

SUPREME COURT OF WISCONSIN

No. 16-05D

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

FILED

JUN 29, 2022

Sheila T. Reiff
Clerk of Supreme Court
Madison, WI

On February 11, 2022, Attorney Laura A. Brenner, Chair of Wisconsin Business Court Advisory Committee (Committee), filed a rule petition asking the court to extend the court's pilot project for commercial court dockets for large claims business and commercial cases ("pilot project") for an additional two years, and to amend the existing interim rule both to extend the pilot project and to clarify that local input is considered before judges are appointed to the pilot commercial court docket.

As background, the Wisconsin Supreme Court approved creation of this pilot project in 2017. See S. Ct. Order 16-05, 2017 WI 33 (issued Apr. 11, 2017, eff. July 1, 2017) (approving the Committee's petition for a pilot project following the court's request for and receipt of public comments and a duly noticed public hearing conducted on February 16, 2017); see also S. Ct. Order 16-05A (Feb. 12, 2020) (extending and expanding pilot project); S. Ct. Correction Order 16-05B (Feb. 22,

2020); and S. Ct. Order 16-05C (Mar. 13, 2020) (adding Dane County to the pilot project).

Upon receipt of the Committee's extension request, the court voted to solicit written comments. A letter seeking public written comment issued on March 11, 2022. Numerous written comments were filed with this court. In addition, the court received copies of numerous letters and emails the Committee received regarding the pilot project. The Committee filed a formal response to the public comments on April 18, 2022.

The court discussed this petition and the comments received in a closed administrative conference.¹ Some of the comments expressed concern with the mechanism for selecting judges who participate in the pilot project. We note that the petition asks the court to amend Section 2. e) of the Interim Commercial Court Rule to reflect the existing practice that the Chief Justice considers the recommendation of the Chief Judge of the Judicial Administrative District when selecting judges for the pilot project. On due consideration, the court has elected to extend the commercial pilot project until July 30, 2024 as set forth herein. Therefore,

IT IS ORDERED that, effective the date of this order:

SECTION 1. Section 2. b) of the Interim Commercial Court Rule is amended to read:

¹Because this petition pertains to an ongoing pilot project, no public hearing is required at this time. However, if the court is asked to adopt a permanent statewide commercial court docket, the Committee will file a formal administrative rule petition that will require both public comment and a public hearing.

2. b) The pilot project will begin and end as authorized by order of the Supreme Court. See S. Ct. Order 16-05, 2017 WI 33 (issued Apr. 11, 2017, eff. July 1, 2017). The approximate duration of the project will be from July 2017 to July ~~2022~~ 30, 2024.

SECTION 2. Section 2. e) of the Interim Commercial Court Rule is amended to read:

2. e) The Chief Justice, after considering the recommendation of the chief judge of the Judicial Administrative District, shall select the circuit court judges in the counties and judicial administrative districts participating in the pilot plan who will be assigned to the Commercial Court docket. Selection of a judge for the Commercial Court docket shall not preclude the judge from continuing work on any other assigned docket. The Chief Justice ~~shall~~ may select no fewer than: three circuit court judges in Waukesha County; no fewer than three circuit court judges in Dane County; no fewer than four circuit court judges within the Eighth Judicial Administrative District; no fewer than four circuit court judges within the Second Judicial Administrative District; and no fewer than three circuit court judges within the Tenth Judicial Administrative District. The Chief Justice may also add additional counties and/or districts to the Commercial Court docket upon the recommendation of the Director of State Courts.

IT IS FURTHER ORDERED on or before July 1, 2023, the Committee shall either file a formal rule petition asking the court to amend the rules to adopt a permanent business court or shall advise the court in writing that it recommends the court permit the pilot project to expire.

IT IS FURTHER ORDERED that this order and the interim commercial court rule, as amended, shall be made available to the public on the

Wisconsin court system's website. The State Bar of Wisconsin shall provide notice of this order.

Dated at Madison, Wisconsin, this 29th day of June, 2022.

BY THE COURT:

Sheila T. Reiff
Clerk of Supreme Court

¶1 ANN WALSH BRADLEY, J. (*dissenting*). I begin by recognizing the hard work that has been exerted in undertaking the Business Court pilot project that began in 2017. This court then created a dedicated court docket for large claim business and commercial cases. These efforts were expended with a goal toward making our court system more efficient and effective in the handling of large claim business and commercial litigation.

¶2 Now, five years later, we are asked to extend the pilot project for yet another two years. At the outset of this project in 2017 I was skeptical and voiced a dissent because I thought creation of a special docket for large business litigation cases sent the wrong message and undermined my vision of the court system as a whole.

¶3 The wrong message was that most circuit court judges were not capable of handling these cases. And, that businesses with large claims deserve special treatment, entitling them access to the most efficient, fair, and cost-effective treatment available in the court system. My vision of the court system remains the same. All people deserve a system that is accessible, efficient, cost-effective and fair.

¶4 I write separately to address two errors of the majority. Because, after five years of existence, the pilot program lacks evidence-based data to justify its continuation and because this court made its decision without holding a public hearing on the petition, I respectfully dissent.

¶5 I begin by addressing the lack of evidence-based data. As with the petition for extension of the pilot project now before

us, we asked for written comments on the original petition filed in 2017. Court of Appeals Judge Lisa Stark, who neither supported nor opposed the petition, wrote to raise concerns about the need for an evidence-based approach for assessing the creation and evaluation of the pilot project.² Her comments were prescient and reflected some of the same concerns I have regarding the petition before us today. Among other evidence-based concerns raised by Judge Stark, I highlight two.

¶6 First, observing that the petition to create the pilot program was based on anecdotal accounts along with some outdated data from other states, the court was being asked to embark upon (and now we are asked to continue) a pilot project without any Wisconsin-based research justifying the project. There was no data evidencing a delay in handling of complex commercial litigation cases, a lack of predictable results, or any unfair handling of such cases—which were the justifications for creating the pilot program.³

² S. Ct. Order No. 16-05, 2017 WI 33 (issued Apr. 11, 2017, eff. July 1, 2017) (Abrahamson, J., dissenting) (Attachment A).

³ Judge Stark continued:

Without initial data to use as a benchmark, the Office of Court Operations will be unable to: compare the number of cases heard in the [Commercial Case Dockets (CCDs)] to the number brought prior to their creation, thus determining if the CCDs have helped to achieve the goal of decreasing repeat litigation; compare the time to completion of cases before and after the implementation of the pilot project, thereby determining whether the CCDs more expeditiously handle business cases and reduce litigation costs; and compare the number of cases appealed and reversed prior to and after the creation of

¶7 Second, she emphasized that we need accurate and expert evaluation of the project as it continues. "Without an accurate evaluation, we will have no definitive basis to determine the effectiveness of the pilot project and whether it should be continued or expanded."⁴

¶8 I agree. Both the creation of the project and now its continuation lack reliable and supportive evidence-based data. Apparently recognizing the need for solid data, the original petition creating the pilot program contained a suggestion that an expert be enlisted to provide a quantitative assessment approach or tool. To date, that has not occurred.

¶9 Additionally, the 2017 Supreme Court Order creating the pilot program required the Business Court Advisory Committee to monitor the program for the first three years and to make an annual report to the Court for the years 2018 and 2019. The report was to contain "[r]ecommendations concerning . . . adoption of additional measurements to evaluate the performance of this pilot project" S. Ct. Order No. 16-05, 2017 WI 33 (issued Apr. 11, 2017, eff. July 1, 2017). Apparently, those recommendations

the pilot project, thereby helping to determine if complex commercial cases are handled more predictably and fairly.

⁴ Id.

likewise never happened.⁵ Thus, I conclude that we are left with a dearth of reliable information sufficient to justify the continuation of the business court pilot project.

¶10 I turn next to the second error of the majority, the failure to hold a public hearing on the petition for continuation now before us. The majority court order issued today requires that "on or before July 1, 2023, the Committee shall either file a formal rule petition asking the court to amend the rules to adopt a permanent business court or shall advise the court in writing that it recommends the court permit the pilot project to expire." I anticipate that a formal public rules hearing will be scheduled to address the Committee's recommendation given that it affects court practice and procedures and is thus required pursuant to Wis. Stat. § 751.12(2).

¶11 Indeed, the petition before us to extend the pilot program also affects the practice and procedure of courts in this state and likewise should have been subject to a public hearing. Wisconsin Stat. § 751.12(2) provides in relevant part: "No rule modifying or suspending statutes relating to pleading, practice,

⁵ I have never received, either directly or forwarded, the required report for 2018 or 2019. In searching files and emails, however, I did encounter a report for 2019 which was attached to the 2020 petition for continuation of the project. A review of the quantitative data provided in that report, however, is insufficient. It merely details such things as the number of cases filed and completed and length of time to completion. It does not include any recommendations for the adoption of additional evaluative measures for performance. If a 2018 report exists, and if it contains data similar to that in the 2019 report, it would likewise be nonresponsive to the court's request.

and procedure may be adopted until the court has held a public hearing with reference to the rule." (Emphasis added).

¶12 I recognize that the petition requests continuation of a pilot project and not a permanent rule change. But this is no ordinary pilot project. It is controversial and substantial. Additionally, it affects not merely a few isolated venues, but rather affects a change of practice and procedure in every county of this state because any county can refer a case to a designated pilot business court. S. Ct. Order No. 16-05A (issued Feb. 12, 2020, eff. Feb. 12, 2020). Even if it is argued that a public hearing is not required here, one should have been held because of the degree of uncertainty and strong public interest raised by numerous letters we have received commenting on the petition. This court typically holds public hearings even when not required unless the petition is totally without merit, ministerial, or nonsubstantive.⁶

⁶ The court's website advises that even when a public hearing is not mandated, the court holds a public hearing on petitions for rule amendment unless the change is ministerial or non substantive. The petition before us hardly fits that bill. The court website provides:

The court notices and holds a public hearing on a petition for the creation or amendment of rules governing pleading, practice and procedure in judicial proceedings in all courts, provided that the court deems the petition to have arguable merit. The court also holds a public hearing on a petition for amendment of the Supreme Court Rules except, in the court's discretion, when the petition concerns ministerial or otherwise nonsubstantive matters or when exigent circumstances exist.

¶13 Regardless of whether it is mandated, a public hearing should have been held to address the uncertainties of the petition and to give voice to those who feel strongly about the petition, both for and against. This petition should have been aired in public rather than decided behind closed doors.

¶14 Because to date this court has not received quantitative Wisconsin evidence-based data justifying either the creation of the business court project or its continued existence, I cannot join the majority order. Without expert assistance to develop the necessary evaluative tools and strategies that provide reliable data, or other sufficient evidence-based data to help guide this court forward, we are left with a void. A public hearing would have allowed the court to ask the tough questions and explore additional concerns raised about the petition, in order to fill the void. But that did not happen. Rather than setting forth in this dissent some of the concerns that should have been addressed at a public hearing, I instead attach one of the many letters that this court received aptly setting forth some of those concerns.⁷

¶15 Accordingly, I respectfully dissent.

¶16 I am authorized to state that Justices REBECCA FRANK DALLET and JILL J. KAROFISKY join this dissent.

<https://www.wicourts.gov/scrules/notices.htm>.

⁷ The letters received by this court can be viewed on the court's website at:
<https://www.wicourts.gov/scrules/archive/1605.htm>.

April 6, 2022

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Chief Justice Ziegler and Justices of the Wisconsin Supreme Court
c/o Clerk of Supreme Court
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(Sent electronically to clerk@wicourts.gov, and hand delivered, 4/6/22)

Re: Rule Petition 16-05D – Business Court Pilot Project

Dear Honorable Chief Justice Ziegler and Honorable Justices of the Wisconsin Supreme Court:

Thank you for the opportunity to comment on the petition to extend the business court pilot project. I respectfully suggest that this project was ill-conceived and should not continue.

By way of background, I have been a member of the Wisconsin Bar since 1978. After a clerkship with this court (Justice William Callow), I practiced as a civil trial lawyer in Madison for 28 years, and then served as a circuit court judge for Dane County for ten years before retiring in 2017. Since then I have mediated and arbitrated civil disputes, including commercial cases. My work as a trial lawyer was mostly insurance defense, and over time, I concentrated on medical malpractice defense. I did handle some commercial cases. On the bench, I spent about half my time in the civil rotation, including commercial cases.

I was honored to be invited to fellowship in the American College of Trial Lawyers and to membership in the Wisconsin Chapter of the American Board of Trial Advocates (ABOTA). I was named ABOTA's Wisconsin trial judge of the year in 2016.

I respectfully offer three points:

First, this business court is entirely unnecessary. Sound, conservative principles of judicial administration counsel that we should continue established traditions that work, supplanting them only if they no longer serve their purpose. Since statehood we have had elected judges, chosen by the people in the court's jurisdiction to hear and decide their disputes. While procedures for assignment of cases may vary depending on the number of judges in a county, the general idea of random assignment of cases to judges within a division preserves the perception of fairness. Any change that does away with this and instead allows certain persons to assign certain judges to certain types of cases, should only be made for compelling reason. Here there is none.

Business cases are no different than other cases. Of course, the judge must learn the substantive law that applies to any case. It is the responsibility of the trial judge to do the homework, and it is the responsibility of the trial lawyer to help the judge understand the governing legal principles. The principles of law in business cases are no more difficult than those in products liability cases, medical malpractice cases, administrative law cases, or most any other area of the law. Likewise, while the nature of the facts will vary, of course, from case to case, there is nothing inherently more complicated about business disputes compared with other cases, which may involve engineering, medicine, and other specialized knowledge. We have always counted on judges and lawyers to do their jobs and learn the material, and that is true regardless of the type of case.

When I was trying medical malpractice cases, we often had cases before judges who had not handled a malpractice case before. Some of those judges were among the finest judges I appeared before. They were prepared. They read the law. When they didn't know something they asked the lawyers, and if we knew, we helped. These judges understood the facts. They knew how to hold the lawyers and parties to a schedule and how to run a trial. I am confident these judges would do just as fine a job with a commercial case.

Likewise, the procedures for handling business cases are no more demanding than those for other cases. Proponents of the business court project have suggested that a business court might handle a business case more efficiently. Not so. I'm sure the business court judges do a fine job, but that's not because they are business court judges, it's because they are good judges, period.

For example, as a trial judge, I had several cases where one party appeared, usually late in the day, and often it seems on a Friday, seeking a TRO in a commercial dispute. We took care of those requests promptly, usually reaching an interim solution with input from the other party whenever possible, and then scheduling a hearing the following week. If I had to move other things on the calendar, so be it. That's just the kind of commonsense calendar management that judges and their staff do all the time.

Why create a new set of rules and procedures, and handpick certain judges to handle business cases, when we don't do that for other cases? Why deprive litigants of their right to have their cases decided by those judges who are elected by them and by their fellow citizens and assigned more or less randomly to hear their cases?

I began by invoking the bedrock principle of sound, conservative judicial administration; put a little differently it comes down to the old maxim, "Don't fix what ain't broke." Our system ain't broke, and we should leave well enough alone.

My second point addresses an attitude some may have that there's no harm in continuing to give this project a try. Why not extend it another two years? I suggest there are at least three reasons to stop it now:

- There was never a good reason to undertake this in the first place, and the fact that it now exists, doesn't change that. This project has reached the end of its original pilot period, and therefore is on schedule to expire now, unless approved to continue. It should be allowed to expire. The petition does not supply a compelling reason to continue an unnecessary project.
- When the judiciary expends time and resources, there are opportunity costs. Why not spend the time and resources -- including the considerable expertise of those serving on this committee -- on something more promising? For example, if business lawyers think judges are not well enough trained in the substantive law or principles of case management, why not work within our exemplary judicial education framework to create programs to be offered at the annual judicial conference, the civil law seminar, or even perhaps the judicial college?
- Most important, with this project the Wisconsin judiciary has squandered its most precious asset -- its credibility as a beacon for equal justice for all. How does the public not look at this without believing that the court is putting its thumb on the scales of justice in favor of business? Why don't injured parties and those that have been denied their civil rights get the same treatment? The way in which this project came about -- without transparency, without diversity of input, without public hearing, without public comment, without public notice that it was scheduled for a vote -- surely contributes to the stain it leaves on the judiciary. Other unfortunate aspects, such as the judicial training provided at the Antonin Scalia School of Law, do little to dispel the perception that this is an ideologically-driven device to give business interests more favorable treatment by the judiciary than the rest of the people get. These were deeply unfortunate, unforced errors, to be sure, but the entire project seems an unforced error, and it's time to correct that.

Rather than ask, why not let this project continue, I respectfully suggest a better question would be, why not let it expire?

My final point is that the court should not be misled by the facile and disingenuous comparison to treatment courts, which, unlike the business court, serve a real need and are rigorously evidence-based. I worked in treatment courts for a combined total of ten years, and was honored to receive the 2017 Aulik Award for leadership in treatment courts in Wisconsin. Treatment courts are not for adjudicating disputes. Rather, once a drug or alcohol addicted criminal offender has acknowledged responsibility, treatment courts provide a closely supervised program of treatment and accountability in lieu of jail or prison. The model works in significant part because of the relationship established between the offender and the judge. Treatment courts were developed to solve the problem (in fact, they are sometimes called problem-solving courts) that locking people up does not address the addiction that is associated with their criminal behavior. In contrast, the business court project remains a solution in search of a problem.

Thank you for the opportunity of presenting my views on the petition to extend this pilot program. I do hope the court will conclude that this misbegotten project has run its course and should be allowed to expire.

Respectfully submitted,

John Markson

cc: Attorney Laura A. Brenner, Chair, Business Court Advisory Committee
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