

**COMMERCIAL LITIGATION COMMITTEE'S REPORT  
REPORT PREPARED FOR THE DECEMBER 4, 2010 COUNCIL MEETING**

**1. 2010-2011 Budget Request and Anticipated Use of Funds.**

Communicated separately to Treasurer by November 15 deadline, as requested.

**2. Use of Budgeted Funds During 2009-2010.**

None.

**3. Next Scheduled Meeting of the Committee**

The next scheduled meeting of the Committee is:

March 14, 2011, 5:30 p.m.  
Brooks Wilkins Sharkey & Turco, PLLC  
401 S. Old Woodward, Suite 460  
Birmingham, MI 48009  
Call-in info: 800-430-0714, code 9711800

**4. Council Approval**

None.

**5. Membership**

Existing members:

1. Jay VandeWyngearde, Vice Chair
2. Doug Toering
3. Jason Shinn, Rep. to SCAO Case Evaluation and Mediation Study  
Advisory Committee
4. Alan Taylor
5. Eric Buikema
6. Kevin Fanning
7. Ashish Joshi
8. Joe Ahern
9. Bruce Inosencio
10. Don Blevins
11. Janet Ziulkowski
12. Robert Constan
13. Robert Hahn
14. Steven Landau
15. Thomas Breutsch
16. Daniel Troyka

17. Erica Bell
18. Rick Paige
19. Thomas Yaczik
20. Matthew Allen\*
21. James Vlasic\*
22. Austin Hirshhorn\*
23. Alan Wortman\*
24. T.L. Summerville\*

\* New member, joined in past quarter.

## **6. Accomplishments Toward Committee Objectives**

See below.

## **7. Meetings and Programs**

During the past quarter, we have several discussions with the commercial litigation sub-committees of the State Bar Litigation Section, Michigan Defense Trial Counsel, and the Federal Bar Association Commercial Litigation regarding a joint continuing biennial program regarding commercial litigation. To be candid, the response was tepid. We either received very little response at all, or we received a response that they were not very interested. We are therefore exploring doing a limited (and low-budget) morning program in the spring regarding issues of interest in commercial litigation.

## **8. Publications**

We have had no activity on this front since we coordinated an issue of the Business Law Journal last year. Several members of the Committee continue to publish articles, most recently "Lessons from the Supply-Chain Litigation Trenches," in the August 2010 edition of DRI's magazine, *For The Defense*.

## **9. Methods of Monitoring Legislative/Judicial/Administrative Developments and Recommended Action**

In September, the Committee provided comments to the Chair regarding Business Impact Committee's proposal for a pilot business docket.

There have been two cases designated for publication by the Michigan Court of Appeals that may be of interest to business practitioners:

A) In *Cedroni Assocs., Inc. v. Tomblinson Harburn Assocs. Architects & Planners, Inc.*, Case No. 28704, the Michigan Court of Appeals reversed the lower court, holding that a losing bidder on a public project had "valid business expectancy" that

would arguable create a claim for tortious interference. The court found that there was a genuine issue of material fact as to whether the plaintiff was a responsible contractor such that a trier of fact could conclude a reasonable likelihood or probability existed that plaintiff would have been awarded the project absent the alleged tortious interference by the defendant-architectural firm. The court emphasized that the submission of the lowest bid, alone, was inadequate to sustain plaintiff's suit, and rejected any *per se* rule that would allow litigation to proceed based simply on proof of the lowest bid, except where no additional criteria needed to be satisfied, which is unlikely. Absent sufficient additional evidence on relevant award criteria, there would be no valid business expectancy. The court also rejected the trial court's determination that, as a matter of law, plaintiff failed to show that defendant did anything improper. Plaintiff submitted evidence sufficient to create a factual dispute as to whether defendant's conduct was intentional and improper, motivated by malice and not legitimate business reasons. The court emphasized that the exercise of professional business judgment in making recommendations as to government contracts and projects must be afforded some level of protection and deference, but refused to preclude litigation where "there exists evidence suggesting that the ostensible exercise of professional business judgment is in reality a disguised and veiled attempt to intentionally and improperly interfere with the contractual or expectant business relationship of others."

B) In *Dutton Partners LLC v. CMS Energy Corp.*, Case No. 29204, the Michigan Court of Appeals issued a potentially important opinion about "alter ego" and "piercing the corporate veil." The plaintiff sought to hold defendant liable for the acts of its subsidiary, Consumers, pointing to common addresses, in-house counsel, overlapping use of names on websites, and that the parent CMS depreciated Consumer's pipeline on CMS's own financial statements. CMS, of course, argued that it was a utility holding company separate from Consumers. The trial court found that there were material questions of fact as to "whether the two entities are alter egos of one another." The Michigan Court of Appeals held that the trial court erred by denying CMS summary disposition, because the plaintiff failed to demonstrate any evidence of fraud, wrongdoing, or misuse of the corporate form, and the court could not find any factual evidence showing that defendant merely used Consumers to commit fraudulent or otherwise wrongful acts.

#### 10. Miscellaneous

None.