

SUPREME COURT OF WISCONSIN

NOTICE

This order is subject to further editing and modification. The final version will appear in the bound volume of the official reports.

No. 16-05

In re creation of a pilot project for dedicated trial court judicial dockets for large claim business and commercial cases

FILED**APR 11, 2017**

Diane M. Fremgen
Clerk of Supreme Court
Madison, WI

On October 26, 2016, Attorney John A. Rothstein, on behalf of the Business Court Advisory Committee appointed by Chief Justice Patience Drake Roggensack, petitioned the Wisconsin Supreme Court requesting authorization for a three-year pilot project to create dedicated trial court judicial dockets for large claim business and commercial cases in Waukesha County and in the circuit courts of the Eighth Judicial Administrative District (pilot project). The petition also proposes an interim commercial court rule and creation of guidelines applicable to the pilot project.

The court discussed the petition at open rules conference on November 7, 2016, and voted to approve the pilot project by a vote of 5:2 (Justice Shirley S. Abrahamson and Justice Ann Walsh Bradley opposed, preferring to defer a decision until after a public hearing). The court also voted to solicit written comment and to

conduct a public hearing to obtain additional input regarding the pilot project.

On December 19, 2016, a letter was sent to interested persons seeking input. The court received written responses from: Rose Oswald Poels, President and CEO, Wisconsin Bankers Association; Randal J. Brotherhood, Chair, Business Law Section, State Bar of Wisconsin; and the Honorable Lisa K. Stark, Wisconsin Court of Appeals. The petitioner filed a response on January 30, 2017, attaching several documents, including communications with business courts in other states, and a copy of a letter to Governor Scott Walker from several business entities expressing support for the petition.

The court conducted a public hearing on February 16, 2017. Attorney John A. Rothstein presented the petition to the court. The court also heard testimony in support of the petition from: the Honorable Michael J. Aprahamian, Circuit Court Judge, Waukesha County; Attorney Laura A. Brenner, Reinhart Boerner Van Dueren S.C.; Attorney Lucas T. Vebber, Wisconsin Manufacturers & Commerce; the Honorable Michael R. Fitzpatrick, Circuit Court Judge, Rock County; Michael A. Crowley, Waukesha County Board of Supervisors; Francis W. Deisinger, President, State Bar of Wisconsin; Attorney Lon E. Roberts, Secretary, Wisconsin Department of Financial Institutions; Attorney Randal J. Brotherhood, Chair, Business Law Section, State Bar of Wisconsin; Attorney Brick N. Murphy, Conway, Olejniczak & Jerry, S.C., and Board of Directors of State Bar of Wisconsin Business Law Section; and the Honorable James A. Morrison, Chief

Judge of the 8th Judicial Administrative District of Wisconsin and Chief Judge of Marinette County.

At the ensuing open rules conference, the court discussed the petition, the proposed interim commercial court rule, and proposed guidelines. The court expressed support for the stated purpose of the petition, that it is in the public interest to ensure that large claim cases involving Wisconsin employers or businesses, or which involve complicated commercial disputes, are resolved expeditiously and with the least amount of costs so as to: (a) improve the quality and predictability of justice in connection with business disputes; (b) improve parties' access to justice; (c) make repeat disputes less likely to occur due to guidance provided by ongoing decisions; and (d) make Wisconsin a desirable forum for resolving business disputes.

A majority of the court voted to approve the interim commercial court rule, subject to certain amendments,¹ and to authorize the Business Court Advisory Committee to amend the rule as provided herein and to create guidelines for the pilot project, which shall be

¹ In addition to technical amendments recommended by the Legislative Reference Bureau which the petitioner did not oppose, the Wisconsin Bankers Association recommended and the court agreed that the definition of "business organization" in proposed interim commercial court rule, section 3(a), include banks, savings banks and savings and loan associations, and that the statutes identified in proposed interim rule section, 4(a), include chapters governing state chartered financial institutions. The court declined the Wisconsin Bankers Association's proposal to add the term "employees" to proposed interim rule, section 4(a), and emphasized that the pilot project is generally not intended to encompass litigation brought by individuals against their employers or against financial institutions.

made available on the Wisconsin court system website. The court will review the operation of this pilot project three years after the effective date. Therefore,

IT IS ORDERED that the Waukesha County Circuit Court and the circuit courts of the Eighth Judicial Administrative District shall, as a pilot project, establish large claim commercial case dockets for the assignment of commercial cases as defined in the interim commercial court rule set forth in Appendix A, attached hereto.

IT IS FURTHER ORDERED that the Waukesha County Circuit Court and the circuit courts of the Eighth Judicial Administrative District may commence the pilot project beginning July 1, 2017, or as soon thereafter as reasonably practicable. The pilot project shall run for a period of three years, unless rescinded, modified, or extended by future order of the court.

IT IS FURTHER ORDERED that the Chief Justice will select the circuit court judges who will be assigned to the commercial court docket from the counties and judicial administrative districts participating in the pilot project.

IT IS FURTHER ORDERED that this court shall review the pilot project three years after the effective date.

IT IS FURTHER ORDERED that a Business Court Advisory Committee appointed by the Chief Justice may provide guidance during the pilot project and may adopt, and make publicly available on the Wisconsin court system website, guidelines for the pilot project. The Business Court Advisory Committee that filed this rule petition consisted of: the Honorable Michael J. Aprahamian, Attorney Michael B. Brennan, Attorney Laura A. Brenner, the Honorable Michael R. Fitzpatrick,

Attorney Nora E. Gierke, the Honorable James A. Morrison, Lon E. Roberts, Secretary, Wisconsin Department of Financial Institutions, and Attorney John A. Rothstein, Chair. These individuals have been invited to continue to serve on the Committee during the pilot project. In addition, the Deputy Director of Court Operations, Wisconsin Director of State Courts Office, Sara Ward-Cassidy, is hereby appointed to the Business Court Advisory Committee.

IT IS FURTHER ORDERED that the interim commercial court rule set forth in Appendix A, attached hereto, shall apply to cases in the pilot project. The interim commercial court rule is subject to amendment by a Business Court Advisory Committee submitting proposed amendments to the supreme court.

IT IS FURTHER ORDERED that a Business Court Advisory Committee, in collaboration with the judges assigned to the pilot project and with assistance from the Court Operations, Wisconsin Director of State Courts Office, will monitor the pilot project during its three-year term, and on or before December 1 of calendar years 2018 and 2019, shall submit a progress report to the Wisconsin Supreme Court that addresses the following:

- a. Circuit court data regarding cases assigned to the pilot project;
- b. Levels of litigant satisfaction with the pilot project;
- c. Views of judges and attorneys concerning the effectiveness and benefits of the pilot project relating to the stated goals of the pilot project;
- d. Recommendations concerning eligibility criteria for assignment of cases to the pilot project, adoption of additional

measurements to evaluate the performance of this pilot project, and proposed changes to rules and forms; and

e. Any other matter that should be brought to the attention of the Wisconsin Supreme Court.

IT IS FURTHER ORDERED that notice of this decision be given by a single publication of a copy of this order in the official publications designated in SCR 80.01, including the official publishers' online databases, and on the Wisconsin court system's web site. The State Bar of Wisconsin shall provide notice of this order.

Dated at Madison, Wisconsin, this 11th day of April, 2017.

BY THE COURT:

Diane M. Fremgen
Clerk of Supreme Court

Appendix A

Interim Rule for Pilot Project for Dedicated Trial Court Judicial Dockets for Large Claim Business and Commercial Cases; Assignment and Management of Business and Commercial Cases

1. Purpose, authority.

- a) The purpose of this interim rule (Rule) is to authorize a pilot project to implement a specialized docket for commercial cases in Wisconsin circuit courts. The commercial court docket is designed to operate within the framework of the existing Wisconsin court system with minimal impact on the balance of court operations. It is intended to leverage judicial expertise in commercial law and disputes with commercial litigants' desire to tailor case management practices best suited for resolving substantial business disputes fairly and expeditiously.
- b) This Rule is adopted pursuant to the Supreme Court's rulemaking authority under s.751.12, stats., and the Court's superintending and administrative authority over all courts conferred by Article VII, §3 of the Wisconsin Constitution. This Rule is temporary and is subject to change as the needs of the pilot project dictate.
- c) This Rule shall be known and cited as the Commercial Court Rule, or CCR.
- d) This Rule is intended to supplement, not supplant, the rules of the Wisconsin Supreme Court and the Wisconsin statutes. Should any conflict be deemed to exist between this Rule and any other supreme court rules or statutes, the other rules or statutes shall control.

2. Scope, effective dates.

- a) This Rule applies in counties and judicial administrative districts that have established specialized dockets for commercial cases, which are referred to in this interim Rule as the "Commercial Court."
- b) The pilot project will begin and end as authorized by order of the Supreme Court. See S. Ct. Order 16-05, 2017 WI 33 (issued Apr. 11, 2017, eff. July 1, 2017). The approximate duration of the project will be from July 2017 to July 2020.
- c) No case filed before the inception date of the pilot project will be included in this pilot project.
- d) The circuit courts for Waukesha County and in the Eighth Judicial Administrative District are hereby designated as the initial locations for the Commercial Court dockets.
- e) The Chief Justice shall select the circuit court judges in the counties and judicial administrative districts participating in the pilot plan who will be assigned to the Commercial Court docket. Selection of a judge for the Commercial Court docket shall not preclude the judge from continuing work on any other assigned docket. The Chief Justice shall select no fewer than three circuit court judges in Waukesha County and no fewer than four circuit court judges within the Eighth Judicial Administrative District.

- f) The pilot project may be expanded or extended by order of the Supreme Court upon the recommendation of the Director of State Courts. This Rule is subject to revision by order of the Supreme Court as the pilot project progresses.

3. Application; definitions. For purposes of this Rule:

- a) "Business organization" includes a sole proprietorship, corporation, partnership, limited liability company, limited partnership, professional association, service corporation, joint venture, bank, savings bank, savings and loan association, or business trust. A "business organization" excludes an individual, a family trust, or a political subdivision or government entity.
- b) "Consumer contract or transaction" is a consumer contract or transaction that is primarily for personal, family, or household purposes.

4. Mandatory Assignment of Cases to the Commercial Court Docket. Any case that is one of the following types of cases that is filed in a circuit court in which a Commercial Court docket has been established shall be assigned to the Commercial Court docket as provided under section 7, and the Commercial Court shall have jurisdiction over any of the following types of cases:

- a) Cases involving the governance or internal affairs of business organizations, including claims between or among owners or constituents of a business organization; claims against officers, directors or managers of a business organization; claims involving the indemnity of owners, officers, directors, or managers of a business organization; claims involving the interpretation of the rights and obligations under the law governing the business organization, such as chs. 178, 179, 180, 181, 183, 185, 214, 215, 221, 222, & 223, stats., or any similar statute or law from another jurisdiction; claims involving the interpretation of the rights and obligations under the agreements governing the business organization, such as the articles of incorporation, bylaws, operating agreements, membership agreement, or partnership agreement of the business organization;
- b) Cases involving tortious or statutorily prohibited business activity, unfair competition or antitrust, including claims under ch. 133, stats.; claims under s.100.30(5m) or (5r), stats.; claims under s.134.01, stats.; claims of tortious interference with a business organization; claims involving restrictive covenants and agreements not to compete or solicit; claims involving confidentiality agreements;
- c) Cases involving the sale, consolidation, or merger of a business organization, conversion, share exchange or the sale of substantially all of the assets of a business organization;
- d) Cases involving the sale of securities, including claims for securities fraud under ch. 551, stats., or any similar statute or law from another jurisdiction;
- e) Cases involving intellectual property rights, including claims to determine the use, ownership, or status of trademarks, trade secrets, or copyrights; claims under s.134.90, stats.; claims involving any agreement relating to the licensing of any intellectual property right, including patent rights;
- f) Cases involving the relationship between a franchisor and franchisee or similar distribution relationship, including claims arising from ch. 135, stats., or any similar statute from another jurisdiction; claims arising from s.134.93, stats., or any similar

statute from another jurisdiction; claims arising from ch. 553, stats., or any similar statute from another jurisdiction;

- g) Cases involving claims or disputes under chs. 402, 403, 404, 405, or 409, or any similar statute or law from another jurisdiction, when the amount in controversy exceeds \$100,000, exclusive of interest, costs, and attorney fees.

5. Discretionary Assignment of Cases to the Commercial Court Docket. In addition to the cases identified above in section 4 above, and which are not otherwise excluded under section 6, parties may jointly move the chief judge of the judicial administrative district in which the Commercial Court sits for discretionary assignment of a case to the Commercial Court docket. If the motion for discretionary assignment is granted, the case may be assigned to the Commercial Court docket. In deciding a motion for discretionary assignment of a case to the Commercial Court docket, the chief judge of the judicial district shall consider the parties to the dispute, the nature of the dispute, the complexity of the issues presented, and whether the Commercial Court's resolution of the case will provide needed guidance to influence future commercial behavior or assist in resolving future disputes. The decision granting or denying a motion for a discretionary assignment of a case to the Commercial Court docket is final and non-appealable.

6. Ineligible Case Types. The following cases will not be assigned to the Commercial Court docket:

- a) Cases involving small claims under ch. 799, stats.;
- b) Cases involving a governmental entity or political subdivision seeking to enforce a statutory or regulatory restriction or prohibition;
- c) Cases involving consumer contracts or transactions; landlord/tenant disputes; domestic relations claims; labor claims; receivership, insolvency, or liquidation cases; malpractice claims; personal injury claims; product liability claims; civil rights claims; tax disputes; cases seeking to compel arbitration or to affirm or disaffirm an arbitration award; construction claims; or environmental claims unless the claim or dispute identified in this section is ancillary and incidental to a case assigned to the Commercial Court under section 4.

7. Identification and Assignment of Cases to Commercial Court Docket.

- a) Plaintiff's duties. At the time of the filing of the complaint under s. 801.02(1) stats., the plaintiff in a civil action shall state on the face of the complaint whether the case qualifies for the Commercial Court docket under section 4.
- b) Clerk of court duties. In Waukesha County, upon the filing of a case qualifying for the Commercial Court docket, the clerk of court shall assign the case to the Commercial Court docket and to one of the judges designated for the commercial court docket. In the event of a request for judicial substitution, the case shall be transferred to the next Waukesha County circuit court judge who is assigned to the Waukesha County Commercial Court docket. In the Eighth Judicial Administrative District, for cases filed in any county in which a circuit court judge in that county has already been assigned a Commercial Court docket, the same procedures shall apply. In counties of the Eighth Judicial Administrative District in which no circuit judge has been assigned to the Commercial Court docket, upon the filing of a qualifying

case, the clerk of court shall notify the chief judge of the Eighth Judicial Administrative District who shall assign one of the Commercial Court docket judges from the other counties in the Eighth Judicial Administrative District. The chief judge's selection shall be made pursuant to s.751.03(3), stats. In the event a request for substitution is filed against the judge chosen by the chief judge of the Eighth Judicial Administrative District, the chief judge shall then assign another judge from the Eighth Judicial Administrative District who has been appointed for Commercial Court cases.

- c) Omission by plaintiff; defendant's and third-party defendant's rights and prerogatives of the circuit court. In the event the duties set forth in subsection 7(a) are not met, the circuit court may, *sua sponte*, or upon a motion filed by the defendant or third party with his or her or its responsive pleading or responsive motion, order the transfer of a case to the Commercial Court docket if that judge determines that the case meets the mandatory criteria of section 4.
- d) On assignment of any matter to the Commercial Court docket, the matter shall retain the civil action number assigned to it by the clerk of court upon the filing of the complaint.

8. Disputes Regarding Assignments of Cases to the Commercial Court Docket.

- a) Contesting the assignment of a case to the Commercial Court docket. After assignment of a case to the Commercial Court docket, the judge assigned to the case may *sua sponte*, or upon motion of any party, reconsider whether assignment of that case to the Commercial Court docket is appropriate under the requirements of section 4. Any party filing a reconsideration motion under this section 8 shall file the motion not later than 20 days after the case is assigned to the Commercial Court docket. If the assigned Commercial Court judge concludes that the case does not qualify for assignment to the Commercial Court docket, the judge shall return the case to the general civil case docket.
- b) Review. Any party aggrieved on the outcome of a motion for reconsideration under subsection 8(a) may request the chief judge of the judicial administrative district in which the Commercial Court sits to review the reconsideration decision. A decision by the chief judge of the judicial district resolving the question of which docket shall be assigned the case is final and non-appealable.

9. Processing of Remaining Civil Cases Not Qualifying for the Commercial Court Docket. Civil cases not qualifying for assignment to the Commercial Court docket under section 4, or for which a joint motion for discretionary assignment has been denied under section 5, shall be assigned to the docket of the general civil court.

¶1 SHIRLEY S. ABRAHAMSON, J. (*dissenting*). I begin by thanking the Committee for its work in bringing forth this petition and for agreeing to continue its work. I also offer my best wishes for the success of the circuit court dockets dedicated to "large business and commercial cases," popularly known as business courts. I cannot, however, join in the adoption of the petition because we do not have the evidence to evaluate the need, if any, for these specialized courts; their structure; and the counties best suited for a pilot program. Moreover, the proposal has the unfortunate potential to cause mischief.

¶2 A significant mischief inherent in the proposal is its message that circuit court judges are not capable of handling complex civil cases and that business, above all, deserves the fastest, most cost-effective, most predictable and fairest disposition of cases. This message is false and undermines confidence in the judicial system. The true message, in my opinion, is that the mission of the courts is that all people should have access to the courts and deserve to have their disputes resolved in a fast, cost-effective, predictable and fair way.

¶3 The defective process used to adopt the business court petition has already had an effect on the way other pending petitions are being processed. Petitioners and opponents, beware!

¶4 In adopting the business court petition, the court, for the first time in institutional memory, adopted a substantive petition without public input, without any hearing, and without discussion.¹ After the court adopted the petition, the court requested comments and held a hearing.

¶5 This process has affected the process used in Rule Petition 17-01, relating to recusal. The recusal petition was filed January 11, 2017 by 54 retired Wisconsin judges asking the court to set objective recusal standards for judges who received campaign contributions from a party to a case. Preliminary discussion of the petition had been set for March 16, 2017 at open court conference. The agenda for the conference was released on March 3, 2017, and included Rule Petition 17-01.

¶6 The first discussion of a rule petition ordinarily involves matters such as whether to schedule a hearing on the petition, whether to invite comments from interested parties, etc. It does not typically involve a vote on whether to adopt or dismiss the petition.

¶7 On March 13-14, 2017, the court received communications from the Wisconsin Institute for Law and Liberty asking the court to postpone its preliminary discussion of Rule Petition 17-01 until the Institute could, within 30 days, submit its opposition to the petition.

¹ The court has adopted, over my objection, a petition seeking technical amendments to a petition already adopted without comment or hearing.

¶8 Perhaps there was some concern by the Institute that the petition might, like the business court petition, be quickly adopted on March 16 without discussion, a hearing, or an opportunity for public comment. Or perhaps the Institute hopes that the Institute's comments will persuade the court to dismiss the petition without further comments or hearing.

¶9 In any event, the preliminary discussion of Rule Petition 17-01 was removed from the March 16 open rules petition conference agenda without any explanation. The court public information officer advised the media that Rule Petition 17-01 will be placed on the April 20 open conference agenda.

¶10 The petitioners have not been advised of this change except through postings of the Institute's communications on the court website. They too may want to make a submission to the court in support of their petition. Otherwise, they might risk their petition being dismissed without further opportunity for discussion.

¶11 Thus, the procedure used for the business court petition is having an effect on the procedure for other petitions before the court.

¶12 I move from procedure for hearing and deciding rules petitions to the substance of the petition creating business courts.

¶13 With regard to the proposal itself, first and foremost, the petition does not achieve the results for which it was adopted. This state of affairs is cause for concern. Three reasons for adoption of this petition were given in the

petition, in written responses, and at the public hearing. None is achieved by the present proposal.

1. The prime reason given for the petition is that the proponents want judges familiar with these kinds of "large claim² commercial cases" to preside in these cases for quality and predictability. Over and over again, the court heard that if any costs are to be saved by the litigants or if any delay in dispute resolution is to be avoided, and if predictability in decisions is to be achieved, it would be because the presiding judges would know what they were doing and would not need as much education from the lawyers.³ Yet neither the petition nor the order describes the experience or education that the business court judges should have.⁴
2. A second reason the proponents offered for the petition was that the decisions of the business court would provide guidance throughout the state. Yet the petition does not set forth a method of "publishing" the case law developed by the business (circuit)

² Despite the hype, the petition does not limit jurisdiction to cases involving large sums of money.

³ It is the lawyers' time and effort to educate judges that increases the costs and causes delay, according to the written comments and testimony.

⁴ Indeed, some of the justices thought it advisable that the judges be able to learn on the job and not be case hardened.

courts or giving effect to these business (circuit) court decisions that have no precedential or persuasive effect under the present law. Nor do the proponents or the petition consider appellate review and the business training and experience (or lack thereof) of appellate judges.

3. The petition proclaims that no costs are involved. Not true! The petition involves significant costs; it is far from a free program.⁵ For example, the petition suggests enlisting an expert in the evaluation process. Such an evaluation process is a significant expense. Furthermore, the evaluation process should be part of the creation of the business courts. It is not. The evaluation is at best an expensive afterthought. Shouldn't this court compare the costs for this project with the costs of other projects the court might undertake, like pilot programs to improve access to justice for middle-class and indigent persons?

¶14 Second, and importantly, the process for adoption of the petition was defective. The defect was the failure to vet the project. The proposal was not discussed with staff, chief

⁵ Costs are everywhere: judges will need to be trained; the Office of Court Operations will need to analyze and report data; clerks of circuit court will have additional duties; and CCAP, already on over-load with mandatory e-filing and decreased revenue, will have additional responsibilities.

judges, the bar, and others. Poor process is apt to end in a poorly planned and managed project.

¶15 The usual process is the court sets a time for a hearing (or for written comments, or for both written comments and a hearing), reads the comments, listens to testimony at the hearing, discusses the proposal in open conference, and then votes on the petition.

¶16 Adoption of this petition was a pre-orchestrated "done deal," without any opportunity for real, meaningful input by others; a real, meaningful hearing; or a real, meaningful discussion by the justices. What kind of fair, open-minded process is that? As a result, the court heard nothing from the chief judges of the state; the circuit court judges, including the Trial Judges Association; court staff; consumer groups; or justices who attempted to make any suggestion to improve the proposal. 'Twas no use to come forth. The ship had already left the dock.

¶17 The errors resulting from the defective process were summarized in a letter by Judge Lisa Stark, presently a court of appeals judge and Dean of the Judicial College and formerly a practicing lawyer with a substantial business litigation practice and a circuit court judge. It is a very thoughtful letter that is a must-read for anyone who wants to change the way courts do business—and there are many ways we should be changing to improve our system for the litigants and public.

¶18 Judge Stark demonstrates an understanding of the various components of the court system and undertaking pilot,

experimental programs, an understanding that would have assisted the Advisory Committee.

¶19 Judge Stark's critical comments evaluating the petition fit into three categories:

- The evidentiary bases for creation of commercial case dockets are missing.
- The effectiveness of the pilot project cannot be evaluated because the present status of business/commercial cases is unknown and no provision is made to seriously evaluate the status of the business/commercial dockets as the pilot project goes forth.
- The effect of this specialized docket on the rest of the cases in the county and the judges across the state has not been considered.

¶20 I attach Judge Stark's excellent letter as Attachment A. Her letter is on the rules portion of the court's website. I attach her letter for a fuller discussion than I present here. Judge Stark does not write in opposition to the petition. Her letter wisely asks for Wisconsin-based research evidencing the problem to be resolved (e.g., a delay in handling complex commercial litigation cases? excessive costs? a lack of predictable results? any unfair handling of such cases at the trial or appellate levels?); a study of solutions to the problems to be resolved; and benchmark data to compare business court cases before, during, and after the adopted solution.

¶21 The final mischief I address is that the formation of business courts seems to be tied in some fashion to financial support of the pilot business courts by business interests (whose cases are to be before the business courts) and increased judicial compensation. Attachment B is a letter (referenced at the hearing and on the court's website) submitted by 20 different business constituencies to Governor Walker indicating that these constituencies would consider financially supporting the business courts and that they favor increased judicial compensation for judges.

¶22 Again, let me be clear. At this time I oppose the creation of the business courts. The process for their creation was defective, and the plans for creating the business courts reflect the defective process. We do not know what problems, if any, business interests currently face in the courts; what solution(s), if any, should be created; and how any solution should be evaluated.

¶23 I hope this pilot project does not prove to be taxpayers' money down the drain. I wish the Committee and court had offered a business-like approach to this project and a cost-benefit analysis.

¶24 For the reasons set forth, I write separately.

¶25 I am authorized to state that Justice ANN WALSH BRADLEY joins this dissenting opinion.

ATTACHMENT A



WISCONSIN COURT OF APPEALS

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January 19, 2017

Clerk of the Wisconsin Supreme Court
Attn: Deputy Clerk – Rules
P.O. Box 1688
Madison, Wisconsin 53701-1688

Re: Rule Petition 16-05, In re creation of a pilot project for dedicated trial court judicial dockets for large claim business and commercial cases

Dear Deputy Clerk:

This letter is written in response to the request for comment on the referenced rule petition. I write to suggest the Supreme Court consider three significant issues prior to implementing the pilot project: (1) the evidentiary basis for creation of Commercial Case Dockets (CCDs) in Wisconsin; (2) the ability to evaluate their effectiveness; and (3) the credibility of the remaining justice system and morale of the other judges serving in the remainder of the circuit court dockets in our state. Action taken in response to these issues will enhance the viability, effectiveness and perception of the proposed Commercial Case Dockets (CCDs) and the pilot project. My comments on this issue are informed by my experience as a civil litigator for eighteen years with approximately one-third of my practice devoted to business litigation; as a circuit court judge for thirteen-plus years in a general jurisdiction circuit court in Eau Claire County, which included nine years as the presiding judge over a drug treatment court; as a dean of the Wisconsin Judicial College; and as a judge for almost four years on the District 3 Court of Appeals.

I. Evidentiary Basis for the CCDs

The stated purposes for the pilot project and creation of CCDs in Wisconsin include a desire to make Wisconsin a more favorable forum for resolving business disputes by improving access to justice, expeditiously resolving business cases and reducing litigation costs, improving the quality and predictability of justice in connection with business disputes, and decreasing the likelihood of repeat litigation. These are laudable goals for any area of law. However, I suggest research is necessary to determine the need for creation of these specialized commercial litigation dockets in Wisconsin, and to provide a baseline to evaluate their effectiveness.

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The proposed pilot project is a unique venture in Wisconsin and differs significantly from other specialized dockets and specialty treatment courts existing in this state. As the petition notes, dedicated dockets have been created in Wisconsin circuit courts for years to handle different types of cases such as family matters, small claims actions, sensitive crimes, probate, children's court, felonies and misdemeanors. However, unlike the proposed pilot project, those dedicated dockets are created based upon the number of case filings and the judges needed to handle the case volume in larger counties, and the judges serve a set term and rotate between dockets. While the judges in such dedicated dockets achieve a measure of expertise in an area of law over the period of their term, they are not usually assigned based upon interest or area of expertise.

The Committee submitting the petition points to specialty courts in Wisconsin as an example for creation of the CCD pilot project. These specialty courts (i.e., treatment courts, veteran's courts, mental health courts, etc.) differ from the proposed pilot project CCDs. Wisconsin specialty courts are created within an individual county, or by agreement between consenting counties, based upon a researched need and a consensus among the stakeholders in those jurisdictions as to the population to be served and who should bear the attendant costs. The specialty courts have their genesis in twenty-five plus years of national research on their effectiveness in reducing criminal recidivism. Judges are selected to serve based upon their expressed interest and willingness to serve, and research suggests their terms should be no more than five years. Many judges receive specialized training after their selection to enhance their effectiveness.

In contrast, the proposal to develop the pilot project CCDs in Wisconsin does not appear to be evidence based. According to the petition, it is based upon a long-standing anecdotal request from the State Bar Business Law Section and some research obtained from other states indicating such dockets speed the time to resolution of complex commercial cases. While providing some support for creation of the CCDs, most of the data from other states appears to be dated, and it does not appear there has been any effort to determine whether the differences in procedure in the different states employing the use of these commercial dockets translates to Wisconsin.

I am concerned we are embarking upon this pilot project without any Wisconsin-based research evidencing a delay in handling of complex commercial litigation cases, a lack of predictable results, or any unfair handling of such cases. In fact, the memorandum accompanying the petition acknowledges the Committee was unable to even determine the number of cases likely to be handled in the CCDs created by the pilot project. Given my anecdotal analysis based upon my experience on the circuit court and court of appeals, I expect the number to be small. (However, I do pause to note the list of case types that are required to be venued in a CCD is quite comprehensive. There is no research provided to support the inclusion of all of these case types, many of which do not appear to be complex or require specific judicial expertise.)

Analysis of the recently completed weighted caseload statistics may shed some light on the number and types of cases that should be subject to the CCDs as proposed. A sample review of the case types proposed to be included in the CCDs from court records for the last several

years in the jurisdictions where the pilot project will operate should provide some baseline information on the number of cases likely to be handled by a CCD and the current time to completion. That information can be used to determine the need for separate dockets, and can be compared to all case types to determine if there is any unusual delay in commercial case processing. A review of the number of cases to be included in the CCDs that have been appealed and decisions reversed in the last several years will provide some insight into whether these case types are being mishandled and fail to provide predictability in result. Without this information, we may be creating a solution without a problem.

Finally, the pilot project proposes those judges assigned to a CCD maintain their current caseload and docket. Without supporting data on the number of cases likely to be venued in a CCD, I question whether that is realistic, and whether cases will be processed more expeditiously.

2. Evaluation

Section 7B of the petition requires the Wisconsin Supreme Court Office of Court Operations to monitor the pilot program and submit an annual progress report to the Supreme Court addressing five topics. Without initial data to use as a benchmark, the Office of Court Operations will be unable to: compare the number of cases heard in the CCDs to the number brought prior to their creation, thus determining if the CCDs have helped to achieve the goal of decreasing repeat litigation; compare the time to completion of cases before and after the implementation of the pilot project, thereby determining whether the CCDs more expeditiously handle business cases and reduce litigation costs; and compare the number of cases appealed and reversed prior to and after the creation of the pilot project, thereby helping to determine if complex commercial cases are handled more predictably and fairly.

I am also concerned that no resources are proposed to be allocated to the pilot project. Clerks of court, district court administrators, chief judges and the Office of Court Operations will have extra burdens on their time under the proposal. Costs will be incurred to establish and maintain a database or repository for CCD opinions that is accessible and useable by all. The Office of Court Operations will incur costs in gathering the proposed data and submitting progress reports. For example, the petition suggests the Director of State Court may wish to enlist the assistance of an expert in the evaluation process. Doing so will necessarily cost money. In addition, the petition recommends the level of litigant, attorney and judicial satisfaction with the pilot project be determined. I am aware from my recent service on a committee involved in assessing satisfaction with a change to a comment in SCR 60.04 that the cost of validated surveys, not anecdotal evidence, ranges between \$3000 and \$15,000 per survey, depending upon who conducts the survey, the number of persons surveyed and the depth of the questioning. We may be able to superimpose this pilot project on the dockets of the judges selected to serve without significant cost other than the hard work and diligence of those judges and their staff, but we will not be able to accurately evaluate the effectiveness of the pilot project without expense. Without an accurate evaluation, we will have no definitive basis to determine the effectiveness of the pilot project and whether it should be continued or expanded.

3. Other Circuit Court Considerations

The pilot project CCDs run the risk of creating a system in which “judge shopping” is permitted and/or encouraged. Specific types of cases are to be mandatorily assigned to the CCDs, some based upon monetary values. This permits litigants to self-select a CCD based upon the type of claims raised and amounts sought. Litigants can petition to be accepted into the CCD, and if accepted effectively remove an assigned judge and self-select the presiding judge, especially in Waukesha County, where it is currently proposed that only two judges be assigned to the CCD. Finally, there is no provision in the petition for assignment of cases in the event of multiple substitutions, which may occur given the number of litigants in complex litigation cases. Will those judges in the other CCD be assigned, and if so, how will these out of district transfers be handled? What happens if all CCD judges are substituted or disqualified?

In the pilot project, the Chief Justice assigns judges to the CCDs. There are no specific criteria for selection or service other than familiarity with commercial disputes, possession of strong business law backgrounds and knowledge of commercial transactions. No set term for service is provided, although I understand that will be necessarily limited by the proposed three-year term of the pilot project. To avoid any impression the creation of CCDs is politically motivated and to avoid other unintended consequences, I suggest that specific objective criteria be established for the selection and assignment of the judges serving in the CCDs, and that set terms for service be established if the CCDs are continued when the pilot project is concluded.

Many judges, including those with state government backgrounds or a number of years on the circuit court bench, who would not normally be considered for these CCD positions, would have the appropriate background, experience and interest to serve. I suggest that an application process be established in the pilot project jurisdictions so that all judges with an interest and expertise may apply for these positions in the CCDs, and that specific selection criteria are established for appointment. If the pilot project proceeds, or is expanded, I also suggest that term limits would be helpful to avoid burnout (which is well supported in treatment court research) and permit others with the interest and experience to serve. Without these opportunities, I am concerned the creation of the CCDs may have the unintended consequence of discouraging otherwise qualified individuals from seeking the bench because they will not believe they will have the opportunity to preside over the types of cases they would find interesting, challenging and rewarding. The public will be disadvantaged through the loss of their service.

(As a side note, the petition suggests guidelines for case management in the CCDs. These suggested practices are taught routinely at the Judicial College and in continuing judicial education seminars, and most are not unique to complex business and commercial cases.)

Finally, I believe the manner in which our message about the creation of the CCDs is conveyed is extremely important. I am concerned the impression created by the petition is that circuit court judges are not capable of handling complex civil cases and their lack of business acumen causes decreased confidence in our courts. I do not want to create the impression that judges who are not selected to serve in the CCDs are somehow less capable, expeditious or fair. We should not create the impression that business, above all, deserves the fastest, most cost

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effective, most predictable and fairest disposition of cases. To do so will create resentment among judges, attorneys and litigants, and cause the public to question the credibility of all serving in the courts.

Conclusion

This pilot project is proposed because there is a perception that complex business disputes are unique, and a separate docket is needed because those with specific expertise in business issues will preside over complex commercial matters more efficiently and effectively. However, before implementing the proposed pilot project, we should have evidence and resources to evaluate those claims. If the claims prove true, we should then provide all judges interested with the opportunity and any necessary training to preside in the proposed dockets. Doing so will enhance the integrity of the entire judiciary and provide for CCDs that are fair, efficient, and sustainable. Thank you for your consideration.

Sincerely,

Lisa K. Stark

cc: Chief Justice Patience Drake Roggensack
Justice Shirley S. Abrahamson
Justice Ann Walsh Bradley
Justice Annette Kingsland Ziegler
Justice Michael J. Gableman
Justice Rebecca Grassl Bradley
Justice Daniel Kelly
Attorney John Rothstein

ATTACHMENT B

January 3, 2017

The Honorable Scott Walker
Governor of Wisconsin
Room 115 East, State Capitol
Madison, Wisconsin

Dear Governor Walker,

We are writing to request your support for including additional funding for judicial pay in your compensation. We appreciate your thoughtful consideration of our request.

As you know, businesses need a stable and predictable legal climate in which to operate. You have been a national leader with reforms that promote fairness and transparency in Wisconsin's legal system, as evidenced by the considerable progress our state has made in national legal climate rankings. We thank you for that leadership.

Our organizations believe that competent and highly-skilled judges are a key ingredient to ensure a fair and predictable court system. We also believe that Wisconsin is more likely to attract competent and highly-skilled judges if they are compensated at a level commensurate to their skill. As such, we would support additional funding for judicial compensation that would place Wisconsin judges more in line with their counterparts in other states.

We also support the Business Court pilot project that is currently under development through the leadership of Chief Justice Patience Roggensack as proposed in Rule Petition 16-05. We believe that a Business Court with specialized competencies in the areas of law impacting business will save time and resources for all parties involved. In order to attract attorneys with the requisite business law expertise to the Business Court, Wisconsin must be able to offer competitive compensation. An increase in judicial pay in your compensation plan will assist in this regard.

We thank you for your continued leadership on legal reforms, and would greatly appreciate your support for this request.

Sincerely,

Kurt R. Bauer
Wisconsin Manufacturers & Commerce

Brandon Scholz
Wisconsin Grocers Association

Mike Theo
Wisconsin Realtors Association

Brad Boycks
Wisconsin Builders Association

Rose Oswald Poels
Wisconsin Bankers Association

Nick George
Midwest Food Processors Association

Erin Roth
Wisconsin Petroleum Council

Pat Goss
Wisconsin Transportation Builders Association

Bob Barker
Associated General Contractors

Joel Frank
Wisconsin Wine & Spirit Institute

Jeff Landin
Wisconsin Paper Council

John Holevoet
Dairy Business Association

Bill Smith
NFIB Wisconsin

Ed Lump
Wisconsin Restaurant Association

Brian Dake
Wisconsin Independent Businesses, Inc.

Emma Shultz
Wisconsin Propane Gas Association

Andy Franken
Wisconsin Insurance Alliance

Matt Hauser
Wisconsin Petroleum Marketers & Convenience
Store Association

Tim Sheehy
Metropolitan Milwaukee Association of
Commerce

Eric Borgerding
Wisconsin Hospital Association

