

# 4 Things Cos. Must Know About Texas' New Business Courts

By **Nicholas Bruno and Madison Moore** (July 21, 2023)

H.B. 19, which Texas Gov. Greg Abbott signed on June 9, is poised to create a statewide business court system — specialty trial courts created to handle Texas' increasingly large business dispute docket.[1]

These business courts will not completely displace our current district court system. Instead, the two will have concurrent jurisdiction — meaning that a case could be tried in either one, subject to certain requirements.

These new courts will present a new set of challenges and nuances, so it is important that companies and their legal teams understand those complexities before their cases are filed.

And while much about exactly how these courts will operate is still unknown, we have identified four things companies must know about the upcoming changes.

## **1. Business courts will hear governance and commercial disputes that meet certain jurisdictional requirements.**

Texas' business courts will hear two broad types of cases: governance disputes and commercial disputes.[2] But certain requirements must be met before the business court will be able to exercise its jurisdiction in either category.

Governance disputes are defined in Section 25A.004(b) of the statute. For a governance dispute to qualify, it must either have more than \$5 million in controversy or involve a publicly traded company.[3] Additionally, the statute dictates that the case must fall within one of seven specified categories:

- (1) A derivative proceeding;
- (2) An action regarding the governance, governing documents, or internal affairs of an organization;
- (3) An action in which a claim under a state or federal securities or trade regulation law is asserted against certain persons;
- (4) An action by an organization, or an owner of an organization, if the action is brought against certain persons or makes certain allegations;
- (5) An action alleging that an owner, controlling person or managerial official breached a duty owed to an organization or an owner of an organization by reason of the person's status as an owner, controlling person, or managerial official, including the breach of a duty of loyalty or good faith;
- (6) An action seeking to hold an owner or governing person of an organization liable for an obligation of the organization, other than on account of a written contract



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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.[4]

Commercial disputes are disputes that are defined in Section 25A.004(d) of the statute. A broader range of cases will fit into the commercial disputes category.

In general, any claim pertaining to certain statutorily defined transactions worth at least \$10 million will be subject to business court jurisdiction.[5] The main exception is if the transaction is "a loan or an advance of money or credit by a bank, credit union, or savings and loan institution." [6]

Business courts will also hear cases "in which the amount in controversy exceeds \$10 million," and either: (1) the action "arises out of a contract or commercial transaction in which the parties to the contract or transaction agreed in the contract or a subsequent agreement that the business court has jurisdiction of the action"; or (2) the action "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." [7]

Business courts will also carry certain ancillary powers. First, business courts will have the power to exercise supplemental jurisdiction over certain claims.[8] According to the statute, "the business court has 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." [9]

But H.B. 19 expressly bars supplemental jurisdiction over "(1) a claim arising under Chapter 74, Civil Practice and Remedies Code; (2) a claim in which a party seeks recovery of monetary damages for bodily injury or death; or (3) a claim of legal malpractice." [10]

Second, business courts will have the same ability to grant relief as their district court counterparts.[11] They will have authority to grant injunctive relief or declaratory judgments.[12]

In sum, commercial disputes valued at more than \$10 million are likely to warrant business court jurisdiction. And the same is true for governance disputes that are either valued at more than \$5 million or concern a publicly traded company.

If your company is regularly involved in disputes above these value thresholds, it is likely that business courts could handle your future cases.

## **2. Cases can be filed in or transferred to the business court.**

A case could be brought before a business court in one of two ways. Just like in a district court, claims that warrant the court's jurisdiction can be filed there from the outset.[13] But even if a suit is initially brought in a district court, a party to the lawsuit may remove it to the business court if certain criteria are met.[14]

First, the action must be within the business court's jurisdiction.[15] Second, the removal "must be filed 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." [16] If the removal is agreed, it may be made "at any

time during the pendency of the action." [17]

Importantly, provided that the removal occurs in a timely manner, a removal of an action to the business court may be made even "[i]f all parties to the action have not agreed to remove the action." [18] The removal can even be initiated by the "judge of a court in which an action is [initially] filed," like the district court. [19]

If the judge initiates the transfer, the "presiding judge for the court's administrative region," after holding a hearing on the request, "may transfer the action to the business court if the presiding judge finds the transfer will facilitate the fair and efficient administration of justice." [20]

Taken together, all of this points to a low barrier for removal. So if a claim satisfies the business court's jurisdictional requirements, and at least one party prefers the business court over the district court, there are avenues available to land in business court.

But even still, if a removed case is ultimately tried before a jury, the jury trial will occur in the county where the action was originally filed, unless the parties agree otherwise. [21]

### **3. Appeals will be heard by a newly established 15th Court of Appeals.**

The Texas Legislature has also created a new system for business court appeals. [22] S.B. 1045, which Abbott signed on June 9, will create a new, Austin-based Fifteenth Court of Appeals. [23]

This court will be created on Sept. 1, 2024. [24] The court will eventually have five justices, who will initially be appointed. [25] Subsequently, they will be elected in statewide races. [26]

The Fifteenth Court of Appeals will have exclusive jurisdiction over appeals from orders or judgments of the business court, and over original proceedings related to actions or orders of the business court. [27] The Fifteenth Court of Appeals will also be given exclusive intermediate appellate jurisdiction over the following kinds of matters that may arise out of, or be related to, a civil case:

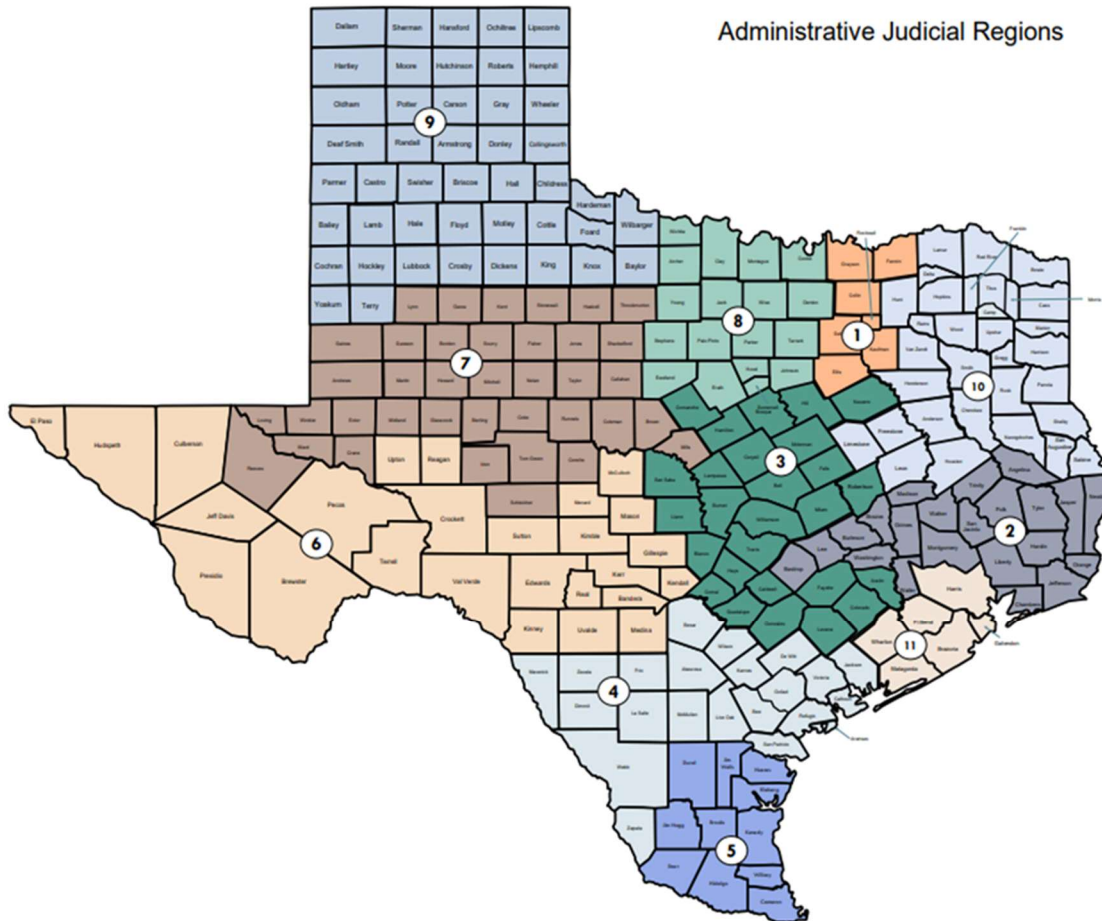
(1) matters brought by or against the state or a board, commission, department, office, or other agency in the executive branch of the state government, including a university system or institution of higher education as defined by Section 61.003, Education Code, or by or against an officer or employee 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. [28]

Finally, while most appeals in other contexts may be transferred between intermediate courts of appeals for docket equalization purposes, the statute establishes that the Texas Supreme Court "may not transfer any case or proceeding properly filed in the Court of Appeals for the Fifteenth Court of Appeals District to another court of appeals for the purpose of equalizing the dockets of the courts of appeals." [29]

**4. Sixteen experienced, governor-appointed judges will preside over the business court.**

The proposed business court system will be made up of 11 divisions.[30] These divisions will have a total of 16 judges.[31] The 11 divisions will cover the same territory as the administrative judicial regions, which are shown below.[32]



Two judges will be assigned to the First, Third, Fourth, Eighth and Eleventh Divisions,[33] which include Dallas, Austin, San Antonio, Fort Worth and Houston, respectively. But only one judge will preside over the remaining six divisions.[34]

The governor, with the advice and consent of the state Senate, will appoint business court judges for two-year terms.[35] Under the statute, each judge must meet the following requirements:

- (1) be at least 35 years of age;
- (2) be a United States citizen;
- (3) 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

(4) be a licensed attorney in this state who has 10 or more years of experience in:

- (A) practicing complex civil business litigation;
- (B) practicing business transaction law;
- (C) serving as a judge of a court in this state with civil jurisdiction; or
- (D) [have] any combination of such experience.[36]

Notably, H.B. 19 does not contain a limit on the number of times a business-court judge may be reappointed.[37]

**5. Given the amount of uncertainty surrounding the business court, it is imperative that companies and their legal teams stay up-to-date on its status.**

H.B. 19 takes effect on Sept. 1.[38] But the business court would not begin taking cases until one year later, on Sept. 1, 2024.[39]

This one-year delay will give the Supreme Court and the business court itself time to develop and adopt procedural rules. But exactly what those rules will look like remains to be seen.

The system adds Texas to the more than two dozen states that have specialized business litigation processes of some sort — the most famous of which is Delaware's Court of Chancery.[40]

However, some have questioned H.B. 19's compatibility with the Texas Constitution, and others have raised similar concerns about the 15th Court of Appeals.[41] The success of any such constitutional challenges to this new system remains to be seen.[43]

Given the low barrier to transfer, it is likely that many complex commercial cases in Texas will be subject to at least a debate about whether the case should wind up in the business court. The precise interpretation of jurisdictional requirements and similar matters are likely to remain the subject of litigation for the foreseeable future.

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[1] Act of May 29, 2023, 88th Leg., R.S., H.B. 19, Title.

[2] Act of May 29, 2023, 88th Leg., R.S., H.B. 19, § 1 (to be codified at Tex. Gov. Code § 25A.004(b)-(d)).

- [3] Id. (to be codified at Tex. Gov. Code § 25A.004(b)-(c)).
- [4] See id. (to be codified at Tex. Gov. Code § 25A.004(b)).
- [5] See id. (to be codified at Tex. Gov. Code § 25A.004(d)(1)).
- [6] See id. (to be codified at Tex. Gov. Code § 25A.001(14)).
- [7] Id. (to be codified at Tex. Gov. Code § 25A.004(d)(2)-(3)).
- [8] Id. (to be codified at Tex. Gov. Code § 25A.004(f)).
- [9] Id.
- [10] Id. (to be codified at Tex. Gov. Code § 25A.004(h)).
- [11] Id. (to be codified at Tex. Gov. Code § 25A.004(a)).
- [12] Id. (to be codified at Tex. Gov. Code § 25A.004(e)).
- [13] Id. (to be codified at Tex. Gov. Code § 25A.006(a)).
- [14] See id. (to be codified at Tex. Gov. Code § 25A.006(d)-(g)).
- [15] Id. (to be codified at Tex. Gov. Code § 25A.006(d)).
- [16] Id. (to be codified at Tex. Gov. Code § 25A.006(f)).
- [17] Id. (to be codified at Tex. Gov. Code § 25A.006(f)).
- [18] See id. (to be codified at Tex. Gov. Code § 25A.006(f)).
- [19] Id. (to be codified at Tex. Gov. Code § 25A.006(k)).
- [20] Id.
- [21] Id. (to be codified at Tex. Gov. Code §§ 25A.015(c) and 25A.015(e)).
- [22] See id. (to be codified at Tex. Gov. Code § 25A.007(a)).
- [23] Act of May 22, 2023, 88th Leg., R.S., S.B. 1045, § 1.02 (to be codified at Tex. Gov. Code § 22.2151(a)).
- [24] See id. § 1.14(a).
- [25] See id. § 1.14(b).
- [26] See id. § 1.04 (to be codified at Tex. Gov. Code § 22.216(n-1)-(n-2)).
- [27] Act of May 29, 2023, 88th Leg., R.S., H.B. 19, § 1 (to be codified at Tex. Gov. Code § 25A.007(a)).
- [28] See Act of May 22, 2023, 88th Leg., R.S., S.B. 1045, § 1.05 (to be codified at Tex.

Gov. Code § 22.220(d)).

[29] See id. § 1.08(b) (to be codified at Tex. Gov. Code § 73.001(b)).

[30] See Act of May 29, 2023, 88th Leg., R.S., H.B. 19, § 1 (to be codified at Tex. Gov. Code § 25A.003).

[31] See id. (to be codified at Tex. Gov. Code § 25A.009(a)).

[32] See id. (to be codified at Tex. Gov. Code § 25A.003); see also Texas Judicial Branch, AJR Map, <https://www.txcourts.gov/media/1453885/ajr-map-2017.pdf>.

[33] Id. (to be codified at Tex. Gov. Code § 25A.009(a)(1)); see id. (to be codified at Tex. Gov. Code § 25A.003).

[34] Id. (to be codified at Tex. Gov. Code § 25A.009(a)(2)).

[35] Id. (to be codified at Tex. Gov. Code § 25A.009(a)-(b)).

[36] Id. (to be codified at Tex. Gov. Code § 25A.008).

[37] See id. (to be codified at Tex. Gov. Code § 25A.009(c)) ("A business court judge may be reappointed.").

[38] Id. § 9.

[39] Id. § 5.

[40] See Erica Grieder, Move Over, Delaware: Texas Posed to Create Specialized Business Courts, Hous. Chron. (June 5, 2023), <https://www.houstonchronicle.com/business/article/business-courts-texas-18128668.php>.

[41] See, e.g., Bob Francis, Business Court System Has Support But Could Face Challenges, Ft. Worth Rep. (June 14, 2023), <https://fortworthreport.org/2023/06/14/business-court-system-has-support-but-could-face-challenges/>.

[42] Id.