ARTICLE

TEXAS'S ATTEMPT TO COMPETE WITH DELAWARE

Robert A. Ragazzo[*]

INTRODUCTION 470
I. TEXAS'S ATTEMPT TO COMPETE WITH DELAWARE'S ENABLING PHILOSOPHY OF CORPORATE GOVERNANCE 474
  A. *Delaware's Approach to Corporate Governance* 474
  B. *Texas's Traditional Approach to Corporate Governance* 479
  C. Tornetta v. Musk 484
  D. *The Delaware Legislature Reacts to the* Musk *Decision* 487
  E. *Texas Aggressively Counters Delaware* 491
    1. Limiting Liability for Breach of Fiduciary Duty 491
      a. *Duty of Care* 492
      b. *Duty of Loyalty* 493
      c. *Duty of Obedience* 493
      d. *Approval of Self-dealing Transactions by Disinterested Directors* 494
    2. Limiting the Right to Inspect Corporate Books and Records 494
    3. Shareholder Proposals 496
    4. Proxy Advisory Firms 498
    5. Derivative Suits 501
  F. *Summary* 503
II. TEXAS'S ATTEMPT TO CREATE A SPECIALIZED BUSINESS JUDICIARY 504
  A. *The Business Court* 504
  B. *The Fifteenth Court of Appeals* 507
  C. *Assessing Texas's Progress* 508
III. DELAWARE'S CASELAW ADVANTAGE 510

* University of Houston Law Foundation Professor of Law, University of Houston Law Center.

A. The Duty of Oversight 511
B. Freezeout Transactions 515
C. Takeover Defense 520
CONCLUSION 528

INTRODUCTION

Delaware corporate law has swept the nation. Although it was once fashionable to suggest that federal incorporation should replace the competition among states to attract corporate business, that approach has faded.[1] Over two-thirds of all Fortune 500 companies are incorporated in Delaware.[2] Although critics may dispute whether the states are racing to the top[3] or the

1. Proposals for federal regulation of corporations have a long history. In William W. Bratton, *A History of Corporate Law Federalism in the Twentieth Century*, 47 SEATTLE U. L. REV. 781 (2024), the author surveys these attempts from 1888 to 2002. He identifies three periods when there was substantial enthusiasm for federal licensing of corporations or control over incorporation. First, during the trust-busting era of the early twentieth century, Congressional bills proposed the federal licensing of large firms that included restrictions on corporate size, lines of business, and mergers. *See id.* at 790–91. Professor Bratton notes that "the clamor for national level corporate law reform abated after 1914." *Id.* at 791. Second, during the New Deal era, bills were introduced into Congress that proposed federal incorporation, but this effort abated by 1941. *See id.* at 798–99. Third, in the 1970s, Professor William L. Cary published an indictment of the pro-managerial tilt of the Delaware legislature and courts. Although he stopped short of proposing federal incorporation, he proposed minimum federal standards for corporate governance. *See* William L. Cary, *Federalism and Corporate Law: Reflections on Delaware*, 83 YALE L.J. 663 (1974). Then, in 1976, three authors proposed federal incorporation of non-financial companies with 10,000 or more employees and sales revenues exceeding $250 million. *See* RALPH NADER, MARK J. GREEN & JOEL SELIGMAN, TAMING THE GIANT CORPORATION 118–31, 240 (1976). As Professor Bratton notes, these efforts ended with the advent of the Reagan administration. *See* Bratton, *supra*, at 813. It took until 2018 for another bill proposing federal incorporation to be introduced into Congress, this time by Senator Elizabeth Warren. *See id.* at 813 & n.204. However, by this late date, it was unlikely that this type of bill has any realistic chance to become law.

2. *See* Jonathan Macey, *Finance Without Government: Financial Regulation in an Age of Political Unrest*, 19 J.L. ECON. & POL'Y 241, 258 (2024).

3. Law and economics scholars argue that market forces require managers to select the jurisdiction of incorporation that offers the most efficient corporate rules and is, therefore, the jurisdiction that maximizes share values. *See* Robert

bottom[4] in copying Delaware, it is reasonably clear that Delaware is winning the race.[5]

There are three principal reasons that explain Delaware's prominence as an incorporation jurisdiction of choice. First, Delaware has an enabling philosophy of corporate governance.[6] It

---

Daines, *Does Delaware Law Improve Firm Value?*, 62 J. FIN. ECON. 525, 527–31 (2001); Roberta Romano, *Law as a Product: Some Pieces of the Incorporation Puzzle*, 1 J.L. ECON. & ORG. 225, 265–73 (1985); Ralph K. Winter, Jr., *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 J. LEGAL STUD. 251 (1977); *see also* FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 222 (1991) (arguing that, although the competition for incorporations may not make state law entirely efficient, "competition creates a powerful tendency for states to enact laws that operate to the benefit of investors").

4. Proponents of the race-to-the-bottom theory argue that, in the absence of federal regulation, states have no choice but to compete with Delaware in relaxing corporate regulations to make their jurisdictions attractive to managers who make incorporation decisions. *See* Oren Bar-Gill, Michal Barzuza & Lucian Bebchuk, *The Market for Corporate Law*, 162 J. INST. & THEOR. ECON. 134, 137–41 (2006); Cary, *supra* note 1, at 705; *see also* Lucian A. Bebchuk, *Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law*, 105 HARV. L. REV. 1437, 1509–10 (1992) (concluding that state competition is undesirable where the interests of managers and controlling shareholders diverge from the interests of public shareholders or the public at large).

5. *See* Brian J. Broughman & Darian M. Ibrahim, *Delaware's Familiarity*, 52 SAN DIEGO L. REV. 273, 275 (2015) (noting that "Delaware is no doubt winning the 'race' for incorporations, long beating other states, and holding the federal government at bay as well") (citations omitted); Jill E. Fisch, *The Peculiar Role of the Delaware Courts in the Competition for Corporate Charters*, 68 U. CIN. L. REV. 1061, 1061–62 (2000) (concluding that "[w]hether the competition is described as a race to the bottom or a race to the top, Delaware emerges as the undisputed winner"). In Mark J. Roe, *Delaware's Competition*, 117 HARV. L. REV. 588 (2003), the author challenges the idea that Delaware has won the corporate law race and argues that much corporate regulation occurs at the federal level: "[W]e live in a federal system where Washington can, and often does, take over economic issues of national importance. . . . That happened for securities trading during the Depression, takeovers in the early 1980s, and corporate governance after the Enron and WorldCom scandals." *Id.* at 591.

6. *See* Lawrence A. Cunningham, *Who Are Quality Shareholders and Why You Should Care*, 47 DEL. J. CORP. L. 575, 577 (2023) (observing that "Delaware corporate law is enabling"); Melvin A. Eisenberg, *The Structure of Corporation Law*, 89 COLUM. L. REV. 1461, 1481 (1989) (noting that "Delaware is usually taken as the apotheosis of enabling statutes"); Tom C.W. Lin, *The New Corporate Political Governance*, 65 B.C. L. REV. 833, 896 (2024) (arguing that "[t]he beauty of

seeks to facilitate corporate transactions rather than to regulate corporations to ensure fairness for stockholders or the public.[7] Second, Delaware has a talented judiciary with substantial business expertise.[8] Third, Delaware has a greater volume of corporate caselaw than any other jurisdiction. This serves to increase certainty with respect to the content of corporate law for the benefit of managers and transaction planners.[9]

---

the Delaware model is that it. . . allows entrepreneurs and executives to govern their respective businesses nimbly"); Larry E. Ribstein, *Limited Liability and Theories of the Corporation*, 50 MD. L. REV. 80, 123 n.192 (1991) (noting that "Delaware has fashioned what is predominantly an enabling statute that accommodates rather than restricts private ordering").

7. *See* Edward B. Rock, *Saints and Sinners: How Does Delaware Corporate Law Work?*, 44 UCLA L. REV. 1009, 1101 (1997) (contrasting the Delaware enabling model with a regulatory approach that, at its extreme, prohibits anything not expressly permitted by the corporation statute).

8. *See* Jonathan R. Macey, *Federal Deference to Local Regulators and the Economic Theory of Regulation: Toward a Public-Choice Explanation of Federalism*, 76 VA. L. REV. 265, 278 (1990) (observing that Delaware has "a judiciary with particularized experience and expertise in corporate law"); Kresimir Pirsl, *Trends, Developments, and Mutual Influences Between United States Corporate Law(s) and European Community Company Law(s)*, 14 COLUM. J. EUR. L. 277, 305 (2008) (noting that "[s]ome see the quality of the Delaware judiciary as the prime reason why corporations incorporate in Delaware"); Faith Stevelman, *Regulatory Competition, Choice of Forum, and Delaware's Stake in Corporate Law*, 34 DEL. J. CORP. L. 57, 130–31 (2009) (identifying the expertise of the Delaware judiciary as "fostering the state's leading reputation in corporate law"). *But see* Kent Greenfield, *Law, Politics, and the Erosion of Legitimacy in the Delaware Courts*, 55 N.Y.L. SCH. L. REV. 481, 483 (2010-11) (offering "a contrary perspective on [the] assertion of Delaware courts' expertise" and concluding that "their corporate law jurisprudence, especially over the last decade, has drifted toward incoherence").

9. *See* EASTERBROOK & FISCHEL, *supra note* 3, at 213 (citing Delaware's "large body of precedents" as one of the reasons for its success in attracting corporations); Jens C. Dammann, *Freedom of Choice in European Corporate Law*, 29 YALE J. INT'L L. 477, 526 n.245 (2004) (pointing to "Delaware's rich body of precedents" as "an important factor in attracting foreign corporations"); Eisenberg, *supra* note 6, at 1512 (noting that Delaware's "rich body of case-law . . . facilitates planning and dispute-settlement"); Renee M. Jones, *Rethinking Corporate Federalism in the Era of Corporate Reform*, 29 J. CORP. L. 625, 638–39 (2004) (emphasizing Delaware's extensive body of corporate caselaw as a reason for Delaware's dominance in the incorporation field).

Delaware derives substantial economic benefits from attracting incorporation business.[10] Other states have sought to receive a share of these economic benefits.[11] Texas is among them. Part I of this article will consider Texas's attempt to copy Delaware's enabling philosophy. It will conclude that, although the Texas courts have not always shared Delaware's enabling view, the Texas legislature has historically done its best to place Texas on a par with Delaware in terms of its enabling philosophy of corporate governance. In recent times, the Texas legislature has actually outdone the Delaware legislature in creating a pro-managerial corporate environment. Part II of this article will consider Texas's attempt to create specialized business tribunals to deal with corporate matters in an effort to create a professional business judiciary that will rival Delaware's. This part will conclude that the creation of these tribunals is a step in the right direction but will not necessarily place the Texas courts on the same level as Delaware's.

The real problem with competing with Delaware for incorporation business involves the third of Delaware's basic advantages. Delaware has well developed bodies of law in most important corporate areas. Despite its status as the second most populous state in the country, Texas has a relative dearth of corporate caselaw when compared to Delaware. Part III of this article will demonstrate that there are significant areas where Texas caselaw provides little or no guidance. This Delaware advantage will take significant time to overcome, if it can ever be overcome. Thus, there is reason to question whether Texas, or any other state, can successfully compete with Delaware to become the incorporation jurisdiction of choice.

---

10. Delaware receives over one quarter of its revenue from incorporation fees and franchise taxes. *See* Pierluigi Matera, *Delaware's Dominance, Wyoming's Dare: New Challenge, Same Outcome?*, 27 FORDHAM J. CORP. & FIN. L. 73, 85 (2022).

11. Nevada, for example, has attempted to become the Delaware of the West. *See* Marcel Kahan & Ehud Kamar, *The Myth of State Competition in Corporate Law*, 55 STAN. L. REV. 679, 693 (2002).

I. TEXAS'S ATTEMPT TO COMPETE WITH DELAWARE'S ENABLING PHILOSOPHY OF CORPORATE GOVERNANCE

A. Delaware's Approach to Corporate Governance

Delaware's status as the incorporation jurisdiction of choice has much to do with its enabling philosophy of corporate governance. Delaware's mission is to aid managers in running their enterprises and to facilitate transactions by subjecting them to the fewest restrictions. Unlike regulatory jurisdictions, Delaware is less concerned about safeguarding shareholder rights or protecting the rights of the public.

The best example of Delaware's enabling philosophy involves its rejection of the de facto merger doctrine. In the famous case of *Hariton v. Arco Electronics, Inc.*,[12] Arco Electronics, Inc., a Delaware corporation, sold all of its assets to Loral Electronics Corp. a New York corporation, in exchange for 283,000 Loral shares. Arco then dissolved and distributed the 283,000 Loral shares to its shareholders.[13] At the end of the day, Loral owned the businesses of both companies and was owned by the shareholders of both companies.

The transaction planners no doubt crafted the form of the transaction so that it could be accomplished under Section 271(a) of the Delaware General Corporation Law ("DGCL"),[14] which requires a shareholder vote in connection with the sale of all or substantially all of a corporation's assets but does not grant dissenting shareholders appraisal rights.[15] As the Delaware Supreme Court noted, "The several steps taken here accomplish the same result as a merger of Arco into Loral."[16] Had Arco merged into Loral, the transaction would have been governed by Section

12. 188 A.2d 123 (Del. 1963).
13. *See id.* at 124.
14. DEL. CODE ANN. tit. 8, § 271(a) (2010).
15. *See id.* § 262(b). Presumably, Arco was the selling corporation because if Loral had been the selling corporation its shareholders would have received both voting and appraisal rights under New York law. *See* N.Y. BUS. CORP. LAW §§ 909(a)(3), 910(a)(1)(B) (McKinney 2025).
16. *Hariton*, 188 A.2d at 124.

251 of the DGCL.[17] Pursuant to that section, the Arco shareholders would have had voting and appraisal rights.[18]

The plaintiff was an Arco shareholder who argued that the sale-of-assets transaction was a de facto merger and that appraisal rights should have been available in connection with the transaction.[19] Arguably, the Delaware legislature intended shareholders to have appraisal rights in any transaction that was the equivalent of a merger. The Delaware Supreme Court rejected the plaintiff's argument that the transaction should be treated as merger. In what has become an iconic statement, the court declared:

> We now hold that the reorganization here accomplished through § 271 and a mandatory plan of dissolution and distribution is legal. This is so because the sale-of-assets statute and the merger statute are independent of each other. They are, so to speak, of equal dignity, and the framers of a reorganization plan may resort to either type of corporate mechanics to achieve the desired end.[20]

The principle of independent legal significance espoused by the court is contrary to standard principles of statutory construction. We normally construe a statute as an integrated whole, rather than construing sections of the statute in isolation. We normally

---

17. DEL. CODE ANN. tit. 8, § 251 (2020).

18. *See id.* §§ 251(c), 262(b) (2023).

19. Since shareholders of a corporation purchasing all of the assets of another corporation receive neither voting nor appraisal rights, the plaintiff might well have been a Loral shareholder complaining that Loral's shareholders received neither right.

20. *Hariton*, 188 A.2d at 125. As the court noted, the doctrine of independent legal significance had its genesis in a pair of Delaware decisions holding that "the elimination of accrued dividends, though forbidden under a charter amendment . . . may be accomplished by a merger." *Id.* at 125 (citing Keller v. Wilson & Co., 190 A. 115 (Del. 1936); Federal United Corp. v. Havender, 11 A.2d 331 (Del. 1940)). In *Orzeck v. Engelhart*, 195 A.2d 375 (Del. 1963), the Delaware Supreme Court consistently rejected the application of the de facto merger doctrine in connection with a stock-for-stock acquisition. By contrast, the de facto merger doctrine has been adopted by a number of courts from other states. *See* Pratt v. Ballman-Cummings Furniture Co., 495 S.W.2d 509, 510 (Ark. 1973); Rath v. Rath Packing Co., 136 N.W.2d 410, 415 (Iowa 1965); Applestein v. United Board & Carton, 159 A.2d 146, 152-53 (N.J. Super. Ct. Ch. Div. 1960), *aff'd*, 161 A.2d 474 (N.J. 1960); Farris v. Glen Alden Corp., 143 A.2d 25, 31 (Pa. 1958).

do not allow the use of one section to accomplish a complete end run around another section.[21] The principle of independent legal significance violates this standard. Yet, the principle has a policy basis. It facilitates transactions by providing certainty to transaction planners. Transaction planners know what rules will apply based on the form of the transaction they have utilized. They do not have to live in fear that a court will recharacterize the transaction and hold that it is illegal because it fails to comply with a different set of rules. This is the very policy relied upon by the Delaware Supreme Court: "To attempt to make any such distinction between sales under § 271 would be to create uncertainty in the law and invite litigation."[22]

In an ordinary merger, the surviving entity succeeds to all of the assets and all of the liabilities of all the constituent entities to the merger.[23] Therefore, some courts have held that the de facto merger doctrine, and similar doctrines, may subject the purchasing corporation in a sale-of-assets transaction to the liabilities of the seller.[24] In *Spring Real Estate, LLC v. Echo/RT Holdings, LLC,*[25] the court noted that Delaware accepts very narrow interpretations of these doctrines:

> When courts have recognized de facto mergers, application of the doctrine requires a corporation to have transfer[red] all of its assets to another, in exchange for stock consideration issued by the transferee directly to the shareholders of the

---

21. *See* 2A Norman J. Singer & J.D. Shambie Singer, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 46:5 (7th ed. 2023) ("A statute is passed as a whole and not in parts or sections and is animated by one general purpose and intent. Consequently, each part or section of a statute should be construed in connection with every other part or section to produce a harmonious whole. Thus, it is not proper to confine interpretation to the one section to be construed." (citations omitted)).

22. *Hariton*, 188 A.2d at 125.

23. *See* DEL. CODE ANN. tit. 8, § 259(a) (2025).

24. In *Ramirez v. Amsted Indus., Inc.*, 431 A.2d 811 (N.J. 1981), the court noted that purchasing corporations in sale-of-assets transactions have been held to be liable under the de facto merger doctrine or the theory that the purchasing corporation is a mere continuation of the selling corporation. *See id.* at 816. However, the court ultimately found these doctrines too limiting and adopted the view of *Ray v. Alad Corp.*, 560 P.2d 3 (Cal. 1977), that a corporation which purchases a line of business assumes the liabilities that the selling corporation had in connection with that line of business. *See Ramirez*, 431 A.2d at 820.

25. C.A. No. 7994-VCN, 2013 WL 6916277 (Del. Ch. Dec. 31, 2013).

> transferring corporation, and the transferee [to have] agree[d] to assume all the debts and liabilities of the transferor. . . .
>
> . . . . [The continuation theory] has been construed very narrowly to require the purchaser of the assets to be a continuation of the same legal entity, not just a continuation of the same business in which the seller of the assets engaged. The primary elements of being the same legal entity have been said to include the common identity of the officers, directors, or stockholders of the predecessor and successor corporations, and the existence of only one corporation at the completion of the transfer."[26]

Thus, although the Delaware courts have not rejected the de facto merger in absolutist fashion in the context of creditors' rights, they have left very little room for its application. The de facto merger doctrine requires that the purchasing corporation have agreed to assume all of the debts and liabilities of the selling corporation. In that event, there is really no need to apply the de facto merger doctrine. A court can simply enforce the parties' contract and does not need to reference the de facto merger doctrine to protect the rights of creditors. When one corporation purchases another's assets, it rarely if ever has the same officers, directors and stockholders as the selling corporation. Indeed, if this is the case, the transaction appears to be simply a fraudulent attempt to avoid liability rather than an actual sale of assets.

In addition to adopting the principle of independent legal significance, the Delaware Courts also exhibit an enabling philosophy by espousing the view that implicit limitations should not be attached to statutory language. If the DGCL does not prohibit something, it should generally be allowed. For example, in *Providence & Worcester Co. v. Baker*,[27] the Delaware Supreme Court upheld a voting scheme in which every common shareholder received one vote for each of his first fifty shares and one vote for every block of twenty shares thereafter—a scheme that limited a 28% shareholder to 3% of the voting power.[28] In allowing the voting structure, the court rejected the argument that

26. *Id.* at *5 (internal citations and quotations omitted).

27. 378 A.2d 121 (Del. 1977).

28. *See* Baker v. Providence & Worcester Co., 364 A.2d 838, 840–41 (Del. Ch. 1976), *rev'd*, 378 A.2d 121 (Del. 1977).

Section 151(a) of the DGCL[29] made the weighted scheme invalid because it implies all shares of the same class must have uniform rights. The court emphasized that there was not "any express provision in §151(a), or elsewhere in the Law, prohibiting . . . charter restrictions on voting."[30]

Similarly, in *Moran v. Household International, Inc.*,[31] the Delaware Supreme Court approved the adoption of a poison pill rights plan. The poison pill rights were issued as a dividend pursuant to Section 157 of the DGCL.[32] In the event that anyone owning 20% or more of Household's stock effected a business combination with Household, the flip-over provision of the rights gave Household shareholders the ability to purchase the acquiring person's stock at half price.[33] The plaintiffs argued that the rights plan was invalid because Section 157 was intended to authorize the issuance of rights for financing purposes rather than for the purpose of creating a takeover defense. The Delaware Supreme Court disagreed:

> [Plaintiffs] are unable to demonstrate that the legislature, in its adoption of § 157, meant to limit the applicability of § 157 to only the issuance of Rights for the purposes of corporate financing. Without such affirmative evidence, we decline to impose such a limitation upon the section that the legislature has not.[34]

It is not true, however, that Delaware takes the most enabling, pro-management view on all issues. For example, in connection with takeover defense, Delaware applies a standard of judicial review that is intermediate between the business judgment rule and the entire fairness test.[35] Although Delaware law on takeover defense has been influential,[36] there are states that reject the

29. DEL. CODE ANN. tit. 8, § 151(a) (2017).
30. *Baker*, 378 A.2d at 123.
31. 500 A.2d 1346 (Del. 1985).
32. DEL. CODE ANN. tit. 8, § 157 (2023).
33. *Household*, 500 A.2d at 1349.
34. *Id.* at 1351.
35. *See infra* Part III.C.
36. *See, e.g.*, Dynamics Corp. of Am. v. CTS Corp., 794 F.2d 250, 253 (7th Cir. 1986) (noting that "Indiana takes its cues in matters of corporation law from the Delaware courts"), *rev'd on other grounds*, 481 U.S. 69 (1987); Amanda Acquisition

Delaware approach and provide that the business judgment rule applies to takeover defense decisions.[37] Moreover, once a target company's board decides to sell the company, the board must attempt to generate the highest possible sale price for the benefit of shareholders and may not consider the interests of non-shareholder constituencies.[38] Yet, the proscription against considering the interests of non-shareholder constituencies in the sale context has been overruled by statute in a majority of states.[39]

B. Texas's Traditional Approach to Corporate Governance

Texas has generally been successful in emulating Delaware's enabling philosophy of corporate governance. For example, Texas caselaw once accepted the de facto merger doctrine in the

---

Corp. v. Universal Foods Corp., 708 F. Supp. 984, 1009 (E.D. Wis.) (predicting that "a Wisconsin court would apply the *Unocal* standard for reviewing a board's actions in connection with a hostile takeover offer"), *aff'd on other grounds*, 877 F.2d 496 (7th Cir.), *cert. denied*, 493 U.S. 955 (1989).

37. *See* MD. CODE ANN., Corps. & Ass'ns § 2-405.1(h) (West 2016) ("An act of a director of a corporation relating to or affecting an acquisition or a potential acquisition of control of the corporation or any other transaction or potential transaction involving the corporation may not be subject to a higher duty or greater scrutiny than is applied to any other act of a director."); OHIO REV. CODE ANN. § 1701.59(D)(1)(a) (West 2021) ("A director shall not be found to have violated the director's duties . . . unless it is proved by clear and convincing evidence that the director has not acted in good faith, in a manner the director reasonably believes to be in or not opposed to the best interests of the corporation, or with the care that an ordinarily prudent person in a like position would use under similar circumstances, in any action brought against a director, including actions involving or affecting . . . [a] change or potential change in control of the corporation, including a determination to resist a change or potential change in control"); 15 PA. STAT. AND CONS. STAT. ANN. § 1715(d) (West 2023) ("[A]ny act as the board of directors, a committee of the board or an individual director relating to or affecting an acquisition or potential or proposed acquisition of control to which a majority of the disinterested directors shall have assented shall be presumed to satisfy [legal standards], unless it is proven by clear and convincing evidence that the disinterested directors did not assent to such act in good faith after reasonable investigation.").

38. *See infra* Part III.C.

39. *See* John H. Matheson & Brent A. Olson, *Shareholder Rights and Legislative Wrongs: Toward Balanced Takeover Legislation*, 59 GEO. WASH. L. REV. 1425, 1540–44 (1991) (collecting statutes).

creditors' rights context.[40] A subsequent Texas statute reversed this result and provides: "A disposition of all or part of the property of a [Texas corporation], regardless of whether the disposition requires the approval of the [corporation's shareholders], is not a merger or conversion for any purpose."[41] Thus, Texas has now squarely rejected the de facto merger doctrine in both the shareholders' rights and the creditors' rights contexts. Moreover, the 2023 amendments to the Texas Business Organizations Code adopt the doctrine of independent legal significance as Texas law.[42]

There are areas in which Texas law favors management more than Delaware law. For example, in Delaware "in order to state a claim for piercing the corporate veil . . . [the plaintiffs] must show (1) that the corporation and its shareholders operated as a single economic entity, and (2) that an overall element of injustice or

40. *See* W. Res. Life Ins. Co. v. Gerhardt, 563 S.W.2d 783, 787 (Tex. Civ. App. 1977).

41. TEX. BUS. ORGS. CODE ANN. § 10.254(a) (West 2007). The statute also provides: "[A] person acquiring property described by this section may not be held responsible or liable for a liability or obligation of the transferring [Texas corporation] that is not expressly assumed by the person." *Id.* § 10.254(b). The courts take seriously the command that a purchaser must "expressly assume" the selling corporation's liabilities. *See* Northland Indus., Inc. v. Kouba, 620 S.W.3d 411, 418 (Tex. 2020) (a "[b]uyer's express assumption of the written warranty for repair or replacement of defective treadmill parts was not an assumption of a warranty of merchantability implied by law"); Sitaram v. Aetna U.S. Healthcare of N. Tex., Inc., 152 S.W.3d 817, 828 (Tex. App. 2004) (an implication from a definition in a contract could not establish an express assumption of liabilities); C.M. Asfahl Agency v. Tensor, Inc., 135 S.W.3d 768, 781 (Tex. App. 2004) (an agreement purporting to bind successors and assigns is ineffective to transfer liability to an asset purchaser); Koll Real Est. Grp., Inc. v. Howard, 130 S.W.3d 308, 315 (Tex. App. 2004) (an indemnity obligation does not constitute express assumption of liabilities).

42. *See* TEX. BUS. ORGS. CODE ANN. § 1.055 (West 2023).

unfairness is present."[43] This standard is similar to the law in other jurisdictions.[44]

Texas, by contrast, is one of the most difficult states in the nation in which to pierce the corporate veil. Although the Texas

---

43. Trevino v. Merscorp, Inc., 583 F. Supp. 2d 521, 528 (D. Del. 2008) (Delaware law) (internal quotation omitted). In *Alberto v. Diversified Grp., Inc.*, 55 F.3d 201, 205 (5th Cir. 1995), the Fifth Circuit gave the same list of Delaware veil-piercing factors. Whether a corporation and its shareholders operate as a single economic entity involves the consideration of seven factors: "(1) undercapitalization; (2) failure to observe corporate formalities; (3) nonpayment of dividends; (4) the insolvency of the debtor corporation at the time; (5) siphoning of the corporation's funds by the dominant stockholder; (6) absence of corporate records; and (7) the fact that the corporation is merely a facade for the operations of the dominant stockholder or stockholders." *Trevino*, 583 F. Supp. 2d at 528–29. A plaintiff must also prove that the use of the corporate form was abused to the detriment of creditors. *See In re* Verizon Ins. Coverage Appeals, 222 A.3d 566, 577 (Del. 2019) ("The alter ego doctrine is used to pierce the corporate veil when a corporation has created a sham entity designed to defraud investors and creditors." (internal quotation omitted)); Crosse v. BCBSD, Inc., 836 A.2d 492, 497 (Del. 2003) ("To state a veil-piercing claim, the plaintiff must plead facts supporting an inference that the corporation, through its alter-ego, has created a sham entity designed to defraud investors and creditors."); *see also Alberto*, 55 F.3d at 206 ("Although the plaintiffs are understandably disappointed that some of their judgments . . . may go unpaid, that is clearly not the kind of unfairness or injustice that will satisfy Delaware law and provoke disregard of the corporate form"); *Trevino*, 583 F. Supp. 2d at 530 ("Limiting one's personal liability is a traditional reason for a corporation. Unless done deliberately, with specific intent to escape liability for a specific tort or class o[f] torts, the cause of justice does not require disregarding the corporate entity.")

44. *See, e.g.*, Sonora Diamond Corp. v. Superior Ct., 99 Cal. Rptr. 2d 824, 836 (Cal. Ct. App. 2000) (holding that to pierce the corporate veil, "there must be such a unity of interest and ownership between the corporation and its equitable owner that the separate personalities of the corporation and the shareholder do not in reality exist," and "there must be an inequitable result if the acts in question are treated as those of the corporation alone"); *see also* McKissick v. Auto-Owners Ins. Co., 429 So. 2d 1030, 1033 (Ala. 1983); Elliott v. Brown, 569 P.2d 1323, 1326 (Alaska 1977); Minton v. Cavaney, 364 P.2d 473, 475 (Cal. 1961); Lunneborg v. My Fun Life, 421 P.3d 187, 200 (Idaho 2018); Blue Star Corp. v. CFK Props., LLC, 980 A.2d 1270, 1281 (Me. 2009); S. Lumber & Coal Co. v. M.P. Olson Real Est. & Constr. Co., 426 N.W.2d 504, 508 (Neb. 1988); Coughlin Constr. Co. v. Nu-Tec Indus., 755 N.W.2d 867, 873 (N.D. 2008); O'Hazza v. Exec. Credit Corp., 431 S.E.2d 318, 321 (Va. 1993); Grayson v. Nordic Constr. Co., 599 P.2d 1271, 1273–74 (Wash. 1979); Gasstop Two, LLC v. Seatwo, LLC, 225 P.3d 1072, 1078 (Wyo. 2010).

Supreme Court once allowed extensive veil piercing based on constructive fraud,[45] the Texas legislature has taken steps to limit this approach. A statute now provides that a shareholder is not liable for "any contractual obligation of the corporation or any matter relating to or arising from the obligation on the basis that the holder, beneficial owner, subscriber, or affiliate is or was the alter ego of the corporation or on the basis of actual or constructive fraud, a sham to perpetrate a fraud, or other similar theory."[46] This statute does not preclude shareholder liability on a veil-piercing theory if a shareholder "caused the corporation to be used for the purpose of perpetrating and did perpetrate an actual fraud on the obligee primarily for the direct personal benefit of the "shareholder."[47] Therefore, although it is more difficult in

45. *See* Castleberry v. Branscum, 721 S.W.2d 270 (Tex. 1986).

46. TEX. BUS. ORGS. CODE ANN. § 21.223(a)(2) (West 2007).

47. *Id.* § 21.223(b). In Latham v. Burgher, 320 S.W.3d 602 (Tex. App. 2010), the court held that in the context of piercing the corporate veil, actual fraud is not equivalent to the tort of fraud. Instead, actual fraud involves "dishonesty of purpose or intent to deceive." *Id.* at 607. Latham involved a serious abuse of the corporate form to the detriment of creditors. *See id.* at 609 (Latham and his wife were a company's sole shareholders, distributed all of the company's profits to themselves over a four-year period, and dissolved the company and distributed its assets to themselves in anticipation of a lawsuit). To date, the cases finding actual fraud in the veil-piercing context have tended to involve similar abuses of the corporate form. *See, e.g.*, Plan B Holdings, LLC v. RSLLP, 681 S.W.3d 443, 464 (Tex. App. 2023) (finding actual fraud where when an owner found her business entity "threatened by creditors" and "moved that company's primary (or sole) asset . . . to a newly created or registered company"); Pelletier v. Victoria Air Conditioning, Ltd., No. 13-20-00011-CV, 2022 WL 52810, at *11 (Tex. App. Jan. 6, 2022) (sustaining a veil-piercing claim where the jury could reasonably infer that a principal intended to deceive a creditor so that it would be willing to contract with LLCs that were pass-through entities with no assets); Wylie v. Simmons, No. 02-19-00241-CV, 2020 WL 7776796, at *14 (Tex. App. Dec. 31, 2020) (holding that a fraudulent transfer of assets from an entity for the purpose of avoiding an obligation to a creditor constituted actual fraud); Tryco Enterps., Inc. v. Robinson, 390 S.W.3d 497, 510 (Tex. App. 2012) (finding actual fraud where a judgment debtor forfeited a corporation's charter and transferred assets to another entity after the judgment was rendered); *cf.* R & M Mixed Beverage Consultants, Inc. v. Safe Harbor Benefits, Inc., 578 S.W.3d 218, 232 (Tex. App. 2019) (finding no actual fraud where a company that procured an insurance policy sold its assets to another company and the insurer failed financially; the court found it significant that the insurer maintained an A-rating for a year and a half after the sale); Weaver & Tidwell, L.L.P. v. Guarantee

most states to pierce the veil in contract than in tort cases,[48] it is significantly more difficult in Texas. In addition, although failure to follow formalities is a veil-piercing factor in most states,[49] including Delaware,[50] it is not a factor in Texas.[51]

Another area in which Texas law has a more pro-management bias than Delaware law involves shareholder action by written consent. In Delaware, the default rule is that a shareholder may act by written consent in lieu of a shareholders meeting if those holding enough votes to pass a measure at a meeting sign the consent.[52] The written consent procedure has been used by insurgents to challenge management.[53] By contrast, the default

---

Co., 427 S.W.3d 559, 575 (Tex. App. 2014) (evidence that one corporation paid another's expenses and controlled its revenues and unfinished projects was insufficient to establish actual fraud).

48. *See, e.g.*, Northbound Grp., Inc. v. Norvax, Inc., 795 F.3d 647, 651–52 (7th Cir. 2015) (Illinois law); Perpetual Real Est. Servs., Inc. v. Michaelson Prop., Inc., 974 F.2d 545, 549–51 (4th Cir. 1992) (Virginia law); Co-Ex Plastics, Inc. v. Alapak, Inc., 536 So. 2d 37, 39 (Ala. 1988); Theberge v. Darbro, Inc., 684 A.2d 1298, 1303 (Me. 1996); *Coughlin Constr. Co.*, 755 N.W.2d at 876; Miller v. Dixon Indus. Corp., 513 A.2d 597, 604 (R.I. 1986).

49. *See* L.D.G., Inc. v. Brown, 211 P.3d 1110, 1126 (Alaska 2009); KDN Mgmt. v. WinCo Foods, LLC, 423 P.3d 422, 430 (Idaho 2018); C. Mac Chambers Co. v. Iowa Tae Kwon Do Acad., Inc., 412 N.W.2d 593, 598 (Iowa 1987); Riggins v. Dixie Shoring Co., 590 So. 2d 1164, 1168 (La. 1991); Hildreth v. Tidewater Equip. Co., 838 A.2d 1204, 1210 (Md. 2003); Snyder Elec. Co. v. Fleming, 305 N.W.2d 863, 868 n.1 (Minn. 1981); *S. Lumber & Coal Co.*, 426 N.W.2d at 509; Green v. Freeman, 749 S.E.2d 262, 270 (N.C. 2013); Taszarek v. Lakeview Excavating, Inc., 930 N.W.2d 98, 100 (N.D. 2019); Mortimer v. McCool, 255 A.3d 261, 278 (Pa. 2021); Brevet Int'l, Inc. v. Great Plains Luggage Co., 604 N.W.2d 268, 274 (S.D. 2000); *Grayson*, 599 P.2d at 1274; Dieter Eng'g Servs. v. Parkland Dev., 483 S.E.2d 48, 59 n.10 (W. Va. 1996); Consumer's Co-op v. Olsen, 419 N.W.2d 211, 217 (Wis. 1988); *Gasstop Two, LLC*, 225 P.3d at 1077.

50. *See* Trevino v. Merscorp, Inc., 583 F. Supp. 2d 521, 528 (D. Del. 2008) (Delaware law).

51. *See* TEX. BUS. ORGS. CODE ANN. § 21.223(a)(3) (West 2007).

52. *See* DEL. CODE ANN. tit. 8, § 228(a) (2023). Section 228 provides that this provision may altered in the certificate of incorporation. *See* Robert B. Thompson & Paul H. Edelman, *Corporate Voting*, 62 VAND. L. REV. 129, 139 n.36 (2009) (noting that "[i]t is common among publicly held corporations to include a provision to limit such action by written consent").

53. *See, e.g.*, Frankino v. Gleason, No. CIV.A. 173999, 1999 WL 1032773 (Del. Ch. Nov. 5, 1999) (written consent to amend a company's bylaws to add enough new members to the board to restore control to a majority shareholder); Blasius

rule in Texas is that shareholders may only act by written consent if that consent is signed by all of the shareholders.[54]

On the other hand, there are areas in which Texas law is more restrictive of management's prerogatives than Delaware law. In Delaware, it takes a majority shareholder vote to accomplish fundamental transactions.[55] In Texas, it takes a two-thirds shareholder vote.[56] In addition, in Delaware the default rule is that only directors may call a special meeting of shareholders.[57] In Texas, shareholders owning at least 10% of a corporation's stock may call a special meeting.[58]

C. Tornetta v. Musk

The Delaware Chancery Court's decision in *Tornetta v. Musk*[59] created shockwaves in the legal community and caused experts to question whether Delaware was truly an enabling jurisdiction that was designed to preserve managerial prerogatives. In 2018, Tesla granted Elon Musk a compensation package that had a fair value on the grant date of $2.6 billion and had the potential to pay Musk $55.8 billion if certain targets were reached.[60] The court held that Musk was a controlling shareholder with respect to the

Indus., Inc. v. Atlas Corp., 564 A.2d 651, 654 (Del. Ch. 1988) (written consent to amend a company's bylaws to add enough new members to the board to give insurgents control of the company and force the board to pursue a leveraged restructuring).

54. *See* TEX. BUS. ORGS. CODE ANN. § 6.201(b) (West 2023). A corporation's certificate of formation may provide that a written consent need only be signed by those owning enough shares to pass a measure at a meeting. *See id.* § 6.202(b) (West 2025).

55. *See* DEL. CODE ANN. tit. 8, §§ 242(b)(1) (2023) (certificate amendments), 251(c) (2020) (mergers), 271(a) (2010) (sales of all, or substantially all, of a corporation's assets), 275(b) (2022) (dissolutions).

56. *See* TEX. BUS. ORGS. CODE ANN. §§ 21.364(b) (West 2025), 21.457(a) (West 2006).

57. *See* DEL. CODE ANN. tit. 8, § 211(d) (2009).

58. *See* TEX. BUS. ORGS. CODE ANN. § 21.352(a)(2) (West 2006). The statute provides that the certificate of formation may increase the percentage of shares needed to call a special meeting but may not increase that percentage in excess of 50%.

59. 310 A.3d 430 (Del. Ch. 2024).

60. *See id.* at 445.

compensation decision.[61] Under existing Delaware law, if a controlling shareholder conditioned a transaction on, and obtained approval from, both a majority of disinterested directors and a majority of disinterested shareholders after full disclosure, the business judgment rule protects the transaction. If the controlling shareholder received only one of those disinterested approvals, the business judgment rule would not apply, but the burden of proof would shift to the plaintiff to prove the unfairness of the transaction. If the controlling shareholder received neither disinterested approval, he would have the burden of proving the entire fairness of the transaction.[62]

The court viewed Musk's domination of the compensation process as precluding a finding that disinterested directors approved the compensation package. Although the package was conditioned on obtaining a majority vote of the disinterested shareholders, the court found that the stockholder vote approving the package was not "fully informed because the proxy statement inaccurately described key directors as independent and misleadingly omitted details about the process."[63] As a result, Musk had the burden of proving the entire fairness of the compensation package. Not surprisingly, the court held that Musk could not prove the entire fairness "of the largest potential compensation plan in the history of public markets."[64] The court ordered rescission of the compensation package.[65]

Obviously unhappy with his treatment by the Delaware courts, Musk caused Tesla to reincorporate in Texas.[66] However,

61. *See id.* at 446. The court relied on the following factors: Musk owned a 21.9% equity stake in Tesla, Musk was the paradigmatic "Superstar CEO" and was the CEO, Chair, and founder of Tesla, Musk enjoyed thick ties with the directors tasked with negotiating on behalf of Tesla, and Musk dominated the process that led to board approval of his compensation plan.

62. *See* Kahn v. M&F Worldwide Corp., 88 A.3d 635, 642 (Del. 2014); Kahn v. Lynch Commc'n Sys., Inc., 638 A.2d 1110, 1117 (Del. 1994).

63. *Tornetta*, 310 A.3d at 446.

64. *Id.* at 448.

65. *See id.* at 546–48.

66. *See* Sean McLain & Erin Mulvaney, *Musk Pay Victory Removes Cloud at Tesla—Vote for Package Worth Billions Sets Stage for the Next Round of Court Battle*, WALL ST. J., June 15, 2024, at B9. After reincorporating in Texas, on September 5, 2025, the Tesla board granted Musk a new compensation package that has the

Musk still wanted the Delaware courts to uphold his 2018 compensation package. In an attempt to reverse the court's decision, Musk obtained a second shareholder vote approving his compensation package and distributed the Chancery Court's opinion as part of the proxy materials. The Chancery Court held that this second shareholder vote was insufficient to validate Musk's compensation package.[67] The court treated Musk's reliance on the second shareholder vote as an attempt to revise the previous judgment rather than as an independent event requiring new judicial review. It held that Musk could not satisfy the standards for reopening a judgment.[68] Further, the court noted that the maximum effect a shareholder vote could have under existing Delaware law was to shift the burden of proof on fairness.[69] The court found that Tesla's proxy materials were materially misleading in that they falsely claimed that the effect of a positive shareholder vote would be to ratify the compensation package and cure any defects found by the court in the first opinion. As a result, even if the court considered the second shareholder vote as an event requiring new judicial review, the vote was not fully informed. It was, therefore, insufficient to shift the burden of proof on fairness and had no effect.[70]

Musk appealed to the Delaware Supreme Court. The en banc court noted in a per curiam opinion that "the Justices have varying views on the liability determination."[71] However, the court unanimously agreed that rescission was an improper remedy and

---

potential to pay him $1 trillion if Tesla meets certain aggressive targets (including raising the company's stock market value from $1.1 trillion to $8.5 trillion). *See* Jack Ewing & Peter Eavis, *Elon Musk Could Become First Trillionaire Under New Tesla Pay Plan*, N.Y. TIMES, Sept. 6, 2025, at B1. The shareholder vote on Musk's new compensation package was scheduled for November 6. Two proxy advisory firms, Glass, Lewis & Co. and Institutional Shareholder Services, Inc., recommended voting against the package. *See* Katherine Hamilton, *Tesla Investors Should Reject Pay Package, Glass Lewis Says*, WALL ST. J., Oct. 21, 2025, at B2. Nevertheless, the shareholders approved Musk's new compensation package. *See* Rebecca F. Elliott et al., *Musk Wins $1 Trillion Pay Package, Creating Split Screen on Wealth in America*, N.Y. TIMES, Nov. 8, 2025, at B1.

67. *See* Tornetta v. Musk, 326 A.3d 1203, 1212–13 (Del. Ch. 2024).

68. *See id.* at 1221–27.

69. *See id.* at 1232.

70. *See id.* at 1233–35.

71. *In re* Tesla, Inc. Derivative Litig., Nos. 534-2024, 10-2025, 11-2025, 12-2025, 2025 WL 3689114, at *9 (Del. Dec. 19, 2025).

allowed Musk to keep the entirety of the compensation from Tesla's 2018 grant.[72] The court reasoned that complete rescission was improper because it did not restore the status quo ante. Musk had performed six years of valuable work for Tesla and met the targets specified in the compensation package. Even if Musk's compensation was excessive, total rescission would mean that Musk had worked for free for six years.[73] Presumably, the plaintiff might have sought to have Musk remit the portion of his compensation that exceeded a reasonable amount. However, complete rescission was the only remedy the plaintiff requested, and the defendant was not required to demonstrate a viable alternative.[74] Because the Supreme Court did not reverse the Chancery Court's liability determination, it permitted the plaintiff to receive nominal damages and attorneys' fees.[75]

D. The Delaware Legislature Reacts to the Musk *Decision*

The Delaware legislature's reaction to the Chancery Court's opinions in the Musk case was swift. In February 2025, less than three months after the Chancery Court's second opinion in Musk, a bill was introduced into the Delaware legislature that Vice Chancellor J. Travis Laster described as designed to accomplish "the most significant single-year revision of Delaware's corporate code since at least 1967."[76] The bill was passed by the Delaware Senate on March 13, 2025 and the Delaware House on March 25, 2025. The bill was signed by the Governor on March 25, 2025.

Much of the legislation was a specific reaction to the Musk case. Delaware law now provides that, to be considered a controlling stockholder, a stockholder must own or control a majority of the voting shares necessary to elect directors, have the

---

72. *See id.*

73. *See id.* at *13–14.

74. *See id.* at *15–16. The court also noted that the increase in the value of the stock previously granted to Musk did not compensate for his work between 2018 and 2024 because past consideration "cannot support a separate promise in excess of the promisor's existing contractual obligations." *Id.* at *14 (citation omitted).

75. *See id.* at *17–18.

76. J. Travis Laster, *How to Evaluate Non-Majority Control: What History and Statutes Tell Us*, 31 FORDHAM J. CORP. FIN. L. 1, 96 (2025) (internal quotation omitted).

right by contract or otherwise to select a majority of the directors, or have functional control equivalent to that of a majority stockholder and own or control at least one-third of the voting shares necessary to elect directors.[77] Thus, a 21.8% stockholder such as Musk can no longer be considered a controlling stockholder in a Delaware corporation.

In addition, the Delaware legislature changed the rule that self-dealing transactions by controlling stockholders must be approved by both disinterested directors and disinterested stockholders after full disclosure to be insulated from judicial review. Delaware law now provides that a controlling stockholder transaction (other than a going private transaction) cannot be the subject of legal or equitable relief if it is approved after full disclosure by either a majority of disinterested directors of a board committee (consisting of at least two directors) that has been expressly delegated the authority to negotiate and reject the transaction and acts in good faith without gross negligence or by a majority of disinterested stockholders who have not been coerced.[78] Thus, a controlling stockholder transaction is now insulated from judicial review if it receives either disinterested board approval or disinterested shareholder approval. It no longer needs to receive both disinterested approvals. The Delaware Legislature also adopted standards that make it easier for directors to be considered "independent" when approving self-dealing transactions. Delaware law now provides that a director of a corporation listed on a national securities exchange will be presumed to be independent with respect to a transaction to which such director is not a party if the director satisfies the exchange's criteria for director independence.[79]

77. DEL. CODE ANN. tit 8, § 144(e)(2) (2025).

78. *Id.* § 144(b)(1), (2). As under current law, a controlling stockholder transaction is also legal if it is fair to the corporation and its stockholders. *See id.* § 144(b)(3).

79. *See id.* § 144(d)(2). For example, the New York Stock Exchange requires that, for a director to qualify as independent, the board must affirmatively determine that the director has no material relationship with the company, either directly or as a partner, shareholder or officer of an organization that has a relationship with the company. The New York Stock Exchange presumes a director to be independent as long as: (a) the director has not been employed by the company and no immediate family member has been an executive of the

Although the Delaware legislature certainly made significant changes in the aftermath of *Musk*, I am not certain that these changes qualify as system-altering. It is worth reflecting that Musk should have won his case in Delaware Chancery Court based on pre-existing law even if he is classified as a controlling stockholder. It should not have been difficult for Musk to receive disinterested board approval of his compensation package. A majority of the Tesla directors did not have any pre-existing conflict of interest. What caused the Chancery Court to challenge the Tesla board's independence was Musk's complete domination of the process by which the compensation package was formulated and approved. Had Musk simply allowed the board's compensation committee and the whole board to do its work, the court would presumably have held the compensation package received disinterested director approval.

What prevented disinterested approval at the shareholder level was the failure to disclose the deficiencies in the board's approval process. This was a bootstrap reason. Had there been no domination of the board's process by Musk, there would also have been no problem with disinterested shareholder approval. Had Musk conditioned the transaction on receiving disinterested approval at both the board and shareholder levels and received both approvals, the compensation decision would have been

company during the past three years; (b) the director and no immediate family member has received more than $120,000 from the company in any twelve-month period during the past three years (other than directors' fees, deferred compensation, or an immediate family member's receipt of compensation as a non-executive employee); (c) the director and no immediate family member is a current partner or employee of the company's internal or external auditor and has not worked on any audit of the company during the past three years; (d) the director and no immediate family member has been an executive during the past three years of another company in which a company executive has served on the other company's compensation committee; and (e) the director is not an employee and no immediate family is an executive of another company whose business dealings with the director's company exceed the greater of $1 million or 2% of the other company's consolidated gross revenues. *See* N.Y. STOCK EXCHANGE, LISTED COMPANY MANUAL § 303A.02. The presumption of independence may only be rebutted by "substantial and particularized facts" showing that a director has a material interest in a challenged transaction or has a material relationship with a person with a material interest in a challenged transaction. DEL. CODE ANN. tit. 8, § 144(d)(2) (2025).

protected by the business judgment rule. Musk should have prevailed under existing Delaware law.

Once the Delaware legislature became concerned about the state's reputation as an enabling jurisdiction, it went beyond attempting to reverse the result in *Musk*. The Delaware legislature also made it more difficult for a shareholder to obtain the books and records of a Delaware corporation. Delaware law previously allowed any shareholder to examine a corporation's books and records upon the demonstration of a "proper purpose" (*i.e.*, a purpose reasonably related to a stockholder's interest as a stockholder).[80] Concerned that defendants had been overly aggressive in denying books and records requests, the Delaware courts became receptive to imposing sanctions to deter this misconduct.[81] Nevada, by contrast, does not allow a shareholder to inspect the financial records of a reporting corporation under the Securities Exchange Act. Otherwise, Nevada only allows a shareholder to examine a corporation's financial records if the shareholder owns at least 15% of the corporation's shares.[82]

Delaware has now limited the types of books and records that a stockholder may inspect merely by having a proper purpose. These documents include: the certificate of incorporation; the bylaws; minutes of stockholders' meetings (and consents evidencing stockholder action) during the past three years; communications to stockholders during the past three years; minutes of meetings of the board of directors or any committee thereof (and records of any action taken by the board or a committee); materials provided to the board of directors or a committee thereof in connection with any action taken by the board or a committee; annual financial statements for the past three years; any agreement effected pursuant to Section 122(18) of the Delaware General Corporation Law (which deals with contracts between the corporation and current or prospective stockholders governing management of the corporation); and

80. *See, e.g.*, NVIDIA Corp. v. City of Westland Police and Fire Ret. Sys., 282 A.3d 1, 13 (Del. 2022).

81. *See* Seidman v. Blue Foundry Bancorp, Civil Action No. 2022-1555-MTZ, 2023 WL 4503948, at *9 & n.99 (Del. Ch. July 7, 2023) (requiring a defendant to pay over $223.000 in attorneys' fees and expenses); Pettry v. Gilead Sciences, Inc., C.A. No. 2020-0132-KSJM, 2020 WL 6870461, at *30 (Del. Ch. Nov. 24, 2020) (granting leave to move for attorneys' fees).

82. NEV. REV. STAT. § 78.257(1), (7) (West 2023).

director and officer independence questionnaires.[83] A stockholder with a proper purpose also has the right to inspect the corporation's stock ledger.[84] To examine other corporate records, a stockholder must demonstrate "a compelling need" by "clear and convincing evidence."[85]

E. Texas Aggressively Counters Delaware

The Texas legislature has acted aggressively to counter the actions of the Delaware Legislature and make the state an attractive place to incorporate. The Texas amendments go much further than Delaware's. The Texas legislation has the potential to be a real game changer in the battle for incorporation business. The Texas legislature has: (a) limited liability for breach of a director's or officer's fiduciary duties; (b) limited the right to inspect the corporate books and records of a public company; (c) made it more difficult for shareholders to offer proposals and get them included in the corporation's proxy materials; (d) placed new disclosure obligations on proxy advisory firms; and (e) made it harder for shareholders to bring derivative suits and easier for corporations to get such suits dismissed. Each of these legislative actions is discussed below.

1. Limiting Liability for Breach of Fiduciary Duty

The 2025 amendments to the Texas Business Organizations Code strictly limit the liability of directors and officers for breach of fiduciary duty. With respect to a corporation that has a class or series of voting shares listed on a national securities exchange, or affirmatively adopts a certificate or bylaw provision electing to be governed by the following rules, "a director or officer is presumed to act: (1) in good faith; (2) on an informed basis; (3) in furtherance of the interests of the corporation; and (4) in obedience to the law and the corporation's governing documents."[86] A director or officer covered by the 2025 amendments cannot be liable for breach of fiduciary duty unless a plaintiff rebuts one of the

83. *See* DEL. CODE ANN. tit. 8, §§ 122(18), 220(a)(1), (b)(2), (e).
84. *See id.* § 220(b)(1)(a).
85. *See id.* § 220(g)(2), (3).
86. *See* TEX. BUS. ORGS. CODE ANN. § 21.419(c) (West 2025).

presumptions listed above and proves that the director or officer breached his duty in a way that involved "fraud, intentional misconduct, an ultra vires act, or a knowing violation of law."[87] In addition, the plaintiff must plead with particularity "the circumstances constituting the fraud, intentional misconduct, ultra vires act, or knowing violation of law."[88]

a. Duty of Care

Under prior law, a defendant was liable for breach of the duty of care upon a finding of gross negligence.[89] This is the same standard applied by the Delaware courts.[90] Now a defendant cannot be liable for breach of the duty of care unless there exists fraud, intentional misconduct, an ultra vires act, or a knowing violation of law. This seems to raise the standard considerably. However, one may question whether this increased protection against liability for breach of the duty of care should cause directors to incorporate or reincorporate in Texas. Texas and

87. *See id.* § 21.419(d).
88. *See id.* § 21.419(f).
89. *See, e.g.*, FDIC v. Schreiner, 892 F. Supp. 869, 881–82 (W.D. Tex. 1995); FDIC v. Benson, 867 F. Supp. 512, 523 (S.D. Tex. 1994); FDIC v. Brown, 812 F. Supp. 722, 723–26 (S.D. Tex. 1992). There is language in older cases that suggests broader protection for directors in duty of care cases. For example, in Cates v. Sparkman, 11 S.W. 846 (Tex. 1889), the court noted that breach of the duty of care would arise only in suits "characterized by ultra vires, fraudulent, and injurious practices, abuse of power, and oppression on the part of the company or its controlling agency clearly subversive of the rights of the minority, or of a shareholder." *Id.* at 849. This statement might suggest that something more than gross negligence was necessary to create liability for breach of the duty care. However, the standard is best interpreted as a summary of the traditional business judgment rule, which precludes judicial review of the substance of board decisions. A precondition to application of the business judgment rule is the board's conduct of an adequate investigation prior to making a substantive decision. As the court noted in *Pace v. Jordan*, a "board may invoke the business judgment rule's protection only if the directors are informed before making a decision, 'of all material information reasonably available to them.'" 999 S.W.2d 615, 624 (Tex. App. 1999) (quoting Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984)). Thus, the gross negligence standard applied to the board's procedural duty of care rather than to its substantive decisions, and Texas law is no different from Delaware law on this issue. Indeed, *Pace* relied on a leading Delaware case in describing the limitations on the business judgment rule. *Id.*
90. *See* Smith v. Van Gorkom, 488 A.2d 858, 872 (Del. 1985).

Delaware both have statutes allowing corporations to disclaim liability for breach of the duty of care in their certificates.[91] Thus, liability for breach of the duty of care was more theoretical than real under prior law.

b. Duty of Loyalty

The situation is quite different with respect to the duty of loyalty. Under prior Texas law, self-dealing directors or officers needed to receive approval from disinterested directors or shareholders after full disclosure or prove that the transaction was fair. If they could not satisfy one of these standards, they were liable for self-dealing on a strict liability basis.[92] This standard is similar to the new Delaware approach. Now, even if self-dealing directors or officers of public Texas companies cannot receive disinterested approval or prove fairness, a plaintiff must still prove that they committed fraud, intentional misconduct, an ultra vires act, or a knowing violation of law to prevail. And liability for breach of the duty of loyalty may not be disclaimed in the certificate of formation.[93] This approach makes Texas much more attractive to managers as an incorporation jurisdiction.

c. Duty of Obedience

Directors and officers have a duty of obedience, which includes the duty to follow directives in the certificate of formation and the bylaws.[94] As with the duty of loyalty, liability for breach of this duty was formerly on a strict liability basis. Liability must now be predicated upon a showing of fraud, intentional misconduct, an ultra vires act, or a knowing violation of law. As with the duty of care and loyalty, this makes Texas a more attractive jurisdiction for managers.

91. *See* DEL. CODE ANN. tit. 8, § 102(b)(7) (2025); TEX. BUS. ORGS. CODE ANN. § 7.001(b) (West 2025).

92. *See* TEX. BUS. ORGS. CODE ANN. § 21.418 (West 2025).

93. *See id.* § 7.001(c)(1) (West 2025).

94. *See* Gearhart Indus., Inc. v. Smith Int'l, Inc., 741 F.2d 707, 719 (5th Cir. 1984).

d. Approval of Self-dealing Transactions by Disinterested Directors

The 2025 amendments to the Texas Business Organizations Code provide that the board of directors of a public corporation[95] or a corporation that has elected to be governed by the following rules may "authorize the formation of a committee of independent and disinterested directors to review and approve transactions . . . involving the corporation or any of its subsidiaries and a controlling shareholder, director, or officer."[96] The 2025 amendments also provide that in such a case the corporation may petition the Business Court[97] to determine whether the directors appointed to the committee are independent and disinterested.[98] If the Business Court finds that the directors are independent and disinterested, its decision is "dispositive in the absence of facts, not presented to the court, constituting evidence sufficient to prove that one or more of those directors is not independent and disinterested."[99] Thus, if the board appoints a committee of directors to review and approve a self-dealing transaction and the Business Court determines the directors to be independent and disinterested, the self-dealing transaction will be beyond judicial challenge as long as the committee approves the transaction in good faith.[100] The 2025 amendments to the Code allow corporations to remove most legal obstacles to self-dealing transactions prior to effecting the transactions.

2. Limiting the Right to Inspect Corporate Books and Records

Like Delaware, Texas has taken action to restrict access to corporate books and records. Under previous Texas law, one

---

95. A public corporation is defined as a corporation that has a class or series of voting shares listed on a national securities exchange. *See* TEX. BUS. ORGS. CODE ANN. § 21.418 (West 2025).

96. TEX. BUS. ORGS. CODE ANN. § 21.416(g) (West 2025).

97. *See infra* Part II.A. The case may be filed in the District Court in which the corporation's principal place of business is located if such place is not within an operating division of the Business Court.

98. *See* TEX. BUS. ORGS. CODE ANN. § 21.4161 (West 2025).

99. *Id.* § 21.4161(h).

100. *See id.* § 21.418(b)(1) (West 2025).

subsection of a statute said that a six-month or five-percent shareholder could examine the books and records of a corporation upon stating a proper purpose. Another subsection provided that, regardless of these restrictions, a court always had the power to order production of a corporation's books and records to any shareholder stating a proper purpose.[101] This left one to wonder what the purpose of the six-month or five-percent tests was. Perhaps this meant that a shareholder who did not meet these thresholds would have the burden of proving a proper purpose whereas the burden would be on the corporation to prove an improper purpose with respect to shareholders who did.

The 2025 amendments to the Texas Business Organizations Code have resolved this problem and limited access to the books and records of public companies. The Code now provides that the six-month or five-percent limitation applies to shareholders of a corporation that has a class or series of voting shares listed on a national securities exchange or that has made an affirmative election to be governed by Section 21.419 of the Code.[102] For such companies:

> (a) [T]he records of the corporation shall not include e-mails, text messages or similar electronic communications, or information from social media accounts unless the particular e-mail, communication, or social media information effectuates an action by the corporation; and (b) seeking corporate books and records in connection with litigation involving the corporation is deemed to be for other than a proper purpose.[103]

Of course, corporate books and records that are relevant to litigation can still be obtained pursuant to the discovery process.[104] In closely held corporations, the six-month or five-percent limitation does not apply and neither the limitation on the scope of inspection nor the limitation on records sought in litigation applies.[105] Thus, with respect to public companies, Texas has more

101. *See* ELIZABETH S. MILLER & ROBERT A. RAGAZZO, BUSINESS ORGANIZATIONS, *in* 20 TEXAS PRACTICE SERIES §§ 33.6, 33.7 (West 3d ed. 2011).

102. *See supra* text accompanying note 86; TEX. BUS. ORGS. CODE ANN. § 21.218(b) (West 2025).

103. *See* TEX. BUS. ORGS. CODE ANN. § 21.218(b), 21.218(b-2) (West 2025).

104. *See id.* § 21.218(b-3)(1).

105. *See id.* § 21.218(b-3)(2).

severely restricted shareholder access to corporate books and records than Delaware.

3. Shareholder Proposals

The SEC has revised the eligibility requirements for submitting proposals that a shareholder wishes to be included in a corporation's proxy materials. To be eligible, a shareholder must now own: (a) $2,000 of the company's securities entitled to vote on the proposal for at least three years; (b) $15,000 of the company's securities entitled to vote on the proposal for at least two years; or (c) $25,000 of the company's securities entitled to vote on the proposal for at least one year. The ownership thresholds must be met by the shareholder individually. Aggregation of holdings is not permitted.[106]

In response to the SEC's revision of Rule 14a-8, the 2025 amendments to the Texas Business Organizations Code allow "nationally listed corporations" to adopt stricter threshold standards for shareholder proposals.[107] A "nationally listed corporation" is defined as a corporation that:

> (a) [H]as a class of equity securities registered under Section 12(b) of the Securities Exchange Act of 1934; (b) is admitted to listing on a national securities exchange; and (c) either: (1) has its principal office in Texas; or (2) is admitted to listing on a stock exchange that: (i) has its principal office in Texas; and (ii) has received approval by the Texas Securities Commissioner.[108]

Such a corporation may opt in to the new statute by amending its certificate of formation or bylaws.[109] If a corporation opts in, a shareholder or group of shareholders wishing to submit a proposal must:

> (a) [O]wn at least $1 million worth or 3% of the corporation's voting shares; (b) have owned these shares for at least six months and continuously own them through the meeting; and

---

106. *See* 17 C.F.R. § 240.14a-8(b)(1)(i), (vi) (2026).
107. *See* TEX. BUS. ORGS. CODE ANN. § 21.373 (West 2025).
108. *See id.* § 21.373(a)(1).
109. *See id.* § 21.373(b).

> (c) solicit the holders of at least 67% of the shares entitled to vote on the proposal.[110]

Thus, the new legislation also increases the expense to shareholders wishing to submit a proposal because they must be willing to solicit 67% of the shares entitled to vote on their own. The new rules do not apply to: (a) director nominations; or (b) procedural resolutions that are ancillary to the conduct of the meeting.[111]

Texas has gone way beyond anything that Delaware has done and restricted shareholder access to the corporate proxy machinery. This legislation can be expected to be challenged on the ground that it conflicts with Rule 14a-8 and violates the Supremacy Clause of the United States Constitution.[112] The official bill analysis provided by the legislature in connection with the new amendments notes: "If [the new] thresholds are not met, the proposal will not be eligible for a vote under Texas law, and the company will not be required to include it in proxy materials under SEC Rule 14a-8."[113] Thus, the new rules purport to limit only what shareholders may vote on at a shareholders meeting, which is a legitimate object of Texas law. However, the obvious purpose of the new rules is to countermand the leniency of Rule 14a-8. The official bill analysis justifies the new rules on this basis:

> Securities and Exchange Commission (SEC) Rule 14a-8 has made it too easy for small shareholders with special interests to force public companies to include proposals in proxy materials, requiring all shareholders to consider and fund them. This rule mandates that public companies present shareholder proposals—such as calls for ESG reporting—alongside management's proposals, even when those proposals originate from shareholders with minimal financial

110. *See id.* § 21.373(e).

111. *See id.* § 21.373(f).

112. *See* U.S. CONST. art. VI; Edgar v. MITE Corp., 457 U.S. 624, 631 (1982) (noting that "a state stature is void to the extent that it actually conflicts with a valid federal statute; and a conflict will be found where compliance with both federal and state regulations is a physical impossibility or where the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" (plurality opinion) (internal quotations omitted)).

113. SENATE RSCH. CTR., BILL ANALYSIS, S.B. 1057, AUTHOR'S/SPONSOR'S STATEMENT OF INTENT (June 6, 2025), https://capitol.texas.gov/tlodocs/89R/analysis/pdf/SB01057F.pdf [https://perma.cc/5WJ7-RBWF].

> stakes. The rule is a federal overlay on state laws governing shareholder meetings, but its thresholds for shareholder eligibility are strikingly low: $25,000 in stock if held for one year, $15,000 for two years, or just $2,000 for three years. These minimal requirements enable activist shareholders to advance their agendas at the expense of companies and the broader shareholder base.

S.B. 1057 addresses this issue by raising ownership requirements for shareholders seeking to introduce proposals at Texas-based public companies.[114]

The official bill analysis seems to be saying that the new Texas rules were designed to nullify provisions of the federal proxy rules, which would appear to violate the Supremacy Clause.

4. Proxy Advisory Firms

The increased influence of institutional shareholders in public corporations has led to the growth of proxy advisory firms, who make recommendations on how shareholders in such corporations should vote on particular issues. The two most important proxy advisory firms are Institutional Shareholder Services, Inc. and Glass, Lewis & Co. In 2020, the Securities and Exchange Commission amended its proxy rules to cover the activities of proxy advisory firms.[115] The proxy advisory firms and their clients lobbied the SEC to modify the rules. In 2022, the SEC eliminated most of its rules regulating proxy advisory firms.[116]

Nevertheless, such firms remain controversial. They do not owe fiduciary duties to the corporations that their advice affects or to the general shareholder bodies of those corporations. They often give advice based on social rather than business factors. For example, the proxy advisory forms often give advice based on ESG (environmental and social governance) and DEI (diversity equity and inclusion) factors. Whether these non-business motivations are legitimate proxy concerns is a fair question. However, it not hard to understand why many businesses are opposed to these

114. *Id.*

115. *See* Exemptions from the Proxy Rules for Proxy Voting Advice, Exchange Act Release No. 34-89372, 85 Fed. Reg. 55082 (Sep. 3, 2020).

116. *See* Proxy Voting Advice, Exchange Act Release No. 34-95266, 87 Fed. Reg. 43168 (July 19, 2022).

considerations. In addition, the proxy advisory firms sometimes give conflicting advice to different clients with respect to the same issue. That is, they advise some clients to vote "yes" and others to vote "no" on the same issue.[117] They justify this conduct by arguing that the advice is tailored to the needs of the individual client.[118] Yet, one can understand why this looks contradictory. Finally, the proxy advisory firms issue corporate governance ratings for corporations, which can also be based on social factors.

The 2025 amendments to the Texas Business Organizations Code place new disclosure obligations on proxy advisory firms[119] that affect publicly traded Texas companies that have their principal places of business in Texas.[120] If a proxy advisory service provides analysis or voting advice with respect to a proxy proposal or issues a corporate governance rating based in whole or part on non-financial factors (*e.g.*, ESG or DEI), the firm must conspicuously disclose to each client and the affected corporation that its advice is based wholly or in part on non-financial factors and explain with particularity the basis of the firm's advice regarding each recommendation.[121] The firm must also disclose on its website that its recommendations are not based solely on financial factors.[122] One might argue that this is appropriate disclosure so that shareholders are aware that the proxy advisory firms are considering more than purely business factors. No doubt the proxy advisory firms would argue that it is impossible to separate business from social factors because social factors inevitably have an impact on business.

117. *See* Edwin Hu et al., *Custom Proxy Voting Advice* 2–3 (Nat'l Bureau of Econ. Rsch., Working Paper No. 32559, 2024) (utilizing Glass Lewis's proprietary data to find that 80% of funds received customized voting recommendations based on a client's preset policy parameters).

118. *See* Raquel Fox et al., *Glass Lewis to End Benchmark Proxy Voting Policy: What Companies Should Know*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Oct. 29, 2025), https://corpgov.law.harvard.edu/2025/10/29/glass-lewis-to-end-benchmark-proxy-voting-policy-what-companies-should-know/ [https://perma.cc/7Q6S-P2RE] (indicating that Glass Lewis will transition from offering its benchmark proxy voting guidelines in order to enable all clients to vote according to tailored policies).

119. *See* TEX. BUS. ORGS. CODE ANN. §§ 6A.001-6A.202 (West 2025).

120. *See id.* § 6A.001(1).

121. *See id.* § 6A.101(a), (b).

122. *See id.* § 6A.101(b)(3).

There is, however, one other item that is considerably more burdensome. A proxy advisory firm is deemed to make a recommendation that is not wholly based on financial factors if the recommendation involves a shareholder-sponsored proposal, is contrary to a recommendation of the board of directors or an independent committee of the board, and does not include a written economic analysis of the financial impact on shareholders of the proposal.[123] This written economic analysis must include:

> (1) [T]he short-term and long-term economic benefits and costs of implementing any shareholder-sponsored proposal, as written; (2) an analysis of whether the proposal is consistent with the investment objectives and policies of the client; (3) the projected quantifiable impact of the proposal, if adopted, on the investment returns of the client; and (4) an explanation of the methods and processes used to prepare the economic analysis.[124]

Thus, to oppose management with respect to a shareholder-sponsored proposal, a proxy advisory firm must not only have purely financial motivations, it must quantify its financial analysis in significant ways.

Finally, if a proxy advisory firm provides conflicting voting advice with respect to a particular issue, the firm must disclose this fact to each client who received the advice, the affected corporation, and the Texas Attorney General.[125] The firm must also disclose which of the conflicting positions is based solely on financial factors or supported by specific financial analyses performed or relied on by the firm.[126]

Failure to make the disclosures outlined above is deemed to be a violation of the Texas Deceptive Trade Practices Act.[127] Anyone receiving advice from the proxy advisory firm, any affected corporation, or any shareholder of an affected corporation, is entitled to bring an action for declaratory or

123. *See id.* § 6A.101(a)(2).
124. *See id.* § 6A.101(c).
125. *See id.* § 6A.102(b)(2).
126. *See id.* § 6A.102(b)(3).
127. *See id* § 6A.201.

injunctive relief.[128] The plaintiff must give notice to the Attorney General, who is entitled to intervene in the action.[129]

Once again, Texas has gone far beyond anything Delaware has done in regulating the conduct of proxy advisory firms. The new Texas proxy regulations were challenged by Institutional Shareholder Services and Glass Lewis on the grounds that they: (a) placed undue restrictions on freedom of speech in violation of the First and Fourteenth amendments to the U.S. Constitution; (b) violated the Dormant Commerce Clause; and (c) were unconstitutionally vague.[130] At a hearing on August 29, 2025, United States District Judge Alan Albright in the Western District of Texas heard arguments and issued a preliminary injunction against application of the new proxy advisory rules to Institutional Shareholder Services and Glass Lewis.[131]

5. Derivative Suits

The 2025 amendments to the Texas Business Organizations Code give protections against derivative suits that are not available in Delaware. They provide that the certificate of a corporation that has common shares listed on a national securities exchange, or has at least 500 shareholders and affirmatively elects to be governed by Section 21.419 of the Texas Business Organizations Code.[132] may require a shareholder seeking to commence a derivative proceeding to meet a specified ownership threshold, as

128. *See id.* § 6A.202.
129. *See id.* § 6A.202(b).
130. Complaint at 24, 30, Institutional S'holder Servs., Inc. v. Paxton, No. 25-CV-01160 (W.D. Tex. July 24, 2025); Complaint at 41, Glass, Lewis & Co. LLC v. Paxton, 25-CV-01153 (W.D. Tex. July 24, 2025).
131. Although Judge Albright has not issued a formal opinion, the hearing and resolution are described in *Securities Regulation and Corporate Governance Update*, GIBSON DUNN (Aug. 30, 2025), https://www.gibsondunn.com/wp-content/uploads/2025/08/texas-court-blocks-enforcement-of-new-texas-proxy-advisor-law-against-iss-and-glass-lewis.pdf [https://perma.cc/F6FP-YNLP].
132. *See supra* text accompanying note 86.

long as that threshold is not higher than 3%.[133] Two or more shareholders may combine to meet the ownership threshold.[134]

In addition, the 2025 amendments to the Texas Business Organizations Code provide that the corporation may petition a court to determine whether members of a board or committee that is authorized to respond to a demand are independent and disinterested.[135] If the derivative suit has been filed, the corporation should file its petition in the court in which the derivative suit is pending. If the derivative suit has not been filed, the corporation should file its petition in the Business Court[136] (or the District Court in which the corporation's principal place of business is located if such place is not within an operating division of the Business Court).[137] Absent a good cause extension, the court must conduct an evidentiary hearing on the petition within 45 days.[138] Absent a good cause extension, the court must make a final determination no later than 75 days after the petition was filed.[139] The court's determination is "dispositive in the absence of discovery of facts, not presented to the court, constituting evidence sufficient to prove that one or more of the directors or individuals is not independent and disinterested."[140] Thus, prior to responding to a demand, the corporation may obtain a determination of whether board or committee members who are to respond to a demand are independent and disinterested. If a court makes this finding, the motion of the board or committee to dismiss derivative litigation will be granted as long as the board or committee acted in good faith after conducting a reasonable inquiry.[141]

133. *See* TEX. BUS. ORGS. CODE ANN. § 21.552(a)(3) (West 2025).
134. *See id.* § 21.551(2)(C) (defining a "shareholder" to include "two or more shareholders acting in concert under an informal or formal agreement or understanding with respect to a derivative proceeding").
135. *See id.* § 21.554(c) (West 2025).
136. *See infra* Part II.A.
137. *See* TEX. BUS. ORGS. CODE ANN. § 21.554(d) (West 2025).
138. *See id.* § 21.554(f).
139. *See id.* § 21.554(h).
140. *See id.* § 21.554(i).
141. *See id.* § 21.558(a).

F. Summary

On balance, prior to 2025 there was little reason to prefer Delaware over Texas, or Texas over Delaware, as a state of incorporation based on the substance of each state's laws. Delaware and Texas both espoused an enabling philosophy of corporate governance. There were areas where Texas was more pro-management and areas where Texas was less pro-management than Delaware. All of this changed in 2025. Although the Delaware legislature responded swiftly to the *Musk* decision by making it more difficult to challenge controlling shareholder transactions or to obtain shareholder access to a corporation's books and records, the Texas legislature went much further. It sharply limited the ability to bring breach of fiduciary duty actions against directors and officers, limited shareholder access to the books and records of public companies more than Delaware had, made it more difficult for shareholders to submit proposals for a vote and gain access to the corporation's proxy machinery, regulated the conduct of proxy advisory firms, and made it more difficult to bring derivative suits. Although the rules governing access to the proxy machinery and regulation of proxy advisory firms are under something of a legal cloud, the remaining items make Texas a substantially more pro-management jurisdiction than Delaware. Indeed, the Texas legislature went to great pains to make clear that Delaware does not apply in Texas. Whereas in 2023 the Texas legislature was proud to declare that Texas accepted the Delaware principle of "independent legal significance,"[142] in 2025 the Texas legislature provided: "The plain meaning of the text of this code may not be supplanted, contravened, or modified by the laws or judicial decisions of any other state."[143] It further provided:

> The failure or refusal of a managerial official to consider, or to conform the exercise of the managerial official's powers to, the laws, judicial decisions, or practices of another state does not constitute or imply a breach of this code or of any duty existing under the laws of this state.[144]

---

142. *See supra* text accompanying note 42.
143. TEX. BUS. ORGS. CODE ANN. § 1.057(a) (West 2025).
144. *Id.* § 1.057(b).

Whether corporations will abandon Delaware for Texas depends on more than the substance of each state's corporation law. It also depends on whether Texas can create a specialized business judiciary that rivals Delaware's and whether Texas can develop a body of caselaw that rivals Delaware's. The following Parts analyze these issues.

II. TEXAS'S ATTEMPT TO CREATE A SPECIALIZED BUSINESS JUDICIARY

Texas has attempted to create a new specialized judiciary with business expertise in the hope that it will rival the Delaware court system. The Texas legislature created a new Business Court at the trial level[145] and a new national Fifteenth Court of Appeals to review the Business Court's cases.[146]

A. The Business Court

A Business Court judge must be a licensed attorney in [Texas] who has 10 or more years of experience in: (A) practicing complex civil business litigation; (B) practicing business transaction law; (C) serving as a judge of a court in this state with civil jurisdiction; or (D) any combination of experience described by Paragraphs (A)-(C)."[147] Business Court judges are appointed by the Governor with the advice and consent of the Senate and serve two-year terms.[148] They may be reappointed to serve additional terms.[149]

The Business Court has civil jurisdiction concurrent with the District Courts, including actions in which a District Court has exclusive jurisdiction, over the following actions in which the amount in controversy exceeds $5 million, excluding interest, statutory damages, exemplary damages, penalties, attorney's fees, and court costs:

---

145. *See* TEX. GOV'T CODE ANN. § 25A.002 (West 2023). The Business Court may be subject to a challenge under the Texas Constitution on the ground that it is in substance a District Court, whose judges are constitutionally required to be elected. *See* Jack B. DiSorbo, *A Primer on the Texas Business Court*, 76 BAYLOR L. REV. 360, 391–93 (2024).

146. *See* TEX. GOV'T CODE ANN. § 22.2151 (West 2023).

147. *See id.* § 25A.008(a)(4) (West 2023).

148. *See id.* § 25A.009(a), (b) (West 2025).

149. *See id.* § 25A.009(c).

> (1) [A] derivative proceeding; (2) an action regarding the governance, governing documents, or internal affairs of an organization; (3) an action in which a claim under a state or federal securities or trade regulation law is asserted against: (A) an organization; (B) a controlling person or managerial official of an organization for an act or omission by the organization or by the person in the person's capacity as a controlling person or managerial official; (C) an underwriter of securities issued by the organization; or (D) the auditor of an organization; (4) an action by an organization, or an owner of an organization, if the action: (A) is brought against an owner, controlling person, or managerial official of the organization; and (B) alleges an act or omission by the person in the person's capacity as an owner, controlling person, or managerial official of the organization; (5) an action alleging that an owner, controlling person, or managerial official breached a duty owed to an organization or an owner of an organization by reason of the person's status as an owner, controlling person, or managerial official, including the breach of a duty of loyalty or good faith; (6) an action seeking to hold an owner or governing person of an organization liable for an obligation of the organization, other than on account of a written contract signed by the person to be held liable in a capacity other than as an owner or governing person; and (7) an action arising out of the Business Organizations Code."[150]

The amount in controversy requirement described above does not apply if the action involves a publicly traded company.[151]

The Business Court has civil jurisdiction concurrent with the District Courts in the following actions in which the amount in controversy exceeds $5 million, excluding interest, statutory damages, exemplary damages, penalties, attorney's fees, and court costs:

> (1) [A]n action arising out of a qualified transaction; (2) an action arising out of a business, commercial, or investment contract or transaction in which the parties to the contract or transaction agreed in the contract or a subsequent agreement that the business court has jurisdiction of the action, except an action that arises out of an insurance contract; (3) . . . an action arising out of a violation of the Finance Code or Business & Commerce Code by an organization or an officer or governing person acting on behalf of an organization other than a bank,

150. *Id.* § 25A.004(b) (West 2025).
151. *See id.* § 25A.004(c).

> credit union, or savings and loan association: (4) an action arising out of or relating to the ownership, use, licensing, lease, installation, or performance of intellectual property . . . ; and (5) an action arising out of Chapter 134A, Civil Practice and Remedies Code [which deals with trade secrets].[152]

The Business Court "has supplemental jurisdiction over any other claim so related to the action that the claim forms part of the same case or controversy."[153] However, a claim within the Business Court's supplemental jurisdiction may proceed in the Business Court only with the consent of all the parties and a judge of the division of the Business Court in which the action is pending.[154]

Cases filed in the District Court that are within the Business Court's jurisdiction may be removed to the Business Court.[155] In addition, "[t]he judge of a court in which an action is filed may request the presiding judge for the court's administrative region to transfer the action to the business court if the action is within the business court's jurisdiction. The judge shall notify all parties of the transfer request and request a hearing on the transfer request. [T]he presiding judge may transfer the action to the business court if the presiding judge finds the transfer will facilitate the fair and efficient administration of justice."[156]

A party in a Business Court proceeding has the right to a jury trial "when required by the constitution."[157] The Texas Constitution provides: "The right of trial by jury shall remain inviolate."[158] "This has been interpreted to mean that in each case where the issue is raised, an inquiry should be made into the practice before the constitution was adopted to determine

---

152. *See id.* § 25A.004(d). A "qualified transaction" is "a transaction, or series of related transactions, other than a transaction involving a loan or an advance of money or credit by a bank, credit union, or savings and loan institution, under which a party: (A) pays or receives, or is obligated to pay or is entitled to receive, consideration with an aggregate value of at least $5 million; or (B) lends, advances, borrows, receives, is obligated to lend or advance, or is entitled to borrow or receive money or credit with an aggregate value of at least $5 million." *Id.* § 25A.001(14).

153. *Id.* § 25A.004(f).

154. *See id.*

155. *See id.* § 25A.006(d).

156. *See id.* § 25A.006(k).

157. *Id.* § 25A.015(a) (West 2023).

158. TEX. CONST. art. I, § 15.

whether such issues were tried by a jury; hence, any right to a jury trial that existed at the time of the adoption of the constitution is confirmed."[159] In addition, although historically there was no right to a jury trial in equitable proceedings, "[i]n Texas . . . since the first state constitution of 1845, a party is not deprived of a jury trial in a suit of an equitable nature."[160]

The current Texas District Courts do not issue written opinions. This practice contributes to the dearth of caselaw in Texas.[161] It is contemplated that the Business Court will issue written opinions in compliance with rules established by the Texas Supreme Court.[162]

B. The Fifteenth Court of Appeals

Business Court cases will be appealed to the newly created Fifteenth Court of Appeals,[163] which will sit in Austin.[164] This procedure will help promote uniformity by providing a single state-wide appellate venue for business cases.[165] The Fifteenth Court of Appeals will initially consist of three judges,[166] who have been appointed by Governor Abbott.[167] Starting in 2027, the court will increase to five judges.[168] The judges on the Fifteenth Court of Appeals will eventually be elected in the same manner as other judges on the Texas Courts of Appeals.[169]

---

159. VERNON'S ANN. TEX. CONST. art. I, § 15 (Interpretative Commentary, 2022 Main Volume) (citing White v. White, 196 S.W. 508 (Tex. 1917)).

160. *Id.* (citing San Jacinto Oil Co. v. Culbertson, 101 S.W. 197 (Tex. 1907)).

161. *See infra* Part III.

162. *See* TEX. GOV'T CODE ANN. § 25A.016 (West 2023).

163. *See id.* § 25A.007(a) (West 2025).

164. *See id.* § 22.2151(a) (West 2023). The Fifteenth Court of Appeals also has exclusive appellate jurisdiction over most civil cases involving the State of Texas. *See id.* § 22.220(d)(1) (West 2025).

165. The Fifteenth Court of Appeals was challenged under the Texas Constitution on the ground that a Court of Appeals must have limited territorial jurisdiction. In *In re* Dallas County, 697 S.W.3d 142 (Tex. 2024), the Texas Supreme Court rejected that challenge.

166. *See* TEX. GOV'T CODE ANN. § 22.216(n-2) (West 2025).

167. *See* DiSorbo, *supra* note 145, at 380 n.111.

168. *See* TEX. GOV'T CODE ANN. § 22.216(n-1) (West 2025).

169. *See* TEX. CONST. art. V, § 6(b).

C. Assessing Texas's Progress

The new Texas business courts are undoubtedly a step in the right direction. There, however, are at least five reasons why the Texas courts may not approach the business expertise of the Delaware courts.

First, the requirements for appointment to the Business Court do not guarantee that its judges will have substantial business law experience. Appointees must have ten years of practice experience in the business area, ten years of judicial experience, or a combination of these experiences that adds up to ten years. A Texas District Judge who was not a business lawyer prior to election to the bench is unlikely to become a business expert by being exposed to a small portion of business cases during a ten-year judicial tenure. Such a judge is unlikely to be the equivalent of a Delaware Chancellor or Vice Chancellor.[170]

Second, judges of the Business Court are appointed for two-year terms. This tenure does not provide the same stability as the Delaware system, where Chancellors and Vice Chancellors are appointed for twelve-year terms.[171] Although Business Court judges may be reappointed, there is no guarantee that they will serve long terms. For whatever reason, judicial service in Texas has seldom been viewed as the pinnacle of a professional career. Judicial service is more often seen as a stepping stone to a lucrative career in private practice or a launching pad for higher governmental office. To take some famous examples, Tom Phillips was once the Chief Justice of the Texas Supreme Court. He left the court to join the Baker Botts law firm.[172] Senator John Cornyn was once a Texas Supreme Court Justice.[173] Congressman Lloyd Doggett was once a Texas Supreme Court Justice.[174]

Third, appointments to the Texas Business Court and the Fifteenth Court Appeals can be expected to be partisan in a way

170. *See supra* note 8.
171. DEL. CONST. art. IV, § 3.
172. *See Thomas R. Phillips*, BAKER BOTTS, https://www.bakerbotts.com/people/p/phillips-Thomas-r#10 [https://perma.cc/94GR-CJ8E] (last visited Mar. 19, 2026).
173. *See About John*, U.S. SENATE, https://www.cornyn.senate.gov/about/about-john-cornyn/ [https://perma.cc/3X7L-9A9F] (last visited Mar. 19, 2026).
174. *See About*, U.S. HOUSE, https://doggett.house.gov/about [https://perma.cc/S4NV-TETA] (last visited Mar. 19, 2026).

that Delaware appointments are not. For example, Governor Abbott's three initial appointments to the Fifteenth Court of Appeals are all Republicans.[175] By contrast, no more than three of five Delaware Supreme Court Justices may be from the same political party, and no more than four of seven members of the Delaware Chancery Court may be from the same political party.[176] This factor will become increasingly problematic if Texas becomes a more purple state. In the future, gubernatorial elections in Texas may again be competitive. The first time a Democrat wins the governorship, the entire composition of the Business Court might switch from Republicans to Democrats. When a Republican thereafter retakes the governorship, the entire Business Court might switch back to the Republicans. Since the Fifteenth Court of Appeals will ultimately be elected, it will also be subject to the vagaries of statewide politics. Therefore, membership on the Texas Business Court and the Fifteenth Court of Appeals may turn out to be significantly less stable than on the Delaware courts.

Fourth, although judges on the Business Court will continue to be appointed, Justices of the Fifteenth Court of Appeals will ultimately be elected, and Justices of the Texas Supreme Court will continue to be elected.[177] Therefore, there is reason to question whether the appellate judges that review decisions of the Business Court will have the same training and expertise in business matters as the Justices of the Delaware Supreme Court.[178]

Fifth, unlike the Delaware Chancery Court, the Texas Business Court will have juries deciding disputed questions of

---

175. *See* Ryan Autullo, *Texas Political Cases Shift to New GOP-Backed Appeals Court*, BLOOMBERG L. (Sep. 3, 2024, at 05:05 EDT), https://news.bloomberglaw.com/litigation/texas-political-cases-shift-to-new-gop-backed-appeals-court [https://perma.cc/GWZ4-ZAX7]. Indeed, as this article details, the creation of the Business Court and the Fifteenth Court of Appeals was politically controversial. Democrats viewed these courts as a way to reapportion judicial business in Democratic counties from Democratic to Republican judges. *See also* Kayla Guo, *Abbott Appoints First Judges to New Appeals Court for Cases Involving State Government, Businesses*, TEX. TRIBUNE (June 11, 2024, at 18:32 CT), https://www.texastribune.org/2024/06/11/texas-appeals-court-15th-abbott-appointees [https://perma.cc/37Z7-ER4A].

176. *See* DEL. CONST. art. IV, § 3.

177. *See* TEX. CONST. art. V, § 2(c).

178. *See supra* note 8.

fact.[179] Since managers are often defendants in business cases, this feature cannot be attractive to those who choose in what jurisdiction to incorporate. Moreover, the introduction of jury trials inevitably lessens the expertise and consistency of decision-making in business cases.[180]

In sum, the creation of the Texas Business Court and the Fifteenth Court of Appeals demonstrates laudable progress in creating a specialized judiciary with business expertise. However, it remains to be seen whether this system will allow Texas's judiciary to rival Delaware's in the business arena. If not, Delaware's well respected business judiciary will remain a magnet for incorporation business in that state.

III. DELAWARE'S CASELAW ADVANTAGE

Delaware's biggest advantage in attracting incorporation business involves the volume of its rich caselaw, which provides greater certainty to transaction planners than the law of other states and reduces litigation. By contrast, Texas, although it is the second most populous state in the nation, has little caselaw in many areas where Delaware has a well-developed doctrinal structure. I will examine three such areas: (a) the duty of oversight that directors have to prevent illegal misconduct; (b) the duty that controlling shareholders have in connection with freezeout transactions; and (c) the duties that directors have when defending against unsolicited takeover bids.

179. *See supra* notes 157–60 and accompanying text.

180. To help alleviate this problem, the 2025 amendments to the Texas Business Organizations Code provide that a corporation's certificate of formation or bylaws may contain a waiver of the right to trial by jury for any claims relating to a corporation's internal affairs. *See* TEX. BUS. ORGS. CODE ANN. § 2.116(b) (West 2025). If such a waiver exists, a person is deemed to have knowingly waived his right to a jury trial if he: (a) voted for or ratified the document containing he waiver; (b) acquired or continued to hold a security of a corporation listed on a national securities exchange at a time when the waiver existed; or (c) knowingly waived his right to a jury trial as demonstrated by other evidence. *See id.* § 2.116(d).

A. The Duty of Oversight

In *Graham v. Allis-Chalmers Mfg. Co.,*[181] derivative plaintiffs sought to hold the directors of Allis-Chalmers liable for damages the company suffered as a result of a criminal conviction for violation of the antitrust laws. "The precise charge made against these director defendants is that, even though they had no knowledge of any suspicion of wrongdoing on the part of the company's employees, they still should have put into effect a system of watchfulness which would have brought such misconduct to their attention in ample time to have brought it to an end."[182] The Delaware Supreme Court squarely rejected this contention: "[A]bsent cause for suspicion there is no duty upon the directors to install and operate a corporate system of espionage to ferret out wrongdoing which they have no reason to suspect exists."[183]

The *Allis-Chalmers* case might be read to suggest that directors have no duty to monitor the affairs of the company and attempt to prevent illegal conduct unless red flags are present, suggesting the existence of illegality. In *In re Caremark International Inc. Derivative Litigation,*[184] Chancellor Allen refused to read *Allis-Chalmers* this broadly. The Chancellor read *Allis-Chalmers* "more narrowly . . . as standing for the proposition that, absent grounds to suspect deception, neither corporate boards nor senior officers can be charged with wrongdoing simply for assuming the integrity of employees and the honesty of their dealings on the company's behalf."[185]

In any case, the Chancellor believed that in 1996 the Delaware Supreme Court would not accept the broader view of *Allis-Chalmers*. Therefore, he held that " a director's obligation includes a duty to attempt in good faith to assure that a corporate information and reporting system, which the board concludes is adequate, exists, and that failure to do so under some circumstances may, in theory at least, render a director liable for losses caused by non-compliance with applicable legal

181. 188 A.2d 125, 125 (Del. 1963).
182. *Id.* at 130.
183. *Id.*
184. 698 A.2d 959 (Del. Ch. 1996).
185. *Id.* at 969.

standards."[186] He recognized that "the level of detail that is appropriate for such an information system is a question of business judgment. And obviously too, no rationally designed information and reporting system will remove the possibility that the corporation will violate laws or regulations, or that senior officers or directors may nevertheless sometimes be misled or otherwise fail reasonably to detect acts material to the corporation's compliance with the law."[187] The Chancellor also noted that "only a sustained or systematic failure of the board to exercise oversight—such as an utter failure to attempt to assure a reasonable information and reporting system exists—will establish the lack of good faith that is a necessary condition to liability."[188] Although employees of Caremark participated in various forms of illegal conduct, resulting in Caremark having to pay approximately $250 million to various public and private parties, the court found that the directors faced little prospect of liability because "the corporation's information systems appear to have represented a good faith attempt to be informed of relevant facts."[189]

Chancellor Allen's opinion in *Caremark* is a thoughtful, well-reasoned opinion. It has been accepted by the Delaware Supreme Court.[190] A substantial body of law has developed, refining the *Caremark* duties that directors have. For example, in *In re McDonald's Corp. Stockholder Derivative Litigation*,[191] stockholders brought a derivative suit against the McDonald's officer responsible for ensuring a safe and respectable workplace. They alleged that he failed to respond adequately to acts of sexual harassment at the company. The Delaware Chancery Court extended the *Caremark* duty of oversight to officers.[192] The court then held that the plaintiffs had adequately pled a *Caremark* claim against the officer. The court found that the allegations of the complaint established that the officer was aware of a large number of "red flags" regarding the existence of sexual

186. *Id.* at 970.
187. *Id.*
188. *Id.* at 971.
189. *Id.*
190. *See* Stone v. Ritter, 911 A.2d 362, 365 (Del. 2006) (holding that "*Caremark* articulates the necessary conditions for assessing director oversight liability.").
191. 289 A.3d 343 (Del. Ch. 2023).
192. *See id.* at 349–50.

harassment and had failed to take appropriate action in response.[193]

By contrast, the Chancery Court dismissed a *Caremark* claim in *In ProAssurance Corp. Stockholder Derivative Litigation*.[194] In that case, one of the nation's largest healthcare professional liability insurance providers signed a policy with a large healthcare institution, which increased its exposure to high severity claims. When the company later announced that its loss reserves were inadequate, stockholders commenced a derivative suit based on *Caremark* against directors and officers. The court held that the complaint did not raise a substantial likelihood of liability with respect to a majority of the company's board and dismissed the complaint for failure to make a demand on the board:

> These events, quite obviously, involve a commercial decision that went poorly—the stuff that business judgment is made of. . . . Oversight claims should be reserved for extreme events. The point is to maintain a baseline expectation that fiduciaries try, in good faith, to monitor key corporate risks and ensure that the entity operates lawfully. For liability to arise, the directors' oversight failures must be so egregious that they

193. *See id.* at 377–80; *see also In re* Boeing Co. Derivative Litig., C.A. No. 2019-0907-MTZ, 2021 WL 4059934 (Del. Ch. Sep. 7, 2021) (refusing to dismiss a derivative suit based on *Caremark* alleging that Boeing had no board-level process for ensuring the safety of its aircraft); Hughes v. Hu, C.A. No. 2019-0112-JTL, 2020 WL 1987029 (Del. Ch. Apr. 27, 2020) (denying a Rule 12(b)(6) motion to dismiss a *Caremark* claim where a company struggled persistently with its financial reporting and internal controls and was unable to acquire sufficient accounting expertise or implement effective controls to address its deficiencies). In a later decision, the Court of Chancery dismissed a similar *Caremark* claim against certain directors of McDonald's. *See In re* McDonald's Corp. S'holder Derivative Litig., 291 A.3d 652 (Del. Ch. 2023). The court found that the plaintiffs had pled sufficient "facts supporting an inference that the Director Defendants knew about a problem with sexual harassment and misconduct at the Company." *Id.* at 662. Nevertheless, the court dismissed the complaint because "the complaint does not support is an inference that the Director Defendants failed to respond." *Id.* The court noted that the Director Defendants "worked with Company management on a response that included (i) hiring outside consultants, (ii) revising the Company's policies, (iii) implementing new training programs, (iv) providing new levels of support to franchisees, and (v) taking other steps to establish a renewed commitment to a safe and respectful workplace." *Id.*

194. Consol. C.A. No. 2022-0034-LWW, 2023 WL 6426294 (Del. Ch. Oct. 2, 2023).

> amount to bad faith. That is, the directors utterly failed to implement a reporting system or consciously disregarded a violation of positive law.
>
> The allegations here suggest nothing of the sort. ProAssurance's board regularly received updates on the company's underwriting practices and reserves. It properly delegated these tasks to management and was guided by actuaries and auditors. The only so-called red flags were of business risks—not illegality. How (and whether) to respond was entirely within the directors' discretion.[195]

How would the Texas courts respond to a *Caremark* claim? This is a very difficult question to answer. As far as I know, there is only one Texas state court case that cites the *Caremark* decision.[196] And the substance of that case was governed by Delaware law.[197]

There is one federal opinion that actually considers the status of *Caremark* under Texas law.[198] As the court noted, it was the court's job to predict how the Texas Supreme Court would handle the question.[199] The court was well aware that "Texas courts have not mapped the parameters of the duty to monitor."[200] Because Texas did not have any law on this issue, the court looked to federal appellate decisions and the law of Delaware.[201] The court concluded that Texas would adopt *Caremark*: "In sum, it is a breach of loyalty to ignore a compliance problem that requires the board's attention."[202]

195. *Id.* at *1; *see also* City of Detroit Police and Fire Ret. Sys. v. Hamrock, C.A. No. 2021-0370-KJSM, 2022 WL 2387653 (Del. Ch. June 30, 2022) (dismissing a derivative claim based on *Caremark* where the board of a natural gas company had a well-functioning committee charged with addressing the risks posed by its business even though the board's process did not prevent a serious explosion).

196. *See* Moody v. Nat'l W. Life Ins. Co., 634 S.W.3d 256 (Tex. App. 2021).

197. *See id.* at 273.

198. *See In re* Life Partners Holdings, Inc., Consolidated Case No. DR-11-CV-43-AM, 2015 WL 8523103 (W.D. Tex. Nov. 7, 2015).

199. *See id.* at *8.

200. *Id.* at *10.

201. *See id.* at 10–11. The court was able to cite only one Texas court of appeals' case for the proposition that Texas courts adopt the Delaware view in corporate matters. This is a thin reed on which to infer deference to Delaware law. *Id.* (citing *In re* Aguilar, 344 S.W.3d 41, 49 (Tex. App. 2011)).

202. *Life Partners*, 2015 WL 8523103, at *13.

Was this federal court right? I suspect that it was. *Caremark* is a well-respected opinion. There is no reason why the Texas courts should choose not to follow it. The difference is that in Delaware, this problem is clearly settled. In Texas, we still have to guess.

B. Freezeout Transactions

In Delaware, controlling shareholders owe a fiduciary duty to the minority.[203] The Delaware Supreme Court once held that it was illegal for a controlling shareholder or group to effect a transaction for the purpose of freezing out minority shareholders.[204] It later reversed its decision and held that such transactions were subject to the entire fairness standard of review.[205] The Delaware Supreme Court later provided that a controlling shareholder could shift the burden of proof on entire fairness by obtaining approval of the transaction by either disinterested directors or disinterested shareholders after full disclosure.[206] If the controlling shareholder conditioned the transaction on receiving and received both disinterested approvals, the business judgment rule protected the transaction.[207] In 2025, the Delaware legislature permitted validation of controlling shareholder transactions upon approval by either a disinterested board committee or disinterested shareholders.[208] However, the new legislation exempts going private transactions from this more lenient standard.[209] Such transactions require approval by both a disinterested board committee and disinterested shareholders to be validated or the controlling shareholder must carry the burden of proving entire

203. *See* Sinclair Oil Corp. v. Levien, 280 A.2d 717, 720 (Del. 1971).

204. *See* Roland Int'l Corp. v. Najjar, 407 A.2d 1032 (Del. 1979); Singer v. Magnavox Co., 380 A.2d 969 (Del. 1977); Tanzer v. Int'l Gen. Indus., Inc., 379 A.2d 1121 (Del. 1977).

205. *See* Weinberger v. UOP, Inc., 457 A.2d 701, 710 (Del. 1983). The entire fairness standard requires the controlling shareholder to prove fair dealing and fair price. *See id.* at 711.

206. *See* Kahn v. Lynch Commc'n Sys., Inc., 638 A.2d 1110, 1117 (Del. 1994).

207. *See* Kahn v. M&F Worldwide Corp., 88 A.3d 635, 644 (Del. 2014).

208. *See supra* Part I.A.

209. A going private transaction is one in which the public shareholders of a company are eliminated and the company's stock is no longer listed on a stock exchange. *See, e.g.*, *Roland Int'l Corp.*, 407 A.2d at 1037.

fairness.[210] In Delaware, it is clear that a minority shareholder challenging a freezeout transaction is entitled to bring a breach of fiduciary duty claim and is not limited to an appraisal remedy.[211]

On this subject, Delaware is a model of clarity. What is the Texas view? Texas law on this issue stems from a 1963 Texas Supreme Court case, *Farnsworth v. Massey*.[212] In that case, a group of shareholders owned 80% of the "Old Companies." They formed new corporations, the "New Companies," in which they owned 100%. They then transferred all of the assets of the "Old Companies" to the "New Companies." Farnsworth owned the 20% minority interest in the "Old Companies."[213] His pro rata share of the sale proceeds was $151,529.27.[214]

Farnsworth brought a fraud claim challenging the sale-of-assets transaction (which we would probably now characterize as a breach of fiduciary duty claim).[215] At trial, the jury awarded Farnsworth $312,000 as the fair value of his interest in the "Old Companies." In addition, the jury awarded Farnsworth $54,000 as special damages for fraud. The trial court held that the plaintiff was entitled to recover the fair value of his stock, but was not entitled to receive special damages for fraud. As a consequence, the trial court entered judgment for Farnsworth for $312,000.[216]

The Court of Appeals viewed the $312,000 awarded by the jury as the equivalent of an appraisal. Because Farnsworth had not complied with a technical requirements of the Texas appraisal statute, the Court of Appeals held that Farnsworth was not entitled to this remedy. As a consequence, the Court of Appeals vacated the $312,000 award. However, the Court of Appeals held that Farnsworth was entitled to recover special damages for fraud. The Court of Appeals awarded Farnsworth his pro rata share of the sale proceeds ($151,529.27) plus special damages for fraud ($54,000).[217] In total, the Court of Appeals rendered Farnsworth a judgment for $205,529.27. In affirming the special damages for

210. *See* DEL. CODE ANN. tit. 8, § 228(a) (2025).
211. *See* Rabkin v. Philip A. Hunt Chem. Corp., 498 A.2d 1099, 1104 (Del. 1985).
212. 365 S.W.2d 1 (Tex. 1963).
213. *See* Massey v. Farnsworth, 353 S.W.2d 262, 270 (Tex. Civ. App. 1961), *rev'd,* 365 S.W.2d 1 (Tex. 1963).
214. *See id.* at 265.
215. *See* Farnsworth v. Massey, 365 S.W.2d 1, 2 (Tex. 1963).
216. *See id.* at 2–3.
217. *See Massey*, 353 S.W.2d at 272.

fraud, the Court of Appeals rejected the argument that because the majority group fulfilled the statutory prerequisites to effect a sale-of-assets transaction, it could not be sued for fraud:

> The Texas Business Corporation Act authorizes a corporation to sell all of its assets, but it does not specifically, or by necessary implication, authorize the directors or majority stockholders of a corporation to sell such assets to themselves, or to a corporation in which they are the sole stockholders, officers and directors.[218]

The Texas Supreme Court reversed. It held that Farnsworth could not receive special damages for fraud because the majority had complied with all of the Texas Business Corporation Act's requirements in a sale-of-assets transaction:

> Acts which are expressly or impliedly authorized by law cannot be made the basis of a claim for damages. Under the Business Corporation Act a majority interest of four-fifths of the outstanding shares of the corporation may dispose of the corporation's assets, subject to the rights of dissenting shareholders. The statutory procedure was carried out in this case and it follows that the plaintiff has neither pleaded nor proved a basis for the recovery of special damages. Plaintiff's complaints of fraud relate to and are based upon the actions of the majority stockholders . . . of the "Old Companies" in selling the assets to the "New Companies" and preventing plaintiff from obtaining a stock interest in the "New Companies" which would correspond to his interest in the "Old Companies." However, as above pointed out, this action characterized by the plaintiff as a "freeze out" is one which the law permits, providing such action is authorized by four-fifths of the outstanding capital stock of the corporation which is selling its assets.[219]

This language suggests that an explicit freezeout transaction is legitimate as long the majority complies with applicable statutory requirements. As long as the majority controls enough votes on the board of directors and enough shares to win the necessary shareholder vote, it may do whatever it likes. This result is questionable and flies in the face of much modern fiduciary duty law. In a typical breach of fiduciary duty case, the majority has

---

218. *Id.* at 267.
219. *Farnsworth*, 365 S.W.2d at 5.

followed all relevant statutory requirements. Yet, the law of fiduciary duties exists as a common law overlay to statutory requirements. As the Delaware Supreme Court once noted, "inequitable action does not become permissible simply because it is legally possible."[220]

Moreover, there is reason to question whether *Farnsworth* means as much as the Texas Supreme Court's language suggests. Although the Supreme Court vacated the award of fraud damages, it also reversed the Court of Appeals' decision that Farnsworth was not entitled to an appraisal remedy.[221] The Supreme Court rendered Farnsworth a judgment for $312,000 (the fair value of Farnsworth's stock as found by the jury).[222] Thus, one may fairly ask whether the Supreme Court didn't grant Farnsworth everything to which he was legitimately entitled. It is not clear what the fraud claim adds to the appraisal claim. If Farnsworth is not being compensated twice for the same injury, the sale-of-assets transaction must have increased the value of the corporation's assets. Such an increase in value would occur if synergy were involved in the combination between the "Old Companies" and the "New Companies." However, the "New Companies" appear to have been formed solely for the purpose of acquiring the assets of the "Old Companies" and do not appear to have had any other assets. As a consequence, *Farnsworth* may be viewed as holding only that the majority may engage in a freezeout transaction as long as it fairly compensates the minority for the value of its interest. So viewed, *Farnsworth* is little different from Delaware law.

Farnsworth suggested that an appraisal, or the common law equivalent, is the exclusive remedy for challenging the unfairness of the consideration in connection with a freezeout transaction. After *Farnsworth*, the Texas legislature amended its appraisal statute to provide: "In the absence of fraud in the transaction, any right . . . to dissent from an action and obtain the fair value of [shares] . . . is the exclusive remedy for recovery of (1) the value of the [shares]; or (2) money damages to the [shareholder]. . . ."[223] Does this language bar the assertion of claims like Farnsworth's?

---

220. Schnell v. Chris-Craft Indust., Inc., 285 A.2d 437, 439 (Del. 1971).

221. *See Farnsworth*, 365 S.W.2d at 4–5.

222. *See id.* at 5.

223. TEX. BUS. ORGS. CODE ANN. § 10.368 (West 2007).

Arguably, "fraud" might be read broadly enough to encompass breaches of fiduciary duty. Indeed, both the Court of Appeals and the Supreme Court in *Farnsworth* felt comfortable describing what was essentially a breach of fiduciary duty claim as a "fraud" claim. In *Gannon v. Baker*,[224] the court refused to limit a dissenting shareholder in a sale-of-assets transaction to an appraisal and noted that "[t]he allegations that [the majority shareholder] failed to disclose material information and engaged in self-dealing in distributing the corporate assets are allegations of fraud in the transaction."[225]

Why does it matter whether a plaintiff with an appraisal remedy can also bring a breach of fiduciary duty claim? First, appraisal claims are subject to significant procedural restrictions. To perfect the right to an appraisal, a shareholder must serve notice of his intention to seek an appraisal on the corporation prior to the date on which a shareholder vote is taken, vote against the action, and take other actions required by statute.[226] Shareholders often run afoul of these requirements.

Second, appraisal does not capture any value created by the transaction with respect to which an appraisal is sought (*e.g.*, synergy). "Fair value" in an appraisal proceeding is defined to be the value of the shares "on the date preceding the date of the action taken that is the subject of the appraisal proceeding" and excludes "[a]ny appreciation or depreciation in the value of the [shares] occurring in anticipation of the proposed action or as a result of the action."[227] If a transaction creates synergistic value, it would seem unfair to allow majority shareholders to appropriate this added value entirely to themselves.

---

224. 807 S.W.2d 793 (Tex. App. 1991), *rev'd on other grounds*, 818 S.W.2d 754 (Tex. 1991).

225. *Id.* at 797; *see also* Cohen v. Mirage Resorts, Inc., 62 P.3d 720, 729 (Nev. 2003) (noting that "the term 'fraudulent' as used in the Model Act . . . encompasses a variety of acts involving breach of fiduciary duties imposed upon corporate officers, directors, or majority shareholders"). *But see* Yeager v. Paul Semonin Co., 691 S.W.2d 227 (Ky. Ct. App. 1985) (holding that minority shareholders could not assert a freezeout claim in connection with a merger because such claim did not amount to fraud and appraisal was the shareholders' exclusive remedy).

226. *See* TEX. BUS. ORGS. CODE ANN. § 10.356(b)(1), (b)(2)(E) (West 2019).

227. TEX. BUS. ORGS. CODE ANN. § 10.362(a) (West 2007).

Third, breach of fiduciary duty actions have procedural advantages over appraisal proceedings. The former, but not the latter, may be brought as class actions and, in appropriate cases, may result in the award of attorneys' fees.[228] Finally, there are some freezeout transactions for which an appraisal is not available (*e.g.*, reverse stock splits, dissolutions). In such cases, are breach of fiduciary duty actions allowed because appraisal is unavailable or is there no remedy to protect the fair treatment of minority shareholders?

Although Delaware law clearly delineates the duties of a controlling shareholder or group in connection with a self-dealing freezeout transaction, the law of Texas is unclear even though there is a leading Texas Supreme Court case on the subject. That case is over six decades out of date and is not a model of clarity. Would the Texas Supreme Court stand by the *Farnsworth* case today? Would the Texas Supreme Court give *Farnsworth* its broadest reading or hold that the court's most extreme statements are dicta? One can only guess at the answers to these questions.

C. *Takeover Defense*

Prior to 1985, most courts evaluated defensive tactics according to a traditional framework. If a majority of the target company's board consisted of independent, outside directors, and the board made an adequate investigation prior to adopting defensive tactics, most courts applied the business judgment rule to determine the validity of defensive tactics.[229] Not surprisingly, defensive tactics were almost universally upheld under this deferential standard of judicial review.

Prior to 1985, the Delaware courts purported to apply a "primary purpose" test to determine the validity of defensive tactics.[230] Pursuant to this test, the courts asked whether the primary purpose of a target company's board was to further legitimate business interests or to perpetuate its control. Despite the different phraseology, the Delaware courts usually accepted

---

228. *See* Andra v. Blount, 772 A.2d 183, 194 (Del. Ch. 2000).

229. *See, e.g.*, Panter v. Marshall Field & Co., 646 F.2d 271, 293–94 (7th Cir.), *cert. denied*, 454 U.S. 1092 (1981); Treadway Cos. v. Care Corp., 638 F.2d 357, 383 (2d Cir. 1980).

230. *See, e.g.*, Cheff v. Mathes, 199 A.2d 548, 554 (Del. 1964).

the board's proffered purpose and did little to investigate whether that purpose was primary. As a consequence, in practice the Delaware "primary purpose" test was indistinguishable from the business judgment rule.[231]

The Delaware courts became concerned that the primary purpose test and the business judgment were too deferential.[232] The Delaware courts were aware that the entire fairness test is usually also outcome determinative.[233] In the context of defensive tactics, this test would require the target company's board to prove that a premium tender offer is inadequate as a substantive business matter. Such proof would presumably be difficult to establish in most cases.

As a consequence, the Delaware Supreme Court adopted a mode of judicial review for defensive tactics that it viewed as intermediate between the business judgment rule and the entire fairness test. According to *Unocal Corp. v. Mesa Petroleum Co.*,[234] in adopting defensive tactics a target company's board must prove that it has "reasonable grounds for believing that a danger to corporate policy and effectiveness exist[s]" and that such tactics are "reasonable in relation to the threat posed."[235]

The Delaware courts have accepted the following threats as justifying defensive action by a target company's board: (a) a takeover bid is at an inadequate price (even though the bid may be at a substantial premium to the previously prevailing price of a

231. *See* Note, *Protecting Shareholders Against Partial and Two-tiered Takeovers: The Poison Pill Preferred*, 97 HARV. L. REV. 1964, 1970 (1984).

232. *See* Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 954 (Del. 1985) (noting that, in the takeover defense context, there is an "omnipresent specter that a board may be acting primarily in its own interests, rather than those of the corporation and its shareholders").

233. *See, e.g.*, AC Acquisitions Corp. v. Anderson, Clayton & Co., 519 A.2d 103, 111 (Del. Ch. 1986).

234. 493 A.2d 946, 954 (Del. 1985).

235. *Id.* at 955.

target company's stock);[236] (b) coercion;[237] (c) greenmail;[238] (d) disrupting the target company's business plan;[239] and (e) threats to non-shareholder constituencies.[240]

236. *See* Paramount Commc'n, Inc. v. Time Inc., 571 A.2d 1140, 1150 n.12 (Del. 1989); Ivanhoe Partners v. Newmont Mining Corp., 535 A.2d 1334, 1342 (Del. 1987); Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 180 (Del. 1985); *Unocal*, 493 A.2d at 955 n.10. The Delaware courts have been generous in accepting proof of inadequacy. They have allowed the board to rely on an investment banker's inadequacy opinion and declined to examine whether the board or the banker had any reasonable basis for its substantive conclusions. *See* Unitrin, Inc. v. Am. Gen. Corp., 651 A.2d 1361, 1383–85 (Del. 1995); *Newmont*, 535 A.2d at 1339 n.12; *Revlon*, 506 A.2d at 181; *Unocal*, 493 A.2d at 950. The Delaware courts have also been lenient in accepting proof of inadequacy by permitting directors to compare the target company's liquidation value to the bid price in cases in which the directors were not considering liquidation as an option. *See Newmont*, 535 A.2d at 1339; *Revlon*, 506 A.2d at 176–77; *Unocal*, 493 A.2d at 950–51. In such cases, the appropriate benchmark would seem to be the target company's going concern value because this value is the one shareholders will receive if the bid is defeated.

237. The courts have roundly condemned coercive partial and two-tiered tender offers (*i.e.*, a partial offer combined with an announced plan to follow up with a squeeze out merger, usually at a lower price or for different consideration than the original offer). *See* Gilbert v. El Paso Co., 575 A.2d 1131, 1135 n.7 (Del. 1990); *Newmont*, 535 A.2d at 1342; Moran v. Household Int'l, Inc., 500 A.2d 1346, 1357 (Del. 1985); *Unocal*, 493 A.2d at 956. Partial and two-tiered tender offers are coercive because, if the bidder purchases less than all of the shares in a tender offer, the remaining shares are usually worth less than the tender offer price. As a consequence, there is significant pressure on shareholders to tender even if they view the bid as less than adequate.

238. In *Unocal* itself, the Delaware Supreme Court held that a bidder's reputation as a greenmailer (*i.e.*, someone who had previously withdrawn takeover bids and sold stock back to target companies at a profit) justified defensive tactics. *See Unocal*, 493 A.2d at 956. Greenmail is allowed under Delaware law because a bidder may pursue conduct that harms a target company's shareholders (*e.g.*, by making a coercive two-tiered tender offer or by proposing to sell significant assets after completing a partial offer and acquiring control). However, one would have thought that in these circumstances the substantively harmful conduct threatened by the bidder would be used to justify defensive tactics rather than the threat of greenmail.

239. In *Time*, 571 A.2d 1140 (Del. 1989), the Delaware Supreme Court held that the target company could defend against an offer that was a "threat" to a plan of merger that had been in the works for a substantial period of time. 571 A.2d at 1140. The court specifically noted that the target company's board was not required to compare the potential value of the merger with the price of a hostile

The Delaware courts have been lenient in accepting proof of proportionality.[241] Where inadequacy is the perceived threat, the Delaware courts have allowed target companies to preclude offers and have not required the target company's board to negotiate with the bidder, conduct an auction, or determine whether an adequate offer can be procured. Where coercion is the articulated threat, the Delaware courts have not limited defensive action to removing the coercive aspects of the offer.[242] To the extent that a takeover bid threatens to disrupt a target company's business

tender offer: "The open-ended analysis mandated by *Unocal* is not intended to lead to a simple mathematical exercise; that is, of comparing the discounted value of [the merged company's] expected trading price at some future date with [the bidder's] offer and determining which is the higher." *Id.* at 1153. If a board can defend against a tender offer to advance its business plan without regard to the comparative value of any outstanding bid, there would appear to be no restrictions on tender offer defense because most companies have a multi-year business plan and almost every unsolicited offer represents a diversion from that plan. Perhaps *Time*—which involved an extraordinary transaction of many years planning—is limited to its facts.

240. The *Unocal* court explicitly empowered a target company's board to consider "the impact on 'constituencies' other than shareholders (*i.e.*, creditors, customers, employees, and perhaps even the community generally)." 493 A.2d at 955. This approach may be criticized on two grounds: (a) it is theoretically questionable whether the board should be allowed to benefit non-shareholder constituencies without a nexus to shareholder value; and (b) the benefit to such constituencies may be used as a pretext to allow a target company's board to perpetuate its control at the expense of shareholders. Nevertheless, I have argued in support of this branch of the Delaware Supreme Court's jurisprudence. *See* Robert A. Ragazzo, *Unifying the Law of Hostile Takeovers: Bridging the* Unocal/Revlon *Gap*, 35 ARIZ. L. REV. 989, 1022–35 (1993).

241. The Delaware Supreme Court has emphasized that if defensive tactics are neither coercive nor preclusive, they should be upheld if they are within "a range of reasonableness. *See Unitrin*, 651 A.2d 1361, 1388 (Del. 1995).

242. For example, in *Unocal* the target company's board faced an offer to purchase half the company for $54 per share in cash and half for securities the bidder valued at $54 per share. Because the second-step securities were of questionable value, the offer in Unocal was a coercive, two-tiered offer. In response, Unocal's board announced a $72 self-tender for up to 49% of the company's stock, an action the Delaware Supreme Court validated based in part on the coercive nature of the original offer. *See Unocal*, 493 A.2d at 956. However, removing the coercive aspects of the original offer required nothing more than guaranteeing non-tendering shareholders a present value of $54 per share.

plan, precluding such an offer would seem to be proportional by definition.[243]

One may question whether the Unocal standard is truly an intermediate standard or whether it is indistinguishable from the business judgment rule. However, once target company directors decide to sell their company instead of simply warding off a potential acquiror, a more exacting framework of judicial review applies. In *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*,[244] the Delaware Supreme Court held that, in the sale context, target company directors are required to attempt to maximize shareholder value.[245]

Revlon requires that directors have a reasonable basis for ascertaining the company's value in the sale context. This requirement is to some extent an application of the duty of care. Although the board is not required to conduct an auction, it is required to have some reasonable basis for the conclusion that its actions are likely to be value maximizing. The courts have permitted directors to rely on traditional financial analyses,[246] and market test procedures[247] to satisfy their duty of care in the sale context.

In addition, once *Revlon* is triggered, a target company's board may no longer consider the interests of non-shareholder constituencies. At the time the company is being sold, there is no longer any link between benefitting non-shareholder constituencies and shareholder value.[248] However, this view

243. The proportionality of defensive tactics justified by the threat of greenmail or the threat to non-shareholder constituencies has not been addressed by the Delaware courts as an independent matter. The cases that involved such threats also involved other threats (*e.g.*, price inadequacy, coercion, disruption of the target's business plan) that justified defensive tactics.

244. 506 A.2d 173 (Del. 1985).

245. *See id.* at 182.

246. *See, e.g.*, *In re* Vitalink Commc'n Corp. S'holder Litig., Civ. A. No. 12085, 1991 WL 238816 (Del. Ch. Nov. 8, 1991); Roberts v. Gen. Instrument Corp., Civ. A. No. 11639, 1990 WL 118356 (Del. Ch. Aug. 13, 1990).

247. *See, e.g.*, Barkan v. Amsted Indus., Inc., 567 A.2d 1279, 1286–87 (Del. 1989); *In re* Fort Howard Corp. S'holder Litig., CIV. A. No. 9991, 1988 WL 83147, at *13 (Del. Ch. Aug. 8, 1988).

248. *See Revlon*, 506 A.2d at 182 ("A board may have regard for various constituencies in discharging its responsibilities, provided there are rationally related benefits accruing to the stockholders. However, such concern for non-

implies that non-shareholder constituencies never counted at all. Almost any board action can be justified on the ground that there is a link to shareholder value.

The Delaware courts have been suspicious of white knight transactions in which a target company's board grants items of favoritism to its preferred suitor. Examples of such favoritism include no shop clauses (a prohibition against seeking additional bidders or sharing information with other bidders), bust up fees (a monetary consolation prize to the favored bidder if some other bidder wins the contest), and lock-up options (allowing a favored bidder an option to purchase stock or assets of the target company, usually at bargain prices). The Delaware courts have routinely proscribed bidder favoritism that was not necessary to generate a bidding contest and that resulted in only a small increase in the highest offer.[249] Such favoritism essentially ends a bidding contest with no benefit to shareholders.

Thus, once the *Revlon* standard of review is triggered, two things change dramatically: (a) the standard of judicial review of defensive tactics is considerably less deferential than that employed under *Unocal;* and (b) non-shareholder constituencies may no longer be considered. It is, therefore, crucial to determine when *Revlon* is triggered. In addition to a decision to sell 100% of a company, *Revlon* is triggered by a sale of control[250] and a substantial restructuring of the company that involves selling a large percentage of the company's assets.[251] Revlon is not triggered by the mere fact that a tender offer is made for a target

stockholder interests is inappropriate when an auction among active bidders is in progress, and the object no longer is to protect or maintain the corporate enterprise but to sell it to the highest bidder." (internal citation omitted)).

249. *See* Paramount Commc'n, Inc. v. QVC Network Inc., 637 A.2d 34, 49–50 (Del. 1993); Mills Acquisition Co. v. Macmillan, Inc., 559 A.2d 1261, 1284–86 (Del. 1989); *Revlon*, 506 A.2d at 183-84.

250. *See QVC*, 637 A.2d at 42. Two factors justify imposing the duty to attempt to maximize shareholder value on the target company's board in the sale of control context: (a) the minority shareholders will be subject to the power of a new controlling shareholder, *see id.* at 42–43; and (b) the minority shareholders will no longer have the ability to sell their shares at a premium absent the consent of the new controlling shareholder, *see id.* at 45.

251. *See* Paramount Commc'n, Inc. v. Time Inc., 571 A.2d 1140, 1150 (Del. 1989) (noting that *Revlon* is triggered where a target company "abandons its long-term strategy and seeks an alternative transaction . . . involving the breakup of the company").

company[252] or by a merger of equals in a stock-for-stock transaction.[253]

In sum, the Delaware Supreme Court has created a substantial body of law that governs judicial review of defensive takeover tactics. How does the law of Texas compare? To the best of my knowledge, there is not a single Texas state court case that cites *Unocal*. The leading case on the legitimacy of defensive tactics under Texas law is the Fifth Circuit's opinion in *Gearhart Industries, Inc. v. Smith International, Inc.*,[254] which predated *Unocal*. Like most pre-*Unocal* cases,[255] *Gearhart* applied the business judgment rule to determine the validity of defensive tactics.[256]

Interestingly, *Gearhart* squarely rejected the idea that the court should be guided by the better developed law of other states and proceeded to analyze the problem as a matter of first principles under Texas law. The court chastised the parties for relying on out-of-state cases rather than analyzing such Texas law as existed:

> We are both surprised and inconvenienced by the circumstance that, despite their multitudinous and voluminous briefs and exhibits, neither plaintiffs nor defendants seriously attempt to analyze officers' and directors' fiduciary duties or the business judgment rule under *Texas* law. This is particularly so in view of the authorities cited in their discussions of the business judgment rule: Smith and Gearhart argue back and forth over the applicability of the plethora of out-of-state cases they cite, yet they ignore the fact that we are obligated to decide these aspects of this case under Texas law.[257]

The interesting question is whether *Gearhart* survives *Unocal*, *Revlon*, and their progeny. The difficulty in predicting the extent to which Texas courts will depart from the traditional law surveyed in *Gearhart* is illustrated by *A. Copeland Enterprises, Inc.*

252. *See id.* at 1151.

253. *See* Arnold v. Soc'y for Sav. Bancorp. Inc., 650 A.2d 1270, 1290 & n.44 (Del. 1994); *Time*, 571 A.2d at 1146-47.

254. 741 F.2d 707 (5th Cir. 1984).

255. *See supra* note 225.

256. *See Gearhart*, 741 F.2d at 722–24.

257. *Id.* at 719 n.4 (emphasis in original).

v. Guste.[258] In *Copeland*, the Texas court was faced with a target company's adoption of a flip-in poison pill rights plan and its use to impede a hostile tender offer so that the board could conduct an auction. The court initially suggested that it would follow *Gearhart*.[259] However, large portions of the *Copeland* opinion in reality apply Delaware law. The court specifically considered and applied *Revlon* duties in the sale context. Had the court truly been applying *Gearhart*, it would have adopted a business judgment rule analysis that would have made the legitimacy of the board's defensive tactics a foregone conclusion.

The Texas Business Organizations Code contains one provision that bears on the duties of a target company's board in conducting takeover defense.

In discharging the duties of director under this code or otherwise and in considering the best interests of the corporation, a director may consider the long-term and short-term interests of the corporation and the shareholders of the corporation, including the possibility that those interests may be best served by the continued independence of the corporation.[260]

What exactly does this statute mean? It does not appear to have been interpreted by any Texas case. The statute may be read to suggest that the business judgment rule should apply to the legitimacy of defensive tactics in Texas. At the very least, this statute codifies the view exemplified by *Unocal* and its progeny that a target company's directors are under no duty to sell the company in response to a premium offer and may undertake defensive tactics in response to such offers.

In determining the standard of judicial review applicable to defensive takeover tactics, the Texas Supreme Court will ultimately have three choices if and when it finally receives a case that poses this issue. The Texas Supreme Court may choose to adopt the pre-*Unocal* view that the business judgment rule protects defensive tactics adopted by a board composed of a majority of independent, outside directors acting with due care. This is generally the view taken by the states that reject Delaware law in the takeover defense area.[261] The Texas Supreme Court may

258. 706 F. Supp. 1283 (W.D. Tex. 1989).
259. *See id.* at 1289.
260. TEX. BUS. ORGS. CODE ANN. § 21.401(b) (West 2013).
261. *See supra* note 37.

choose to follow *Unocal, Revlon*, and their progeny. Finally, the Texas Supreme Court may choose to require that, after an appropriate period to negotiate and develop alternatives, a target company's board must step aside and allow shareholders to assess the viability of an offer. This view is espoused by academics who believe in the efficient market hypothesis.[262] It was also once espoused by the Delaware Court of Chancery.[263]

In sum, four decades after *Unocal*, we are still waiting for an answer from the Texas Supreme Court regarding the standard of judicial review that should be applied to defensive takeover tactics. There is no telling how much longer we will have to wait.

CONCLUSION

In conclusion, Delaware has three main advantages that allow it to be the jurisdiction of incorporation of choice. Delaware has an enabling philosophy, a talented judiciary that specializes in business law, and a rich body of caselaw. Prior to 2025, Texas competed fairly with Delaware with respect to the first of these reasons. Both states were enabling jurisdictions, and there was little substantial difference between the law of these states. That changed in 2025. The Delaware legislature modified its corporation law in ways that made it modestly more pro-management. Delaware law now makes it easier to validate controlling shareholder transactions and makes it more difficult for a shareholder to access corporate books and records. Texas, by contrast, has sharply reduced liability for breach of fiduciary duty, required shareholders seeking access to a public corporation's books and records to own at least 5% of the corporation's shares or to have owned the shares for at least six months, made it more difficult for shareholders to offer proposals at a shareholders meeting and gain access to the corporation's

262. *See, e.g.*, Frank H. Easterbrook & Daniel R. Fischel, *The Proper Role of a Target's Management in Responding to a Tender Offer*, 94 HARV. L. REV. 1161, 1165–82 (1981).

263. *See* City Cap. Assocs. v. Interco, Inc., 551 A.2d 787, 798–801 (Del. Ch. 1988). It should be noted, however, that the *Interco* decision was later disavowed by the Delaware Supreme Court. *See* Paramount Commc'n, Inc. v. Time Inc., 571 A.2d 1140, 1152–53 (Del. 1989).

proxy machinery, regulated proxy advisory firms, and made it more difficult to commence derivative suits. Thus, Texas has chosen to compete aggressively for incorporation business.

However, Delaware's other advantages continue to exist. Delaware has a talented, experienced, relatively non-partisan judiciary. The Texas legislature's creation of the Business Court and the Fifteenth Court of Appeals is an attempt to create a specialized business judiciary that is on par with Delaware's. Although the creation of these courts is a step in the right direction, it is not clear that they will rival the Delaware courts in stability and business expertise. Business court judges may substitute judicial experience for business practice experience. As a result, there is no guarantee that these judges will have the expertise of Delaware Chancellors and Vice Chancellors. Business Court judges are appointed by the Governor for two-year terms. There is no guarantee that this bench will have the same stability or relative non-partisanship as the Delaware Court of Chancery. Appeals from the Texas Business Court will go to a national Fifteenth Court of Appeals. Ultimately, these judges will be elected, as are the members of the Texas Supreme Court. There is, therefore, no guarantee that these appellate courts will have the expertise or stability of the Delaware Supreme Court. Finally, the Texas Constitution carries a robust right to a jury trial that applies in the Business Court. The Delaware Court of Chancery sits without juries. The introduction of jury trials inevitably reduces the expertise and consistency inherent in decision-making. As a result, the creation of new specialized business tribunals is a step in the right direction but does not necessarily place these tribunals on par with their Delaware counterparts.

The biggest competitive problem from Texas's perspective lies with the third of Delaware's advantages. There are many areas where Delaware has a well-developed body of caselaw and Texas, despite its status as the second most populous state in the country, has little or no law. As a consequence, Texas law provides less legal certainty to managers and transaction planners than Delaware law. This factor will be hard for Texas to overcome in the near and intermediate future.

Whether Texas will succeed in attracting incorporation business depends on whether its newly created advantage in substantive law outweighs the Delaware advantages that lie in its specialized business courts and its well-developed body of caselaw. Although one suspects that there will not be a mass migration of companies from Delaware to Texas, this situation is well worth monitoring.