

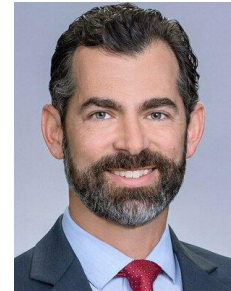
Questions Linger Over Texas Business Court's Jurisdiction

By **Ryan Sullivan** (November 21, 2023)

H.B. 19, which created Texas' new business court, went into effect on Sept. 1.[1] But many questions remain unanswered about how the business court will actually work.

For example, H.B. 19 permits the business court to exercise supplemental jurisdiction over certain claims. But if the parties do not agree whether the court has supplemental jurisdiction over claims, then those claims may proceed concurrently in another court.

Navigating supplemental jurisdiction and concurrent proceedings will surely prove challenging for many litigants. This article will explore key jurisdictional questions that potential litigants should ask before finding themselves in Texas' new business court.



Ryan Sullivan

What is H.B. 19?

H.B. 19 creates a specialized business trial court devoted to resolving complex business disputes.[2] The business court will include 16 judges across 11 divisions.[3] Each judge will be an appointee of the governor and serve a two-year term.[4]

Generally, the business court has jurisdiction to hear three types of business-related claims: governance disputes exceeding \$5 million, commercial disputes exceeding \$10 million, and other claims related to a case or controversy within the court's jurisdiction that form part of the same case or controversy.[5]

How broad is the definition of "governance disputes"?

H.B. 19 specifies the types of governance disputes over which the business court has jurisdiction. These include, among others, derivative actions, certain types of securities claims under state or federal law, and actions "regarding the governance, governing documents, or internal affairs of an organization."[6]

But what constitutes an action regarding the governance, governing documents or internal affairs of an organization? H.B. 19 broadly defines "governing documents" as "the instruments, documents, or agreements adopted under an organization's governing law to govern the organization's formation and internal affairs."[7]

Bylaws, partnership agreements and shareholder agreements are clear examples of governance documents.[8] But what about hiring policies, bidding procedures and oral agreements to promote an employee? While not necessarily within the same category as articles of formation and bylaws, such examples arguably meet H.B. 19's broad definition of "governance documents."

Moreover, an action need only regard an organization's governance, governing documents or internal affairs to meet business court jurisdictional requirements — in addition to the \$5 million threshold. Because "regard" is a broad term, the business court potentially has jurisdiction over a claim that merely relates to an organization's governance, however tangentially.[9]

The definition of "internal affairs" — including "matters relating to the organization's membership or ownership interests" — casts a similarly wide jurisdictional net.[10]

For example, consider an allegation that a defendant defrauded a plaintiff out of \$5 million by misrepresenting himself as the majority shareholder of a large corporation. Such an allegation regards a matter related to an organization's ownership interests and, therefore, might meet business court jurisdictional requirements, even though governance of the corporation is not directly at issue.

H.B. 19 further includes "an action arising out of the Business Organization Code" as a governance claim over which the business court has jurisdiction.[11] The Texas Business Organization Code contains no fewer than eight titles and dozens of chapters.

The statute broadly governs for-profit and nonprofit corporations, limited liability corporations, general and limited partnerships, real estate investment trusts, and professional entities.[12] As the Business Court Subcommittee of the Supreme Court Advisory Committee recently observed, the definition is "potentially overbroad" and should be subject to refinement by business court decisions.[13]

Who determines whether a contract confers jurisdiction?

The business court has jurisdiction over certain types of commercial disputes exceeding \$10 million, including disputes arising out of a contract or commercial transaction where the parties "agreed in the contract or a subsequent agreement that the business court has jurisdiction." [14]

However, H.B. 19 does not address a situation in which the contract is unclear as to whether the parties agreed to business court jurisdiction, or where the parties disagree as to the existence of a subsequent agreement conferring jurisdiction. Will the business court determine whether it has jurisdiction by interpreting contractual language? Will it hold an evidentiary hearing, similar to an arbitrator ruling on whether an arbitration agreement controls a dispute?

Further complicating matters, H.B. 19 contemplates situations in which some of a plaintiff's claims proceed in the business court, while other claims that are part of the same case or controversy proceed concurrently in a district court.[15] In such a situation, would the business court's interpretation of contractual language bind the district court?

Will supplemental jurisdiction encourage gamesmanship?

Similar to a federal court's supplemental jurisdiction over state law claims, the business court has supplemental jurisdiction over a "claim related to a case or controversy within the court's jurisdiction that forms part of the same case or controversy." [16] If that were the extent of H.B. 19's discussion of the subject, supplemental jurisdiction would be relatively straightforward.

However, H.B. 19 further states that a "claim within the business court's supplemental jurisdiction may proceed in the business court only on the agreement of all parties to the claim and a judge of the division of the court before which the action is pending." [17] In other words, any party can thwart supplement jurisdiction by withholding agreement, providing a potentially powerful bargaining chip in negotiations.

Where the parties do not agree to supplemental jurisdiction over a claim, "the claim may proceed in a court of original jurisdiction concurrently with any related claims proceeding in the business court." [18] H.B. 19 is silent as to how the parties and courts should handle claims proceeding concurrently in separate courts, and the potential for logistical headaches is obvious.

Without additional rules or further guidance, it is unclear whether proceedings should be stayed in one court while the other proceeds, or whether claims should be severed. As Judge Tracy Christopher of the Texas Court of Appeals for the Fourteenth District observed: "Lots of potential problems with this if not agreed." [19]

Conclusion

Litigants before the newly created business court surely will have to address several key jurisdictional questions as the court begins accepting cases. Many questions in addition to those discussed above are likely to arise — and to date, there are few answers.

Parties to potential business court litigation would be well served by considering these threshold jurisdictional questions sooner rather than later.

Ryan Sullivan is counsel at Reichman Jorgensen Lehman & Feldberg LLP.

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[1] Tex. Gov't Code § 25A.001 et seq.

[2] C.S.H.B. 19 Bill Analysis, available at <https://capitol.texas.gov/tlodocs/88R/analysis/pdf/HB00019H.pdf>.

[3] Tex. Gov't Code § 25A.009.

[4] Id.

[5] Tex. Gov't Code § 25A.004.

[6] Id.

[7] Tex. Gov't Code § 25A.001(3).

[8] Id.

[9] See, e.g., *Lamar, Archer & Cofrin LLP v. Appling*, 138 S. Ct. 1752, 1760 (2018) ("'[R]egard' means 'to have relation to or bearing upon: relate to,' and is the equivalent of 'relation' and 'respect'"); *West v. Nationwide Credit Inc.*, 998 F. Supp. 642, 644 (W.D.N.C. 1998) ("[T]he court first looks to the dictionary definition of the term 'regarding.' Webster's Ninth New Collegiate Dictionary (1st ed.1983) defines the term 'regard' as, inter alia, 'to relate to,' while it provides the following definition for the term 'regarding': 'with respect to: concerning.' Based on these definitions, the court believes the ordinary meaning of the term

'regarding' is consistent with the broader interpretation advocated by Plaintiff").

[10] Tex. Gov't Code § 25A.001(7).

[11] Tex. Gov't Code § 25A.004(b)(7).

[12] Tex. Bus. Orgs. Code § 1.001 et seq.

[13] Oct. 2, 2023, Memorandum from the Business Court Subcommittee to the Supreme Court Advisory Committee, available at <https://www.txcourts.gov/media/1457250/scac-materials-oct-13-2023.pdf>.

[14] Tex. Gov't Code § 25A.004(d)(2).

[15] Tex. Gov't Code § 25A.004(f).

[16] Tex. Gov't Code § 25A.004(f).

[17] Id.

[18] Id.

[19] Oct. 5, 2023, email from Hon. Tracy E. Christopher, Oct. 2, 2023, Memorandum from the Business Court Subcommittee to the Supreme Court Advisory Committee, Tab 1C, available at <https://www.txcourts.gov/media/1457250/scac-materials-oct-13-2023.pdf>.