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Texas Targets Del. Primacy With Trio Of New Corporate Laws

By **Andrew Oringer** (June 17, 2025, 5:19 PM EDT)


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It has long been the case that Delaware corporate law has effectively become a sort of federal law governing corporate governance and stockholder rights. The state has managed to develop an established system of rules with extensive interpretive authority, which has generally been welcomed by those looking for a domicile for their corporations and other businesses. This procedural backdrop has helped Delaware position itself as a leader in attracting business formation.

And there has been a substantive appeal to domiciling in Delaware. Arguably at the heart of Delaware's attractiveness is the highly developed business judgment rule. Under that rule, a court generally is not to second-guess the judgment of a board or other decision-maker so long as a majority of the board or other members have no conflicting interest in the decision, and if the decision is undertaken with due care and in good faith.

A key area in which the business judgment rule can come into play is the area of executive compensation. The role of executive compensation, in fundamental business approaches, took on new significance after the Enron and WorldCom debacles, becoming an important lynchpin in the historic Troubled Asset Relief Program legislation that bailed out the financial sector in 2008.

Subsequent federal statutory enactments have also focused on executive compensation. It is through this prism that a number of issuers and other companies; boards and board committees; and consultants, lawyers, and other advisers have come to scrutinize executive compensation with an increasingly jaundiced eye. Against this backdrop, executives understandably may prefer a regime in which a company's compensation decisions are the subject of high levels of judicial and regulatory deference.

Lately, however, the Delaware courts' arguably somewhat deferential approach to executive compensation has become more varied and restrictive. There have been a series of cases coming out of Delaware in recent years that may be perceived by some as ratcheting up the second-guessing of corporate decision-making and as being increasingly business-unfriendly.[1]

Even so much as a decision to deny a motion to dismiss could reverberate in the market, as once a case survives such a motion, legal expenses could soar and the risk of an adverse judgment may increase exponentially when compared with the risk immediately before the denial. Those eventualities may dramatically increase the potential for material settlements, and, as a result, companies, defendants and their lawyers generally prefer judicial trends in favor of early dismissal.

We now see executive compensation emerging as a possible basis for a desire on the part of company decision-makers to disrupt Delaware's hold on business formation. The tipping point, if indeed this possibility comes to pass, may in retrospect turn out to be the high-profile judicial **rejection** of Elon Musk's compensation package by the Delaware Court of Chancery in its January 2024 decision in Tornetta v. Musk.[2]

The Musk cases, including the Court of Chancery's December 2024 second **decision** in Tornetta v. Musk, or Tornetta II, are noteworthy examples of where the case went far beyond the settlement stage, and to the point of actual and impactful adverse judgment. Indeed, as discussed below, the impact transcends the legal and extends strikingly to the practical.

In the first of the Tornetta v. Musk decisions,[3] the Court of Chancery analyzed Musk's pay package from Tesla Inc. under an entire fairness standard of review, given the court's classification of the transaction as a conflicted-controller transaction. The court determined that the approval of Musk's pay package was in breach of Musk's, as well as the Tesla directors', fiduciary duties, and ordered the package to be rescinded.[4]

In response to that decision, Tesla sought and obtained stockholder ratification of the pay package. In the Tornetta II decision,[5] the court declined to revise its prior decision to rescind the pay package, again determining that the package was excessive and the result of a breach of fiduciary duty — and made quite the award of attorney fees, to boot.

Musk, not one to take rebuke lying down, decided to pack his bags and head elsewhere, and Texas seems to have taken the hint. Even before the Musk decisions, some had started to openly wonder whether Delaware's grip on corporate formation is at risk, with Texas emerging as a prime and aggressive competitor. Indeed, Texas, unlike Delaware, has the additional selling point of being a hotbed for certain types of business activity, having nothing to do with its being a potential legal-side magnet for business formation.

Texas officials have made no secret of their intent. Thus, Texas has enacted a triple play of new laws, with the express goal of attracting businesses to relocate to Texas.

First, S.B. 29 **changes** the Texas Business Organization Code and addresses governance and legal protections for business entities by (1) making clear that laws and court decisions from other states cannot override Texas business laws, allowing Texas-based companies expressly to specify in documents that internal disputes must be resolved in Texas courts; and (2) codifying the business judgment rule under which there is a presumption that corporate officers and directors act in good faith when making business judgments, thereby making it harder for shareholders to sue companies if there is no fraud, misconduct or illegal activity.

The legislation also allows publicly traded Texas companies to have an ownership threshold for shareholder derivative actions of up to 3% of outstanding shares, thereby, in the words of Gov. Greg Abbott, "eliminat[ing] rogue shareholders, with just a handful of shares of stock in a company, from being able to hold a company hostage from the ability to make sound business decisions."

Second, S.B. 1058 **exempts** various stock exchanges from certain franchise tax liabilities, and, third, H.J.R. 4 **provides** for a constitutional amendment to be put on the ballot in November 2025 to let voters decide whether to ban the state from imposing certain taxes on stock exchanges.

It's not as though Texas' designs here are overly subtle: "This legislation will incentivize even more businesses now to move the registrations, perhaps move their listings and ultimately to move their headquarters to Texas," Texas Stock Exchange CEO James Lee said.

Abbott also said when signing the bills into law on May 14, "Business decisions are to be made by the elected officers and their shareholders, not by unelected judges," adding, "These laws codify policies that attract businesses, attract job creators and will ensure that Texans are going to have plentiful job opportunities to earn a great paycheck for decades to come."[6]

Then there is the **upcoming** Texas Stock Exchange, which appears presently to be slated to open during the second week of February 2026. As Lee said when the bills were signed, "[The legislation] also lays the foundation for exchange operators to make meaningful investments in Texas, while providing greater access to our public markets."[7]

There are also other pending bills. For example, H.B. 9, if approved by the voters in November, would **raise** the business personal property tax exemption from $2,500 to $250,000. It would not be surprising if Texas is not at all done, either: One might suggest the state could be about to take a page out of the Dr. Seuss playbook: "[M]ost people stop with the Z[, b]ut not me."[8]

So, we once had Brexit, and now one may wonder if we're on the precipice of, as the phrase has been coined, DExit. Delaware might well be reminded of when Atari was the only video game purveyor that mattered, and when Betamax ruled the world of television taping (when there was such a thing as "taping"). It is also worth noting that Texas is not the only jurisdiction making a pitch to eat Delaware's lunch; for example, Ohio has been mentioned as a jurisdiction that would like a seat at this table.

Success can be fleeting, especially for those who lose sight of that very truism. Texas Association of Business President and CEO Glenn Hamer left no doubt about Texas' designs at the bill signing, championing the effort of the Lone Star State to solidify it as the best state and "unrivaled epicenter" for business, and asserting "that it's only a matter of time before we leave Delaware in the dust."[9]

Sure enough, in an effort to mollify potential DExiters, Delaware earlier this year **enacted** S.B. 21, which includes new safe harbor protections for insiders, limits certain inspection rights and, in the case of a transaction involving a controlling shareholder, requires controlling shareholders only to obtain either minority shareholder approval or independent board approval.

So will Texas emerge as a new home for business formation? Are there other states that will take the bait and go all-in on an effort to displace Delaware? As Delaware has shown, the economic upside for a state becoming home to innumerable corporations and other businesses is patently evident, so the attraction is a strong one.

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[1] E.g., In Re: Match Group Inc. Derivative Litigation, 315 A.3d 446 (Del. 2024) (extending the situations in which the analytical framework laid out in Kahn v. M&F Worldwide Corp., 88 A.3d 635 (Del. 2014), may apply); In re: Investors Bancorp Inc. Stockholder Litigation, 177 A.3d 1208 (Del. 2017) (limiting the scope of ratification as a permissible defense); Knight v. Miller, No. 2021-0581-LWW (Del. Ch. June 1, 2023) (going so far as to reject a settlement following an earlier decision in the same case (No. 2021-0581-SG (Del. Ch. Apr. 27, 2022)); Garfield v. Allen, No. 2021-0420-JTL (Del. Ch. May 24, 2022) (concluding that the defendant knowingly accepted compensation not provided for under the relevant plan); Howland v. Kumar, No. 2018-0804-KSJM (Del. Ch. June 13, 2019) (motion to dismiss denied in a compensation-related action for breach of fiduciary duty); Pfeiffer v. Leedle, C.A. No. 7831-VCP (Del. Ch. Nov. 8, 2013) (motion to dismiss denied in a compensation-related action for breach of fiduciary duty).

[2] Multiple reports have connected the Musk situation to the possibilities that companies might seek to redomicile outside of Delaware. E.g., K. Mejdrich, "5 Things Executive Pay Attys Should Keep an Eye on in 2025," Law360 (Employment Authority), https://www.law360.com/employment-authority/articles/2281495/5-things-executive-pay-attys-should-keep-an-eye-on-in-2025 (Jan. 9, 2025); K. Mejdrich, "4 Trends Executive Compensation Attorneys Are Watching," Law360, https://www.law360.com/articles/1805981/4-trends-executive-compensation-attorneys-are-watching (Feb. 23, 2024).

[3] Tornetta v. Musk, 310 A.3d 430 (Del. Ch. 2024).

[4] It is noted that, compounding the complexities of the Tesla situation is the issue that rejections of pay packages can make it very challenging to recast the compensation at desired levels (even conceding arguendo that there should be some amount of downwards revision) with retroactive effect, especially if options are a part of the package, in light of various extensive and difficult tax rules (e.g., Section 409A of the Internal Revenue Code of 1986) that may apply.

[5] Tornetta v. Musk, 326 A.3d 1204 (Del. Ch. 2024).

[6] Perreault, Daniel. "Gov. Abbott signs three bills with goal to attract more businesses to relocate to Texas," KVUE.com, https://www.kvue.com/article/news/politics/texas-legislature/texas-governor-

abbott-signs-bills-attract-businesses-move-headquarters/269-9b39bdb6-70a9-471f-b9cb-79cf4b9ba7b9 (May 14, 2025) ("KVUE.com (5/14/25)").

[7] Id.

[8] Dr. Suess, On Beyond Zebra! (Random House 1955).

[9] KVUE.com (5/14/25). Note that an effort to stop Tripadvisor, Inc. from redomiciling was rejected by the Delaware Supreme Court in Maffei v. Palkon , No. 125, 2024 (Del. Feb. 4, 2025).