

**STATE OF WISCONSIN
IN THE SUPREME COURT**

**In re Creation of a Pilot Program for
Dedicated Circuit Court Judicial Dockets for
Large Claim Business and Commercial Cases**

**PETITION 16- ____
MEMORANDUM**

The Business Court Advisory Committee (Committee) petitions the Wisconsin Supreme Court to approve a pilot program to create dedicated circuit court judicial dockets for large claim business and commercial cases.

Wisconsin Supreme Court Chief Justice Patience Drake Roggensack convened the Committee in the fall of 2016 and charged it with exploring whether it would be desirable to establish dedicated commercial civil litigation dockets in Wisconsin circuit courts.

The Committee as a whole met or conferenced on September 13, 2016, October 6, 2016 and October 19, 2016. The Committee further established several distinct workgroups to study specific topics of the project and those workgroups held additional meetings and conferences to accomplish their assigned topics. The workgroup assigned topics were case eligibility; case management suggestions, guidelines, procedures and forms; counties and jurisdictions for pilot program selection; methods for circuit judge assignments; and reporting and monitoring of program results. Each workgroup reported its conclusions to the full Committee. The Committee also reviewed and considered materials from other jurisdictions, as described herein.

Interest in a dedicated business court in Wisconsin is not new.

In 1996, on recommendations made by a Special Task Force appointed by then Governor Tommy G. Thompson, then Chief Judge Patrick T. Sheedy of the Milwaukee County Circuit Court implemented a business court pilot program and designated two

judges to the Special Business Court in Milwaukee. The court implemented a set of summary proceeding rules allowing only court trials, barring summary judgment motions, limiting pleadings and calling for restricted but expedited discovery. The apparent goal of the Milwaukee program was speed; namely, to minimize the time from commencement of the case to decision. Use of the pilot Milwaukee program was voluntary and required the consent of all parties. A petition had to be filed to place a case within the program. In an attempt to improve the pilot plan, Milwaukee County revised its rules in 1998, eliminating monetary limitations and adding the right to join third parties, pursue summary judgments, and request a jury. The process, however, remained voluntary. Unfortunately, the pilot project was underutilized by practitioners, and eventually ended. Anecdotal reports suggest that the initial restriction of summary judgment motions, and the disallowance of jury trials and plenary discovery, caused practitioners to bypass the program. Further it was felt that due to the elective nature of the program, the normal dynamics of litigation caused non-movants of any proposed assignment to be suspicious of the other side's motives, and thus, default to a refusal to consent. The pilot rules applicable to Milwaukee were repealed, effective March 1, 2009. See generally Jane C. Schlict, Milwaukee's New Business Court Rules, Milwaukee Business Association Messenger, Vol. 6, No. 5, May 1998; Pete Millard, Reworking the Business Courts, The Business Journal of Milwaukee, March 31, 1997; New civil court local rules proposed in Milwaukee County, Wis. L.J. (July 7, 2008).

Although Wisconsin's initial experiment with a voluntary business court docket proved unsuccessful, lawyers, judges and members of the business community continue to believe Wisconsin would be well served by a business court. The State Bar of Wisconsin's Business Law Section has been interested in the prospect of a Commercial

Court Docket for some time.¹ In 2015, the Legislative Reference Bureau began drafting a proposed bill to create a business court, although apparently it was not introduced. That legislation would have created a new s. 753.063 of the statutes, (the Chapter applicable to circuit courts) to designate certain circuit court branches as business courts within each of the four appellate districts in the state. That draft legislation was modeled on Iowa's Business Court Pilot Program. It used the definition of "business entity" found in s. 183.1200 (1)-(3).

Meanwhile, much has been learned about establishing specialized dockets in Wisconsin. Wisconsin has established several successful specialty courts including a drug court, veterans' courts, a mental health court, and a children's court. See Joe Forward, Specialty courts: Justice system partners find solutions to ease budgets, reduce crime, and help offenders make lasting changes, State Bar of Wisconsin, Inside Track, Feb. 2, 2011.

Moreover, many other states have now implemented and maintain some manner of commercial docket program, business court, or specialized docket for complex cases. Across the nation business courts and specialized commercial dockets have emerged as an accepted means of efficiently handling complex business and commercial litigation. See Recent Developments in Business and Corporate Litigation. ABA Business and Corporate Litigation Committee (2014); Mitchell L. Bach, Esq., and Lee Applebaum, Esq., A History of the Creation and Jurisdiction of Business Courts in the Last Decade, 60 Business Law 147 (2004).

There are commercial courts of some type in Alabama, Arizona, California, Colorado, Connecticut, Delaware, Florida, Georgia, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Nevada, New Hampshire, New Jersey,

¹ Telephone conversations with Attorney Randy Brotherhood, Chair, State Bar of Wisconsin, Business Law Section, and Attorney Jud Wyatt, Past-president, State Bar of Wisconsin, Business Law Section.

New York, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, and West Virginia, and Virginia. See Richard L. Renck, Carmen H. Thomas, Recent Developments in Business Commercial Courts in the United States and Abroad, ABA Business Law Today (May 2014); See John F. Coyle, Business Courts and Interstate Competition, 53 William and Mary Law Review, page 1915, 1918 (2012); In the Matter of Authorizing a Commercial Court Pilot Program in the Superior Court of Maricopa County, Order 2015-15 (Ariz., Feb. 18, 2015); order Establishing the Davidson County Business Court Pilot Project, No. ADM2015-00467 (Tenn., Mar. 16, 2015); Report and Recommendations of the Supreme Court of Ohio's Task Force on Commercial Dockets (December 2011).

The Committee reviewed the business court models of several other jurisdictions to inform its work.

For example, Georgia's Supreme Court established the Fulton County Superior Court's Business Case Division in June 2005. The business court's 2012 Annual Report included a "Business Court Impact" Section, in which the court sought to measure the business court's efficiency in terms of disposition times. A 2011 study found generally that delays in civil and domestic case administration resulted in both the loss of significant economic productivity and the loss of jobs.

The 2012 study gathered representative sample case data for the 2005 to the mid-2012 time period. It "measured both the amount of time a case was pending, as well as a case's complexity by highlighting the number of docket entries created in each case." The study found that, on average, the business court administers a complex contract case in 608 days, compared to 1,746 on the general docket.

This empirical data highlights that jurisdictions with business courts can achieve more efficient adjudication of disputes.

In Ohio, business or commercial dockets began with the creation of the Supreme Court Task Force on Commercial Dockets. In January 2009, temporary rules were

enacted to create pilot projects in four counties. The stated goal of the Ohio commercial dockets was to promote efficiency and predictability in the following types of cases: disputes involving the formation, governance, dissolution, or liquidation of any business entity; disputes among owners (or other principals) of a business entity concerning their rights and obligations; disputes concerning trade secrets, nondisclosure, noncompete, or employment agreements between a business entity and an owner of the business entity; cases involving the rights, obligations, liability, or indemnity of a business entity's officers, directors, or owners; and contract disputes and business-tort disputes between business entities.

In January 2012, the task force issued a final report recommending permanent commercial dockets for any court of common pleas having six or more general division judges or located in a county having a population of 300,000 or more according to the latest federal decennial census. The report found that the benefits of the program included accelerating decisions, creating expertise among judges, and achieving consistency in court decisions around the state.

On May 29, 2012, the Supreme Court of Ohio extended the effective end date of temporary rules governing the operation of the commercial dockets pilot program through June 30, 2013. Subsequently, three of the counties have extended operation of their respective commercial dockets; one county, Franklin County, by a 9–8 vote of its judges, decided to disband its commercial docket.

In South Carolina, a Business Court Pilot Program commenced in 2007 in Charleston, Greenville, and Richland Counties. On January 3, 2014, then South Carolina Chief Justice Jean H. Toal ordered that the pilot program be expanded to include all counties in the state. South Carolina is now divided into three business court regions, and cases within those regions apply for business court assignment through the region's business court judge.

In October 2012, the West Virginia Supreme Court of Appeals commenced a Business Court division.

Thus, many states have successfully established business or complex commercial dockets in courts of general jurisdiction. These dockets are focused on litigation between businesses, acknowledge the fact that most business-to-business litigation is different from other litigation, and often benefit from advanced case management techniques and judges with business law experience. The Committee's research indicates that the concept of a commercial docket concept has gained high levels of approval from the legal community in other states.

Wisconsin now lags behind other jurisdictions in the creation of a general business or commercial court. The Committee recommends that Wisconsin close this business gap. A business court has the potential to make Wisconsin circuit courts a more favorable forum for resolving business disputes by expeditiously resolving business cases and reducing litigation costs.

Proposed Pilot Program

The Committee has concluded that a dedicated commercial docket will benefit the citizens of Wisconsin, the bench, and the bar. It will provide the commercial docket judges with more concentrated experience in handling business disputes. It will promote predictable outcomes, which are important to business decision makers. It will contribute to greater efficiency in the court system, and will lessen delays in the court system.

The Committee believes that while a business court will prove to be a valuable and effective component of the circuit court in the long-term, a "test" or "pilot" program is an important first step. A pilot program will provide empirical evidence to substantiate the usefulness of a dedicated business court docket. Experience gained through a pilot

program will also help to identify improvements or necessary changes to the rules and statutes, before a commercial court achieves a permanent or statewide status.

Therefore, the Committee recommends establishing the commercial court as a pilot program. Based on consultations with the Office of Court Operations, the Committee believes that three years is an appropriate length of time to determine if the pilot commercial court meets expectations. The Committee recommends that the pilot court commence on or after July 1, 2017. 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, although, if approved, the Committee seeks the assistance of the Director of State Courts Office to provide guidance and assistance implementing the pilot program and collecting and analyzing data to assess the effectiveness of the pilot program.

Authority

The Petition and 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.

Location

The topic of the locations that the Committee would recommend for pilot plans proved to be the most challenging and time consuming. By these deliberations the Committee discerned that the success of the pilot program would almost certainly turn upon the identification, appointment, and location of circuit court judges who had the type of outside business and commercial experience who could best assist the pilot program and its goals. The location of these judges was important because part of the goal of the Committee is to propose a Petition that does not require a change of any of the statutes regarding venue of civil cases, substitution rights, or administrative rules. At the same time, the size of prospective candidate counties, and the number of circuit judges in it, became important. For example, nominating a county with only one circuit judge or one

with few business cases would create little or no helpful data for evaluating the benefits or performance of this proposal. In turn, if nominations to the pilot program were limited only to counties, this consideration meant that the Committee could only realistically look at counties having the largest cohorts of sitting circuit judges, thus eliminating the greater majority of counties in the state. Given these conflicting considerations, and in order to give a better representative sampling on how this program might be made to work statewide (with smaller counties being able to participate and enjoy its benefits with their oftentimes significant commercial cases), the Committee broadened its search and considered other judicial geographical subdivisions. The subdivisions that struck the Committee as best were the pre-existing judicial administrative districts. The reasons supporting judicial districts included pre-existing administrative rules allowing the intra-district assignment of circuit judges (Wis. Stat. §751.03[3])², the extension of the program's benefits to smaller counties, the generation of more extensive and representative data results for evaluations and adjustments, and a larger cohort of sitting circuit judges in the judicial administrative districts thus enlarging the pool of candidates (with business backgrounds and experience) from which initial judicial assignments can be made.

Based on these considerations, the Committee conclude that the goals of this pilot plan would be best served if one county and one judicial administrative district were chosen. Acting on these determinations, the Committee identified Waukesha County and the Eighth Judicial District as ideal and, perhaps, the best candidates for the pilot program. Waukesha County enjoys significant business activity, it has a large cohort of sitting circuit judges (twelve), and among those judges there are candidates with significant business and commercial backgrounds and experience. The Eighth Judicial District enjoys similar characteristics. It embraces seven counties (Brown, Door,

² "The chief judge of any judicial administrative district may assign any circuit judge within the district to serve in any circuit court within the district." Id.

Kewaunee, Marinette, Oconto, Outagamie and Waupaca), includes the two counties that cover the Fox River Valley and its commerce, is home to multiple important manufacturing and other industrial business that would benefit from a dedicated commercial court docket, and has a total of 24 sitting circuit court judges. Two members of this Committee serve as judges in these regions: the Honorable James Morrison, Chief Judge, Eighth Judicial District, and the Honorable Judge Michael Aprahamian, Waukesha County Circuit Court. Both have offered to take a leadership role in introducing the concept of a dedicated commercial court docket in their respective regions. Waukesha and the Eighth District were preferred over Milwaukee County (for initial pilot plan purposes) due primarily to wish to avoid any confounding factors from the prior 1990's Milwaukee history, as well as the obligations Milwaukee County already shoulders through its existing structures.

Case Eligibility

The pilot program will focus on disputes relating to and between business entities. To this end, cases that involve consumers, labor organizations, and residential foreclosures as well as cases in which the government was a party will not be included in the commercial docket. The committee sets forth the proposed eligibility criteria for the commercial court docket in the proposed Temporary Rule (see Appendix A).

A key matter in the administration of a commercial docket is the manner in which commercial docket cases are assigned to the docket. Under the pilot commercial docket pilot program, qualifying eligible cases will be mandatorily assigned to the commercial docket. The mandatory assignment of qualifying cases is intended to cure the limitations that hindered success of the earlier Milwaukee experience.

The Committee, as a safety valve and opportunity for complete coverage, has also included in its Petition a mechanism for any willing group of litigants to seek a discretionary assignment to the commercial docket for those cases that might benefit

from such treatment but which fall outside of the existing categories for mandatory assignment.

The Committee has also attempted to engineer easily understood clerical steps to accomplish the prompt assignment of qualifying cases to the commercial docket which avoid controversy, and even in the event of controversy, provide a fast and clear result.

Judicial Selection and Appointment

The Committee unanimously agrees that the success of a dedicated business court docket will be tremendously dependent upon the quality and experience of the judges who are assigned to the court. A business court comprised of judges familiar with commercial disputes will enhance confidence in the Wisconsin courts as a venue for resolving business controversies.

Further, without judges who possess strong business law backgrounds and knowledge of commercial transactions, the pilot program might be little different than a general civil calendar. Assignment of the right judges to the pilot program is crucial for its acceptance by the legal and business communities.

To ensure uniform oversight, 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 initial circuit judges within them who will handle the docket for cases qualifying for the commercial court. Wis. Stat. §751.03(1). 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.

Proposed Temporary Rule

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 would apply only in counties or judicial districts that have established a pilot specialized court docket for commercial cases and is intended to be in effect only for the duration of the pilot program. The Temporary Rule defines a "commercial case," and specifies the types of cases that would be eligible for assignment to the commercial court,³ and the manner of assignment. The Committee predicts that even in the pilot phase there may be some adjustments that may require the Supreme Court to modify this Temporary Rule. If the pilot project is successful, permanent rules may be developed, informed by the practical experience and information gained during the pilot project.

Proposed Business Court Docket Guidelines

Early and active judicial management of commercial cases is another essential component to achieving the goal of a cost-effective and efficient processing of commercial disputes. The Committee recognizes and respects that implementation of a commercial docket and its day-to-day operation are primarily the concern of each local

³ The proposal explicitly excludes certain types of cases, including: small claims cases under Wis. Stat. Ch. 799; cases involving a governmental entity or political subdivision seeking to enforce a statutory or regulatory restriction or prohibition; and 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, absent exceptional circumstances.

court. There is, and should be, a strong element of local control with regard to the commercial docket.

Accordingly, the Committee recommends certain guidelines, rather than rules, for the judicial management of unique aspects of complex commercial cases. The Committee anticipates that judges assigned to the commercial dockets will refine and further develop appropriate guidelines for complex case management during the pilot program.

The Committee believes that an early conference will help identify factual and legal issues and focus the parties on discovery that is needed and proportionate to the issues and to the amount in controversy.

Judges assigned to a pilot commercial docket are advised to consider the following issues early in the commercial litigation:

1. ESI: Electronic discovery (e-discovery) frequently encompasses requests for electronically stored information or "ESI". The Federal Rules of Civil Procedure (FRCP), were amended, December 1, 2015, to address certain issues relating to electronic discovery. The Committee notes that strong judicial control over electronic discovery is important to managing the costs of e-discovery. Consistent with Wisconsin law, commercial court judges are encouraged to consider implementing portions of FRCP 26 concerning e-discovery early in proceedings.
2. Mediation/ADR: Commercial court judges are advised to actively consider when alternative dispute resolution should be invoked, as appropriately timed mediation can be business useful and cost effective.
3. Protective orders: Consistent with Wisconsin law, commercial court judges are encouraged to use a standardized confidentiality stipulation and protective order, such as the one included in the USDC-ED. See also Wis.

Local Rule 26(e) (confidentiality) and (f) (sealing). Commercial court judges are advised to act early to address and resolve issues concerning exchange of confidential information during the case and handling of information to be filed, to minimize disputes on this topic.

4. Deadlines: Commercial court judges are encouraged to consider:
 - a. whether non-dispositive motions should be expedited, if there should be shorter briefing deadlines, and/or more strict briefing rules, including page limits for brief and affidavits and whether there is a need for a reply brief on certain motions;
 - b. prompt resolution of expedited motions;
 - c. Use of telephonic and/or videoconference hearings.
5. Consistent with Wisconsin law, commercial court judges are encouraged to consider developing and using specialized forms, such as FRCP 26(f)(3) and (4) discovery plan.
6. Status conferences. Commercial court judges are advised to conduct status conferences at regular intervals, a minimum three months after the initial status conference, to monitor status of discovery and motion practice.

The Committee anticipates that feedback obtained when this Petition is filed will yield excellent suggestions for additional case management guidelines. Accordingly, the Committee asks, that if the Court adopts the Petition, the Committee be afforded the opportunity to review and refine the proposed guidelines and provide an updated version no more than 30 days prior to the commencement of a pilot program.

Data Collection and Reporting

The Committee recommends that the circuit court of the County in which the pilot program is located and the Wisconsin Supreme Court Director of State Courts monitor the pilot program during its three-year term. The Director of State Courts should be

authorized to utilize whatever subordinate entities or internal resources it oversees to fulfill this goal. Using those resources, it is recommended that the Director of State Courts submit progress reports on or before December 1 of calendar years 2017, 2018, 2019, and 2020, that address the following:

- A. Circuit court data that analyzes cases assigned to the pilot commercial court;
- B. Levels of litigant satisfaction with the pilot commercial court;
- C. Views of judges and attorneys concerning the effectiveness and benefits of the pilot commercial court;
- D. Recommendations concerning eligibility criteria for assignment of cases to the commercial court, adoption of additional measurements to evaluate the performance of this pilot commercial court, and proposed changes to rules and forms; and
- E. Any other matter that should be brought to the attention of the Wisconsin Supreme Court.

Because of the specific case type eligibility requirements of the proposed Rule (and the lack of any specificity in the current case classification data kept for general civil cases) the Committee cannot accurately estimate the volume of cases that might be assigned to the initial pilot commercial courts. However, data from the Wisconsin Department of Financial Institutions show that as of September 2016, Wisconsin had more than 400,000 active domestic corporations, domestic limited liability companies (LLC), authorized foreign corporations and LLCs, non-stock corporations and domestic limited liability partnerships.

Other Recommendations

States leading in the institution of commercial courts provide for a repository of decisions made by their commercial courts. Such repositories offer significant aid to practitioners for the counseling of businesses and the avoidance of similar litigation.

Reports suggest that current providers of electronic databases of court decisions are eager to capture and publish decisions of any court branch or level. Availability is the only limiting factor. Given these opportunities, the Court may wish to explore whether the decisions of the pilot commercial courts should be captured and made publicly available, either through the State Bar reporting system, outside data services, through the Department of Financial Institutions, or the Court's own reporting system.

Summary

The Committee unanimously believes that a pilot commercial court docket has the potential to resolve commercial cases more quickly and efficiently; a result that will ultimately require less of the courts' resources. Consequently, the commercial docket should improve the administration of justice for all. An efficient process will also enhance Wisconsin's business climate and promote economic growth.

The Committee respectfully requests that this Court enter an administrative order that will permit a three-year pilot commercial court docket in two selected regions of the state, Waukesha County and the Eighth Judicial District. A proposed Temporary Rule⁴

⁴ There is precedent for the proposal that this Court adopt a Temporary Rule. This is precisely how the now mandatory eFiling program in the State commenced. On September 9, 2004, The Director of State Courts sent the Court a memorandum requesting approval of a temporary rule governing a pilot project for voluntary small claims eFiling. The court met on September 16, 2004 and issued an order approving the pilot project on February 25, 2005. The file in the clerk's office does not indicate that a public hearing was held or that the order was published. An article announcing the pilot project appeared in the April 2005 Wisconsin Lawyer.

The temporary order was renewed at CCAP's request in 2006 and the pilot project lasted until 2008, when the Director's Office requested the voluntary eFiling rule through the formal petition process., See Rule Petition 06-08, *In the matter of the Creation of a Court Rule Governing Electronic Filing in the Circuit Courts* (May, 1, 2008, eff. 7/1/08). See also S. Ct. Order 14-03, *In the Matter of the Petition to Create Wisconsin Statute s. 801.18, 2009 WI 4, 2016 WI 29* (issued Apr. 28, 2016, eff. July 1, 2016) (adopting and implementing mandatory eFiling rule).

An Interim Rule applies only in the regions undertaking a pilot project. It is intended to be flexible; amendments require the approval of the court, but typically do not require a public hearing. As a temporary rule, it is not published in the statute books,

and Guidelines for the pilot commercial court docket are offered for this Court's consideration and accompany this memorandum.

Respectfully submitted,

this ____ day of October, 2016.

/s/ John A Rothstein _____.

John A Rothstein, Chair, Business
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but is made publically available, on the Court's rules website. The Committee anticipates that if the pilot is successful, a subsequent rule petition asking the Court to expand the pilot project and adopt formal rules would follow, as occurred in the e-filing matter.