

Practice Update

Strategies for Texas Business Courts

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Texas business courts were created by Chapter 25A of the Texas Government Code and opened for business on September 1. These courts provide specialized venues for complex or large dollar business disputes. Any case filed after September 1 can be removed to or filed in these courts if it meets certain criteria. Strategically planning for using these courts will pay dividends for savvy litigants.

Business courts give qualified litigants the ability to avoid pretrial proceedings in unfavorable venues. Whether filed initially in a business court or removed to it, pretrial proceedings will be held where the business courts sit – initially Austin, Dallas, Fort Worth, Houston, and San Antonio. The removal process is analogous to removal to federal courts. The cases will be remanded to standard courts for trial. If the case was removed, it will be remanded back to the original trial court for trial. Where the case was originally filed in the business court the plaintiff can choose any venue that is a proper county for trial. In addition, the parties and the business court judge may agree to hold the jury trial in any other county. It is not yet clear whether the trial court judge or the business court judge will preside at trial.

While the Texas Rules of Civil Procedure governing motions for summary judgment and to dismiss will remain the same in business courts, there are inherent advantages in motion practice in these

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courts. First, the judges will be appointed and must have at least 10 years of experience in complex litigation or business transactions, must have previously been a civil court judge, or a combination of these requirements. The appointees to these courts uniformly have been very qualified and possess significant judicial experience.

These courts may also have smaller caseloads, and the judges must prepare written opinions for dispositive rulings and on issues important to the jurisprudence of Texas. The judge may also issue a written opinion on any order. These requirements mean that motions will be more carefully considered and likely ruled upon more quickly. Litigants will also be able gauge how judges will rule by reference to these written opinions. These advantages are likely to increase over time as the appointed judges deal with a docket exclusively composed of business cases, the body of case law from these courts increases, and the separate Court of Appeals, which will hear appeals from these courts, issues rulings. There can also be risks to a detailed written opinion. While the precedential value of these written orders is not known at this time, it could still be a problem for a party if the written opinion is adverse – especially if there are similar cases pending or likely to be filed.

The inherently smaller caseloads and increased experience of the judges will likely mean that motions will be more thoroughly considered. If your case is strong on the law/facts these courts may give you a better chance of summary judgment. Since these courts will likely have the time to carefully scrutinize legal issues and case weaknesses, plaintiffs should consider whether their case may have difficulty withstanding this level of scrutiny.

The most expensive part of litigation is often discovery. Business courts may be an ally in reining in discovery and pretrial practice and costs. The judges appointed to these courts will be experienced and will have the time to make sure discovery

abuses do not occur. They are unlikely to allow runaway discovery or motion practice since one of the purposes of these courts is to promote efficiency and speed. Finally, if, as is likely, these courts will consider dispositive motions carefully, it may mean that cases end earlier with less discovery.

Since the subject matter jurisdiction of these courts is limited, you will need to consider how to plead your case to fit within business court requirements. For example, pleading securities claims, breach of fiduciary duty, corporate governance, and internal governance proceedings with an amount in controversy over \$5 million will satisfy jurisdictional requirements. Public companies making these claims do not have to meet the \$5 million threshold. Allegations of breaches of the Business and Commerce Code, Finance Code, and derivative proceedings are matters that will grant access to the business courts if the amount in controversy is \$10 million or above. Cases involving consumer claims under Chapters 17 and 601.001 of the Business and Commerce Code cannot be brought in business courts. Similarly, claims involving insurance or for bodily injury cannot be lodged in these courts.

Claims ancillary to the main claims listed above may be entertained if the parties agree. If there is no agreement the qualifying claims can remain in the business court with the ancillary claims moving forward in a regular district court. Selecting the appropriate causes of action and figuring out the correct measure of damages will allow you make sure your case can take advantage of these courts. On the other side of the coin, a party may want to challenge jurisdiction if a good case can be made that the matter does not belong in a business court.

Planning for using business courts should begin even before litigation is anticipated. Consider adding appropriate contract language designating these business courts as the place where such disputes over the contract and ancillary matters should be handled. Chapter 25A of the Texas Government Code

provides that claims are properly handled in a business court where it is “agreed in a contract or subsequent agreement that the business court has jurisdiction.”

Business litigants now have expanded options to resolve their cases in courts that have been specially designed for their matters. Careful planning and strategy can help parties to take advantage of these new options.

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