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Corporate law showdown: the battle for incorporation supremacy in the United States




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I. INTRODUCTION

Well over half of Fortune 500 companies are incorporated in Delaware, owing to its business-friendly reputation and its Court of Chancery—a respected authority on corporate law, with well-developed and predictable case law that gives investors confidence.[1] Beyond being the most common state of incorporation, Delaware is where shareholder rights are most frequently tested, with hundreds of fiduciary duty suits litigated annually in its Court of Chancery.[2] As a result, Delaware produces a body of precedent that sets the standard nationally concerning shareholder litigation and directly affects investors in U.S. public companies. For European institutional investors holding billions in U.S. equities, this means Delaware litigation has historically been the most reliable avenue to secure recoveries and governance reforms.

Texas and Nevada have recently challenged Delaware's supremacy, enacting enhanced officer and director protections laws, often at the expense of shareholder oversight. In response, Delaware has likewise revised its statutes. These statutory changes are recalibrating the balance between boards and shareholders. For institutional investors, the risk is facing higher hurdles in detecting and remedying misconduct. Protections long taken for granted—such as meaningful access to records, independent board oversight, and accountability for breaches of fiduciary duty—may erode, raising the potential for unchecked conflicts of interest and corporate wrongdoing. Because the relationship between shareholders and corporations is governed by the law of the state of incorporation, this article examines key developments in Texas, Nevada, and Delaware.

II. BACKGROUND - TESLA DECISION

In January 2024, Delaware's Court of Chancery rescinded an equity compensation plan for Tesla's CEO Elon Musk, valued at approximately $56 billion (€48bn). Although approved by Tesla's board and unaffiliated shareholders, the Court of Chancery found Tesla failed to fully inform shareholders, mischaracterized directors as independent, and conducted no meaningful negotiation of the plan.[3] Tesla later provided shareholders with additional details and obtained ratification, but the Court of Chancery refused to revise its ruling.[4] Shortly afterward, Tesla officially reincorporated in Texas, while Musk's social media proclaimed: "Companies should get the hell out of Delaware."[5]

Several corporations have taken similar steps. Beyond Tesla, Musk reincorporated SpaceX in Texas and Neuralink in Nevada. In early 2025, Bill Ackman's Pershing Square announced its relocation to Nevada.[6] Other public companies—including Roblox Corporation,[7] Madison Square Garden Entertainment Corp., and Madison Square Garden Sports Corp.[8]—have announced plans to redomesticate in Nevada, citing litigation costs, statutory changes, or Delaware's evolving judicial environment. While there is no evidence of a mass exodus from Delaware, recent reincorporations suggest Tesla's move may be the beginning of a broader shift towards jurisdictions offering greater protections for boards and executives.

III. TEXAS

New Texas laws will reshape its corporate litigation.

House Bill 19 created a specialized Texas Business Court, modeled on Delaware's Court of Chancery, with five of eleven planned forums currently active.[9] Unlike Texas's elected district judges, Business Court judges are appointed by the governor for two-year terms, subject to senate confirmation.[10] **House Bill 40** expanded the Business Court's jurisdiction by lowering the threshold for claims from $10 million to $5 million and including intellectual property, trade secret, and arbitration enforcement cases.[11]

Senate Bill 29 codified the business judgment rule,[12] allowing certain corporations[13] to opt into statutory presumptions that officers and directors act in good faith, on an informed basis, in furtherance of corporate interests, and in compliance with the law and governing documents.[14] Shareholders must rebut these presumptions, and prove a breach involving fraud, intentional misconduct, ultra vires acts, or knowing violations of law.[15]

Access to company books and records is also more limited than in Delaware. Shareholders must hold at least five percent of outstanding shares ***or*** have owned stock for six months prior to demanding inspection.[16] Even then, emails, texts, and social media communications are excluded unless they effectuate formal corporate action.[17] The statute further states that a proper purpose does not exist if the corporation reasonably determines that the demand is related to "an active or pending derivative proceeding" that "is ***or is expected to be instituted or maintained***" by the shareholder.[18] This language makes inspection demands riskier if litigation is contemplated.

Texas also permits certain corporations to impose minimum ownership requirements, up to three percent, before a shareholder may bring a derivative action.[19] Additional reforms allow governance documents to waive jury trials for certain "internal disputes," and restrict attorneys' fee recoveries in disclosure-only settlements.[20,21] Seemingly in response to the Tesla matter, safe harbor protections for conflicted transactions were strengthened, authorizing boards to form a committee of disinterested and independent directors to approve deals, and seek court approval before the transaction is closed.[22]

IV. NEVADA

Like Texas, Nevada legislators have proposed a constitutional amendment to establish a specialized business court with appointed judges.[23] Also, in May 2025, Nevada enacted **Assembly Bill 239** ("AB 239"), which mirrors some Texas reforms. Corporations may now opt into bench trials for derivative and breach of fiduciary duty claims.[24] Access to books and records is highly constrained: shareholders must own at least fifteen percent of outstanding shares[25] and are limited to "books of account and financial statements."[26] Board minutes and materials are unavailable, making it difficult to uncover fiduciary breaches. AB 239 also shields controlling shareholders by presuming no breach of duty if a disinterested committee of directors approves the subject transaction.[27]

Nevada's statutory business judgment rule further insulates directors and officers, presuming they act in good faith, on an informed basis, and in

the corporation's interests.[28] They cannot be held personally liable unless shareholders rebut the presumption and show intentional misconduct, fraud, or knowing violations of law.[29] Gross negligence does not support a claim,[30] and no exceptions apply.[31] These provisions make Nevada attractive to corporations seeking stronger protection from liability. Venture capital firm Andreessen Horowitz reincorporated there, citing Nevada's business judgment rule and inspection limits as deterrents to "fishing expeditions" and frivolous suits.[32] Investors expecting rigorous oversight should be wary. Unlike Delaware, Nevada has little case law interpreting these provisions, leaving investors uncertain how courts will apply them in practice.

V. DELAWARE

Delaware responded with reforms of its own. **Senate Bill 21** narrowed the scope of its books and records statute.[33] Stockholders may obtain specific materials, such as board and committee minutes and related materials, records of director actions, and independence questionnaires.[34] Other documents require a court order supported by clear and convincing evidence of compelling need, described with particularity, and tied to a proper purpose.[35] For investors, these revisions narrow the scope of pre-filing investigatory tools and expand management's defenses, making it more difficult to obtain the kind of evidence that has historically underpinned successful fiduciary duty claims.

Senate Bill 21 also revised Section 144's "safe harbor" for conflicted transactions to require application of the business judgment rule (versus the more rigorous "entire fairness" standard) if such transactions are approved by ***either*** an informed majority of disinterested directors acting in good faith or an informed majority of disinterested shareholders.[36] This resolves prior ambiguity suggesting ***both*** criteria were necessary to obtain business judgment protection.[37] Additionally, safe harbor protections now extend to cover equitable challenges, such as fiduciary duty claims. The safe harbor applies where a board of directors ratifies the action after being advised of the material facts regarding the director's interest, ensuring decisions are made on an informed basis.[38] Alternatively, the action must be fair to the corporation.[39]

VI. CONCLUSION

State law decisively shapes the balance of power between corporate boards and shareholders in the U.S. Following a controversial legal battle involving a high-profile CEO (Musk), a power struggle has emerged among the states—most notably Delaware, Texas, and Nevada—as they revise corporate laws to attract incorporations and assert legal dominance. Delaware has updated key statutes to clarify related-party transactions and shareholder rights, while Texas aggressively courts businesses with its new Business Court, codified protections for directors, and stricter thresholds for shareholder claims. With each state reshaping fiduciary duty, governance, and inspection standards, investors and corporate leaders must now weigh legal jurisdictions more carefully than ever before when assessing shareholder protections and corporate accountability. For European institutions with long-term holdings in U.S. equities, these jurisdictional shifts underscore the need not only to monitor portfolio companies, but also to anticipate how changes in state law may affect the enforcement of shareholder rights. It is also critical that investors select highly qualified and determined securities litigation counsel who understand the complexities and pitfalls inherent in protecting investors' rights, and who are adept at navigating the maze of each jurisdiction of incorporation.

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[5]See Elon Musk, X.COM (Aug. 19, 2024, 3:29 AM), https://x.com/elonmusk/status/1825450020721569893?lang=en.
[6]FINANCIAL TIMES, *Delaware faces challenge as U.S. firms eye Nevada and Texas for incorporation* (Mar. 17, 2025), https://www.ft.com/content/a5ce9b83-1551-4718-9a54-3fa23370f15d.
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[11]*See* Nossaman, LLP, NOSSAMAN EALERT, *Delaware, Nevada or Texas – Which State's Corporation Statute Will Reign Supreme?* (June 30, 2025), https://www.nossaman.com/newsroom-insights-delaware-nevada-or-texas-which-states-corporation-statute-will-reign-supreme.
[12]Tex. Bus. Orgs. Code § 21.419.
[13]Tex. Bus. Orgs. Code § 21.419(a).
[14]Tex. Bus. Orgs. Code § 21.419(c).
[15]Tex. Bus. Orgs. Code § 21.419(d).
[16]Tex. Bus. Orgs. Code § 21.218(b).
[17]*Id.*
[18]Tex. Bus. Orgs. Code § 21.218(b-2) (emphasis added).
[19]Tex. Bus. Orgs. Code § 21.552(a)(3).
[20]*See* Nossaman, LLP, *supra*; *see also* Tex. Bus. Orgs. Code § 21.116.
[21]Tex. Bus. Orgs. Code § 21.561(c); § 101.461(c); § 153.411(c).
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[24]Nev. Rev. Stat. § 78.046.
[25]Nev. Rev. Stat. § 78.257.
[26]Nev. Rev. Stat. § 78.257(1).
[27]Schwartz, *supra*.
[28]Nev. Rev. Stat. § 78.138(3).
[29]*See* Nev. Rev. Stat. § 78.138(7). However, the revised statute does allow for liability pursuant to specific statutory carveouts and permits the company's articles of incorporation to allow greater individual liability.
[30]*Chur v. Eighth Judicial Dist. Court of Nev.*, 136 Nev. 68, 71-73, 458 P.3d 336, 339-40 (2020).
[31]*Guzman v. Johnson*, 137 Nev. 126, 127, 483 P.3d 531, 534 (2021).
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[33]8 *Del. C.* § 220(a)(1).
[34]8 *Del. C.* § 220(a)(1)(e) through (g), inclusive.
[35]8 *Del. C.* § 220(g).
[36]8 *Del. C.* § 144.
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[38]*Id.*
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