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Countdown to Business Courts: Six Must-Know Rules

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Gov. Greg Abbott signed HB 19 into law last summer, officially creating the hotly anticipated Texas business court. The new court — which is set to open its doors Sept. 1, 2024 — has been top of mind for Texas trial lawyers ever since. Now, the Texas Supreme Court has proposed the first set of procedural rules that will apply in the business court, bringing clearer focus to the business court vision. Commercial trial lawyers should now be better positioned to advise their clients on the particulars of this new forum.

The business court's enabling statute (summarized more completely in a prior article) sets out the operational framework and establishes the court's jurisdiction. Under the law, the governor may appoint up to 16 judges, geographically dispersed among Texas's existing judicial administrative regions. The statute also establishes the business court's original jurisdiction. The court can hear corporate governance, commercial and financial disputes that meet specified criteria, and it will have limited supplemental jurisdiction over related claims — but only if both the parties and the presiding judge agree to include the supplemental claims in the business court case.

Though comprehensive in some respects, the enabling statute leaves some procedural details out, and some of the omissions have driven debate among commentators over the past year. For example, it remains an open question whether the relatively narrow scope of the business court's jurisdiction will drive protracted jurisdictional litigation that might overshadow the other efficiencies the business court promises to offer.

While the statute contemplates the remand and removal of cases between the new business court and Texas's existing trial courts, it gives no procedural guidance and instead requires the Texas Supreme Court to enact appropriate procedural rules to cover such matters.

The statute also contemplates that business court judges will issue reasoned written opinions, which should lead to a body of corporate governance case law that increases legal certainty for Texas-based businesses. But the statute does not specify when opinions are required or what criteria they must meet; rather, it directs the Supreme Court to adopt appropriate rules for the issuance of written opinions.

The Supreme Court has now proposed rules to address the mechanics surrounding some of these open questions through its recently issued Preliminary Approval of Rules for the Business Court, which includes proposed additions to the Texas Rules of Civil Procedure that govern in the Texas business court.

Rule 354 addresses how jurisdiction and venue is established in the Texas business court. It requires business court plaintiffs to “plead facts to establish the business court’s authority to hear the action” and “to establish venue in a county in an operating division of the business court,” in addition to the pleading requirements for standard civil cases. The rule further allows parties to challenge the business court’s authority to hear a given case as well as the venue, further authorizing the court to determine its own authority to hear the case *sua sponte*. Questions of when and

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how the business court will exercise this authority are left for further development in written opinions.

Rule 355 outlines the procedure the parties must follow to remove cases from trial courts of general jurisdiction to the business court and for a party opposing business court jurisdiction to seek remand. The removing party must notify the other parties, the originating court and the business court of its intent to remove and plead facts establishing venue and the business court's authority to hear the case. The non-removing party has 30 days to contest the removal, and the business court has discretion to determine, *sua sponte*, whether the removal was proper. This procedure will be familiar to federal court litigants, but whether federal case law — for example, the doctrine of improper joinder — extend to the Texas business court remains a question to be litigated.

Rule 356 allows something that many parties may not have expected: Judges presiding over courts of general jurisdiction may seek transfer of filed cases to the business court. The court requesting transfer must notify all parties of its intent to transfer the case. If either party objects to the transfer, the presiding judge for the administrative judicial region in which the court is located is required to self-assign to the court and conduct a hearing on the transfer. The regional presiding judge “may” transfer the action to the business court upon a finding that “the transfer will facilitate the fair and efficient administration of justice.” What factors go into this determination will undoubtedly be the subject of much debate, not to mention how often trial judges in courts of general jurisdiction will invoke this rule.

Rule 357 has important implications for parties facing the imminent expiration of the statute of limitations. The rule suspends applicable statutes of limitations for up to 60 days when the business court dismisses a claim

and the plaintiff refiles in another court. Superficially, this rule resembles an existing provision in the Texas Civil Practice & Remedies Code, Section 16.064. How the rule and the statute interact (if at all) may result in interesting procedural questions.

Rule 358 governs remote appearances. It provides that, as a general matter, the normal Texas Rules of Civil Procedure (Rule 21d) govern remote proceedings in the business court. But there are two important caveats. First, the business court may not require parties to appear electronically at hearings in which oral testimony is heard, absent agreement of the parties. With respect to electronic appearances for jury trials, the rule goes one step further by saying the business court must not allow “a participant” to appear electronically. The text of the rule contains no exceptions for international litigants, those with health issues or otherwise. How — if at all — this will impact the mechanics of testimony at business court proceedings is something to be seen.

Rule 359 requires the business court to issue a written opinion in connection with a dispositive ruling on request of any party, and it further requires written opinions on “an issue important to the jurisprudence of the state.” Will parties perceive some advantage to requesting a written opinion to force the judge to draft one as the rule arguably contemplates? And what sort of norms will develop surrounding what a written opinion must contain, given that the rule does not define what a “written opinion” is? These too are questions for a later day.

The proposed rules are subject to public comment through May 1 but otherwise take effect on Sept. 1, when the business court officially opens for business.

As these rules are revised, promulgated and re-revised, the typical lifecycle of a Texas business court dispute will grow ever more defined. But that is a long process and a long way off. For

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now, business litigants and their counsel can only think about whether, come September, they want to take advantage of these new rules.



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