



MCGINNIS LOCHRIDGE

*Client Alert*

## New Business Courts: Strategic Considerations for Oil and Gas Counsel

*By: Austin W. Brister and Ashley N. Vega*

### Introduction

On September 1, 2024, Texas unveiled a significant change to its legal landscape: the opening of the new Texas Business Courts, which, for now, is comprised of five separate divisions. This new specialized court system, designed to handle complex commercial disputes, represents a major shift in how high-stakes business litigation may be conducted in the Lone Star State. For in-house counsel in the oil and gas industry, this development warrants close attention and careful consideration.

The Texas Business Courts will potentially impact a wide range of cases, from high-value contract disputes to intricate corporate governance issues. As with any substantial change to the legal system, this new court structure brings with it a host of potential questions, challenges, strategies, and other considerations. For example:

- How will the limited jurisdiction of these new courts fit within the types of disputes common in the oil and gas sector?
- What strategic implications might arise from the Business Courts' mandate to issue written opinions, unlike their district court counterparts?

- What potential pros and cons may arise from submitting a case to the new Business Courts?
- How might existing agreements and future contracts be affected by this new forum?

This article aims to provide oil and gas in-house counsel with a practical overview of the new Texas Business Courts, as well as some potential impacts and strategic considerations. We'll examine the structure, jurisdiction, and procedural aspects of the new system, explore potential strategic considerations, and discuss the possible implications for the energy industry.

### Purpose and Intent

The Texas Business Courts aims to address what legislators identified as a growing need for specialized courts to handle complex business litigation. Twenty-nine other states have already created specialized business courts, and the Texas legislature saw the need to do the same to ensure that Texas remains an attractive state for companies to do business and resolve disputes.

The primary goals of this new system include:

- Creating more predictable outcomes for business disputes;

- Making Texas a more attractive venue for resolving commercial conflicts; and
- Improving efficiency in handling complex business cases.

Proponents of the Business Courts argue that this system will allow for the development of a specialized system for complex business litigation, not only allowing judges to develop specialized expertise but will also resulting in streamlined rules and concentrated dockets for certain major business dispute. Additionally, proponents argue that it will increase efficiency, as litigants in Business Courts will not have to compete for hearings and trial scheduling alongside the already busy, overburdened criminal and family law dockets.

### Initial Business Courts

The new law creates 11 multi-county Business Court divisions. However, initially, Texas will only open five divisions, representing the majority of the state's population and business base. The five initial divisions include:

- First Business Court Division, located in Dallas
- Third Business Court Division, located in Austin
- Fourth Business Court Division, located in San Antonio

- Eighth Business Court Division, located in Fort Worth
- Eleventh Business Court Division, located in Houston

Each Business Court division has been appointed two judges, each of whom will serve a two-year term. These five divisions are fully operational beginning September 1, 2024.

In addition, a newly created Fifteenth Court of Appeals will open September 1, 2024, based in Austin.

### **Jurisdiction and Case Eligibility**

The Texas Business Courts are courts of limited jurisdiction, as opposed to the general jurisdiction granted to state district courts under the Texas Constitution. Their limited jurisdiction, set forth in Texas Government Code Sec. 25A.004, is described by a detailed list of claims, with a variety of limitations, exceptions, and exclusions. The following is an overgeneralization of those categories for illustration.

#### **1. Major Corporate Governance Claims**

One category covers what might be generally summarized as major corporate governance claims, including cases involving: (1) Derivative actions; (2) Corporate governance and internal corporate affairs issues; (3) Securities and trade regulation litigation cases against certain parties; (4) Actions by a business or its owner against another owner or officer; (5) Actions to hold owners or executives responsible for breaches of duty; (6) Actions to hold owners or governing persons liable for obligations of the business; and (7) Actions arising out of the Texas Business Organizations Code.

**Key Threshold Requirement, Only for Non-Public Companies:** For claims involving publicly traded companies there is no minimum amount in controversy to establish Business Court jurisdiction. However, for other entities, in order to establish Business Court jurisdiction, the claim must involve a minimum of \$5 million in controversy

#### **2. Major Contract/Transaction Disputes**

Another category covers what might be generally summarized as certain major contract or transactional disputes, including claims that:

(1) involve an amount in controversy exceeding \$10 million; AND

(2) one of the following apply:

(a) the claim arises out of a “Qualified Transaction” (generally defined as one where a party pays or receives, or is required to pay or is entitled to receive, consideration with a value of more than \$10 million, or lends or borrows more than \$10 million, excluding those involving a bank, credit union, or savings and loan association);

(b) the parties agreed to Business Court jurisdiction in the underlying contract or in a subsequent contract (excluding insurance contracts); OR

(c) the claim arises out of a violation of the Texas Finance Code or the Business & Commerce Code, by an organization (or officer or governing person on its behalf) other than a bank, credit union, or savings and loan association.

#### **3. Related Equitable Jurisdiction**

The statute also provides Business Courts with jurisdiction covering actions seeking injunctive relief or declaratory judgment involving disputes based on a claim otherwise within the Business Court’s jurisdiction.

#### **4. Supplemental Jurisdiction**

The Business Courts may have supplemental jurisdiction over any other claims related to a case within the court’s jurisdiction, but only if all parties to the claim and the judge agree. If the parties do not agree to the court’s supplemental jurisdiction, then the claims may proceed in a separate court, such as a state district court, concurrently with the claims pending in Business Court.

#### **5. Exclusions from Jurisdiction**

Certain types of cases are expressly excluded from the jurisdictional reach

of the Business Courts, except on a “supplemental” jurisdiction basis, including:

- Cases related to a consumer transaction;
- Deceptive Trade Practices Act claims;
- Free Enterprise and Antitrust Claims;
- Cases brought by or against a government entity;
- Cases to foreclose on a lien on real or personal property;
- Cases brought under the Family Code, Estates Code, Insurance Code, and Chapter 53 and Title 9 of the Property Code;
- Cases involving the production or sale of farm products, under 9.102 of the Texas Business & Commerce Code; and
- Cases related to insurance coverage.

Additionally, the following three types of cases cannot go to Business Court regardless of any supplemental jurisdiction:

- Cases involving medical malpractice;
- personal injury; and
- Cases involving legal malpractice.

#### **Key Considerations for Oil and Gas In-House Counsel:**

- Many oil and gas contract disputes may meet the \$10 million amount in controversy threshold, but the underlying contracts might not have involved \$10 million in initial consideration or lending. For example, joint operating agreements or midstream contracts like gas purchase agreements often involve no initial monetary consideration but can lead to significant disputes in excess of \$10 million. Disputes may arise as to whether the definition of “qualified transaction” is broad enough to encom-

pass transactions with little or even no monetary consideration, but significant value over the life of the contract.

- If a contract or transaction does not qualify as a “qualified transaction,” Business Court jurisdiction can still be established so long as the amount in controversy exceeds \$10 million *and* the parties expressly agree to Business Court jurisdiction. Some commentators argue that a general “choice of business courts” provision will establish this element, while others suggest the clause should expressly incorporate supplemental claims.

### **Jury Trial Rights and Appellate Process**

Importantly, the right to a jury trial is preserved in the Business Court system. For cases originally filed in a district court, jury trials will likely be held in the same county where the plaintiff filed the lawsuit. For cases originally filed in the Business Court, the plaintiff will get to choose any proper county for a jury trial after pre-trial resolution by the Business Court.

Appeals from the Business Courts will be handled by the new Fifteenth Court of Appeals, with further discretionary review available from the Texas Supreme Court.

### **Strategic Considerations for Oil and Gas Counsel**

#### **Assess pros and cons of new venue**

For cases filed on or after September 1, 2024, litigants will have the option to file qualifying cases directly in the Business Courts or transfer qualifying cases to the Business Courts. This creates new strategic considerations for where to file suits and whether to seek removal. Among those considerations:

- Assess the potential impact of having business court judges, who are appointed rather than elected, presiding over your cases, and how this might affect jury selection and trial strategy.

- Assess whether expedited resolution aligns with your litigation strategy for each case. While faster outcomes can be beneficial, they may not always serve your company's interests, particularly in complex, high-stakes disputes.
- Consider the potential impact on discovery timelines and motion practice. The specialized nature of the court may lead to more streamlined processes.
- Be prepared for a potentially different pace of litigation, which may require adjustments to your internal case management processes.

### **Choice of Forum/Venue Provisions**

One significant potential issue is the application of the existing body of Texas case law regarding choice of forum and venue to the new Business Court cases. Although there is a considerable body of Texas case law on the subject in general, it remains to be seen how those principles will be applied in the context of the new Business Courts.

**Food for Thought:** Consider amending existing agreements to include choice of forum and venue provisions that expressly agree to Business Court jurisdiction.

### **Evaluate Potential Written Opinions**

Consider the long-term implications of seeking written opinions in your cases. While they may provide clarity, they could also set unfavorable precedents.

Unlike state district courts, the Business Courts are required to issue written opinions for dispositive rulings when requested by the parties or when they are on issues important to state jurisprudence. Before diving head-first into the new Texas business courts, in-house counsel should consider the potential impact of written opinions on your company's business and legal strategies outside of the immediate dispute. Consider the following:

**Potential Benefits:** Proponents of the new Business Court argue that requiring written opinions at the lower court level will benefit Texas by speeding up

the development of Texas law to guide Texas businesses, contract drafting and governance, and lead to a more well-developed body of law to provide more predictable outcomes in major disputes.

**Potential Drawbacks:** On the other hand, it is not always desirable to have written opinions at the lower court level. For instance, written opinions can significantly increase public awareness of the dispute and lower court outcome. Similarly, some may perceive a risk that an adverse written opinion could have far-reaching implications beyond the immediate case.

While it is not entirely clear the precedential weight such written opinions will carry on that same court, on other business courts, or on state district courts, they are likely to at least carry some persuasive authority. As a result, for better or for worse, lawyers will often benefit in the near future by expanding their legal research to cover potential Business Court opinions.

### **Anticipate Possible Constitutional Challenges**

A significant issue to be aware of is that several trial bar groups have promised to present constitutional challenges to the existence of the new Business Court system. In fact, some have already been filed and ruled upon by the Texas Supreme Court. The new Business Court law anticipated these challenges, placing exclusive jurisdiction to hear this type of litigation in the Texas Supreme Court, presumably hoping to dramatically shorten the amount of time to obtain a final ruling on any constitutional issues raised.

### **Anticipate Strategies to Avoid Business Courts**

While the Business Courts are intended to be ideal for certain complex business disputes, in reality, a core strategy of some litigants will likely be to avoid Business Court. A variety of motives could underly an attempt to avoid Business Court. For example, some may avoid Business Court out of a desire to avoid the delay, expense, or uncertainties posed by potential consti-



tutional challenges or procedural issues. Others may attempt to avoid Business Court to avoid a particular judge or to guide the case to a district court they prefer. Some may desire to avoid the written opinions that will flow out of the Business Courts. Of course, in the world of complex commercial litigation, one should also anticipate opponents who may challenge jurisdiction for the primary purpose of delaying and complicating litigation.

There will likely be a variety of creative methods and strategies for avoiding Business Court. Counsel should be prepared to spot and counter such strategies. The most obvious substance of such disputes will center on whether a case qualifies under the various statutory criteria, limitations, or exceptions, and whether other claims can fall within the court's supplemental jurisdiction. Of course, others may attempt to add claims against third parties primarily for the purpose of avoiding a contractual choice of Business Courts provisions.

#### Removal and Remand

Develop a decision-making framework for determining when to file in or seek

removal to the Business Court. Factors might include the complexity of the case, desired speed of resolution, and the potential impact of a written opinion on your company's broader legal interests. Likewise, develop a decision-making framework for determining when to avoid Business Court. Unless all parties agree to the transfer, be aware of the 30-day deadline for removal after discovering facts establishing business court jurisdiction.

#### Conclusion

The Texas Business Courts represent a significant shift in the state's approach to complex commercial litigation. For in-house counsel in the oil and gas industry, these courts offer both opportunities and challenges. With the opening of the Business Courts, it is crucial to:

- Consider your company's/client's goals for seeking or avoiding Business Court jurisdiction, and weigh the perceived pros and cons. As this is a developing area, this will likely require some monitoring for developments, and the goals and strategies may evolve over time.

- If your company/client prefer to seek Business Court jurisdiction, then consider amending existing contracts to address permissive or exclusive Business Court jurisdiction, especially for high-value transactions.
- Develop strategies to evaluate whether certain cases are, or are not, ideal for Business Court.
- Prepare your legal team for the nuances of this new specialized court system, including the impact of written opinions.
- Stay informed about developments, including potential constitutional challenges and early rulings.

By proactively adapting to this new system and carefully considering each case's unique circumstances, you can position your company/client with purpose, whether that means seeking to leverage the potential benefits of the Texas Business Courts while mitigating potential risks or avoiding the Texas Business Courts and its perceived risks and challenges.



**Austin Brister** is a partner in our Houston office. Austin represents oil and gas exploration and production companies and landowners in complex litigation, including mineral and leasehold title disputes, surface trespass and damages, royalty calculation and payment disputes, operator/nonoperator disputes, removal of operator, lease termination/perpetuation disputes, retained acreage and proration unit issues, and an array of other issues in upstream oil and gas.

For more information about this Client Alert contact Austin at 713-615-8523 or [abrister@mcginnislaw.com](mailto:abrister@mcginnislaw.com).



**Ashley Vega** is an associate attorney in our Houston office. Ashley represents individuals and companies in state and federal court across a variety of industries. Her practice primarily focuses on litigation with an emphasis on onshore / offshore energy disputes and construction defect matters. This includes representing oil and gas exploration and production companies, offshore installation companies, and construction contractors among others.

For more information about this Client Alert contact Ashley at 713-615-8512 or [avega@mcginnislaw.com](mailto:avega@mcginnislaw.com).

## MCGINNIS LOCHRIDGE

we're in it together®

**Austin**  
1111 W. 6th  
Bldg. B, Ste. 400  
Austin, Texas 78703  
(512) 495-6000

**Dallas**  
500 N. Akard St., Ste. 2250  
Dallas, TX 75201  
(214) 307-6960

**Houston**  
609 Main St., Ste. 2800  
Houston, TX 77002  
(713) 615-8500

**Decatur**  
203 W. Walnut St., Ste. 100  
Decatur, TX 76234  
(940) 627-1100