

**STATE OF WISCONSIN
IN THE SUPREME COURT**

**In re Creation of a Pilot Project for Dedicated Trial Court Judicial
Dockets for Large Claim Business and Commercial Cases
(PETITION)**

In the fall of 2016 Chief Justice Patience Drake Roggensack established the Business Court Advisory Committee to explore commercial court dockets in Wisconsin ("Petitioner" or "Committee").¹ The Chief Justice asked the Committee to submit its recommendations to this Court by November 1, 2016 regarding the establishment of a dedicated judicial docket for large claim business and commercial cases in Wisconsin.

Courts in Wisconsin already recognize the benefits of dedicated dockets in the circuit courts of this State for the efficient handling of different types of cases such as dockets for family matters, sensitive crimes, probate, children's court, small claims, felonies and misdemeanors. Various circuit courts around Wisconsin have established and routinely use dedicated dockets.

The Committee convened, met, and resolved 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

¹ The members of the committee are: the Honorable Michael Aprahamian, Attorney Michael Brennan, Attorney Laura Brenner, the Honorable Michael Fitzpatrick, Attorney Nora Gierke, the Honorable James Morrison, Lon Roberts, Secretary, Wisconsin Department of Financial Institutions, and Attorney John Rothstein, Chair.

(d) make Wisconsin a desirable forum for resolving business disputes.

In taking this step, Wisconsin will join more than 26 other states where creation of specialized dockets for business and commercial cases has proved an effective tool for economic development, business retention, and enhanced effectiveness of the judicial system.

The Committee recommends the Court establish a pilot commercial court docket for large claim business and commercial cases (commercial case docket). The Committee recommends the initial pilot commercial case docket commence in July 2017 and continue for three years, to permit a reasonable period for evaluation. At the end of three years, the Supreme Court may determine the advisability of adopting a commercial case docket as a permanent feature of the circuit court.

The Committee submits that a pilot program for the handling of business disputes through the use of dedicated circuit court dockets can be tested and accomplished without the need for material additional budget requirements. A pilot program will allow the collection of data to permit the bench and bar of this State, together with the additional stakeholders of the business community, the Legislature and the general public, to consider whether an expansion of such a program is worthwhile, or if not, what other adjustments might be made to make it so.

To facilitate the creation of a pilot commercial court docket for large claim business and commercial cases, the Committee has also prepared a template for a temporary rule of civil procedure (reflecting the same substantive provisions of this Petition) to aid the identification and assignment of cases eligible for the pilot program. The proposed temporary rule, if desired, is intended to be in effect for the duration of the pilot program and will govern only those circuit courts in counties and jurisdictions nominated to participate in the pilot project. If the pilot project is successful, permanent rules may be developed, informed by the practical experience and information gained during the pilot project.

This Petition and its supporting memorandum are filed pursuant the Court's rulemaking authority under §751.12 and its administrative authority over all courts conferred by Article VII, §3 of the Wisconsin Constitution.

Accordingly, the Petitioner hereby requests that the Supreme Court approve the following:

1. Creation of a Pilot Commercial Case Docket. The circuit court of Waukesha County and the circuit courts of the Eighth Judicial Administrative District (the "Eighth District"), shall establish a large claim commercial case docket of their respective courts for the assignment of commercial cases as defined herein. The considerations that went into the nomination of these two locales is set forth in the memorandum accompanying this Petition.

2. Assignment of Cases to the Commercial Case Docket; Qualifying Cases; Excluded Cases.

A. Definitions. These definitions apply in counties and judicial districts that are nominated and have established pilot commercial case dockets:

a. A "business organization" includes a sole proprietorship, corporation, partnership, limited liability company, limited partnership, professional association, service corporation, joint venture, or business trust. A "business organization" excludes an individual, a family trust, or a political subdivision or government entity.

b. A "consumer contract or transaction" is one that is primarily for personal, family or household purposes.

B. Qualifying Cases for the Commercial Case Docket; Mandatory Assignment. The following cases shall be assigned to the commercial court docket of the nominated circuit courts:

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 Wis. Stat. Chs. 178, 179, 180, 181, 183 and 185 (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, articles of organization, 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 Wis. Stat. Ch. 133; claims under Wis. Stat. §100.30(5m) & (5r); claims under §134.01; claims of tortious interference related to 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 Wis. Stat. Ch. 551 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 Wis. Stat. §134.90; 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 Wis. Stat. Ch. 135 or any similar statute from another jurisdiction; claims arising from Wis. Stat. §134.93 or any similar statute or law from another jurisdiction; claims arising from Wis. Stat. Ch. 553 or any similar statute from another jurisdiction;
- g. Cases involving claims or disputes under Wis. Stat. Ch. 402, 403, 404, 405 and 409 (or any similar statute or law from another jurisdiction) when the amount in controversy exceeds

\$100,000 in damages, exclusive of interest, costs and attorneys' fees.

C. Excluded Cases. The commercial court docket shall exclude the following types of cases:

- a. Cases involving small claims under Wis. Stat. Ch. 799;
- 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 subsection is ancillary and incidental to a case assigned to the commercial court because it meets a criterion set forth above.

D. Discretionary assignment of cases to the Commercial Court Docket. In addition to the cases identified above in subparagraph 2(B) above, and which are not otherwise excluded under subparagraph 2(C), parties may jointly move the chief judge of the judicial administrative district in which the commercial court sits for discretionary assignment of a business organization 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.

E. Processing of Remaining Civil Cases Not Qualifying for the Commercial Court Docket. Civil cases not falling within the categories for the commercial court docket, or for which a joint motion for discretionary assignment has been denied, shall continue to be processed though the standard assignment and docket of the general civil court.

3. Steps to Delineate and Direct Mandatory Qualifying Cases to the Commercial Court Docket.

A. Plaintiff's Duties. At the time of the filing of the initial complaint, the plaintiff shall state on the face of the complaint whether the case qualifies for mandatory commercial court docket treatment under the categories set forth in Section 2. Upon receipt of an initial complaint stating that the action qualifies for mandatory commercial court docket assignment, the clerk of court shall randomly assign the case to one of the judges designated for the commercial case docket in that locale.

B. Omission by Plaintiff; Defendant's and Third-Party's Rights and Prerogatives of the Circuit Court. In the event the duties set forth in section 3(A) are not met, the circuit court *sua sponte*, or upon a motion filed by the defendant or third party with his or her or its responsive pleading or responsive motion, a judge of a general civil court docket may order the transfer of a case to the commercial court docket if that judge determines that the matter meets the mandatory criteria of Section 2.

4. Circuit Court Judges to Handle the Commercial Case Docket.

A. Initial Assignment of Circuit Judges to the Commercial Court Dockets. Pursuant to Article VII, Section 4(3) of the Wisconsin Constitution and Wis. Stat. §751.03(1), the Committee recommends that the Chief Justice of the Supreme Court designate and assign to the counties and districts chosen for the pilot plan, the circuit judges within them who will handle the docket for cases qualifying for the commercial court. Selection of a judge for the commercial court docket shall not disqualify the judge from continuing his or her work on any other then-assigned docket. To address the issue of judicial substitutions, the Committee recommends that for Waukesha County, that no less than two judges be named to handle the commercial court docket. In the case of the Eighth District, the Committee

recommends that five judges be named to handle the cases of the commercial court docket.

B. Assignment of Individual Cases to the Circuit Judges Chosen to Handle Commercial Court Dockets. The Wisconsin venue and substitution laws shall remain unchanged and in full force and effect. Accordingly, in Waukesha County, upon the filing of a business case qualifying for commercial court treatment, the clerk of courts of Waukesha shall randomly assign the case to one of the two judges already designated for the commercial court docket. In the event of a request for substitution, the case shall be transferred to the next Waukesha judge who is assigned to the commercial court docket.

In the Eighth District, for cases filed in any county in which a circuit judge in that county has already been assigned a commercial court docket, the same procedures shall apply. For cases filed in counties of the Eighth District which have no circuit judges selected for the commercial court docket, upon the filing of a qualifying case, the clerk of court of the affected county shall notify the chief judge of the Eighth District who shall assign one of the commercial court docket judges from the other counties in the Eighth District. The chief judge's selection shall be made pursuant to Wis. Stat. §751.03(3). In the event a request for substitution is filed against the judge chosen by the chief judge of the Eighth District, the chief judge shall then assign another judge from the Eighth District (who been appointed for commercial court cases) to sit on the case.

5. 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 assigned commercial court judge *sua sponte*, or upon motion of any party, may reconsider whether assignment of that case to the commercial court docket is appropriate per the requirements of the Section 2. Any party filing a reconsideration motion under this Section 5 must do so not later than 20 days after the case is assigned 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 5(A) above, 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 of the circuit court shall process the case, shall be final and non-appealable.

6. Recommended Guidelines for Case Management for Circuit Judges Handling Cases on the Commercial Court Dockets.

These are suggested guidelines, not rules, for the judges who will handle the commercial court dockets. Ultimately, the success of the pilot commercial court dockets will depend heavily upon the prior business and civil experience that the selected commercial court judges bring with them to the qualifying cases. Nevertheless, each judge with a commercial court docket is strongly encouraged to consider closely the incorporation of the following suggestions into his or her standard practice for the management of commercial court cases.

A. Electronic Storage Information ("ESI") Issues and Early Case Management of ESI: *Early intervention in ESI Discovery. Judges with a commercial court docket should intervene early in the suit to control and manage ESI discovery.* Experience demonstrates that strong judicial control of electronic discovery reduces litigation costs. Strong early control also prevents ESI discovery from being misused to obtain unfair litigation leverage. Both federal and state courts are getting better at controlling these matters because if ESI is not promptly controlled, ESI discovery often can take on a life of its own which can quickly transform a resolvable dispute into one that is impossible to resolve quickly or voluntarily.

Proportionality of ESI Requests. In managing ESI discovery, judges assigned the commercial court docket should consider and prefer, where ever possible, the "proportionality" of any requested ESI to the size and importance of the case at hand. Unless controlled, the cost of ESI can easily outweigh the expected benefits of the suit. This Court anticipated and emphasized this challenge in its 2010 Note to the amendment of the Wisconsin discovery statute addressing ESI requests. ("Supreme Court Note, 2010: Sub. (2) (e) was created as a measure to manage the costs of the

discovery of electronically stored information. If the parties confer before embarking on such discovery, they may reduce the ultimate cost.") Federal authorities agree through Federal Rule of Civil Procedure 26(b)(1) which now expressly directs:

“parties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.”

Consistent with Wisconsin law, pilot Wisconsin commercial courts should consider carefully proportionality standards for the commercial cases coming before them. Proportionality in ESI discovery will improve the fair and efficient administration of justice.

Adding court involvement to the ESI conferences required by Wis. Stat. §804.01(2)(e). Wisconsin Statute §804.01(2)(e) calls for parties to confer preliminarily on ESI issues. Such conferences are helpful. But it would be even more efficacious if the conferences included the participation of the assigned commercial court judge. Besides easing discussions and facilitating compromises, the involvement of the judge has the extra benefit of educating the judge early on ESI issues as well as the substance of the case.

B. Timing of mediation/ADR: *Judges of the commercial court should give substantive consideration to the issues of mediation timing and needs at the initial court conferences.* Judges on the commercial court dockets should be encouraged to consider and discuss at the initial case conference the timing and needs for meaningful alternative dispute resolution possibilities and mediation. For instance, sometimes sequenced targeted depositions and targeted written discovery can be accomplished promptly which in turn will allow meaningful and early mediation. Early mediation, if successful, saves time and money for all parties.

To further this goal, consistent with Wisconsin law, the commercial court judge should require commercial litigants to address expressly these opportunities (and any related needs) in their initial case conference submissions to the Judge. Early and meaningful consideration of ADR and mediation possibilities also allows the court to investigate whether there are better business solutions to solve the underlying dispute, such as mergers, acquisitions or a buy-out. Often commercial cases are filed for positioning on such "bigger picture" needs. If detected early, the management of the case can be crafted to incentivize and advance discussions and negotiations within the ADR or mediation context.

C. Protective orders and sealed document orders: *Consistent with Wisconsin law, commercial court judges should encourage the use of standardized discovery protective orders, and orders governing the sealing of documents, such as those publicly available through the local rules of the United State District Court for the Eastern District of Wisconsin.* Protective orders regarding documents produced in discovery are routinely requested and used in cases involving commercial entities. The same is true for orders governing the sealing of documents where that is an issue. Use of standardized forms speeds the consideration of the substantive issues in dispute and reduces costs. Consistent with Wisconsin law, use of standardize and non-controversial forms should be encouraged. At the court's discretion, standardized forms may be tailored and adopted for use in any case before the commercial court. See e.g., USDC-E.D. Wis. Local Rule 26(e) (confidentiality) and (f) (sealing).

D. Altered time deadlines for resolution of motions and setting of trial dates.

Consistent with Wisconsin law, judges sitting on the business court docket should consider:

- a) Whether *non-dispositive* motions should be expedited, such as shorter briefing deadlines, or more strict briefing rules (e.g., no reply brief on certain type motions).
- b) Telephonic hearings. Telephonic hearings save time, travel and costs. Some courts throughout state already have telephonic hook-ups. If not, telephonic conferences can be set up by parties with the commercial court having only to make one phone call to the conference call-in number. For non-dispositive matters, telephonic conference should be encouraged

except where the judge believes that in-person presentation or consultation is helpful or necessary.

E. Regular status conferences for case management. *Judges on the commercial court should be encourage to hold regular periodic status conferences in their cases every three months following the initial conference.* The frequency of conference ultimately depends, of course, on the specifics of the case. Nevertheless, for standard practice, a good practice is to have regular status conferences to be set by the court. Regular conference focuses all participants on moving the case along, when the case can be set for trial, when dispositive motions should be filed, what problems are occurring or anticipated, and what motions may be appropriate. Frequent periodic conferences additionally has the salutary effect of deterring questionable discovery practices or gratuitously difficult litigants.

7. Duration of Pilot Project Dockets and Reporting of Results.

A. Duration. The Committee recommends that the pilot project extend for a period of three (3) years starting July 1, 2017 or at such other time as the Supreme Court directs.

B. Reporting. The Committee recommends that the Wisconsin Supreme Court Office of Court Operations, and at its discretion, whatever subordinates and internal resources it oversees, monitor the pilot program during its three-year term, and on or before December 1 of calendar years 2017, 2018, 2019, and 2020, it shall submit a progress report to the Wisconsin Supreme Court that addresses the following:

- a. Circuit court data that analyzes cases assigned to the pilot commercial court dockets;
- b. Levels of litigant satisfaction with the pilot commercial court dockets;
- c. Views of judges and attorneys concerning the effectiveness and benefits of the pilot commercial court dockets relating to the stated goals of the project;

d. Recommendations concerning eligibility criteria for assignment of cases to the commercial court dockets, adoption of additional measurements to evaluate the performance of this pilot commercial court processing, and proposed changes to rules and forms; and

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

To obtain valid and helpful evaluations, the Committee recommends that the Office of Court Operations be authorized to request, in its discretion, leave to consult with a professional evaluator to identify what data should be collected to ensure a meaningful review. The Court may also wish to commission an ongoing committee to assist in the review and monitoring of the program.

7. Proposed Temporary Rule. For the Supreme Court's consideration, and in the event it desires it, a template for a temporary rule is attached to this Petition as Appendix A.

Respectfully submitted this ____ day of October, 2016.

/s/ John A Rothstein_____.

John A Rothstein, Chair, Business
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