

ENACTMENT OF HB 19
BY THE 2023 TEXAS LEGISLATURE
SPECIALIZED TEXAS BUSINESS COURT

TEXAS BUSINESS LAW FOUNDATION

The Texas Business Law Foundation (TBLF) is a non-profit corporation organized in 1988 and supported by leading law firms, corporate law departments, professors of business law and individual attorneys throughout Texas. Its mission is to promote a favorable business climate in Texas through the establishment and maintenance of a modern, effective system of business laws. To achieve this goal, TBLF:

- Provides information to its members and interested parties regarding Texas business laws and legislation,
- Monitors and reports on Texas legislative and administrative proposals of interest to TBLF members that impact Texas business laws,
- Supports the introduction of bills in the Texas Legislature that in the consensus opinion of the business law community advance the quality of Texas business law and solve business problems,
- Endorses or opposes proposed business law legislation introduced by other parties based upon the perceived merit of the proposals,
- In every legislative session since 1989 has employed effective lobbyists to actively engage with the Texas Legislature in support of TBLF's positions, and
- Serves as a source of advice and perspective to the legislative, judicial and executive branches of the government of the State of Texas on matters of business law.

For further information on the early history, mission and accomplishments of the TBLF, see: <https://www.jw.com/wp-content/uploads/2016/09/1239.pdf> or contact its Chair, Irene Kosturakis, at irene.kosturakis@bmc.com.

The TBLF supported the drafting and filing of bills proposing the creation of a Texas business court in the 2023 and each prior legislative session beginning in 2015, presented witnesses in support of those bills, prepared whitepaper reports addressing the policy and legal implications of the business court legislation and deployed its lobbyists to engage directly with Governor Abbott, bill sponsors and other key legislators and their staffs.

The enrolled, final version of HB 19 as signed into law by Governor Abbott and its legislative history can be found at:

<https://capitol.texas.gov/BillLookup/Text.aspx?LegSess=88R&Bill=HB19>

TEXAS BUSINESS LAW FOUNDATION

Enactment of HB 19: Specialized Texas Business Court*

Litigation is part of doing business, and costs businesses millions of dollars annually. Thirty states have created specialized courts to address complex business litigation with greater efficiency and consistency. With the passage of House Bill 19 (HB 19) by the 2023 Texas Legislature and Governor Abbott's signature on June 9, 2023, Texas now has a business court that will open its doors in 2024, becoming the thirty-first state to undertake this judicial innovation. This followed unsuccessful efforts to pass business court legislation in the 2015, 2017, 2019 and 2021 sessions of the Texas Legislature. What made the difference in 2023?

The creation of a Texas business court was identified by each of Governor Abbott, Lt. Governor Patrick and House Speaker Phelan as a top legislative priority in 2023. Chief Justice Hecht's 2023 State of the Judiciary message noted that while the proposed creation of Texas business courts by HB 19 "is not without controversy" . . . "I believe business courts would benefit the Texas justice system, and I support their creation."

Despite strong opposition from Texas trial lawyer organizations, HB 19 was broadly supported by Texas businesses, and received overwhelming legislative approval. The hard work and skillful negotiation of primary authors Representative Andy Murr (R-Kerrville) and Senator Bryan Hughes (R-Tyler), supported by 77 joint and co-authors, produced floor votes in the Texas House of Representatives of 90 to 51 and 86 to 53, and in the Texas Senate of 24 to 6, favoring passage of HB 19.

The jurisdiction of the Texas business court provided in HB 19 is narrowly tailored to reach disputes between businesses, or among businesses and their owners, directors and management, relating to matters such as breach of contract, breach of fiduciary duty, governance and control disputes, and violations of state and federal securities and trade regulation laws. The minimum amount in controversy for most actions before the business court is set at \$5 million or \$10 million depending on the nature of the specific claims asserted. The amount in controversy requirements do not apply to a limited set of actions - those seeking only injunctive or declaratory relief and cases addressing claims of breach of fiduciary duty, governance and control disputes and securities and trade regulation litigation if a publicly traded company is a party.

The Texas business court when fully operational will have statewide jurisdiction, supporting the creation of consistent business case law and court rules, and complementing the state's innovative business laws as codified in the Business Organizations Code, the Business & Commerce Code, the Finance Code and the Texas Securities Act. The specifics of the business court's jurisdiction are addressed in more detail in Part II below.

Key features of the Texas business court:

- Statewide jurisdiction, consisting of sixteen trial-level judges:
 - Judges are appointed by the Governor subject to Senate confirmation by a two-thirds vote.

*This memorandum was prepared by the Texas Business Law Foundation. Questions can be directed to Michael W. Tankersley, Chair, Business Court Committee (mike.tankersley@alston.com – 214-922-3400) or Irene Kosturakis, Chair, Texas Business Law Foundation (irene.kosturakis@bmcsoftware.com) - 713-918-2233.

- Judges will serve in one of eleven divisions having boundaries corresponding to the Texas court system’s Administrative Judicial Regions (AJR’s – see Appendix A), with ten judges to take office in 2024. The remaining six business court judges will take office in 2026, if the 2025 Texas Legislature takes further action to authorize and fund those divisions. The initial ten judges (two per division) will serve Regions 1 (Dallas and nearby counties), 3 (Travis and nearby counties), 4 (Bexar and nearby counties), 8 (Tarrant and nearby counties) and 11 (Harris and nearby counties).
- Judges will serve two-year terms, a limitation imposed by the Texas Constitution Art. XVI Sec. 30. A proposal to amend the Constitution to extend the term of office to at least four years is anticipated in 2025.
- Judges must have at least 10 years of experience in complex business litigation, business transaction law or serving as a Texas civil court judge and have lived at least five years prior to appointment in a county included in the division of the business court to which the judge is appointed.
- Business court judges are expected to issue written opinions on a regular basis that will make available a body of Texas business case law to guide Texas businesses and their legal counsel. The bill anticipates that business court staffing will include briefing attorneys to assist in this task and directs the Texas Supreme Court to issue rules regarding the issuance of written opinions by the business court.
- Appeals from the business court will go to the new statewide 15th Court of Appeals created during the 2023 Texas Legislature by Senate Bill 1045, which was also signed into law by Governor Abbott on June 9, 2023. Final appeals go to the Texas Supreme Court. Section 4 of HB 19 grants the Texas Supreme Court exclusive jurisdiction to hear any challenge to the constitutionality of the statute creating the business court.
- The business court’s administrative office and clerk will be based in Travis County. Business court judges are allowed to establish chambers in state or county facilities in any county within the business court division they serve. Court proceedings, other than jury trials, may be held in any courtroom within the business court’s division.
- While most complex business cases are resolved by settlement, the rare jury trial will be heard in the county chosen by the plaintiff where proper venue would otherwise exist for that case. The business court judge is required to issue an order early in a proceeding confirming the county where venue will exist for any jury trial.
- It is expected that the business court will use advanced communications technology to facilitate motions and other procedural hearings and that much of the court’s business will be handled remotely, saving time and expense for the parties.
- Court fees charged to the parties are expected to cover a substantial majority of the costs of the business court given the wherewithal of the business parties expected to appear there.

The Texas business court will improve the efficiency, consistency and predictability of business litigation by allowing judges having the required experience and career interest, working in a statewide jurisdiction, to focus on complex business litigation exclusively. These cases will no longer compete with, and when they are heard, delay, the variety of civil and criminal matters that currently crowd the dockets of state district courts, many of which are given statutory priority over business cases by Texas Government Code 23.101-103. At the same time, most litigation impacting businesses, including larger public companies, will continue in state district courts due to the business court's limited jurisdiction.

Sophisticated businesses considering moving to Texas or other states increasingly want to know whether their business disputes will receive reasonably prompt, expert and fair adjudication. In states having specialized business courts, the answer to that question is an easy "YES!" Most of the states that compete with Texas to attract business¹ have specialized business courts. In November 2018, Georgia voters, by a 69% to 31% majority, approved a constitutional amendment to allow the creation of a statewide business court with appointed judges, in a state where, like Texas, all other trial court judges are elected.² A bill to create a business court in Utah was introduced this year and passed both houses of its legislature by unanimous votes.³

Texas is establishing a competitive position on this score by creating a Texas business court that draws on the positive experience of other states and highly-qualified Texas attorneys and judges having the necessary backgrounds and experience to serve as business court judges. Such a court can be expected to rapidly gain a national reputation commensurate with the Texas business climate - as being second to none.

Set forth below is a detailed explanation and commentary in three parts regarding the Texas business court established by HB 19:

- (I) Section-by-section analysis and commentary,
- (II) Summary of the business court's jurisdiction with commentary, and
- (III) Potential questions and responses regarding the business court and its constitutionality.

¹ Including California, New York, Illinois, Massachusetts, Pennsylvania, North Carolina, Georgia, Tennessee and Florida.

² A constitutional amendment is not necessary in Texas to create the proposed business court. The Supreme Court of Texas has confirmed that Article 5 of the Texas Constitution gives the Texas Legislature the power to create courts having some or all of the jurisdiction and powers of a state district court and to determine how the judges of that court will be selected. *Jordan v. Crudginton*, 149 Tex. 237 (1950).

³ <https://le.utah.gov/~2023/bills/static/HB0216.html>.

I. Section-by-Section Analysis and Commentary

Each provision of Chapter 25A of the Texas Government Code is summarized below and in Section II following, with commentary in italics:

Section 1. – Amends Subtitle A, Title 2, of the Texas Government Code by adding a new Chapter 25A as described below.

- §25A.001 – Provides definitions, most of them tracking closely terms also defined in the Texas Business Organizations Code and the Texas Business & Commerce Code, that provide consistency and avoid ambiguity in the operative provisions of Chapter 25A.
- §25A.002 – States that the business court is a statutory court created by the Texas Legislature under Article 5, Section 1 of the Texas Constitution:

Sec. 1. JUDICIAL POWER VESTED IN COURTS; LEGISLATIVE POWER REGARDING COURTS. The judicial power of this State shall be vested in one Supreme Court, in one Court of Criminal Appeals, in Courts of Appeals, in District Courts, in County Courts, in Commissioners Courts, in Courts of Justices of the Peace, and in such other courts as may be provided by law.

The Legislature may establish such other courts as it may deem necessary and prescribe the jurisdiction and organization thereof, and may conform the jurisdiction of the district and other inferior courts thereto.

The Legislature’s authority to create new courts and provide for the selection of their judges was upheld by the Texas Supreme Court in Jordan v. Crudgington, 149 Tex. 237 (1950). Some opponents of the business court have claimed that the business court is unconstitutional because its structure and powers are comparable to a state district court’s, making it a defacto state district court without complying with other provisions of the Texas Constitution applicable to state district courts. These arguments track the dissenting opinion in Jordan, which was not persuasive to the Texas Supreme Court majority in 1950, or to the Texas Legislature and Texas voters as they subsequently amended the Texas Constitution to expand upon and confirm the Legislature’s broad authority to establish statutory courts.

- §25A.003 (a) - Provides that the business court’s judicial district consists of all counties in the state of Texas. As discussed below, the business court’s initial jurisdiction when its doors open in 2024 will be limited to five divisions in the most populous areas of the state (Divisions 1, 3, 4, 8, 11 – see Appendix A), with the remaining six divisions covering the remainder of the state not having judges appointed or receiving case filings until 2026, if approved by the 2025 Texas Legislature.
 - *Statewide jurisdiction will encourage improved consistency and predictability of Texas business law for businesses operating in Texas and their legal counsel as decisions reached by the business court, and reported in the published opinions contemplated by §25A.016, will have relevance uniformly across the entire state,*

instead of only within one of hundreds of judicial districts or within one of fourteen appeals court districts. This will be supported by the requirement in §25A.007 that appeals from the business court go to the newly created 15th Court of Appeals, which also has statewide jurisdiction.

- §25A.003 (b) to (n) – Divides the business court’s statewide jurisdiction into eleven multi-county divisions having the same boundaries and numbering as the administrative judicial regions established under Texas Government Code Sec. 74.042 and covering the entire state [see Appendix A]. Section 6 of HB 19 provides for the initial appointment of ten judges (two in each division) to five of the eleven divisions over the next year, those associated with the state’s larger cities: Region 1 (Dallas area), Region 3 (Austin area), Region 4 (San Antonio area), Region 8 (Fort Worth area) and Region 11 (Houston area).

The remaining six judges will be appointed in 2026, provided that the 2025 Texas Legislature takes further action to authorize and fund those divisions. Until those six additional judges are appointed cases may only be filed in the initial five divisions, to the extent proper geographic venue exists within the division where the case is filed. §25A.009(f) allows business court judges to exchange benches and sit and act for each other in any matter pending before the court in order to promote the orderly and efficient administration of justice.

- o *Given the limited amount of data currently available from the Texas court system on the frequency of cases that would fall within the jurisdiction of the business court, this arrangement will initially establish business court divisions in the state’s more heavily populated urban areas. The 2025 Texas Legislature will consider the creation of the additional business court divisions with the benefit of information about actual and potential business court caseloads expected to be available then.*

- §25A.004 (a) – Grants the business court powers equivalent to those provided to district courts by Chapter 24 of the Texas Government Code, including the power to issue writs of injunction, mandamus, sequestration, attachment, garnishment and supersedeas and to grant any relief that may be granted by a district court, subject to the limitations appearing in Subsections (b), (c), (d), (e) and (f) discussed below.
- §25A.004 (b), (c), (d), (e) – These subsections describe, and limit, the types of legal actions that are within the business court’s subject-matter jurisdiction. Business court jurisdiction in these areas is concurrent with the jurisdiction of district courts. Subsection (b) addresses actions addressing breach of fiduciary duty, governance and control disputes, and violations of state and federal securities or trade regulation laws, which must satisfy a \$5 million amount in controversy requirement (excluding interest, statutory damages, exemplary damages, penalties, attorney’s fees, and costs). Subsection (c) gives the business court jurisdiction over the matters described in Subsection (b), without requiring a minimum amount in controversy, if a party to the action is a publicly traded company (defined as a company whose voting equity securities are listed on a national securities exchange, and its controlled subsidiaries). Subsection (d) addresses disputes arising out of financial and commercial transactions or violations of the Finance Code or Business & Commerce Code, which are subject to a larger \$10 million amount in controversy

requirement. Subsection (e) addresses actions seeking declaratory or injunctive relief, which are not subject to an amount in controversy requirement.

A description of each jurisdictional provision with examples of the types of cases it addresses appears in Section II.

- *This provision assures that a limited class of complex business disputes will go to the business court. The vast majority of commercial litigation will remain in the state's courts of general jurisdiction.*
- *The subject matter jurisdiction of the business court is generally comparable to that of other states' business courts. The \$5 million and \$10 million amount in controversy thresholds are significantly higher than found in the business courts of other leading commercial states, which it is expected will moderate the initial volume of business court cases and serve as a reasonable proxy to assure the cases have the complexity that will most benefit from the business court's specialized focus.*
- *Other states that have created business courts have adjusted their jurisdictional provisions over time to assure that an appropriate volume of cases that will benefit from the business court's specialized expertise are directed to the business court to improve the overall efficiency of their court systems. It is expected that a similar process will play out in Texas over coming years.*
- §25A.004 (f) – Grants the business court supplemental jurisdiction over other claims not listed in subsections (b), (c), (d) and (e) that are sufficiently related to the claims in the business court action that they form part of the same case or controversy, provided the parties and a judge of the applicable business court division agree such other claims should proceed together with the primary jurisdiction claims in the business court. If the parties and judge do not so agree, the other claims may proceed concurrently in a court having jurisdiction. These provisions are analogous to procedural rules applicable to federal court jurisdiction over state law matters.
- §25A.004 (g) – Identifies areas of subject-matter jurisdiction that are expressly denied to the business court unless the claim falls within the business court's supplemental jurisdiction provided under §25A.004 (f):
 - (1) civil actions (i) brought by or against a governmental entity or (ii) to foreclose on a lien on real or personal property;
 - (2) claims arising out of: (i) Subchapter E, Business & Commerce Code, Chapter 15 (addressing covenants not to compete) and Chapter 17 (addressing deceptive trade practices), (ii) the Estates Code, (iii) the Family Code, (iv) the Insurance Code and Chapter 53 and Title 9 of the Property Code (addressing mechanic's, contractor's and materialman's liens);
 - (3) a claim arising out of the production or sale of a farm product, as defined by Section 9.102 Business & Commerce Code;
 - (4) a claim related to the duties and obligations under an insurance policy;

- (5) a claim related to a consumer transaction, as 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.
- §25A.004 (h) – Provides that the business court does not have jurisdiction of the following claims regardless of whether the claim is otherwise within the court’s supplemental jurisdiction under §25A.004 (f):
 - (1) a claim arising under Chapter 74, Civil Practice and Remedies Code, which addresses medical malpractice;
 - (2) a claim in which a party seeks recovery of monetary damages for bodily injury or death; or
 - (3) a claim of legal malpractice.
- §25A.005 - Provides that business court judges have the same powers, duties, immunities and privileges as state district court judges.
- §25A.006 (a), (b), (c), (d), (g) – Sets forth procedures for filing cases in the proper division of the business court, including related pleading requirements, removing cases filed in other courts to the business court if they fall within its jurisdiction, and for removing cases to other courts from the business court if they do not fit within the business court’s jurisdiction. Recognizes that parties may also enter into a written contract that specifies a county having venue.
- §25A.006 (f) – Allows parties to file agreed notices of removal at any time during the pendency of an action and sets forth procedures governing the granting of removal if all parties to the action have not agreed to the removal. Parties are allowed to move for removal to the business court up to 30 days after they discover, or reasonably should have discovered, facts establishing the business court’s jurisdiction over the action, provided that if an application for temporary injunction is pending during that 30 day period, the deadline is extended to the 30th day after the date the application for a TRO is granted, denied or denied as a matter of law.
- §25A.006 (h), (i), (j) – Filing of an action or notice of removal in the business court is subject to the penalties of Section 10.001, Texas Civil Practice and Remedies Code, applicable to filings made for improper purposes or without the required elements of legal support. Removal of a case to the business court is not subject to the statutes or rules governing the due order of pleading. Removal of a case does not waive a defect in venue or constitute an appearance to determine personal jurisdiction.
- §25A.006 (k) – Authority is given to regional presiding judges, upon the request of a judge in whose court an action within the business court’s jurisdiction is filed, after a hearing, to authorize the transfer of the case to the appropriate division of the business court if the transfer will facilitate the fair and efficient administration of justice.
- §25A.006 (l) – Once the business court judge establishes jurisdiction and venue over an action, the judge is to issue an order declaring the county in which any jury trial for the action will be held as required by §25A.015.

- §25A.007 –The 15th Court of Appeals created by the 2023 Texas Legislature in SB 1045 has exclusive jurisdiction over appeals from orders and judgments of the business court or an original proceeding related to an action or order of the business court. The 15th Court of Appeals will have statewide jurisdiction and will initially consist of three justices serving staggered six year terms who will be elected on a statewide basis following their initial appointment by the Governor. The number of justices will be expanded to five in 2027. The 15th Court of Appeals is expected to begin receiving cases on September 1, 2024, the same date as the business court.

The 15th Court of Appeals was created to exercise exclusive jurisdiction over appeals of civil cases to which the state, a state agency, or a state employee is a party, appeals of cases when the constitutionality or validity of a statute or rule is challenged and the attorney general is a party, and appeals of other matters as provided by law, such as appeals from the business court.

If the 15th Court of Appeals is not available to receive appeals from the business court for any reason, such as a delay in its becoming operational or a successful constitutional challenge to its creation, then appeals from business court's orders and judgments will be heard by the existing court of appeals having jurisdiction of civil cases appealed from the courts of the county having venue for jury trials as named in the business court order required by §25A.006 (l).

- §25A.008 - Provides qualifications required to serve as a business court judge, including age (at least 35 years), residency (for at least five years prior to appointment) in a county included in the division of the business court to which the judge is appointed, holding a current Texas law license and relevant experience (10 or more years practicing complex civil litigation or business transaction law or serving as a judge of a Texas court with civil jurisdiction or any combination of the preceding). A business court judge may not have had their license to practice law revoked, suspended, or subject to a probated suspension.
 - *The chief goal of the bill is to create a court that delivers improved efficiency by specializing in complex business cases that justify the court's jurisdiction. Specialization will allow greater efficiency in the handling of cases within the business court's jurisdiction due to commonalities in the patterns of pre-trial activity in complex business cases, the frequent appearance of issues of foreign state law and because the business court judges will not have to balance a large docket of non-business cases, many of which have been granted priority over business cases by the Texas Legislature in Texas Government Code §23.101-.103. Central to the promise of specialization and efficiency is the expertise that business court judges will bring to the job, and the further expertise they will develop from handling a concentrated docket of business cases.*
- §25A.009 (a), (b), (c) - Provides that the Governor, with the advice and consent of the Texas Senate, will appoint two judges to each of the First, Third, Fourth, Eighth and Eleventh divisions of the business court, and one judge to each of the other six divisions of the business court as and when such divisions have been created and funded as provided in

Sections 6 and 7 of the bill. Business court judges are to serve for terms of two years, beginning on September 1 of every even-numbered year and may be reappointed.

- *Article XVI, Section 30, of the Texas Constitution provides that "The duration of all offices not fixed by this Constitution shall never exceed two years." The Texas Supreme Court in Jordan v. Crudgington, 149 Tex. 237 (1950) held that Section 30 was applicable to limit the terms of judges appointed to a legislatively created court. It is expected that a constitutional amendment will be proposed in the 2025 Texas Legislature to provide for a longer term of office for business court judges.*
- §25A.009 (d), (f) – The business court judges are to elect by majority vote a judge of the business court to serve as administrative presiding judge for the duration of that term and may similarly fill any vacancy in the position. Allows business court judges to exchange benches and sit and act for each other in any matter pending before the court in order to promote the orderly and efficient administration of justice.
- §25A.010 - Provides that any vacancy on the business court may be filled by the Governor, with the advice and consent of the Senate, in the same manner as an original appointment, to complete the remainder of the unexpired term.
- §25A.011- Provides that the salary of a business court judge is to be the amount provided by §659.012 of the Texas Government Code. Section 2 of HB 19 amends §659.012 to appropriately reference business court judges in its provisions relating to judicial compensation. Section 3 of HB 19 amends §659.012 of the Texas Government Code, to provide for business court judges to participate in the judicial retirement system to the same extent as a district court judge.
- §25A.012 - Provides that removal from office, disqualification and recusal for business court judges will follow the same standards as for state district court judges.
- §25A.013 - Prohibits business court judges from engaging in the private practice of law during their tenure.
- §25A.014 - Allows the chief justice of the Texas Supreme Court to assign visiting judges to the business court, subject to their meeting the standards for qualification to serve as a business court judge stated in §25A.008, and also subject to objection, disqualification or recusal in the same manner as a visiting state district court judge in a state district court.
- §25A.015 – (a) Confirms the constitutional right to a trial by jury for parties in a business court action.
- §25A.015 (b), (c), (d), (e) - In the absence of an agreement by the parties to hold any jury trial in another county, (i) a jury trial in a case initially filed in the business court may be held in any county in which the case could have been filed under Sec. 15.002 of the Texas Civil Practice and Remedies Code, as chosen by the plaintiff, and (ii) a jury trial in a case removed to the business court will be held in the county in which the action was originally filed. §25A.006 (l) requires that the business court judge issue an order declaring the county

in which any jury trial will be held at the time that the court confirms that it has jurisdiction and venue for the case.

A jury trial for a case in which a written contract specifies a county as venue for suits is required to be held in that county. The parties and the business court judge may agree to hold a jury trial in any other county. A party to a business court action may not be required to agree to hold the jury trial in a different county.

- §25A.015 (f), (g) - The rules governing the drawing of jury panels, selection of jurors and other jury-related practice and procedure in the business court will be the same as for the district court in the county where the trial is to be held. Other rules of practice, procedure, evidence, issuance of process and matters relating to the conduct of trials, hearings and other business in the business court will be as prescribed for district courts unless otherwise provided in Chapter 25A.
 - *This bill makes no change in the right of the parties to a jury trial in a county of the plaintiff's choosing or as the parties may have otherwise agreed.*
- §25A.016 – Provides for the Texas Supreme Court to promulgate rules for the issuance of written opinions by the business court.
 - *The availability of written opinions from the business court will improve the understanding of Texas business law by businesses and their legal advisors and the consistency and predictability of Texas business litigation.*
- §25A.017 (b), (c) – Provides that the administrative presiding judge of the business court will manage administrative and personnel matters on behalf of the court, including the authority to appoint the business court's clerk. The clerk's office is to be located in Travis County and its functional responsibilities are specified as equivalent to a state district court clerk. Each business court judge may maintain chambers in a county of his or her choosing within the geographic boundaries of the relevant business court division, in facilities provided by the state or contracted for with the county.
- §25A.017 (d), Authorizes business court proceedings, other than jury trials as addressed in §25A.015, to be held in any courtroom within the geographic boundaries of a business court division as the business court judge determines to be necessary or convenient.
- §25A.017 (a), (e), (f), (g) - Provides for remote, communications technology supported proceedings to be conducted from a courtroom or the judge's state-provided chambers, subject to the limitation that the business court may not require a party or attorney to remotely attend a court proceeding in which oral testimony is heard, absent good cause or agreement of the parties. The business court is required to provide reasonable notice to the public that a proceeding will be conducted remotely, and to make it available for observation by the public.
- §25A.017 (h), (i), (j), (j) - Provides for business court security and staffing, including staff attorneys for the court and each judge, and payment of related costs. Business court staff

are employees of the Office of Court Administration of the Texas Judicial System and are state employees for all purposes.

- *The business court is allowed, and encouraged, to conduct business in the most efficient manner possible—including, where feasible, by Internet-based communications technology that will limit the need for counsel or parties to travel to the offices or courtroom of the business court judge. Lawyers in more remote parts of Texas and from out-of-state firms, and litigant witnesses and in-house counsel based in other states, should not be required to travel for shorter administrative hearings, thus saving significant time and money. Commercial cases within the business court’s jurisdiction are particularly well suited for, and served by, these kinds of technology-supported strategies.*

Staff attorneys are provided to support the business court in view of the document- and motion- intensive nature of complex commercial litigation and the expectation that business court judges will regularly issue published opinions.

- §25A.0171 – Provides that the business court is administratively attached to the Office of Court Administration of the Texas Judicial System, which is required to provide support for the operation of the business court, without taking responsibilities for any of the duties of the business court. Requires that the Office of Court Administration submit to the Legislature not later than December 1 of each year a report on the number and types of cases heard by the business court in the preceding year.
- §25A.018 - Authorizes the Texas Supreme Court to set fees for filings and actions in the business court in amounts sufficient to cover the costs of operating the business court.
 - *While it is probably not realistic to expect the business court to cover 100% of its costs by collecting fees and costs charged to litigants, the business court should cover a higher percentage of its costs when compared to state district courts given the absence of indigent parties entitled to fee waivers resulting from the business court’s narrow jurisdiction focused on complex business disputes.*
- §25A.019 - Provides for the seal of the business court.
- §25A.020 – Provides for the Texas Supreme Court to promulgate rules of civil procedure for proceedings in the business court, including rules addressing the timely and efficient removal and remand of cases to and from the business court and the assignment of cases to judges of the business court. The business court is authorized to adopt rules of practice and procedure consistent with the Texas Rules of Civil Procedure and the Texas Rules of Evidence.

Section 2 – Amends §659.012 of the Texas Government Code to appropriately reference business court judges in its provisions relating to judicial compensation.

Section 3 - Amends §659.012 of the Texas Government Code, to provide for business court judges to participate in the judicial retirement system to the same extent as a district court judge.

Section 4 - Grants the Texas Supreme Court exclusive jurisdiction to hear any challenge to the constitutionality of the statute creating the business court. Authorizes the Chief Justice of the Texas Supreme Court to appoint sitting or retired judges to serve on the business court as provided in §25A.014 above if appointment of business court judges by the Governor is held to be unconstitutional.

- *While the Texas Business Law Foundation is confident that the provisions of Chapter 25A of the Texas Government Code creating the business court are fully consistent with the Texas Constitution, parties opposed to the passage of HB 19 have asserted that is not the case and threatened litigation challenging the court on constitutional grounds. Section 4 assures that the time required to resolve such questions is minimized by granting the Texas Supreme Court exclusive jurisdiction to hear any such challenges.*

In the unlikely circumstance that the process for appointment of business court judges by the Governor is held by the Texas Supreme Court to violate the Texas Constitution, the business court can still function relying on visiting or retired judges appointed by the Chief Justice of the Texas Supreme Court. Given that the 2025 Texas Legislature will convene less than six months following the September 1, 2024 opening of the business court to receive case filings, there will be a promptly available opportunity for the Texas Legislature to take any needed actions to amend Chapter 25A or propose amendments to the Texas Constitution to address any constitutional or other legal infirmities that may be identified.

Section 5 – Except as otherwise provided by the statute, the business court will be created (begin accepting case filings) September 1, 2024.

Section 6 – Provides that the Governor is to appoint judges to the First (Dallas area), Third (Austin area), Fourth (San Antonio Area), Eighth (Fort Worth area) and Eleventh (Houston area) Business Court Divisions as soon as practicable after the effective date of the statute (September 1, 2023) [see Appendix A]. The Governor is directed to appoint judges to the Second, Fifth, Sixth, Seventh, Ninth and Tenth Business Court Divisions on or before September 1, 2026, but not before July 1, 2026, as required by §25A.009. This delay will allow the 2025 Texas Legislature to evaluate the utility of establishing operating business court divisions in less populous areas of the state.

Section 7 – Provides that the business court will not be created unless the legislature makes a specific appropriation for that purpose. That appropriation was made, so the condition has been satisfied.

Section 8 – The changes in law made by the statute will apply to civil actions commenced on or after September 1, 2024.

Section 9 – The statute takes effect September 1, 2023, in order to allow the Governor, the Texas Supreme Court and its Office of Court Administration to undertake the necessary work to prepare the business court to begin hearing cases on and after September 1, 2024.

(II) Summary of the Business Court’s Jurisdiction and Examples with Commentary

§25A.004 (b) - Provides that the business court has civil jurisdiction concurrent (identical) with that of state district courts in the following categories of business disputes in which the amount in controversy exceeds \$5 million, excluding interest, statutory damages, exemplary damages, penalties, attorney ’s fees, and court costs:

(1) a derivative proceeding;

“Derivative proceeding” is defined in §25A.001 (2) to mean “a civil action in the right of a domestic or foreign corporation, domestic or foreign limited liability company, or domestic or foreign limited partnership, as and to the extent provided in the Business Organizations Code.”

Example: Company X Inc. is authorized by the board of directors to enter an ill-advised business venture with the CEO’s brother in law and loses more than \$10 million. Shareholder Bob Smith believes the CEO and board breached their fiduciary duties and should pay damages to Company X for the losses incurred. Shareholder Bob Smith delivers a written demand that the board take action against the CEO and responsible directors to recover the losses. The board forms a “special committee” of allegedly independent directors to investigate the situation in response to Bob Smith’s demand.

If the special committee determines to pursue claims for the benefit of the company against the CEO and directors, then there is no derivative proceeding, but shareholder Bob Smith may be repaid the cost of his efforts to force the board to pursue Company X’s claims. If no special committee is formed, or the appointed special committee comes back with a determination not to pursue any claims, shareholder Bob Smith files a derivative proceeding per TBOC Sec. 21.551 et seq. asking the business court to allow shareholder Bob Smith to assert the fiduciary duty claims against the CEO and board independently of Company X, but for the benefit of Company X.

(2) an action regarding the governance, governing documents, or internal affairs of an organization;

“Internal affairs” is defined in §25A.001 (7) to mean “the rights, powers, and duties of an organization’s governing persons (i.e., the board, general partner), officers, owners, and members; and (2) matters relating to the organization’s membership or ownership interests.”

Example: A corporation fails to provide a significant record shareholder with notice of a shareholders meeting where an important vote will be taken. The shareholder sues in the business court to enjoin the meeting, or the action voted upon, based on the corporation’s failure to provide notice and the shareholder owning enough shares to reverse the result of the vote at the meeting.

Example: Members of a limited liability company (LLC) include in the company agreement of the LLC a provision requiring each member that wants to sell all or part of their interest in

the LLC to offer it first to the other members of the LLC for a 30-day period. A member sells their interest in the LLC to a third-party without providing notice. The LLC or one of its members files suit in the business court to enforce the company agreement by reversing the transaction and requiring the ownership interest to be offered to the other members.

Example: Texas Business Organizations Code Sec. 21.714 provides a long list of subjects that shareholders of a close corporation can include in a shareholders' agreement that will be binding on all shareholders. Any dispute among the shareholders and the corporation over breach or enforcement of any of those agreements will "relate to the internal affairs of the corporation" and fall within the business court's jurisdiction. These types of agreements might include terms governing how officers and directors will be selected, restrictions on transfers of stock, how and when dividends will be declared and paid, terms of employment of shareholders, directors, officers or others, qualifications to own shares, specifying where litigation of disputes will occur, how financial reporting will be handled, how profits or losses will be apportioned, etc.

(3) an action in which a claim under a state or federal securities or trade regulation law is asserted against:

- (A) an organization;
- (B) a controlling person or managerial official of an organization for an act or omission by the organization or by the person in the person's capacity as a controlling person; or managerial official;
- (C) an underwriter of securities issued by the organization; or
- (D) the auditor of an organization;

Example: Litigation of state and federal claims for securities law violations, including (i) claims for making material misstatements in the public or private sale of common stock of bonds; and (ii) claims against publicly traded issuers, their CEOs and CFOs, possibly their boards and auditors, for making material misstatements or omissions about their businesses, or otherwise failing to comply with applicable disclosure requirements, in their publicly filed reports and public statements.

Example: A suit by companies that produce software applications for use on the Apple iPhone against Apple alleging that Apple is unfairly using its monopoly power over iPhone software to dictate what applications can operate on its products, in violation of Texas and U.S. antitrust laws.

- (4) an action by an organization, or an owner of an organization, if the action:
 - (A) is brought against an owner, managerial official, or controlling person of the organization; and
 - (B) alleges an act or omission by the person in the person's capacity as an owner, managerial official, or controlling person of the organization;

Example: Suit by a business entity (organized in Texas or any other state) against the manager of the business entity (CEO, general partner) to recover assets stolen from the business entity by the manager, or compensation wrongfully paid to the manager.

Example: Suit by an owner of 50% of a corporation against the other 50% owner of the corporation for failing to comply with their agreement to elect designated individuals to the board of directors of the corporation.

(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;

Example: In the example of a derivative proceeding provided above at (1), the claims against the CEO and the responsible directors based upon breach of fiduciary duty (duty of loyalty and duty of care) that are at the heart of the matter fall within the business court jurisdiction under this provision and could be pursued by the company directly.

Example: A corporate officer learns of a business opportunity to purchase for a very low price some real estate that is likely to quickly appreciate because the officer's employer will be announcing a major development near to it. The officer buys the real estate, then sells it for a large profit after the announcement. This represents a business opportunity of the employer which should have been offered to the company, giving the company the right to sue him to recover the profit on the transaction.

(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 signed by the person to be held liable in a capacity other than as an owner or governing person; and

Example: Three partners form a furniture moving business (Moveco) and operate it successfully. There is a falling out and two of the partners (A and B) cause Moveco to purchase the ownership rights of the third partner in Moveco (C), who receives a promissory note payable by Moveco for \$1 million, with interest, over 10 years in exchange for his ownership in Moveco. Later the two partners A and B start a new moving business (Newco) and gradually move all of Moveco's moving business to Newco, causing Moveco to fail and default on the promissory note payable to C. C sues his two former partners A and B to collect from them the balance of the promissory note, saying that A and B should be personally liable for the debt of Moveco.

(7) an action arising out of the Texas Business Organizations Code.

Example: §21.218(b) of the Texas Business Organizations Code provides specified shareholders with the right to examine a corporation's books and records: "(b) On written demand stating a proper purpose, a holder of shares of a corporation for at least six months immediately preceding the holder's demand, or a holder of at least five percent of all of the outstanding shares of a corporation, is entitled to examine and copy, at a reasonable time, the

corporation's books, records of account, minutes, and share transfer records relating to the stated purpose.” If a corporation does not respond to a proper request to examine its books and records, the business court has jurisdiction to hear the dispute.

Example: If a Texas resident owning shares of a Delaware corporation headquartered in Houston, Texas wants to litigate his or her right to inspect its books and records, those rights exist under the Delaware General Corporation Law, not the Business Organizations Code, and so jurisdiction to hear that case is not provided by subsection §25A.004 (b)(7). However, jurisdiction should be available under subsection §25A.004 (b)(2) above as a matter involving the internal affairs of the corporation.

§25A.004 (c) - Expands upon the jurisdiction granted by §25A.004 (b) by providing that the business court has civil jurisdiction concurrent (identical) with that of state district courts as described in §25A.004 (b) regardless of the amount in controversy if a party to the action is a publicly traded company.

"Publicly traded company" is defined in §25A.001 (13) as “an entity whose voting equity securities are listed on a national securities exchange registered with the United States Securities and Exchange Commission under Section 6, Securities Exchange Act of 1934 (15 U.S.C. Section 78f) and any entity that is majority owned or controlled by such an entity.”

Companies that file reports with the Securities and Exchange Commission to support publicly traded debt or other non-voting securities, or whose voting securities are not listed on a national securities exchange, are not covered by this expansion of the business court’s jurisdiction.

§25A.004 (d) - Provides that the business court has civil jurisdiction concurrent (identical) with that of state district courts in the following categories of business disputes in which the amount in controversy exceeds \$10 million, excluding interest, statutory damages, exemplary damages, penalties, attorney ’s fees, and court costs:

- (1) an action arising out of a qualified transaction;

“Qualified transaction” is defined in §25A.001 (14) to mean “a transaction, other than a transaction involving a loan or an advance of money or credit by a bank, credit union, or savings and loan institution, in which a party: (1) pays or receives, or is obligated to pay or is entitled to receive, consideration with an aggregate value of at least \$10 million; or (2) lends, advances, borrows, or receives, or is obligated to lend or advance or is entitled to borrow or receive, money or credit with an aggregate value of at least \$10 million.”

Examples of transactions covered by this definition would include buying, selling, renting, licensing or otherwise making available tangible or intangible property, providing business services, investing funds in a business venture; or lending funds between business parties.

The exclusion of transactions “involving a loan or an advance of money or credit by a bank, credit union, or savings and loan institution” was introduced as a floor amendment in the House of Representatives necessary to obtain passage.

§25A.004 (d)(2), addressed below, should allow the business court to hear a dispute over a lending transaction involving a bank, credit union, or savings and loan institution if the loan documents make clear the parties’ agreement that the business court has jurisdiction of the action.

Note that §25A.004 (g)(1)(B) denies the business court jurisdiction over a civil action to foreclose a lien on real or personal property unless that action falls within the business court’s supplemental jurisdiction provided under §25A.004(f), which requires that the foreclosure have a nexus with the principal claims being litigated (should be satisfied in litigation over a lending transaction), and that the parties and the business court judge all agree to hear the supplemental claims in the business court action.

Example: The owner of a luxury hotel in Austin signs a 7-year affiliation and management agreement with international luxury hotel chain operator that is expected to produce fees to the hotel chain operator of \$3 million or more per year (\$21 million in total). After two years, luxury hotel owner gets a better offer from another operator and notifies the luxury hotel chain it is terminating the affiliation and management agreement for reasons that may or may not exist, may or may not constitute a breach of the agreement. Hotel owner is sued in the business court by the luxury hotel chain operator for damages exceeding \$10 million.

(2) an action that 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, except an action that arises out of an insurance contract; and

Example: The grant of jurisdiction in Sec. (2) covers much of garden-variety commercial litigation that asserts claims of breach of contract and failed investments and damages exceeding \$10 million, provided that the parties have agreed that the business court has jurisdiction of the action.

Example: A bank located in Dallas, Texas loans \$20 million to a Texas business entity borrower, which is personally guaranteed by the borrower’s president and 20% stockholder. Subsequent amendments to the loan agreement and guarantee provide that the parties agree that the lender may, at its option, elect to file any claims arising out of the loan documents in the Texas business court. The borrower defaults on the loan and the bank files suit in the Texas business court to collect the loan from the borrower and from the individual guarantor.

The jurisdiction provided by subsection (2) will overlap substantially with the jurisdiction provided by the preceding subsection (1), but does not incorporate the limitations resulting from the “qualified transaction” definition requiring that the subject transaction have a value of \$10 million or more and excluding transactions involving a loan or an advance of money or credit by a bank, credit union, or savings and loan institution. It effectively incorporates the policy principle of requiring agreement by the parties to the jurisdiction of

the business court that is at the center of §25A.004 (e) 's establishment of the business court's supplemental jurisdiction.

Most detailed business agreements include provisions specifying the agreed venue for any disputes. Whether the terms of currently existing business agreements are worded in a way that will support the position that the parties agreed to litigate disputes in the business court will require a careful reading of the agreements. Given the late and somewhat unexpected arrival of the Texas business court, it will be difficult to argue that business agreements entered into prior to June 2023 reflect the parties' express intention to have their cases litigated in the business court. Going forward, drafters of business agreements involving Texas parties will have to consider whether to include provisions directing disputes to the business court that are within its jurisdiction. This may be a difficult decision initially considering how little is known about the Texas business court at this time.

(3) subject to subsection (f) (describing claims that are and are not within the business court's supplemental jurisdiction), an action that arises out of a violation of the Texas Finance Code or the Texas 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.

Example: A private equity fund makes a \$20 million loan to a limited partnership organized by a real estate developer to build and own an office building. The loan agreement states that it is governed by Nevada law and provides for the payment of interest at an annual rate of 10% plus a contingent payment of one-third of the borrower's profit upon the sale of the office building. The office building is sold after three years at a significant profit, providing the investor a return in excess of 30%. The borrower pre-emptively sues the lender in Texas seeking to avoid the contingent payment, alleging that the loan is usurious under Title 4, Chapters 301-306, of the Texas Finance Code and that the parties' choice of Nevada law should be set aside under Title 9, Chapter 271 of the Texas Business & Commerce Code.

§25A.004 (e) - Provides that the business court has civil jurisdiction concurrent (identical) with that of state district courts in an action seeking injunctive relief or a declaratory judgment under Chapter 37, Civil Practice and Remedies Code, involving a dispute based on a claim that falls within the business court's jurisdiction under §25A.004 (b), (c) or (d). No minimum dollar amount in controversy is required, reflecting that actions for exclusively equitable remedies such as injunctive relief or declaratory judgment relief generally do not seek the payment of damages in a manner that would allow an amount in controversy to be specified.

Example: This provision confirms the ability of the business court to provide equitable remedies of injunctive and declaratory relief in the cases within the business court's express jurisdiction as described in the examples appearing above, in addition to any damages that might be awarded.

§25A.004 (f) – Except as provided in §25A.004 (g) (denying the business court jurisdiction over medical malpractice, legal malpractice and death and injury claims), the business court has supplemental jurisdiction over any other claim that is so related to the claims in the action that

are within the court's jurisdiction that they form part of the same case or controversy, provided that parties involved in the claim and a judge of the court agree.

§25A.004 (g) – Identifies areas of subject-matter jurisdiction that are expressly denied to the business court unless the claim falls within the business court’s supplemental jurisdiction provided under §25A.004 (f):

- (1) civil actions (i) brought by or against a governmental entity or (ii) to foreclose on a lien on real or personal property;
- (2) claims arising out of: (i) Subchapter E, Business & Commerce Code, Chapter 15 (addressing covenants not to compete) and Chapter 17 (addressing deceptive trade practices), (ii) the Estates Code, (iii) the Family Code, (iv) the Insurance Code and Chapter 53 and Title 9 of the Property Code (addressing mechanic’s, contractor’s and materialman’s liens);
- (3) a claim arising out of the production or sale of a farm product, as defined by Section 9.102 Business & Commerce Code;
- (4) a claim related to the duties and obligations under an insurance policy;
- (5) a claim related to a consumer transaction, as 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.

§25A.004 (h) – Provides that the business court does not have jurisdiction of the following claims regardless of whether the claim is otherwise within the court’s supplemental jurisdiction under §25A.004 (f):

- (1) a claim arising under Chapter 74, Civil Practice and Remedies Code, which addresses medical malpractice;
- (2) a claim in which a party seeks recovery of monetary damages for bodily injury or death;
or
- (3) a claim of legal malpractice.

(III) Potential Questions and Responses

Isn't it a criticism of our current elected state district court judges to create a new court for business cases?

- Not at all. Texas judges are some of the finest and most committed in the country. But most Texas courts have broad jurisdiction that can combine civil, criminal, personal injury, family, governmental and business cases. Expecting a judge to process all of them equally expeditiously and expertly is unrealistic and unfair to the judge. The judge's hands are often tied because significant number of non-business cases are given statutory priority by Texas Government Code Sections 23.101-.103.
- Nobody thinks that a child-welfare case, or a criminal prosecution, should sit and wait for days or weeks while a business case proceeds. But no one should think that high-stakes, complex business cases can wait for months and years, either, especially when there may be short-fused transactions or business emergencies that require prompt attention. Delay can, and does, cause litigation costs to explode for business litigants, damaging or destroying companies and costing jobs and future growth.
- None of the judges in the 30 other states having business courts have been insulted by the development of those courts, and neither should our state's judges be insulted by the creation of a Texas business court. As in the majority of other states with some form of business court, the proposed business court in Texas would facilitate judicial business of all courts, in part by reducing the burdens that complex business cases can impose on other categories of cases.
- Specialization is not seen as a criticism in other familiar circumstances. Texas' legal system is already specialized from top to bottom, with more than 200 specialty courts ranging from drug courts to veterans' courts, child protection to family to probate courts, among others. Justices on the Texas Supreme Court are not diminished by the fact that criminal cases go to the Texas Court of Criminal Appeals. Fifth Circuit judges are not insulted by the fact that patent cases go to the U.S. Court of Appeals for the Federal Circuit. And state district court judges sitting in the densely populated Texas counties are not offended by the existence of district courts specializing in civil, criminal, juvenile, probate and family-law matters.
- Under the stated criteria to serve as a business court judge (§25A.008), every current Texas district court judge who has served for at least 10 years meets the minimum standards to be considered by the Governor to serve as a business court judge. One of the key insights proven out in other states' business courts is that even judges with limited exposure to complex business and commercial litigation when they first become a business court judge will quickly develop the kind of specialized expertise that delivers major efficiency gains.

Is there really a need for this kind of court?

- Yes. As every other state with a business court has learned, lumping complex business cases in with all other types of cases helps no one. Complex business cases often require far more sustained attention in pre-trial stages than an average civil case, and when they come up for pre-trial hearings, in addition to the hours or days spent with the hearing, they can require the judge to invest substantial time reading many pages of filings not covered by testimony and becoming familiar with arcane laws and business practices, frequently those of other states. These demands then push aside the more typical litigants and absorb scarce judicial resources.
- Out-of-state businesses are frequently shocked at how long it can take to get a ruling in a Texas court. The delays are often understandable (and sometimes not), but business courts in other states have shown that they are able to dramatically decrease the time parties spend in litigation, making states with business courts more competitive and allowing parties litigating in those courts to reduce litigation costs. That is why New York protects, and brags on, the capabilities of its business courts, referred to as the commercial docket, and why states like Nevada, Wyoming and Utah have created, or are in the process of creating, business courts in order to make themselves more appealing places to do business and handle complex business litigation.
- As a result of the widespread delays known to accompany complex business cases in Texas in recent years, business law firms and in-house counsel frequently advise their clients to choose to litigate any disputes in another state's courts by agreement of the parties, or to agree to binding arbitration, pulling many of these cases out of the Texas court system entirely.
- Businesses are increasingly dissatisfied with the results of binding arbitration, citing the high cost of multiple arbitrators, little or no improvement in the speed of disposition when compared to state and federal courts, little or no information available about the quality of arbitrators, and the unavailability of any avenue of appeal. "If the arbitrator gets the law wrong, the award stands. If the arbitrator gets the facts wrong, the award stands. If the arbitrator gets the facts wrong and the law wrong, the award stands." Experienced business court judges develop expertise in moving cases efficiently to settlement or a trial decision, with full public visibility, and access to appellate review to address any asserted errors at the trial level.

Will this bill deprive parties of their right to trial by jury?

- No. The right to trial by jury in the plaintiff's chosen county is expressly protected.
- Most claims that are likely to involve jury trials—criminal matters, negligence, personal injury, ordinary breaches of contract and the like—are not within the business court's jurisdiction. Creating the business court means that the state district courts will be able to handle those other cases with fewer conflicting demands.

- For claims that *are* within the business court’s jurisdiction, if a case gets all the way to the trial stage, HB 19 expressly protects the constitutional right to a jury trial. It also requires that the trial be held in the county the plaintiff has chosen (if venue is proper there)—in other words, the same county where the trial would have been held if the case had been filed in a state district court, using the same jury pool and related rules that would be used for any other kind of case in that county.
- The fact is that a very low percentage of complex commercial cases ever come before a jury. Once parties complete discovery and confirm how the judge will rule on any questions of applicable law, the path to settlement is generally clear and in both parties’ interest.
- The most important factor that pushes complex business litigation to settle is a firm trial date. District courts with crowded dockets have a limited ability to provide a firm, timely trial date for a complex business case that might take weeks of trial time. The absence of a firm trial date means that those cases can take years before reaching a settlement that might have been generated in much less time in a business court that is not similarly congested.

Aren’t appointed judges barred by the Texas Constitution?

- No. The Texas Constitution provides for elected judges in many courts, and when it requires election of judges, it says so expressly. But Article 5 of Texas Constitution also foresaw that the Legislature might need to create other kinds of courts, and it unambiguously gives the Legislature the power to create those courts and provide for the selection of their judges. The Constitution does not require election of judges for a statewide court like the proposed business court.
- The Legislature’s authority to create new courts and provide for the selection of their judges was upheld by the Texas Supreme Court in *Jordan v. Crudgington*, 149 Tex. 237 (1950). Some opponents of the business court have claimed that the business court is unconstitutional because its structure and powers are comparable to a state district court’s, making it a defacto state district court without complying with other provisions of the Texas Constitution applicable to state district courts. A reading of *Jordan* quickly makes it clear that these arguments are just tracking the dissenting opinion in that case, which was not persuasive to the Texas Supreme Court majority in 1950, or to the Texas Legislature and Texas voters as they subsequently amended the Texas Constitution to expand upon and confirm the Legislature’s authority to establish statutory courts and provide for their jurisdiction, accommodate the jurisdiction of constitutional courts and provide methods for the selection of their judges.
- HB 19 fast-tracks to the Texas Supreme Court any challenge to the constitutionality of the business court’s method of judicial selection, so if there is a problem, it can be addressed quickly. In the unlikely event that the bill has any unconstitutional feature, Section 4(b) of the bill provides a temporary solution of allowing the Chief Justice of the Texas Supreme Court to appoint retired or former judges to the business court. If there is

a constitutional issue, the 2025 Texas Legislature can propose a constitutional amendment or another solution, such as providing for statewide election of business court judges, to address it.

Couldn't the business court judges be elected within the business court's divisions like other Texas judges?

- No. Imposing election requirements on the business court judges would impair, and might even destroy, the court's ability to attract qualified judges who will deliver the efficiency gains for complex business litigation promised by the experience of 30 other states that have created similar courts.
- Requiring election of business court judges would have eliminated any assurance that business court judges would have the minimum qualifications to serve on this specialized court as set forth in §25A.008 of HB 19. There is no gate-keeping function in the current Texas system for electing judges that can screen primary or general election candidates to confirm they have the minimum qualifications to serve on the business court. Selection of judges having these basic qualifications is essential to the business court realizing the efficiency gains that will benefit Texas businesses that litigate there.
- Requiring election of business court judges would mean that they would have to organize primary and general election campaigns every two years, a pace that would undoubtedly impair their ability to efficiently manage their dockets of complex business cases and dramatically reduce the pool of qualified candidates willing to serve as business court judges. As a statutory court created by the Texas Legislature, business court judges would continue to be subject to the two-year term requirement imposed by the Texas Constitution, Art. XVI Sec. 30, even if elected.
- The limited jurisdiction of the business court means that it is not expected to decide cases of significant import for the rights, interests and lives of Texas citizens in general, or cases where there are significant partisan divides on the legal questions being litigated. The strong, historic policy rationale for partisan elected judges in Texas simply does not exist in the case of the business court.
- The Texas Commission on Judicial Selection established in 2019 by the 86th Texas Legislature was unable to come to a consensus regarding material changes to the current Texas system of partisan judicial elections, while describing its challenges and disadvantages, in their 2020 Final Report. At the same time, the Report did document that "The Commissioners overwhelmingly recommend increasing the minimum qualifications of our judges," which received 12 yes votes, one no vote and 2 abstentions. The Report cited a number of surveys of Texas lawyers expressing similarly overwhelming agreement.
- Increasing judicial qualifications in Texas is not an easy thing to do. Qualifications for state district court judges are required to be set forth in the Texas Constitution, making

any changes to increase minimum judicial qualifications, or support their specialization in a judicial innovation like the business court, very difficult to accomplish.

Who is going to pay for the business court?

- HB 19 provides for fees from business court cases to cover the business court's expenses. The costs should not be excessive; for the first biennium there are only ten judges, with staff, office space and supporting technology. Complex business cases involve potentially very large sums of money and substantial investment of judicial resources, and it is only fair that the litigants in such cases pay the costs of administering justice. Because of its narrowly tailored jurisdiction focused on complex business disputes, the business court should cover a higher percentage of its costs when compared to state district courts given the absence of indigent parties entitled to fee waivers.

Do other states have business courts?

- Yes—30 other states have created specialized courts to address complex business litigation over the past 25 years. Utah's legislature authorized the creation of a business court in March 2023 by a unanimous vote of each house of its legislature. All of the large, commercial states that Texas competes with for business and jobs have created specialized courts to address complex business cases.
- Large companies, well advised by counsel, do consider a state's treatment of relevant litigation and related costs when considering moving into or expanding in a state. New York has widely circulated a 15 minute video bragging on the efficiency and effectiveness of its business court, referred to as the commercial docket, and even called upon a famous Texas trial lawyer to appear in the video praising New York's business court.

Isn't this just a Republican power grab in response to recent elections?

- No. Bills proposing the creation of a Texas business court have been introduced in the 2015, 2017, 2019 and 2021 sessions of the Texas Legislature, beginning well before recent elections. The 30 states currently providing specialized courts for complex business and commercial litigation fall on both sides of the political divide. New York, Illinois, Pennsylvania, Massachusetts and California do not have business courts because of a Republican power grab. There is no party-driven position favoring or disfavoring business courts. Democrat votes contributed to the large majorities passing HB 19 in each house of the Texas legislature. Business courts are good for business – that makes them inherently bipartisan.
- The work of the business court, more than most kinds of courts, should seldom if ever be political. This kind of litigation simply requires judges with specialized experience in the subject matter who can help cases proceed efficiently.

How many Texas cases would be brought into the business court each year?

- No one knows for sure because our method of maintaining judicial-branch statistics doesn't give us enough granularity to categorize cases this way. The Texas Judicial Council is working to modernize our statistical methods. The dollar thresholds set for amounts in controversy necessary to invoke business court jurisdiction of \$5 million and \$10 million are substantially in excess of what is found in other states' business courts. It is expected that these amounts will be adjusted over time to manage the number and types of cases coming to the business court to obtain the best results for Texas litigants and the state's court system.
- One thing expected of the business court is growth over time. Because many businesses today doubt that they can get focused attention or reasonably prompt resolution in Texas courts, they are advised by Texas legal counsel to use the courts of other states whenever they can, or agree to binding arbitration. As a result terms designating venue in other states or providing for binding arbitration are common in agreements having Texas parties. As the Texas business court begins to receive cases and its judges, their decisions and handling of complex business litigation become known, business litigants will be more willing to bring their business disputes here. As the Texas business court achieves statewide and national recognition for excellence it should have no difficulty in staying very heavily engaged.

