

The Texas Lawbook

Free Speech, Due Process and Trial by Jury

Texas Business Court Poised to Usher in New Era of High Stakes Commercial Litigation

May 31, 2023 | BY ANNA ROTHMAN, NICK BROWN & BEN BARNES

The Texas business litigation bar is abuzz with anticipation as the Texas business court bill from 2023 heads to Gov. Greg Abbott's desk for signature. Arguably the most transformative change to the Texas judiciary since tort reform, the bill has potential to reshape the way businesses in Texas resolve complex disputes. Despite many open questions, the bill, which would require the business court to begin hearing qualifying cases beginning on Sept. 1, 2024, stands to impact business litigation in Texas sooner than later.

The governor will appoint up to 15 judges to preside over cases filed in the new court, which will have jurisdiction over a range of complex business cases. Like existing trial courts, the business court can issue injunctions, award damages and enforce judgments, among other powers. To serve on the court, judges must have 10 years of experience as a business trial or transactional lawyer or as a judge. In light of these requirements and the court's limited jurisdiction, advocates predict faster decision-making from less burdened judges with relevant business litigation experience.

Not unlike their federal counterparts, business court judges are to be appointed by the governor with the advice and consent of the Texas Senate. However, for constitutional reasons, the judges will serve two-year terms rather than lifetime appointments. To address the potential for unreasonably high turnover, the bill allows for reappointment *ad infinitum*, and news reports suggest that Gov. Abbott intends to pursue *ad infinitum* appointments to create predictability on the court. Notwithstanding these intentions, this aspect of the bill drives uncertainty and could lead to the same unpredictable dynamics that currently play out in state district courts when a judge is up for reelection in the middle of a case.

The business court judges will be geographically dispersed among preexisting judicial administrative regions on a uniform basis. Houston, Dallas, Austin and San Antonio will each have two business court judges, and the remaining regions will have one. This allocation gives plaintiffs an unusual ability to select their judge. But many disputes before the business court are likely to involve sophisticated deals with mandatory venue provisions, limiting litigants' ability to shop fora.

Despite the relatively small number of judges,

the bill promises efficiency by limiting the disputes that the court can hear. The bill grants the business court original jurisdiction over three categories of disputes:

- disputes exceeding \$5 million in controversy and arising out of the Texas Business Organizations Code or otherwise involving derivative, corporate governance, securities or trade regulation claims;
- disputes exceeding \$10 million in controversy where the parties have agreed to business court jurisdiction; and
- disputes involving certain violations of the Texas Finance or Business and Commerce Code or arising out of a "qualified transaction" involving at least \$10 million of consideration.

The bill also grants supplemental jurisdiction over related claims, but the business court's supplemental jurisdiction is limited. The court can hear related claims only if the parties agree and the presiding judge consents. Otherwise, "the claim may proceed in a court of original jurisdiction concurrently with any related claims proceeding in the business court." It remains to be seen how existing doctrines associated with parallel litigation — for example, issue preclusion and anti-suit injunctions — will affect this unique jurisdictional construct. It is clear, however, that the bill gives litigants latitude to dispute whether and to what extent related claims should proceed in a single forum, and we can expect extensive litigation over this procedural question.

When jurisdiction does exist, plaintiffs can access by filing directly in the business court, and defendants can remove qualifying cases through a procedure modeled after federal practice. Litigants also can move to remand an action if they contend no business court jurisdiction exists. For cases directly filed in business court, the bill indicates that the plaintiff gets to choose any venue where the case could have been filed. For cases removed to the business court, the venue is the county of original filing. While some features of the business court are clearly modeled after chancery courts in other jurisdictions (like Delaware), the bill preserves litigants' right to a jury trial as required by Texas law, providing that "a party in an action pending in the business court has the right to a trial by jury when required by the constitution."

The Texas Lawbook

The Texas Rules of Procedure and Evidence will generally apply, but the bill allows both the Texas Supreme Court and the business court itself to promulgate additional “rules of practice and procedure” that are “consistent with” those areas.

In-house counsel handling other types of litigation, such as products liability or personal injury, also stand to benefit. If the business court operates as designed, it should reduce the burden on trial courts of general jurisdiction, while the business court handles complex commercial disputes. This feature promises to reduce overall caseloads and improve the efficiency of the justice system.

All this assumes, of course, that the Texas Supreme Court concludes that the bill passes constitutional muster. High-profile legal scholars across Texas have debated whether moving business disputes away from locally elected judges renders the entire scheme unconstitutional. Several legal industry groups openly opposed the bill and will likely challenge its validity, which may in turn leave the business court’s ultimate fate with the Texas Supreme Court.

If the bill is entered into law, the new business court will mark a significant shift in how Texas-based businesses resolve disputes. As with any new law, there will be risks and uncertainties to consider. Attorneys must stay vigilant and monitor the implementation and impact of the new law to ensure that their business clients are well-positioned to take advantage of its potential benefits, while mitigating any risks.

Anna G. Rotman is a litigation partner at Kirkland & Ellis in Houston. She has significant experience in business disputes, environmental and products liability cases, and in restructuring-related litigation.

Nick Brown is a litigation partner at Kirkland & Ellis in Houston. He has led complex, high-stakes cases in the technology, energy, manufacturing and distribution industries in federal district and appellate court, Texas state court and arbitration.

Ben A. Barnes is a litigation partner at Kirkland & Ellis who offices in Dallas and Houston. He focuses on energy and restructuring litigation, but his broad experience also includes corporate governance, real estate and antitrust disputes.

Ally Arias is a litigation associate at Kirkland & Ellis in Houston.