

ANALYSIS

The New Texas Business Court May Provide A Smart Alternative To Delaware Chancery Court

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By *Garland A. Kelley* | July 10, 2023 at 07:00 AM



Garland A. Kelley, partner in the Houston office of Looper Goodwine P.C. Courtesy photo

As the state very often selected as a “state of incorporation,” Delaware may now face serious competition: Texas.

Delaware virtually cornered this market primarily by creating a carefully developed and coherent set of statutes, laws and judicial precedents and by empowering a respected court to enforce them—the Delaware Chancery Court. Having handled numerous matters and trials in that court, on both the plaintiff and defense side, it’s evident that the Delaware Chancery Court established itself as the preferred forum to resolve many of the most hotly contested and precedent-setting disputes.

By incorporating in Delaware, corporations pay the state certain taxes and in exchange obtain a sophisticated and largely predictable legal framework that provides significant deference to business judgment, a nuanced understanding of fiduciary duties and complex business transactions, timely and fairly efficient resolutions, and knowledge that swift sanction can result should its officers or directors cross the lines between permitted corporate behavior and wrongdoing.

If it succeeds, Texas may persuade many corporations that they have an alternative to Delaware. In June, Texas law officially recognized a new Business Court—which will come into existence on Sept. 1 and (after judges are appointed and procedures put in place) will begin to accept litigation one year later. At that point, parties can file cases in the Business Court or remove currently-pending actions to that court.

The new Texas court focuses on (and is mainly limited to) complex commercial cases, i.e., disputes between businesses, among businesses and their owners, directors and management, and as to issues such as breach of contract, breach of fiduciary duty, disputes about governance and control, and violations of securities and trade regulations. Specifically:

1. Subject to a \$5 million minimum amount in controversy:
 1. Derivative actions.
 2. Disputes about an organization’s governance or internal affairs.
 3. Claims arising from state and federal securities or trade regulation laws.
 4. Actions by an owner or organization against an owner of the organization acting in that capacity.
 5. Actions alleging that an owner or control person breached a duty owed to the organization.
 6. Actions alleging an owner’s liability for an organization’s debts (other than a contractual agreement to pay the debt).
 7. Actions arising under the Texas Business Organizations Code.

8. (Note, if a party to the action is a publicly traded company listed on a national securities exchange, the amount in controversy requirement may not apply.)
2. Subject to a \$10 million minimum amount in controversy:
 - a. Original jurisdiction over qualified transactions (as defined by statute).
 - b. Contracts agreeing to business court jurisdiction (excluding insurance contracts).
 - c. Actions alleging violations of the Finance Code or Business Organizations Code by an organization other than certain financial institutions.

The Business Court may also exercise supplemental jurisdiction over other claims among the parties, if all parties and the court judge agree, and if those claims are so closely connected as to make them part of the same case or controversy. The Business Court may not, however, exercise jurisdiction over claims involving personal injury or death, legal malpractice, or medical liability.

Some notable hurdles and differences exist between the Texas Business and Delaware Chancery courts:

First, unlike Chancery which hears only equitable matters and therefore does not use juries, the Texas Business Court can try jury cases in counties of proper venue within the court's division.

Second, appeals from the Business Court go initially to a newly created Fifteenth Court of Appeals (and thereafter to the Texas Supreme Court).

Third, although the Business Court's jurisdiction is statewide, as its roll-out begins it will only operate in 80 of Texas' 254 counties.

Texas is divided into eleven administrative judicial regions, and the Business Court will initially operate in five of them: the First (Dallas and Plano area), Third (Austin area), Fourth (San Antonio area), Eighth (Fort Worth area) and Eleventh (Houston area).

Each of those five Business Courts will have two judges.

A Business Court judge must be a licensed attorney in Texas who has 10 or more years of experience in practicing complex civil business litigation, business transaction law or serving as a judge in Texas with civil jurisdiction, or any combination of those.

The remaining six judicial regions will have Business Courts created in September 2026, if the legislature funds a court in that region. Those six divisions will have one judge each.

Fourth, the new court will likely face constitutional challenges, as (among other things) the Texas Constitution requires that "district" court judges be elected. Under the new law, the governor will appoint Business Court judges to two-year terms. Notably, the law mandates that any constitutional challenge to the new court will be heard exclusively by the Texas Supreme Court.

Companies (and attorneys who advise them) should begin to consider some practical consequences and opportunities:

- Incorporation in Texas, including potential new subsidiaries or other "downstream" or related operations.
- To what extent (if at all), they want to designate the Texas Business Court in various forum-selection clauses.
- And if so, how dispute-related outcomes may differ either due to the law that will now be applied or those deciding it.
- Analyze what claims may end up being adjudicated in the new court, including "non-business" claims that may be brought in pursuant to the Court's supplemental jurisdiction.

- To what extent, as this court builds expertise, it offers an additional reason to do business in Texas.

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