



MESSAGE FROM THE CHAIR

Dear Members of the Business Law Section,

I hope this letter finds you well. It is with great honor and a sense of responsibility that I step into the role of Chairman for the Business Law Section of the State Bar of Texas. This year promises to be one of progress, innovation, and camaraderie, and I am excited to embark on this journey with each of you by my side.

Firstly, I want to acknowledge and appreciate the invaluable contributions that each of you has made to our Section. Your dedication and commitment have been instrumental in shaping the robust foundation on which we stand today.

Let me take a moment to remind you of some of the outstanding benefits our Section offers. Our Continuing Legal Education (CLE) programs continue to set the gold standard, ensuring that our members stay at the forefront of the legal profession. Our legislative reports, with our partner the Texas Business Law Foundation (TBLF), provide timely and comprehensive updates on relevant business law developments, allowing members to navigate the ever-evolving landscape of business law with confidence. Additionally, our website serves as a comprehensive resource, providing access to an array of publications, resources, and other benefits. Our dynamic committees have been pivotal in driving the initiatives of the Section, and I commend the tireless efforts of our committee leadership and members. Lastly, I applaud TBLF and our membership in their individual efforts to bring business courts to Texas to keep the State competitive and a leader in business opportunities around the world.

Looking ahead, I am thrilled to share some of the new initiatives we have on the horizon:

1. ****Standing CLE Committee****: Recognizing the importance of continuous learning, I hope to establish a standing CLE committee dedicated to curating and delivering top-tier educational content that meets the diverse needs of our members.

2. ****Section Bylaws Revision****: Our Section Bylaws are the backbone of our operations. With the evolving needs of our Section and its members, we are committed to revising and updating the Bylaws to ensure they remain relevant, clear, and in line with our collective vision.

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3. ****Exploring New Benefits****: We are constantly on the lookout for innovative ways to support and benefit our members. This year, we will intensify our efforts to uncover new opportunities that cater to the multifaceted requirements of our ever-growing member base. Please reach out if there is a way we can benefit you and your practice.

I firmly believe that the strength of our Section lies in the collective wisdom of its members. I invite each one of you to actively engage, share your insights, and be an integral part of the Section's journey by joining a committee that focuses on your interests. A list can be found on the Section's website. Together, we can shape a future that not only upholds the rich legacy of the Business Law Section but also sets new benchmarks of excellence in business and in Texas.

In closing, I'd like to extend an open invitation to all who are interested in contributing and being a part of this vibrant community. Your ideas, your enthusiasm, and your commitment are what make the Business Law Section a beacon of excellence in the legal fraternity.

Thank you for your continued dedication to the Business Law Section. I am eager to witness the heights we will achieve together.

Warm regards,

Schuyler 'Rocky' Reidel
Reidel Law Firm
Chairman, Business Law Section of the State Bar of Texas.

ADVANCED BUSINESS LAW 2023 – DRAFTING IN BUSINESS TRANSACTIONS

By: Carol B. Mattick, Carol Bavousett Mattick, PLLC, San Antonio, TX and Austin, TX

The Business Law Section has partnered once again with Texas Bar CLE to present the *Advanced Business Law 2023 CLE*. The Business Law Section has deployed experts active in the Section to create the substance of this year's program in *Advanced Business Law* as well as a day-long program in *Drafting in Business Transactions*. Texas Bar CLE had received feedback from many Section members that business lawyers really wanted a program focused on transaction drafting. *The Drafting in Business Transactions* program is being held on November 1st, the day before *Advanced Business Law 2023* on November 2nd and 3rd. Both programs are virtual this year, with authors and presenters available to answer questions by chat during the video conference presentation.

The Drafting in Business Transactions program will take the drafting concepts of noted legal academic Tina Stark and apply them to the kinds of contracts business lawyers routinely draft. Stark takes the key points of the business deal at hand and translates them into contract concepts to ensure that the business transaction is accurately and fully reflected in the agreements. The program starts off with five panels, each analyzing different contract concepts such as:

- The importance of understanding the economics of the deal, the risks being taken by each party, and the client's business goals, which enable the lawyer to add value to the deal
- The interrelated use of representations and warranties, particularly in purchase and sales agreements
- The use of covenants or promises by one party and corresponding rights of the other party to enforce those covenants
- The best use of conditional obligations, discretionary authority, and declarations in agreements
- How best to deal with breaches of agreements, structure remedies, and draft dispute resolution provisions



The *Drafting in Business Transactions* program ends with presentations on particular timely drafting topics such as confidentiality provisions, ramifications for business agreements of the Corporate Transparency Act of 2024, and drafting non-compete provisions in light of the FTC challenge to non-competes for employees.

The Business Law Section is considering offering this drafting content in small workshop conferences and would like feedback on whether such conferences might be valuable to its membership. Please email us at membership@texasbusinesslaw.org.

The *Advanced Business Law 2023* CLE will provide:

- An overview of the 2023 Texas Legislature for business lawyers for business lawyers
- Changes to the Texas Business Organizations Code by Daryl Robertson, chair of the Business Law Section's TBOC Committee and primary author of the TBOC
- Everything about the new Texas specialized Business Courts with a number of prominent Texas practitioners and a business court judge from New York state
- Recent changes in the Texas Rules of Disciplinary Conduct
- ABA Resolution 100, with AJ Singleton, Chair of the ABA's Professional Responsibility Committee
- Specifics of the Corporate Transparency Act of 2024
- Recent developments in fiduciary duties by Beth Miller of Baylor Law School
- M&A risk management tools of rep and warranty insurance

These programs will be first available at on November 1 through 3 by video conference and afterward on demand.

Join in and recharge your practice!

Carol Mattick, <http://www.cbmattick.com/>, is a corporate and securities law attorney who practices out of San Antonio and Austin. Currently, she is the Chair-Elect of the Business Law Section and the Chair of the Website Committee. Contact Carol to become a member of the Website Committee.

THE NEWLY CREATED TEXAS BUSINESS COURT – WHAT YOU NEED TO KNOW

By: Brian K. Tully, GablesGotwals, Houston, TX

Texas recently passed legislation creating a Business Court system to hear certain disputes between or among businesses and their owners or controlling persons and management regarding breach of contract, breach of fiduciary duty, corporate governance, and the like. In doing so, Texas becomes the 31st state to create a specialized court to address complex business litigation with an eye toward quicker resolution of such disputes and more consistency across the state.

Businesses, as well as legal practitioners in Texas should know what to expect in the near future. This Alert provides the classic "5 Ws" – What? Why? Where? Who? When?

What is the Texas Business Court?

The Texas Business Court is being established to hear a limited range of disputes. It will have the same powers as Texas District Courts (the courts of general jurisdiction in Texas), but the Texas Business Court will have no jurisdiction over claims by or against governmental entities, claims for personal injury, medical, or legal malpractice, violations of the Texas Deceptive Trade Practices Act or the Texas Free Enterprise and Antitrust Act, state antitrust law claims involving governmental entities, foreclosure of liens, or claims arising out of the Texas Estate Code, Texas Family Code, Texas Insurance Code or involving contractor's or mechanic's liens under the Texas Property Code. [Continue Reading](#).



POST-CLOSING COVENANTS IN M&A TRANSACTIONS

By: Lindsey Reighard, McDermott Will & Emery LLP, Dallas, TX

This article is the first of what will be a series of articles regarding M&A transactions in this Newsletter. The next article will be about doing intellectual property due diligence for an M&A transaction.

After the acquisition of a target company's business and assets, whether by merger, equity purchase or otherwise (a "M&A transaction"), the seller and the buyer are bound by post-closing covenants under the definitive agreement for the transaction ("M&A agreement"). These covenants are crucial for ensuring a smooth transition of the acquired business, maintaining ongoing arrangements, and allocating responsibilities between the buyer and the seller, thus facilitating the successful execution of the M&A transaction.

Sellers often aim to conclude their involvement without any lingering obligations to the buyer. Conversely, buyers commonly seek to restrict sellers from competing with the acquired business, poaching its employees, or utilizing its confidential information. Buyers may also require sellers to assist in resolving any identified issues uncovered during due diligence. Consequently, M&A agreements typically impose more post-closing covenants on sellers than on buyers to safeguard the buyer's interests and ensure a smooth transition.

Common post-closing covenants include:

- 1. Non-Competition and Non-Solicitation:** Buyers commonly require sellers not to compete with, or solicit employees or customers, from the acquired business for a specified period. These covenants can cover affiliates, have varying durations and define the restricted business, geographic areas, and employees. Enforcement depends on reasonableness and jurisdiction.

[Continue Reading](#)



NEWSLETTER SUBMISSIONS

If you would like to submit an article for inclusion in the Business Law Section's Newsletter, please email it to Lori Wilkins At lori@amc-texas.com

The Newsletter Committee reserves the right to edit contributions for clarity and content.

EMPLOYERS BEWARE: AI TOOLS MAY LEAD TO LABOR FORCE FRICTION AND STRIKES

rBy: Miles O. Indest, Meghaan C. Madriz, Alice N. Moscicki, Sabrina A. Beldner, and David L. Greenspan – McGuire Woods, TX

According to recent studies, 83% of large employers surveyed rely in some form of artificial intelligence (AI) in employment decision-making, and 86% of employers that use AI admit that it is becoming a mainstream technology at their company. (See Chicago Tribune's "Do Robots Care About Your Civil Rights?" and Harvard Business Review's "AI Adoption Skyrocketed Over the Last 18 Months"). The potential uses and benefits of AI are powerful, but the risks are, in some regards, less obvious.

To date, the literature tends to focus on potential discrimination and bias associated with the use of AI in employment decision-making. (See *The Promise and The Peril: Artificial Intelligence and Employment Discrimination* by Keith E. Sonderling, et al., 77 U. MIA L. REV. 1 (2022)). However, a new area of risk is emerging for



employers – potential alienation of the labor force with the use of “generative AI” as a replacement for traditional notions of labor.

Generative AI, specifically large language models, can be trained on large quantities of text data and, in response to prompts, generate text by predicting the “best” following text. The use of generative AI for creative works, scripts, and guidance has created a new avenue for automation. While many welcome automated machines replacing dangerous tasks in heavy industry, much fewer welcome AI replacing the role of creative professionals.

While assessing the strength of their AI policies, employers can learn from three recent instances of labor force friction involving Hollywood, the National Eating Disorder Association, and an online coding forum. [Continue Reading](#)

INSUFFICIENT ALLEGATIONS FOR NEGLIGENCE CLAIM AGAINST PRIVATE INVESTORS AND THE BOARD MEMBERS THEY APPOINTED

In re First Reserve, Management, L.P., No. 22-0227 (Tex. June 23, 2023)

By Melissa Clark, Whitaker Chalk Swindle & Schwartz PLLC

Following explosions at a chemical plant caused by a ruptured pipe, thousands of lawsuits were filed and consolidated in a Multi-District Litigation (MDL) court. The plant-owner, TPC, is indirectly owned by Sawgrass Holdings, LP, which is owned by two private-investor groups, “First Reserve” and “SK Capital”. The general partner of Sawgrass Holdings, LP is Sawgrass Holdings GP LLC. The general partner has a board of directors, made up of two First Reserve appointees, two Sawgrass Holdings LP appointees and TPC’s CEO. In amended petitions, the plaintiffs alleged negligent undertakings against the two private-investor groups. The two private investor groups moved to dismiss

under Texas Rule of Civil Procedure 91a. The trial court denied the investor groups’ motion to dismiss, and the court of appeals denied mandamus relief. In *In re First Reserve Management, L.P.*, the issue before the Texas Supreme Court was whether under Rule 91a the trial court should have dismissed the claim against the two private-investor groups. *In re First Rsrv. Mgmt., L.P., No. 22-0227 (Tex. June 23, 2023)*.

In analyzing a motion to dismiss under Rule 91a, a court must decide the motion solely on the pleading of the cause of action. See Tex. R. Civ. P. 91a.6. Here, the Supreme Court stated that the only factual allegation in the petition was that First Reserve and SK Capital controlled TPC’s operations because they appointed members to the board of directors that governed TPC. The Supreme Court cited precedent that distinct legal entities are generally not liable for one another, that an appointing company is not liable to a separate legal entity solely because they appointed a member to that separate entity’s board, that it is routine for entities to limit liability through affiliates, and that to satisfy the duty element of a negligent undertaking theory, the defendant must act in such a way that a duty arises where a duty does not otherwise exist. Here, the Supreme Court held that the Plaintiffs did not plead sufficient facts showing the private-investor groups undertook TPC’s day-to-day operations, and the trial court should have dismissed the claim on the grounds that the claim has no basis in law.



KEEP YOUR EMAIL ADDRESS UPDATED

With the electronic distribution of the newsletter, it will be important for every Section member to keep an updated email address with the State Bar of Texas since that agency will distribute the email on behalf of the Section. You may update your email address at the [MyBarPage](#) of the State Bar’s website. Please note that the Section will not sell or distribute your email address to anyone, including the State Bar’s CLE Division.



However, while this petition was before the Supreme Court, TPC moved for protection in the U.S. Bankruptcy Court for the District of Delaware. Accordingly, the Supreme Court denied this petition for writ of mandamus because the amended petition included claims that the bankruptcy court enjoined the Plaintiffs from prosecuting, and the Supreme Court chose not to disrupt the stay.

[Melissa Clark - Whitaker Chalk Whitaker Chalk](#), is an Associate at Whitaker Chalk Swindle & Schwartz PLLC and primarily practices securities law, advising broker-dealers, investment advisors, and issuers as well as preparing private offering memorandums.

WHEN IS A PARENT CORPORATION RESPONSIBLE FOR A SUBSIDIARY'S TORTS? – A TEXAS SUPREME COURT CASE OF INTEREST

By: William "Pat" Huttenbach, Crain Caton & James, Houston, TX

In re First Reserve Management, L.P., No.22-0227, 2023 WL 414054 (Tex. June 23, 2023), is a case of interest in which the Texas Supreme Court discusses when a parent corporation's actions cross the line of "control" of the subsidiary, making the parent potentially liable for the subsidiary's torts. This case resulted from a series of explosions at the TPC petrochemical processing plant in Port Neches, Texas.

The issue in this original proceeding is whether Plaintiffs could sufficiently plead claims that investors in the plant's owner are directly liable for the damages from the explosions.

The Texas Supreme Court ruled Plaintiffs could not be found liable and that the MDL court should have dismissed the claims against the investors. A summary of the Court's opinion is that parents do not take potential liability as long as they act in a manner consistent with "norms of corporate behavior" for parent's oversight of a subsidiary. Although the Texas Supreme Court indicates parents are safe when acting within "industry standard," the Texas Supreme Court does not identify the limits of those norms. However, a few of the Court's pronouncements in the opinion indicate acts that are within those norms and will not create potential liability.

Excerpts from First Reserve Management that may clarify what clients can safely do are listed below:

- Creation of affiliated corporations to limit liability while pursuing common goals lies firmly within the law and is commonplace.
- Even when one company appoints a loyal employee to the board of a separate legal entity, the appointing company does not become liable for the board's conduct.
- It is entirely appropriate for directors of a parent corporation to serve as directors of its subsidiary, and that fact alone may not serve to expose the parent corporation to liability for its subsidiary's acts.
- We have never held corporations liable for each other's obligations merely because of centralized control, mutual purposes, and shared finances. There must also be evidence of fraud, evasion of existing obligations, circumvention of statutes, monopolization, criminal conduct, or the like.
- A company with the power to elect a majority of members to a homeowners' association was not liable for decisions made by the association with respect to security measures.
- Norms of corporate behavior are crucial reference points when distinguishing a parent's oversight of a subsidiary from the parent's control over the operation of the subsidiary's facility. Activities that involve the facility, but which are consistent with the parent's investor status, such as monitoring of the subsidiary's performance, supervision of the subsidiary's finance and capital budget decisions, and articulation of general policies and procedures, should not give rise to direct liability.
- Liability cannot be based on First Reserve's ownership interest in TPC, its appointment to the GP Board, or any other action that is consistent with its investor status.



- The critical question is whether, in degree and detail, actions directed to the facility by an agent of the parent alone are eccentric under accepted norms of parental oversight of a subsidiary's facility.

No information in this communication is intended to constitute specific legal advice. For specific legal advice, please contact an attorney, and if you have any such questions or would like more information about this issue, please contact William "Pat" Huttenbach at 713.752.8616, or email at phuttenbach@craincaton.com.

Author, Pat Huttenbach, <https://www.craincaton.com/attorneys/huttenbach-william-pat/>, is an attorney with Crain Catton & James, with a practice that includes complex commercial litigation, bank defense, and lawsuits involving the Uniform Commercial Code. He is Chair of the Commercial Code Committee of the Business Law Section. Contact Pat for information on joining this committee.

The author wishes to acknowledge the contributions of his Crain Catton & James colleagues, Jackie Krejci and James E. Smith in preparing this paper.

TEXAS BUSINESS COURTS – DIVISIONS, CONSTITUTIONALITY CHALLENGES, AND SAMPLE CONTRACTUAL PROVISIONS

By: Byron Egan, Jackson Walker LLP, Dallas, TX

Legislation to create a new system of specialty trial courts in Texas ("Business Courts") was passed by the 88th Texas Legislative Session which ended on May 29, 2023 and was signed on June 9, 2023 by Governor Greg Abbott. The new Business Courts were created to hear significant business-related disputes. Also created was a special intermediate court of appeals to hear appeals from Business Courts. The Business Courts were created by House Bill 19 ("HB 19") as a new chapter 25A ("§ 25A.001 et seq" or "Chapter 25A") to the Texas Government Code (the "Government Code") with judges to be appointed by the Governor with the consent of the Senate.

A separate bill ("SB 1045") amended § 22.201 of the Government Code to create a Fifteenth Court of Appeals ("15th Court of Appeals") to hear appeals from Business Courts. Both HB 19 and SB 1045 became effective September 1, 2023, but will be operational only for actions commenced on or after September 1, 2024, to allow time for the appointment and confirmation of their judges and adopt procedural rules for the operation of such courts.

The Business Courts will initially be in the major metropolitan areas (see Geographic Divisions below) with the expectation that the Texas Legislature will ultimately create Business Courts for the rest of Texas. The creation of the Texas Business Courts has followed a long and winding road that commenced in 2015. (See Byron F. Egan, Texas Chancery Courts: The Missing Link to More Texas Entities, Texas Bar Journal, Vol. 79, No. 2 at 98 (Feb. 2016)). From the beginning, passage of the establishment of specialty business courts has been strongly supported by the Texas Business Law Foundation ("TBLF"). See A. R. Bromberg, B. F. Egan, D. L. Nicewander, and R. S. Trotti, The Role of the Business Law Section and the Texas Business Law Foundation in the Development of Texas Business Law, <https://www.jw.com/wp-content/uploads/2016/09/1239.pdf>. However, prior efforts stalled in previous legislative sessions due largely to opposition from trial lawyer-focused organizations. HB 19, which ultimately garnered bipartisan support, addresses the growing need for specialized Texas state courts to handle complex business litigation.

The Business Courts are designed to handle a wide range of commercial disputes, including contract disputes, fiduciary duty claims, and other corporate governance issues. By creating a dedicated venue for these cases, the Legislature sought to expedite proceedings, enhance judicial expertise, deliver more predictable outcomes for business disputes, and attract more businesses to Texas by offering a favorable environment for resolving commercial disputes. Any challenges to the constitutionality of the Business Courts will be decided by the Texas Supreme Court, which has been given exclusive and original jurisdiction over any such disputes. [Continue Reading](#)