

# Navigating the New Landscape: An Overview of the Texas Business Court\*

By Amy Prueger\*\*

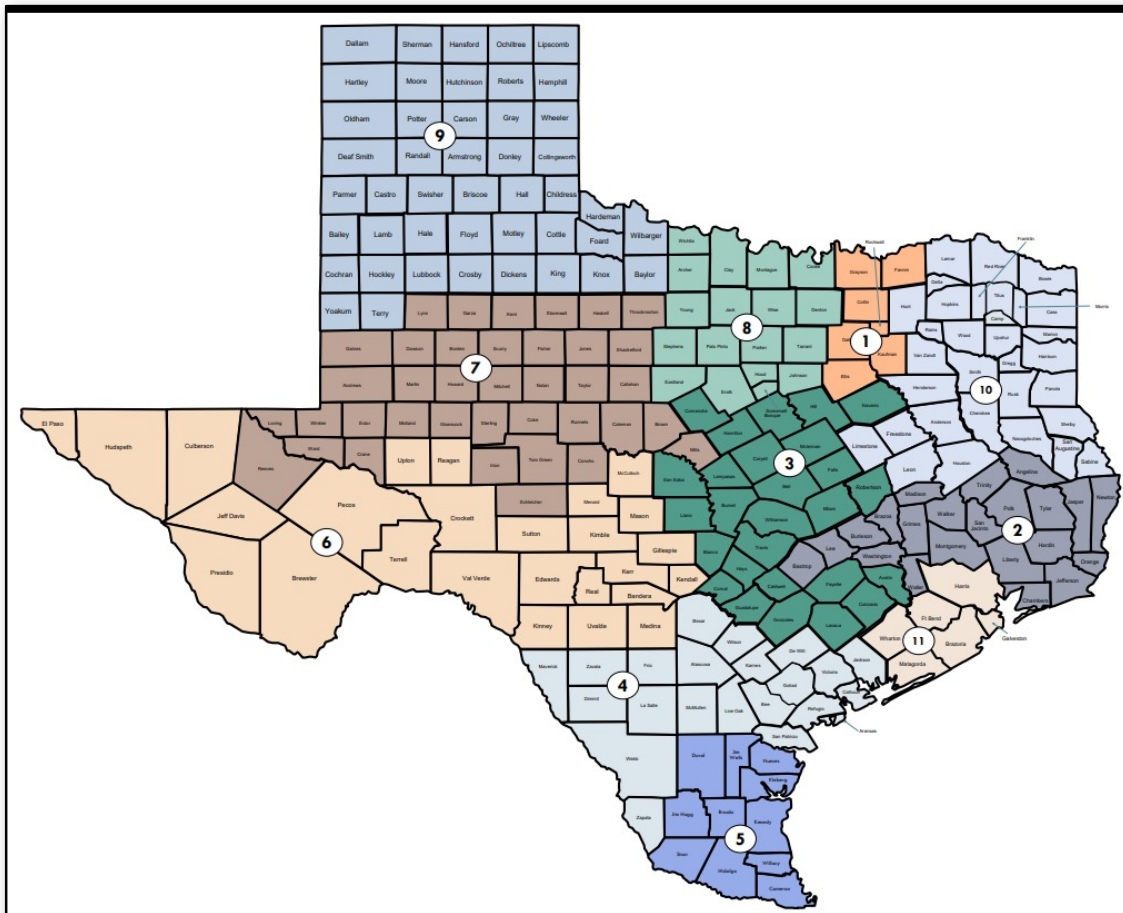


Figure 1 Administrative Judicial Regions, available at [www.txcourts.gov/media/1453885/ajr-map-2017.pdf](http://www.txcourts.gov/media/1453885/ajr-map-2017.pdf)

**O**N MAY 25, 2023, AFTER NEARLY A DECADE of proposals, the Texas Legislature finally passed legislation creating a specialized business litigation court. Chapter 25A of the Texas Government Code became effective on September 1, 2023, and applies to civil actions commenced beginning September 1, 2024.

Not all aspects of the new court are known at this time as the Legislature left certain procedural matters to be addressed by the Texas Supreme Court, including removal, remand, payment of fees, and the issuance of written opinions. The Court received proposed rules and recommendations from the Texas Supreme Court Advisory Committee on October 13, 2023. On February 6, 2024, the Texas Supreme Court gave preliminary approval to the proposed rules for the new Business Court and preliminarily amended the Texas Rules of Procedure related to the new Fifteenth Judicial District Court of Appeals. The proposed rules were open for public comment until May 1, 2024. As the comment period has now concluded, the Court will likely promulgate the final rules in the summer of 2024.

### Divisions and Judges

The Business Court, authorized under Texas Constitution Section 1, Article V, is a single statewide statutory court with eleven “divisions.” Tex. Gov’t Code §§ 25A.002, .003. These divisions encompass the same counties as the current administrative judicial regions (*Id.* § 74.042), i.e., “[t]he First Business Court Division is composed of the counties composing the First Administrative Judicial Region...” *Id.* § 25A.003(c). The map on page 80 shows the eleven administrative judicial regions/Business Court divisions. A list of counties and their administrative judicial region designation is available at <https://www.txcourts.gov/media/1442723/counties-by-ajr-sept-2017.pdf>.

The governor will appoint sixteen judges to serve on the Business Court: two judges in the First, Third, Fourth, Eighth, and Eleventh Divisions (primarily urban areas) and one judge sitting in the Second, Fifth, Sixth, Seventh, Ninth, and Tenth Divisions (rural areas). *Id.* § 25A.009(a).

Business Court judges must be licensed attorneys, 35-years old, U.S. citizens, reside within their division for at least five years, and may not have had their license

revoked, suspended, or have received a probated suspension. *Id.* §§ 25A.008. Notably, a judge must have at least ten years’ experience in “complex civil business litigation, in business transaction law, as a Texas judge with civil jurisdiction” or some combination of those three. *Id.* § 25A.008(a)(4).

In comparison, Texas Constitution Article V, § 7 imposes no practice-area requirement on district judges. District judges must be U.S. citizens; have been a practicing lawyer or a Texas judge (or combination thereof) for eight years; not have

had their law licenses revoked, suspended, or subject to a probated suspension. A district judge must only have resided in the district where that judge was elected for two years before her election and must reside in that district during the judge’s term of office.

Business Court judges have all powers, duties, immunities, and privileges of district court judges. *Id.* § 25A.005. And, like other judges, Business Court judges may not practice law while serving and are subject to recusal and disqualification. *Id.* §§ 25A.012-013.

Visiting judges can serve on the Business Court, as assigned by the Supreme Court’s Chief Justice, but must have the same qualifications as Business Court judges. Like visiting district court judges, Business Court visiting judges are subject to objection, disqualification, or recusal. *Id.* § 25A.014.

Business Court judges are paid an annual base salary of at least \$140,000, the same as district court judges. *Id.* § 659.012.

One striking difference between district court judges and Business Court judges is that Business Court judges are appointed to two-year terms by the governor, with the advice and consent of the Senate. *Id.* § 25A.009(a)-(c). Vacancies are filled in the same manner. *Id.* § 25A.010. Business Court judges are never elected.

While the urban divisions were funded with the 2023 legislation, the rural divisions are subject to funding in the 89th legislative session. *Id.* §§ 25A.003(d), (g), (h), (i), (k), & (l). Thus, on September 1, 2024, only the First, Third, Fourth, Eighth, and Eleventh divisions will be operating.

If the rural divisions are funded, the governor must appoint the remaining judges after August 31, 2026, but before September 2, 2026. *See* S. RSCH. CTR., Enrolled Bill Analysis, Tex. S.B. 1045, 88th Leg., R.S., at Sec. 6(b) (2023).

### Jurisdiction

The Business Court has concurrent jurisdiction with civil district courts over these specific business disputes:

- when the amount at stake exceeds **\$5 million** (excluding certain additional damages and fees) in the following:
  - derivative proceedings;
  - actions related to the governance, governing documents, or internal affairs of an organization;
  - actions involving claims under state or federal securities or trade regulation laws against organizations, controlling persons, managerial officials, underwriters of securities, or auditors;
  - actions by organizations or owners against owners, controlling persons, or managerial officials, alleging acts or omissions in their capacity as such;
  - actions alleging breaches of duty by owners, controlling persons, or managerial officials owed to an organization or its owners;
  - actions seeking to hold owners or governing persons of an organization liable for the organization’s obligations, excluding those arising from specific written contracts; and
  - actions arising from the Business Organizations Code.
- when the amount exceeds **\$10 million** (excluding certain additional damages and fees) in the following:
  - actions arising from qualified transactions (as defined in section 25A.001, a qualified transaction is a transaction involving loans or advances

between parties with an aggregate value of at least \$10 million, but excluding more formal loans or advances from banks, credit unions, or savings and loan institutions);

- o actions arising from contracts or commercial transactions where the parties agreed in the contract or a subsequent agreement that the Business Court has jurisdiction (excluding actions related to insurance contracts);
- o actions arising from violations of the Finance Code or Business & Commerce Code by an organization or its officers or governing persons, excluding banks, credit unions, or savings and loan associations.

*Id.* §§ 25A.004(b), (c), & (d).

The Business Court also has concurrent jurisdiction with district courts, regardless of the amount in controversy, if a party to the action is a publicly traded company. *Id.* § 25A.004(c).

In actions seeking injunctive relief or a declaratory judgment under Civil Practice and Remedies Code Chapter 37, the Business Court has concurrent jurisdiction with district courts for disputes related to claims falling within the Business Court's jurisdiction. *Id.* § 25A.004(e).

The Business Court has supplemental jurisdiction over claims that form part of the same case or controversy as a case within the court's primary jurisdiction. *Id.* § 25A.004(f). However, it may only exercise that supplemental jurisdiction with the agreement of all parties to the claim. *Id.* If the parties cannot agree, then the claim will be heard in the court of original jurisdiction alongside the claims considered in the Business Court. *Id.* This could result in conflicting findings or rulings concerning the same underlying dispute.

Some actions are excluded from the Business Court's jurisdiction. First, certain actions, even if within the Business Court's primary jurisdiction, are expressly excluded **unless** the actions fall within the Business Court's supplemental jurisdiction:

- o actions against or by a governmental entity;
- o actions to foreclose on real or personal property liens;
- o claims arising out of Texas Business & Commerce Code Chapter 15 (monopolies, trusts, and conspiracies in restraint of trade) and Chapter 17 (Deceptive Trade Practices Act), Property Code Chapter 53 (mechanic's, contractor's, and materialman's liens) and Title 9 (trusts), and any claims arising out of the Estates, Family, or Insurance Codes;
- o claims related to consumer transactions ("a transaction between a merchant and one or more consumers," as defined by Tex. Bus. & Com. Code § 601.001); and
- o claims related to the duties and obligations under an insurance policy.

*Id.* § 25A.004(g).

Certain actions are never permitted in Business Court, even under supplemental jurisdiction:

- o claims arising under Chapter 74, Civil Practice and Remedies Code (medical malpractice);
- o claims for monetary damages for bodily injury or death; or
- o claims of legal malpractice.

*Id.* § 25A.004(h).

## The Business Court is administratively attached to the Office of Court Administration of the Texas Judicial System (OCA), and thus all Business Court personnel are state employees.

### Filing and Removal

An action may be filed directly in the Business Court provided the court has jurisdiction and venue (under state law or as specified in a contract). Once filed, the Business Court will assign the action to the division where venue is proper. Should the Business Court determine after division assignment that the division assigned does not

include a county of proper venue, the court can transfer the case to another division or, if there is not an operating division that includes the proper county, at the option of the filing party, transfer to a district court or county court at law with proper venue.

A case can be removed to the Business Court if it falls within the court's primary jurisdiction. If the Business Court determines it does not have jurisdiction, it can remand to the court where the action was originally filed. The parties can agree to remove the case to Business Court any time during the pendency of the case. *Id.* § 25A.006(f). If the parties do not agree, the timeframe for removal is similar to that in federal court: "not later than the 30th day after the date the party requesting removal of the action discovered, or reasonably should have discovered, facts establishing the Business Court's jurisdiction over the action." *Id.* § 25A.006(f)(1).

A case can be transferred out of the Business Court if the court lacks jurisdiction. *Id.* § 25A.006(b). The party filing the action can choose to transfer to the district court or county court at law with proper venue or to dismiss without prejudice. *Id.*

Not every qualifying case can be removed: an action filed in a district or county court that is not within the operating division of the Business Court cannot be removed. *Id.* § 25A.006(e).

This means that for actions properly raised in counties that fall within the rural divisions not yet funded, there is no operating court for those claims to go to until the Legislature funds the remaining divisions (Second, Fifth, Sixth, Seventh, Ninth, and Tenth Divisions). So those parties with actions where venue is proper in those counties would, at the earliest, be able to file in the Business Court in 2026.

### Courtrooms, Venue, Remote Proceedings

The Business Court is one court with eleven divisions, each including multiple counties. Each Business Court judge must maintain chambers in one of the counties within the division to which the judge is appointed. *Id.* § 25A.017(c). However, a judge may hold court in any courtroom within that division, as necessary or convenient. *Id.* A judge can also conduct remote proceedings as needed but may not require a party or attorney to attend remotely a court proceeding in which oral testimony is heard unless the parties agree otherwise. *Id.* § 25A.017(a), (e). Remote jury trials are not authorized under Chapter 25A. *Id.* § 25A.017(e).

Currently, it is not clear where the Business Court will be physically. The statute does not contemplate separate Business

Court buildings. The Business Court is administratively attached to the Office of Court Administration of the Texas Judicial System (OCA), and thus all Business Court personnel are state employees. *Id.* § 25A.017(k) OCA may contract for the use of facilities with a county, so potentially Business Court judges will sit in district court buildings, but those arrangements have not yet been established. *Id.* §§ 25A.017(k), 25A.0171.

The Business Court clerk's office will be in Travis County in state facilities, which have not yet been determined. *Id.* § 25A.017(b).

### Jury Trials

As in district court, parties in Business Court have a right to a jury trial. *Id.* § 25A.015. If a jury trial is requested, the presiding Business Court judge will decide the county in which the trial will take place, based on certain factors:

- If the case was initially filed in the Business Court, the jury trial must occur in a county where the case could have been filed under the general venue rules.
- If the case was removed from another court, the jury trial must be conducted in the county where the action was originally filed.
- If a written contract specifies a particular county for the trial, the jury trial must be held in that specified county.

*Id.* § 25A.015(b)-(d).

However, the parties and the Business Court judge may agree to hold the jury trial in a different county, but no party can be compelled to agree to a different county. *Id.* § 25A.015(e). The handling of jury calls, juror selection, and other related practices, rules, and procedures are the same as in district court of the respective county. *Id.* § 25A.015(f).

### Appeals

Appeals from the Business Court (among a number of other types of appeals) will be exclusively within the jurisdiction of the new statewide Fifteenth Judicial District Court of Appeals, headquartered in Austin. *See id.* §§ 22.201(p), .2151, .220.

### New Rules

The Legislature tasked the Texas Supreme Court with adopting rules of procedure for the Business Court, including removal, remand, payment of fees, and the issuance of written opinions. *Id.* § 25A.220. The Texas Supreme Court Advisory Committee has been working on those rules for many months and submitted proposed rules and recommendations to the Court on October 13, 2023 (available at <https://www.txcourts.gov/scac/meetings/2021-2030/>). The Texas Supreme Court provided preliminary approval for the rules and opened the rules for public comment until May 1, 2024.

The Committee's current proposal does not address Business Court filing fees. Chapter 25A directs the Texas Supreme Court to set filing fees "in amounts sufficient to cover the costs of administering" the Business Court. *Id.* § 25A.218. As discussed in the legislation's final fiscal note, the amount of the fees is intended to be "sufficient to cover the costs of administering the new chapter's provisions," but since the Business Court's caseload is unknown, it is also unknown if any fees set would support operating the court. *See* Legislative Budget Board, 88th Leg., R.S., Tex. H.B. 19, Enrolled Fiscal Note (May 16, 2023). With that caveat, the Legislative Budget Board estimated there would be a \$0 net impact to General Revenue Related Funds for the Business Court in the next two years. *Id.*

After the judges have been appointed for the Business Court, they will need to develop local rules for the Business Court. *See id.* § 25A.020(b).

### Constitutional Challenges

The Legislature anticipated constitution challenges to the new court. The Texas Supreme Court has exclusive and original jurisdiction over any constitutional challenges, and the Court may issue injunctive or declaratory relief, as necessary. Acts 2023, 88th Leg., R.S., ch. 380, sec. 4 (H.B. 19). If the appointment of judges by the governor is held unconstitutional by the Court, then the Business Court will be staffed by retired or former judges or justices appointed to the court under Section 25A.014 (appointment of visiting judges). *Id.*

### Conclusion

The Business Court is now a reality. While many aspects of the court are determined by statute, the new legal framework is not fully formed. This new framework will be shaped by rules currently under consideration and the actions of Texas attorneys, as well as the Business Court judges, as they navigate this relatively uncharted territory ahead.

*\* Originally published in The Advocate, Spring 2024. Reprinted with permission of the Advocate and the author.*

*\*\* Amy Prueger is a civil litigator with Enoch Keever PLLC in Austin, Texas.*