


MEMORANDUM

TO: DTCWV Board of Directors

FROM: Russell Jessee 

DATE: October 16, 2011

RE: September 30, 2011 Business Court Committee Meeting

On September 30, 2011, I attended a meeting among members of the West Virginia Supreme Court of Appeals' Business Court Committee and invited stakeholders to discuss proposed rules for a Commercial Litigation Court in West Virginia. Laurie Barbe requested that I attend for the Board, as the Board had scheduled an off-site meeting on the same date.

The Business Court Committee comprises Circuit Court Judges Darrell Pratt, Jim Rowe, Donald Cookman, Rick Murensky, Chris Willkes, and Susan Tucker. All but Judge Tucker attended on September 30. The Supreme Court's General Administrative Counsel, Kirk Brandfass, also was part of the panel for the meeting. Justices Robin Davis and Menis Ketchum attended the meeting in the afternoon. The attending stakeholders primarily were members of the defense bar. Troy Giatras was the only readily identifiable attendee with a plaintiff-oriented practice. Several non-attorney business owners also attended.

The meeting gave invited stakeholders an early opportunity to comment on proposed rules for a Commercial Litigation Court in West Virginia (attached) before they are presented to the Supreme Court and released for public comment. The Business Court Committee already is on the second draft of proposed rules. It developed the proposed rules after studying the business courts of a dozen other states, particularly North Carolina.

The following provides a report on what appeared to be the most pertinent issues raised in the September 30 meeting:

1. Composition of the Commercial Litigation Court

The state will be divided into seven regions along county lines and respecting current judicial circuits as much as possible. Each region is to include at least one population center of 60,000 residents. Judge Murensky has made an initial proposed division (attached).

Seven judges will be appointed from among current and senior status circuit court judges.¹ The current proposed rules have the Chief Justice appointing the judges but it was suggested that the entire Supreme Court appoint them. The judges will receive specialized training in business law. While a judge attends to business law cases, other circuit judges would cover the judge's regular case load.²

The proposed rules require the Supreme Court's Administrative Director to provide support staff. It was suggested that court reporters be required to be proficient in Real Time reporting.

2. Jurisdiction of the Commercial Litigation Court

As proposed, the Business Court's jurisdiction would be limited to disputes "between two or more business entities, their officers, directors, or shareholders," that involve at least one of 22 types of specific business law issues or a catchall "[o]ther cases involving business entities deemed by the Chief Justice to require transfer." Thus, the court's jurisdiction is defined in terms of both the types litigants and the types of subject matter. The proposed rules also specifically exclude certain types of disputes from the court's jurisdiction, notably consumer litigation.

Much discussion was had that defining jurisdiction in terms of types of litigants *and* subject matter may be too limiting. For example, a business may have a trade-secret and non-compete dispute with a former manager, who, as an individual, would not be a "business entity" (and may not be even a former officer, director, or shareholder), even though the dispute would be well-suited to resolution by a business court.

Some Committee members expressed that they did not want the Commercial Litigation Court to be overburdened or to have frivolous suits, and, thus, they seemed to favor narrowly defining the court's jurisdiction.

3. Designation and Transfer of Actions to Commercial Litigation Court

Actions would first be filed in circuit court as with any action. Much discussion was had on the process and timing of designating cases for transfer to the Commercial Litigation Court system. Several suggestions were made to modify proposed deadlines and procedures to avoid delay in getting cases transferred.

¹ The proposed rules state that not more than two judges may be from a single region and that cases will be assigned to a judge from within the region where a case originates. With seven regions and seven judges, it would seem that each region necessarily would have one and only one judge. Such provisions that hypothetically contemplate more than one judge per region would thus seem to be unnecessary.

² Although not discussed at the meeting, the proposal that the panel of judges come exclusively from current and senior status circuit court judges would appear to create a resource allocation issue. Additional duties are added to the aggregate duties of circuit court judges without expanding the number of judges to attend to those duties.

Currently, the proposed rules require the party designating a case to pay a \$1,000 non-refundable fee. The Committee stated that it established the fee so the Commercial Litigation Court would have a funding mechanism. Some discussion was had about the parties possibly sharing the fee and possibly paying the fee only after a successful transfer to the Commercial Litigation Court.³

4. Mediation

Mediation would be mandatory for all Commercial Litigation Court cases. Although not discussed in any detail at the September 30 meeting, mandatory mediation would seem to ignore that businesses typically have better resources to analyze and resolve disputes before litigation. If businesses are in litigation, it is likely because the parties could not reach a negotiated or mediated solution.

5. Rules and Case Management Orders

The West Virginia Rules of Civil Procedure, Rules of Evidence, and Trial Court Rules will apply to the Commercial Litigation Court.

The proposed rules specify detailed case management orders. It was suggested that the case management orders as proposed, including the “time and location for the taking of depositions,” may be too detailed; perhaps, litigants and their experienced counsel did not require such detail.

Litigants as well as counsel would be required to attend the initial Case Management and Time Scheduling Conference. The Committee stated that other states had found that even sophisticated business litigants frequently were not well-informed about the costs and procedures of litigation. Thus, the initial conference would not be a settlement conference, per se, but would provide what the Committee sees as a necessary opportunity for litigants to gain a better understanding of what resolving their dispute in court will require.

6. Trials

Jury trials would be available to all parties. Trials will be conducted, to the extent possible, in the originating county. Juries would be empanelled in the county in which a case is tried.

³ Although not discussed at the meeting, a \$1,000 additional fee to be in the Commercial Litigation Court would appear to narrow the cases heard there to major commercial disputes. Parties to smaller contract disputes, for example, may not see value in the additional fee. Of course, commercial litigation plaintiffs already will have paid a filing fee.

7. Next Steps

Clearly, the Committee had spent extensive time studying other states' business court systems and developing the proposed rules. Nonetheless, the Committee encouraged written comments from the invited stakeholders and state it would possibly incorporate them into the next version of the proposed rules. Any written comments should be timely submitted. Steve Canterbury stated that within a month he hoped to have completed draft rules that will be presented to the Justices. The Justices then will make the gatekeeping decision of whether or not to proceed. If the proposal proceeds, there will be a 60- to 90-day public comment period. After that period, final rules will be presented to the Justices with comments for a final decision. In all the process is expected to take another four or so months.

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Please do not hesitate to contact me (304-353-8103, russell.jessee@stephoe-johnson.com) if you have any questions or comments.

29. Commercial Litigation.

Rule 29 Commercial Litigation Court – Preamble.

By the establishment of a Commercial Litigation Court, there is hereby adopted a process for the just and efficient litigation of cases between commercial entities.

The Court will specialize in the timely resolution of disputes between businesses by the use of 1) judges with training and expertise in commercial litigation, and 2) standardized pretrial and trial procedures which will address situations that are unique to commercial litigation.

The purpose of the Court is to create and provide an efficient and consistent body of commercial law upon which both the legal and business community may rely.

Rule 29.01 Commercial Litigation Court.

(a) The Commercial Litigation Court consists of seven (7) judges, appointed by the Chief Justice of the Supreme Court of Appeals from the pool of currently active sitting circuit court judges and senior status judges who have served at least three (3) years; not more than two (2) judges may be from any one Commercial Litigation Region. After the initial appointments, all future terms of service shall be for seven (7) consecutive years. There is no prohibition against serving successive terms. In the event of a vacancy on the court, the Chief Justice shall appoint a replacement judge to fill the vacancy and serve out the remainder of the term. The Chief Justice shall annually designate one judge to serve as its Chief Judge. The Chief Judge will be responsible for handling all administrative matters for the court.

(b) All judges of the Commercial Litigation Court shall receive training and education designed to prepare them for the specialized caseload they will handle while serving on the court. All expenses incurred as a result of a Commercial Litigation Court judge's participation in such training shall be reimbursed by the Supreme Court of Appeals of West Virginia as authorized by law.

(c) The Administrative Director for the West Virginia Supreme Court of Appeals shall provide support staff for the Commercial Litigation Court including, but not limited to, a secretary, a law clerk, a paralegal, a certified court reporter and clerical staff. The staff shall be provided with the office space and equipment that are necessary to carry out the duties of the Court.

(d) The Court shall have statewide jurisdiction, and shall also have regional venues that will incorporate the population requirements set forth in West Virginia Code §51-2-15.

Rule 29.02 Application.

These rules shall apply to and govern all actions in the circuit courts which are transferred by the Chief Justice to the Commercial Litigation Court. These rules shall not be construed to either limit the jurisdiction of the circuit courts or create any new causes of action.

Rule 29.03 Definitions.

For purposes of this Rule, the following definitions apply:

- (a) "Consumer" – an individual who buys goods or contracts to buy goods.
- (b) "Commercial Entity" – a business organization that can legally enter into a contract, and which may therefore be sued for failure to comply with the terms of the contract.

Rule 29.04 Court Duties.

The court shall:

- (a) develop and implement effective case management and trial methodologies, and fairly and expeditiously resolve commercial litigation referred to the court by the Chief Justice;
- (b) preside over commercial litigation or proceedings assigned to the court by the Chief Justice;
- (c) recommend for adoption by the Supreme Court of Appeals rules for conducting the business of the court as needed;
- (d) report periodically to the Chief Justice concerning the court's activities;
- (e) take all such necessary actions incidental to the powers and responsibilities conferred by this rule, as well as actions specifically directed by the Chief Justice; and
- (f) develop and implement plans for central organization including, but not limited to, staffing, record keeping, transfer and storage of Commercial Litigation Court files to the appropriate circuit, implementation of appropriate technology, adoption of necessary rules and procedures and any other administrative action necessary to achieve the effective management of commercial litigation.

Rule 29.05 Jurisdiction.

(a) The jurisdiction of the Commercial Litigation Court shall include any action between two or more business entities, their officers, directors, or shareholders, involving:

- (1) The business relationship, including breaches of business contracts;
- (2) The sale or purchase of a business;
- (3) The sale or purchase of commercial real estate;
- (4) The sale or purchase of business products covered by the Uniform Commercial Code;
- (5) The terms of a commercial lease;
- (6) Commercial non-consumer debts;
- (7) The internal affairs of a business, such as dissolution of a business or shareholder actions;
- (8) Trade secrets and trademark infringement;
- (9) Non-compete agreements;
- (10) Intellectual property, securities, technology disputes;
- (11) Business torts;
- (12) Insurance coverage disputes in commercial insurance policies;
- (13) Professional malpractice claims in connection with the rendering of professional services to a business entity;
- (14) Anti-trust;
- (15) Injunctive and declaratory relief between business entities;
- (16) Liability of shareholders, directors, officers, partners, etc.
- (17) Mergers, consolidations, sale of assets, issuance of debt, equity and like interests;
- (18) Shareholders derivative claims;
- (19) Unfair trade practices;

- (20) Commercial bank transactions;
- (21) Franchisees/Franchisors;
- (22) Internet, electronic commerce and biotechnology disputes; and
- (23) Other cases involving business entities deemed by the Chief Justice to require transfer.

(b) The following types of actions are presumed to be actions that do not come within the jurisdiction of the Complex Commercial Litigation Court:

- (1) Consumer litigation such as products liability, personal injury, wrongful death, consumer class actions, and consumer insurance coverage disputes;
- (2) Employee suits involving occupational health and safety;
- (3) Consumer environmental actions;
- (4) Consumer malpractice actions;
- (5) Administrative disputes with Government organizations, regulatory agencies, and taxing authorities;
- (6) Consumer and residential real estate, such as landlord/tenant disputes; and
- (7) Domestic relations; and
- (8) Criminal cases;
- (9) Eminent domain – condemnation
- (10) All other cases not included in Rule 29.05(a)

Rule 29.06 Applicable Rules.

All provisions of the West Virginia Rules of Civil Procedure, the West Virginia Rules of Evidence and the West Virginia Trial Court Rules shall apply to the Commercial Litigation Court.

If the instant rules conflict with other rules or statutes, these rules shall apply; otherwise, all applicable rules promulgated by the Supreme Court of Appeals of West Virginia apply.

Rule 29.07 Designation and Transfer of Actions to Commercial Litigation Court.

(a) Any party may file a verified Certificate of Designation of a case as a mandatory commercial litigation action with the circuit clerk of the circuit wherein the action is pending, and, in connection with such filing, shall pay to the circuit clerk a non-refundable fee of one thousand dollars (\$1,000.00). A copy of the Certificate of Designation must be filed within thirty (30) days of the filing of the complaint, answer, or motion to intervene, and shall be simultaneously served upon each opposing party, the presiding circuit court judge, and the Chief Justice of the Supreme Court of Appeals of West Virginia

(b) Within thirty (30) days of the filing of the Certificate of Designation, an opposing party may file a stipulation to the designation or a response in opposition to the designation, and shall serve the same on opposing parties, the presiding judge, and the Chief Justice, setting forth the reasons for opposing the designation of the matter as a Commercial Litigation Court action.

(c) The Chief Justice shall make a final decision on the designation of the case within thirty (30) days of the filing of Certificate of Designation.

Rule 29.08 Assignment and Duties of Presiding Judge.

(a) When an action is certified as a Commercial Litigation Court action, the Chief Justice shall assign a special commercial litigation judge from within the commercial litigation region wherein the action originated to be the presiding judge and to manage and litigate the case within any region where venue is proper.

(b) The presiding judge, within forty-five (45) days of being assigned, shall conduct a Case Management and Time Scheduling Conference with all counsel of record and litigants, and shall assign a Special Commercial Litigation judge, from another region, to serve as a mediator in the case.

(c) The presiding judge may schedule conferences, motions, mediation, pretrial hearings, and trials in any circuit court courtroom within the region where the case is pending, with due consideration for the convenience of the litigants.

Rule 29.09 Case Management Orders.

After the presiding judge has conducted the case management conference with all counsel of record and litigants as provided in Rule 29.08, he or she shall issue a

Case Management Order within fifteen (15) days of the conference that includes, but shall not be limited to, the following:

(a) The length of the discovery period, including the number of interrogatories and depositions permitted;

(b) The time and location for the taking of depositions;

(c) The period of time within which the identity of witnesses, including expert witnesses, shall be disclosed, and a list of documents to be offered at trial;

(d) The designation of a mediator as well as both the time for, and location of, the mediation;

(e) The time periods relevant to the filing, briefing, and docketing of dispositive motions;

(f) The time for, and location of, a pretrial conference, as well as the requirements of the pretrial memorandum;

(g) The time for, and location of, the trial;

(h) A statement from each party setting forth the principal legal and factual issues in dispute;

(i) A statement from each party concerning the potential for utilizing any methods of alternative dispute resolution; and

(j) Any stipulations by the parties as to any legal or factual issues.

All cases should proceed to final judgment in an expedited manner. The time standards set forth in the West Virginia Trial Court Rules for general civil cases shall apply, provided, however, that the court shall make every effort to conclude the case within twelve (12) months from the date the Case Management Order was entered.

All other time standards for service of notices and entry of orders as set forth in the West Virginia Rules of Civil Procedure shall apply, unless modified by a court order executed by the presiding judge.

Rule 29.10 Mediation.

(a) Mediation shall be mandatory in all cases certified as commercial litigation. Mediation shall be conducted in accordance with Rule 25 of the West Virginia Trial

Court Rules. The first mediation session shall commence within thirty (30) days of the entry of the Case Management Order.

(b) Only a commercial litigation judge from a commercial litigation region other than that where the case is pending shall serve as mediator in cases certified and transferred to the court for disposition. Provided, no sitting circuit judge serving as a Commercial Litigation Court judge shall receive additional compensation above his or her salary as set out in W. Va. Code §51-2-13. Provided, further, that such judge shall be reimbursed by the Supreme Court of Appeals of West Virginia for any and all of his or her expenses incurred as a result of his or her participation in commercial litigation cases, as authorized by law.

(c) If the parties stipulate a method of alternative dispute resolution involving arbitration, the parties shall file such stipulation with the court setting forth the method of arbitration, and shall waive mediation in lieu of binding arbitration on all or some of the issues in dispute.

Rule 29.11 Trials and Appeals.

(a) The right to a trial by jury shall be preserved for any party involved in litigation before the Commercial Litigation Court. Any party may demand a jury trial pursuant to Article VI of the West Virginia Rules of Civil procedure. All rules contained in Article VI of the West Virginia Rules of Civil Procedure shall apply to such trials.

(b) The West Virginia Rules of Evidence shall apply to every case tried before the Commercial Litigation Court.

(c) The Rules of Appellate Procedure for the Supreme Court of Appeals of West Virginia shall apply to every case tried before the Commercial Litigation Court.

(d) Every effort shall be made by the presiding judge to try the case in the county of origin. However, the judge, at his or her discretion, may order that the case be tried in another county within the region where the case originated.

(e) Jurors shall be summoned from the county where the case shall be tried, as authorized by law.

(f) The circuit clerk of the county of origin shall maintain the official court file on behalf of the Commercial Litigation Court.

