenced the distributor agreement, and CT Miami's yearly financial statements all referenced the distributor agreement.

CT thereafter filed an action in the Circuit Court in and for Miami-Dade County, alleging that the parties had never intended the distributor agreement to control their relationship, and that instead, the parties had reached short-term oral and e-mail agreements on a per-deal basis. Concurrently with its complaint, CT also filed a motion to stay arbitration, alleging that because SELA had failed to execute the distributor agreement, there was no enforceable arbitration clause to make the dispute arbitrable. In turn, SELA filed a competing motion to compel arbitration, alleging that the distributor agreement was the operative agreement and that the arbitration clause was effective even without a countersignature, based on the parties' subsequent communications and course of conduct.

The trial court conducted a non-evidentiary hearing on the competing motions to stay and to compel arbitration, with CT arguing that it had raised a substantial issue as to whether the distributor agreement was ever formed and that, at the very least, it was entitled to an evidentiary hearing on the same. The trial court ruled that the parties were bound by the distributor agreement and that the dispute must be submitted to the AAA. It determined that the claims at issue fell within the scope of the distributor agreement, and that SELA had not waived its right to arbitrate. In its order, the trial court cited to Florida law for the proposition that even though the distributor agreement was not countersigned by SELA, "generally, it is enough that the party against whom the contract is sought to be enforced signs it." Based on the record before it, the trial court found that the parties performed in accordance with the distributor agreement. However, in paragraphs 5 and 7 of the order, the trial court ruled that the arbitrator had jurisdiction to determine whether a valid arbitration clause existed, and that CT had not waived any future rights to contest arbitration at a later time. The trial

126. *Id.* at *2.

court denied the motion to stay arbitration, and granted the motion to compel arbitration, reserving jurisdiction to enforce the arbitral award.

CT appealed, arguing that the trial court has exclusive jurisdiction to determine whether an agreement was reached between the parties such that an enforceable arbitration clause exists, and that the trial court erred by allowing the arbitrator to decide this issue. CT also appealed the trial court's issuing the order without conducting an evidentiary hearing.

On appeal, the Third District Court of Appeal agreed that the issue of whether the parties had entered into an agreement to arbitrate, when one of the parties disputed the agreement, was exclusively within the province of the trial court. In considering a motion to compel arbitration of a dispute, Florida courts consider three elements: (1) whether a valid written agreement to arbitrate exists; (2) whether an arbitrable issue exists; and (3) whether the right to arbitration was waived. The only issue presented on appeal went to the first of the elements—whether a valid written agreement to arbitrate existed.

The appellate court determined that there are three categories of challenge to an arbitration clause: (1) a challenge to the specific provision itself; (2) a challenge to the contract as a whole that would invalidate the contract after an agreement had been reached, such as fraud, duress, or a contractual provision that is contrary to public policy; and (3) a challenge to the contract as a whole alleging that there was never an agreement between the parties, and therefore never an agreement to arbitrate. The appellate court opined that a challenge to the contract as a whole must be determined by the trial court, because arbitrators have no inherent authority over a dispute or the parties to the dispute—the only authority vested in an arbitrator is that which is contractually designated in the operative agreement. Therefore, challenges to the enforceability of a contract containing an arbitration provision must be determined by the trial court, before arbitration may be compelled. The appellate court therefore determined that the trial court's ruling that the arbitrator had jurisdiction to determine whether the arbitration provision was enforceable, and that the issue could be raised again before the arbitrator was error.

Nevertheless, the appellate court found that despite this error, the trial court had correctly ruled that the parties had entered into a binding contract containing an arbitration provision, and that based on the "tipsy coachman doctrine," it could affirm the trial court's decision despite the errors contained in paragraphs 5 and 7 of the order.

Ignoring paragraphs 5 and 7 of the order, the appellate court concluded that in paragraph 4 of the order, the trial court had correctly ruled that a valid agreement to arbitrate existed.[127] It then turned to whether the trial court could make that determination in the case, without conducting an evidentiary hearing.

The appellate court determined that the statutory provision applicable to the dispute[128] provided that if the trial court was satisfied that no substantial issue existed as to the making of the agreement or applicable arbitration provision, then the court could "summarily hear and determine the case." Given the

127. *Id.* at *8.

128. The pre-2013 version of Section 682.03(1), Florida Statutes, which was amended substantially in 2013.

undisputed facts in the case, a nearly insurmountable presumption existed that the distributor agreement and its agreement to arbitrate were valid and binding agreements. Because CT had executed the distributor agreement containing the arbitration provision, it could be enforced against CT, even in the absence of a countersignature by SELA. The parties had performed under the distributor agreement, lending additional support to the trial court's determination that it was a valid and binding agreement. Although CT denied that the parties had intended to be bound by the distributor agreement, it did not support this legal conclusion with evidence. Because the trial court specifically found that CT had failed to meet its burden of raising a substantial issue concerning entry into the distribution agreement, the appellate court agreed with the trial court that an evidentiary hearing on the issue was unnecessary, and affirmed the trial court's order compelling arbitration.

FI-Evergreen Woods, LLC v. Estate of Robinson (An Agent May Bind a Principal to an Arbitration Agreement, Provided the Agent Has Apparent Authority).

FI-Evergreen Woods, LLC v. Estate of Robinson,[129] analyzed an agent's ability to bind its principal to an arbitration agreement. The appellate court had previously remanded an appeal of the case back to the trial court for an evidentiary hearing to determine whether a patient's husband ("Mr. Robinson") had the authority to bind the patient ("Ms. Robinson") to an arbitration agreement, with his signature.[130] The trial court determined that Mr. Robinson could not bind Ms. Robinson to the agreement. The appellate court reversed, with directions to compel arbitration.

During Ms. Robinson's admission to a nursing home, she was alert and lying on her bed. The nursing home's admissions director arrived and told Ms. Robinson that she had admission documents for Ms. Robinson to sign. Ms. Robinson stated that she wanted Mr. Robinson to review and sign the documents, which he did. The documents that Mr. Robinson executed included an arbitration agreement, which the admissions director expressly stated, in Ms. Robinson's presence, was not a condition to admission to the nursing home. Relying on *Stalley v. Transitional Hospitals Corporation of Tampa*,[131] the trial court found that based on these facts, Mr. Robinson was not authorized to sign the arbitration agreement and bind Ms. Robinson.

Pursuant to *Stalley*, a non-signatory to an arbitration agreement is bound to the agreement when the signatory is authorized to act as the agent of the person sought to be bound. In *Stalley*, a hospital admission case, the appellate panel stated that the patient, the principal to the arbitration agreement, had never stated that the person who signed the arbitration agreement was authorized

129. 172 So. 3d 493 (Fla. 5th DCA 2015).
130. *Fi-Evergreen Woods, LLC v. Robinson*, 135 So. 3d 331 (Fla. 5th DCA 2013).
131. 44 So. 3d 627 (Fla. 2d DCA 2010).

to do so—the hospital had simply accepted the representation of the patient's signing spouse that she was authorized to handle the admissions documents on behalf of the patient. Accordingly, in *Stalley*, the appellate court opined that the acts of an agent, standing alone, are insufficient to establish that the agent is authorized to act for the principal.

The *Robinson* court distinguished *Stalley*, because Ms. Robinson expressly told the admissions director that she wanted Mr. Robinson to handle the admissions papers on her behalf. The appellate court viewed this as clear authorization, at least by implication, that Ms. Robinson authorized Mr. Robinson to execute the arbitration agreement, and bind her thereto. In the appellate court's opinion, it did not matter that arbitration agreements necessarily require their participants to forego jury trials, because arbitration agreements are treated like all other contracts, arbitration is a favored means of dispute resolution, and where possible, courts should resolve all doubts in favor of arbitration.

Therefore, the appellate court held that an agent may bind a principal to an arbitration agreement just like any other contract, and declined to hold that there must be an independent waiver of the principal's right to a jury trial, for an agent to bind his principal. Because the nursing home's reliance on Mr. Robinson's apparent authority to execute the arbitration agreement on Ms. Robinson's behalf was reasonable, the appellate court reversed the order on appeal with directions for the trial court to grant the motion to compel arbitration.

Woodbridge Holdings, LLC v. Prescott Group Aggressive Small Cap Master Fund, G.P. (Examining Fair Value Offer Provisions of LLC Appraisal Notice Statute).

Woodbridge Holdings, LLC v. Prescott Group Aggressive Small Cap Master Fund, G.P.,[132] involves a statutory valuation proceeding, to determine the values of the shares of a limited liability company. After a bench trial on the issue, the trial court issued a judgment containing findings of fact and conclusions of law, determining the fair value of dissenting shareholders' shares.[133] The trial court's judgment also assessed fees and costs against Woodbridge Holdings, LLC ("Woodbridge") finding that it had failed to comply with Florida's Appraisal Notice and Form statute,[134] and that it had acted arbitrarily and not in good faith in determining the fair value of the shares.[135] Woodbridge appealed the trial court's orders, and the shareholders; Prescott Group Aggressive Small Cap Master Fund, G.P.; Ravenswood Investments III, L.P.; The Ravenswood Investment Company, L.P.; and William Maeck (collectively "Appellees") cross-appealed from the trial court's corrected final judgment.

132. No. 4-D13-1262, 2015 WL 4747174 (Fla. 4th DCA 2015).

133. *Woodbridge, id.* at *1.

134. Fla. Stat. § 607.1322.

135. In a subsequent corrected final judgment, the trial court confirmed its award of interest at a fixed-rate of 8 percent, finding that this was the proper statutory interest on the date in 2009 when Woodbridge merged with another company. *Id.*

On appeal, the appellate court affirmed the trial court's valuation of the disputed shares. The appellate court found that because the trial court was confronted with a variety of evidence and methodologies concerning the valuation of the disputed shares, it was tasked with weighing the credibility of the witnesses and their valuation techniques. It found that the trial court's orders, replete with findings of fact, were supported by sufficient evidence as to the fair value of the shares. Similarly, the appellate court found that the court's determination that Woodbridge did not substantially comply with Section 602.1322, Florida Statutes' fair value offer provisions, was supported by sufficient evidence that Woodbridge's initial offer to the dissenting shareholders was not the product of an analysis using customary valuation techniques. Accordingly, the trial court affirmed this portion of the order as well, although it reversed the trial court's award of fees for appellee Ravenswood's real estate expert, John Burns, who did not testify at trial, finding that under Florida's Statewide Uniform Guidelines for taxation of costs, it was not appropriate to tax the fees for non-testifying experts as costs.

III.3 Maryland's Business and Technology Case Management Program

Morgan Stanley & Co., Inc. v. Andrews (Appeal of Ruling of Circuit Court for Montgomery County Holding That Funds Held in a Joint Bank Account Are Not Jointly Owned).

In *Morgan Stanley & Co., Inc. v. Andrews*,[136] the Maryland Court of Special Appeals considered the extent to which a creditor of one joint account holder may garnish funds in a joint account when another joint account holder is a non-debtor.

The appellant, Morgan Stanley & Co., Inc. ("Morgan Stanley") obtained a judgment against John Andrews, appellee ("Son") and subsequently requested a writ of garnishment for Son's bank accounts with PNC Bank, National Association ("PNC"). The court issued the writ of garnishment and PNC filed an answer to the writ for an account jointly titled in both the Son's name and in the name of Don D. Andrews ("Father"). Father filed a motion pursuant to Maryland Rules 2-645(i) and 2-643(e), asserting his claim to the garnished property and requesting a hearing.

At an evidentiary hearing, Father presented three witnesses: PNC branch manager Lori McConnaughey ("McConnaughey"), Son, and Father. Importantly, both Morgan Stanley and Father stipulated that Father was the original source of all of the funds in the joint account. McConnaughey testified that she assisted Father with establishing the joint account and that Father's intent was

136. 2015 WL 5735268 (Md. Ct. Spec. App. Oct. 1, 2015).

that Son be able to write checks from the account "if something happened." Son testified that he wrote checks from the joint account in order to help Father, only paying expenses that were for Father's benefit and not using the account to pay any of his personal expenses. Father testified that he established the joint account because he wanted Son to be able to "handle the remodeling" of Father's vacation home. Father also testified to the arrangement that he and Son had agreed to with regard to the account, explaining that Son never had possession of the checkbook, but rather every time Son wanted to write a check, Son would request a check from Father who would send two or three checks to him. Furthermore, both Son and Father testified that Father was the sole contributor of funds for the joint account.

Father asserted that the evidence established that the money in the joint account belonged to Father, while Morgan Stanley argued that all of the funds in the joint account were subject to garnishment because both Father's and Son's names appeared on the account. Morgan Stanley averred that funds held in the joint account were per se subject to garnishment because they were held in a joint account upon which Son was a named owner and authorized signatory. Morgan Stanley further asserted that Son obtained a benefit from the funds because he was permitted to use Father's vacation home during the remodeling period. Finally, Morgan Stanley posits that, under the law of garnishment, the judgment creditor has the authority to garnish the funds because any joint account holder has the authority, pursuant to the banking agreement, to deposit and deplete funds in the account.

The court began its analysis by acknowledging that Maryland courts had not previously addressed the situation presented, wherein two individuals are owners of a joint bank account, one of whom is a judgment debtor and the other is not. The court did, however, address a similar issue in *Wanex v. Provident State Bank of Preston*,[137] and so they began their analysis there. In *Wanex*, a daughter was an employee of her father's business and had signature authority on the father's business account. A creditor sought a writ of garnishment against the father and the father moved to quash the garnishment, arguing that it interfered with the daughter's rights in the account. The trial court, with the Court of Special Appeals affirming, found that the daughter did not have an ownership interest in the account and denied the father's motion. The *Wanex* case differs in that the daughter had signature authority and not ownership, however it is important to note that the Court of Special Appeals emphasized as a basis for their affirmation that the daughter had not deposited any personal funds into the account.

More importantly, the court took efforts to explain the legal framework that applies when evaluating a claim raised by a non-debtor joint account holder in response to an attempt of garnishment by a creditor of a debtor joint account holder. Citing *Wanex*, the court explained that the garnishing creditor can reach funds of the depositor only in cases where the depositor is the true owner of the funds. Further, the court noted that a bank deposit prima facie belongs to the person whose name is on the account and who can withdraw funds from

137. 53 Md. App. 409, 413 (1983).

the account. The Court of Appeals has previously commented that the form of a joint account raises only a rebuttable presumption, but the burden is upon the party seeking to rebut it.[138] Until this case, there was no clarification on how, and by what standard, the presumption can be rebutted.

The central question of this case is under what circumstances, if any, can the presumption of ownership be rebutted when a creditor of one joint account holder seeks to garnish the account? In answering this question, the court notes that the overwhelming majority of jurisdictions that have addressed this issue have differentiated between legal title to the account and equitable title to the funds within the account. Various factors are considered by the various jurisdictions, but the court adopts two primary factors: (1) the exercise of control over the funds in the account, and (2) contribution, or the source of funds within the account.

The court then held that a co-owner of a joint account can rebut the presumption of ownership by proving, by clear and convincing evidence, which portion of the account belongs to each co-owner.

Based on the foregoing holding, the court found that since both parties had stipulated that Father was the original source of all funds held in the joint account and that the evidence showed that any benefit to Son was incidental, the circuit court reasonably concluded that Father had proved, by clear and convincing evidence, that he was the sole owner of all funds held in the joint account. The court held that Father had overcome the significant hurdle and had effectively rebutted the presumption of joint ownership.

David S. Bontempo, Individually and on Behalf of Quotient, Inc. v. Lare (Appeal of Ruling of Circuit Court for Howard County Holding That Defendant Had Not Engaged in Fraudulent Conduct and That Dissolution of the Corporation Was Not the Appropriate Relief for the Oppressive Conduct Found).

In *Bontempo v. Lare*,[139] the Court of Appeals considered two issues: (1) whether the circuit court erred in declining to order employment-related relief as part of the relief for the oppressive conduct it had found by one of the controlling stockholders of the corporation; and (2) whether the circuit court erred when it determined that the Lares had not engaged in fraudulent conduct.

Petitioner David Bontempo, a minority stockholder in, and former employee of, Respondent Quotient, Inc. ("Quotient"), successfully proved in the trial court that he had been oppressed by Respondent Clark Lare, whose shares together with those owned by his wife Jodi Lare, also a Respondent, are a majority of the issued and outstanding stock of Quotient. While the trial court ordered an

138. *Haller v. White*, 228 Md. 505, 510 (1962).
139. 444 Md. 344, 119 A.3d 791 (2015).

accounting and awarded Mr. Bontempo damages, unpaid corporate distributions, and attorneys' fees, it declined to dissolve Quotient, to require Quotient to reinstate Mr. Bontempo as an employee, or to award other employment-related relief. Additionally, the trial court did not find that the actions of Mr. Lare constituted fraudulent conduct that merited an award of punitive damages to Mr. Bontempo.

In 1999, the Lares founded Quotient out of their home and funded it with their personal savings and credit cards. In 2000, Mr. Bontempo left his job at another corporation where he had a salary of $85,000 to become a 45 percent stockholder in Quotient and draw a salary of $20,000 from Quotient. There was no written employment contract between Mr. Bontempo and Quotient. In 2001, the Lares and Mr. Bontempo executed a Stockholders Agreement in which the parties assented to the terms of their earlier oral agreements and the Lares began to draw a salary from the corporation. Mr. Bontempo testified that he had an oral agreement with the Lares that his salary would match the Lares' combined salaries, but the Lares contended there was no such agreement.

As Quotient grew, the corporation paid for various personal expenses for both the Lares and Mr. Bontempo, including cell phones, vehicles, automobile insurance, meals, and entertainment. In 2007, Mr. Lare approached Mr. Bontempo about making short-term interest-free loans to Watermont Pharmacy, the pharmacy where Jodi Lare worked and was part-owner. Mr. Bontempo approved those loans but he was not aware that Quotient funds continued to be used for short-term loans to Watermont for several years beyond the loans he had approved. In 2006, the Lares placed their household employees on Quotient's payroll, and corporate funds were used to pay for the Lares' personal trainers and personal legal fees. Further, in 2007, the Lares borrowed more than $200,000 from Quotient in connection with a revocation of their home and instead of paying off the loan as stated in the note, they executed a new note with a balance of $500,000 due on January 1, 2016. The relationship between Mr. Bontempo and the Lares deteriorated to the point where Mr. Bontempo was urged to let the Lares buy out his shares and to "name a price." After Mr. Bontempo's refusal, he was fired. Though he was no longer an employee, Mr. Bontempo remained an officer, director, and stockholder of Quotient.

Mr. Bontempo filed an action consisting of five counts. The first was a direct claim against the Lares under § 3-413 of the Corporations & Associations Article of the Maryland Annotated Code ("CA") seeking equitable relief based on his status as a stockholder and the alleged illegal, fraudulent, and oppressive conduct of the Lares. Three derivative claims were asserted seeking various types of relief against the Lares based on alleged breaches of fiduciary duties. The fifth claim was a direct claim against Quotient for breach of contract and sought compensatory damages related to unpaid salary and distributions based on his status as both an employee and a stockholder.

The circuit court, following a nine-day trial, looked to the "reasonable expectations" test articulated in *Edenbaum v. Schwarcz-Osztreicherne*[140] to assess whether Mr. Bontempo, in his status as a minority stockholder,

140. 165 Md. App. 233, 885 A.2d 365 (2005).

had been oppressed with respect to his investment in Quotient, finding that Mr. Bontempo's reasonable expectations were that the corporation would employ him, that he would participate in the corporation's profit distributions, and that he would not be terminated for subjective reasons. The trial court then found that Mr. Lare oppressed Mr. Bontempo by firing him for refusing to sell his shares, but found that the conduct did not involve fraud or illegality that warranted a dissolution of the corporation. Mr. Bontempo prevailed on this sole count and the trial court ordered an accounting of the Lares' personal use of Quotient funds and ordered reimbursement of a portion of Mr. Bontempo's legal fees and litigation expenses. On appeal to the Court of Special Appeals, the trial court's ruling challenged on appeal were upheld, with the exception of one not relevant to this discussion.

On appeal, Mr. Bontempo averred that the proper remedy for the oppressive conduct found was the involuntary dissolution of the corporation under CA § 3-413.[141] Taking note that the statute does not define "oppressive" acts, the court adopts the "reasonable expectations doctrine." Under that doctrine, "to determine whether a majority stockholder's misconduct vis-à-vis a minority stockholder has been so severe as to trigger the possible demise of the corporation, a court measures that conduct against the 'reasonable expectations' of the minority stockholder when the minority stockholder obtained his or her interest in the company." Mr. Bontempo argued that since the trial court found that his "reasonable expectations" were violated, Quotient must be dissolved as a matter of law. The court however, clarified that a reasonable expectation for purposes of the corporate dissolution statute is simply a way of detecting oppression and does not dictate the relief that an equity court is to grant.

Affirming that Mr. Bontempo suffered oppressive acts, and recognizing that the only remedy for oppressive conduct mentioned in the statute is dissolution of the corporation, the court determined that because the statute also refers to the court acting as a "court of equity," it indicates that the Legislature intended for a court to exercise its equitable powers in such a case and need not dissolve the corporation based on its judgment. The court stated that a "court acting under CA § 3-413 has the power to fashion a remedy less drastic than dissolution is not required to match its remedy to an expectation of the minority stockholder."

Ultimately, the court held that the measuring stick for "oppression" of a minority stockholder—the stockholder's "reasonable expectations" upon becoming an owner of the corporation—does not dictate the nature of equitable relief that a trial court must impose. In fact, when a claim is brought by a minority stockholder under the Maryland General Corporation Law for dissolution of a corporation on the grounds that those in control of the corporation have engaged in oppressive conduct as to the minority stockholder, a court may consider other equitable remedies less drastic than dissolution of the corporation. A trial court's decision as to what, if any, equitable relief to grant is review on appeal

141. The statute states that "any stockholder entitled to vote in the election of directors … may petition … to dissolve the corporation on grounds that [t]he acts of the directors are … oppressive."

for abuse of discretion. In this case, the Court of Appeals found no error and affirmed the decision of the lower courts.

Poling v. CapLease, Inc. (Motion to Dismiss for Failure to State a Claim Upon Which Relief May Be Granted Against a Claim That a Cash-Out Merger Violated the Rights of the Preferred Stockholders).

In *Poling v. CapLease, Inc.*,[142] on a motion to dismiss filed by the defendant CapLease, Inc. ("CapLease"), the Circuit Court for Baltimore City considered whether the challenged transaction violated the preferred stockholders' contractual rights when the transaction at issue did not constitute a redemption.

The plaintiff, John Poling, initiated the action as a purported stockholder class action brought on behalf of the holders of CapLease's 8.375 percent Series B Cumulative Redeemable Preferred Stock and 7.25 percent Series C Cumulative Redeemable Preferred Stock. The action arose from CapLease's merger with American Realty Capital Properties, Inc. ("ARCP"). The terms of that merger provide for the acquisition by ARCP of all of the outstanding shares of CapLease, including the preferred stock. Holders of preferred stock of CapLease received $25 per share in cash, together with accrued and unpaid dividends up to the date of merger. Poling is aggrieved because holders of the preferred stock, who purchased with the understanding that they would receive a dividend of 8.375 percent per annum through at least April 19, 2017, for the Series B Preferred Stock and a dividend of 7.25 percent per annum through at least January 25, 2018, for the Series C Preferred Stock, will lose their right to receive future dividends. Poling alleged that the redemption of the preferred stock prior to these dates is not allowed by the Articles Supplementary governing the rights of the shares, which expressly prohibit the redemption of preferred stock, or if the court were to find that the transaction was not a redemption, there are only four instances in which preferred stockholders may be defeased of their rights under the Articles Supplementary, none of which are present. CapLease asserted that Poling's assertion that the merger effected a redemption of the preferred stock is not consistent with Maryland law, arguing that the courts have expressly rejected the argument that a cash-out merger constitutes a redemption of preferred stock.[143]

The Articles Supplementary set forth the rights of the preferred stockholders and each party asserted that reading the Articles as a whole supports its respective interpretation of the terms. After a review, the court held that as a matter of law the provisions of the Articles Supplementary did not prohibit the cash-out merger between CapLease and ARCP.

Following the finding that the Articles supported CapLease's argument, the court began its analysis by stating that while the Articles Supplementary do limit

142. Maryland Business and Technology Case Management Program, Case No. 363433 (05/13/15, Pierson, J.), *available at* http://www.courts.state.md.us/businesstech/pdfs/mdbt6-15.pdf.

143. CapLease cites *Rauch v. RCA Corp.*, 861 F.2d 29 (2d Cir. 1988).

CapLease's right to redeem the preferred stock, the flaw in Poling's theory is that the transaction at issue did not constitute a redemption, because CapLease did not acquire the stock. The court noted that in this transaction, the preferred stock was not acquired by CapLease and did not assume the status of authorized but unissued shares, but rather the preferred stock was converted into the right to receive cash pursuant to an offer provided by a third party.

In response to Poling's argument that preferred stockholders could not be defeased of their rights under the Articles Supplementary, the court stated that "where a merger of corporations is permitted by law, a stockholder's preferential rights are subject to defeasance … [s]tockholders are charged with knowledge of this possibility at the time they acquire their shares."[144] The court further explained that any attempt to equate the merger with a redemption is inconsistent with the basic rule that the preferred stockholders' rights are to be found in the charter, the contract between the corporation and its stockholders.[145]

Based on the foregoing holding, the court granted CapLease's motion to dismiss for failure to state a claim upon which relief can be granted and the action was dismissed with prejudice.

Falls Garden Condo. Ass'n., Inc. v. Falls Homeowners Ass'n., Inc. (Appeal of Circuit Court for Baltimore County Decision to Enforce a Letter of Intent Generated During Settlement of Litigation Discussions).

In *Falls Garden Condo. Ass'n, Inc. v. Falls Homeowners Ass'n, Inc.*,[146] a condominium association brought action against a homeowners' association of a neighboring residential community, seeking declaratory judgment that the condominium association had obtained ownership of neighboring homeowners' association's parking spaces by adverse possession or, alternatively, that it had obtained an easement over the parking spaces by prescription or by necessity. The circuit court granted the neighboring homeowners' association's motion to enforce a letter of intent in settlement of litigation, to which the condominium association now appeals.

At the end of 2010, Falls Garden Condominium Association ("Falls Garden"), an association comprised of a cluster of condominiums located in the Summit Ridge area, filed a complaint in the Circuit Court of Baltimore County asking for a determination that it was the owner of thirty-nine of sixty-seven parking spots that are located between its condominium and the townhouses that are a part of the Falls Homeowners Association, Incorporated ("Falls Homeowners"), an association comprised of 112 townhomes. The Falls

144. *Citing Rothschild Int'l Corp. v. Liggett Grp., Inc.*, 474 A.2d 133, 137-138 (Del. 1984).

145. The court notes that it is a commonly accepted principle that the provisions of the state corporation statute are incorporated in a corporation's charter.

146. 441 Md. 290, 107 A.3d 1183 (2015).

Homeowners denied the complaint and counterclaimed, alleging trespass. As the trial date approached, the parties, in an effort to settle the matter, exchanged a series of emails that culminated in the parties executing a Letter of Intent. Following subsequent problems, the Falls Homeowners filed a Motion to Enforce Settlement Agreement to implement the Letter of Intent. Falls Garden responded to the Motion, asserting that the Letter of Intent was not enforceable and that it objected to its terms. The circuit court ultimately granted the Falls Homeowner's Motion and enforced the Letter of Intent.

Falls Garden then appealed to the Court of Appeals to consider whether the circuit court had erred by ruling in favor of enforcing the Letter of Intent given that the Letter of Intent did not contain all material terms.

The court began its analysis by noting that it had limited experience jurisprudentially with letters of intent, but relied upon *Cochran v. Norkunas*,[147] one of the only pertinent cases. In *Cochran*, the court acknowledged that when analyzing cases in which letters of intent have been at issue, there are four distinct categories to which the letter will fall:

> (1) At one extreme, the parties may say specifically that they intend not to be bound until the formal writing is executed, or one of the parties has announced to the other such an intention. (2) Next, there are cases in which they clearly point out one or more specific matters on which they must yet agree before negotiations are concluded. (3) There are many cases in which the parties express definite agreement on all necessary terms, and say nothing as to other relevant matters that are not essential, but that other people often include in similar contract. (4) At the opposite extreme are cases like those of the third class, with the addition that the parties expressly state that they intend their present expressions to be a binding agreement or contract; such an express statement should be conclusive on the question of their "intention."[148]

The court determined that the express language of the Letter of Intent in question does not state whether the parties intend to be bound, thereby eliminating categories one and four from consideration. The court then proceeded to conduct an analysis on definiteness, which is the defining difference between categories two and three. In the court's view, definiteness may show finality and the presence of an intention to be bound, while too much indefiniteness may invalidate the agreement because of the difficulty of administering it. Here, the court found that the Letter of Intent contained all necessary terms of the parties' agreement and was therefore enforceable and binding.

Finally, the court noted that the mere fact that a letter of intent explicitly contemplates future agreements does not make it unenforceable, because some letters of intent are signed with the belief that they are letters of commitment and if that belief is shared, then the letter is a memorial of a contract. Here, despite

147. 398 Md. 1, 919 A.2d 700 (2007).
148. *Citing Cochran*, 919 A.2d at 707-08.

contemplation of a future lease, the Letter of Intent represented a meeting of the minds and met the requisite factors to establish a contract.

Ultimately, the court held that the Letter of Intent is an enforceable contract to which the parties intended to be bound and ordered its enforcement by its terms.

III.4 Massachusetts Business Litigation Section

Chitwood v. Vertex Pharmaceuticals, Inc. (An Inference of Wrongdoing Is Insufficient to Demonstrate a "Proper Purpose" Pursuant to the Massachusetts Shareholder Inspection Statute, G.L. c. 156D, § 16.02, and Guidance on the Use of Board Special Committees).

In *Chitwood v. Vertex Pharmaceuticals, Inc.*,[149] the BLS held that an inference of wrongdoing, without more, is insufficient to demonstrate a "proper purpose" pursuant to G. L. c. 156D, § 16.02 ("Massachusetts Shareholder Inspection Statute"), and denied a plaintiff shareholder's claim to inspect the books and records of a special committee's investigation into his allegations of wrongdoing. The BLS also strongly endorsed (1) using a special committee to investigate claims and (2) reserving the final decision to adopt the special committee's findings and recommendations to the independent directors on a company's Board of Directors.

The case arose from sales of Vertex Pharmaceuticals, Inc. ("Vertex") stock by company directors and officers ("Insiders") made immediately after a press release that allegedly overstated the efficacy of Vertex drugs and inflated the Vertex share price. The company subsequently issued a press release correcting the erroneous press release, which drove the share price back down. In total, the Insiders sold approximately $37 million worth of Vertex shares.

The plaintiff shareholder,[150] through her law firm, wrote Vertex a demand letter, which called upon the Vertex Board of Directors (the "Board") to investigate the trading activity as well as the circumstances surrounding the issuance of the two press releases. The Board ultimately convened a Special Committee consisting of two directors who did not sell company shares after the initial press release and who were considered "independent" under NASDAQ listing standards. After its investigation, the Special Committee concluded that no wrongdoing took place, and submitted its report and recommendations to the Board. The independent members of the Board attended the meeting and

149. 33 Mass. L. Rep. 36, 2015 Mass. Super. LEXIS 89 (Mass. Super. Ct. Aug. 4, 2015) (Sanders, J.).

150. The shareholder was later substituted out because she was not a shareholder at the time of the two press releases. She was replaced by the plaintiff, a retired electrician living in Indiana, who owned one hundred shares of Vertex stock at the time.

voted unanimously to accept the Special Committee's findings and recommendations.

Dissatisfied, the plaintiff wrote a letter to Vertex demanding to inspect the books and records of the Special Committee. Pursuant to subsection (c) of the Massachusetts Shareholder Inspection Statute, a party can inspect and copy certain books and records if "(1) [her] demand is made in good faith and for a proper purpose; (2) [she] describes with reasonable particularity his purpose and the records [she] desires to inspect; (3) the records are directly connected with [her] purpose; and (4) the corporation shall not have determined in good faith that disclosure of the records sought would adversely affect the corporation in the conduct of its business…." Relying on *Gent v. Teradyne, Inc.*, another BLS case in which a shareholder was denied access to corporate books and records,[151] the Court concluded that there was not a proper purpose behind the books and record request because the plaintiff did not present any evidence that established a "credible basis" for allegations of wrongdoing.

In reaching this conclusion, the Court also noted that the plaintiff stood on "even weaker footing than the plaintiff in *Gent*," in which the company did nothing to investigate the plaintiff's allegations of wrongdoing. Specifically, the Court found that the plaintiff had failed to adduce evidence "calling into question the independence of the Special Committee or the diligence of its efforts." Absent such evidence, "the Special Committee's conclusion (ultimately accepted by the Board) would warrant dismissal of any derivative action the plaintiff might file," since Massachusetts law requires prior demand on the Board before a derivative action is filed, and the Special Committee's conclusion was protected by the business judgment rule.

TIBCO Software, Inc. v. Zephyr Health, Inc. (Third-Party Defendant Can Enforce Arbitration Clause in an Employment Agreement Even Though It Was Not a Party to the Agreement).

In *TIBCO Software, Inc. v. Zephyr Health Inc.*,[152] the former employer ("Plaintiff") of an employee sued an employee and his new employer ("Defendant") to enforce a non-compete clause in the employment contract between the Plaintiff and the employee. The employment contract also contained an arbitration provision, and the Defendant sought to enforce it against the Plaintiff. Citing to *Vassalluzzo v. Ernst & Young*, another BLS case from 2007 authored by then-Judge Ralph Gants (now Chief Justice of the Massachusetts Supreme Judicial Court),[153] the BLS concluded that because Plaintiff's claims arose out of an employment contract containing an arbitration provision, the

151. *Gent v. Teradyne, Inc.*, 27 Mass. L. Rep. 517, 2010 Mass. Super. LEXIS 305 (Mass. Super. Ct. Oct. 8, 2010) (Fabricant, J.).

152. 32 Mass. L. Rep. 637, 2015 Mass. Super. LEXIS 62 (Mass. Super. Ct. April 1, 2015) (Kaplan, J.).

153. 22 Mass. L. Rep. 654, 2007 Mass. Super. LEXIS 263 (Mass. Super. Ct. June 21, 2008) (Gants, J.).

Defendant can enforce the arbitration clause despite not being a signatory to the employment contract.

In *Vassalluzzo*, the Court refused to allow a new employer to enforce an arbitration provision in the new employee's prior employment agreement because (1) it was not a signatory to the contract containing an arbitration provision, and (2) the claims did not arise from the contract. It did, however, express a willingness to allow a non-signatory defendant to enforce an arbitration provision if (1) the plaintiff's claims solely arose from the contract and (2) the contract required arbitration of claims arising from it. The very same rationale of the *TIBCO* decision was adopted by the Massachusetts Supreme Judicial Court less than two weeks later in *Machado v. System4 LLC*.[154]

Employers faced with employment contracts governed by Massachusetts law—whether they are signatories or non-signatories—should take several points away from these cases. In drafting employment agreements governed by Massachusetts law, employers should consider requiring arbitration of claims brought against them but not by them, or they should consider carve-outs if they foresee the need or advantage of seeking immediate injunctive relief or litigating a claim arising from the contract. Companies hiring employees with non-compete agreements governed by Massachusetts law should determine whether it can force arbitration under those agreements under the test articulated in *Vassalluzzo* and now adopted by the Supreme Judicial Court in *Machado*. If claims would not exist but for the contract, Massachusetts courts may allow the new employer to force the old employer to arbitrate those claims.

III.5 Michigan Business Court

The business court opinions below (all trial court decisions) may be accessed at http://courts.mi.gov/Administration/admin/op/Pages/Business-Courts.aspx.

State of Michigan v. HP Enterprise Service, LLC[155] (Ordering Defendant to Turn Over Source Code to the Plaintiff).

In this case, the court considered whether the state was entitled to an injunction requiring HP to turn over the software code for the state's ExpressSOS system.[156] In 2003, the state began contracting for an enterprise application for the secretary of state's website and online services kiosk. In 2008, the contract was awarded to the Saber Corporation, which was later purchased by HP. After the initially successful launch of some applications, problems with the electronic services and the website began. The problems were not fixed, and the contractual

154. 471 Mass. 204 (Mass. 2014).

155. *State of Michigan v. HP Enterprise Service, LLC*, Kent County Cir. Ct.Case No. 15-08662-CKB (Nov. 16, 2015).

156. Judge Yates began his opinion with a touch of creativity by announcing that "An Injunction Shall Issue" in Morse code. The court was appropriately pointing out that encoded information was not useful to the owner, unless the owner has access to the code.

relationship between the state and HP soured. Ultimately, the state terminated the contract.

Upon learning that the contract was terminated, HP "pulled its implementation team out of Michigan, leaving the state to fend for itself." The state filed suit, and in addition to its contract remedies, requested that the court grant injunctive relief directing HP to: (1) return its project staff to the project; (2) fulfill certain contractual obligations during the post-termination period; and (3) surrender the source code for the ExpressSOS website. Prior to the hearing, HP and the state reached an agreement that resolved both the project staffing issue and the post-termination contractual obligations. However, the parties could not resolve the source code issue.

The court ordered HP to turn over the ExpressSOS source code. The court applied the familiar three-part test for injunctive relief: (1) likelihood of success on the merits; (2) irreparable harm; and (3) balance of harms to opposing parties. The court began by noting that the State of Michigan had paid HP "millions of dollars," but yet "HP has failed to meet critical milestones prescribed by the contractual agreement." Thus, the court reasoned, the state's likelihood of success was high—although the court observed in a footnote that the state pled a second count, for conversion, which was "more debatable." Second, the court found that the state would suffer irreparable harm because the state had recently passed a law that imposed enhanced registration fees beginning January 1, 2017; therefore, the SOS software must be modified to handle the changes "by a legislatively mandated deadline." Without the source code for the ExpressSOS system, the state could not make the necessary changes.

Finally, the court weighed the potential harm to HP, which it described as "some vague prospect of damage to its reputation if it provides the source code to the State of Michigan, which in turn fouls up the implementation process on its own." The court wryly dismissed HP's argument by declaring that, should the State of Michigan make changes on its own that cause problems, HP would be able to "proudly announc[e], 'We told you so.'" The court went on to point out that HP had already delivered several batches of source code to the state during the course of performance of the contract, and "yet no adverse consequences have resulted from the State of Michigan's access to source code on any of those occasions." Thus, the court ruled that there was little potential harm to HP, and issued the injunction directing HP to turn over the source code to the state.

McLaren Health Corp. v. Detroit Medical Center[157] (Rejecting the Tort of Intentional Infliction of Economic Harm).

In *McLaren*, the business court addressed complicated issues arising out of the Michigan Antitrust Reform Act (MARA). Specifically, the plaintiffs alleged that the agreement between McLaren and the Detroit Medical Center, which

157. *McLaren Health Corp. v. Detroit Medical Center*, Oakland County Cir. Ct. Case No. 2013-137031-CB (Jan. 30, 2015); *appeal denied* Mich. Ct. App., Doc. No. 320846 (Sept. 9, 2015).

prohibited McLaren from affiliating with other hospitals without the medical center's consent, was an illegal restraint on trade and a violation of MARA. The original complaint, which claimed that the agreement was an unreasonable restrictive covenant, was dismissed because the operative sections of the agreement did not constitute a noncompetition agreement.

The court did, however, grant leave to amend the complaint. While that ruling was on application for appeal, the plaintiffs amended their complaint to include several new theories. Those included an allegation that the Detroit Medical Center had intentionally inflicted economic harm—which would be a brand new cause of action under Michigan law. In support, the plaintiffs cited the only case in Michigan law to mention that theory of liability, *Trepel v. Pontiac Osteopathic Hosp.*, 135 Mich. App. 361, 354 N.W.2d 341 (1984).

The business court noted that in *Trepel*, that cause of action was only referenced in passing, and that the Michigan Court of Appeals did not analyze the elements or even the existence of such a claim under Michigan law. Further, the business court observed that no other Michigan decision, either published or unpublished, recognized such a tort. Accordingly, the court stated that "the decision to recognize a whole new common-law tort claim rests with the Michigan Supreme Court, not this court." Therefore, the court dismissed that claim.

Scottsdale Insurance Co. v. Charter Township of Orion.[158] (Privity of Contract Is an Essential Element of an Insurance Breach of Contract Claim).

After the "Basketball America" facility in Orion Township flooded, Scottsdale Insurance paid several hundred thousand dollars for repairs to its insured, Basketball America. In its subrogation action, Scottsdale sued the general contractor, several subcontractors, and the township. Scottsdale alleged that the flood was caused by a leak in a water meter on a water supply line that connected the building to the township's water service. The general contractor and the subcontractor who installed the device asserted the township gave them the water meter, fully formed, and that they did not "disassemble the meter or otherwise inspect it."

The court dismissed Scottsdale's breach of contract claim because Basketball America, the insured, was neither a party to, nor an intended third-party beneficiary of, the building contracts; thus, Basketball America lacked the necessary privity of contract. Express warranty and implied warranty claims were dismissed on a similar analysis.

In addition, the court considered Scottsdale's *res ipsa loquitur* claim. The court noted that *res ipsa* is not "a cause of action," but rather a means of "proving a negligence claim with circumstantial evidence." Thus, the court dismissed that count as well.

158. *Scottsdale Insurance Co. v. Charter Township of Orion, et al.*, Oakland County Cir. Ct. Case No. 2013-134852-CB (Mar. 12, 2015).

NatureRipe Foods LLC v. Siegel Egg Co.[159] (Large Attorney Fee Warranted by Complicated Case).

In November of 2014, NatureRipe Foods LLC obtained a "sizable" verdict against Siegel Egg Co., Inc. Subsequently, NatureRipe filed a motion for final judgment, which included the verdict amount plus costs, prejudgment interest, and attorney fees. Attorney fees were recoverable because of a contractual attorney fee provision. The court approved the entry of the final judgment, except for the attorney fees. The court noted that under Michigan law, it was required to review the fees for reasonableness. After doing so, the court found the case particularly complex. Thus, the large attorney fee award (over $200,000), which the court noted "might seem excessive to the untrained eye," was reasonable because of the "deft handling of factual and legal issues alike." The court approved the fees.

Dillon v. 3D ScanIT, Inc.[160] ("Goods" and "Services" Defined for the Purpose of the Michigan Sales Representative Commissions Act).

The issue was the definitions of "goods" and "professional services" for the purpose of the Michigan Sales Representative Commissions Act ("MSRCA").[161] The defendant, 3D ScanIT, Inc., was in the business of using technology to develop highly accurate 3D blueprints of existing custom products. Plaintiff Dillon claimed that he worked for 3D ScanIT from 2007 through November 3, 2014, and that he was paid a base salary and a commission on all his sales. He alleged that 3D ScanIT consistently withheld commissions during his employment and thus violated the MSRCA. The company moved for summary disposition arguing that MSRCA only applies to the sale of goods, whereas Plaintiff earned commissions for selling Defendant's services.

The business court agreed that the MSRCA applies only to the salesperson who "contracts with or is employed by a principal for the solicitation of orders or sale of goods and is paid, in whole or in part, by commission." The more difficult question was whether Dillon was selling "goods" (and was therefore covered by the MSRCA), or "professional services" (and was therefore was not protected by the Act).

Ultimately, the court distinguished selling "goods" from selling "services" by the amount of skill involved. Even though the finished product Dillon provided to customers was a set of blueprints or measurements, the actual business was the "the skill in creating the blueprint, and not the actual blueprint. And this means that the essential character of their business is one as a service provider." The court drew an analogy to architectural services: even though

159. *NatureRipe Foods LLC, v. Siegel Egg Co.*, Kent County Cir. Ct. Case No. 2012-10585-CKB (April 3, 2015).

160. *James Dillon v. 3D ScanIT, Inc.*, Oakland County Cir. Ct. Case No. 2015-145990-CK (Aug. 26, 2015).

161. Mich. Comp. L. 600.2961.

architects provide a finished, tangible set of blueprints, people hire architects for design services. To hold otherwise would mean "every architect is in the business of selling goods as opposed to services. But this is not the case." The court therefore dismissed MSRCA claim.

Karamanos v. Compuware Corp.[162] (Difficulty of Setting Aside Arbitration Award with No Findings of Fact).

In 2013, Peter Karamanos sued his former company, Compuware Corporation, for breach of contract, conversion and unjust enrichment. The parties agreed to arbitrate their dispute. They agreed that the arbitrator would issue an award without findings of fact. But when the arbitrator issued an award of $16.5 million in favor of Karamanos, Compuware first filed a motion with the arbitrator to clarify his award. When the arbitrator refused, Compuware filed a motion with the business court to vacate or modify the arbitration award.

Compuware argued that the only reasonable basis for the award was a treble damages award on a theory of conversion. The court found that interpretation appeared "[f]acially … reasonable." Nevertheless, the court noted that under Michigan law, the "Court may not invade the province of the arbitrator." The court observed that where the arbitrator does not issue a fact-finding report, "it is extremely difficult if not impossible to meet the burden of proving the existence of a substantial error by the arbitrator." Since the court found that there were other possible theories on which the arbitrator could have decided that Karamanos was entitled to the amount of compensation at issue, the court would not investigate further. Accordingly, the court denied Compuware's motion to vacate the award.

III.6 New Hampshire Superior Court Business and Commercial Dispute Docket

Hooksett Sewer Commission v. Penta Corporation, I Kruger, Inc. d/b/a Kruger, Inc. and Graves Engineering, Inc.[163] (Applicability of Article 2 of the UCC in Mixed Sales and Services Contracts).

The plaintiff sewer commission hired the defendant to design and build a waste water treatment facility. The contract between the parties included the design, equipment, and construction of the new system. Because the contract included both goods and services, the defendant argued that Article 2 of the

162. *Karamanos v. Compuware Corp.*, Wayne County Cir. Ct. Case No. 2013-013776-CK (May 11, 2015) *appeal pending* Mich. Ct. App. Case No. 327476.

163. No. 13-CV-540 (August 12, 2015) *available at* http://www.courts.state.nh.us/superior/orders/bcdd/Hooksett-Sewer-Commission-v-Penta-Corp-et-al.pdf.

Uniform Commercial Code, relating to "transactions in goods," did not apply to the contract.

The New Hampshire Supreme Court had previously examined two possible tests for determining whether such a mixed contract was governed by the UCC: the predominant factor test and the gravamen test. The predominant factor test focuses on whether the predominant factor is the rendition of service, with goods incidentally involved, or a transaction of sale, with labor incidentally involved. In contrast, the "gravamen test" focuses on whether the claim is focused on allegedly defective goods, or the quality of the services rendered. Only if the focus is on goods does the UCC govern. The Business Court observed that the "predominant factor" test is the majority rule in this country.

The Court went on to observe that one of the specific purposes of the UCC was to make commercial law uniform throughout the country, and given that, adopted and applied the predominant factor test to the facts. Because significantly more than half of the total contract price applied to the cost of materials, the Court determined that the UCC did apply.

XTL-NH, Inc. v. New Hampshire State Liquor Commission[164] (Expert Testimony Regarding Legal Standards, Work Product Privilege, and Implicit Waiver of Attorney Client Privilege).

The Business Court issued two decisions this year in this suit by a disappointed bidder for a liquor warehousing contract against the state agency for failing to comply with competitive bidding statutes. In the earlier opinion, the Court significantly limited the scope of testimony that proposed legal experts may provide, ruling that general background information about competitive bidding might aid the Court in applying the law to the facts, but they would not be permitted to testify as to whether or not the bidding processes used complied with New Hampshire law, or for that matter, testify as to what would be required by applicable New Hampshire competitive bidding law.

In the later opinion, the Business Court dealt with a dispute regarding discovery of, and reliance upon, legal advice provided to the state agency in following required competitive bidding procedures. The disappointed bidder wished to discover the advice provided by an attorney retained to assist the state agency in the process, to which the state agency interposed a work product objection. While upholding the assertion of the work product privilege, the Court went on to preclude the state agency from relying upon "advice of counsel" in support of its claim to have acted in good faith in the bidding process.

164. No. 2013-CV-119 (May 12, 2015 and October 28, 2015) *available at* http://www.courts.state.nh.us/superior/orders/bcdd/XTL-v-NH-Liquor-Commission-3.pdf and http://www.courts.state.nh.us/superior/orders/bcdd/XTL-v-NHSLC-2.pdf.

Brockway Smith, Inc. v. WH Silverstein, Inc. and Traditional Living, Inc.; Traditional Living, Inc. v. WHS Homes, Inc.[165] (Corrections of Errors in Deposition Testimony).

Although dealing with a mundane issue, the Business Court has provided a helpful decision on the often vexing question of whether, and to what extent, errors in deposition testimony may be corrected. Here, the Court is not dealing with minor errors in the transcription that are noted on an errata sheet, but actual changes to the substance of responses.

One party objected to substantive changes made by a deponent for the other party, noting that unlike the federal rule that permits such changes, FRCP 30(e)(1)(B), the analogous state court rule is not as broad. Unlike the federal rule, the state court rule had not been the subject of any judicial interpretation.

Noting the federal rule permits a deponent to make substantive changes, but that the changes may be used for impeachment purposes at trial, it would not be appropriate to force a witness to testify falsely at trial for the sole purpose of remaining consistent with earlier deposition testimony.

The Court noted that there are a number of ways to deal with problematic changes, such as reopening the deposition at the expense of the party proffering the change, or other evidentiary or monetary sanctions. But because the ultimate purpose of the trial is to search for the truth, the rule should not be interpreted and applied in such a way to be inconsistent with that purpose.

III.7 Philadelphia Court of Common Pleas Commerce Case Management Program

Staffmore LLC v. Assessment and Treatment Alternatives, Inc., et al. (Former Employee and Independent Contractor Did Not Breach Any Duties, Convert Any Chattel or Persons, or Interfere with Contracts).

In *Staffmore LLC v. Assessment and Treatment Alternatives, Inc.*,[166] the Commerce Court addressed claims for breach of the duty of loyalty, conversion, tortious interference with contract, civil conspiracy and unjust enrichment between and amongst a staffing service, service provider, and former employees.

Staffmore LLC ("Staffmore"), a staffing service, was one of many agencies that supplied clinicians to Assessment and Treatment Alternatives, Inc. ("ATA"),

165. No. 2012-CV-00037 (February 12, 2015) *available at* http://www.courts.state.nh.us/superior/orders/bcdd/WHS-v-TLI.pdf.

166. July Term 2012, No. 2694, 2015 Phila. Ct. Com. Pl. LEXIS 22 (C.C.P. Phila. March 27, 2015) (McInerney, J.), *available at* http://courts.phila.gov/PDF/cpcvcomprg/120702694.pdf.

a health service provider. ATA employed the clinicians to provide health services to its clients. In November 2011, Jordon Weisman ("Weisman"), Executive Director and Vice President of ATA's Board of Directors, began discussing the employment of the clinicians directly by Staffmore, rather than by ATA. ATA entered into a Staffing Contract ("the contract") with Staffmore in which Staffmore would continue to supply clinicians, Staffmore would pay the clinicians directly, and ATA would pay Staffmore for the clinicians provided. The contract included the hiring and recruiting of clinicians by ATA after they had left Staffmore.

In addition to ATA, Staffmore also supplied clinicians to the Philadelphia Mental Health Center ("PMHC"). Around the time the contract was being negotiated between Staffmore and ATA, and prior to its execution, Weisman sought employment by PMHC. PMHC extended an offer to Weisman, which he accepted. On December 12, 2011, Weisman resigned from ATA. Before departing, he provided a transition memorandum outlining the status of his current projects. He also deleted personal emails and ATA material from his ATA supplied laptop. In addition, in January 2012, an independent contractor at ATA, Kim Thomas ("Thomas") was also offered employment at PMHC. Prior to her departure, she sent an email to Weisman asking if PMHC could handle 80 more kids, if she could get them to switch. After leaving ATA, Thomas solicited former ATA clinicians, and received emails from former ATA clinicians seeking employment at PMHC.

A few months after their departure, ATA stopped paying Staffmore for its services as required by the contract. Consequently, Staffmore stopped supplying clinicians to ATA, and informed its supplied clinicians, via email, to stop working with ATA. It advised them that, pursuant to the contract, ATA could not contact them directly for services for the next 12 months. In response, ATA informed the clinicians, via email, that if they had worked for ATA prior to the execution of the contract that they could still work for ATA, and ATA would pay them directly.

Thereafter, Staffmore filed a lawsuit against ATA for breach of contract. In response, ATA filed a counterclaim for breach of contract, conversion, tortious interference with contract, civil conspiracy and unjust enrichment. ATA also filed a joinder complaint against Weisman, Thomas, and PMHC (collectively "Third-Party Defendants") for breach of the duty of loyalty, conversion, tortious interference with contract, civil conspiracy and unjust enrichment. Weisman responded by filing a counterclaim against ATA under the Stored Communications Act.

The court was presented with various motions by the parties, which were disposed of, and two outstanding motions remained—Staffmore's motion for summary judgment as to ATA's counterclaims, and Third-Party Defendants' motion for summary judgment as to ATA's claims. ATA argued that Weisman converted transcripts of meeting minutes, and that the Third-Party Defendants converted and conspired to convert the clinicians, and tortiously interfered with ATA's contracts. Further, ATA argued that Weisman and Thomas breached their

duty of loyalty to ATA, and conspired with Staffmore and PMHC to breach their duty. ATA argued that these actions unjustly enriched the Defendants.

The court determined that ATA failed to show any evidence to support any of its causes of actions. First, with regard to conversion, the court stated that conversion was the "deprivation of another's right to property, or use or possession of, a chattel, or other interference therewith." ATA alleged that Weisman converted ATA's meeting minutes by deleting them from his laptop. The court found that there was no evidence that the transcript of the meeting minutes were converted by Weisman to "gain a profit, advantage or benefit," and there was also no evidence that ATA suffered harm as a result.

Similarly, the court found that there was no evidence to establish that Thomas, PMHC or Staffmore converted any property as there was no deprivation of or interference with any rights to chattel. Specifically, ATA argued that Staffmore converted the email addresses of its clinicians when Staffmore emailed them to stop working for ATA. The court found that Staffmore, pursuant to its contract, had a right to possess the email addresses of its clinicians.

With regard to Thomas and PMHC, ATA argued that they converted ATA's clinicians and former clients. However, the court aptly noted that the clinicians and former clients were not chattel and, therefore, not subject to conversion. Consequently, the court dismissed ATA's claim for conversion.

Second, the court found that Thomas and Weisman did not breach any duty of loyalty to ATA. ATA argued that Thomas, while she was employed by ATA, breached her duty of loyalty by sending an email attempting to solicit ATA's clients. ATA also alleged that she breached her duty of loyalty after she left by soliciting ATA's clinicians. The court stated that solicitation or use of customer lists do not violate the duty of loyalty unless there is an express breach of a contract. Since Thomas was an independent contractor, and not subject to any type of employment agreement, she did not breach any duty of loyalty.

ATA argued that Weisman breached his duty of loyalty by transferring ATA's clinicians to Staffmore, and negotiating a contract between Staffmore and ATA while seeking employment from competitor PMHC to benefit Staffmore at ATA's expense. The court concluded that, although during the negotiations Weisman was offered a position with PMHC, there was no evidence that he engaged in any self-dealing or that he performed his duties in bad faith to the detriment of ATA. To the contrary, the court found that Weisman negotiated the contract to benefit ATA. Further, the court found that Weisman, while employed by ATA, did not solicit or contact any client or clinician at ATA, or ask them to switch to PMHC.

In addition, ATA cited to the Superior Court's decision in *Reading Radio, Inc. v. Fink*,[167] in support of its argument that Weisman and Thomas breached their duty of loyalty. In that case, the Superior Court found that a former managerial employee, while still employed by his former company, was actively engaged in soliciting other employees to his new employer, and interfered with the other employees' covenants-not-to-compete. The court found *Reading Radio* distinguishable and unpersuasive. It found the Superior Court decision

167. 833 A.2d 199 (Pa. Super. Ct. 2003).

PTSI, Inc. v. Haley[168] analogous. In that case, the former employees were not subject to a restrictive or non-disclosure agreement and, therefore, the Superior Court found that they had not violated their duty of loyalty. Likewise, the court stated that neither Weisman nor Thomas entered into employment agreements, and that there was no evidence to support ATA's contention that they solicited clients while still employed by ATA. Consequently, they did not violate any duty of loyalty.

Lastly, the court determined that Staffmore and the Third-Party Defendants did not interfere with any contractual relations. The court found that ATA did not have any contracts with its clients. ATA's clients were informed during their intake process that they have the right to choose any service provider, including, but not limited to, ATA, and were provided a Freedom of Choice form to sign. Since no contract existed, ATA could not maintain a cause of action for tortious interference with contractual relations.

GMW Organization, LLC v. Steven B. Atlass, et al. (Party Could Not Evade Contractual Payment Obligations by Claiming Other Entity Had Control, Where in Fact It Had Managing Control; and Debt Could Not Be Considered "Capital" Under Terms of Agreement).

In *GMW Organization, LLC v. Atlass, et. al.*,[169] the Commerce Court interpreted contracts entered into by various parties to raise capital for prospective investment opportunities, and the compensation that would be received for assisting in the negotiations.

GMW, an investment banking service, entered into a contract with Atlass and its affiliates (collectively "Atlass") to raise capital for two hospitals, one recently purchased by Atlass and the other which Atlass was planning to purchase. With the capital, Atlass intended to convert the hospitals into medical offices. The contract provided that GMW would assist Atlass in structuring the transaction, prepare and create the appropriate documentation, initiate contact with prospective investors, evaluate a proposal and assist in any negotiations. In addition, the contract set forth a compensation structure depending on the source and amount of the capital, and provided that regardless of the source of the capital, GMW would provide a list of the prospective sources.

Before entering into the contract, GMW entertained bringing in a co-investment banker. In that vein, GMW contacted Friedman, Billings and Ramsey ("FBR") to pursue a joint venture opportunity. In June, 2011, FBR sent

168. 71 A.3d 304 (Pa. Super. 2013).

169. August Term 2012, No. 1597, 2015 Phila. Ct. Com. Pl. LEXIS 28 (C.C.P. Phila. April 21, 2015) (McInerney, J.), *aff'd on the basis of the trial court opinion*, Superior Court Case No. 304 EDA 2015 (Pa. Super. Ct. Nov. 24, 2015), *available at* http://courts.phila.gov/pdf/opinions/120801597_4222015131950595.pdf.

a list of potential investors to GMW that included a private equity company, Iron Point Partners, LLC ("Iron Point").

After entering into the contract, GMW continued to contact investors regarding a joint venture opportunity with Atlass. In addition, GMW began preparing materials, financial projections and an organizational chart, and answered detailed due diligence questions that would enable a potential co-investor to assess the viability of a joint venture. GMW's work resulted in an investment banking agreement with Robert W. Baird & Co. ("Baird") in November 2011. GMW was involved in negotiating the Baird Agreement, which included Baird's obligations in connection with the possible investment in the hospitals. In addition, the Baird Agreement provided that for an investment or commitment of capital in the joint venture, Baird could include equity, equity-lined or senior, mezzanine, subordinated or convertible debt financing.

In November 2011, GMW and Atlass amended their contract to include Baird as a prospective source of capital. The parties agreed that GMW would be credited with any source of capital identified by Baird. The contract also required GMW to find sources of capital if it was to be compensated for finding that capital. Atlass believed the term "capital" included equity, but not debt. GMW also understood that capital generally could include equity, but not debt; however, it believed that the term "capital" in the agreement meant equity and debt.

Thereafter, Baird engaged in due diligence, prepared pre-marketing materials, contacted prospective investors and responded to due diligence requests from investors. In January 2012, Baird began making phone calls to capital sources, including Iron Point. On January 20, 2012, Baird sent GMW and Atlass a list of potential capital sources. This was the first time Iron Point had been identified to Atlass.

From January 20, 2012, to March 6, 2012, GMW participated in conference calls and meetings with various investors, including Iron Point: and GMW prepared Atlass for the conference calls. GMW also provided comments on draft term sheets/letters of intent from Iron Point, which eventually resulted in Iron Point submitting a first proposed term sheet to Atlass on March 6, 2012.

GMW received a copy of the first term sheet and revised proposed term sheets thereafter. Iron Point dictated the structure of the deal in all aspects. There were limited negotiations between Atlass and Iron Point, in which Baird took the lead on Atlass' behalf. GMW was not involved with these negotiations. During the negotiations, Iron Point decided to pursue a joint venture with only one of the hospitals, St. Agnes Hospital, and decided against the other.

On June 1, 2012, the parties agreed on the terms of the transaction and formed St. Agnes MOB, LLC, a limited liability company ("St. Agnes"). St. Agnes would own and operate the hospital and other real property owned by Atlass. Pursuant to the transaction, Iron Point contributed approximately $6 million, with approximately $2 million being used to pay off the existing lender, and the remaining $2.5 million being a loan to Atlass. Iron Point took 90 percent ownership interest, while Atlass took 10 percent. In addition, the operating agreement for St. Agnes specified that a five-member Board of

Managers would control the new organization, with GMW serving as the initial managing member.

GMW argued that in accordance with the contract, it was entitled to receive 25 percent interest in the entity controlling St. Agnes, since the transaction was effected with a GMW prospective source. Atlass argued that the entity controlling St. Agnes was a Board of Managers, not a general partnership. In the alternative, Atlass argued that the contract provided GMW would only be entitled to a 25 percent interest in Atlass' general partner.

GMW also argued that under the terms of the contract, it was entitled to receive 10 percent of the amount Atlass would receive from the transaction, e.g., 10 percent of the $2.5 million loan that Atlass received from Iron Point. Atlass argued that GMW was not entitled to any monies because the loan was not a capital-raising event; rather, the loan was a debt, not equity.

When GMW did not receive monetary compensation, it filed suit against Atlass. The case proceeded to a bench trial before Judge McInerney. Following the conclusion of the bench trial, the court found: (1) GMW was not entitled to 10 percent of the $2.5 million Iron Point loaned to Atlass because the loan was a "debt in the form of a loan"; and (2) GMW was entitled to 25 percent interest in the general partner of Atlass.

GMW filed a timely post-trial motion. GMW requested clarification of the court's decision regarding its entitlement to 25 percent interest in the general partner of Atlass, and argued that the court erred in not ruling in its favor and awarding it a 10 percent fee for the $2.5 million loan. Atlass argued that the court's decision clearly stated that GMW was entitled to only a 25 percent interest in the general partnership of Atlass. With regard to the loan, GMW argued that the contract clearly provided that GMW was not entitled to receive 10 percent on any amounts received by Atlass as debt.

In its opinion, the court found that all of GMW's complaints of error relate to the court's interpretation of the contract between GMW and Atlass. First, the court stated the contract provided that GMW would be entitled to receive "25% of the [general partnership] in the entity that controls St. Agnes Hospital." While Atlass argued that GMW was not entitled to any interest because St. Agnes had a Board of Managers, not a general partner, the court disagreed and concluded that Atlass as a managing partner had significant control over the business. Consequently, the court held that Atlass controlled St. Agnes within the meaning of the contract; and the contract provided that GMW was entitled to receive 25 percent interest in the general partner of Atlass. Therefore, in reaching its conclusion, the court was enforcing the clear and unequivocal terms of the contract between the parties.

The court further stated that even if the provisions of the contract were ambiguous, extrinsic evidence showed that the parties intended GMW to receive 25 percent interest in the newly formed general partnership that would control St. Agnes, not a 25 percent interest in Atlass or a 25 percent interest in St. Agnes, a limited liability company. In other words, the extrinsic evidence showed that GMW would have a 25 percent interest in either the general partner of Atlass, or a newly formed Atlass general partner.

Second, the court stated that it did not err in determining that debt was not included in the compensation provisions of the contract. Specifically, the contract provided that GMW would receive "10% of the amount Atlass would receive from the St. Agnes transaction (*see above example*) …." The example in the contract showed that if Atlass received $20 million, GMW would receive $600,000. In the calculation, debt, buyout of partners, and expenses, were subtracted from the net amount. Consequently, the court determined that the contract expressly provided that GMW would receive compensation, net of debt and costs. Since Atlass did not receive any compensation, but rather received debt, GMW was not entitled to 10 percent of the debt.

GMW also argued that the "debt" referenced in the contract referred to existing debt, not a loan effectuated during the transaction. The court disagreed because the contract and the evidence did not establish that "debt" only applied to existing debt. Further, the court stated that the $2.5 million loan was a legitimate loan/debt, and that it could not be converted to equity.

Lastly, GMW argued that the court erred in construing the contract against GMW, despite the doctrine of *contra proferentem*. The contract was drafted by Atlass with the assistance of counsel, and Plaintiff did not have the assistance of counsel. The court disagreed. The doctrine of *contra proferentem* permits a court to construe an ambiguity against the drafter of the contract. In this case, there was no ambiguity. The contract unambiguously provided that GMW was not entitled to compensation when Atlass received debt from the St. Agnes transaction. In addition, the court stated that even if a provision is ambiguous, it would be reluctant to apply the doctrine because the agreement was negotiated between two sophisticated parties. The fact that GMW chose to negotiate the contract without the assistance of counsel was not relevant. GMW was a sophisticated party, and it was substantially involved in the negotiation of the contract. Therefore, the court ruled that even if the contract was ambiguous, the doctrine of *contra proferentem* would not apply.

Angela Vendetti v. Jack McDavid, et al. (No Prima Facie Case for Derivative Action in LLC; Dividend Payment Subject to Discretion of Managing Member; Providing Information Distinguished from Obligation to Provide Records; Court Refuses to Remove Managing Member and Appoint Receiver).

In *Vendetti v. McDavid, et. al.*,[170] the Commerce Court addressed the interpretation of an operating agreement after business relationships between members of the Company had soured.

Plaintiff Angela Vendetti entered into an agreement with Defendant McDavid and others to form an entity, 2100 Fairmount Avenue LLC (the "Company").

170. March Term 2014, No. 4606, 2015 Phila. Ct. Com. Pl. LEXIS 231 (C.C.P. Phila. August 31, 2015) (Glazer, J.), *available at* http://www.courts.phila.gov/pdf/opinions/140304606_1130 2015142959770.pdf.

The parties agreed that a coffee shop co-owned by Plaintiff would rent the property under a lease agreement from the Company, and that McDavid would be a managing member of the Company. Over a period of time, the Company suffered financial problems, and the coffee shop moved out of the building. As a result, Plaintiff's business relationship with McDavid became strained. Plaintiff filed a derivative action for fraud of a director, breach of fiduciary duty, breach of operating agreement, and sought appointment of a receiver and reorganization. Defendants filed a motion for summary judgment on all counts.

The court examined each cause of action *seriatim*. First, the court stated that although Plaintiff filed a motion for leave to maintain the derivative action, Plaintiff's allegations failed to establish a prima facie case for a derivative action based upon fraud. In addition, she failed to acquire the necessary authorization from the Company to maintain the action.

Second, after outlining the requirements for a breach of contract action, the court determined that Plaintiff failed to provide support for her claim that McDavid breached the terms and conditions of the operating agreement. Specifically, Plaintiff alleged that McDavid failed to provide dividends to the Company's members. However, the operating agreement provided that distribution of cash or other assets would be determined by McDavid, the managing member, with the exception of dissolution. McDavid was not required to make any distribution; rather this was left to his sole discretion. Since the language of the operating agreement clearly provided that McDavid had discretion on when and how to distribute cash or other assets, McDavid did not breach the operating agreement by failing to do so.

Further, Plaintiff alleged that McDavid breached the operating agreement by failing to provide copies of the Company's financial records. The court stated that the Company's obligation to provide a member with various documents was governed by two paragraphs in the operating agreement. The court found that there was an important distinction between the words "records" and "information" in these two paragraphs. The first paragraph dealt with providing records, while the latter paragraph addressed information. The court stated that records refers to actual documents, while information refers to material contained within the documents. As such, the court ruled that providing a member with information contained within financial documents, and not the actual financial documents, complies with the operating agreement. Moreover, the court found that the operating agreement limited disclosure of information to "reasonable" requests that were "reasonably" related to the members' interest in the Company. Therefore, the Company would not be required to respond to an overly broad request amounting to no more than a fishing expedition.

Plaintiff also alleged that McDavid breached the operating agreement by not allowing her personal counsel to attend and record a shareholder meeting. In order to succeed on this cause of action, Plaintiff had to prove that there was a duty under the operating agreement to permit personal counsel to attend and record meetings with members. The court found that the operating agreement did not impose any such duty. In fact, the operating agreement was silent on

this issue. Since the operating agreement did not impose this duty, McDavid could not be held liable for breaching it.

More importantly, even if Plaintiff could establish that McDavid somehow breached the terms of the operating agreement, Plaintiff failed to establish that she sustained any damage as a result thereof. The court held that Plaintiff's lack of actual damages was fatal to her claim.

Third, Plaintiff alleged that McDavid breached his fiduciary duty by failing to provide dividends, financial records, and by engaging in a pattern of deceit, gross negligence, willful misconduct and wrongful taking. The court stated that although the operating agreement provided a limitation of liability for willful conduct, Plaintiff failed to substantiate any of her claims. Specifically, Plaintiff's bald and unsubstantiated allegations were unsupported by any evidence or documentation.

Lastly, Plaintiff requested McDavid's removal, appointment of a receiver, and dissolution of the Company. The operating agreement provided that the managing member could be removed upon a unanimous vote, and that if such event shall occur, another member, Houston, would take the position. Further, the operating agreement stated that on application by a member, the court could order dissolution when it was not reasonably practicable to carry on the business of the Company in conformity with the operation agreement. The court found that Plaintiff had not taken any of the initial steps required to remove McDavid as the managing member, or provided evidence to substantiate her claim that an appointment of a receiver and dissolution of the Company was necessary.

UCC Cases on Revocation and Course of Performance

Glenn Distributors, Corp. v. Reckitt Benckiser, LLC (Court Looks to Course of Performance in Determining Obligations Under UCC as to Nature of Contract).

In *Glenn Distributors, Corp. v. Reckitt Benckiser, LLC*,[171] the Commerce Court addressed the Uniform Commercial Code ("UCC") and the definition of agreements.

Reckitt, a distributor of closeout products, would send an email to various purchasers, including Glenn, notifying them of available products. Glenn would then, in turn, respond by providing a bid price for the items, and the quantity it wanted to purchase. If Glenn won the bid, Reckitt would notify it; and in some circumstances would notify Glenn that the available quantity had changed. Glenn would then forward a purchase order, and Reckitt would forward an invoice.

171. December Term 2012, No. 1574, 2015 Phila. Ct. Com. Pl. LEXIS 113 (C.C.P. Phila. April 27, 2015) (McInerney, J.), *available at* http://www.courts.phila.gov/pdf/opinions/121201574_1130201511137539.pdf.

However, there were times when the quantities listed on the purchase order and invoice did not match. Glenn found that there were 46 transactions in which it requested a certain number of products that were not received. Consequently, Glenn instituted an action against Reckitt alleging breach of contract. Both parties filed cross-motions for summary judgment, and the lower court granted summary judgment in Reckitt's favor.

Glenn argued that there were binding agreements between the parties to ship the goods. Reckitt argued that there was no agreement or, in the alternative, stated that their agreement was modified by their course of performance and dealings. The court found that the UCC governed the transaction between the parties. Section 1202 of the UCC defined agreement as the bargain of the parties as found in a written contract or by course of performance and dealing. The court ruled that Glenn failed to allege that it did not receive the products for which it paid. Rather, Glenn alleged that it requested a certain number of products in its purchase order, and the number of products received in the shipment was less. Further, the court found that Glenn did not issue payment when the purchase order was submitted. Instead Glenn waited until after receiving an invoice from Reckitt to issue payment. Glenn also never raised any objections to receiving fewer products than requested in its purchase order. Consequently, the court determined that the parties' course of performance established, at best, that their initial agreement had been modified, and that Glenn could not maintain an action for breach of a contract because it agreed to the modification.

Lombard Metals Corp. v. AMG Resources Corp. (Court Applies UCC Sections 2608(b) and 2607(c)(1) in Reasonableness of Revocation Case).

In *Lombard Metals Corp. v. AMG Resources Corp.*,[172] the Commerce Court addressed the Uniform Commercial Code, and the reasonableness of a revocation.

AMG purchased steel from a third party and then resold the steel to Lombard. Shortly thereafter, Lombard learned that the steel was defective. Lombard notified AMG about the defect, however, AMG argued that Lombard did not provide notice in a timely and reasonable manner. As a result, Lombard filed a breach of contract action against AMG.

During a bench trial, the court found that Lombard's notice of the breach was delivered in a timely manner. Therefore, Lombard was entitled to resulting damages. Specifically, the court determined that Sections 2608(b) and 2607(c) (1) of the UCC governed the transaction. These UCC Sections provide that revocation of an acceptance must occur within a reasonable time after the buyer discovers the defect. Reasonable time is not defined, and is not confined to a specific time period.

172. January Term, 2013 No. 000994, 2015 Phila. Ct. Com. Pl. LEXIS 109 (C.C.P. Phila. March 31, 2015) (Glazer, J.), *aff'd*, Superior Court Case No. 822 EDA 2015, 2015 Pa. Super. Unpub. LEXIS 3857 (Pa. Super. Ct. October 21, 2015), *available at* http://www.courts.phila.gov/pdf/opinions/130100994%20_11302015143358948.pdf.

Using the reasonableness standard, the court found that Lombard, based on the parties past course of dealings, had no reason to suspect that the steel was defective. Further, when AMG received notice of the defects, it did not question Lombard's timing or contend that its conduct was unreasonable. Consequently, the court ruled that the evidence established that Lombard acted reasonably and was entitled to damages.

On appeal, Pennsylvania's Superior Court affirmed the Commerce Court's decision. The Superior Court recited the facts from the Commerce Court's Opinion, and then discussed the trial court's legal analysis. The appellate court found that Lombard acted reasonably in notifying AMG of the breach, and that Lombard's entitlement to damages was supported by the evidence.

West Virginia

The Velotta Company v. Stantec Consulting Services, Inc. v. CTL Engineering of West Virginia, Inc.

In *The Velotta Company v. Stantec Consulting Services, Inc. v. CTL Engineering of West Virginia, Inc.*,[173] the Court was faced with Defendant Stantec Consulting Service, Inc.'s ("Stantec") Motion for Partial Summary Judgment. The Plaintiff originally filed this action alleging breach of a subcontract on four separate projects, as well as negligence. In Stantec's Motion, it requested that the Court grant summary judgment in regards to Count I only of the Complaint. Stantec argued that the Velotta Company ("Velotta") "failed to offer any evidence that Stantec failed to complete the design services for the Westmoreland project under the subcontract or that its performance fell below the applicable standard of care." In response, Velotta admitted that it did not incur substantial damages on the Westmoreland project, but it asserted "that it may seek setoff in Count I from the three other projects at the center of this litigation under West Virginia Code § 56-5-4." Further, Stantec's Motion argued that the substantive law of Pennsylvania should apply rather than West Virginia substantive law. Specifically, Stantec argued that "substantive Pennsylvania law should be applied to this case because the bridge for which it provided design services is located in Pennsylvania." Velotta responded that "West Virginia substantive law should apply because the contracts were executed through Stantec's Buckhannon, West Virginia office and because the design work was performed by Stantec's staff at that office." The Court first decided the choice of law question and found that West Virginia substantive law "is the appropriate substantive law to apply to the instant case due to the location of the work performed." The contract between the parties specifically provided that the governing law of the agreement shall be in the jurisdiction where a majority of the services are performed. It was not disputed that the design services were performed in West Virginia. As such, the Court found that West Virginia substantive law applied.

173. Civ. No. 13-C-122, Order Granting Defendant Stantec Consulting Service, Inc.'s Motion for Partial Summary Judgment, (Upshur. County W. Va. Bus. Ct. Div. Sept. 3, 2015).

Next, the Court went on to discuss whether West Virginia Code § 56-5-4 saved Plaintiff's Count I from summary judgment. West Virginia Code § 56-5-4 provides that

> In a suit for any debt, the defendant may at the trial prove and have allowed against such debt any payment or setoff which is so described in his plea, or in an account filed therewith, as to give the plaintiff notice of its nature, but not otherwise. Although the claim of the plaintiff be jointly against several persons, and the setoff be of a debt, not to all, but only to a part of them, this section shall extend to such setoff, if it appear that the persons against whom such claim is, stand in the relation of principal and surety, and that the person entitled to the setoff is the principal. And when the defendant is allowed to file and prove an account of setoff to the plaintiff's demand, the plaintiff shall be allowed to file and prove an account of counter setoff, and make such other defense as he might have made had an original action been brought upon such setoff, and, in the issue, the jury or judge shall ascertain the true state of indebtedness between the parties, and judgment shall be rendered accordingly.

W. Va. Code Ann. § 56-5-4. Ultimately, the Court ruled that Velotta misapplied West Virginia Code § 56-5-4 because it did not bring a suit for debt. Moreover, and even more importantly, the Court found that Count I of Velotta's Complaint does not seek a setoff. "Velotta's position that Count I serves as a vehicle to withhold payment to obtain a setoff is a new position and contradicts the allegations within the Complaint." As such, even applying West Virginia substantive law, the Court granted Stantec partial summary judgment as to Count I of the Complaint.

Southern Amusement Co., Inc., v. B & J Business Enterprises, Inc., dba Giovannis Pizza, et al.

In *Southern Amusement Co., Inc., v. B & J Business Enterprises, Inc., dba Giovannis Pizza, et al.*,[174] the Court was faced with Defendant Jessie's Italian Restaurant, LLC's ("Jessie's") Motion to Dismiss. In this matter, Southern Amusement Co., Inc. ("Southern Amusement") alleged that "Jessie's tortiously interfered with a contract between [Southern Amusement] and Defendant Greg Dotson on behalf of B & J Enterprises, Inc., doing business as Giovannis Pizza ("Greg Dotson/B & J/Giovannis"). Specifically, Southern Amusement alleged that "Jessie's tortiously interfered with this contract when its owners purchased Jessie's along with video lottery contracts from Dawn Enterprises, LLC, knowing that there was a contract between [Southern Amusement] and Greg Dotson/B & J/Giovannis and that only 5 machines were permitted at the business location."

174. Civ. No. 14-C-231, Order Granting Motion to Dismiss on Behalf of Defendant Jessie's Italian Restaurant, LLC, (Logan County W. Va. Bus. Ct. Div. May 22, 2015).

The Court noted that the "issue is whether [Southern Amusement] has passed the minimum threshold to support the essential elements of a claim for tortious interference against [Jessie's]." It is clearly established West Virginia law that in order to sustain a cause of action for tortious interference, a plaintiff must properly allege:

1. existence of a contractual or business relationship or expectancy;
2. an intentional act of interference by a party outside that relationship or expectancy;
3. proof that the interference caused the harm sustained; and damages.

Southern Amusement argued that former defendants Jeannie Dotson and Bridget Dotson should have taken over Greg Dotson's business and the Southern Amusement contract. However, the Complaint is devoid of any allegations that Jeannie Dotson, Bridget Dotson, or any other person or entity had a duty to uphold a contract to which they were not a party. As such, the Court granted the Motion to Dismiss finding that Southern Amusement "can prove no set of facts to support the essential element that Jessie's committed an intentional act that caused the harm sustained by Southern Amusement, the alleged breach of the Southern Amusement contract."[175]

Boone Motor Sales, Inc., d/b/a Stephens Auto Center v. Thornhill Group, Inc., d/b/a Thornhill Ford Lincoln, et al.

In *Boone Motor Sales, Inc., d/b/a Stephens Auto Center v. Thornhill Group, Inc., d/b/a Thornhill Ford Lincoln, et al.*,[176] the Court was faced with separate Motions for Summary Judgment of Defendant Ford Motor Company ("Ford") and Defendant Thornhill Group, Inc., d/b/a/ Thornhill Ford Lincoln's ("Thornhill"). Plaintiff Boone Motor Sales, Inc. ("Boone") filed a Petition for Temporary Relief and Complaint on May 8, 2014. Boone asserted the following claims against Ford: (1) Violation of Statute, West Virginia Code § 17A-6A-1, et seq., (2) Breach of Contract, and (3) Civil Conspiracy. Boone asserted the following claims against Thornhill: (1) Violation of Statute, West Virginia Code § 17A-6A-1, et seq., (2) Tortious Interference, and (3) Civil Conspiracy. Boone further made a request for injunctive relief under the West Virginia Code § 17A-6A-1,

175. On the same day the Court entered the Order Granting Motion to Dismiss on Behalf of Defendant Jessie's Italian Restaurant, LLC, it also entered an Order Granting Motion for Summary Judgment Filed on Behalf of Dawn Enterprises, LLC using essentially the same arguments and analysis. *See* Civ. No. 14-C-231, Order Granting Motion for Summary Judgment Filed on Behalf of Dawn Enterprises, LLC, (Logan County W. Va. Bus. Ct. Div. May 22, 2015).

176. Civ. No. 14-C-98, Order Granting Summary Judgment in Favor of Defendants, (Boone County W. Va. Bus. Ct. Div. July 27, 2015); Civ. No. 14-C-98, Order Denying Plaintiff Boone Motor Sales, Inc.'s Post-Summary Judgment Motions, (Boone County W. Va. Bus. Ct. Div. Sept. 29, 2015).

et seq. Essentially, Boone's claims concern "the relocation of Thornhill's dealership 1.2 miles from its current location, which Boone opposes."

After the close of discovery, Defendants Thornhill and Ford filed and served respective Motions for Summary Judgment as to all remaining claims.[177] Interestingly, Boone failed to file a response to either of the pending Motions for Summary Judgment and failed to appear at the hearing on the Motions. Significantly, Boone is an authorized Ford dealer pursuant to the terms and conditions of a Ford Sales and Service Agreement ("Agreement"). Ultimately, the Court found that Boone's claims for breach of contract, civil conspiracy and tortious interference "necessarily fail because Boone has presented no evidence of resulting injury or damages. The Court went even further and held that even if Boone could prove damages, "Ford has not breached the Agreement by approving Thornhill's relocation request." Specifically, the Court found that the "Agreement *expressly* gives Ford the contractual right to determine the numbers and locations of its dealers." Moreover, the Court held that Boone's claim for civil conspiracy must also be dismissed for two reasons: (1) there was no underlying wrongful act to support a civil conspiracy claim and (2) there is no evidence that Ford and Thornhill combined together with the "malicious desire" to destroy Boone's business. Lastly, in regards to the tortious interference claim, the Court held that "Thornhill cannot be liable for conduct which Thornhill is permitted to do, but also that which Ford has the legal and contractual right to do." For those reasons, the Court granted summary judgment as to all remaining claims for both defendants.

Five days after the Court granted both defendants' Motions for Summary Judgment, Boone filed a Motion for Leave to File an Amended Complaint. Twenty-three days after the Court granted both defendants' Motions for Summary Judgment, Boone filed a Motion for Relief from Judgment or Order. The Court found that both Thornhill and Ford had timely filed their respective Motions for Summary Judgment and Memoranda in Support. The Court further found that Boone had received these Motions and the appropriate Notice of Hearing. Moreover, Boone had received the Order Granting Summary Judgment but had admittedly failed to read it. Boone had failed to present any evidence into the record for the Court to consider in opposition to the Motions for Summary Judgment filed by Thornhill and Ford. The Court noted that "[t]he purpose of the Business Court Division is to provide litigants with a forum that is expedient. The Business Court Division is meant to provide a more efficient forum of litigation to business litigants who have encountered complex business issues. The Business Court Division allows business litigants to obtain resolutions in a timely manner so that they do not have to operate under legal uncertainties."[178]

177. Prior to the hearing on the present Motions for Summary Judgment, the Court dismissed Violation of Statute cause of action as to both defendants and denied the request for injunctive relief.

178. The Court found that counsel for Boone had "distracting personal and professional issues" and that he did "not efficiently litigate this matter."

The Court ultimately denied Boone's Motion for Leave to File Amended Complaint because Boone was "dilatory in its filing of its Rule 15(a) motion and because to grant the same would cause prejudice to the Defendants and no prejudice to Boone." In regards to Boone's Motion for Relief from Judgment or Order, as a threshold inquiry, "the Court is obligated to evaluate whether the moving party actually has an underlying meritorious claim." The Court found that based on the lack of evidence presented by Boone, it did not have a meritorious claim. However, the inquiry does not end there. Next, the Court must decide if there was "excusable neglect." In this matter, the Court found that there was not "excusable neglect" and denied Boone's Motion for Relief from Judgment or Order.