

WMC

Wisconsin's Chamber

Via Electronic Submission

September 9, 2024

The Honorable Chief Justice Annette Ziegler and
Justices of the Wisconsin Supreme Court
c/o Clerk of the Supreme Court
Attention: Deputy Clerk-Rules
P.O. Box 1688
Madison, WI 53701-1688
Clerk@wicourts.gov

FILED

SEP 10 2024

CLERK OF SUPREME COURT
OF WISCONSIN

RE: Rule Petition 16-05E, Proposed Amendment to the Pilot Project and Interim Rule

Dear Justices of the Wisconsin Supreme Court:

Wisconsin Manufacturers & Commerce (WMC) appreciates the opportunity to comment in support of Rule Petition 16-05E.

WMC is the state's chamber of commerce and largest general business association in Wisconsin, representing approximately 3,800 member companies of all sizes and from every sector of the economy. Since 1911, WMC's mission has been to make Wisconsin the most competitive state in the nation to do business. A specialized commercial docket that can handle complex commercial disputes with expertise and efficiency is one such way that Wisconsin can remain competitive.

Sunsetting Wisconsin's commercial docket pilot would make our state an outlier. More than half of all states have a business court or some specialized commercial docket program, either statewide or at a lower jurisdiction, including *all* of Wisconsin's border states and industrial competitors of Indiana, Ohio, and Pennsylvania.¹ Just this year, two more states, Utah and Texas, have established business court programs.² A growing number of states across the political spectrum, from New York and Illinois to Florida and Wyoming, are recognizing the how the innovation of commercial dockets or courts provides efficiencies for both litigants and the court system.

Litigants, judges, and the court system at large benefit, directly or indirectly, from an efficient direction of resources created through a commercial docket. For parties, litigation increases costs for businesses, small and large, which cannot be anticipated and can easily and quickly add

¹ Benjamin Raymond Norman and Benjamin Mark Burningham, *Recent Developments in Business Courts 2024*, American Bar Association (March 7, 2024), available at: https://www.americanbar.org/groups/business_law/resources/business-law-today/2024-march/recent-developments-business-courts-2024/.

² *Id.*

up when defending or pursuing a claim. Two years ago when this Court last considered extending the pilot program, Petitioners noted in their response to comments and their Exhibit 3, an overwhelming majority of pilot participants somewhat or strongly believed that the pilot program led to: a better timeline for the case (84%); more effectively managed discovery (84%); limited continuances (88%); reduced delays bringing the case to trial or settlement (88%); and achieving a resolution at a lower cost (both time and expenses) (78%). (Percentages reflect the combined total for “somewhat” and “strongly” believed responses to participant questionnaire.) Clearly for litigants there are cost and time efficiencies.

One recurring criticism is that the pilot’s existence suggests that Wisconsin’s Circuit Court judges are deficient when handling complex cases. On the contrary; Wisconsin’s judges, at all levels, on a daily basis, exhibit their legal acumen and competence in all areas of law. This pilot should not be understood as suggesting the Wisconsin Judiciary is lacking understanding in a particular field of law or cannot manage complex cases (every case no matter the field of law can present unique facts that can increase their complexity), rather, the commercial docket provides an opportunity for judges assigned to it to *further develop* their depth of understanding of the designated case codes. With greater expertise comes the increased capacity to more quickly recognize and understand the issues presented by commercial cases. The impact of this judicial expertise has, in participants’ views, led to the positive benefits mentioned above. Whether a judge sitting on the bench for the first time presiding over her first case, or after decades and hundreds of cases, surely the judge with more experience and exposure has developed insights and knowledge about certain areas of the law, rules of evidence, and case management the new judge has not yet developed; nevertheless, both attorneys and judges have duties of competence and diligence, for the former, and the latter to handle cases with competence and “dispose of all judicial matters promptly and efficiently.” See SCR 20:1.1, 1.3, *see also generally*, SCR 60.04. Sometimes ensuring our ethical duties as attorneys and judges takes more time and attention to ensure competent representation or a correct and fair outcome; the commercial pilot program presents judges assigned to the docket an opportunity to develop their competence to more “promptly and efficiently” dispose of these complex commercial cases, thereby clearing more time in their schedules and on their docket for other cases – a benefit to the judge and parties in these other cases, a benefit to the court system as a whole.

Another common criticism is that the pilot provides preferential treatment and undermines the neutrality of the court system. These criticisms are misguided. First, the judges assigned to the commercial docket still retain their responsibilities as judges in their respective circuits – there is no diversion of judicial time or resources to manage pilot program cases that detracts from a criminal proceeding, family law matter, or other dispute seeking resolution by the court. As presented in other comments submitted on this petition, the Legislature has indeed designated certain court proceedings that must be prioritized. The commercial docket does not take precedence or run parallel to the established court system, rather, it is a program to develop a cadre of expertise within the judiciary to dispense with such cases when they arise, but these cases are otherwise handled just as any other – except for the potential for the case to be more

quickly and effectively disposed of and unencumbering the judge's time in order to address other cases assigned to her or his docket.

Second, all parties in all cases, regardless of the parties' case type, wealth, or community status, are subject to the black and white letter of the law governing the dispute. Judges selected for the commercial docket, as noted, retain their responsibilities in their circuits for other cases alongside the commercial docket case assigned to her or him. If the pilot did not exist, or in counties not included in the pilot, a judge would still be, or is, assigned to adjudicate the cases designated for assignment to the pilot; no one has in the past, nor now, is questioning judges' ability (and ethical duty) to administer justice fairly and impartially because a case is coded in a certain manner, whether it be a commercial dispute, criminal prosecution, divorce and child custody matter, or other case. There is no evidence supporting this criticism of the pilot being unique to Wisconsin judges and courts either – if more than half of the nation has shown that commercial dockets and business courts can be administered successfully and enhance the administration of justice without bias or preferential treatment, Wisconsinites should have full faith and confidence our judges assigned to the pilot program have and will continue to maintain their ability to fairly and impartially administer justice regardless of case code or party involved. To suggest otherwise infers some other, underlying, pervasive ethical failing within the Wisconsin Court System that stretches well beyond the scope or impact of this petition and the pilot program.

Lastly, this Court is not usurping Legislative authority or skirting public participation in this process by considering this petition as some have criticized. First, this Court's rulemaking process is public, and importantly, a public hearing is set for later this month. Numerous comments have been filed since the petition first requesting establishment of the pilot program. Second, as previously mentioned, the Legislature has the ability to prioritize certain court proceedings or actions, and indeed done so in certain circumstances. This commercial docket pilot program is *not* such a prioritization, as previously explained; the pilot program is a tool this Court is experimenting with (as have more than half of states around the country) to better-utilize its limited judicial resources – most importantly judges' time. Third, this legislative session, companion bills were introduced in both the Senate and Assembly that would codify the commercial docket pilot *and* eight other "treatment court" programs. See 2023 Senate Bill 275, 2023 Assembly Bill 280. The Senate version of the bill passed that chamber on a voice vote, suggesting legislative support for the codification of the various treatment and commercial court programs. As is often the case with many legislative proposals, it did not become law this session, but is likely to be reintroduced and advanced in the session opening in 2025. Between this Court's public rulemaking process, the numerous comments submitted over the past few years regarding the pilot, and legislative interest in codifying the pilot, this Court should not hesitate granting this petition over only a perceived encroachment on legislative policy preferences or open government concerns.

This petition 16-05E seeks to extend the pilot to allow for additional quality data collection and a final report. After working through initial start-up challenges, weathering the COVID-19

pandemic, and making adjustments to the pilot in past petitions, the pilot program is able to generate quality data and metrics that will help this Court determine the next step for the pilot after this extension. Additional data and a final report from the Business Court Advisory Committee will also benefit lawmakers as they discern in the next (or future) sessions to legislatively codify the commercial docket program.

WMC supports Rule Petition 16-05E to extend the Commercial Docket Pilot Program for two additional years and collect data for a comprehensive evaluation report. The Commercial Docket Pilot Program has already indicated beneficial outcomes by pilot participants through conservation of monetary and time resources of litigants and judges. Wisconsin becoming an outlier by prematurely ending the commercial docket pilot program before a full snapshot of quantitative data would put Wisconsin's judicial climate at a competitive disadvantage with our neighboring and competitor states, and more than half of all states of all political and judicial ideologies.

Respectfully submitted,



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