

**MAY 22, 2023**

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A Business Court in Texas: What It Means for Litigants, Attorneys, and Commercial Law

After years of stalled attempts, Texas will soon be the thirtieth state to establish a specialized business court specifically designed to hear complex commercial cases. House Bill 19, recently approved by the Texas Legislature, currently awaits Governor Greg Abbott's signature—the final step in the legislative process. Should the bill be signed into law as expected, the court it creates is likely to have a profound impact on business litigation in Texas.

STRUCTURE AND JURISDICTION OF THE COURT

The Texas business court will begin its first term on September 1, 2024. Once established, the court will have 11 divisions consistent with the existing administrative regions for the state's judicial system. The governor will appoint judges to the business court for a two-year term, after which each judge will go before the governor to be reappointed. The governor will appoint two judges to each of the First, Third, Fourth, Eighth, and Eleventh Divisions of the business court, and one judge to each of the Second, Fifth, Sixth, Seventh, Ninth, and Tenth Divisions. Within seven days of the start of each term, the appointed judges by majority vote will select a judge of the court to serve as administrative presiding judge for the term's duration.

A business court judge must have the following qualifications:

- Be at least 35 years of age;
- Be a United States citizen;
- Have been a resident of a county within the division of the business court to which the judge is appointed for at least five years before appointment; and
- Be a licensed attorney in Texas who has 10 or more years of experience in:
 - Practicing complex civil business litigation;



- Practicing business transaction law;
- Serving as a judge of a court in this state with civil jurisdiction; or
- Any combination thereof;
- The judge must also have never had his or her license to practice law in Texas revoked, suspended, or subject to a probated suspension.

The business court will have civil jurisdiction concurrent with district courts over disputes with an amount in controversy exceeding \$5 million (excluding interest, statutory damages, exemplary damages, penalties, attorney's fees, and court costs) that concern corporate governance disputes; derivative proceedings; claims under a state or federal securities or trade regulation law asserted against an organization, a controlling person or managerial official, a securities underwriter, or an auditor; contract and commercial transactions; and actions arising out of the Business Organizations Code. Regardless of the amount in controversy, the business court will have civil jurisdiction concurrent with the district courts if a party to any of these types of actions is a publicly traded company. Furthermore, the business court will have civil jurisdiction concurrent with district courts when the amount in controversy exceeds \$10 million (with the same exclusions) in actions arising out of (1) a qualified transaction, (2) a contract (except an insurance contract) or transaction in which the parties agreed that the business court has jurisdiction, and (3) a violation of the Finance Code or Business & Commerce Code by an organization, officer, or governing person other than a bank, credit union, or savings and loan association. In any of these disputes, the business court will have civil jurisdiction concurrent with district courts over suits seeking equitable relief, including injunctive relief or a declaratory judgment under Chapter 37 of the Civil Practice & Remedies Code. Upon agreement of all parties to a claim and a judge of the division before which the claim is pending, the business court will also be able to exercise supplemental jurisdiction over any other claim related to a case or controversy within the court's jurisdiction that forms part of the same case or controversy.

Several common types of cases involving Texas businesses will not fall within the business court's jurisdiction. For instance, unless they fall within the court's supplemental jurisdiction, the court will not have jurisdiction over civil actions involving a governmental entity; civil actions to foreclose on a lien on real or personal property; claims arising out of the Estates Code, the Family Code, and the Insurance Code; or claims related to consumer transactions to which the consumer is a party. Likewise, the business court will not have jurisdiction over wrongful death, personal injury, or legal malpractice claims.

Parties may file suit in the business court in the first instance, and specific rules and procedure are forthcoming to govern transfer of cases to the business court at the request of litigants. A judge of a court in which the action is filed may request the presiding judge for the court's administrative region to transfer the action to the business court if the action is within the business court's jurisdiction. The judge will notify all parties of the transfer request. After a hearing on the request, the presiding judge may transfer the action to the business court if the presiding judge finds the transfer will facilitate the fair and efficient administration of justice. The business court clerk will then assign the case to the appropriate division of the business court.

As for appeals, the bill anticipates the creation of the Fifteenth Court of Appeals, which would have exclusive jurisdiction over an appeal from an order or judgment of the business court or an original proceeding related to an action or order of the business court. The bill to create the Fifteenth Court of Appeals (S.B. 1045) has passed the Senate and the House; however, the bill was amended in the House and must now return to the Senate for its assent to the House amendments.



CONTROVERSY

This is not the first time that the Texas Legislature has considered a bill to create a specialized business court. But with the support of Governor Abbott, Texas Supreme Court Chief Justice Nathan Hecht, and other state leaders, House Bill 19 appears to have been a priority for the Legislature this time around. Proponents argue that a separate business court will save companies and the judicial system time and money. Texas already has more than 200 specialty courts to handle cases involving probate disputes, family law, criminal cases, juvenile cases, and veterans issues, proponents say, and a specialized business court would only add to the effort to create a more efficient judicial system. Advocates argue that Texas loses businesses to the 29 states that currently offer a separate, more efficient court system with business law expertise. A specialized business court thus creates an additional incentive for companies to continue seeking out Texas as their corporate and legal home.

Proponents also assert that the court's specialized nature will develop Texas law on complex commercial issues. The complexity of commercial legal disputes requires expertise to fully understand the issues and their legal and business ramifications, leading businesses to abandon courts in favor of arbitration and other methods of alternative dispute resolution. But, proponents say, these out-of-court alternatives reduce transparency, hinder the development of precedent, and often result in litigation despite the intent of the parties. A specialized business court would do the opposite, creating more certainty under Texas law for businesses, improving the quality of business law, and expediting the administration of justice in cases that often clog the courts.

But opponents are not convinced that a separate business court serves the interests of justice and fairness—especially when the judges are Governor-appointed rather than elected. The court's opponents argue that these judicial appointments provide an opportunity for political favoritism. And because each appointee's term is two years with an option for reappointment, as discussed above, critics question whether the court will provide cases with continuity of adjudication.

Furthermore, opponents argue that the prospect of the Governor appointing judges with only a business background siloes complex commercial disputes. This separation, they argue, will only further entrench special interests in favor of corporations and prioritize the interests of companies over those of individuals. In other words, critics express concern that the specialized court gives businesses preferential treatment and fast-tracks their day in court to the detriment of those not privy to a specialized system.

WHAT'S NEXT

The bill leaves the following key issues still to be determined:

- **Written Opinions.** H.B. 19 gives the Texas Supreme Court the authority to adopt rules governing the issuance of written opinions by the business court. The Court has not yet indicated when it might issue such a rule or what its terms might be.
- **Rules.** While the bill permits the removal to the business court of actions filed in the district court or county court at law and within the business court's jurisdiction, the bill does not set forth the procedures for doing so. The bill provides that Texas Supreme Court will adopt rules of civil procedure for the business court as the Court determines necessary, including rules for the timely and efficient removal and remand of cases to and from the business court and for assignment of cases to judges of the business court. The business court may also adopt rules consistent with the Texas Rules of Civil Procedure and the Texas Rules of Evidence.

Given that appointments, Supreme Court Rules, and the establishment of the Fifteenth Court of Appeals must still take place, it will be a while before Texas litigants know when the business court will begin hearing cases and how it will manage the cases it hears. In the short term, the courts and active litigation will continue with business as usual.



But companies with active complex commercial litigation should take note of venue and jurisdictional considerations when evaluating possible transfers to the business court. Complex commercial litigants and their attorneys should also keep a close eye on the appointments process and how cases will be assigned to appointed judges. While the Texas Legislature has taken an enormous step toward the creation of a specialized business court, the court's formation is only just beginning.

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