

Proposed Rules for the New Business Court*

By Marcy Hogan Greer** & Hon. Emily Miskel***

HOUSE BILL 19, CODIFIED INTO THE Texas Government Code as new chapter 25A, created a new statutory court of statewide jurisdiction for specialized matters involving businesses. See Acts 2023, 88th Leg., R.S., Ch. 380 (H.B. 19), Sec. 1, eff. September 1, 2023.¹ Governor Greg Abbott signed HB 19 into law on June 9, 2023. <https://capitol.texas.gov/BillLookup/History.aspx?LegSess=88R&Bill=HB19>. This article explains the process that went into preparing the report and recommendations of the Supreme Court Advisory Committee (SCAC) for rules governing proceedings in the new Business Court. The SCAC's proposal is currently under review by the Supreme Court of Texas.

HB 19 requires the Supreme Court to “adopt rules of civil procedure as the court determines necessary,” including rules providing for the:

- timely and efficient removal and remand of cases to and from the Business Court;
- assignment of cases to judges of the Business Court;
- issuance of written opinions by the Business Court; and
- fees for filings and actions in the Business Court.

TEX. GOV'T CODE §§ 25A.016, 25.081, 25A.020.

On June 3, 2023, the Supreme Court requested the Supreme Court Advisory Committee “to study and make recommendations” as to each of these categories of rulemaking under HB 19, and others. The SCAC appointed a subcommittee to prepare reports and recommendations. The recommendations were vetted by the full SCAC on October 13, 2023. The proposed rules were then revised based on the comments and submitted to the Supreme Court on November 6, 2023.

Overview of rulemaking. The Texas Legislature created the Business Court to entertain complex, sophisticated business disputes. It is intended to provide an efficient and predictable venue for these lawsuits. The Business Court has jurisdiction over certain business and commercial cases with at least \$5 million at stake (except there is no minimum amount in controversy for certain claim involving publicly traded entities).

The Business Court will open its doors on September 1, 2024, and both the judiciary and the Office of Courts Administration (OCA) are working hard to ensure that it is ready to hear disputes on day one.

The Business Court will operate in divisions that correspond to the 11 administrative judicial regions of Texas. Five of these divisions serving urban areas (Dallas, Austin, Houston, San Antonio, and Fort Worth) will be funded and operational on September 1, 2024. The remaining six divisions, which serve predominately rural areas, will be deferred to the 2025 legislature for approval and funding. See, e.g., TEX. GOV'T CODE § 25A.003.

The Business Court's limited jurisdiction is concurrent with the civil courts of Texas where the Business Court has operating divisions. The Texas Legislature provided that cases within its jurisdiction may be originally filed in the Business Court or may be removed there from other courts, similar to the removal process for cases that are amenable to jurisdiction in the federal courts.

The Business Court will be run by appointed judges who have at least 10 years of experience in practicing complex civil business litigation or business transaction law or 10 years of service on a civil bench in Texas. TEX. GOV'T CODE § 25A.008. Unlike other civil courts, Business Court judges are required to issue written opinions that will create a body of accessible law to govern the specialized court.

Other contributors to this special edition of the Advocate will report on various aspects of the new Business Court.

The scope of proposed rules. HB 19 requires the Supreme Court to “adopt rules of civil procedure as the court determines necessary, including rules providing for: (1) the timely and efficient removal and remand of cases to and from the Business Court; and (2) the assignment of cases to judges of the Business Court.” TEX. GOV'T CODE § 25A.020. It also requires the Supreme Court to adopt rules “for the issuance of written opinions by the Business Court.” Id. § 25A.016. Finally, HB 19 and to set fees for filings and actions in the Business Court. Id. § 25A.018.

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The Supreme Court's June 3, 2023, letter instructed the SCAC:

HB 19, by adding Government Code Chapter 25A, creates a Business Court and gives it jurisdiction over certain business matters. HB 19 includes several rulemaking directives. First, new §25A.016 directs the Court to adopt rules “for the issuance of written opinions by the Business Court.” Second, new §25A.018 directs the Court to set fees for filings and actions in the Business Court. Finally, new § 25A.020 directs the Court to “adopt rules of civil procedure as the Court deems necessary,” including rules “for 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 Committee should draft recommended procedural and administrative rules.

https://scac.jw.com/wp-content/uploads/2023/06/36453016_1_2023-06-03-SCAC-Referral.pdf (last visited Jan. 14, 2024).

The Subcommittee. The Business Court Subcommittee appointed by the SCAC is: Marcy Greer – Chair, Hon. R.H. Wallace – Vice Chair, Rusty Hardin, Hon. Peter Kelly, Hon. Emily Miskel, Chris Porter, Hon. Maria Salas Mendoza, Hon. Cathy Stryker, Hon. John Warren, Hon. David Evans, Hon. Harvey Brown, and Robert Levy. We were gifted with a group of highly experienced and incredibly hard-working and collegial team members. We also invited Jerry Bullard, Melissa Davis Andrews, and David Shank to join our discussions, and they also provided significant input.

The Subcommittee's process. The Subcommittee focused on proposing rules that we believe will aid the courts and practitioners with respect to Business Court proceedings and the interplay between the Business Court and other Texas civil courts. Some portions of the legislation that primarily affected the behind-the-scenes administration of the Business Court were not proposed as rules of civil procedure.

The threshold issues. The Subcommittee had several virtual meetings and email discussions soon after the members were appointed. We discovered that we had a few, significant stumbling blocks that needed to be determined at the outset: (1) where the specialized rules for the Business Court should be located; (2) whether a heightened pleading standard should apply to demonstrate Business Court jurisdiction; and (3) a paradigm for setting court fees.

Some members initially thought that the Business Court Rules should go in the Rules of Judicial Administration (RJA), while others believed that they worked best in the Rules of Civil Procedure.

The pleadings question arises because the legislature created a removal/remand process that might require more information than Texas' traditional notice pleading. The Business Court's jurisdiction is complex and exacting. Pleadings that would satisfy notice pleading standards under Texas practice may not be sufficient to allow the judiciary to determine whether a case originally filed in or removed to Business Court were within that court's limited jurisdiction.

Finally, as to fee-setting, the subcommittee had no idea where to start. The legislature directed the Supreme Court to “set fees for filings and actions in the Business Court *in amounts sufficient to cover the costs of administering this chapter*, taking into account fee waivers necessary for the interest of justice.”

TEX. GOV'T CODE § 25A.018 (emphasis added). We considered both traditional, up-front filing fees, as well as “pay-as-you-go” models (similar to arbitrations where fees are incurred per day of hearing, for example). But without having any data as to the number of cases that would be eligible for the Business Court—much less those that would be likely filed or removed there—the subcommittee felt it would be impossible to set fees sufficient to ensure that the Business Court would be self-funding. Concerns were also raised that setting fees too high may drive business away from the Business Court for many cases or too low would risk failing the legislative mandate of self-funding.

We reported these threshold matters to the full SCAC Committee in our August 19, 2023, meeting and had a vigorous discussion. See Transcript of Aug. 18, 2023, SCAC Meeting, <https://scac.jw.com/wp-content/uploads/2023/09/scac23-08-18.pdf> (last visited Jan. 14, 2024). Based on those discussions and further deliberation of the subcommittee members, we assumed the following:

- **Placement of the proposed rules.** Other than a proposed amendment to Rule 2, the Subcommittee has recommended placement of the proposed Business Court rules at the end of Part II of the Texas Rules of Civil Procedure (Rules of Practice in District and County Courts) and to replace repealed Section 12 (Review By District Courts of County Court Rulings).²
- **Pleadings specificity.** The Subcommittee has recommended that initial pleadings be required to allege sufficient facts to establish jurisdiction and venue in the Business Court. Recognizing that this recommendation may depart from Texas' notice pleading standards in some cases, we considered it necessary to assist the court and practitioners in navigating these threshold matters and potentially avoiding disputes about jurisdiction and venue.
- **Fees.** We did not make recommendations regarding fees, except to propose that fees be set by administrative order rather than a formal rule. We had only very limited information as to the number of actions anticipated to be filed in the Business Court, and without it, it is impossible to set fees designed to allow the Business Court to be self-supported at the outset. We understand that OCA is carefully analyzing data that will help the Supreme Court to determine appropriate fees.

Drafting the rules. In the context of this beneficial discussion, the subcommittee analyzed HB 19 section by section to determine whether a rule or guidance was needed and if so, where it should be placed. See SCAC Meeting Agenda Oct. 13, 2023 (and materials) at 28-31, available at: <https://scac.jw.com/wp-content/uploads/2023/11/SCAC-Meeting-Materials-Oct-13-2023.pdf> (last visited Jan. 14, 2024).³ We concluded that certain court-administration provisions of the statute need not be implemented through rules or should be addressed in the RJA. We also wanted to leave

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room for local rules of the Business Court to develop. See *id.* The Subcommittee focused on proposing rules that we believe will aid the courts and practitioners with respect to Business Court proceedings and the interplay between the Business Court and other courts.

We then began drafting provisions and had extensive and robust discussions as a group in weekly Zoom meetings. We vetted and exchanged multiple drafts of the proposed rules before settling on a consensus draft.

We presented our report and recommendations to the full Supreme Court Advisory Committee in early October and invited written comments in advance of the October 13, 2023, meeting. See SCAC Meeting Agenda (and materials) at 4-31. We solicited both written and oral feedback and had a vigorous discussion of the proposed rules at the SCAC meeting on October 13, 2023. See Transcript of Oct. 13, 2023, SCAC Meeting, <https://scac.jw.com/wp-content/uploads/2023/11/scac23-10-13.pdf> (last visited Jan. 15, 2024).

Based on that discussion and additional oral and written comments, the subcommittee further revised the proposed rules and memo accordingly. We presented our final proposal to the Supreme Court on November 6, 2023.

On February 6, 2024, the Supreme Court published its preliminary amendments to the Texas Rules of Civil Procedure and Rules of Judicial Administration relating to the Business Court, which are open for public commentary until May 1, 2024.

See <https://www.txcourts.gov/supreme/news/supreme-court-approves-preliminary-rules-for-new-texas-business-court-and-15th-court-of-appeals/>

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¹ Citations in this article to HB 19 will be to the codified version.

² We considered, alternatively, replacing the repealed Part III (Rules of Procedure for the Courts of Appeals) with the Business Court rules. With either placement, they would replace repealed Rules 331-345.

³ The chart, memo, and proposed rules were updated after the SCAC discussion and are available on request.