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Texas stakes its claim as new home for business courts

With companies increasingly eyeing Nevada and Texas over Delaware, Texas's new Business Court offers a timely, if still untested, alternative to the Court of Chancery's seasoned dominance.

By Paul A. Reynolds

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As you have probably heard, the Delaware Court of Chancery – the country's most prominent and influential court for resolving internal corporate disputes – has been under attack in recent months, following several controversial decisions. Most notably, in *Tornetta v. Musk*, the court invalidated Elon Musk's Tesla \$55.8 billion compensation plan (310 A.3d 430, Del. Ch. 2024), refused to vacate the decision after Tesla's shareholders ratified the compensation package in a subsequent vote, and awarded attorneys' fees of \$345 million (326 A.2d 1203, Del. Ch. 2024).

The controversy over these decisions has caused a number of publicly traded and privately held companies to consider reincorporating – or incorporating in the first instance – in other states, primarily Nevada and Texas. Indeed, several high-profile companies have, in recent months, done just that, including Dropbox, TripAdvisor, Neuralink and Persing Square to Nevada and SpaceX and Tesla to Texas. In response, Delaware's legislature, in February, enacted S.B. 21, a complex piece of legislation that, among other things, narrowed the definition of a controlling shareholder; in response, Nevada (AB 239) and Texas (S.B.s 29, 2411, and 2337) have each enacted similar legislation.

Putting aside the events of the last few months, Nevada has, for nearly 20 years, been trying to offer itself as a more appealing alternative to Delaware, with legislation that is more protective of directors and

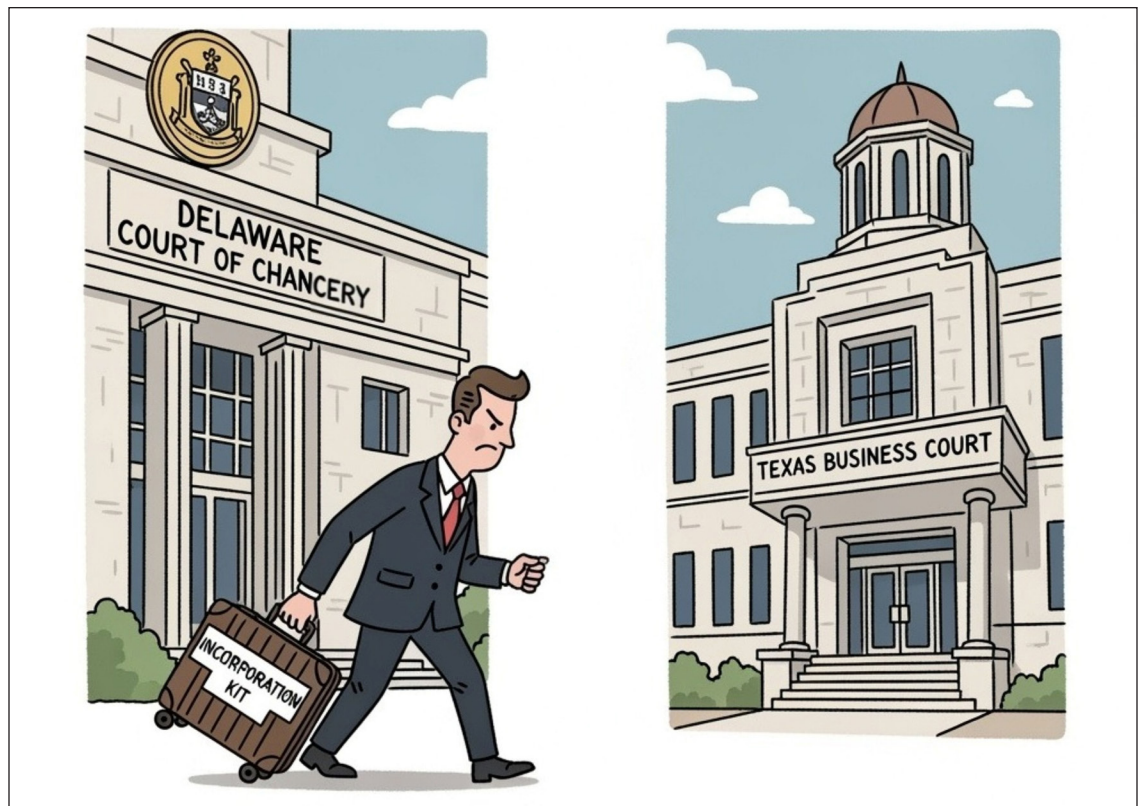
officers. Texas is relatively new to the game. But one thing Texas has done – that Nevada is only just now contemplating – is create a special business court. And that court has just issued its first merits decision, making it timely to focus on it as compared to Delaware's Court of Chancery in terms of the analysis of whether to reincorporate, or where to incorporate in the first instance.

The Delaware Court of Chancery Delaware came to prominence as a state of incorporation starting in the early 1900s (before then New Jersey was most popular); it did so by focusing on three things: (1) lower

corporate taxes; (2) an efficient and flexible statutory law of corporations; and (3) a specialized court to hear intra-corporate disputes, the Court of Chancery. It has been remarkably successful in this regard, with a majority of public and private companies having long been incorporated there. The Court of Chancery is one of the key differentiators that has historically favored Delaware incorporation. The Court of Chancery is a court of equity. Historically, in Great Britain, and the early days of the United States, there were separate courts of law and equity. Most states – currently all but four, including Delaware –

have combined those courts into unified court systems that hear both legal and equitable matters.

Internal corporate disputes – which are controlled by the law of the state of incorporation, a venerable choice of law principle – are considered equitable in nature under Delaware law; it considers corporate directors' relationship to stockholders to be analogous to a trustee's relationship to trust beneficiaries, a classic equitable relationship, and thus within the Court of Chancery's subject matter jurisdiction. There is also statutorily conferred subject matter jurisdiction, most notably, "to interpret, apply, enforce or determine



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the validity” of various corporate instruments, including certificates of incorporation, bylaws, stock purchase agreements, proxies, merger agreements and the like. *See* 8 Del. Code § 111(a). One notable feature of courts of equity generally, and the Court of Chancery in particular, is that they do not – and cannot – hold jury trials; all cases are tried to the bench.

A dispute involving the internal affairs of a corporation will subject the various constituents to the personal jurisdiction of that state’s courts, so the Court of Chancery is an available forum for the litigation of such disputes, along with the courts where the company is headquartered. Further, mandatory choice of forum provisions, mandating that such disputes be litigated solely in the state of incorporation, are increasingly being inserted into corporate constitutive documents. (Delaware courts have upheld the enforceability of these provisions. *See Boilermakers Local 154 Ret. Fund v. FedEx Corp.*, 73 A.3d 934, 954 (Del. 2013). California courts had also generally upheld those provisions in Delaware corporations’ charters. *See Drulias v. 1st Century Bancshares, Inc.*, 30 Cal. App. 5th 696, 707-08 (2018). More recently California’s 4th District Court of Appeal refused to enforce such a provision, given that it found some of the claims before it were not inherently equitable and to require them to be tried in a court that does not use juries would impermissibly impinge on the California Constitution’s bar on pre-dispute jury trial waivers. *See EpicentRx, Inc. v. Superior Court*, 95 Cal. App. 5th 890, 904-08 (2023). The California Supreme Court granted review of EpicentRx and heard argument on May 6, so a decision is expected forthwith.)

In any event, the certainty of a bench trial in the Court of Chancery is particularly attractive to incorporators, given the extreme quality and expertise of the Chancellor and Vice-Chancellors who comprise the Court of Chancery’s judicial officers. They have been chosen from practitioners who have specialized in handling highly complex intra-corporate disputes for their entire careers at the highest level. Further, the Court of Chancery is very generously funded, given its importance in generating tax revenue through encouraging Delaware incorporation or formation.

As such, the Court of Chancery’s opinions tend to be extremely detailed and nuanced, no matter their often mind-numbing complexity; its opinions commonly exceed 100 pages, with hundreds of footnotes containing copious case and record citations. And there has developed over the years a mind-bogglingly large volume of these opinions. This extremely extensive and nuanced body of case law, applied by world experts on the subject matter, is perceived by many to provide greater predictability of outcome than if the cases were filed elsewhere.

In terms of procedure, having just tried a case in the Court of Chancery last December, I found that its lack of opening statements and closing arguments – replaced instead by the exchange of lengthy pre-trial and post-trial briefs and an argument held several months after the presentation of evidence – was particularly appreciated in a large, complex case. The ability to make very detailed and precise written arguments, with citations to evidence and law is, in my view, far superior in a complex case as compared to having to get up and deliver a closing argument orally following the examination of the last witness. This procedure is one of the best aspects of practice in the Court of Chancery as it is far more likely, in my view, to lead to the various arguments being made as well as they can be made, and thus more likely to lead to the correct outcome, win or lose.

Texas’s new Business Court

Texas’s new Business Court opened for business on Sept. 1, 2024. There are currently five divisions: Dallas, Fort Worth, Houston, Austin, and San Antonio; a specialized intermediate appellate court, the 15th Court of Appeals in Austin, has exclusive jurisdiction over appeals from the Business Courts.

The Business Court’s subject matter jurisdiction – set out in Texas Government Code § 25A.004 and recently expanded by legislation (HB 40), enacted in June and set take effect Sept. 1 – is both broader and narrower than the Court of Chancery’s. It is broader in that it applies not just to internal corporate disputes but also cases arising under federal or state securities or trade regulation law, commercial contract disputes, actions to en-

force arbitration agreements, certain IP disputes, including trade secret disputes and attorney malpractice. It is narrower in that there is a \$5 million amount in controversy jurisdictional threshold. The Business Court’s subject matter jurisdiction is concurrent with Texas’s general jurisdiction district court trial courts; there is a removal process.

The judges are appointed by the governor – unlike other trial court judges, who are elected – and must have at least 10 years’ experience practicing complex business litigation, business transaction law, serving as a civil trial judge or some combination of the three. It seems unlikely, even with these requirements, that the bench’s expertise and sophistication regarding internal corporate disputes will reach quite the height of the Court of Chancery’s bench, given the extreme subject matter expertise of the jurists typically appointed to that court. Further, Texas’s corporations case law is nowhere near as extensive as Delaware’s, which has been extensively developed over more than 100 years of subject matter expertise and jurisdictional dominance. Still, with the Business Court having just issued its first merits decision (on a motion for summary judgment) in *Primexx Energy Opportunity Fund, LP v. Primexx Energy Corp.*, 2025 Tex. Bus. 9, –S.W.3d – (Tex. Bus. Ct. 2025), the initial returns are encouraging. The opinion runs nearly 80 pages, and its analysis shows an admirable level of detail and sophistication.

There is one other issue, though: jury trials, the first of which is expected to be held before the Business Court in September. The Business Court tries to a jury those actions or claims that are entitled to a jury trial by the Texas Constitution. *See* Tex. Govt. Code § 25A.015. That includes intra-corporate disputes under applicable Texas case law. This is a major point of differentiation from Delaware practice. True, the enactment in May of S.B. 29 added, *inter alia*, statutory language that allows for a jury waiver to be included in a company’s certificate of formation or bylaws as to any intra-corporate dispute (called “internal entity claims”). *See* Tex. Bus. Orgs. Code § 2.116. Such a waiver binds shareholders who voted for or ratified the document containing the waiver or, after the waiver was included – if the company is traded on a national exchange) –

either purchased or continued to hold stock in the company. *Id.* Some commentators expect this statute to be challenged as violating the Texas Constitution.

But even putting aside that uncertainty and assuming the statute is upheld, the procedure for bench trials in the Business Court is governed by the Texas Rules of Civil Procedure. And those rules provide for in-trial opening statements and closing arguments rather than the pre- and post-trial briefing and then argument practice used in the Court of Chancery. As noted, in my opinion, the briefing-then-argument practice is far preferable for the types of large, complex actions that would typically be tried in the Business Court. In this regard, Delaware practice is preferable, as I see it.

Conclusion

In choosing whether to incorporate in Delaware or Texas, based on their respective specialized court systems alone, Delaware, as the long-term incumbent – with the certainty of a bench trial before a jurist of extreme subject matter expertise and the world’s most developed body of case law on the subject – has the edge. But it will be interesting to see how things develop in the Texas Business Court. Given Delaware recent legislative enactment, S.B. 21 – intended to counter the issues that were causing some companies to reincorporate elsewhere – it may make sense to take a wait-and-see approach regarding the Business Court before choosing Texas.

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