

CREATE A “CYBER” COURT FOR BUSINESS DISPUTES

House Bill 4140 (Substitute H-3) First Analysis (6-12-01)

Sponsor: Rep. Marc Shulman
Committee: Civil Law and the Judiciary

THE APPARENT PROBLEM:

In his January 2001 state of the state message, Governor Engler called for the establishment of a state “cyber court” for cases involving technology and high-tech businesses, where the cases would be tried via computer rather than in a physical courtroom. Briefs could be filed online, evidence viewed by streaming video, oral arguments delivered by teleconferencing, and conferences held by e-mail. Lawyers would not have to be in Michigan or even be licensed to practice in the state. Cases could be “heard” at any time, and judges would be trained to understand the complex issues involved in technology disputes. Legislation has been introduced to create a “cyber court.”

THE CONTENT OF THE BILL:

The bill would add a new chapter (Chapter 80) to the Revised Judicature Act to create a new court of record, a “cyber court,” with concurrent jurisdiction over business and commercial actions involving more than \$25,000. Among other things, the bill also would create a legislative oversight committee, and would fund the court from annual appropriations to the supreme court.

Statement of purpose. The bill would list the stated purpose of the cyber court to do all of the following:

- allow disputes between business and commercial entities to be resolved with the expertise, technology, and efficiency required by the information age economy;
- assist the judiciary in responding to the rapid expansion of information technology in Michigan;
- establish a technology-rich system to serve the needs of a judicial system operating in a global economy;
- maintain the integrity of the judicial system while applying new technologies to judicial proceedings;

- supplement other state programs designed to make the state attractive to technology-driven companies;
- permit alternative dispute resolution (ADR) mechanisms to benefit from the technology changes; and
- establish virtual courtroom facilities, and allow the conducting of court proceedings electronically and the electronic filing of documents.

Court funding. The cyber court would be funded from annual appropriations to the supreme court.

Location, facilities, staff. The cyber court would be located in one or more counties as determined by the state supreme court, though it would maintain its staff and support services at the seat of government. The cyber court would sit in facilities designed to allow all hearings and proceedings to be conducted by means of electronic communications (including, but not limited to, video and audio conferencing and Internet conferencing), and whenever technologically feasible – and at the judge’s discretion and pursuant to court rules – all of the cyber court’s proceedings would be broadcast on the Internet. The cyber court would hold session and schedule hearings or other proceedings to accommodate parties or witnesses who were located outside of Michigan, and cyber court facilities would be open to the public to the same extent as a circuit court facility. The supreme court would appoint the clerk of the cyber court.

Judges. The state supreme court would assign to the cyber court, for at least three years duration, persons who had been elected to and served as judges in Michigan and who had requested to be considered for that assignment. In making assignments to the cyber court, the supreme court would be required (a) to consider a person’s experience in presiding over commercial litigation and his or her interest in the application of technology to the administration of justice, and (b) to endeavor to reflect the ethnic and racial diversity of the state population and the

statewide judicial bench. The total number of judges assigned to the cyber court would have to reasonably reflect the court's caseload. of the cyber court. The Michigan Judicial Institute would provide appropriate training for judges who were assigned to the cyber court.

Jurisdiction. The cyber court would have concurrent jurisdiction over commercial litigation actions in which the amount in controversy exceeded \$25,000. The bill would define "business and commercial actions" to mean disputes arising between business owners, associates, or competitors or between a business entity and its customers. The term would include, but not be limited to, the following list of disputes:

- Those involving information technology, software, or web site development, maintenance, or hosting;
- Those involving the internal organization of business entities and the rights or obligations of shareholders, partners, members, owners, officers, directors, or managers;
- Those arising out of contractual agreements or other business dealings, including licensing, trade secret, noncompete, nonsolicitation, and confidentiality agreements;
- Those arising out of commercial transactions, including commercial bank transactions;
- Those arising out of business or commercial insurance policies; and
- Those involving commercial real property other than landlord/tenant disputes.

The bill would "expressly exclude" from "business and commercial actions" the following types of disputes:

- Tort actions, including, but not limited to, personal injury, wrongful death, or medical malpractice matters;
- Landlord/tenant matters;
- Employee/employer disputes;
- Administrative agency, tax, zoning, and other appeals;
- Criminal matters; and
- Proceedings to enforce judgements of any type.

Filing fee. Before a civil action were filed in the cyber court, the party bringing the action would be required to pay a \$200 filing fee. Each month, the clerk of the cyber court would deposit with the state treasurer all fees collected, and secure and file a receipt for all the fees deposited.

Proceedings, removal to circuit court. An action could be filed in the cyber court by filing a complaint with the clerk of the cyber court, but a defendant could remove the action to circuit court within 14 days of the deadline for filing an answer to a complaint. If a defendant removed an action to the circuit court, the clerk of the cyber court would have to forward to the circuit court, as a filing fee, a portion of the \$200 cyber court filing fee that was equal to the filing fee otherwise required in the circuit court.

The bill would require the supreme court to adopt special rules for the cyber court regarding practice and procedures, the form and manner of pleadings, and the manner of service of process in the cyber court.

All matters heard in the cyber court would be heard by means of electronic communications, including, but not limited to, video and audio conferencing and Internet conferencing among the judge and court personnel, parties, witnesses, and other persons necessary to the proceedings.

An action in the cyber court would be heard by the judge without a jury. Unless a party removed an action filed in the cyber court to the circuit court, all parties to an action in the cyber court would be considered to have waived the right to trial by jury and to have waived the right to move for a change of venue. The court could grant a new trial upon the same terms and under the same conditions and for the same reasons as prevail in the case of the Michigan circuit court in a case heard by a judge without a jury.

Court powers. The cyber court would have the same power as the circuit court to subpoena witnesses and require the production of books, papers, records, documents, electronic documents, and any other evidence, and to punish for contempt. The judge and clerk of the cyber court could administer oaths and affirmations and take acknowledgements of instruments by electronic means. An oath or affirmation taken from a person located outside of Michigan would be considered to be an oath or affirmation authorized by Michigan law.

Appeals. An appeal from the cyber court would be to the court of appeals, as prescribed by supreme court rules. The clerk of the cyber court would have to immediately furnish the parties to every action with an electronic notice of entry of any final order or judgment. The time within which an appeal as of right could be taken also would be governed by supreme court rules.

Alternative dispute resolution. The supreme court would provide by rule for an alternative dispute resolution for matters before the cyber court.

Supreme court rules. In addition to the rules for alternative dispute resolution, the bill would require the supreme court to adopt rules to implement the bill's provisions.

Written report. The state court administrator would be required to submit a written report to the legislature not later than October 1, 2004, on the operation of the cyber court. The report would have to include the administrator's recommendations, if any, for expanding the cyber court's jurisdiction over other matters.

Legislative oversight committee. The bill would create a six-member legislative oversight committee on the cyber court to monitor the development of the court, consider and respond to rules proposed or adopted by the supreme court, and, in cooperation with the state court administrator, determine if further legislation were needed to facilitate the implementation of the cyber court or to expand its jurisdiction. The committee would do all of this for the period beginning on January 1, 2002 and ending on December 31, 2004. The committee would be required to submit a written report on the above matters to the chairpersons of the standing committees in the Senate and in the House of Representatives having jurisdiction over legislation pertaining to the judiciary. The committee also could accompany the required written report with proposed legislative bills to implement its recommendations.

Three of the committee's members would be appointed from the House of Representatives by the Speaker of the House, and three would be appointed from the Senate by the Senate Majority Leader in the same manner in which members are appointed to or removed from standing committees in each legislative house. Committee members could be reimbursed for expenses incurred in administering their duties. The committee would annually elect from its membership a chairperson and alternate chairperson (who would have to be from different

houses), with the first chairperson being from the House of Representatives. The position then would alternate between the Senate and the House of Representatives. The committee would conduct its business at public meetings in compliance with the Open Meetings Act, with public notice of the time, date, and place of the meetings being given as required by the act. Special meetings would be held at the call of the chair or a majority of the committee. (The bill would define "majority" to mean at least two of the three members appointed by the Speaker of the House and at least two of the members appointed by the Senate Majority Leader.) The committee would prescribe rules for its own procedure. A majority of the committee would constitute a quorum, and any of the committee's recommendations would require the concurrence of a majority of its membership.

Effective date. If enacted, the provisions of the bill requiring the supreme court to adopt rules to implement the bill and those creating the legislative oversight committee would take effect on January 1, 2002. The rest of the bill's provisions would take effect on October 1, 2002.

FISCAL IMPLICATIONS:

According to the House Fiscal Agency, the bill would result in increased state costs, but the amount cannot be determined at this time. (6-12-01)

ARGUMENTS:

For:

The bill is an important technology initiative that would make Michigan the leader in applying information technology to a critical part of the judicial system, namely, business litigation. It not only could benefit businesses by streamlining high-tech business disputes, it also could benefit the state economy by potentially attracting more high-tech companies to locate within the state. The cyber court would build on other developments, in both society and the judicial system, but would take the additional step of creating a completely electronic business court. Already many courts allow for the electronic filing of initiatives, some use distance video for criminal arraignments, and many, if not most, maintain judicial documents in some kind of electronically accessible form. The bill also would complement the expansion of broadband technology already being considered by the state, and the public's increased use of and familiarity with information technology, including the expanded use

of electronic commerce and distance learning. The bill would benefit business by facilitating the prompt resolution of disputes, which can mean the difference between success and failure for new high-tech business ventures. In today's global economy, fast resolution of business disputes is particularly crucial, as costly and protracted business disputes can outlast the sometimes ephemeral high tech companies. Establishing an electronic business court also could benefit non-commercial judicial cases by lessening the workload on traditional court dockets with the removal of at least some business cases to the electronic court.

The bill presents the exciting possibility that Michigan would be the first state in the union to have a fully functioning electronic court. Some states have courts with divisions specializing in business cases, such as New York and North Carolina, while Delaware has a Court of Chancery specially equipped to handle business cases, and Maryland reportedly is on the verge of implementing a separate business division in its court system. Other courts also use elements of computer technology, as, for example, in the federal Microsoft antitrust case, where federal judges used laptop computers that allowed the judges to communicate with their clerks or research legal documents while they listened to arguments and the federal appeals court required both the government and Microsoft to submit their court filings on CD-ROMs that could be viewed on the judges' laptop computers and that had almost 15,000 links to case law, exhibits, legal motions, and even videotaped testimony. The College of William and Mary in Williamsburg, Virginia, also has an experimental electronic court project, Courtroom 21, run by the college and by the National Center for State Courts. The college requires its law students to present mock cases, and has been gathering data on various issues involved in the use of an electronic court. But so far, no working court has gone fully electronic in the ways proposed by the bill (which, for the time being, at least, still would require the judge and the clerk to be physically present in a facility open to the public). Michigan could once again be a trend setter for the nation, and in an area that is sure to only expand over the coming years.

Against:

A number of concerns have been or could be raised about the proposed cyber court. One has to do with the fact that the bill would require the state supreme court to assign to the proposed court elected judges who requested to be considered for that assignment. But what if a judge from an already overworked judicial circuit or district were assigned for the

minimum three-year term to the cyber court? Wouldn't this leave the judicial circuit or district even more under-staffed and overworked? In addition, some people also question whether the special training for cyber court judges would lead the judges to believe that they understood the technological facts in a case before the lawyers even presented their arguments. For example, the February 22, 2001 *New York Times* article quotes a Baltimore lawyer who specializes in intellectual property as asking if it is desirable to have a judge enter the courtroom as his or her own expert, and wondering whether by training judges to be friendly to business there will be a deliberately built in bias to attempt to attract a certain class of litigants to the state. Other people raise the issue of access by the Upper Peninsula to such a court, since broadband technology currently ends at the Mackinac Bridge. How would the Upper Peninsula participate in the proposed court if the technology for such participation is not available to those in the UP? Still other proponents of the idea of a limited electronic court for business disputes pointed out that while it will take a two-thirds majority of both legislative houses to create the court (according to Article 6, Section 1 of the state constitution), amending the legislation, once the court was established, would take only a legislative majority. Should expansions to the proposed electronic court also be subject to a supermajority vote, just as its creation is constitutionally required to have such a vote? Of particular concern to some groups is the possibility that the voluntary nature of the court could be changed in the future by a simple majority vote of the legislature. Furthermore, some people question requiring special training only for judges hearing electronic business disputes. Why should businesses be given specially trained judges just because their disputes could be heard in the proposed electronic court, while other litigants would have to settle for judges who hadn't had special training in how to deal with their problems? Finally, by allowing lawyers not licensed in Michigan to try cases from their home states, it is unclear how the bill would deal with holding out-of-state lawyers accountable to Michigan's legal code and how to discipline them for misconduct.

Response:

With regard to the issue of specially trained judges, Michigan already has moved to something similar by establishing the family division of the circuit court, where, presumably, judges who preside over family law cases have or develop some expertise in family law matters. This seems to be a desirable move, and one that certainly could be encouraged in other areas as well. It also seems desirable to have judges with

some existing background in the kind of cases they hear, with lawyers arguing such cases being afforded the opportunity to provide more detailed information in each particular case. Finally, the bill deliberately would start out with a limited scope for the proposed cyber court, though as the state gained experience in conducting such a court, its scope presumably could be extended to other cases, including even certain criminal cases, if that seemed feasible and desirable. With regard to the Upper Peninsula's access to the proposed court, it should be pointed out that broadband technology, while rapidly expanding, is not the only technological means by which persons could obtain access to an electronic court. Access over telephone lines, which obviously do extend into the Upper Peninsula, is one widespread way in which Internet access is available, and the rapid development in wireless technology also soon may provide another means of access to an electronic court.

POSITIONS:

The governor supports the bill. (5-11-01)

Automation Alley (a regional consortium of over 300 companies, educational institutions and professional and trade associations based in the areas along and about Interstates 696 and 75 in Oakland County) supports the bill. (6-11-01)

The Michigan Manufacturers Association supports the bill. (6-11-01)

The Michigan Trial Lawyers Association supports the creation of a cyber court, but has concerns that future legislation could remove the voluntary nature of such a court by a simple majority vote. (6-11-01)

Analyst: S. Ekstrom

■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.