



COURT(ING) BUSINESS

Complex Cases to Receive Clear Focus

By Tom Schuman

When Frank Sullivan, Jr., an Indiana Supreme Court Justice for 19 years and currently a professor at the Indiana University Robert H. McKinney School of Law, speaks about courts, it's a good idea to pay close attention.

Asked about the importance of the new commercial court pilot project that begins June 1, Sullivan pauses, offering, "States that have the best functioning judicial systems have business or commercial courts of one kind or another. There's some general consensus around the country that businesses, all other things being equal, are attracted to states that have a well-developed business or commercial court."

The purpose of the commercial courts (officially outlined by an Indiana Supreme Court order on January 20 of this year; see box on this page) is to achieve fast, consistent and reliable resolution of commercial disputes. In the more than 20 states that have adopted a form of such courts since 1993, those results help bring "confidence and predictability" to the business community.

Ron Christian, executive vice president and chief legal & external affairs officer for Evansville-based Vectren, understands the sometimes unavoidable court delays but also outlines the potential damage for companies caught in that situation.

"The problem from the business perspective is that if it's a material piece of litigation, it just casts a cloud over the business," he articulates. "For a public company, that uncertainty can translate into a reduction of shareholder value, cause investors to take their capital elsewhere. It's a serious problem and this a great first step toward addressing it."

The terms "confidence" and "predictability" also make this an economic development

issue. Judges, both in the state of Indiana and beyond, readily acknowledge and embrace that role.

Maria Granger, Floyd Superior Court 3, will be one of the six judges in the commercial court pilot project. "The idea of getting just and efficient determination of commercial disputes is something that is hopefully going to cause businesses to want to locate in Indiana because they know they're going to get consistent decision-making that they can rely on. I look at more judicial efficiency as an asset to the corporate and economic development arena in Indiana."

Elizabeth Gonzalez, a justice in the Eighth Judicial District Court in Las Vegas, has been working in Nevada's redesigned business courts for the past decade. If her caseload is a good indicator, the more efficient and effective courts have been a factor in economic growth.

"I don't know the data," she admits. "I'm not sure of increases in incorporation, but given the large number of cases that I have that are international businesses, I have to believe someone was marketing business courts as part of the reason to incorporate in Nevada. In a lot of cases, international companies set up a single-purpose entity in Nevada."

Timeliness is everything

Time, or lack of it, quickly becomes a liability for business disputes and judges who are trying to manage often out-of-control caseloads. Steven David, a trial court judge in Boone County for 15 years before being chosen for the Indiana Supreme Court in 2010, says it's not unusual for a court to have 1,000 to 1,500 cases pending. Many, criminal and juvenile to name two types, have strict deadlines on when they must be decided.

Michael Wukmer, a member of the Indiana Commercial Court Working Group with David, Indiana Chamber President Kevin Brinegar and 16 others, practices in the



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*Frank Sullivan, Jr.
Indiana University law professor*

Order Establishing Indiana Commercial Court Pilot Project

The purpose of commercial courts is to:

- (1) establish judicial structures that will help all court users by improving court efficiency;
- (2) allow business and commercial disputes to be resolved with expertise, technology, and efficiency;
- (3) enhance the accuracy, consistency, and predictability of decisions in business and commercial cases;
- (4) enhance economic development in Indiana by furthering the efficient, predictable resolution of business and commercial law disputes; and
- (5) employ and encourage electronic information technologies, such as e-filing, e-discovery, telephone/video conferencing, and also employ early alternative dispute resolution interventions, as consistent with Indiana law.

litigation and intellectual property groups at Ice Miller in Indianapolis. He affirms the current lengthy time frames.

“A lot depends on where a case is filed. For example, if you have a case in Marion County or Hamilton County, the dockets there are crowded and it could certainly take two or three years to get through these types of disputes,” he shares. “In federal court, it’s the same kind of thing. I think what we put together with the commercial court, I would classify it as a nice start.”

Granger, the Floyd County judge, confirms a caseload of close to 1,000 – “maybe 1,200” – for her and her colleagues. “The downside to not managing these cases effectively is that the costs just become exorbitant.”

Las Vegas judges did receive a significant reduction in the other types of cases they handle as part of the business court restructuring. That was to allow those judges more time to deal with the preliminary injunctions and other motions that are so prevalent in these types of cases.

Certainty is so important for businesses, Christian adds. “You can take bad news; you can take good news; you just can’t take no news.”

Decision quality

The second advantage is predictability. Sullivan, pointing to Delaware as one of the models, describes it this way:

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Indiana Supreme Court justice*

body of corporate and commercial precedent here in Indiana than we have at present to consult,” he claims. “Almost without exception, the decisions of Indiana state courts are really ‘one-offs’ – made only for the lawyers or litigants in that particular case.

And they don’t stand as precedent for future cases until they get to the appellate level, which only a fraction of disputes do.”

David agrees, citing problem-solving, drug and veterans courts as some examples of current specialization. “At a minimum, it’s going to be nice for these judges to have the benefit of each other’s orders and rationale. It won’t control decisions that will be made, but hopefully help judges make more informed, more timely decisions. It will minimize situations where those judges have to go back to square one.”

Again, we go west for confirmation. Gonzalez says, “In our jurisdiction, it’s that specialized knowledge you get by handling that case type over and over again. For me to deal with issues like trade secrets and confidentiality is pretty easy and doesn’t take me a lot of lead time. But a judge who is not hearing those cases on a regular basis, there is going to be a very steep learning curve for them.”

How it will work

The Indiana Supreme Court order established the following pilot projects, beginning June 1 and not exceeding three years. The judges will be:

- Craig Bobay, Allen Superior Court – Civil Division
- Stephen Bowers, Elkhart Superior Court
- Richard D’Amour, Vanderburgh Superior Court
- Granger, Floyd Superior Court 3
- John Sedia, Lake Superior Court
- Heather Welch, Marion Superior Court, Civil Division 1

In the pilot stage, all parties must agree to utilization of the commercial court.

“The implication, of course, is that everyone who is there wants to be there,” Sullivan explains. “That will be extremely conducive to the courts achieving their objective of resolving cases very expeditiously. The litigant who is there for purposes of delay or gaining some type of advantage is probably not going to be somebody who is going to opt into the system in the first place.”

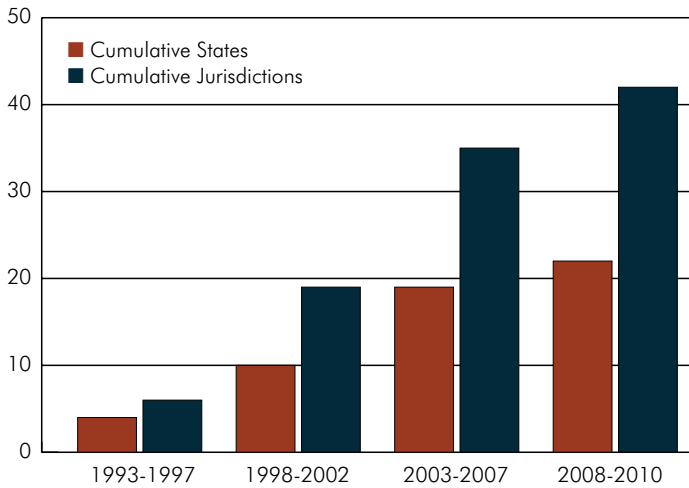
David speculates on the types of cases that likely will land in the specialized courts.

“We’re not talking about classic or traditional tort cases or contract disputes.



Indiana Supreme Court Chief Justice Loretta Rush praises the efforts of the Indiana Commercial Court Working Group during January’s State of the Judiciary address.

Strong Growth in First 18 Years of Business Courts



Source: National Center for State Courts

We’re not anticipating employment litigation,” he lists. “It’s acquisition, divestiture, allegations of insider trading, sophisticated transactions, trade secrets litigation – those types of things. These are the types of cases where discovery is very important; there are often significant issues related to discovery, motions to dismiss, motions for summary judgements. You are in court more often prior to an actual trial than you might otherwise be.”

Bobay, who also is chairing the working group, adds, “It really is helpful to have a clear focus on these cases from the outset and to have the court involved in actively managing these cases. Oftentimes, big complex cases can get out of hand before they show up for the first time on a judge’s desk.

“We need a comprehensive case management plan,” he continues, “all laid out that the parties agree to with realistic deadlines, focusing on wanting to get this case done efficiently and not having it linger for years.”

That is the number one piece of advice Gonzalez shares with judges across the country who inquire about the operation of the courts. “Spend the time with the lawyers and parties to make them understand that you are there to help them get out of the court system – to make decisions at an early stage to help them get in and out as quickly as possible and cost effectively.”

Judicial network

Bobay and Granger, two of the pilot project justices, say their recent focus has been on preparation. That includes “fine-tuning case management practices, setting deadlines, getting the language down on our orders, preparing forms that we will distribute to lawyers.”

It also includes taking advantage of the expertise of judges from across the country. Bobay (and Welch who also serves on the working group) attended their first national conference three years ago to learn more about commercial courts. He and Granger cite colleagues in Nevada, North Carolina, New York, Michigan, Wisconsin and South Carolina as among those offering guidance.

Both are also receiving feedback in their local communities since the January State of the Judiciary address from Indiana Supreme Court

Chief Justice Loretta Rush and the ensuing court order officially establishing the pilots.

“Word has gotten out that we’re looking into this,” Bobay offers. “As it has gotten more concrete and we’re getting closer to that June 1 deadline, more and more lawyers are constantly asking and looking forward in anticipation of getting their clients in this specialized court.”

Granger terms lawyers in her area “curious” and “excited,” as well as being in agreement that the commercial courts will be good for business.

Positive outlook

Wukmer, the Ice Miller attorney, is anxious for the pilot project to begin, but already looking further down the road.

“What I would like to see Indiana do is be able to create something unique and different from what other states are doing. Create something that would encourage businesses, to help them realize that if they found a good faith dispute could be litigated quickly in the Indiana courts, they would choose Indiana as opposed to going to Delaware or New Jersey or wherever else they would choose to go.

“I would ultimately like a couple of different tracks,” he suggests, “one truly expedited so they could go in and get a dispute settled in maybe anywhere from six weeks to six months – from beginning to end.”

David speculates that the need for such a system is only going to increase.

“Look at technology, some of the issues facing us, whether it’s security, cybersecurity, drone technology. Who knows what kind of trade secret, non-disclosure, non-compete, shareholder actions (are coming) – how complex they may be getting. Hopefully, we will be a little pre-emptive, ahead of the game in having created something that might address those in a more efficient, more predictable manner than if we waited five years.”

When asked about potential hurdles, Wukmer lists two: hoping judges not selected for the initial pilot projects don’t feel slighted (“we have a lot of judges who are excellent”) and the longer-term need to receive state funding and not have the efforts be politicized in any way.

He is confident that a third caution is taking care of itself. “If we have a good system, it shouldn’t be difficult to get buy-in from the business community.”

The optimism among the Indiana judges and working group members is evident.

Bobay: “It’s a pretty unique opportunity that we have. It’s not just the Legislature or courts or lawyers or business community, but we’ve all been involved at the table early on in structuring this, and that’s been pretty exciting. I think we’ll have good results.”

Granger concurs with the importance of the diversity and experience of the working group. “I feel the litigants and the lawyers can be confident we’ve done our homework here and we’re going to deliver a very good product in the commercial courts.”

It’s a win for all, according to David. “We have built it; now we will see whether they will come. We’ve built it by seeking volunteers. That’s the concept. I think it will be a tremendous success regardless of the outcome. We’ll either know that we need six more (courts) or we only need two or we don’t need any. In addition, we are working on providing to any trial court judge enhanced case management information – how to more effectively preside over some of these more complex civil cases.”

RESOURCES: Michael Wukmer, Ice Miller, at www.icemiller.com | Frank Sullivan, Jr., Indiana University, at www.mckinneylaw.iu.edu | Ron Christian, Vectren, at www.vectren.com | Judges Steven David, Craig Bobay and Maria Granger at www.in.gov/judiciary | Judge Elizabeth Gonzalez at www.clarkcountynv.gov