

DELAWARE VS. TEXAS: A COMPARISON OF CORPORATE GOVERNANCE AND BUSINESS COURTS

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OVER THE LAST TWO LEGISLATIVE SESSIONS, the State of Texas has created the new Texas Business Court and enacted major corporate governance reforms. According to proponents, these changes are poised to help the Lone Star State attract more business incorporation, more business operations, and more business litigation. Others point to Delaware's own legal reforms and its perennial Court of Chancery as a standard that will be hard for any other state to overcome. Any examination of these two legal traditions must ask two questions. First, what's the difference between the two courts? Second, how will Texas's evolving corporate law interact with the Business Court to shape corporate decision-making? To help answer these questions, this Article sets forth a short overview of the structural differences between the Texas Business Court and Delaware Court of Chancery, and some key differences between the two states' corporate governance laws as they relate to the business disputes courts most often resolve.

TEXAS BUSINESS COURT STRUCTURE

Jurisdiction

The Court of Chancery has jurisdiction over "all matters and causes in equity," as well as power to interpret and enforce Delaware General Corporation Law.¹ There is no threshold amount in controversy, so any dispute that falls within the court's equitable (or limited statutory) jurisdiction may be heard. The majority of the court's docket is composed of commercial disputes involving equitable rights or remedies or the interpretation of corporate documents. The court lacks, however, jurisdiction "to determine any matter wherein sufficient remedy may be had by common law, or statute."² This means that the Court of Chancery can't adjudicate legal claims, such as for breach of contract or fraud—though it can and often does issue damages in connection with equitable claims, like unjust enrichment. Legal claims must be brought in Delaware Superior Court (which, incidentally, has created a special division for certain high-dollar cases)³ or one of the other state trial courts.

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The Texas Business Court's jurisdiction is not divided between legal and equitable claims. Instead, the court has jurisdiction over most legal or equitable claims that fall within three buckets: (1) most corporate governance actions—such as breach of fiduciary duty or a derivative proceeding—provided that the amount in controversy exceeds \$5 million; (2) corporate governance actions regardless of the amount in controversy if either party is a publicly traded company; and (3) most commercial disputes—including breach of contract, fraud, trade secrets, and enforcement of an arbitration agreement—where the amount in controversy exceeds \$5 million.⁴ The court is denied jurisdiction over certain claims, with personal injury claims being the most prominent.⁵ And unlike the Delaware Courts, where jurisdiction is exclusive between the Chancery and common-law courts, the Texas Business Court has concurrent jurisdiction with other trial courts.

Fact Finder

In the Court of Chancery, all trials are to the bench because the court's jurisdiction is limited to equitable causes of action. By contrast, in the Texas Business Court, parties are entitled to trial by jury in all cases involving legal rights—although Texas courts respect jury trial waivers in contracts (including corporate bylaws).⁶

Selection of Judges

The Delaware Court of Chancery is composed of one Chancellor and six Vice Chancellors, each of whom are appointed by the Governor and confirmed by the Senate to serve a twelve-year term, with no more than four judges permitted to be members of the same political party.⁷ Although there are

only minimal requirements to be appointed as Chancellor or Vice Chancellor,⁸ in practice nearly every Chancellor or Vice Chancellor has extensive experience litigating before the Court of Chancery.

The Texas Business Court is served by ten judges who are

appointed by the Governor and confirmed by the Senate for a two-year term.⁹ Judges must have practiced law in complex commercial litigation or transactional law for at least ten years.¹⁰ The judges elect an administrative presiding judge to lead the court and handle certain administrative duties.¹¹

Assignment of Cases

The Texas Business Court is separated into five divisions, centered on large metropolitan areas in the state: Houston, Dallas, Fort Worth, San Antonio, and Austin.¹² Cases must be filed in a Business Court Division where venue is proper.¹³ Each division is allocated two judges, who are generally drawn from the legal community in that area.¹⁴ After a case is filed in or removed to the Business Court, it is randomly assigned to one of the two judges appointed to the division.

The Court of Chancery is not organized by division; the Chancellor and six Vice Chancellors serve the state as a

whole. Historically, the Chancellor retained strong discretion in assigning cases among the Vice Chancellors. But the court recently developed a random selection protocol, which was rolled out this past fall.¹⁵

Appellate Process

In the Court of Chancery, there is only one level of appellate review. Appeals from the Court of Chancery are taken directly to the Supreme Court of Delaware as a matter of right.¹⁶

There are two levels of appellate review from the Texas Business Court. Appeals from the Business Court are taken as of right to the Fifteenth Court of Appeals, which has exclusive jurisdiction over Business Court appeals.¹⁷ A party who loses in the intermediate court of appeals may seek further, discretionary review from the Supreme Court.¹⁸

Court Summary

	Delaware Court of Chancery	Texas Business Court
Jurisdiction	Equitable claims and claims involving Delaware General Corporation Law.	Equitable and legal claims involving: (i) corporate governance actions exceeding \$5 million at issue; (ii) corporate governance actions involving a publicly traded company; and (iii) commercial claims exceeding \$5 million at issue.
Fact-Finder	All bench trials.	Bench trials for equitable claims, jury trials for legal claims.
Selection of Judges	Appointed by Governor to 12-year terms.	Appointed by Governor to 2-year terms. Heightened business qualifications.
Divisions	Statewide.	Divisions based in Houston, Dallas, Fort Worth, San Antonio, and Austin.
Assignment of Cases	Assigned by the Chancellor via random selection protocol.	Randomly assigned among the two judges sitting in the division where the case is filed.
Appellate Process	Direct appeal as of right to Supreme Court.	Direct appeal as of right to Business-Court specific court of appeals and discretionary appeal to Supreme Court.

CORPORATE GOVERNANCE LAWS

There are a number of key areas in a state's corporate governance structure that exert influence on the decision to incorporate or litigate in the state. These include—among others: management's fiduciary duties; the state's business judgment rule (the BJR); rules surrounding interested party transactions; stockholder rights to records and in connection with derivative actions; and availability of non-jury trials for internal business disputes. What follows is a brief overview comparing Texas and Delaware corporate law in these key areas.¹⁹

Fiduciary Duties and the Business Judgment Rule

In both states, fiduciary duties are generally developed by case law.²⁰ In general, Delaware directors and officers are subject to the fiduciary duties of care and loyalty (which further include the duties of good faith, oversight, and disclosure) owed to the corporation and its stockholders.²¹ Texas officers and directors owe fiduciary duties of loyalty, due care, and obedience (i.e., duty to follow the law and charter documents) to the corporation.

Directors and officers in both states are protected by the business judgment rule. In Delaware, common law defines that rule as a presumption that the disinterested directors of a corporation “acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interest of the company.”²² Delaware case law also sets forth exceptions to the BJR, such as providing for enhanced judicial scrutiny when: (a) the board authorizes takeover defense measures or (b) the board approves a transaction involving a cash-out change of control.²³

In contrast, Texas codified the BJR via Senate Bill 29 in May 2025, establishing, for many corporations, a statutory presumption that directors and officers are presumed to act in good faith, on an informed basis, in furtherance of the interests of the corporation, and in obedience to the law and the corporation's governing law.²⁴ Texas does not recognize “enhanced scrutiny,” and the statute provides that no claim can be made against a director or officer unless the claimant proves that: (1) one or more of the presumptions in the BJR is rebutted; (2) the director or officer's failure to act constituted a breach of a fiduciary duty; and (3) such breach involved fraud, intentional misconduct, an *ultra vires* act, or a knowing violation of law, which fraud, intentional misconduct, an *ultra vires* act, or a knowing violation of law must be pled with particularity.²⁵

Interested Party Transactions

Directors who have an interest in a transaction do not, in Delaware, benefit from the business judgment rule. Rather, under the Delaware General Corporation Law (DGCL), related party transactions may be approved in differing ways such as by: (a) via a majority of disinterested directors or a committee of the board with a majority of disinterested directors on the committee approving; (b) via a majority of informed, uncoerced, and disinterested stockholders; or (c) if the transaction is deemed “entirely fair” to the corporation and its stockholders.²⁶ Specified transactions require other procedures. For instance, going private transactions (where a controlling shareholder acquires the outstanding stock of the company) require approval both (a) in good faith and without gross negligence by a majority of the disinterested directors serving on a special committee, so long as certain committee composition and disclosure requirements are met, and (b) by an informed and uncoerced majority of disinterested stockholders (with the transaction conditioned on such approval). Otherwise, it must be “entirely fair” to the corporation and its shareholders.²⁷

Texas Business Organizations Code (TBOC) Section 21.418 provides that any related party transaction may be approved by (a) the disinterested, informed directors acting in good faith; (b) the informed vote of the shareholders in good faith; or (c) by a court if fair to the corporation. While the two states statutes governing interested transactions are now conceptually similar, some technical differences remain.

Select Stockholder Rights (Books and Records and Derivative Suits)

Books and Records

Under the DGCL, a stockholder may generally inspect, and make copies and extracts from, a Delaware corporation's books and records during normal business hours for any proper purpose upon written demand under oath stating a proper purpose.²⁸ If a Delaware corporation refuses to permit inspection or does not reply to the demand within five business days after the demand has been made, the stockholder may apply to the Delaware Court for an order to compel such inspection.²⁹

The DGCL defines books and records to include the following items: (1) corporate governance documents; (2) board and committee minutes; (3) stockholder meeting minutes, stockholder consents, and stockholder written communication; (4) financial statements; (5) board materials; and (6) director and officer independence questionnaires.³⁰ While these may always be requested, the DGCL provides that the Chancery

Court may compel the corporation to produce additional records if the corporation has not properly kept records (including of annual and special meetings) or if a plaintiff shows a “compelling need” for documents.³¹

Under the recent reforms to the TBOC, a stockholder may inspect a Texas corporation’s books and records during normal business hours. A request to inspect must be made upon written demand, stating a proper purpose if either such stockholder holds at least 5% of the outstanding shares of stock of the Texas corporation, or has been a holder of shares for at least six months prior to such demand.³² Emails, text messages, and social media information are not considered corporate records, unless they effectuate a corporate action, and thus are not subject to books and records inspection requests.³³

Pre-suit Derivative Demands

Under Delaware court rules and case law, in order for a stockholder to commence a derivative action on behalf of the

corporation, the stockholder must: (1) make a demand on the company’s board of directors; or (2) show that demand would be futile.³⁴ If a demand is made and the board of directors dismisses it, a Delaware court will evaluate the independence and good faith of the board or the committee, the reasonableness of its investigation into the demand, and the proffered reasons for dismissing the demand.³⁵

Under the TBOC, generally a stockholder may not institute a derivative proceeding until the 91st day after the date a written demand is filed with the corporation, stating with particularity the act, omission, or other matter that is the subject of the claim or challenge and requesting that the corporation take suitable action.³⁶ Texas also allows certain corporations, including public corporations, to establish an ownership threshold, not to exceed 3% (and which can be met by multiple shareholders aggregating ownership), required to institute a derivative claim.³⁷

	Delaware	Texas
Fiduciary Duty and BJR	Both are delineated in case law.	Duties are described in case law but BJR is codified in statute.
Interested Party Transactions	Different types of interested transactions may be permitted if approved in various detailed ways specified in the DGCL	Burden of proof on an interested director or officer to prove that the alleged interested-party transaction falls within statutorily specified safe harbors (majority disinterested director approval, majority stockholder approval or an evaluation of the transaction’s fairness).
Stockholders Rights to Books and Records and in Regard to Derivative Suits	Statutorily defined definition of books and records that may, in specified circumstances, be expanded by the Chancery Court. May bring derivative suits if a stockholder of the corporation at the time of the transaction of which such stockholder complains, or that such stockholder’s stock thereafter devolved upon such stockholder by operation of law.	Minimum ownership thresholds to inspect books and records and limits on limitations on when emails, text messages, and social media information are considered as such. Minimum ownership thresholds to bring a derivative suit for specified corporations.
Venue and Jury Trial Rights	Chancery cases do not involve juries.	Statutory ability to waive jury trials in governance documents for internal business disputes.

Jury Trial Rights in Internal Business Disputes

Jury trials are generally not available in the Delaware Chancery Court, which is where stockholder suits relating to the internal affairs of a Delaware corporation must be filed.³⁸

Under Texas law, in civil cases, a party generally has a right to a jury trial to determine questions of fact, but Texas does permit jury waivers to be included in corporate bylaws.³⁹

Corporate Governance Summary

The structures of the state's corporate governance structures may be summarized with respect to the foregoing selected governance topics in the table on page 15.

Conclusion

Will the Texas Business Court and the state's corporate governance structure really overtake its Delaware counterparts to make Texas the lead destination for business organizations and business litigation? It's too early to tell, and Delaware has both a 250-year head start on its court system and a long history of corporate governance innovation. But, the Texas Business Court had a strong first year, in which it beat projections of the number of cases it would receive and the average amount in controversy alleged in claims brought before it. The merits of the two courts will continue to be debated, and this Article hopefully will help to highlight some of differences between them. Similarly, Texas has only recently embarked on key reforms to its corporate governance structure, but there is considerable excitement in the state and around the nation that Texas's corporate governance modernization efforts—in tandem with its Texas Business Court—will help the state to achieve its goals to overtake Delaware.

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1 DEL. CODE tit. 10, § 341; *id.* tit. 8, § 111.

2 DEL. CODE tit. 10, § 342.

3 See generally Joseph R. Slights III & Elizabeth A. Powers, *Delaware Courts Continue to Excel in Business Litigation With the Success of the Complex Commercial Litigation Division of the Superior Court*, 70 BUS. LAW. 1039 (2015).

4 TEX. GOV'T. CODE § 25A.004(b)–(d-1).

5 *Id.* § 25A.004(f)–(h).

6 *Id.* § 25A.015(a).

7 DEL. CONST. art. IV § 3.

8 *Id.* art. IV § 2.

9 TEX. GOV'T. CODE § 25A.009(a)–(b).

10 *Id.* § 25A.008(a).

11 *Id.* § 25A.009(d).

12 *Id.* § 25A.003. The Business Court statute also provides for divisions headquartered in El Paso, Beaumont, Midland/Odessa, Amarillo, Tyler, and the Rio Grande Valley. See *id.* But, the legislature has not implemented these divisions yet. See TEX. H.B. 40, 89th Leg., Reg. Sess. § 44 (2025).

13 TEX. GOV'T. CODE § 25A.006(a).

14 *Id.* § 25A.003.

15 See Press Release, Court of Chancery Updates E-Filing System Effective September 15, 2025 (Aug. 4, 2025), <https://courts.delaware.gov/forms/download.aspx?id=300228>.

16 DEL. CODE tit. 10, § 145.

17 TEX. GOV'T. CODE § 25A.007(a).

18 *Id.* § 22.001.

19 This issue of *The Advocate* also includes an article singularly focused in more detail on two key pieces of recent Texas legislation enacting corporate reforms in some of these key areas. In this Article, we compare and contrast selected aspects of Texas and Delaware's current governance structures with specific reference to the corporate entity form, rather than examining in detail the recent Texas reforms relative to prior Texas law.

20 See, e.g., *Walt Disney Co. Derivative Litig.*, 825 A.2d 275 (Del. Ch. 2003) (discussing purported breaches of fiduciary duty by the Disney board in the hiring and subsequent firing of Michael Ovitz); Elizabeth S. Miller, *Overview of Fiduciary Duties, Exculpation, and Indemnification in Texas Business Organizations*, TEX. J. BUS. L., Summer 2020 (citing several cases for the proposition that “[t]he provisions of the [Texas Business Organizations Code] governing for-profit corporations . . . , do not explicitly set forth or define the fiduciary duties of corporate directors; however, case law generally recognizes that directors owe the corporation (but not individual shareholders) a duty of obedience, a duty of care, and a duty of loyalty”).

21 See *Gantler v. Stephens*, 965 A.2d 695, 708–09 (Del. 2009).

22 See *Benihana of Tokyo, Inc. v. Benihana, Inc.*, 906 A.2d 114, 120 (Del. 2006).

23 See, e.g., *Unocal Corp. v. Mesa Petrol. Co.*, 493 A.2d 946, 954 (Del. 1985).

24 TEX. BUS. ORGS. CODE § 21.419(c).

25 *Id.* § 21.419(d), (f).

26 DEL. CODE tit. 8, § 144(a).

27 *Id.* § 144(c).

28 *Id.* § 220(b).

29 *Id.* § 220(c).

30 *Id.* § 220(a)(1).

31 *Id.* § 220(g).

32 TEX. BUS. ORGS. CODE § 21.218(b).

33 *Id.*

34 See, e.g., *United Food & Com. Workers Union v. Zuckerberg*, 262 A.3d 1034, 1048 (Del. 2021); Del. Ch. Rule 23.1.

35 See, e.g., *Szeto v. Schiffer*, No. 12934, 1993 WL 513229, at *3 (Del. Ch. Nov. 24, 1993).

36 TEX. BUS. ORGS. CODE § 21.553(a).

37 *Id.* § 21.552(a)(3).

38 See DEL. CODE tit. 10, § 369 (“When matters of fact, proper to be tried by a jury, arise in any cause depending in Chancery, the Court of Chancery may order such facts to trial by issues at the Bar of the Superior Court.”).

39 TEX. BUS. ORGS. CODE § 2.116.