

## How (and Why You May Want) to Get into the New Texas Business Courts

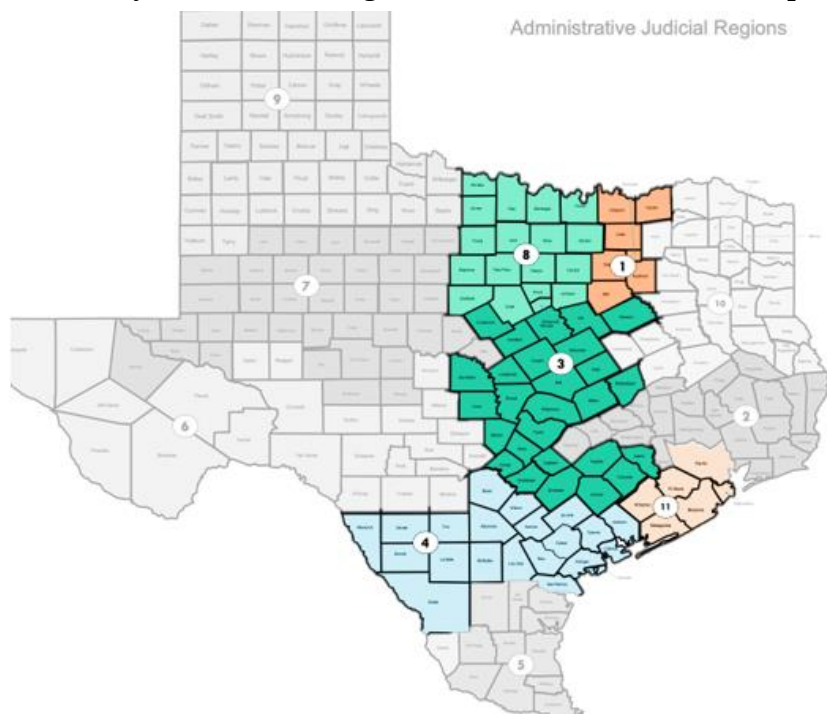
By Heath Cheek and Nathan Cox

After we tried a complex business dispute in Texas state court and then an expedited action in Delaware Chancery Court (all in a three-week period this fall), the allure of a new court system in Texas modeled after the Chancery Courts is clear: a more efficient, predictable court system to hear the state's most complex cases. This article summarizes the expected benefits of the new Business Courts as well as what cases are within its jurisdiction and what in-house counsel (like you) can do to get eligible cases into the Business Courts.

We are big believers in the future of the Texas Business Courts, as evidenced by the fact that we filed the first-ever case in the Texas Business Courts back on September 1<sup>st</sup>. That case is a complex, \$15 million contract dispute, which the Texas Business Courts are uniquely qualified to review.

### **The anticipated benefits: An efficient and (hopefully) predictable system.**

Although Texas has long championed itself as the best state for businesses—based on surveys<sup>1</sup>, frequency of corporate relocations<sup>2</sup>, and the number of Fortune 500 companies in Texas<sup>3</sup>—its court system, in the legislature's mind, was not on par with the goal of being the best place for businesses, certainly in comparison to Delaware's vaunted Chancery Court. Approximately half of states have some form of specialized business court, yet, the number one state for businesses did not. The Texas Legislature believed that establishing specialized business courts would lead to more consistent, timely rulings and efficient, cost-effective (relatively speaking) lawsuits. Accordingly, the Texas legislature enacted



<sup>1</sup> <https://chiefexecutive.net/best-worst-states-survey-shows-unsettled-ceos-are-ready-to-roam/>

<sup>2</sup> [https://www.dallasfed.org/research/swe/2024/swe2402#:~:text=Texas%20remains%20a%20top%20destination&text=1%20in%20net%20jobs%20gained,and%20Arizona%20\(Chart%203\).](https://www.dallasfed.org/research/swe/2024/swe2402#:~:text=Texas%20remains%20a%20top%20destination&text=1%20in%20net%20jobs%20gained,and%20Arizona%20(Chart%203).)

<sup>3</sup> <https://gov.texas.gov/news/post/texas-again-leads-nation-with-most-fortune-500-headquarters>

House Bill 19, creating the Business Courts, dedicated to a narrow subset of complex, civil litigation involving business disputes (e.g., shareholder derivative suits, corporate governance, securities claims, fraudulent real estate transactions, UCC claims, and many more) with a lot at stake (a minimum amount of controversy between \$5 and \$10 million depending on the cause of action).

At initiation and for the first two years, the Business Courts are starting with only the metropolitan areas of Dallas, Austin, San Antonio, Fort Worth, and Houston.

Currently, Texas has 487 district judges who, on average, receive over 300 new cases per year and have an active docket of over 2,000 cases.<sup>4</sup> The vast majority of the docket consists of criminal (35%), family law (34%), and personal injury cases (6%).<sup>5</sup> A Texas District Court judge has to be a generalist out of necessity, and District Judges getting the types of cases going to business courts are few and far between when spread out over 487 district courts. A justice on the Fifth District Court of Appeals estimated it could be as little as 1% of cases.<sup>6</sup> However, despite comprising a small percentage of cases, complex business disputes take up an inordinate amount of the court system's limited time and resources. That's where the Business Courts come in to (hopefully) save the day.

First, the Business Courts is a court system comprised of judges with more experience in the narrow subset of cases within the subject-matter jurisdiction of the Business Courts. For example, to be eligible to be appointed to the Business Courts, the applicant must have at least ten years of experience in complex civil litigation, business transactions, or as a civil district judge. TEX. GOV'T CODE ANN. § 25A.008. And the first round of judges appointed to the Business Courts and Fifteenth District Court of Appeals reflect the qualifications expected of the position.

Second, the Texas Business Courts will have more resources in the form of time to spend per case and dedicated staff attorneys. Due to the limited types of cases and amount of controversy, lawsuits in the Business Courts will compete with far fewer cases for the judge's attention. Specifically, judges will have more time to dedicate to each case, and Section 25A.017(i) of the Texas Government Code allows the appointment of staff attorneys to help manage the workload. The combination of time and staff attorneys will enable the Business Courts to keep up with preparing the optional and required written opinions under the newly proposed Texas Rule of Civil Procedure 359, another benefit of the Business Courts. This will hopefully also lead to published case law from the Business Courts (like in the Chancery Courts) which is (presently) only available for the appellate court system.

The expected benefit and overarching goal of the Business Courts is to provide a more efficient and predictable forum for larger, more complex civil litigation facing

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<sup>4</sup> <https://www.txcourts.gov/media/1456803/ar-statistical-fy-22-final.pdf> at 69.

<sup>5</sup> The next highest are tax (5%) and debt (4%) cases.

<sup>6</sup> [Advisory Committee Brainstorms on Rules for New Business Courts | Texas Lawyer](#)

Texas businesses. It is difficult for businesses to make informed decisions, and for attorneys to advise them, due to the inherent unpredictability of litigation. The creation of the Business Courts should curb some of those concerns through a smaller number of judges who have more experience with the subject matter in conjunction with the requirement of issuing reasoned, written opinions. This should result in the development of “a coherent body of law,”<sup>7</sup> providing lawyers and business with insight to then act moving forward. Along with the lighter docket, the end result should be quicker time to resolution and a more predictable, efficient, and cost-effective court system for types of cases that currently can cost hundreds of thousands and up to millions of dollars in just attorneys' fees and expenses.

### **Recent trial experience highlights the anticipated benefits.**

Through no fault of the Texas state judge, this fall we tried a complex commercial case that took five years to get to jury trial. Although that's longer than typical, it's all too common for cases to have multiple settings and on multi-week dockets, leading to companies incurring the cost of trial preparation and employees missing work multiple times during the life of a case. As addressed above, with the recent population growth, Texas district judges are faced with growing dockets (over 2,000 cases) ranging from criminal and family to personal injury and corporate disputes. With the exception of summer interns, Texas state judges are tasked with doing all hearing and trial preparation, and case law research. There isn't enough time to rule on cases and draft their own detailed opinions. Consequently, there is no developed, public case law at the trial court level, it all comes from the appellate system.

Conversely, in the Delaware action we tried this fall, the case was filed in June, removed to Federal court, remanded back to state court, and still proceeded to trial with a special setting on the first cause of action (a change in control of the company) on October 7th. Less than four months for the general and limited partners in the company to get to trial on a critical, time-sensitive issue facing the company. When motions were filed in the interim, within one business day the Court issued a briefing schedule with deadlines for a response and reply then a reasoned opinion all within five business days. The Judge's prior orders (everything from discovery motions to motions for summary judgment and bench trials) are published on WestLaw and helped shaped trial strategy and advise to the client. The Chancery court had the resources (including law clerks) to review the several hundred pages of the operative agreements before trial as well as the applicable case law before and during trial to tailor the trial to the crucial issues.

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<sup>7</sup> As stated in the original, introduced version of HB 19.

## What cases can the Business Courts hear?

Texas Government Code § 25A.004 sets forth a list of the types of claims that the Business Courts have concurrent jurisdiction with Texas District Courts. Below are tables that break down the claims in more plain language with the applicable amount in controversy (“AIC”) requirement. At a high-level, the subject-matter jurisdiction of the Business Courts is 1) internal/corporate business disputes (§ 25A.004(b)) and 2) external business disputes between companies (§ 25A.004(d)). Notably, some claims are far more likely to meet the applicable amount in controversy requirement than others (*e.g.*, breach of contract versus a DTPA claim).

| Internal/Corporate Business Disputes – § 25A.004(b)  |                                     |
|--|-------------------------------------|
| If private company (AIC > \$5 million)   | If publicly traded company (no AIC) |
| 1) Derivative proceedings.   |                                     |
| 2) Actions regarding: <ol style="list-style-type: none"> <li>a) Governing documents (<i>e.g.</i>, operating agreements); and,</li> <li>b) Governance or internal affairs of the company (<i>e.g.</i>, change in control).</li> </ol>   |                                     |
| 3) State or Federal Securities or Trade Regulations, such as: <ol style="list-style-type: none"> <li>a) Unregistered sale of securities (Texas Securities Act § 4008.051); and,</li> <li>b) Misrepresentation/omission in sale of securities (TSA § 4008.052(a)).</li> </ol> |                                     |
| 4) Actions by a company (or owner) against an owner or governing person of the company ( <i>e.g.</i> , general partner, member/manager of LLC, Board of Director, or trustee).   |                                     |
| 5) Brief of fiduciary duty claim against owner or governing person of the company ( <i>e.g.</i> , general partner, member/manager of LLC, Board of Director, or trustee).  |                                     |
| 6) Alter ego/piercing the corporate veil claims.   |                                     |
| 7) Actions arising out of the Texas Business Organizations Code, including: <ol style="list-style-type: none"> <li>a) Receiverships;</li> <li>b) Creation of partnership; and,</li> <li>c) Vicarious liability of partners.</li> </ol>                                       |                                     |

External Business Disputes – § 25A.004(d)

AIC greater than \$10 million for all claims

- 1) Action arising out of a “qualified transaction” which just means a transaction with an aggregate value of at least \$10 million (*i.e.*, obligation to pay or right to receive that much or value of goods or services adding up to \$10 million).
  - a) Excluding loans or advances of money or credit from a bank.
- 2) Actions arising out of a contract/transaction with a Business Court venue clause (except for insurance contracts).
- 3) Actions arising out of a violation of the Finance Code, for example:
  - a) Unfair Debt Collection Act;
  - b) Usury; and,
  - c) Excessive fees in contracts.
- 4) Actions arising out of a violation of the Texas Business & Commerce Code, for example:
  - a) Fraud in real estate and stock transactions;
  - b) UCC;
  - c) Anti-trust actions;
  - d) Texas Uniform Fraudulent Transfer Act;
  - e) Texas version of the Fair Credit Reporting Act;
  - f) Compensation agreements for sales representatives;
  - g) Fair Practices of Equipment Manufacturers, Distributors, Wholesalers & Dealers Act;
  - h) Unauthorized use of computer zombies or botnets;
  - i) Deceptive Trade Practices Act;
  - j) Trademark actions; and,
  - k) Noncompetition agreements.

The Business Courts also have jurisdiction over declaratory judgment actions under Chapter 37 of the Civil Practice and Remedies Code for any claim within the court’s jurisdiction in the above tables.

## How to increase the chances of getting into the Business Courts.

First and foremost, adding language to your existing venue provisions to require eligible claims to be brought in the Business Courts. Indeed, that was the legislature's intention with § 25A.004(d)(2) which grants jurisdiction to the Business Courts over any claim that "arises out of a contract or commercial transaction in which the parties . . . agree[d] that the business court has jurisdiction of the action."

Second, as a backup option, adding a venue provision requiring venue in a county that is part of the initial wave of the Business Courts so that, even if the claim isn't able to initially be filed in the Business Courts, it can later be removed if it later becomes removable (*e.g.*, damages model increases above the AIC threshold or due to a counterclaim).

A sample venue / forum-selection clause is below:

"Any dispute, claim, controversy, or legal proceeding arising out of or relating to [this Agreement] shall be exclusively brought before the [First, Third, Fourth, Eighth, Eleventh] Business Court Division of the State of Texas (the "Business Court"), if the dispute meets the jurisdictional requirements of such Business Court ("Dispute"). If the Dispute does not meet the jurisdictional requirements of the Business Court, then the Dispute shall be exclusively brought in [insert secondary venue option (*e.g.*, state and federal courts in \_\_\_\_\_ county, arbitration, etc.)]. The parties also consent to supplemental jurisdiction by the Business Court over any claims that form part of the same case or controversy as the Dispute."

Note: the Business Court Divisions track the Judicial Administrative Districts set forth in § 74.042 of the Texas Government Code.<sup>8</sup>

Heath and Nathan look forward to experiencing the new Business Courts firsthand. If you have any questions about the new Business Courts, please contact Heath Cheek ([hcheek@bellnunnally.com](mailto:hcheek@bellnunnally.com)) and Nathan Cox ([ncox@bellnunnally.com](mailto:ncox@bellnunnally.com)).

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<sup>8</sup> The relevant Judicial Administrative Districts, for purposes of the initial wave of Business Courts, are Dallas (1st), Austin (3rd), San Antonio (4th), Fort Worth (8th), and Houston (11th).