Episode 3: “Texas Glitters, But Is It Gold? Assessing Operational Challenges Texas Faces in Achieving Delaware's Gold Standard”

Scott: Welcome to the Akin Podcast series, The Business Court Benches Delaware and Texas Compared. This is episode three: Texas Glitters, but is it Gold? Assessing Operational Challenges Texas Faces in Achieving Delaware's Gold Standard. My name is Scott Bernard, and I'm your co-host. I'm a securities and fiduciary litigation partner in the Dallas office of Akin.

Stephanie: And I'm Stephanie Lindemuth. A litigation partner in the New York office of Akin. In this final episode, we're looking at the operational realities of the new Texas business courts, their structure, their challenges, and the long road ahead as Texas competes with Delaware's established dominance.

Scott: Stephanie, before we dive into the Texas courts, we probably should talk a little bit about the judicial behemoth that is Delaware.

Stephanie: Sure. The Court of Chancery is the gold standard because of its talented, responsive, and knowledgeable judiciary with decades of experience resolving sophisticated business disputes often on an expedited schedule.

Scott: It's important to point out that in the Court of Chancery, the judges are nominated by the governor and confirmed by the Senate, and they serve long 12-year terms. This provides insulation from short-term political pressure.

Stephanie: And finally, it is a non-jury trial court. That single factor contributes significantly to speed, consistency, and predictability as complex issues of fact are decided by specialized judges, not juries. When we talk about Delaware, its greatest advantage is judicial efficiency and predictability. The Delaware Court of Chancery is celebrated for its rapid decisions, often resolving complex disputes within weeks due to specialized rules, and the critical absence of juries.

Scott: I think that non-jury element is key. I mean, the chancery court handles only equitable claims, meaning it's only gonna conduct bench trials where the specialized judges are deciding the facts. And they frequently grant expedited litigation, which allows these cases that are high stakes disputes like mergers or requests for injunctive relief to move from the time that the lawsuit is filed into trial within weeks or months in some cases.

Stephanie: Right, and that speed is facilitated by an unspoken rule that the Court of Chancery aims to issue decisions within 90 days of oral argument. Though getting to oral argument can still take months in a non expedited case.

Scott: Texas is also aiming for faster, simpler, and honestly more predictable high stakes litigation. But the biggest difference we're seeing is that the Texas Business Court is still in its very early stages. It's still developing its case law. I mean, the, the court's only been around for about a year, and it's just now starting to see some of the more high profile cases. For example, last month the Dallas Maverick sued the Dallas Stars in Texas Business Courts. And that got a good amount of press,

Stephanie: Right.

Scott: And a major structural difference that complicates speed and predictability is that in Texas, under the Texas Constitution, there's a right to a jury trial. And so that's different from Delaware and is gonna have an impact.

Stephanie: Yes. The possibility of a jury trial for complex commercial issues in Texas introduces extra stages like selection and deliberation that could increase time, complexity and unpredictability compared to Delaware's judge only model. While Texas legislators emphasize that they seek to protect the constitutional right to a jury trial, it is fundamentally different from the Delaware model.

Scott: And it's not just the jury issue beyond that. Mm-hmm. Which some of the opponents are arguing violates the Texas Constitution's requirement for elected district court judges. But the proponents argue that the business court is a quote, inferior statutory court making the appointment process permissible.

Stephanie: Mm-hmm. And then there's the crucial issue of judicial term length, which directly impacts independence and continuity. Delaware judges serve long 12 year terms providing insulation from short term political pressure and promoting stable jurisprudence development. But that's different than what's going on in Texas. Right?

Scott: That's right. That's very different. So the Texas Business Court judges, like we talked about in the last episode, they're appointed by the governor with Senate consent, but they only serve two-year terms. And sometimes cases can go longer than two years. Critics are concerned about the implications of the short term. And there's actually been some talk at the Texas legislature about changing this. They worry that judges may feel pressured to, quote, play it safe, or that they'll try to appease the people who are selecting them to be reappointed when that time comes near that could potentially affect the perception of independence and predictability,

Stephanie: Right. And the two year term of course, heavily impacts continuity. I mean, complex commercial litigation often spans years, and a short term makes it likely the presiding judge could change, perhaps multiple times across a single matter. That raises concerns about inefficient docket management, delays as new judges get up to speed and a lack of consistency in developing precedent.

Scott: Yeah, and the Texas Business Courts are meant to be specialized centers of expertise and there's some concern that a two year term is not gonna give a judge enough time to get up to speed and to be really dedicated to how the court should work and what the body of law is, and to kind of author detailed, robust opinions that we are looking for to try to help shape the future of Texas corporate law. This could make the courts less attractive to litigants who are seeking highly specialized adjudication.

Stephanie: Right, but it's not all bad here. There are a few mitigating factors and potential advantages to that short term. Texas does require the business court judges have at least 10 years of experience in complex civil business litigation. And the two year term does increase accountability and allows the system to be more flexible and undergo design changes quickly while it's still young. And it can also make it easier to recruit high caliber judges because there's a shorter time commitment.

Scott: That's right. Texas is trying to compensate for the short term by focusing on written opinions. The Texas Business Court is required to issue written opinions for dispositive rulings and on issues that are important to the Lone Star State's jurisprudence. The idea is that they're gonna build a robust body of case law over time, adding to predictability, just like what we see in the Delaware Court of Chancery. These opinions are intended to involve the type of depth of reasoning that you would normally see in like an appellate court opinion. And even though there's only one judge writing the opinion, the idea is to speak as one voice for the entire Texas Business Court.

Stephanie: Right. That push to create consistent written precedent is a crucial move to develop market comfort. Though Texas law does limit the courts in referencing outside law, specifically the plain meaning of the Texas Corporate Code Text cannot be supplanted by the laws or judicial decisions of any other state, including Delaware.

Scott: Well, Stephanie, as we wrap up, what are Delaware's enduring advantages in this debate?

Stephanie: Delaware's advantages here are undeniable. They have decades of experience as a central source of corporate law. The sheer predictability and comprehensiveness of its law is helpful and the market comfort outside investors have with Delaware law is unbeatable, plus Delaware is flexible with regular legislative review and updates to its corporate law. And Scott, what are Texas's aspirations for the future of corporate law?

Scott: Well, first of all, I mean, I agree with everything you're saying about Delaware, Stephanie. I think it's obviously the gold standard right now for courts, but you know, with Texas's creation of its own specialized court, combined with the idea that the court's focusing on these written opinions to provide guidance, it'll be interesting to see if the court can really build up this robust body of case law over time.

Stephanie: Right.

Scott: And you know, look, having a specialized court is probably something that should have happened a while ago. There's at least 30 other states that have specialized courts, and it's obviously part of Texas's broader strategy to become the headquarters of headquarters. Texas is also trying to limit the cost that corporations may incur from frivolous derivative lawsuits. And Texas also offers financial incentives of a lower annual franchise tax compared to what we're seeing in Delaware. And look, the, the debate is raging on. We just saw this week that Coinbase announced that it was going to be changing its incorporation from Delaware to Texas. And in fact the Chief Legal Officer of Coinbase wrote an opinion piece in the Wall Street Journal saying that the company is pursuing reincorporation because it believes that Texas's legal framework is more predictable and efficient than Delaware's.

Stephanie: Hmm, that's interesting. But despite these efforts, nearly 70% of Fortune 500 companies and 80% of US IPO companies are incorporated in Delaware. And while the choice of state may be more appropriate for some corporations, the Texas Business Court will likely take years to develop the institutional knowledge, depth of precedence and judicial expertise of Delaware's court of chancery. A significant shift in incorporation volume would truly be a watershed event.

Scott: On that note Stephanie, thank you for joining me to discuss the corporate home debate between Texas and Delaware. And thanks to our listeners for listening to this limited Akin podcast series, The Business Court Benches: Delaware and Texas Compared. My name is Scott Bernard. I'm a fiduciary and securities litigation partner in the Dallas office of Akin.

Stephanie: And I'm Stephanie Lindemuth, your co-host from Akin’s New York office. I'm a business litigation partner focusing on fiduciary and securities litigation. Thank you Scott so much for putting this together with me, it's been a lot of fun. And thank you to our listeners. That wraps up our limited podcast series. Until next time!