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To: The Honorable Chief Justice and Justices of the Wisconsin Supreme Court
From: Attorney Richard G. Niess
Re: Objection to Rule Petition 16-05D (original and 9 copies)

May it please the Court.

Rule Petition 16-05D should be rejected by this Court. The petition seeks a second two-year extension for the Wisconsin business court "Pilot Project" ostensibly to gather additional data on its performance. The petition is thus a tacit concession that the data collected over the last five years do not support continuing the business court in Wisconsin.

This dearth of data perpetuates a problem that has plagued this ill-advised "Pilot Project" from its birth in 2016. In originally pitching its version of the business court to the Supreme Court, the Business Court Advisory Committee relied on a number of highly questionable arguments (addressed below). Yet the Committee presented no data demonstrating that there was any commercial litigation problem that needed fixing in Wisconsin circuit courts in the first place, let alone any problem that required such a drastic remedy as establishing a special court for business. No systematic analysis was made of commercial litigation to identify any deficiencies in the years before this business court was adopted under the radar in 2016, nor has the Advisory Committee made any such study in the five years since. Without isolating any problem to be solved, it was a "shoot first, aim later" approach by a secret committee stacked with business interests already dead set on a plan.

Lacking Wisconsin-specific data, the Advisory Committee and its business proponents relied upon mere anecdotal statements from business interests and unvetted "meta-analyses" of unrevealed metrics from other states to support its recommendation to graft the business court onto an already well-functioning circuit court system. (See the February 16, 2017 public hearing on WisconsinEye held months after the "Pilot Project" was already adopted.)

The Advisory Committee not only downplayed the absence of supporting data, but argued that this Court should establish the "Pilot Project" just so such data could be obtained in the three-year pilot period requested in the original Petition 16-05. Id. Indeed, the Committee sold this "Pilot Project" to the Supreme Court as "tailored specifically to seek out that experiential data by which this Court can render reasoned judgments going forward..." See January 31, 2017 "Comments from the Petitioner".

The absence of Wisconsin-specific data in the fall of 2016 was not surprising because Petition 16-05 was adopted by this Court within mere weeks from when then-Chief Justice Roggensack appointed the Business Court Advisory Committee specifically to develop a specialty court proposed by business for business. Ignoring the Supreme Court's own internal operating procedures designed for transparency and diversity of opinion in appointing court committees, the Chief Justice stacked the committee with five business lawyers and three judges (two of whom were soon to be appointed business court judges themselves.) The Advisory Committee contained no labor or consumer advocates, no one representing the viewpoints of the public, and no one speaking for all other stakeholders in our circuit court system. By all appearances, the process was closed to all but pro-business court advocates.

The Advisory Committee proceeded privately and rapidly to develop the business court, which this Court adopted in November 2016 less than two weeks after the Advisory Committee filed its original petition. There was no public hearing, no opportunity for public comment, and no notice that the petition was even scheduled for a vote.

Three years later in 2020, again with no useful "data by which this Court can render reasoned judgments going forward," the Advisory Committee secured a two year extension of the "Pilot Project". It simultaneously obtained an order expanding the pilot to Dane County, with no prior notice to Dane County in any filing with the Court, no input from Dane County, and no representation by Dane County on the Advisory Committee. The Dane County Circuit Court first learned that it would be forced to form a business court after it was already a done deal. The Dane County circuit judges' strong protests were simply brushed aside.

Now the Business Court Advisory Committee petitions for two more years, extending the data-lacking business court "Pilot Project" to seven years from the initial three.

On its face, the petition's request for a two year extension is not aimed at gathering objective data from which "this Court can render reasoned judgments going forward..." The Advisory Committee really only seeks data to support a conclusion it has already reached. Rather than aiming for a fair evaluation of the "Pilot Project" using even-handed evidence—the essence of a pilot project—the Advisory Committee admits to honoring the same confirmation bias that has contaminated its work from the get-go:

> *The Committee seeks to confirm the usefulness of a state-wide commercial court docket, and to identify improvements or changes that may be needed to the rules and statutes before a subsequent rule petition is filed, asking the court to adopt formal rules for the commercial court docket to become a permanent part of the Wisconsin Court System.*

Petitioner Supporting Memorandum, page 2.

Indeed, contrary to the fundamental concept of a pilot project, the Advisory Committee has all along made no secret of its intention to make this business court a permanent feature of

Wisconsin's circuit courts. Just look at the supporting memorandum filed with the original Petition 16-05 in October 2016.

Thus, the plea for more time to gather information must be greeted with skepticism. As discussed below, for five years the Business Court Advisory Committee has taken a decidedly unserious approach to gathering any useful data for objectively evaluating this "Pilot Project". It doesn't require a cynic to conclude that the real purpose for the requested extension is to permit the Advisory Committee to further entrench this business court throughout Wisconsin, thus banking on the principle of institutional persistence to embed this court indelibly in our court system, despite its many shortcomings.

Petition 16-05D is just the latest example highlighting one of the principal shortcomings of the business court "Pilot Project" all along—its failure to consider any viewpoints other than those of business interests in the formation and management of this needless business court.

We all want businesses to thrive in this state. Ensuring that circuit courts handle commercial litigation in a manner that protects the integrity of the courts is an important piece of this. There are certainly ways to accomplish this goal—two of which are detailed below— but the "Pilot Project" is not one of them. Thus, this Court should reject any extension of the business court beyond its current expiration date on June 30, 2022, which is already two years beyond its original end date.

Five years is long enough for any pilot project and too long for this one.

I. MY BACKGROUND

I am pro-business, large and small. For 26 years I represented large and small businesses in state and federal courts throughout Wisconsin. For 13 years, I was the president and shareholder of a small business, a law firm service corporation employing up to twenty people, with all of the same issues faced by every other small business, e.g., leases, tech, health insurance, liability insurance, vendors, personnel, retirement plans, client relationships, shareholder agreements, on and on.

While on the Dane County bench—13 years as presiding judge of the civil division—I handled many of the same types of cases that are now forced involuntarily into the Dane County business court.

A few years back, I attended a National Judicial College seminar on "complex commercial litigation" at the University of Nevada-Reno where the then-nascent business court model was discussed extensively. Since retiring from the bench, I continue to mediate cases with complex business issues.

I have also read—many times—most of the documents published over the last five years by the Office of State Courts on this "Pilot Project", and have researched the etiology of this business court concept nationwide. I have monitored the "Pilot Project" extensively in the two-plus years since it was first revealed to anyone in Dane County that the Dane County Circuit Court would be forced to establish a business court against its wishes.

Finally, I have watched the entire February 16, 2017 rules hearing on this already-adopted business court, which highlighted the glaringly inadequate arguments for establishing a business court in Wisconsin.

II. SPECIFIC OBJECTIONS TO RULE PETITION 16-05D

A. The Business Court Advisory Committee has been cavalier in its data gathering from the very beginning five years ago. It doesn't deserve another two years to do more of the same. Consider the three-year progress report filed by the Advisory Committee in December 2019, which is a far cry from anything objective or reliable, let alone data-driven.

1. Although the 2019 progress report details some data on how cases have progressed in the dedicated business courts—all of which are unremarkable, by the way — the Advisory Committee fails to report the same readily available data on commercial cases handled by circuit courts that do not have a dedicated business court. These data remain uncollected even today. Thus, there is no basis for this Court to "render reasoned judgments going forward" on whether the results in the dedicated business court are any better or worse than those in non-business circuit courts.

2. The 2019 progress report relies on the business court judges themselves to critique their own courts, rather than any objective third-party evaluators. Two of these judges are members of the Business Court Advisory Committee as well. How likely were they to provide objective evaluations, let alone ones that call for brutally honest criticism? And where are the evaluations of those judges handling business cases in the many courts that do not have a dedicated commercial docket?

3. The 2019 progress report relies on an aptly-named Survey Monkey panel with patently biased methodology that disqualifies the results as unreliable on their face.

4. The remainder of the 2019 progress report consists of shallow, one-sided, subjective rah-rah from users of the business court. Query: what business litigator is going to say he or she doesn't like being privileged with a business court created and controlled by business interests for business interests? And why weren't non-business litigators polled on how happy they are about how this Court favors business interests with their own special courts? Don't Wisconsin courts exist for all of us?

Notably absent, moreover, are any comments from litigators who handled commercial cases in those circuit courts that did not have a dedicated commercial docket with presiding judges appointed by the Chief Justice. Dane County had many such cases from 2016 through 2019, all of which were handled as well as those in the business court. Why weren't the lawyers in those cases consulted?

The biased 2019 progress report lacks any input from the many of us in the bar (including justices, judges and former judges) who view the business court as an assault on judicial independence and the principle of equal access to justice. There are compelling arguments against the business court as it exists now in Wisconsin which lawyers need to know in order to decide whether participating in the commercial docket serves the best interests of their clients and otherwise furthers the integrity of the courts. The Business Court Advisory Committee ignores all of this in reporting on the "progress" of this "Pilot Project".

B. Further demonstrating the Advisory Committee's lackadaisical approach to data collecting, Petition 16-05D's supporting memorandum blames Covid for the paltry case filings in the "Pilot Project" over the last two years. Lacking evidence for this contention, the Advisory Committee simply states three times that it "believes" this to be true. See Memorandum, page 3. The Advisory Committee presents zero data on decreased *commercial* case filings in the "Pilot Project," just decreased civil case filings generally around the state. Thus, no competent evidence is advanced supporting the Committee's belief that commercial case filings were decreased in Wisconsin courts at all over the last two years, let alone in those courts controlled by the "Pilot Project".

Covid's impact on the people of Wisconsin was not uniform. Many folks (particularly many women, minorities, the poor and the working poor) suffered existential crises—the disease itself, loss of child care and, consequently, employment, etc. It is no wonder that filing civil lawsuits may have been the last thing these struggling individuals could prioritize. What evidence does the Advisory Committee bring to this Court that business was similarly handicapped by the disease? None. Like its justifications for this business court, the Advisory Committee simply asks us to take their assertions on faith.

Moreover, the Advisory Committee has made no effort to gather data on whether commercial case filings were also reduced in non-business courts. Thus, even if there were data that "Pilot Project" filings were depressed over the last several years, there is as much reason to believe that the reduction was due to distaste for this flawed business court as for any other reason. Preference for federal court? More pre-suit settlements? Agreement to arbitrate? Who knows? Certainly not the Business Court Advisory Committee nor, regrettably, this Court.

On the other hand, there is no dispute that Covid shutdowns have dramatically stressed the criminal justice system with substantial backlogs throughout Wisconsin circuit courts. See Kellie Sue Thompson,"Justice Delayed is Justice Denied," *Wisconsin Lawyer*, March 10, 2022.

In allocating our limited court resources, why not give more priority to the undeniable problems in the criminal courts rather than to imagined problems with commercial litigation? Business has always been able to protect itself in our courts.

C. Those of us who were appalled upon learning that business interests had rapidly taken control over commercial litigation in Wisconsin before anyone else had any meaningful opportunity for input have always suspected the term "Pilot Project" to be a ruse— a charade designed to seduce the public into thinking this was an actual, well-constructed experiment rather than what it truly is, a done deal from the beginning. The request to extend the business court for another two years— four years beyond the three year term ordered when the business court was adopted—only adds to this justified suspicion. This is so because, rather than treating the court as an honest-to-goodness "Pilot Project" by prioritizing the collection of competent data needed to evaluate its performance, the Business Court Advisory Committee has instead focused on growing the reach of the business court both in the scope of its case assignments and in the number of circuit courts appropriated for the mission.

If it were truly a pilot project, why wasn't it treated as such for the last five years? Again, why didn't the Advisory Committee or Office of State Courts collect meaningful data for an evidence-based approach to commercial litigation so we can properly evaluate the business court's performance? Such is the hallmark of a legitimate pilot program and there is almost none of that going on now.

As discussed at length during the February 16, 2017 hearing, Judge Lisa Stark's letter specifically reminded us that hard data are needed to justify the business court, a position which the Business Court Advisory Committee explicitly acknowledged and claimed to embrace. Yet, five years later, the Advisory Committee presents nothing but anecdotal hoorah from those who have advocated for the business court concept from its data-bereft birth. I'm confident you will see more of the same comments submitted in support of this current petition. But, again, so what? That business court lawyers are enamored with their own business court does not, in any way, prove that the court is needed, or even popular outside of business circles. It is an unreliable, squishy metric driven by bias—useless for evidence-based evaluation.

Why do the Advisory Committee and business interests deserve two more years to perpetuate their own special court which has generated inadequate evidentiary support for five years and was never properly vetted in the first place? And why would we task the Advisory Committee with future data gathering given its five year bias in favor of the business court and its pattern of inadequate data-gathering to date?

III. THE COMMITTEE'S FLIMSY JUSTIFICATIONS AT THE FEBRUARY 16, 2017 HEARING

To recap, on November 7, 2016, this Court adopted Rule Petition 16-05 filed by the Business Court Advisory Committee less than two weeks earlier.

The result?

A court like no other in Wisconsin.

The Chief Justice receives recommendations for judicial appointments from the Business Court Advisory Committee and selects a limited number of business court judges for the "Pilot Project." These hand-picked judges then receive training out-of-state from special interests aligned with big business (query: who pays for this?) They adhere to court procedures drafted by business lawyers. The process largely bypasses the voter-controlled and otherwise random judicial assignment of cases. It creates a two-tiered court system—one controlled by business interests and one for everybody else.

Three months later, on February 16, 2017, this Court held a public hearing on the already-adopted petition "to determine whether any fine-tuning [was] warranted." State of the Judiciary 2016 Address, page 4.

During that hearing, proponents of the business court—most of whom were members of the Advisory Committee—were questioned on why Wisconsin needs this court. Various rationales were offered, none with supporting data from Wisconsin and none, frankly, which made any sense.

A. Attorney Laura Brenner, a member of the Advisory Committee and the petitioner here, argued that the business court will save businesses money because they will not have to file briefs to educate judges on the law or how businesses operate. How paying lawyers to file briefs is a burden unique to business was not explained because, of course, in all areas of litigation, lawyers must educate the court on the law and the facts of a particular enterprise.

In medical malpractice cases, to take just one example, expert witnesses are required to explain the complexities of the human body, medical technology, and various alternative treatment modalities. Lawyers have to explain to the court the ins-and-outs of Chapter 655, medical negligence law, vicarious liability of various contracting and intersecting health systems, immunities, damage caps and notice of claims procedures for University Hospital physicians and, perhaps, informed consent law.

Shouldn't physicians get their own courts?

Attorney Brenner was unable to quantify the cost savings to her clients, so again no data. Nor did she explain why business litigators couldn't, with a few key strokes on the word processor, pull a brief from their firm's brief bank to explain, say, fair dealership "community of interest" law to a judge. Having practiced as a civil trial lawyer for 26 years, I can assure you this type of cost-effective representation is done all the time.

B. One proponent argued that the already-adopted business court will encourage businesses to locate here or, if already here, not leave the state for supposedly greener pastures. He was unable to cite any data supporting the theory, either in Wisconsin or any other state, and for good reason. Business courts are not even on the radar for most businesses in making their decisions about where to locate. Instead, successful businesses are concerned about state and local tax policy, transportation infrastructure, nature parks, an available and educated workforce, quality public and private schools, ultrafast wifi internet, clean energy and water, disaster protection, affordable housing, nightlife and outdoor recreational opportunities for employees, to name some of the more salient considerations. See, e.g., Konrad Putzier, "The Next Austin? What Companies Will Look for in a Headquarters City," *Wall Street Journal,* February 9, 2022. https://www.wsj.com/articles/ten-key-factors-for-headquarter-cities-of-the-future-11644426062.

C. Attorney John Rothstein, then-Chair of the Advisory Committee, claimed business courts will provide "better justice" for business without defining what that means, or explaining why business deserves "better justice" than anyone else. Business courts with judges hand-selected by the Chief Justice will also be better for everyone else in the state, he claimed, because they will free up other judges to handle the supposedly more routine non-business litigation. Again, no data were introduced—nor even anecdotal stories—suggesting judges in this state were not then timely and competently handling all litigation in their courts, including commercial cases. All judges I know are eager to roll up their sleeves to deliver the best, most cost-effective process and result for the litigants in all cases, even the most complicated ones. It's what we do (or, in my case, did).

Attempting to cover for the absence of Wisconsin-specific data supporting the need for a business court, Attorney Rothstein invoked "metadata" from other states. But the "metadata" themselves were not produced to allow this court to determine if these other states were fair apples-to-apples comparisons with Wisconsin. Unlike Wisconsin, maybe these other states actually identified a problem with their commercial litigation.

Mostly, Mr. Rothstein cited these "metadata" as demonstrating that businesses in other states liked having their own courts. Well, who wouldn't? A more telling question, however, is this: how do the non-business litigators in those other states—and their clients—feel about their second-class status in circuit courts? Where are the "metadata" on that?

D. One proponent endorsed the idea that we should publish business court decisions so that businesses could better predict how a particular commercial case issue would be handled in Wisconsin courts, the theory apparently being that other business court judges would read the decisions and adopt their rationale. Judge Michael Fitzpatrick envisioned business court judges working nights and weekends to draft written opinions for this purpose instead of ruling from the bench as judges are taught in the Wisconsin Judicial College to do whenever possible in all other litigation.

Posting links to circuit court decisions on the Supreme Court website is a bad idea, and not simply because the Supreme Court's apparent imprimatur exalts these decisions to undeserved prestige.

None of the circuit court decisions currently posted on the Supreme Court website set forth any novel exegesis on a difficult point of law that could be cited by the business community as heralding how Wisconsin courts would apply previously uninterpreted substantive commercial law. That is not to say they are not well-crafted opinions. They are. But they all involve the application of well-settled law to the specific facts of each case, and in that respect constitute the bread-and-butter of what trial court judges do daily in cases of all kinds, not just commercial cases.

Posting these written decisions on the Supreme Court website accomplishes little for business litigators because each commercial case involves its own highly fact-specific situation, and more often than not the controlling law has already been well-settled by an appellate court.

And in those rare situations where the law is less than well-settled, of what use is a circuit court decision? These decisions have not been reviewed by the appellate courts and may be wrong. Thus, a decision bank containing business court opinions and rulings serves to perpetuate any unreviewed errors the business courts make. There is a reason why we have appellate courts with published precedent, which the Business Court Advisory Committee seeks to sidestep with this shadow bank of business court decisions.

Moreover, publishing business court decisions invites confusion among counsel, clients, and the courts as to their significance because circuit court decisions are in no way precedent and should never be cited as such. Circuit court judges already deal with too many improperly cited unpublished Court of Appeals' cases.

Finally, even if posting business court decisions under Supreme Court aegis wasn't a bad idea, doing so is unnecessary. Business litigators are a specialized group with their own State Bar section. You can bet that any significant circuit court decision will be circulated statewide in chat groups, blogs, seminars, you name it. Such widespread decision-sharing among lawyers makes these decisions readily available to anyone who wishes to bring them to any other circuit judge's attention. Every circuit judge and trial lawyer in Wisconsin can tell you that broad dissemination of significant circuit court decisions happens frequently.

IV. MORE RECENT JUSTIFICATIONS ADVANCED FOR THE FLAWED BUSINESS COURT/COMMERCIAL DOCKET MODEL

Newer rationales for the business court, all unpersuasive, have appeared in whack-a-mole fashion. They boil down to the same type of cheerleading by business interests (and some of the handpicked judges) that has pervaded the Advisory Committee's work.

A. Without any competent supporting evidence, the proponents argue that the selected judges are more willing and better situated by experience to handle these cases than those judges elected by their counties' voters to do so. The contention profoundly misinterprets the essential nature of judging, and is simply not true. Should medical malpractice cases only be handled by judges educated in medicine? Or products liability cases only by judges experienced in mechanical engineering?

And even if it were true, why are we only transferring, for example, commercial real estate construction disputes to a specialized court where they exceed $250,000, and excluding small business, which is the backbone of Wisconsin's economy? A commercial real estate construction dispute is no more complex and deserving of special attention for big business at $251,000 than it is for a Mom-and-Pop shop at, say, $75,000. Yet, big business gets its own courts.

B. Again without any supporting data, proponents of the business court posit that commercial cases are more specialized and difficult than other civil litigation. This Court knows from its daily experience that this contention is also not true. More difficult and specialized than medical malpractice, products liability, mass torts, insurance coverage, eminent domain, actions affecting the family, engineering/building construction, legal malpractice cases with their "case within a case" component, administrative law, and constitutional issues, to give just a few examples?

How many specialized, dedicated courts should we have?

C. No data support the rationalization that commercial cases are better handled by these handpicked judges (nor, by the way, do I argue that they are handled any worse.) Indeed no data back up the contention that the business court has improved the handling of commercial litigation in Wisconsin in any respect. Otherwise, the Advisory Committee would not have felt the need to file Rule Petition 16-05D. But a two year extension of the "Pilot Project" cannot cure this deficiency because, again, the Advisory Committee has gathered no data demonstrating how circuit courts performed in their handling of commercial cases before the "Pilot Project," nor any data on how non-business courts in Wisconsin have handled them since. The few hard data that actually have been collected by the Advisory Committee over the last five years reveal no greater efficiencies nor better results than circuit courts achieved before Rule Petition 16-05 was adopted in November 2016.

D. Nor do they support the illogical argument that these handpicked business judges two counties away can protect against collateral damage to innocent parties caught in the crossfire of business litigation better than the judges elected in the county where the business operates.

E. As for the contention that business courts have done well in other states, so what? How did commercial litigation fare in those states before the business court? Do these other states

grant business the same sweetheart deal in their court systems, with their own hand-picked judges and controlling committee structure? Again, the Business Court Advisory Committee has made no attempt to make an apples to-apples comparison—indeed, any comparison at all—between Wisconsin's approach to the business court and that of any other state. Give the Committee two more years, and it still won't do it.

F. Comparisons to treatment courts are disingenuous. This is true for many reasons but, as pertinent here, the litigants in these treatment courts do not participate in choosing the court's judges nor does the Chief Justice.

Judge John Markson has previously addressed the inapt analogy to treatment courts in a comment responding to a September 2021 *Wisconsin Lawyer* article on the business court:

> *I do object to the attempt to bolster this project by saying it is like a treatment court. It is not. I had the privilege of serving four years in our drug treatment court and six in our OWI treatment court. Treatment courts are very different from the business court project. Treatment courts do not handle litigation. A drug or OWI treatment court works with criminal offenders whose criminality is associated with drug or alcohol dependency. Participants must meet established criteria, but participation is voluntary. The judge works as part of an interdisciplinary team to assure that participants get into treatment and complete treatment. Participants return to court at specified intervals for an extended period of time, perhaps a year or so. Treatment court judges get specialty training because they deal with issues outside the usual litigation docket of a trial judge.*
>
> *The principles governing treatment courts are rigorously evidence-based. Research shows that treatment courts work. However, because treatment courts are so different from the business court project, it is not reasonable to draw any inference about how well the business court project will work by comparing it to treatment courts.*
>
> *Fundamentally, it is worth remembering that treatment courts were designed to solve a well-defined, recognized problem: that locking people up does nothing to address the addiction that got them into trouble with the criminal justice system. In fact, treatment courts are sometimes referred to as "problem-solving courts."*
>
> *This brings us back to the question: just what is the problem the business court project is trying to solve? Given the issues articulated by Judge Niess, is it worth it?*
>
> *Perhaps we will see, but in the meantime, I respectfully suggest we do away with the notion that this project is like a treatment court, because it simply is not.*

IV. A BETTER ALTERNATIVE TO WISCONSIN'S BUSINESS COURT—FOR BUSINESS AND FOR OUR COURT SYSTEM

So, if the current business court has been adopted for no good reason–if it currently serves no purpose other than to grant commercial interests their own special deal in the circuit courts–why are we sacrificing fundamental court values to make it happen?

There is a better way.

This court should deny Petition 16-05D and allow this business court "Pilot Project" to expire on June 30, 2022. Cases that are already in a business court can be handled there to conclusion, while assignment of commercial case filings commencing July 1, 2022 should be handled like they, and every other civil case in Wisconsin, had been handled for decades, on a county-by-county basis.

If a credible contention then arises that commercial litigation in Wisconsin is beset by one or more major, system-wide difficulties—and a simple solution is not otherwise apparent—this Court should use its Internal Operating Procedures, page 27, et seq., to appoint an unbiased task force composed of members broadly representing the interests of all stakeholders in our circuit court system. These committee members should include not only large and small business, but consumer advocates, general practitioners, the public, the court system, and labor advocates as well.

This Court should assign to the task force the mission to define the problem and its cause, gather competent data to better understand it, and explore strategies to remedy the problem in as minimalist a manner as possible that also honors our courts' democratic structure, ethics and other long-held values. Before adopting any proposal for drastic change in case handling (like the current business court, for example), the Court should require an opportunity for public comment and a public hearing. Then this Court should adopt the proposed change only if it concludes there is no other, less drastic way to solve the problem.

Had this procedure been followed with the business court proposal in 2016, any problem identified could have been remedied without resort to a substantial structural change as damaging to our circuit court system as the special prize-for-business "Pilot Project" has been.

V. ANOTHER BETTER ALTERNATIVE FOR BUSINESS AND FOR OUR COURT SYSTEM

If retaining a reformed business court in some form is still the Supreme Court's preferred way to go, here are six steps essential to removing the ethical and practical warts that plague this current model without compromising the court system's efficient, professional handling of commercial cases.

A. Stop allowing the Chief Justice to handpick the judges who will hear commercial cases, whether in collaboration with the Advisory Committee and business advocates or otherwise. No other docket in Wisconsin does this. The current practice degrades judicial independence and mocks the principle of equal treatment in our courts.

B. Stop spending taxpayer money to send these select judges out of state or by Zoom to be "educated" by partisan interests (or worse, allowing these partisan interests to pay.) Instead, redirect the funds to the Wisconsin Judicial College to create for-credit commercial docket judicial seminars for *all* judges in this state. The training could be the focus of either freestanding seminars, or the annual three-day Judicial Conference, which is constantly looking for relevant programming. Use Wisconsin-based nonpartisan business academics, owners, lawyers, leaders, and other experts as faculty. This type of judicial education is already done successfully for all other types of litigation in this state and would be just as effective for circuit court commercial litigation.

One focus of the training should be the docket-management protocols the current business court employs. These procedural case-management tools, although more cumbersome than necessary, are no more difficult to apply than those governing other complex litigation in Wisconsin. Indeed, little contained in these protocols, other than some unnecessary paperwork, is different from how commercial litigation has been handled in Dane County—and, I suspect, in most circuit courts statewide—for years.

C. Stop limiting the number of judges who hear these cases. Properly trained (see above), all judges in every county can and should handle these cases as they were elected to do, subject to local-court case-assignment and judicial-rotation rules. If efficient, expert judicial disposition of commercial cases is truly the goal, the more well-trained judges handling this docket, the better.

D. Keep the cases in the venue where filed, subject to the same venue requirements and judicial-substitution rules as in all other civil cases. If a judge cannot for some reason hear the case, select a new judge in the same manner as substitutions and conflicts are handled.

E. Stop mandating that commercial cases be handled using the commercial docket case-management protocols. Instead, adopt the protocols as guidelines to be followed if counsel agree. The guidelines can be effectively taught by the Wisconsin Judicial College and encouraged by this Court, but should remain modifiable at each judge's informed discretion as appropriate to each particular case and in collaboration with counsel. Commercial litigators almost always know more about a case and the best way to expeditiously resolve it successfully than the judge does. Rigid adherence to the protocols erroneously presumes otherwise.

F. Stop posting links to circuit court business decisions on the Supreme Court website, for the reasons set forth in section III, D above.

VI. ADDITIONAL COMMENTS FROM OPPONENTS OF THIS BUSINESS COURT

The Business Court Advisory Committee has recently solicited comments on the business court from members of the bar. I have encouraged judges and attorneys to email Advisory Committee Chair Attorney Laura Brenner their thoughts. I hope this Court will retrieve all of the comments from Attorney Brenner, because I believe they will demonstrate the depth and breadth of the opposition to the big business takeover of commercial litigation in our circuit courts.

I attach a sampling of the comments, including emails from judges and former judges Brian Blanchard, Paul Lundsten, Michael Skwierawski (representing himself and 19 other judges and attorneys), and David Flanagan, as well as attorneys Timothy Casper and Joseph Humphrey.

VII. CONCLUSION

This Court should press the re-set button on commercial litigation in this state by denying Rule Petition 16-05D.

The current business court model is a Trojan Horse offering from special interests that should alarm anyone concerned about judicial independence and equal access to justice in Wisconsin courts. It is also a slippery slope to a Pandora's box full of potential specialty courts unfairly influenced by special-interest litigants rather than, more appropriately, controlled by Wisconsin voters.

And to what end? The business court provides no demonstrated advantages to businesses litigating commercial cases, yet creates the undeniable image problem of unequal treatment in our court system—a self-inflicted black eye.

Under the Wisconsin Constitution and statutes, circuit courts in this state have general jurisdiction over all matters criminal and civil, including business cases. Circuit judges are elected by the voters in each county to carry out this mission within their counties, including the handling of all commercial disputes. To eliminate the perception that any litigant might achieve an unfair advantage over other litigants through judicial assignment, all civil cases in Dane County (including commercial disputes) used to be randomly assigned among ten experienced civil judges. And, of course, substitution rights were available to all litigants as a last resort.

In the 13 years I served as presiding judge of the Dane County civil division, I never heard a complaint about the speed, efficiency, or quality of the justice achieved in any commercial case, either in Dane County or elsewhere in Wisconsin.

Why have we upended this system, successful for so many years, to serve the wants of a special interest group that is unable to justify the change with anything that passes for reasonable argument or reliable data? Why do businesses alone among civil litigants need their own limited

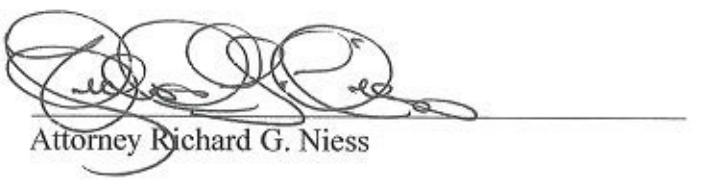
number of exclusive judges handpicked by the Chief Justice and trained by out-of-state special interests? Why do they alone deserve to bypass the constitutional and statutory scheme that grants Wisconsin voters, not large and small business, ultimate control over the judiciary?

And at what cost to the fundamental credibility of our court system in the eyes of the public?

We should return to the system we had before this Court adopted the "Pilot Project" in 2016. Then, if there is truly a need to fix commercial litigation, let's build an evidenced-based solution from the ground up. Include representatives from all interested consumers of our court services in the process so that, to the extent possible, the solution works for everyone in our court system, not just one particular special-interest faction.

Thank you for considering my comments.

Respectfully submitted this 8th day of April, 2022.



Attorney Richard G. Niess

Cc: -Attorney Laura Brenner (lbrenner@reinhartlaw.com) by email attachment
-MS Word copy to the Office of the Clerk of the Supreme Court by email

Subject Business Court Advisory Committee

From Brian W Blanchard <Brian.Blanchard@WICOURTS.GOV>

To: 'lbrenner@reinhartlaw.com' <lbrenner@reinhartlaw.com>

Cc: 'madniess@aol.com' <madniess@aol.com>

Date Feb 16 at 12:34 PM

Dear Attorney Brenner,

I write in strong support of each of the suggestions provided by Judge Niess in his current Wisconsin Lawyer essay (Feb. 2022). His points resonate with me about the reality, as well as the damaging optics, of the current operation of this pilot.

Please allow me to amplify one of his core points. It rises from my daily work reviewing records in appeals. I'm often struck by the abilities of circuit court judges to navigate obscure or potentially complicated areas of Wisconsin law that the judges have never confronted before. How is it that these judges routinely manage to come up with sensible, timely, effective resolutions to issues in unusual cases across the very wide range of legal topics (property law, divorce, probate, contracts, torts, criminal law, the list goes on)?

There are of course many contributing factors. But it's clear that the judges have access to quality judicial education and resources, equipping them to address a wide range of issues regardless of their particular professional and personal backgrounds. Beyond that, of course, they have every incentive to try hard to maintain their reputations for fairness, acuity, and efficiency among their judicial colleagues across the state, members of the bar, and the public at large.

Business disputes can certainly get complicated. But so can divorces. As Judge Niess points out, judicial education is important for all complicated areas of law. But in my experience, a complicated set of maintenance and property division disputes in a heavily litigated divorce case can be more difficult—sometimes much more difficult—for a circuit court judge to resolve in an effective and timely fashion than the types of business disputes that I see routinely litigated in our state courts.

Thank you in advance for considering and sharing these thoughts with others working on these issues.

Sincerely,

Brian Blanchard
Judge, Wisconsin Court of Appeals, D-IV

From: lundsten@live.com,
To: lbrenner@reinhartlaw.com,
Subject: Business Court Pilot Program
Date: Tue, Mar 8, 2022 12:54 pm

Dear Attorney Brenner,

I am writing in opposition to the extension of the Business Court Pilot Program. I agree with Judge Niess that the program is contrary to important principles of fair and equal access to the judicial system in Wisconsin.

I spent 17 years reviewing circuit court decisions as an appellate court judge. I agree with Judge Niess that there is nothing uniquely complicated about the categories of business cases that are being directed to a small number of hand selected business court judges.

There can be no doubt that limited court resources are being directed to a limited set of civil litigants who do not merit special treatment. Indeed, these are litigants who are already best able to take advantage of our high functioning trial and appellate courts.

This is not just the appearance of favoritism, this is actual favoritism. No fair-minded person looking at the full picture could conclude otherwise.

Sincerely,

Paul Lundsten
Judge, Wisconsin Court of Appeals, Retired.

From: mjskwierawski@gmail.com,

To: Annette.Ziegler@wicourts.gov, Patience.Roggensack@wicourts.gov, Ann.Bradley@wicourts.gov, Rebecca.Bradley@wicourts.gov, Rebecca.Dallet@wicourts.gov, Brian.Hagedorn@wicourts.gov, Jill.Karofsky@wicourts.gov,

Bcc: madniess@aol.com,

Subject: Proposed Rules to Create Permanent Business Courts in Wisconsin

Date: Thu, Jan 13, 2022 2:51 pm

Attachments: Business Court Proposal MS2.docx (141K)

Chief Justice Ziegler and Members of the Supreme Court,

It is our understanding that a set of proposed Supreme Court Rules is in the filing process to establish permanent Supreme Court Rules to create Business Courts in Wisconsin. We have attached a position paper on those proposed rules, drafted by the undersigned and endorsed by 19 retired judges and attorneys. We have submitted this paper also to the Advisory Committee for Business Court Rules. If anyone has questions about this paper and the issues raised, I can be reached via this email address or my cell phone at 414-430-0359. Thank you for your consideration of and attention to these important issues for the Wisconsin Courts.

Michael J. Skwierawski, Retired Chief Judge for District 1, Milwaukee County

To: Supreme Court Business Court Advisory Committee

From: Michael J. Skwierawski, Reserve Judge, Retired Chief Judge District 1

I have been a practicing lawyer in Wisconsin for 55 years. I retired after 25 years on the bench in Milwaukee County, District 1. I spent seven years as the head of the Civil Division in Milwaukee County and 5 years as the Chief Judge for District 1. In the last 17 years since my retirement, I have mediated over 400 cases involving commercial business litigation. I write to express my opposition to the Business Court Rules as currently proposed to the Wisconsin Supreme Court as unnecessary, unwise, and likely to do serious long term damage to the public's perception of Wisconsin's courts as impartial arbiters of the law and legal disputes.

In the late 1990s, the courts in Milwaukee were presented with a proposal to establish a "business court" similar to what is being proposed now. The proposal included serious limitations on depositions, written discovery and motion practice including limitations on dispositive motions. It was all designed to speed up the process of large claims and reduce expenses for the litigants. We took a serious look at it and rejected the idea. The proposal came from large metropolitan courts where the standard time from filing to trial in large claims cases was 4-6 years. At that time, District 1's large claims civil cases were taking approximately 18 – 24 months to conclusion. There was no need to speed up our process. The severe truncation of pretrial discovery and motion practice was unnecessary and counter productive as limitations on discovery have always been available to Wisconsin litigants. Courts work with the attorneys to tailor pretrial scheduling orders to suit the needs of a particular case, and Judges work hard to ensure Wisconsin Courts are never forced to put up with wild goose chases and fishing expeditions. Replacing this discretion with the one size fits all approach of the proposed rules will not be productive. I might also add that during the past 17 years of my mediation practice it has become abundantly clear that the biggest impediment to early settlement of major commercial lawsuits is the lack of meaningful disclosure of facts and documents that

support or undermine the parties' legal theories and fact arguments. The more the process gets artificially speeded up, the less likely it can be settled early. This current proposal is unnecessary today just as it was 20 years ago when presented to the Courts in Milwaukee County.

There are two other serious problems with the current proposal. The first is the proposed selection of the judges for the "Business Courts" by the Chief Justice of the Supreme Court. This is a bad idea because the Chief Justice almost never has detailed information about and experience with trial judges in every district. The only person in the system who has that kind of detailed interaction with the trial judges to assess the strengths and weaknesses and performance of all judges is the Chief Judge of each district. They should make that appointment as they have always done in every other kind of case assignment. The suggestion that an outside committee could somehow assist the Chief Justice in these appointments would only make a bad idea worse. Empowering outside groups or individuals to play an important role in selecting judges for "special" cases will only confirm and support the arguments of those who criticize the Business Court proposal as surrendering the courts to special interest groups whose goal is to create courts that will lean in the "right direction" in close cases.

The second additional serious problem is the proposal that the judges "selected" for the Business courts should be "educated" by outside special interest groups with their own publicly announced agendas. Again, this will be interpreted as an attempt to tip the scales in favor of businesses in the Business Courts. It comes at a time when the Wisconsin legislature is "investigating" the donation and use of private funds to "assist" government employees to do their jobs during the 2020 election, something that has been called illegal and a bad idea in lawsuits. Perhaps the proposed funding of the "education" of business court judges will have to be added to the list to be "investigated" because it appears to be cut from the same cloth. Who will decide that case if the Wisconsin Supreme Court has already endorsed this concept of private funding for judicial education?

For all of the 25 years that I served on the bench, Wisconsin was nationally recognized as a leader and model for judicial education. Our judges have always been interested, willing and eager to explore new ideas in case management. This proposal should be placed on a shelf but the ideas for better management of business cases should be a topic for new and additional programs run by our own managers of judicial education. If any district wants to establish a business calendar, let judges apply to serve on that calendar and require them to attend our own programs on this topic. We could then escape or at least minimize the stain on the public's perception of the impartiality of our Wisconsin courts.

One last critical suggestion: if any business court rules are adopted, we should not allow any case to be assigned to a "Business Court" unless all parties to the lawsuit consent and are in fact business entities. If one side is a business and the other side is an individual or a non-business entity, there will be no way to convince the non-business parties or the public at large that the system is not stacked in favor of the business litigants. That perception will damage our courts' reputation and the public's acceptance of our decisions for generations to come.

Michael J. Skwierawski, Retired Chief Judge, District 1

I am authorized to state that the following retired judges and attorneys join and support these positions:

Dennis Cimpl	Michael Malmstadt	Richard S. Brown
David Flanagan	Dale Pasell	Patrick Willis
Sarah O'Brien	Daniel Moeser	Diane Sorenson
James Miller	Michael J. Dwyer	Att. Paul Gossens
David Hansher	Robert Kinney	Moria Krueger
Gary Carlson	William Stewart	Francis Wasielewski
Charles Kahn		

From: daveflanagan725@gmail.com,
To: lbrenner@reinhartlaw.com,
Bcc: madniess@aol.com,
Subject: Commercial Court Pilot Program
Date: Sun, Mar 6, 2022 7:51 pm

Dear Attorney Brenner,

Thank you for the opportunity to submit the following comment with regard to the Commercial Court Pilot Program. I have been a member of the Wisconsin Bar since 1974. I practiced as a trial attorney for 24 years and served as a circuit court judge for 17 years.

To begin, the Commercial Court concept creates, at the very least, the appearance of favoritism and improper influence. The concept is an impairment of judicial independence and is an unjustified misallocation of judicial resource. Finally, and of extreme importance, the silent process, actually lack of process, by which this idea was implemented is a sad affront to the goal of honest, open government.

Yours very truly,

Dave Flanagan, Reserve Judge

From: tcasper@murphydesmond.com,
To: lbrenner@reinhartlaw.com,
Subject: Business Court
Date: Mon, Mar 7, 2022 5:13 pm
Attachments:

Hi Laura! I write to express my opposition to the Business Court and any extension of the pilot project for that court. I have a variety of concerns about this court, but I will give you one real-world example. I practiced law in Texas for twenty years, primarily as a civil litigator. The large counties in the state do not have courts of general jurisdiction, but specialized courts. This siloed system creates a cadre of lawyers who need to be employed before certain judges, or things become VERY difficult, and the playing field uneven. In fact, before lawyers are hired for cases, the first question that is asked is, "Who is the judge?" I often suggested courts of general jurisdiction (but with emphasis in a few areas similar to those that we have in Dane County) in the same courthouse to solve this problem. These suggestions fell on deaf ears for obvious reasons. Further, these specialized courts begin to ignore various court rules and do things as they please, because that is how things are done.

I'd be pleased to discuss these and other issues at your convenience. Thank you for your involvement in this matter.

Timothy J. Casper
MURPHY DESMOND S.C.
(608) 268-5597 P I (608) 257-2508 F
33 East Main Street, Suite 500 I Madison, WI 53703
website I map I email

Subject Opposition to the extension of the Wisconsin Business Court project

From Joseph Humphrey <joe@wislaw.net>

To: <lbrenner@reinhartlaw.com>

Date Apr 6 at 10:21 AM

Attorney Brenner and the Business Court Advisory Committee,

I am writing this in opposition to the extension of the Business Court project. The Business Court, as it is currently structured, is unnecessary to the practice of law in the State of Wisconsin and creates an appearance, if not a reality, of capture and unfairness that our legal system can ill afford in the current environment.

As a litigator and counsel to business and commercial clients I have never considered using the Business Court to resolve disputes. In presenting the option of using the Business Court with clients, I struggle to explain the upside. In my practice I have never found any Circuit Court Judge to be unable or incompetent to preside in complex litigation or business/commercial law issues. Almost all business and commercial issues can be boiled down to basic legal interpretation of long existing legal principals or interpretation of statutes, the type of tasks that all Courts do on a daily basis. In my experience, if a Judge is having difficulty following an issue it is because I have failed in my job. If a truly complex business or commercial issue arises in which specialized knowledge is required arbitration in front of an individual with such specialized knowledge is always an alternative.

When discussing the existence of the Business Court with clients or other non-lawyers, the assumption of non-lawyers is that the Business Courts rule in a way favorable to the largest businesses and are captured by business interests and not the law. Even if this is not the reality, the mere creation of a separate system to handle large business and commercial disputes perpetuates the appearance on unfairness and unequal application of the law. In this time where Courts and the Wisconsin Bar are stretched thin in providing equal access to underprivileged and economically disadvantaged citizens who present a majority of legal matters in the system, creating a separate, streamlined system for monied interests communicates the wrong message.

I oppose the Business Court project. Instead of creating different tracks for different interests, our Wisconsin Circuit Courts should strive to be the best forum for all litigants and all matters. Equal justice means equal forums for the application of justice.

Thank you for considering my thoughts.

Joseph Humphrey
GEIER HOMAR & ROY, LLP
131 W. Washington Ave.
Madison, WI 53703

joe@wislaw.net
608-333-0001