



WISCONSIN COURT OF APPEALS

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April 8, 2022

Chief Justice Ziegler and Justices of the Wisconsin Supreme Court
c/o Clerk of Supreme Court
Attention: Deputy Clerk-Rules
P.O. Box 1688
Madison, Wisconsin 53701-1600
(Sent electronically to clerk@wicourts.gov)

Re: Rule Petition 16-05D—Proposed Amendment to the Pilot Project for Dedicated
Circuit Court Judicial Dockets for Large Claim Business and Commercial Cases and
Interim Rule

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

This letter is written in response to the Supreme Court's request for comment on the referenced Rule Petition. This is the second letter I have written to provide the Court with input on the commercial court docket pilot project (CCD). The first was filed with the Court on January 19, 2017 and is available for review on the Court's website.

In my first submission, I recommended that the Supreme Court consider three significant issues prior to implementing the pilot project: (1) the lack of an evidentiary basis for creation of CCDs in Wisconsin; (2) the inability to evaluate their effectiveness; and (3) their likely impact upon the credibility of the remaining justice system and morale of the other judges serving in the remainder of the circuit court dockets in our state. I suggested that timely and appropriate action taken in response to these issues, preferably prior to the implementation of the pilot project, would help determine whether the CCDs were necessary, and if so, enhance the viability, effectiveness and perception of the proposed CCDs.

My recommendations were not uninformed. I have experience as a civil litigator for 18 years with a significant practice in business and commercial litigation. I served as a circuit court judge in a general jurisdiction court for 13½ years in Eau Claire County. I have taught judicial education courses since 2005, including case management, and have served as the Dean of the

Wisconsin Judicial College since 2011. I have assisted in planning and implementing many justice initiatives in Eau Claire County including a drug court in 2004—over which I presided for nine years—a restorative justice program, a nationally recognized criminal justice collaborating council, and Eau Claire County’s nationally recognized evidence-based justice system. Finally, I have worked with state-wide committees for years in developing standards for our Wisconsin treatment courts, and the evaluative criteria necessary to determine if those courts were fair, efficient and effective.

Unfortunately, my recommendations regarding the CCD pilot project were ignored. Despite the passage of five years and the expansion of the pilot project, the concerns I expressed in 2017 remain unaddressed. Now, after the CCDs have been operating for five years, the Business Court Advisory Committee (Committee) proposes that the pilot project be extended once more, this time to gather supporting data. The purpose of this endeavor is not to determine if the courts are viable and whether they should continue to function, but instead to determine if *state-wide* trial court judicial dockets for large claim business and commercial cases should be established. For the reasons provided below, I respectfully recommend that the Supreme Court deny the Petition and terminate the pilot project.

1. Lack of Evidentiary Basis for the CCDs

The stated purposes for the pilot project included a desire to make Wisconsin a more favorable forum for resolving business disputes by improving access to justice, expeditiously resolving business cases and reducing litigation costs, improving the quality and predictability of justice in connection with business disputes, and decreasing the likelihood of repeat litigation. In my 2017 submission, I suggested that research was necessary to determine the need for the CCDs in Wisconsin, and to provide a baseline to evaluate their effectiveness in fulfilling the above-stated purposes. For instance, there was no evidence at that time to determine: the basis for the selection of certain types of cases to be handled in a CCD (despite the lack of such evidence, the types of cases handled have been expanded since the pilot project’s inception); the number of cases likely to be handled by the CCDs (which even in 2017, without any evidence other than my own anecdotal analysis, I expected would be small, and the Committee acknowledged was unknown); the average time to disposition of the case types to be included in the CCDs; and what evaluative criteria should be used to determine whether the above goals were met. In short, there was no Wisconsin-based research evidencing a delay in the handling of complex commercial litigation cases, a lack of predictable results, or any unfair handling of such cases that supported the creation of the CCDs.

In my 2017 submission, I suggested several ways the Committee, or others assigned to the task, could attempt to obtain some of this missing evidence. To my knowledge, none of those suggestions were considered or followed. Thus, the need for the CCDs remains as unsupported as it was at their creation.

There is some evidence contained in Attachments A and B to the Memorandum filed in support of the current Petition that the Committee relies upon to argue for the pilot project’s extension. I submit that the minimal—and what I consider flawed—data presented fully supports my recommendation to deny the extension of the pilot project, and to terminate it.

The Memorandum states that the average number of civil filings in Wisconsin circuit courts per year from 2015 to 2019 was 32,446. In 2020 and 2021 that average number fell, likely due to the pandemic, to 23,992. The total number of civil filings in Wisconsin circuit courts from 2017 to 2021 was therefore approximately 145,332. During those same years, the entire number of large claim business and commercial cases filed in the CCDs in Wisconsin totaled 172—34.4 cases a year on average. Even if we extrapolated the number of qualifying cases that were filed in the few jurisdictions in which the CCDs operated for the past five years to determine the number of cases the CCDs would have considered if they had operated state-wide, the number of cases served by the CCDs during the past five years is infinitesimal as compared to the number of overall civil cases filed in the circuit courts.

As Judge Markson says in his excellent submission to this Court, “when the judiciary expends its time and resources, there are opportunity costs.” The time, expense, resources and expertise of the Committee, the CCD judges and the court system as a whole would be far better devoted to other efforts rather than providing this dedicated service to a handful of special business interests. Judge Markson’s recommendations in that regard, such as providing case management and other relevant educational programming to all judges, are well made. There is absolutely no reason for the CCDs to exist given the minimal number of parties to be served and cases to be heard. The pilot project and its extension are not wise or reasonable uses of public resources.

Further, the Committee notes that in each year from 2015 to 2021, the circuit courts in this state disposed of several thousand cases a year more than were filed. This should serve to dispel the myth that somehow the circuit courts as a whole are backlogged and that a special docket is necessary to provide more efficient service to business and commercial interests.

Finally, in 2017 I questioned whether the CCDs could meet their stated goal of having business and commercial cases heard more expeditiously when no accommodation was to be made to the CCD judges’ caseloads. Notably, since 2017, the CCD judges have been able to include the assigned cases into their regular workloads without accommodation. This clearly indicates that the number and types of cases assigned to be handled by CCD judges can easily be accommodated into the workloads of all judges, and those cases can be handled without delay or added cost to the parties. The CCDs are unnecessary for the efficient handling of business and commercial cases.

2. Lack of Evaluative Criteria

To my knowledge, no criteria have been established with which to evaluate the fairness, effectiveness and efficiency of the CCDs. As noted in my 2017 letter, no resources were allocated to the pilot project. If any data had been collected, no funds were set aside to establish a data collection base and pay someone to collect, maintain, and evaluate the data and report their findings. For example, at the outset, the original petition suggested that the Director of State Courts might wish to enlist the assistance of an expert in the evaluation process. That did not occur. And, to my knowledge, the cost to hire an evaluator to merely conduct a survey was in 2017 at least \$3,000 to \$15,000.

The present Petition suffers from the same deficiencies. In my Court of Appeals parlance, I would consider the Petition and supporting Memorandum undeveloped. The Committee suggests that it wants to extend the pilot project for two years to collect data to determine if *state-wide* trial court judicial dockets for large claim business and commercial cases should be established.

However, the Committee provides no information on: what data it proposes to collect; who will collect it; where it will be maintained; who will develop objective, evidence-based evaluative criteria for the data collection; what costs will be incurred to develop the criteria and obtain and maintain the data, and who will pay them; whether a neutral third party will be involved; and what criteria should be considered at the end of the extended pilot project to determine whether it should be continued or expanded. The Committee has had five years to develop this information. The Petition is undeveloped, and on that basis alone, it should be denied.

Interestingly, the Committee does provide what it refers to as “Qualitative Data” in support of its Petition. See Attachment B to the Memorandum. But this self-serving data could not serve any evidentiary purpose if offered in a court of law. It appears to be generated as the result of an online survey asking the opinions of those who participated in cases heard in pilot project courts as to the CCDs’ efficacy and efficiency. Aside from the apparent flaws in this system of survey—including no evidentiary basis for the biased form of the questions, no information as to the number of parties surveyed or the number of respondents, whether they represented successful or unsuccessful litigants, and in what types of cases—the results themselves do not support extending the pilot project.

The survey results on all questions are virtually identical, meaning it appears the same respondents provided the same answers to virtually all of the survey questions. Rather than evidencing overwhelming support for the CCDs, the results show that, at best, only 58% of those involved in a case heard in a CCD court strongly believed that the CCD judge provided a more efficient and effective experience. That same number strongly believed that the CCDs should become a permanent part of the Wisconsin court system. Anecdotally, one would expect that if the CCDs fulfilled their stated purposes, a larger number of business and commercial respondents would have extremely strong support for them. That does not appear to be the case.

Of even more interest, however, is the survey response to Question 6. When asked if the respondents believed that the CCD demonstrated that the judge managed the trial more effectively than the traditional court docket, only 7% of respondents stated they strongly believed this to be true. 3% did not believe this at all, and 81% of respondents left the question unanswered or considered it not applicable. Perhaps some of the respondents’ cases have not yet been resolved. But the more likely reason for this response is that a significant percentage of the cases filed in the CCDs that have been closed were resolved through mediation or arbitration. In other words, those cases were resolved without the need for, or intervention of, the CCD court and its judicial expertise.

In summary, the need for evaluation of the CCDs was known prior to the implementation of the pilot project. Despite that need and ample opportunity to undertake it, no meaningful evaluation has occurred, and none is proposed. The minimal and flawed evaluation that has occurred does not show that the CCDs have accomplished their stated purposes. The Petition should be denied, and, further, the pilot project should be terminated.

3. Other Justice System Considerations

In 2017, I expressed concern that the creation of the CCDs would have negative repercussions for the justice system. Those concerns have to some extent been realized. For example, the CCDs create the perception among the bar and justice system participants that judge

shopping is permitted. With the opportunity for parties to opt into the pilot project system even though they are not in a CCD forum, that perception is encouraged.

Further, I remain concerned that the pilot project and its extension create and foster the impression that circuit court judges as a whole are not capable of handling complex civil cases and that those judges who are not selected to serve in the CCDs are somehow less capable, expeditious or fair. Nothing could be further from the truth. As Judge Markson notes, business cases are no different than other cases. All judges must learn the substantive law that applies to any case with the assistance of the litigants. The principles of law in business and commercial cases are no more complex or difficult than those in many of the other types of cases that come before the circuit courts. There is nothing inherently more complicated about a business dispute than other cases, such as those involving products liability matters, insurance coverage disputes, administrative reviews, medical negligence matters, or even divorce cases involving business or commercial disputes.

The process to select CCD judges also enhances this misperception regarding the judiciary as a whole. The CCD judges are selected by the Chief Justice, seemingly elevating them above their colleagues. The Petition proposes that the selection process be modified to take place with the input of the Chief Judge of a judicial district. This will not diminish the perception that the selected judges are somehow more capable or worthy than their colleagues.

Regardless of who has input in the selection decision, the fact that there are no criteria established for selection or service as a presiding judge in a CCD creates further problems. The only known criteria to serve as a CCD judge are familiarity with commercial disputes, possession of a strong business law background and knowledge of commercial transactions. While all of the CCD judges who have served to date should be commended for stepping up and accepting this added responsibility, some of them, nevertheless, did not meet the minimal selection criteria, leaving others to question the basis for their selection. Other judges who would relish the challenge and experience of participating in the CCDs have not been considered. Still others have had the pilot project foisted upon their jurisdiction without their knowledge and consent. All of this creates dissension among the judiciary and negatively affects morale. While I do not recommend extension of the pilot project, if it is extended, I strongly recommend that an application process be implemented so that those judges who are interested in serving in this type of court are considered. Selection criteria should be established, and any perception that the appointments are in some fashion politically motivated, or that CCD judges are somehow more qualified to serve, should be avoided.

Finally, whatever limited benefits the CCDs provide to business and commercial parties cannot offset the diminished reputation that the court system suffers when viewed as biased toward business interests. As I said in my 2017 submission, we cannot and should not create the impression that business, above all, deserves the fastest, most cost efficient, most predictable, and fairest disposition of all cases. A high-value business case is no more important than the case of a parent whose children may be removed from their care, a defendant who may be convicted of a crime with a possible loss of freedom, or a family losing their home.

Our circuit court judges do a remarkable job of presiding over a vast number of different types of cases with significant expertise, talent, patience and intelligence. We should encourage their commitment and vitality in their current roles, without the use of the CCDs. At this juncture,

after five years, we must conclude that the CCD pilot project has failed to prove its efficacy. I strongly recommend that the Supreme Court deny the petition to extend the pilot project and terminate the CCDs.

Respectfully submitted,

Lisa K. Stark

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cc: Chief Justice Annette Kingsland Ziegler
Justice Ann Walsh Bradley
Justice Patience Drake Roggensack
Justice Rebecca Grassl Bradley
Justice Rebecca Frank Dallet
Justice Brian Hagedorn
Justice Jill J. Karofsky
Attorney Laura A. Brenner, Chair,
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