



State Bar of Texas Litigation Section

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DATE: April 29, 2021

FROM: Cade Browning, Chair-Elect of the State Bar of Texas Litigation Section

TO: Hon. Dade Phelan, Speaker of the House
Members of the Texas House of Representatives

RE: Opposition to HB 1875 – ‘The Chancery Courts Bill’

The Litigation Section (“[The Litigation Section](#)”) formally opposes the passage of HB 1875. As you may know, The Litigation Section is a voluntary section of The State Bar of Texas and represents 8,650 lawyers from all parts of the State and all sides of the Bar. We are a neutral organization comprised of plaintiff attorneys, defense attorneys, judges, mediators / arbitrators, pro bono attorneys, and law students who are dedicated to improving our justice system and the quality of legal services delivered to Texans. Very rarely does The Litigation Section ask The State Bar Board for permission to take a position on pending legislation in Texas. However, as The Litigation Section did in 2015 and 2017 regarding previous versions of the Chancery Court Bill, we once again have asked and received permission to oppose the passing of HB 1875.


Why? Because HB 1875 is simply not in the best interest of the citizens of the State of Texas, the judiciary, nor the public’s access to justice, which we are duty-bound to shepherd. Attached, you will find a memo setting out in more details the particulars about how this bill is not well reasoned to achieve its stated goals.

We respectfully ask that you, who represent all 254 counties in this Great State, consider our position and ask yourselves whether you are willing to usurp those 254 counties of the right to resolve local disputes in exchange for a new additional court system, which the Office of Court Administration [estimates](#) will cost over \$12 million in the first two years, with judges appointed by whichever political party may happen to hold the Governor’s Mansion at any particular time.

Thank you for your attention to this matter and consideration.

Very truly yours,

STATE BAR OF TEXAS LITIGATION SECTION

By: 
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DISCLAIMER:

THIS POSITION IS BEING PRESENTED ONLY ON BEHALF OF THE LITIGATION SECTION OF THE STATE BAR OF TEXAS. THIS POSITION SHOULD NOT BE CONSTRUED AS REPRESENTING THE POSITION OF THE BOARD OF DIRECTORS, THE EXECUTIVE COMMITTEE, OR THE GENERAL MEMBERSHIP OF THE STATE BAR.

THE LITIGATION SECTION, WHICH TAKES THIS POSITION, IS A VOLUNTARY SECTION OF 8,650 MEMBERS COMPOSED OF LAWYERS PRACTICING IN A SPECIFIED AREA OF LAW. THIS POSITION IS TAKEN AS A RESULT OF A VOTE OF 19 TO ZERO OF THE COUNCIL OF THE LITIGATION SECTION, WHICH IS THE GOVERNING BODY OF THAT SECTION. NO APPROVAL OR DISAPPROVAL OF THE GENERAL MEMBERSHIP OF THIS SECTION HAS BEEN OBTAINED.

Litigation Section of the State Bar of Texas
Request to Oppose HB 1875
Relating to the Creation of a Business Court and a Court of Business Appeals

Description of HB 1875: This bill is the latest in a series of bills filed, but never passed, in past legislative sessions dating back to at least 2015 that would create a statewide specialized civil trial court and an appellate court to hear derivative actions on behalf of organizations (defined) and actions against, between or among organizations, governing authorities (undefined) and certain classes of individuals (defined) relating to a contract transaction for business or similar purposes. The Business Court would be composed of 7 trial judges appointed by the governor for 2-year terms. The Court of Business Appeals would hear appeals from the Business Court and be composed of 7 justices also appointed by the governor for 2-year terms. Appeals from the Business Court of Appeals would go to the Texas Supreme Court.

The Litigation Section requests it be allowed to oppose this bill for the following reasons:

- **Negative Impact on Access to Justice:** The State Bar Board has always taken the position that a section can and should request and be granted permission to oppose bills that impact access to justice. This bill challenges access to the justice system in many ways: (1) the constitutionality of the bill's underlying framework and appellate track is questionable. The bill itself contains several contingent provisions in the event the Act or the appointment of judges or justices under the Act is found to be unconstitutional; (2) it will increase costs that will be passed on to litigants; (3) it will have an adverse financial impact on the existing judicial system resulting in a resource drain, displacement and competition for courthouse space; (4) it will create an unlevel playing field for litigants of limited means; (5) delays in resolving the Business Court docket likely will cause delays in resolving the regular court docket; (6) the bill's provision that personal injury claims must be severed from business claims is not only inefficient but could lead to conflicting and inconsistent outcomes in otherwise related claims.
- **2008 State Bar of Texas Court Administration Task Force:** In 2007, the State Bar Board granted permission for the Litigation Section to oppose a specialty court bill, SB 1204. The bill did not pass. Post session, members of the Litigation Section Council, along with other stakeholders, were asked to serve on the 2008 State Bar of Texas Court Administration Task Force to consider matters concerning the courts, including specialty courts. This led to the recommendation and enactment in 2009 of a specific court resources provision, Section 74.254 of the Government Code, with the Task Force and the Legislature recognizing there was no need for a separate court system. Unfortunately, these resources have not been provided. However, the Task Force's recommendations remain valid and under Section 74.254, the Legislature should provide such funding in lieu of the creation of an entirely new and additional court system in Texas.
- **Lack of Data and Input from Stakeholders:** This is a major revision of the judicial system in Texas without gathering and analyzing data to determine the need for the change or the reasonable probability that the desired result can or will be obtained. There has been no analysis of the potential for unintended consequences. Whether the proposed change will improve the judicial system of Texas or make it more prone to

manipulative legal tactics is a legitimate concern. Major revisions of the judicial system in the past have relied upon objective data, careful reflection, meaningful review and input from relevant stakeholders, and a showing that the revision will justify the cost and have a reasonable probability of success. There is a lack of any empirical evidence that supports the case for creating specialized business courts. It also bears noting how little we know about the consequences of actually enacting this legislation, including the impact on our judicial system, our county governments, our funding of the courts and our citizens. As always, those who urge major civil justice reforms should have the dual burdens of showing—with credible evidence—the existing system deficiencies and that the proposed reforms will not create other significant problems that will worsen access to justice.

- **Judicial Resources:** The proposed Business Court system, with its own segregated trial and appellate system, would be a resource and financial drain on a judicial system that is already underfunded. Without the necessary empirical data and analysis, it is not possible to determine the full extent of the drain and the current judicial services that will be affected. Moreover, no necessity has been established to justify such a redundant judicial system. Like criminal, probate or juvenile courts, specialty courts for complex litigation could be created within the current court system as facilities and demand exist. Also, the bill's suggestion that lower appellate courts are incapable of handling complex business cases, while providing for appeals from a single business court of appeals to the supreme court, is both unfounded and inconsistent.
- **Litigation Costs:** The proposed scenario for a Business Court and Business Court of Appeals is likely to increase litigation costs, promote forum shopping, and cause delay.
- **Displacement:** HB 1875 would interfere with the justice system by displacing local dockets, courtroom space, judges and court staff. These are roving judges without courtrooms. This is a unique concept and it is not possible, given the time constraints, to calculate the impact on local courtroom usage and dockets, especially in a state which requires diverse approaches to managing dockets in high density urban areas as well as in rural counties and districts. The proposed Business Court system will disrupt the judicial system in both urban and rural districts.
- **Judicial Selection Process:** The judges under this bill will be appointed rather than elected, which is a significant change that would result in a different selection process for courts having concurrent jurisdiction. This may lead to a perception of a lack of neutrality, compromised access to justice and an unlevel playing field for certain litigants. The creation of a court system where judges have concurrent jurisdiction and are selected under different criteria will, in all probability, undermine the public's perception in the remnants of the existing system, as well as any new system. The proposed system also has no provision to ensure that appointments are geographically diverse, which could give rise to a lack of ethnic diversity among the appointed judges or justices.

- **Constitutionality:** There have been questions raised concerning whether the bill comports with the Texas Constitution and the requirements of due process. We believe these questions need to be carefully considered in advance to minimize years of costly litigation.¹
- **Section 8.01.03 of the State Bar of Texas Board Policy Manual** permits any section to take a position either in support or in opposition to any legislation that relates to the “selection, tenure, compensation, staffing, equipping and housing of the State Judiciary.

Respectfully, the Section maintains that HB 1875, at every level, impacts selection, staffing, equipping, and housing of the judiciary and would be a barrier to access to the civil justice system, if enacted.

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¹ The section does not and will not take a position on whether the bill violates the Texas Constitution or due process requirements.