

DExit: The Delaware Exit Movement

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Overview

Delaware has long been the preferred state of incorporation for U.S. companies. Approximately 66.7% of Fortune 500 companies are incorporated in Delaware, and 81.4% of IPOs select Delaware as their corporate domicile¹.

This dominance raises two critical questions:

- Why Delaware?
- Why are some companies now considering alternatives?

Why Delaware?

Several factors drive Delaware's position as the leading state for incorporation:

- Specialized court system: The Delaware Court of Chancery exclusively handles corporate law matters, providing predictable and efficient outcomes
- Flexible corporate laws: The Delaware General Corporation Law (DGCL) allows for flexible governance structures
- Privacy protections: Delaware does not require public disclosure of directors or shareholders in filings
- Tax advantages: The state imposes no corporate income tax on out-of-state income, no sales tax and offers favorable treatment of intangible assets

The “DExit”

Despite the advantages, Delaware's dominance is being challenged by states such as Texas and Nevada². This shift is partly fueled by controversial decisions, including

the rescission of Elon Musk's \$55.8 billion compensation package despite shareholders' approval, raising concerns about judicial overreach.³ *Tornetta v. Musk*, 326 A.3d 1203 (Del. Ch. 2024).

In 2024, settlements totaled \$618.3 million in aggregate, a significant increase from \$110.1 million in 2019.⁴ More recently, in *The New York City Employees' Retirement System, et al. v. Barbara M. Byrne, et al.*, shareholders challenged Paramount's \$8 billion merger with Skydance, alleging that the board failed to consider a better offer. The court allowed the case to proceed before the deal closed and scrutinized the special committee's decisions, signaling a willingness to look beyond traditional business judgment protections.⁵ This trend has created an increasingly receptive legal environment for shareholder litigation.

Coupled with the franchise tax obligations and dual compliance costs, these developments have prompted companies such as Simon Property Group, AMC Networks and Madison Square Garden Sports to explore alternatives.⁶

1. <https://corp.delaware.gov/stats>

2. *Texas and Nevada Introduce Legal Reforms to Attract Corporate Incorporations, Challenging Delaware's Dominance*

3. *Delaware Court of Chancery Rejects Elon Musk's \$55.8 Billion Tesla Compensation Package (Again)* | McCarter & English, LLP

4. *M&A Settlements in Delaware Chancery Court Have Increased Substantially*: Cornerstone

5. *The New York City Employees' Retirement System, et al. v. Barbara M. Byrne, et al.*, :: 2025 :: Delaware Court of Chancery Decisions :: Delaware Case Law :: Delaware Law :: U.S. Law :: Justia



Delaware's Response

To counter the DExit trend, Delaware enacted Senate Bill 21 (SB 21) in March 2025, amending the DGCL.⁷ SB 21 amended Section 144 of the DGCL and corporations can now choose from different approval methods for Safe Harbor protections. The provision also seeks to clarify definitions of controlling stockholder, disinterested director and material relationships to improve legal predictability.⁸

These changes aim to reduce litigation risk and provide companies with greater flexibility. SB 21 also amended Section 220 of the DGCL by restricting access to corporate books and records, which may reduce broad document demands and legal and litigation expenses. Ultimately, the effectiveness of these reforms will depend on judicial interpretation.

States Gaining Ground

In September 2025, Texas launched a dedicated Business Court system to expedite complex commercial disputes over the Delaware Court of Chancery.⁹ Texas also offers a codified business judgment rule and thresholds for shareholder litigation, designed to protect directors and minimize frivolous lawsuits.

Similarly, Nevada provides a presumption of good faith and limits liability for directors and officers unless fiduciary duties are breached through intentional misconduct, fraud or knowing legal violations. (Nev. Rev. Stat. § 78.138(7)

(2024)). Nevada also imposes zero corporate income tax, minimal reporting requirements and broad deference in corporate governance structures, reducing regulatory burdens.

Impact on D&O Insurance

The state of incorporation, Delaware versus alternatives like Texas or Nevada, can have meaningful implications for D&O insurance, particularly in terms of coverage structure, pricing, claims response and legal interpretation.

Legal Environment & Liability Exposure

- **Delaware:** Delaware offers strong protection for directors and officers through the Business Judgment Rule, exculpation provisions and demand futility standards for derivative suits. However, Delaware prohibits indemnification for judgments and settlements in derivative actions, making Side A D&O coverage essential. Delaware courts often apply Delaware law to D&O policies issued to Delaware corporations, which can be favorable to policyholders due to the broad coverage interpretations.
- **Texas & Nevada:** Texas and Nevada allow indemnification for derivative settlements and judgments, which can reduce the need for dedicated Side A coverage and potentially reduced premiums. They also provide broader exculpation statutes and more management-friendly litigation environments, which may reduce overall D&O liability exposure.¹⁰

6. *The U.S. Reincorporation Race: Who's in the Lead?*

7. *Substitute 1 to S.B. 21, 151st Gen. Assemb., Reg. Sess. (Del. 2025) (enacted Mar. 25, 2025)*

8. *Delaware Enacts Important Corporate Law Reforms*

9. *Law Firms Join Early Winners in 'Very Hot' Texas Business Court*

10. *Nevada favors directors and officers while Delaware favors shareholders, analysis finds | Legal Dive*

Impact on D&O Insurance Pricing & Structure

While insurers do not typically tailor D&O policies solely based on the state of incorporation, underwriters consider legal environments when assessing risk. Companies incorporated in states with lower litigation risk and stronger indemnification rights may be viewed more favorably, potentially leading to better pricing and/or broader terms. In Delaware, insurers could argue that Side A policies should be priced differently due to the non-indemnifiable nature of derivative claims. Alternatively, one could argue that companies incorporated in Texas or Nevada should reflect below-market pricing for any Side A policies procured.

Conclusion

Delaware remains a top choice for incorporation due to its favorable corporate legal framework, its robust body of case law and historical dominance. However, recent judicial trends, high-profile corporate migrations and competitive reforms in other states have challenged its supremacy. Companies evaluating incorporation options must weigh governance, flexibility, litigation risk and insurance implications when determining the optimal jurisdiction.

Additional considerations influence the determination of appropriate D&O limits and structure, including the state of incorporation. Risk exposure factors must also be evaluated when negotiating pricing and limits for Side A policies. Any formal discussion on optimizing a D&O program should be supported by a comprehensive review of your program, litigation history, customized analytics and overall risk appetite.





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