STATE BAR LITIGATION SECTION REPORT

THE ADVOCATE

The 89th Texas Legislative Session– A Recap for Litigators

VOLUME 113

WINTER

2025

TEXAS BUSINESS COURTS 2.0: HOW SB 29 & HB 40 ARE RESHAPING CORPORATE LITIGATION

BY TREY COX

Introduction: The New Litigation Landscape in Texas

In 2024, Texas stepped decisively into the ring of corporate litigation jurisdictions, adopting sweeping changes designed to modernize and streamline business dispute resolution. With the enactment of Senate Bill 29 (SB 29) and House Bill 40 (HB 40), the state has moved to rival Delaware in institutional infrastructure.

For Texas litigators, these developments represent a fundamental reshaping of where and how corporate disputes will be fought and resolved. The Texas Business Courts, now better resourced and more accessible, are poised to become the go-to venue for complex litigation. Corporate clients, meanwhile, will look to counsel for strategic guidance on how to structure their governance documents, assert venue rights, and navigate these evolving rules.

The Texas Business Courts, now better resourced and more accessible, are poised to become the go-to venue for complex litigation.

This article distills the essential implications of SB 29 and HB 40, equipping Texas litigators to adapt, advise, and advocate with clarity and confidence in this transformed environment.

Codifying the Business Judgment Rule: Litigation Strategy Recalibrated

SB 29's formal incorporation of the business judgment rule into the Texas Business Organizations Code (TBOC) is a clear message to corporate America: Texas trusts its directors (Tex. Bus. Orgs. Code § 21.419; Senate Bill 29, 89th Legislature, Regular Session (2025), Section 11, available at: https://capitol.texas.gov/tlodocs/89R/billtext/html/SB00029F.htm). Section 21.419 creates a presumption of business judgment for corporations with voting shares listed on a national securities exchange or those that affirmatively opt into this provision through their governing documents.

This codification imposes a formidable barrier to fiduciary duty claims. Plaintiffs must now allege and prove intentional misconduct, fraud, knowing illegality, or acts outside corporate authority. These evidentiary burdens mirror Delaware's standards and may, in practice, be applied stringently depending on judicial interpretation.

For Texas commercial litigators, this shifts the calculus. Discovery fishing expeditions into board deliberations are likely to find less oxygen under this presumption. Motion practice becomes more decisive. Defense counsel should now lean harder into early dispositive motions, armed with statutory presumptions that didn't exist a year ago. Plaintiffs' counsel, conversely, will need more than insinuation—they will need internal documents or whistleblower evidence demonstrating fraud or bad faith, or face early dismissal.

Strategically, this change encourages more robust pre-litigation investigation, sharper pleadings, and more cautious boardroom behavior. The litigation arena now favors the well-prepared and well-documented over the merely suspicious.

Derivative Litigation Tightened: Precision Over Volume

Few categories of litigation have generated more noise than derivative suits—many filed by marginal shareholders with minimal skin in the game. SB 29 raises the bar for derivative suits by imposing stricter standing requirements, such as by allowing the corporation to set a minimum ownership threshold to institute a derivative proceeding (not to exceed three percent of the outstanding shares) and limiting fee recoveries for "disclosure-only" settlements (Tex. Bus. Orgs. Code §§ 21.552, 21.561).

This provision is surgical. It doesn't ban derivative suits outright but allows corporations to preemptively decide whether derivative suits brought by nominal shareholders are in their best interests, while also discouraging low-value, high-cost suits concerning corporate disclosures. When adopted, these changes make it harder for marginal shareholders to bring claims without demonstrating substantial grounds. Plaintiffs' firms banking on fee awards from marginal disclosures will find the business model less viable.

From a defense perspective, these changes open new avenues for early dismissal based on standing. Expect motion practice to focus not only on fiduciary standards but also on threshold ownership and procedural compliance.

For corporate counsel, the opportunity is twofold: (1) tailor organizational documents to set appropriate opt-in thresholds for private companies, and (2) communicate these changes to directors to reduce their litigation anxiety and encourage candid deliberation.

The practical takeaway? Derivative litigation is no longer a volume game. It is a more surgical enterprise.

Exclusive Venue and Jury Trial Waivers: Controlling the Battlefield

One of the most consequential features of SB 29 is its explicit authorization for companies to designate Texas courts—and specifically the Texas Business Courts—as the exclusive venue for internal disputes (SB 29 § 3 (amending TBOC § 2.115(b))). Combined with provisions allowing enforceable jury trial waivers (SB 29 § 4 (amending TBOC § 2.116)), this represents a strategic shift toward predictability.

The jury trial waiver provision may face constitutional scrutiny, as Texas's constitution deems the right to a jury trial "inviolate" (Tex. Const. art. I, § 15). However, Texas courts have upheld jury trial waivers in civil cases when consent is knowing and voluntary, as in *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124 (Tex. 2004). SB 29's safe harbor provisions, requiring shareholder ratification or post-adoption equity acquisition, aim to meet these standards, though their enforceability may still be tested in court.

Until appellate courts weigh in, expect aggressive motion practice on enforceability. Litigators should prepare to brief both constitutional precedent and procedural compliance meticulously.

On the front end, transactional counsel will increasingly be called upon to embed these waivers in bylaws and shareholder agreements. But it is litigators who must interpret and defend them under fire. That means educating clients early—at formation, funding, or merger—about what these provisions mean and why they matter.

Business Courts Expanded: Specialization as Strategy

HB 40 expands the Texas Business Courts' jurisdiction and operational footprint (HB 40, 89th Leg., Reg. Sess. (2025)). The lowered amount-in-controversy threshold—from $10 million to $5 million—marks a deliberate move to capture mid-market disputes that were previously excluded (Tex. Gov't Code § 25A.001(14); House Bill 40, 89th Legislature, Regular Session (2025), Section 43, available at: https://capitol.texas.gov/tlodocs/89R/billtext/html/HB00040F.htm).

The implications for litigators are immediate and significant. The Texas Business Courts are no longer a boutique venue for eight-figure battles. They are the presumptive forum for a broad swath of commercial disputes, from technology licensing disagreements to multi-million-dollar earn-out claims.

The inclusion of intellectual property and arbitration-related actions further broadens the courts' appeal (Tex. Gov't Code § 25A.004(d)(4), (d-1); House Bill 40, 89th Legislature, Regular Session (2025), Section 45, available at:https://capitol.texas.gov/tlodocs/89R/billtext/html/HB00040F.htm). For Texas firms representing startups, life sciences, or energy clients, this means specialized judicial expertise where it's most needed. And for arbitration practitioners, the ability to seek enforcement or interim relief from judges who understand complex contracts is a welcome upgrade.

Governance Enhancements and Pre-Litigation Certainty

Among SB 29's most quietly potent provisions is the authorization of independent director committees and pre-transaction judicial review (Tex. Bus. Orgs. Code §§ 21.416–21.4161; Senate Bill 29, 89th Legislature, Regular Session (2025), Sections 8–9, available at: https://capitol.texas.gov/tlodocs/89R/billtext/html/SB00029F.htm). These mechanisms, long familiar to Delaware practitioners, now have a Texas analog.

Litigators advising boards must now recalibrate their counsel. Where potential conflicts of interest arise—say, in transactions involving controlling shareholders or insider participation—companies should proactively form independent committees and, where appropriate, seek a pre-transaction blessing from the Business Court.

Doing so builds a record of good faith and independence that can inoculate against future claims. It also reduces post-closing litigation, which can derail M&A activity and depress valuations.

This is no longer aspirational governance; it is a litigation strategy. The courtroom now starts in the boardroom.

Operational Realities: Efficiency Meets Expectation

While SB 29 and HB 40 offer powerful tools, their efficacy

depends on implementation. The Texas Business Courts will face rising caseloads and increasingly complex dockets. The judges presiding over these cases must possess more than legal acumen—they must understand corporate finance, governance dynamics, and IP valuation.

To ensure the success of the Texas Business Courts, litigators must also advocate for continued funding, training, and technological investment. Case management systems must support expedited scheduling. Judicial clerks must be fluent in business law. And the courts must develop consistent, published precedent to provide clarity.

Moreover, the Texas Supreme Court's forthcoming jurisdictional rules will play a pivotal role in balancing access with specialization (22A.006). Poorly drawn lines could either flood the Texas Business Courts with low-value noise or deny parties a forum suited to their dispute. Litigators must stay engaged in the rulemaking process, whether through bar associations or direct comment, to ensure procedural clarity aligns with legislative intent.

Constitutional Uncertainty and the Path Forward

No reform comes without friction. SB 29's jury trial waiver provision is particularly vulnerable to constitutional challenge. The Texas Constitution's protection of jury trials—especially in civil matters—has deep roots (Tex. Const. art. I, § 15). Courts will be asked to reconcile this principle with SB 29's emphasis on predictability and consent.

Expect early cases testing the waiver's enforceability. Litigators should prepare to brief historical precedent, the scope of shareholder consent, and the public policy rationale for contractual venue control.

If upheld, these provisions will further cement Texas as a business-savvy jurisdiction. If struck down, expect a wave of litigation over fallback venue and dispute mechanisms.

In the interim, prudent counsel should advise clients to document shareholder consent clearly and consider dual-path strategies (e.g., arbitration clauses or forum selection coupled with conditional waivers) to preserve flexibility.

Conclusion: A Litigation Advantage Forged in Law

SB 29 and HB 40 are not abstract legislative acts. They are a blueprint—offering Texas litigation counsel the opportunity to lead, advise, and advocate from a position of strength.

Texas is no longer merely a venue for doing business—it is a venue for resolving business disputes with speed, sophistication, and strategic foresight. But this new terrain requires new skills. Litigators must become fluent not just in doctrine, but in governance language, board dynamics, and jurisdictional nuance.

We are entering an era where litigation strategy begins long before the complaint is filed—and where Texas, for the first time in generations, has a legitimate claim to be the courtroom of choice for American business.

Trey Cox is Global Co-Chair of Litigation and Co-Partner in Charge of the Dallas office for Gibson Dunn & Crutcher, LLP. Chambers USA notes that Trey is "consistently recognized as one of the country's best trial lawyers," ranking him in Band 1 in its Trial Lawyers, General Commercial Litigation, and Texas Regional Spotlight categories. ★