

TEXAS' NEW BUSINESS COURTS AND COURT OF APPEALS

By Mark C. Walker and Adrian Acosta

On June 2, 2023, the Texas 88th Legislature concluded its session and passed two laws that significantly affect the adjudication of select cases. House Bill 19 (HB 19) amended the Texas Government Code and created a statewide business court system that will have jurisdiction over business and commercial cases with at least \$5,000,000 at stake. The second is Senate Bill 1045, which creates a new court of appeals to hear appeals from those business courts. The Texas Fiscal Note on HB 19 states that "the bill would create the business court as a statutory court under Section 1, Article V, of the Texas Constitution." 2023 Texas House Bill No. 19, Texas Eighty-Eighth Legislature.

Effective dates: The new bills will not take effect until September 1, 2023. The newly created courts will not accept cases until September 1, 2024, and the law will only apply to cases filed on or after that date.

Proponents said: During the debates on the bill, a corporate attorney testified that the creation of the business courts will help provide consistent and timely rulings. The bill's proponents argued that since these business courts will be reserved for complex cases and run by judges with business law expertise, the matters will not languish in the court system for years. For example, some cases have been held up in courts for up to six years. Proponents further stated that the specialized nature of the courts would encourage quicker settlement. The proponents added that while there are specialized courts for family law, juveniles, and probate, there is no such specialized court for business litigation. They further argued that creating a 15th intermediate court of appeals with statewide jurisdiction would allow judges to apply specialized precedent throughout the state rather than having regional precedent. However, it should be noted that only one witness testified in favor of the bill during the debates.

Opponents said: The bill's opponents stated that a business court would create two systems of justice and that no empirical studies demonstrated the need for judicial reforms in the State of Texas. Moreover, the 15th Court of Appeals would be contrary to allowing Texans to appeal their cases directly to locally elected judges. Additionally, there are concerns about whether the business court is constitutional since the judges would be appointed rather than elected. For example, an attorney out of Amarillo did not mince words when she wrote her opposition to the bill: "The appointment of judges violates our constitution. There is no need for this bill. Our state has plenty of big business without this bill. There is no money to pay for this bill. It provides preferences to businesses over individuals. I am totally against this bill."

Below is a summary of the bill, along with some possible challenges it will face once it is enacted.

I. Jurisdiction of the new business trial courts.

There will now be a statewide business court with concurrent jurisdiction with district courts involving both foreign and domestic business organizations, whether for-profit or not-for-profit. The jurisdiction depends on the amount of controversy in the case, exclusive of interest, statutory damages, exemplary damages, penalties, attorney's fees, and court costs. The new business courts have jurisdiction in the following categories of cases:

- A. Cases exceeding \$5 million.** Business governance disputes in which the amount in controversy exceeds \$5 million and involve:
 - 1. a derivative proceeding;
 - 2. an action regarding the governance or internal affairs of the organization;
 - 3. an action in which a claim under a state or federal securities or trade regulation law is asserted against an organization, a governing or controlling person or officer of an organization, or an underwriter of securities issued by the organization or its auditor;
 - 4. an action by an organization or an owner or member thereof if the action is brought against an owner, managerial official, or controlling person and alleges an act or omission by that person in the person's official capacity;
 - 5. an action alleging that an owner, managerial official, or controlling person breached a duty, including a duty of care, loyalty, or good faith;
 - 6. an action seeking to hold an owner, member, or governing person liable for an obligation of the organization other than on account of a written contract signed by the person to be held liable in a capacity other than as an owner or governing person; and
 - 7. an action arising out of the Business Organizations Code.
- B. Cases exceeding \$10 million.** Commercial disputes in which the amount in controversy exceeds \$10 million and involve:
 - 1. an action arising out of a "qualified transaction" (as defined in the bill);
 - 2. an action that arises out of a contract or commercial transaction in which the parties to the contract or transaction agreed to that the business court has jurisdiction over the action, except an action arising out of an insurance contract; and
 - 3. an action that arises out of a violation of the Finance Code or Business & Commerce Code by an organization or an officer or governing person acting on behalf of an organization, other than a bank, credit union, or savings and loan association.
- C. Extraordinary and ancillary relief.** Actions seeking injunctive or declaratory relief so long as it involves a dispute falling within the scope of the jurisdictional grant for the business court; and
- D. Supplemental jurisdiction.** Any other claim related to a case or controversy within the court's jurisdiction that forms part of the same case or controversy. A claim within the business court's supplemental jurisdiction may only proceed upon agreement of all

parties and the judge.

- E. Publicly traded companies.** If a party is a publicly traded company, and the case meets the criteria for either \$5 million or \$10 million, the business courts will have concurrent jurisdiction in the matter. Texas business courts will also have supplemental jurisdiction when there is a claim that arises out of related facts, much like how federal courts have supplemental jurisdiction for non-federal question claims.

II. Actions outside business courts' jurisdiction.

- A. No original jurisdiction.** Unless a claim falls within the business court's supplemental jurisdiction, business courts do not have original jurisdiction over the following types of claims:

(1) Civil actions:

- (A) brought by or against a governmental entity; or
- (B) to foreclose on a lien on real or personal property;

(2) Claims arising out of:

- (A) Subchapter E, Chapter 15, and Chapter 17, Business & Commerce Code [pertaining to covenants not to compete, antitrust, and deceptive trade practices];
- (B) the Texas Estates Code;
- (C) the Texas Family Code;
- (D) the Texas Insurance Code; or

(E) Chapter 53, Title 9, Texas Property Code [pertaining to mechanic's, contractor's, or materialman's liens, and to trusts];

(3) Claims arising out of the production or sale of a farm product, as that term is defined by Section 9.102, Business & Commerce Code;

(4) Claims related to a consumer transaction, as that term is defined by Section 601.001, Business & Commerce Code, to which a consumer in this state is a party, arising out of a violation of federal or state law; or

(5) Claims related to the duties and obligations under an insurance policy.

- B. No jurisdiction of any kind.** Additionally, business courts will not have jurisdiction over medical malpractice, personal injury, or legal malpractice.

Jury trials. Although Texas Business Courts will be statewide, jury trials will be held in the county where the case could have originally been brought. If a contract between the parties to a business court case contains a venue provision, a jury trial of that case will be held in the county agreed on in the

contract. The parties to a business court case can also agree to have a trial held in any county of their choosing. Cases in the business courts can be tried to a jury when required by the Texas Constitution.

III. Cases filed in or transferred to the business court.

Cases can be initiated in business courts either by original filings or removal from another civil court. Assuming the jurisdictional requirements listed above are met, a party may file a new lawsuit with a business court by establishing that venue is appropriate in one of the counties served by the division of the business court.

However, cases can also be removed from a district court to a business court. If the removal is agreed between the parties, the case can be removed at any time during the pendency of the case. If the removal is not agreed, notice of removal must be filed:

(1) not later than the 30th day after the date the party requesting removal of the action discovered, or reasonably should have discovered, facts establishing the business court's jurisdiction over the action; or

(2) if an application for temporary injunction is pending on the date the party requesting removal of the action discovered, or reasonably should have discovered, facts establishing the business court's jurisdiction over the action, not later than the 30th day after the date the application is granted, denied, or denied as a matter of law." If a case is filed in a court of proper venue sitting in a county not served by a business court division, the case may not be removed to any business court.

If a case is filed with a business court, but the business court lacks jurisdiction over the case, the court may transfer the case to an appropriate district court or county court at law, or dismiss the case without prejudice to refile.

If a case is removed to a business court, but the court lacks jurisdiction, the court must remand the case back to the court it was removed from.

IV. Locations of new business trial courts.

There will be 11 business court divisions, divided geographically and consistent with the existing administrative judicial regions. Five of those divisions, serving mostly urban centers, will be created effective September 1, 2024, while the creation of the other six divisions, which would serve more rural parts of the state, are deferred to the 2025 Texas Legislature for approval and funding. The first five divisions to be created encompass Dallas County and six surrounding counties (1st Division), Travis County and 27 surrounding counties (3rd Division), Bexar County and 22 surrounding counties (4th Division), Tarrant County and 18 surrounding counties (8th Division), and Harris County and five surrounding counties (11th Division).

V. Appeals to the new 15th Court of Appeals.

The new court of appeals will be based in Austin and created effective September 1, 2024. The court will have five justices appointed first, and then elected in statewide partisan elections.

The new court of appeals will have exclusive jurisdiction over appeals from an order or judgment of the business court or an original proceeding related to an action or order of the business court.

The Fifteenth Court of Appeals will also have exclusive intermediate appellate jurisdiction over the following matters that arise out of or are related to a civil case within the business court's jurisdiction:

(1) matters brought by or against the state or a board, commission, department, office, or other agency in the executive branch of the state government, including a university system or institution of higher education as defined by Section 61.003, Education Code, or by or against an officer or employee of the state or a board, commission, department, office, or other agency in the executive branch of the state government arising out of that officer's or employee's official conduct [with certain exceptions]

(2) matters in which a party to the proceeding files a petition, motion, or other pleading challenging the constitutionality or validity of a state statute or rule, and the attorney general is a party to the case.

The Fifteenth Court of Appeals will not be subject to any docket equalization transfers to or from other courts of appeals.

Appeals from the Fifteenth Court of Appeals would go to the Texas Supreme Court.

VI. Qualification and selection of business trial judges appointed to two-year terms.

Judges for the business court divisions will be appointed by the Governor, subject to the advice and consent of the Texas Senate. There will be 16 judges who will serve for two years beginning on September 1 of every even-numbered year (beginning on September 1, 2024) and may be reappointed without a limit on the number of reappointments.

Two judges will be assigned to the First (Dallas), Third (Austin), Fourth (San Antonio), Eighth (Fort Worth), and Eleventh (Houston) Divisions. The other six divisions will have only one judge each.

Each judge must meet the following qualifications: (1) at least 35 years old; (2) United States citizen; (3) resident of a county within the division of the business court to which the judge is appointed for at least five years prior to appointment; (4) licensed Texas attorney with 10 or more years of experience in complex business litigation, practicing business transactional law, serving as a judge of a court in Texas with civil jurisdiction; and (5) must

not have had their law license revoked, suspended, or subject to a probated suspension.

VII. Challenges to the new business courts and court of appeals.

It is highly likely that the new courts will face stiff constitutional challenges. While the bills were being reviewed, the plaintiff and defense bars united to oppose the creation of the new courts. The Texas Association of Defense Counsel, the Texas Chapters of ABOTA, and the Texas Trial Lawyers Association sent rare joint letters to committee leaders in the House and Senate, outlining the opposition to the legislation.

Opponents of the new courts point out that not only does the system create special courts for special people, but it is also likely that appointment of trial and appellate judges violates the Texas Constitution. And the limited jurisdiction of the Fifteenth Court of Appeals may violate the Texas Constitution, which requires that the court of appeals must have "appellate jurisdiction co-extensive with the limits of their respective districts." Tex. Const. Art. V Sec. 6. There are also concerns that the courts may violate the right to a jury trial.

VIII. Conclusion: All business entities in Texas must become familiar with the new business courts.

Whether the new business courts survive challenges remains to be seen. For now, though, all business entities in Texas need to become familiar with the new court system.

For assistance in navigating the new system, please reach out to the authors.

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