UCLA School of Law

Law & Economics Research Paper No. 24-04

DEXIT DRIVERS: IS DELAWARE'S DOMINANCE THREATENED?

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Abstract: For over a century, Delaware has led the corporate law landscape, though it has not been without competitors. States such as Georgia, Maryland, New Jersey, Ohio, Pennsylvania, Tennessee, and Virginia have attempted to rival Delaware, attracted by its significant tax revenue from incorporations. Today, Nevada emerges as a notable challenger, actively promoting "DExit" – a push for companies to leave Delaware. Consequently, this analysis primarily examines the choice between Delaware and Nevada.

Widespread discussion of the potential for mass DExit was triggered by recent criticisms from business leaders and prominent corporate lawyers. While such complaints have not yet triggered a mass exodus from Delaware, many firms are reportedly considering changing their corporate domicile. But is Delaware's dominance genuinely at risk? Are these just isolated incidents or signs of a broader trend?

This article provides both an empirical and a qualitative analysis of firms that reincorporated from Delaware to another state between 2012 and 2024. It analyzes these firms based on size, filing status, and new state, along with their stated motivations.

The data suggest two main conclusions. First, almost all reasons given for reincorporation seem implausible. If DExit becomes more frequent, plaintiff lawyers should scrutinize these disclosures, particularly focusing on enhanced liability protections for controllers, directors, and officers, suggesting possible conflicts of interest requiring entire fairness review.

Second, the number of reincorporations from Delaware remains minimal compared to the vast number of new incorporations Delaware attracts annually. Given the strong inertia behind the initial incorporation decision and the weak drivers for DExit, it is unlikely to become widespread soon.

JEL: K22

Keywords: corporate governance, corporate law, reincorporation, Nevada, Delaware, Delaware corporate law, empirical analysis

DExit Drivers: Is Delaware's Dominance Threatened?

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* William D. Warren Distinguished Professor of Law, UCLA School of Law. I am extremely grateful to UCLA School of Law Library Director Kevin Gerson and Reference Librarian Sherry Leysen for their outstanding assistance with collecting the data reported in Part II, as well as my research assistants Trevor Atamian and Ryan Duffy. I am also grateful to Helen Bainbridge, Ofer Eldar, Ann Lipton, James Park, Fernan Restrepo, Andrew Verstein, and the participants in a faculty workshop at the UCLA School of Law for their helpful comments on an earlier draft. Finally, I also thank a group of prominent practitioners who requested anonymity to speak candidly about trends in Delaware law and the Delaware courts. The responsibility for any errors is mine.

For over a century, Delaware has dominated the corporate law landscape.[1] Yet, for most of that century, it has not done so unchallenged. To the contrary, Delaware has consistently faced both criticism and competition. Many other states have looked jealously at the enormous tax revenues Delaware generates from the companies it incorporates and sought to challenge Delaware's number one status.[2] Past challengers include Georgia, Maryland, New Jersey, Ohio, Pennsylvania, Tennessee and Virginia.[3] Today, the most successful of these challengers is Nevada, which is aggressively promoting DExit.[4] Accordingly, the analysis herein focuses mainly on the choice between Delaware and Nevada.

Past critics of Delaware corporate law were mainly academics and left-of-center activists. Columbia law professor and Securities and Exchange Commission (SEC) chair William Cary famously contended that Delaware was winning a race to the bottom in corporate law.[5] More recently Harvard law professor Lucian Bebchuk has assumed Cary's mantle as a frequent critic of Delaware corporate law and proponent of federalizing this body of law.[6] Among activists, Ralph Nader long was a vocal critic of Delaware corporate law, calling for replacing it with federal

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[1] See Peter Molk, Delaware's Dominance and the Future of Organizational Law, 55 Ga. L. Rev. 1111, 1113 (2021) ("Delaware dominates business law. … Delaware has held this dominant business law position for over a century."); see generally infra Part I.

[2] See id. at 113 ("Over a quarter of [Delaware's state government revenue]—$1.3 billion—comes from taxes and fees collected from the businesses organized within its borders.").

[3] Joel Seligman, A Brief History of Delaware's General Corporation Law of 1899, 1 DEL. J. CORP. L. 249, 283 (1976).

[4] DExit is a portmanteau of Delaware and exit, in the same spirit as Brexit and Megxit, used as a shorthand for corporate reincorporations out of Delaware to another state. On Nevada's efforts to compete with Delaware, see Michal Barzuza & David C. Smith, What Happens in Nevada? Self-Selecting into Lax Law, 27 Rev. Fin. Stud. 3593, 3594 (2014) ("Nevada is second to Delaware in attracting out-of-state incorporations."); Keith Paul Bishop, The Delaware of the West: Does Nevada Offer Better Treatment for Directors?, Insights, Mar. 1993, at 20, 20 (" Nevada has amended its corporate law in a rather obvious effort to entice management into making Nevada its corporate home.").

[5] See William L. Cary, Federalism and Corporate Law: Reflections Upon Delaware, 83 Yale L.J. 663, 705 (1974) (criticizing corporate law's "race for the bottom, with Delaware in the lead").

[6] See Kenneth Ayotte & David A. Skeel, Jr., An Efficiency-Based Explanation for Current Corporate Reorganization Practice, 73 U. Chi. L. Rev. 425, 468 (2006) (calling Bebchuk Delaware corporate law's "principal critic")

law.[7] At the other end of the political spectrum, former Trump Attorney General William Barr recently claimed that Delaware courts' flirtations with the environmental, social, and governance (ESG) movement could cause a corporate exodus from Delaware.[8]

Significantly, recent critics have included business leaders and prominent corporate lawyers.. After his $50 billion-plus compensation plan was struck down by the Delaware Chancery Court,[9] for example, Tesla CEO Elon Musk fired off a social media post recommending that one should "[n]ever incorporate your company in the state of Delaware."[10] TransPerfect CEO Phil Shawe, a frequent critic of what he calls "Delaware's legal cabal,"[11] pushed to relocate TransPerfect from Delaware to Nevada.[12]

The bar's dissatisfaction with the recent direction of Delaware law was manifest at the 2024 Tulane Law School Corporate Law Institute. Panelists such as Catherine G. Dearlove, a director at Delaware-based law firm Richards Layton & Finger PA, William M. Lafferty, chair of Delaware law firm Morris Nichols Arsht and Tunnell LLP, and Scott B. Luftglass, vice chair of Fried Frank Harris Shriver & Jacobson LLP, reportedly expressed increasing concern about unpredictability in Delaware law, which makes it more difficult to advise clients with confidence.[13] Off-the-

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[7] See, e.g., Ralph Nader, The Case for Federal Chartering, in Corporate Power in America 67 (Ralph Nader & Mark J. Green eds., 1973); Ralph Nader et al., Taming the Giant Corporation (1976).

[8] William P. Barr & Jonathan Berry, Delaware Is Trying Hard to Drive Away Corporations, Wall St. J., Nov. 24, 2023, available at https://www.wsj.com/articles/delaware-is-trying-hard-to-drive-away-corporations-business-environmental-social-governance-investing-780f812a.

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

[10] Elon Musk (@elonmusk), X (Jan. 30, 2024) https://x.com/elonmusk/status/1752455348106166598.

[11] See, e.g., Phil Shawe (@PhilShawe), X (Feb. 4, 2024), https://twitter.com/PhilShawe/status/1754160915979653141; see also Karl Baker, Longtime Delaware Courts Attacker TransPerfect Found in Contempt, Faces Fines of $30K a Day, DelawareOnline.com (Oct. 18, 2019) (describing "Shawe's unprecedented resentment over Delaware's court-ordered sale of his profitable New York translation company), https://www.delawareonline.com/story/money/business/2019/10/18/transperfect-found-contempt-delaware-court-faces-fines-30-k-day/4011754002/.

[12] Press Release, TransPerfect Moves State of Incorporation from Delaware to Nevada (Aug. 15, 2018), https://www.transperfect.com/about/press/transperfect-moves-state-incorporation-delaware-nevada.

[13] Rose Krebs, Delaware's Corp. Law Dominance A Hot Topic At Tulane Conference, Law360.com (Mar. 7, 2024), https://www.law360.com/articles/1811403/del-s-corp-law-dominance-a-hot-topic-at-tulane-conference. A similar concern was reportedly expressed by William Anderson, senior managing director of Evercore investment bank. Id. See also Kevin LaCroix, Delaware or Another State: What's the Difference?, D&O Diary (May 6, 2024) ("As

record conversations with several prominent Delaware practitioners confirmed a growing concern about increased uncertainty, especially with regard to controller transactions.[14] This sort of skepticism matters because legal counsel play an important role in selecting the client's state of incorporation.[15]

Although the debate has not yet manifested itself in a mass flight from Delaware, numerous firms reportedly are considering changing their corporate domicile.[16] But is Delaware's dominance really threatened? Are we seeing flashes on the horizon or simply a few flashes in the pan by a handful of petulant CEOs and controllers?

Part I of this Article reviews Delaware's dominance of corporate law and the market for corporate charters. Because this story is extremely well known, only a brief review is necessary to set the stage for the analysis that follows. To further set the stage, Part I also argues that reincorporation is likely to be rare, as there is considerable inertia behind incorporation decisions. Part II reports data on annual incorporations in Delaware and data on a sample of firms that reincorporated or had pending reincorporations from Delaware to a new state between 2012 and 2024.

Given the period for which data was collected, a couple of caveats are in order. First, Delaware's primary competitor—Nevada—began seriously competing with

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influential as Musk may be, this is happening now not just because Musk is mouthing off again. Commentators, observers, and practitioners have in fact raised a number of concerns about Delaware.").

[14] Off-the-Record Interview with New York-Based Law Firm Partner (May 7, 2024).

[15] The significance of the lawyer's role is suggested by Ofer Eldar and Lorenzo Magnolfi, who found that large firms were less likely to incorporate in their home state than were small firms, which Eldar and Magnolfi attributed to the advice such firms received from their law firms. Ofer Eldar & Lorenzo Magnolfi, Regulatory Competition and the Market for Corporate Law, 12(2) Am. Econ. J.: Microecon. 60, 81 (2020). The importance of the lawyers' advice in choosing a state of incorporation is confirmed by survey data collected by William J. Carney, George B. Shepherd, and Joanna Shepherd Bailey, which suggested that issuer counsel played a predominant role in selecting the state of incorporation when companies go public. William J. Carney, George B. Shepherd, Joanna Shepherd Bailey, Lawyers, Ignorance, and the Dominance of Delaware Corporate Law, 2 Harv. Bus. L. Rev. 123, 138 (2012). The survey data was supported by their analysis of IPO data. See id. at 148 (finding "that, although both the issuer's lawyer and the underwriter's lawyer influence the choice of state of incorporation, the influence of the lawyer on the issuer is greater"); see also Robert Anderson IV, The Delaware Trap: An Empirical Analysis of Incorporation Decisions, 91 S. Cal. L. Rev. 657, 710 (2018) (reporting data confirming "that lawyers play a key role in choosing the state of incorporation").

[16] Wilson Sonsini, Delaware's Status as the Favored Corporate Home: Reflections and Considerations (Apr. 23, 2024), https://www.wsgr.com/en/insights/delawares-status-as-the-favored-corporate-home-reflections-and-considerations.html (reporting that "many of our clients have asked us whether they should remain in Delaware or choose Delaware as the state of incorporation for their new ventures").

Delaware in the late 1980s.[17] As such, the dataset does not capture any initial burst of reincorporations that may have occurred, if any. Even if such an initial burst occurred, however, the data suggest the rate of companies leaving Delaware for Nevada has slowed to a trickle.[18] Second, the cases generating the current round of DExit debates are of relatively recent vintage.[19] Accordingly, the data may not support predictions about future trends. In sum, although the data is illuminating and instructive, no claim is made that it is the final word on the DExit debate.

With those caveats in mind, Part II reports that the number of DExit transactions is small both in absolute numbers and, especially, relative to the vastly larger number of new incorporations in Delaware annually. Part II then breaks down the sample by attributes such as size, filing status, and new state. It also reports the stated motivations of the firms in the sample.

Part III examines the stated motivations and various sources of anecdotal information to determine what actually drives the DExit decision and to make predictions about whether any of those drivers poses a serious threat to Delaware's dominance. It is difficult to make a compelling case for any of the drivers as a potential motivation for large numbers of firms. The analysis thus leads to two conclusions: one transactional and one systemic. Because most purported DExit drivers are implausible, and are made in proxy disclosures that are typically thin and unsupportive of the claims made, plausible proxy fraud claims may exist in many reincorporation transactions, Likewise, because the most plausible DExit drivers involve enhanced liability protections for directors and managers, plaintiff lawyers should scrutinize these transactions for conflicts of interest potentially triggering entire fairness review.

As for the systemic implications, providing enhanced litigation protection for controlling shareholders, board members, and managers are among the most common and the most plausible motivations for DExit. As for director and officer liability, however, it seems likely that only a relatively small subset of firms would reincorporate for that reason, As for the liability exposure of controlling shareholders, it is not clear that reincorporating in Nevada will offer controllers much additional protection. Part III concludes that DExit is likely to remain rare, while acknowledging that past experience teaches making DExit predictions is a risky proposition.

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[17] See infra notes 276-290 and accompanying text (discussing history of Nevada's challenge).

[18] See infra Part II.B. 3.a (discussing reincorporations by state).

[19] See infra notes 200-206, 346-374 and accompanying text (discussing controversial decisions).

I. Delaware's Persistent Dominance

The current debate over reincorporation choices takes place against a historical background of persistent Delaware dominance of the market for corporate charters. When newly formed firms are choosing a state of incorporation, they rarely sort through the laws of all 50 states to choose the state best suited to their needs.[20] Instead, at this initial stage, most corporations chose to remain in their original state of incorporation.[21] As for those who opt to incorporate outside their home state, most opt for Delaware.[22] If the firm opts to go public, it will typically do so as a Delaware corporation (see Table 2). Having chosen Delaware, firms rarely change their legal domicile.[23]

As a result of these choices, Delaware dominates the market for corporate charters, especially among public corporations. Although Delaware accounts for less than one-third of one percent of the United States' population, it is the legal home for two-thirds of the Fortune 500 companies.[24] As for the broader set of all public corporations, Delaware is home to more than half of the corporations listed for trading on U.S. stock exchanges.[25]

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[20] See Brian Broughman et. al., Delaware Law As Lingua Franca: Theory and Evidence, 57 J.L. & Econ. 865, 866 (2014) (arguing that "incorporation decisions are bimodal: public and private firms typically choose between home-state and Delaware incorporation"); Robert Daines, The Incorporation Choices of IPO Firms, 77 N.Y.U. L. Rev. 1559 (2002) (asserting that firms make a binary choice between Delaware and their home states when deciding where to incorporate).

[21] Elder & Magnolfi, supra note 15, at 61. As one might expect, close corporations are particularly likely to opt for home state incorporation. See Ian Ayres, Judging Close Corporations in the Age of Statutes, 70 Wash. U.L.Q. 365, 374 (1992) ("Strong structural forces tie a small business' incorporation to the state where it conducts most of its business."); Eric Kades, Freezing the Company Charter, 79 N.C. L. Rev. 111, 150 (2000) ("There is little if any state competition for the charters of small, privately-held firms, because they usually operate in only one state and the costs of incorporating elsewhere exceed the benefits."). Larger privately held corporations (defined as those with more than 1,000 employees) were more likely to opt for out-of-state in corporation, with approximately 25% opting for Delaware. Jens Dammann & Matthias Schündeln, The Incorporation Choices of Privately Held Corporations, 27 J.L., Econ., & Org. 79 (2011).

[22] Delaware Corporate Law: Facts and Myths, Delaware.gov, https://corplaw.delaware.gov/facts-and-myths/ (last visited Mar. 21, 2024).

[23] The present study identified only 71 DExit transactions in the period 2012-2024 (see Table 3).

[24] Molk, supra note 1, at 1113..

[25] See Facts and Myths, supra note 22. As a result of Delaware being the dominant home of public U.S. corporations, Delaware corporate law has become the dominant source of U.S. corporate law. Under the widely accepted conflicts of law rule known as the internal affair doctrine, Delaware law governs corporate governance disputes involving the companies it

A. The Historical Debate Over Why Firms Chose Delaware

Although there is no doubt about Delaware's dominance, there long has been considerable disagreement as to the reasons for and consequences of that dominance. To be sure, there is little disagreement that Delaware incorporation offered benefits. Instead. the dispute focused mainly on who benefited. As noted above, Cary argued that states engage in a "race to the bottom" resulting in corporate laws favoring managers over shareholders.[26] In contrast, Cary's critics contended that states engage in a race to the top with the opposite result.[27]

Critically, however, both sides assumed that states compete to grant corporate charters.[28] After all, or so the logic goes, the more certificates of incorporation the

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incorporates regardless of which jurisdiction in which the dispute is litigated. See, e.g., Askanase v. Fatjo, 130 F.3d 657, 674–75 (5th Cir. 1997) ("Because LivingWell is a Delaware corporation, Delaware law controls."); see generally Kimberly-Clark Corp. v. Factory Mut. Ins. Co., 566 F.3d 541, 546 (5th Cir. 2009) (holding that "corporate governance issues must be adjudicated using the law of the state of incorporation"); Kikis v. McRoberts Corp., 639 N.Y.S.2d 346, 346 (N.Y. App. Div. 1st Dept. 1996) (holding that "issues of corporate governance are determined by the State in which the corporation is chartered"). As a result, it is difficult to think of a body of law as thoroughly dominated by a single state as Delaware dominates corporate law, especially the law governing public corporations. Indeed, Delaware law is so dominant that, in many respects, it functions as a de facto national corporate law. Ronald J. Gilson, Globalizing Corporate Governance: Convergence of Form or Function, 49 Am. J. Compar. L. 329, 331 (2001). Mike Dooley thus observed that, in the corporate law field, "the terms 'prevailing,' 'weight' and 'majority' are all understood to mean 'Delaware.'" Michael P. Dooley, Two Models of Corporate Governance, 47 Bus. Law. 461, 463 (1992). Arguably, Congress is the only real competition to Delaware's status as regulator-in-chief of corporate governance. See Mark J. Roe, Delaware's Competition, 117 Harv. L. Rev. 588 (2003) (discussing competition between Wilmington and Washington). As we shall see below, the risk of federal intervention functions as a major constraint on Delaware's decisions when making corporate law.

[26] See supra text accompanying note 5.

[27] See, e.g., Ralph K. Winter, Jr., State Law, Shareholder Protection, and the Theory of the Corporation, 6 J. Legal Stud. 251 (1977).

[28] See Summer Kim, Corporate Long Arms, 50 Ariz. St. L.J. 1067, 1074 (2018) ("The competition among states for corporate charters has been one of the most widely written about topics in corporate law scholarship."). Lynn LoPucki captured the gist of the regulatory competition view:

> Three principles structure the charter competition. First, a corporation can incorporate in any state. Second, regardless of the state chosen, the corporation will be allowed to do business in all states. Third, regardless of where the corporation does business, the law of the state of incorporation governs its internal affairs. Those affairs include substantially the entire scope of corporate law.
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> The system—charter competition—is composed of three subsystems operating simultaneously. In the first, corporations choose states of incorporation. In the second,

state grants, the more franchise taxes it collects.[29] According to Cary, because it is corporate managers who decide on the state of incorporation, the competition between states takes the form of adopting statutes allowing corporate managers to exploit shareholders.[30] In response, Cary's critics argued that investors will not purchase, or at least not pay as much for, securities of firms incorporated in states that cater too excessively to management, which gives management strong financial incentives to choose states that protect shareholder interests.[31] Accordingly, Cary's critics argue that Delaware is racing to the top—i.e., towards high quality law that promotes investor interests—rather than to the bottom.[32]

The shared assumption of regulatory competition likely is overstated, however. In fact, the empirical data suggest a much less vigorous competition than either Cary or his critics assumed.[33] Indeed, some scholars go so far as to claim that—at

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> states decide what packages of regulation to offer. In the third, courts chosen in a variety of ways interpret and apply the incorporation state's law to regulate the corporation.

Lynn M. LoPucki, Corporate Charter Competition, 102 Minn. L. Rev. 2101, 2104 (2018).For an argument that the regulatory competition debate overlooks foreign nations as competitors, see William J. Moon, Delaware's New Competition, 114 Nw. U.L. Rev. 1403 (2020).

[29] See Jens C. Dammann, Freedom of Choice in European Corporate Law, 29 Yale J. Intl. L. 477, 478 (2004) (observing that both side in the debate "assume that states compete for corporate charters in order to maximize the revenues derived from incorporation fees").

[30] See Henry N. Butler & Larry E. Ribstein, Opting Out of Fiduciary Duties: A Response to the Anti-Contractarians, 65 Wash. L. Rev. 1, 69 (1990) ("Cary argued that states compete for incorporation business by offering terms that appeal to corporate managers."); see also Lucian Arye Bebchuk, Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law, 105 Harv. L. Rev. 1435, 1459 (1992) ("Delaware's choice of corporate law rules will be determined primarily by its desire to ensure that its rules are attractive to those making explicit or implicit reincorporation decisions.").

[31] See Dammann, supra note 29, at 479 (explaining that proponents of the race to the top argument claim managers "have a strong incentive to make the corporation's shares attractive to shareholders, lest capital markets punish the corporation and--by extension--its managers").

[32] See, e.g., Daniel R. Fischel, The "Race to the Bottom" Revisited: Reflections on Recent Developments in Delaware's Corporation Law, 76 Nw. U.L. Rev. 913, 920 (1982) ("Delaware's preeminence, in short, is in all probability attributable to success in a "climb to the top" rather than to victory in a 'race to the bottom.'"). For an interesting argument using branding and competitive advantage theories to explain Delaware's dominance, see Omari Scott Simmons, Branding the Small Wonder: Delaware's Dominance and the Market for Corporate Law, 42 U. Rich. L. Rev. 1129 (2008).

[33] See, e.g., Lucian Arye Bebchuk & Assaf Hamdani, Vigorous Race or Leisurely Walk: Reconsidering the Competition over Corporate Charters, 112 Yale L.J. 553, 574-76 (2002); Marcel Kahan & Ehud Kamar, The Myth of State Competition in Corporate Law, 55 Stan. L. Rev. 679, 682 (2002).

least as to public corporations—state competition for charters is a myth.[34] Although that claim seems overstated,[35] there seems little doubt that competition between states is much weaker than most participants in the historical debate assumed.[36]

B. Opting to Reincorporate: The Problem of Inertia

Once a firm has chosen its state of incorporation, there is a substantial inertia effect, which results in firms failing to change their state of incorporation despite potential benefits from more favorable corporate laws elsewhere.[37] To be sure, direct costs of switching likely are not high enough to explain the observed inertia.[38] A shareholder vote and some state filings are all that is required, along with the accompanying legal fees.[39] As for the risk of shareholder litigation, the *TripAdvisor* decision is widely regarded as providing a roadmap for effecting a reincorporation.[40]

Something else thus must be imposing indirect costs sufficient to generate the observed inertia. One plausible candidate is a network effects/path dependency story.[41] To explain Delaware's dominance Professor Klausner persuasively

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[34] Kahan & Kamar, supra note 33, at 684.

[35] For a counter-argument that regulatory competition remains vigorous, see LoPucki, supra note 28, at 2124-2130.

[36] See, e.g., Bebchuk & Hamdani, supra note 33, at 615 ("The competitive threat to Delaware's dominant position, we have shown, is rather weak, and Delaware's position is far stronger and more secure than has been previously recognized.").

[37] See generally Eldar & Magnolfi, supra note 15, at 61-62 (positing that a firm will only consider deviating from its prior choices if there is a sufficiently strong preference for particular laws).

[38] See LoPucki, supra note 28, at 2118 (arguing that the direct "costs of reincorporation do not appear to be high enough to affect corporate decision making").

[39] See id. ("To change its incorporation state after the initial selection, the corporation must … pay legal fees, additional state filing fees, and perhaps the costs of printing and distributing proxy statements."). An estimate of those costs in 2015 dollars was "about $88,110." Id. at 2218 n.74.

[40] Jennifer Kay, Musk's Tesla Threats Unlikely to Shake Delaware's Dominance, Bloomberg News (Apr. 2, 2024), https://news.bloomberglaw.com/litigation/musks-tesla-threats-unlikely-to-shake-delawares-dominance. For discussion of *TripAdvisor*, see infra notes 121-130 and accompanying text.

[41] To be sure, some will draw a technical distinction between inertia and network effects, arguing that the former relates to a firm's tendency to stick with prior choices (absent some countervailing circumstances), while the latter relates to the tendency to adopt the same choices as other peer companies. Email from Ofer Eldar to Stephen M. Bainbridge (July 16, 2024, 09:45 PDT) (copy on file with author).

invoked network effects.[42] As more companies chose to incorporate in Delaware, more litigation takes place, generating a more extensive body of case law and encouraging members of the Chancery Court to become even more expert in corporate law.[43]

If network effects are at least a partial explanation for Delaware's dominance, one would expect corporate boards to exhibit a certain amount of path dependence-based inertia. In economics, the theory of path dependence helps reconcile market failures with the principles of rational choice theory.[44] The prevailing view in neo-classical economics suggests that rational actors select efficient options.[45] However, path dependence suggests that inefficient choices can endure over time.[46] This persistence is influenced by initial conditions, which might be shaped by random factors or external influences, setting the actor on a specific trajectory.[47] Any deviation from this trajectory could be seen as prohibitively expensive, regardless of the potential benefits of more efficient alternatives.[48] Among the costs impacting the choice between the feasible alternatives is whether the initial choice has significant network externalities. If so, market actors may persist with the initial

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[42] See Michael Klausner, Corporations, Corporate Law, and Networks of Contracts, 81 Va. L. Rev. 757, 844 (1995) ("Even if reincorporation costs are low, . . . the network externality model may explain Delaware's success.").

[43] See id. at 844-47 (describing how network externalities contribute to Delaware's dominance).

[44] See generally S.J. Leibowitz & Stephen E. Margolis, Path Dependence, Lock-in, and History, 11 J. L. Econ. & Org. 205 (1995).

[45] Scott A. Beaulier, Peter J. Boettke, & Christopher J. Coyne, Knowledge, Economics, and Coordination: Understanding Hayek's Legal Theory, 1 NYU J.L. & Liberty 209, 212 (2005) ("According to standard neoclassical theory, if we make a few assumptions about how markets work (e.g., individuals have perfect information, there is free entry and exit from a market, etc.), an efficient allocation of resources can be reached.").

[46] Frederick W. Lambert, Path Dependent Inefficiency in the Corporate Contract: The Uncertain Case with Less Certain Implications, 23 Del. J. Corp. L. 1077, 1088 (1998) (observing that "path dependence suggests that product selection built on external value results in the emergence of suboptimal products").

[47] Gerhard Rosegger, How Can We Improve the Context for Innovation?, 21 Can.-U.S.L.J. 333, 337 (1995) (observing that "evolutionary theorists would argue that the emergence of a successful basic innovation tends to be the result of 'initial conditions,' perhaps even fortuitous accidents, which then lead to what is called the 'path dependence' or 'trajectory' of further developments").

[48] Ronald J. Gilson, Corporate Governance and Economic Efficiency: When do Institutions Matter?, 74 Wash. U. L.Q. 327, 329-30 (1996); Daria Roithmayr, Locked in Inequality: The Persistence of Discrimination, 9 Mich. J. Race & L. 31, 39 (2003) ("Markets characterized by switching costs and self-reinforcing positive feedback also frequently exhibit … 'path dependence.'").

choice rather than switching to a more desirable alternative.[49] In the present context, if network effects are at least a partial explanation of Delaware's dominance, path dependence causes firms to remain incorporated in Delaware rather than incurring the cost of giving up those valuable effects.

Even if one rejects the network effects hypothesis,[50] however, one will nevertheless expect to observe inertia in incorporation choices. This is because behavioral economics suggests several plausible reasons for the observed pattern of inertia. Regret avoidance is a well-documented decision-making bias, for example, which posits that decision-makers feel more regret when negative outcomes result from acting rather than from doing nothing.[51] This tendency leads them to prefer inaction.

Another potential source of inertia is the cost of assessing available alternatives. In theory, choosing to reincorporate out of Delaware requires a thorough comparison of Delaware corporate law to that of 49 other options (disregarding the possibility of assessing the merits of U.S. territories and foreign countries). Many firms will lack the in-house legal expertise necessary to such an analysis, while outside counsel often will lack the necessary knowledge of the firm's business to make the requisite fine distinctions that would favor one state over another. Perhaps as a result, most incorporation decisions end up being a binary choice between the firm's home state and Delaware.[52] Having made that initial choice for Delaware, it

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[49] Klausner, supra note 42, at 809-812. See generally Charles M. Yablon, Judicial Drag: An Essay on Wigs, Robes and Legal Change, 1995 Wis. L. Rev. 1129, 1149 (1995) ("Fans of path dependent analysis can provide numerous examples of historical events which have led seemingly rational actors to adopt arguably suboptimal behaviors which they continue to follow because moving to a better system would involve unacceptable expense in terms of transition costs, information costs, and/or risk.").

[50] A number of leading scholars have rejected the network effect argument.. See, e.g., Roberta Romano, The Need for Competition in International Securities Regulation, 2 Theoretical Inquiries L. 387, 516 (2001) (arguing that "network effects of inefficient corporate law provisions (or provisions that lose their efficient properties as business conditions change) will not prevent the emergence of, and switch to, more efficient provisions."); see also Larry E. Ribstein & Bruce H. Kobayashi, Choice of Form and Network Externalities, 43 Wm. & Mary L. Rev. 79, 128 (2001) (finding that network externalities from legal rules have little impact on the founders' choice of organizational form); Michael J. Whincop, An Empirical Analysis of the Standardization of Corporate Charter Terms: Opting Out of the Duty of Care, 23 Int'l. Rev. L. & Econ. 285, 285-86 (2003) (finding little evidence to support the network externalities argument with respect to Australian charter provisions).

[51] See Russell Korobkin, The Status Quo Bias and Contract Default Rules, 83 Cornell L. Rev. 608, 657-59 (1998) (positing regret avoidance as an explanation of the status quo bias); Russell Korobkin, Inertia and Preference in Contract Negotiation: The Psychological Power of Default Rules and Form Terms, 51 Vand. L. Rev. 1583, 1619-20 (1998) (same).

[52] See supra notes 20-23 and accompanying text.

seems unlikely that firms would revert to home state incorporation absent dramatic changes in either Delaware or home state law.

Finally, as a practical matter, shareholder resistance often will make leaving Delaware can be difficult for large public corporations lacking a controller.[53] Despite the claims of race to the bottom theorists that Delaware law is adverse to shareholder interests,[54] there is considerable evidence that investors prefer Delaware incorporation. Venture capitalists reportedly prefer founders to incorporate in Delaware.[55] Activist investors pressuring incumbent directors to improve firm performance reportedly often include reincorporation into Delaware among their demands.[56] Institutional investors likewise appear to prefer Delaware to Nevada incorporation.[57]

In sum, inertia suggests that the benefits of reincorporation not only must exceed the costs but must do significantly. This is a key point for purposes of assessing the likelihood of mass DExit, because many of the motivations discussed in the next part appear to offer benefits that are modest, at best.

II. Reincorporation Data

In this section, we report two sets of data. The first looks at the rate of formation of new Delaware corporations to determine if there is evidence of a decline in the

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[53] Although we were able to identify only four instances in our study period in which the shareholders rejected a reincorporation proposal, see infra text accompanying note 75, we do not have data on the number of possible reincorporations that were considered by management and not brought forward due to potential shareholder resistance.

[54] See supra text accompanying note 26.

[55] See Jennifer Kay, Musk's Tesla Threats Unlikely to Shake Delaware's Dominance, Bloomberg News (Apr. 2, 2024), https://news.bloomberglaw.com/litigation/musks-tesla-threats-unlikely-to-shake-delawares-dominance ("Often it's venture capital firms and other investors who push for Delaware incorporation . . .."); Jaspreet Mann, Where to Incorporate Your Business: California or Delaware, DLA PIPER, https://perma.cc/JMQ9-C836 ("Founders of investor-funded emerging companies should know that the investors prefer Delaware by a long shot."); Why Delaware Corporate Law Matters So Much, DelawareInc.com (July 24, 2017), https://www.delawareinc.com/blog/why-delaware-corporate-law-matters-so-much/ [https://perma.cc/65AF-DGCD] ("Venture capitalists and angel investors ... typically prefer investing in Delaware companies than companies incorporated in other states."). A study of venture-capitalist-backed start-ups concluded that home state investors were relatively indifferent between incorporation in Delaware and their home-state, while out-of-state investors tended to prefer Delaware incorporation. Brian Broughman et. al., supra note 52, at 868.

[56] Eldar & Magnolfi, supra note 15, at 65.

[57] See id. at 64 ("Nevada firms tend to be relatively small with low institutional shareholdings, and that Delaware firms tend to be larger and have significant institutional ownership").

number of firms choosing Delaware incorporation. The second examines firms that have reincorporated outside Delaware to determine if there are common characteristics and reasons they chose to exit Delaware.

A. Incorporating Into Delaware

We gathered data on the annual number of new Delaware incorporations from the Delaware Division of Corporations Annual Reports for the period 2012-2022.[58] Table 1 reports the results. Other than the decline from 2021 to 2022, the data reveal a steady increase in the number of new Delaware incorporations. To be sure, it is possible that the number of new Delaware incorporations would be growing even faster if there was no regulatory competition from Nevada and other states, but there is no indication that Delaware's dominance is in decline. To the contrary, except for a dip in 2022, the number of new Delaware incorporations rose every year since 2012.

Table 1. New Delaware Corporations Per Year

Year	New Incorporations
2022	58,662
2021	62,510
2020	51,747
2019	45,405
2018	44,669
2017	41,553
2016	40,253
2015	38,288

[58] Delaware Division of Corporations, Annual Report: 2022, https://corpfiles.delaware.gov/Annual-Reports/Division-of-Corporations-2022-Annual-Report-cy.pdf; Delaware Division of Corporations, Annual Report: 2021, https://corpfiles.delaware.gov/Annual-Reports/Division-of-Corporations-2021-Annual-Report.pdf; Delaware Division of Corporations, Annual Report: 2020, https://corp.delaware.gov/stats/2020-annual-report/; Delaware Division of Corporations, Annual Report: 2019, https://corpfiles.delaware.gov/Annual-Reports/Division-of-Corporations-2019-Annual-Report.pdf; Delaware Division of Corporations, Annual Report: 2018, https://corp.delaware.gov/stats/2018-annual-report; Delaware Division of Corporations, Annual Report: 2017, https://corp.delaware.gov/stats/2017-annual-report; Delaware Division of Corporations, Annual Report: 2016, https://corpfiles.delaware.gov/2016AnnualReport.pdf; Delaware Division of Corporations, Annual Report: 2015, https://corpfiles.delaware.gov/Corporations_2015%20Annual%20Report.pdf; Delaware Division of Corporations, Annual Report: 2014, https://corpfiles.delaware.gov/Annual-Reports/Division-of-Corporations-2014-Annual-Report.pdf; Delaware Division of Corporations, Annual Report: 2013, https://corpfiles.delaware.gov/Corporations_2013%20Annual%20Report.pdf; Delaware Division of Corporations, Annual Report: 2012, https://corpfiles.delaware.gov/Annual-Reports/Division-of-Corporations-2012-Annual-Report.pdf.

2014	36,445
2013	34,234
2012	32,394

The decline in 2022 plausibly is an artifact of general economic conditions rather than any Delaware-specific considerations. Growth in the U.S. GDP declined from 5.9 percent in 2021 to 2.1 percent in 2022.[59] The number of new business applications nationwide declined from 5.41 million in 2021 to 5.08 million in 2022.[60] Given that decline, a drop in Delaware incorporations is unsurprising.

This conjecture is supported by a 1995 study of reincorporations between 1985 and 1993 by Demetrios Kaouris, which found that the number of new Delaware corporations steadily increased between by over forty-seven percent between 1985 and 1993, despite a dip in the period 1988 to 1990.[61] Kaouris attributed that decline to the economic recession in that period rather than a shift away from Delaware.[62] Alternatively, the 2022 decline observed in the present study may represent a regression to the mean rate of increase, as the apparent decline follows significant upticks in 2020 and 2012.[63]

Delaware's continued dominance is also confirmed by its sustained ability to attract the lion's share of U.S. IPOs. Although the percentage of new IPOs that chose Delaware incorporation has been somewhat volatile, Table 2 shows that Delaware has consistently captured 80 percent or more of those IPOs in the 2012-2022 period.[64] The mean for the period is 86.6 percent. The median is 89. The standard deviation is 4.7. Only the figure for 2022 is more than 2 standard deviations from the mean. Given the unusually high percentage of IPOs captured by Delaware in 2020 and 2021, the apparent decline in 2022 may represent only a return to a long-term rate. If one eliminates 2020 and 2021 from the data set, the

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[59] Economic Commission for Latin America and the Caribbean, United States Economic Outlook: 2022 Year-in-Review and Early 2023 Developments 7 (2023).

[60] Orbelo, How Many New Businesses Start Each Year?, https://www.oberlo.com/statistics/how-many-new-businesses-start-each-year.

[61] Demetrios G. Kaouris, Is Delaware Still A Haven for Incorporation?, 20 Del. J. Corp. L. 965, 999 (1995).

[62] Id.

[63] See Paul Kiefer, Latest State Revenue Forecast Shows Only Minor Improvement, Delaware Public Media (May 15, 2023) (noting that "the number of new incorporations in Delaware has begun to decline, but only relative to a surge after 2020"), https://www.delawarepublic.org/politics-government/2023-05-15/latest-state-revenue-forecast-shows-only-minor-improvement.

[64] The data reported in Table 2 was collected from the same set of Delaware Division of Corporation Annual reports set out supra note 58.

mean declines to 85.2 and the standard deviation to 4.1. The 2022 figure (79 percent) is well within two standard deviations of that mean.

Table 2. Percentage of IPO Firms Incorporated in Delaware

Year	Percent
2022	79
2021	93
2020	93
2019	89
2018	82
2017	80
2016	89
2015	86
2014	89
2013	83
2012	90

Delaware's dominance is further confirmed by Professor Anat Alon-Beck's study of the incorporation choices of unicorns (defined as private companies with a valuation exceeding $1 billion).[65] Only 5 out of 220 unicorns in her dataset incorporated in a state other than Delaware.[66] She contrasts that 97% of unicorns choosing Delaware to 79% of public corporations, 67% of early-stage venture capital corporations, and 2% of small private enterprises incorporated in Delaware.[67] She attributes Delaware's dominance of the competition for unicorn charters to the high percentage of sophisticated investors among unicorn shareholders, arguing that such investors prefer Delaware law, which they perceive as protecting investor interests—"i.e., being friendly to shareholders rather than management,"[68]which is consistent with the evidence recounted above regarding investor preferences.[69]

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[65] Anat Alon-Beck, Incorporating Unicorns: An Empirical Analysis (2024) (draft on file with author).

[66] Id. at 27.

[67] Id. at 5-6.

[68] Id. at 33.

[69] See supra notes 55-57 and accompanying text.

B. Reincorporating Out of Delaware

This section reports hand collected data on reincorporations and related transactions by which firms that exited Delaware in the period 2012-2024.[70]

1. Collecting the Data

Using the EDGAR filings content sets on Westlaw and Bloomberg Law, evidence in corporate filings of reincorporation transactions out of Delaware were identified by searching for the term reincorporation and its variations (including redomiciled and redomesticated), combined with phrases such as "from Delaware" "from the State of Delaware" "out of Delaware" or "from Delaware to."[71] Typical language patterns describing the reincorporation (such as the stated reasons for, or purposes of, the reincorporation) also were used for search queries.[72] Once a potentially relevant reincorporation transaction was identified from the search results, public filings associated with an entity's CIK number were searched and reviewed for evidence of reincorporation out of Delaware. The searches also surfaced failed or pending reincorporations. The time period searched was 2012 to 2024.[73]

The data collected included:

- The entity associated with the reincorporation and its CIK number.
- The state to which the entity reincorporated from Delaware as stated in its filings.
- The effective date (preferably the month/day/year) and year of the reincorporation.
- The specific filing(s) (typically the 10-K, 10-Q, or 8-K) in which the effective date was stated.
- The entity's filer status before and after the effective date of the reincorporation, as stated in 10-K filings before and after the reincorporation.
- The entity's float in the year of incorporation, and float date, as stated in the entity's 10-K cover sheet.

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[70] The dataset was closed on June 28, 2024, at which time several pending reincorporation transactions were still awaiting shareholder approval.

[71] Sample query: (conversion OR reincorporat! OR redomicil! OR redomesticat!) /25 ("from Delaware" OR "from the State of Delaware" OR "out of Delaware to" OR "from Delaware to" OR "from a Delaware".

[72] Sample query: reason! OR purpose! /5 reincorporat!.

[73] Because specific terms and word patterns were relied upon to retrieve evidence of reincorporations, there may be DExit transactions not captured by our search.

- The specific term used in the entity's filing(s) to refer to the reincorporation (reincorporation, redomicile, redomestication) and the method (typically merger or conversion).
- The rationale for transaction as stated in the company's filings (typically the proxy statement).
- Information about the entity's management, shareholders, and their holdings drawn from the proxy statement:
    - CEO and the CEO's percentage of holdings in the year of reincorporation;
    - Board Chair, and the Chair's percentage of holdings in the year of reincorporation;
    - Any large shareholders, defined as holding fifteen percent or more;
    - Any controlling or majority shareholders as identified in the filing.
- Evidence of shareholder litigation against the entity's CEO or Board Chair in the five years prior to the effective date of the reincorporation or proposed reincorporation.

2. Annual Reincorporation Events

A total of 67 successful reincorporation events between 2012 and 2024 were identified, along with 4 reincorporation transactions that were pending in 2024 when data collection project ended (see Table 3).[74] In developing the data set, we identified seven corporations as to which the shareholder vote on a proposed reincorporation failed, which were excluded from the data.[75] Five of the failed transactions proposed reincorporating in Nevada and one each in Maryland and Texas. Four of the failed transactions were proposed by non-accelerated filers, one was a smaller reporting company, one was a large accelerated filer, and one's filing status could not be determined.[76]

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[74] Dataset on file with author.

[75] Dataset on file with author.

[76] A large accelerated filer has a common equity float held by non-affiliates of more than $700 million. 17 C.F.R. § 240.12b-2(2). An accelerated filer has a common equity float held by non-affiliates of between $75 and $700 million. Id., § 240.12b-2(1). A non-accelerated filer has a common equity float held by non-affiliates thus has a common equity float held by non-affiliates of less than $75 million. Prior to 2018 amendments, a smaller reporting company was one that has a public float of less than $75 million or had annual revenues of less than $50 million and a zero public float. Amendments to Smaller Reporting Company Definition, Exchange Act Rel. No. 78,168 (June 27, 2016). After those amendments, a smaller reporting company is one that has a public float of less than $250 million or had annual revenues of less than $100 million and a public float of less than $700 million. Id., § 240.12b-2. An emerging growth company is one that had annual gross revenues of less than $1,235,000,000 in its most recent fiscal year. Id.

Table 3. Annual Reincorporations Out of Delaware

Year	Events
2012	6
2013	6
2014	5
2015	6
2016	4
2017	3
2018	6
2019	2
2020	8
2021	5
2022	5
2023	9
2024	2
Pending	4
Total	71

3. Attributes of Reincorporating Firms

a. New State of Incorporation

The firms in the sample reincorporated into ten states, but Nevada was by far the leading choice (See Table 4). Maryland, Texas, and Wyoming are states commonly identified as competing with Delaware and Nevada for out-of-state incorporations, although our data suggest with modest success to date.[77] Collectively, those 4 states were chosen by 64 firms in the sample. Of the seven events involving the six other states, all but one were home state reincorporations.[78]

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[77] See Note, Spencer C. Ebach, A Reputation to Uphold: Maryland Courts and the Continued Development of REIT Law, 80 Md. L. Rev. Online 73 (2021) (describing Maryland's success in attracting real estate investment trusts); Sujeet Inda, Texas is Throwing Down a Legal Challenge to Delaware, Fin. Times (Jan. 28, 2024) (describing Texas' creation of a business court intended to compete with Delaware); Luke Scheuer, Digitizing Delaware's Data Advantage, 28 Widener L. Rev. 29, 61 (2022) (describing Wyoming's efforts to compete with Delaware by facilitating fintech).

[78] AmeriCann, Inc., Quarterly Report (Form 10-Q) (Feb. 14, 2024) (Colorado reincorporation; Colorado principal executive office); Community Bankers Trust Corp., 2014 Annual Report (Form 10-K) (Mar. 13, 2015) (Virginia reincorporation; Virginia principal executive office); hhgregg, Inc., 2016 Annual Report (Form 10-K) (May 19, 2016) (Indiana reincorporation; Indiana principal executive office); MarineMax, Inc., Current Report (Form 8-K) (Mar. 20, 2015) (Florida reincorporation; Florida principal executive office); Pendrell Corp., 2012 Annual Report (Form 10-K (Mar. 8, 2013) (Washington reincorporation; Washington principal executive office); Pike Corp., Quarterly Report (Form10-Q) (Nov. 10,

Interestingly, despite a much ballyhooed effort by North Dakota to attract corporations by offering a shareholder friendly statute,[79] we observed no reincorporations to North Dakota during the period.[80]

Table 4. New Domicile State

New State	Total
Colorado	1
Florida	2
Indiana	1
Maryland	6
Nevada	49
North Carolina	1
Texas	6
Virginia	1
Washington	1
Wyoming	3

The present study did not examine reincorporations into Delaware. Prior studies consistently reported that the number of reincorporations into Delaware considerably exceeded the number leaving Delaware. Kaouris identified 255 reincorporations by over-the-counter (OTC) corporations between 1982 and 1994.[81] Of those, 226 (eighty-nine percent) reincorporated into Delaware from other states.[82] Most OTC corporations that reincorporated into states other than Delaware chose their home state as their new domicile.[83] Kaouris also identified

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2014) (North Carolina reincorporation; North Carolina principal executive office). The sole exception was Saga Communications, Inc., which had its principal executive office in Michigan, but opted for incorporation in Florida. Saga Communications, Inc., Current Report (Form 8-K) (May 20, 2020). Saga's proxy statement pointed to Florida's lack of an annual franchise tax as justification for its choice. Saga Communications, Inc., 2020 Proxy Statement (Schedule 14A) (Apr. 16, 2020).

[79] See Stephen M. Bainbridge, Why the North Dakota Publicly Traded Corporations Act Will Fail, 84 N.D.L. Rev. 1043, 1045 (2008) ("In 2007, North Dakota threw down the gauntlet to Delaware by adopting the Publicly Traded Corporations Act . . ..").

[80] As I predicted. See id. ("I am confident in predicting that the North Dakota experiment will fail.").

[81] Kaouris, supra note 61, at 999.

[82] Id.

[83] Id. at 1001.

150 NYSE or AMEX firms that reincorporated between 1982 and 1994.[84] One hundred twenty one of those firms (eighty-one percent) reincorporated into Delaware.[85] Among the seventeen corporations that exited Delaware during the period, thirteen reincorporated in their home state.[86]

A 1998 study by Randall Heron and Wilbur Lewellen identified 364 reincorporations in the period 1980 to 1992.[87] Although the period in which their sample was chosen did not precisely overlap with that of Kaouris, their results are consistent with the latter's findings. Sixty-two percent of the companies in their sample were OTC corporations, with the remainder being listed on the NYSE or AMEX.[88] Eighty-seven percent of the reincorporations were by companies moving into Delaware.[89]

Using a database of firm incorporation decisions between 1995 and 2013, a 2020 study by Ofer Eldar and Lorenzo Magnolfi identified 592 firms that reincorporated at least once during the period.[90] Three hundred ninety nine firms reincorporated from elsewhere into Delaware, while 77 reincorporated out of Delaware.[91] Eldar and Magnolfi further reported that Delaware continued to dominate the market for corporate incorporations during the period. In fact, Delaware's share of the market for corporate charters actually increased from 50.09 percent to 63.86 percent between 1995 and 2013.[92] As for the subset of firms whose principal office is located in a state other than its state of incorporation, Delaware's market share also increased—albeit only very slightly—from 82.80 in 1995 to 82.66 in 2013.[93]

Consistent with the present study's findings, Eldar and Magnolfi also found that Nevada was Delaware's principal competitor. During the study period Nevada's share of all incorporations increased from 2.32 percent in 1995 to 8.48 percent in

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[84] Id.

[85] Id.

[86] Id. at 1003.

[87] Randall A. Heron & Wilbur G. Lewellen, An Empirical Analysis of the Reincorporation Decision, 33 J. Fin. & Quant. Anal. 549, 550 (1998).

[88] Id. at 553.

[89] Id.

[90] Eldar & Magnolfi, supra note 15, at 66. Reflecting the fact that some firms reincorporated more than once, they observed a total of 607 reincorporations during the period. Id.

[91] Id.

[92] Id.

[93] Id.

2013.[94] Nevada's share of firms that incorporated outside their home office state increased from 2.85 percent to 9.69 percent.[95]

b. Size

Prior DExit studies commonly identify size as an important attribute of firms leaving Delaware. Kaouris reported 255 reincorporations among OTC corporations, but only 150 among exchange-listed corporations.[96] The former tended to be smaller than the latter during that period.[97] Eldar and Magnolfi found that larger firms were less likely to incorporate in their home state compared to smaller firms.[98] According to their study, relative to Delaware corporations, Nevada corporations were smaller, had a lower average institutional stock ownership, and higher managerial ownership.[99] They concluded that "the increase in Nevada's market share is mostly due to small firms with low institutional shareholding and high insider ownership."[100]

Our study sorted firms in the sample by 10-K filing status (see Table 5) and by public common equity float. As to the former, prior to the reincorporation event, the vast majority consisted of either non-accelerated filers or smaller reporting companies. The results are largely consistent with the findings of the prior studies, in that the smallest companies in the sample skewed towards Nevada. Based on the annual sorting reported in Table 6, there does not appear to be a trend over time towards larger or smaller firms.

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[94] Id.

[95] Id.

[96] Kaoiuris, supra note 61, at 999-1001.

[97] Id. at 1001.

[98] Eldar & Magnolfi, supra note 15, at 81.

[99] Id. at 66. In their sample, Delaware firms averaged $2.04 billion in assets and Nevada firms averaged $390.81 million. Id. at 68. Delaware firms had a higher rate of institutional shareholder ownership (averaging 40.26) than did Nevada firms (averaging 11.27 percent). Id. Delaware corporations had a lower percentage of managers, directors, and officers who owned more than 15% of the stock (0.08, 0.07, and 0.05 percent on average, respectively) than did Nevada firms (0.14, 0.13, and 0.11, on average respectively). Id.

[100] Id. at 66.

Table 5. New State by Filing Status

Filing Status	Total	Nevada	Non-Nevada
Large Accelerated Filer	5	3	2
Accelerated Filer	12	2	10
Non-accelerated Filer	26	18	8
Smaller Reporting Company	28	26	2

Table 6. Reincorporations by Filer Status Per Year

	Large Accelerated Filer	Accelerated Filer	Non-accelerated Filer	Smaller Reporting Company
2012	0	1	0	5
2013	0	1	0	5
2014	0	1	0	4
2015	1	2	1	2
2016	0	2	0	2
2017	0	0	1	2
2018	1	1	0	4
2019	0	1	1	0
2020	0	2	5	1
2021	0	0	3	2
2022	0	0	5	0
2023	0	0	8	1
2024	2	0	0	0
Pending	1	1	2	0

As for public common equity float in the year of reincorporation, the companies in the sample ranged from a low of $673,042 to a high of $772.5 billion.[101] Thirty-five firms in the sample were nano caps (less than $50 million), of which 27 reincorporated in Nevada. Seventeen were micro caps (between $50 and $300 million), of which nine reincorporated in Nevada. Tesla was the sole large cap company (above $10 billion). The remainder were small cap companies, of which six were reincorporated in Nevada. In general, our results are thus consistent with

[101] We were unable to obtain float data for the reincorporation year for 10 companies in the sample.

prior studies finding that DExit firms tend to be small and that smaller firms tend to choose Nevada.

c. Litigation

As we shall see below,[102] limiting director and officer liability exposure is a commonly claimed motivation for proposing DExit. Accordingly, it seemed reasonable to collect data on whether DExit firms had experienced recent director and officer litigation. Litigation data was searched and collected using Westlaw and Bloomberg Law. On Westlaw, two content sets were used: 1) Delaware State & Federal Cases, and 2) Delaware Dockets. Searches in both content sets used a combination of company name (e.g., "Tesla"), CEO (e.g., "Musk"), Board Chairman (e.g., "Denholm"), large shareholder(s), if any (fifteen percent or more), and any identified controlling shareholder(s). Using the date filter and date sort, cases and dockets were reviewed for relevance focusing on the year of reincorporation and five years prior. Sample queries within the cases content set: TI(Tripadvisor); TI(Tripadvisor & greg! /3 maffei). Sample query within the dockets content set: (breach /3 fiduciary) & PTN(Tesla OR Musk). On Bloomberg Law, dockets were searched by party names and results were reviewed, focusing on the year of reincorporation and five years prior.

The number of firms in the sample that had experienced litigation was small. In addition, only one firm in the dataset experienced multiple lawsuits (Tesla).

Table 7. Corporations Whose Directors and Officers Experiencing Pre-Reincorporation Litigation

Company	To State	10-K Filer Status	Effective Date	Litigation
Alset Ehome International, Inc.	Texas	Non-accelerated filer	10/4/22	1
Ashford, Inc.	Maryland	Accelerated filer	10/31/16	1
Cabo Verde Capital, Inc.	Nevada	Non-accelerated filer	11/6/15	1
Cannae Holdings, Inc.	Nevada	Large accelerated filer	6/19/24	1
China Advanced Materials Construction Group, Inc.	Nevada	Smaller reporting company	8/1/13	1

[102] See infra Part III.D.

Contango Oil & Gas Co.	Texas	Accelerated filer	6/14/19	1
Fundamental Global Inc. (FG Financial Group)	Nevada	Non-accelerated filer	12/9/22	1
Tesla, Inc.	Texas	Large accelerated filer	6/13/24	8

d. Controlling Shareholders

Because controlling shareholder liability exposure has figured in much recent DExit speculation,[103] it seemed reasonable to collect data on whether the relocating corporations had a controlling shareholder.[104] In sum, seventeen companies in the dataset had an identifiable controller:

Table 8. Firms with Identifiable Controller

Company	To State	Effective Date	10-K Filer Status
American Housing REIT, Inc.	Maryland	9/12/13	Smaller reporting company
Applied UV, Inc.	Nevada	10/25/23	Non-accelerated filer
Ballantyne Strong, Inc.	Nevada	12/23/22	Non-accelerated filer
Bravo Multinational, Inc.	Wyoming	10/9/20	Non-accelerated filer

[103] See infra notes 332-342 and accompanying text.

[104] Data relating to controlling shareholders was obtained using two methods within the EDGAR Filings & Disclosures content set on Westlaw. First, the reincorporation entity's filings were reviewed for mentions or descriptions of a controlling shareholder(s). In a small number of instances, the data was explicitly stated (e.g., "[company] is the company's controlling stockholder" "we are a 'controlled company'"), typically in an entity's proxy statement wherein the reincorporation proposal was discussed. Second, to capture potential instances of the information being described in filings other than those of the reincorporation entity, a specific search query of the two phrases that were most likely to appear (controlling shareholder(s)/controlling stockholder(s)) was run within the EDGAR Filings & Disclosures content on Westlaw. Sample query: controlling /2 shareholder! stockholder! /25 "[reincorporation entity]". In at least once instance, the information was confirmed in another entity's filing ("He is also the Chairman and controlling stockholder of [reincorporation entity]."). Search results caveat: because the search was limited to the two phrases most likely to appear (controlling shareholder/controlling stockholder), any alternate descriptions were not retrieved with this search.

Coates International Ltd.	Nevada	5/9/18	Smaller reporting company
Invitation Homes Inc.	Maryland	2/6/17	Non-accelerated filer
IronClad Encryption Corp. (Butte)	Nevada	1/26/17	Smaller reporting company
Light & Wonder, Inc.	Nevada	1/10/18	Large accelerated filer
Mitesco, Inc.	Nevada	10/13/23	Smaller reporting company
Pam Transportation Services, Inc.	Nevada	Pending	Accelerated filer
Pendrell Corp.	Washington	11/14/12	Accelerated filer
Saga Communications, Inc.	Florida	5/20/20	Accelerated filer
Toga Ltd.	Nevada	7/10/18	Smaller reporting company
TripAdvisor, Inc.	Nevada	Pending	Large accelerated filer
USA Equities, Inc.	Nevada	9/23/21	Smaller reporting company
Viewbix, Inc.	Nevada	Pending	Non-accelerated filer
Xiangtian (USA) Air Power Co., Ltd.	Nevada	10/31/16	Accelerated filer

Not surprisingly, given the liability exposure of controlling shareholders, the number of firms with identifiable large shareholders was much larger than the number with acknowledged controllers:

Table 9. Ownership by Largest Shareholder

To State	**<15%**	**15%-35%**	**36%-50%**	**51-75%**	**>76%**
Colorado	0	0	1	0	0
Florida	1	1	0	0	0
Indiana	0	0	1	0	0
Maryland	0	2	0	1	3
Nevada	10	13	7	13	6
North Carolina	1	0	0	0	0
Texas	1	2	3	0	0
Virginia	1	0	0	0	0
Washington	0	0	0	1	0
Wyoming	0	1	0	0	2

Twenty-six out of the 71 firms in the dataset—36.6%—thus had a shareholder or shareholder group that owned more than fifty percent of the stock.

We also examined ownership stakes by CEOs:

Table 10. CEO Stockownership

To State	<5%	5-10%	10%-25%	25%-50%	>50%
Colorado	0	1	0	0	0
Florida	1	1	0	0	1
Indiana	0	1	0	0	0
Maryland	5	0	1	0	0
Nevada	25	3	6	7	8
North Carolina	0	1	0	0	0
Texas	2	0	3	1	0
Virginia	1	0	0	0	0
Washington	1	0	0	0	0
Wyoming	1	0	0	1	1

Ten out of the 71 firms in the data set—14%—had CEOs who owned fifty percent or more of the voting stock, including 8 out of the 49 that reincorporated in Nevada—16.3%.

4. DExit Drivers: Prior Research

During the period 1980 to 1992 covered by Heron and Lewellen's survey of reincorporations, two major developments occurred. In response to the wave of hostile takeovers in the 1980s, many states adopted antitakeover statutes of varying sorts intended to protect local companies from so-called corporate raiders.[105] During the same period states began adopting exculpation statutes designed to limit director exposure to liability for breaches of the duty of care.[106] Heron and Lewellen

[105] See Lucian Arye Bebchuk & Allen Ferrell, Federalism and Corporate Law: The Race to Protect Managers from Takeovers, 99 Colum. L. Rev. 1168, 1171 (1999) ("States have developed a substantial body of rules, including both antitakeover statutes and judicial decisions permitting the use of defensive tactics, that make takeovers more difficult [and] are quite likely to excessively protect managers.").

[106] A. Mechele Dickerson, A Behavioral Approach to Analyzing Corporate Failures, 38 Wake Forest L. Rev. 1, 11 n.41 (2003) (noting that during the period "states quickly adopted" provisions allowing corporate articles of incorporation "to include exculpatory clauses … that eliminate the personal liability of directors for monetary damages resulting from a breach of the duty of care").

sought to determine whether the availability of these new protections encouraged corporations to reincorporate into states offering them.[107]

Heron and Lewellen identified six motivations for reincorporating that companies gave in their proxy statements: "i) establish takeover defenses, ii) reduce director liability, iii) move to a jurisdiction with more flexible and predictable corporation laws, iv) realize tax or franchise fee savings, v) reconcile the legal and operating domicile of the firm, and vi) facilitate acquisitions."[108] Many companies offered more than one of these motivations.[109] Of these, however, the ability to adopt takeover defenses and to adopt exculpatory clauses were the most commonly offered motivations.[110] The latter motivation is less likely to be pertinent today, as all states now have statutes authorizing exculpation clauses, albeit with considerable variation in who is covered and what claims may be exculpated.[111] As to the former motivation, although courts in states other than Delaware initially tended to adopt standards for takeover defenses tracking Delaware law,[112] today "most states have adopted [poison] pill-validation statutes that immunize managerial decisions to adopt pills from judicial review."[113] In addition, most states offer stronger antitakeover state packages than does Delaware.[114] Although hostile

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[107] Heron and Lewellen, supra note 87, at 549.

[108] Id. at 553.

[109] Id.

[110] Id. at 551. They found that reincorporations motivated by a desire to gain additional takeover protections resulted in negative abnormal returns, leading them to conclude "that takeover defense enhancements implemented in the process of reincorporation diminish shareholder wealth," which they argued was consistent with the assumption that such statutes tend to entrench incumbent managers. Id. at 559. In contrast, they found that reincorporations motivated by a desire to take advantage of exculpatory provisions produced positive abnormal returns. Id. at 560.

[111] See Jens Frankenreiter et. al., Cleaning Corporate Governance, 170 U. Pa. L. Rev. 1, 34–35 (2021) ("In all states that permit or imply them (and by 2003 all did), an exculpation provision shields directors (and in some cases officers) from monetary liability for breaching their fiduciary duty of care. . . . There is nonetheless some substantive variation among states' mandates.").

[112] See Melissa M. Kurp, Corporate Takeover Defenses After QVC: Can Target Boards Prevent Hostile Tender Offers Without Breaching Their Fiduciary Duties?, 26 Loy. U. Chi. L.J. 29, 35 (1994) (noting that although some states "have rejected the *Unocal* standard through legislation, … the trend seems to be that courts construing laws of states other than Delaware will approve and rely upon the *Unocal* standard").

[113] Ofer Eldar, A Lawyer's Guide to Empirical Corporate Governance, 27 Stan. J.L. Bus. & Fin. 1, 11 (2022). For an overview of poison pills and the law governing them, see Christine Hurt, The Hostile Poison Pill, 50 U. Cal. Davis L. Rev. 137 (2016).

[114] See Stephen M. Bainbridge, Dodd-Frank: Quack Federal Corporate Governance Round II, 95 Minn. L. Rev. 1779, 1793 (2011) ("Compared to most states, which have adopted

takeovers today are relatively rare,[115] it was somewhat surprising that our research found no evidence that these considerations were among the motivations for firms in our sample (see Tables 11 and 12). After all, takeover defenses and antitakeover statutes both entrench management and, according to some scholars, give management negotiating leverage in potential friendly acquisitions,[116] which presumably might be attractive to some companies.

In any case, Heron and Lewellen's findings were derived from their entire sample, including incorporations into Delaware from another state. Turning to the smaller subset of firms incorporating out of Delaware, "[t]wenty cited savings in taxes and franchise fees as a reason for their departure, eight mentioned antitakeover motives, six indicated a desire to reconcile their legal and operating domiciles, but none referred to reductions in director liability."[117] Taxes thus seem to have played a more important role in firms choosing to exit Delaware than it did for companies choosing to form or remain in Delaware.[118]

5. DExit Drivers: The Present Study

We reviewed proxy statements and annual reports by the companies in the sample to determine the stated motivations for reincorporating that their boards disclosed to the shareholders. Common themes were identified and coded as "Yes" when a stated purpose or reason was indicated.[119] Most sample firms identified two or more motivations. Table 11 breaks out the motivations for the sample, for Nevada reincorporations only, and for non-Nevada reincorporations. Table 12

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multiple antitakeover statutes of ever-increasing ferocity, Delaware's single takeover statute is relatively friendly to hostile bidders.")

[115] See Amanda M. Rose, Cutting Class Action Agency Costs: Lessons from the Public Company, 54 U. Cal. Davis L. Rev. 337, 380 (2020) (noting that "hostile takeovers remain a rare occurrence").

[116] See, e.g., Dale Arthur Oesterle, The Negotiation Model of Tender Offer Defenses and the Delaware Supreme Court, 72 Cornell L. Rev. 117, 121 (1986) (discussing theory that takeover defenses give management negotiating leverage). But see Guhan Subramanian, Bargaining in the Shadow of Takeover Defenses, 113 Yale L.J. 621, 623 (2003) (arguing that "the bargaining power hypothesis is only true in a subset of all deals, contrary to the claim of some defense proponents that the hypothesis applies to all negotiated acquisitions").

[117] Heron & Lewellen, supra note 87, at 560 n.7.

[118] Kaouris likewise interpreted his data as suggesting that avoiding Delaware franchise taxes was the primary motivator for firms that exited Delaware between 1985 and 1993. Kaouris, supra note 61, at 1000 and 1003.

[119] One striking feature of the results is the remarkably high uniformity of language over time and across companies. It appears as though proxy statement drafters routinely cut-and-paste the relevant language from earlier proxy statements.

breaks out the stated motivations by filing status for the fiscal year prior to reincorporation.

The motivations identified were:

- Franchise tax: The entity opposes the imposition of Delaware franchise taxes, and expects the new jurisdiction to generate substantial franchise tax savings, often with the amount of expected savings explicitly stated.[120]
- Modern and/or effective corporation laws: The entity believes the new jurisdiction's laws will meet its business needs through its "modern" or "effective" approach. Specific language typically includes a rationale that the new state's legislature "has demonstrated a willingness to maintain modern and effective corporation laws to meet changing business needs," and like expressions.
- Comprehensive and/or flexible corporation laws: The entity believes the new jurisdiction's laws will meet its business needs through its "flexible" or "progressive" approach. Specific language typically includes a rationale that the new jurisdiction is recognized as "adopting and implementing comprehensive and flexible corporation laws that are frequently revised and updated to accommodate changing legal and business needs," and like expressions.
- Delaware law more uncertain or complex: The entity regards the new jurisdiction's laws as less uncertain, volatile, or complex than Delaware law. Specific language typically includes a rationale that Delaware law is more "uncertain and complex than [the new jurisdiction's] equivalents due to the large body of nuanced Delaware case law," "Delaware has adopted a litigation-intensive, standards-based corporate governance regime. This system generates volatility and reduced predictability in legal outcomes related to complex corporate governance matters. [New jurisdiction] like

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[120] Several firms also identified various other tax and administrative cost savings they anticipated, including reduced reporting obligations. The pertinent costs, however, were vaguely specified and no monetary figures were provided. See, e.g., A.H. Belo Corp., 2018 Annual Proxy Statement (Schedule 14A) 21 (Apr. 23, 2018) ("In addition [to franchise tax savings], the Company incurs annual Delaware service-related fees for statutory service of process and other representation and for legal fees to Delaware counsel, as well as fees related to Delaware tax filing preparation, which will No [sic] longer be required after the Reincorporation."); Ashford Inc., 2016 Special Meeting Proxy Statement (Schedule 14A) 8 (Oct. 7, 2016) ("We believe the Company may also be able to reduce and streamline legal and other administrative costs as a result of being incorporated in the same jurisdiction as the two entities that it currently manages . . .."); Pike Electric Corp., 2013 Annual Meeting Proxy Statement (Schedule 14A) 47 (Sep. 17, 2013) ("Reincorporating into North Carolina would also simplify the Company's corporate administration and reduce costs by eliminating its obligation to file certain reports and other documents in Delaware and by eliminating the need to utilize special advisors regarding Delaware-specific issues."). Note that anticipated savings in legal fees and related expenses are broken out as a separate category.

many other states, has a more code-based corporate governance regime. This system is likely to generate less volatility," and like expressions.

- Statute-focused approach: The entity regards the new jurisdiction's statute-based laws, rather than judicial interpretations, as more predictable. Specific language typically includes a rationale that the new jurisdiction offers an advantage, "unlike Delaware corporate law, much of which consists of judicial decisions that migrate and develop over time, [new jurisdiction] has pursued a statute-focused approach that does not depend upon constant judicial supplementation and revision, and is intended to be stable, predictable and more efficient."
- Litigation risk: The new jurisdiction is expected to provide the entity with greater protection from meritless or frivolous lawsuits, which in turn may help the entity "attract and retain qualified management."
- Liability risk: The entity expects to receive greater protection for its directors, officers, or the company in the new jurisdiction. Specific language typically includes that the new jurisdiction offers "a broader exclusion of liability," or that the new jurisdiction will "limit the personal liability" of directors or officers.
- Flexibility and simplicity in corporate governance: The entity expects to have greater flexibility with certain aspects of corporate governance.
- Flexibility in certain corporate transactions: The entity expects to have greater flexibility with certain aspects of corporate transactions.
- Abundance of case law: The entity regards the new jurisdiction as having "a substantial body" or "abundance" of case law to ensure clarity and predictability of corporation laws.
- Align domicile/operations: The entity expects the new jurisdiction to better align with its operations or the location of its headquarters, management, or employees.
- Minimal disclosure and reporting requirements in new state: The entity expects the new jurisdiction to afford it greater freedom from reporting and corporate disclosure requirements, and favors that the identity of the corporate shareholders is not part of the public record.
- State-specific rationales: For companies reincorporating into Nevada, a small number of companies used specific language "that Nevada is emulating, and in certain cases surpassing, Delaware in creating a corporation-friendly environment." A small number of companies reincorporating into Maryland indicated a preference for Maryland-specific REIT laws.
- Other: Indicates where no stated reason or purpose was provided, or was described simply as a reorganization; indicates instances of more unique rationales (e.g., name conflict developed in Delaware; expiration of settlement agreement that required incorporation in Delaware, and the like).

Tables 11 and 12 rank these motivations by their frequency in the sample by new state and filing status, respectively.

Table 11. Stated Motivation for Reincorporation

Stated Motivation	Total (n=71)	Nevada Only (n=49)	Non-Nevada (n=22)
Reduce Franchise Tax	57	39	18
Greater Protection from Litigation Risk for Company, Directors, and/or Officers in New State	18	18	0
Ability to Limit or Eliminate Director and Officer Liability in New State	16	15	1
Statute-focused Approach not Dependent on Judicial Interpretation or Supplementation in New State	14	14	0
Flexibility re Certain Corporate Transactions	10	9	1
Modern and/or Effective Corporate Laws in New State	11	4	7
Align Legal Domicile with Business Operations	10	2	8
Flexibility and Simplicity in Corporate Governance	8	6	2
Nevada Emulating and/or Surpassing Delaware in Creating a Corporate Friendly Environment	5	5	0
Certain Aspects of Delaware Law Uncertain and/or Complex	4	0	4
Abundance of Case Law in New State Will Enhance Clarity and Predictability	3	3	0
Maryland Expertise in REITs	3	0	3
Minimal Disclosure and Reporting Requirements in New State	3	3	0
Comprehensive, Flexible, and/or Progressive Laws in New State	2	2	0
Other	25	15	10

Table 12. Stated Motivation by Filing Status

Stated Motivation	Large Accelerated Filer (n=5)	Accelerated Filer (n=12)	Non-accelerated Filer (n=26)	Smaller Reporting Company (n=28)
Reduce Franchise Taxes	5	11	23	18
Greater Protection from Litigation Risk for Company, Directors, and/or Officers in New State	3	1	11	3
Ability to Limit or Eliminate Director and Officer Liability in New State	3	2	8	3
Statute-focused Approach not Dependent on Judicial Interpretation or Supplementation in New State	3	0	10	1
Flexibility re Certain Corporate Transactions	1	0	9	2
Modern and/or Effective Corporate Laws in New State	2	3	4	2
Align Legal Domicile with Business Operations	3	4	3	0
Flexibility and Simplicity in Corporate Governance	0	1	5	2

Nevada Emulating and/or Surpassing Delaware in Creating a Corporate Friendly Environment	0	0	1	4
Certain Aspects of Delaware Law Uncertain and/or Complex	2	1	1	0
Abundance of Case Law in New State Will Enhance Clarity and Predictability	0	0	0	3
Comprehensive, Flexible, and/or Progressive Laws in New State	0	0	0	2
Maryland Expertise in REITs	0	2	0	1
Minimal Disclosure and Reporting Requirements in New State	0	0	1	2
Other	3	6	9	6

III. DExit Drivers

Assessing the merits of the various motivations relocating firms have offered has both transactional and systemic significance. As to the former, judicial analysis of the motives of the relocating firm's controlling shareholder (if any), directors, and officers, will figure prominently in any litigation challenging the reincorporation. In the *TripAdvisor* case, for example, minority shareholders challenged a proposed conversion of the company from a Delaware to a Nevada corporation.[121] Plaintiffs conceded that the proposed transaction was fully compliant with the governing statute. As Vice Chancellor Laster observed, however, under Delaware law inequitable actions by a fiduciary are not permissible

[121] Palkon v. Maffei, 311 A.3d 255, 261 (Del. Ch. 2024).

simply because they are permitted by a statute.[122] Instead, Delaware courts require a dual showing that the transaction both complied with the statute and was consistent with the fiduciary duties of controllers, directors, and officers.[123] In evaluating the latter issue, a court will apply the entire fairness standard if the corporation's fiduciaries receive non-ratable benefits from the transaction. In the reincorporation setting, for example, "a controller or other fiduciary obtains a non-ratable benefit when a transaction materially reduces or eliminates the fiduciary's risk of liability."[124] Although TripAdvisor had offered multiple motivations for the proposed transaction, at this procedural stage, Laster zeroed in on its acknowledged desire to reduce its directors' and officers' liability exposure.[125]

While Laster declined to enjoin the conversion, he denied the defendants' motion to dismiss for failure to state a claim.[126] Instead, finding that plaintiffs had adequately alleged that the conversion constituted a self-interested transaction by TripAdvisor's controlling shareholders due to the significant litigation and takeover protections provided by Nevada law relative to Delaware law, he held that plaintiffs could pursue claims for legal damages for breach of fiduciary duty.[127] To be sure, planners of future reincorporations can structure the deal so as to receive *Corwin*[128]

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[122] Id. at 267.

[123] Id.

[124] Id. at 270.

[125] Laster explained:

> The defendants contend that other benefits of Nevada incorporation render the conversion fair, such as lower franchise taxes and a greater ability to recruit management personnel. The reduction in franchise taxes appears immaterial given the size of the Company and Holdings. The greater ability to recruit management personnel seems to be a function of reduced litigation exposure, so it is not really a separate benefit. Regardless, those allegedly countervailing benefits cannot be assessed at this stage.

Id. at 282.

[126] Vice Chancellor Laster concluded that "it seems likely that the court will have a sufficiently reliable basis to craft a monetary award for any harm that the Company's stockholders suffer. A judgment against the defendants in that amount should provide the plaintiff with a fully adequate remedy." Id. at 286. Accordingly, he ruled that "[i]junctive relief is therefore off the table." Id. at 287.

[127] Id. at 283.

[128] See id. at 262 ("If a board proposed a similar conversion for a corporation without a stockholder controller, and if the fiduciaries fully disclosed the consequences of the change in legal regimes, including the effect on stockholder litigation rights, then the stockholders' approval of the conversion would be dispositive, triggering an irrebuttable version of the business judgment rule.") (citing Corwin v. KKR Fin. Hldgs. LLC, 125 A.3d 304 (Del. 2015))/

or *MFW*[129] cleansing, as appropriate, but *TripAdvisor* teaches that without such cleansing courts will parse the motivations for the transaction to determine if it confers non-ratable benefits on the corporation's fiduciaries. Ironically, the increasing difficulty of obtaining such cleansing is a common complaint about the state of Delaware law.[130] In the reincorporation setting, those problems are compounded because all directors may be deemed interested in the transaction to the extent that it materially reduces their liability exposure.[131]

As for the systemic implications of the DExit drivers, the plausibility and merits of the various motivations is relevant to assessing whether any or all of them pose serious threats to Delaware's dominance of the market for corporate charters. Given the inertia behind reincorporation decisions,[132] plausible threats must involve significant and credible costs for firms remaining in Delaware and/or substantial benefits on offer by alternative states. In addition, because prior research concluded that only a subset of firms were prime candidates for reincorporation,[133] parsing the various motives will determine whether that remains the case.

Many of the DExit drivers identified in Part II.B overlapped or were otherwise related to one another. Accordingly, this Part groups those drivers into several broader categories for purposes of analysis. State specific considerations, such as Maryland's apparent advantage in REITs, are omitted as being unlikely to tell us much about the big picture.

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[129] See *Palkon,* 311 A.3d at 262-63 ("If directors proposed a similar conversion for a corporation with a stockholder controller, and if they properly conditioned the transaction on the twin *MFW* protections, then the dual approvals would be dispositive, again triggering an irrebuttable version of the business judgment rule."). As an initial matter, conflicted controller transactions are subject to review under the entire fairness standard, which requires the defendant controller to prove both fair dealing in structuring and conducting the transaction and that the controller paid a fair price. See Kahn v. Lynch Commun. Sys., Inc., 638 A.2d 1110, 1115 (Del. 1994) ("A controlling or dominating shareholder standing on both sides of a transaction, as in a parent-subsidiary context, bears the burden of proving its entire fairness."). Under the Delaware Supreme Court's decision in Kahn v. M&F Worldwide Corp., 88 A.3d 635 (Del. 2014), and its progeny, a controlling shareholder can cleanse the transaction by complying with a six-part process involving approval of the transaction by a special committee of independent directors and a majority of the disinterested shareholders. See id. at 645 (listing six requirements).

[130] See infra notes 365-374 and accompanying text (discussing complaints about the difficulty of obtaining *MFW* cleansing).

[131] See *Palkon,* 311 A.3d at 276-77 (concluding that a material reduction in liability exposure confers a material non-ratable benefit on the board and thus triggers entire fairness review).

[132] See supra Part I.B.

[133] See supra Part II.B. 4.

A. Franchise Taxes and Other Administrative Costs

Given the consistency of our findings with the prior research,[134] it was not initially surprising that reducing franchise taxes was the most commonly cited DExit driver. After all, Delaware long has had the highest franchise tax rate in the country.[135] Delaware charges most public corporations $250,000 in franchise taxes per year.[136] In contrast, Nevada levies an annual filing fee capped at $11,125.[137] The absolute savings thus are substantial.

Oddly, neither company proxy disclosures nor the legal literature on reincorporations focus on savings relative to revenues and earnings, which seems a more pertinent inquiry than the absolute amounts. For some of the nano- and micro-cap firms that make up the bulk of our sample, the relative savings likely mattered. The company with the smallest float in our sample, for example, Green Technology Solutions, Inc., which reincorporated from Delaware to Nevada via written consent in 2014, was one of those that identified lower franchise taxes in Nevada as one of its motivations for reincorporating.[138] The company had net losses of $909,000 in 2013, $1.4 million in 2012, and $4.2 million in 2011.[139] At least in 2012 and 2013, the tax savings available by reincorporating would have made a significant difference in the size of the company's losses. In 2011, however, even saving the full amount of Delaware's current franchise tax would have reduced the company's loss by less than six percent.

But for most firms in our sample—even the smallest—it seems unlikely that the anticipated franchise tax savings relative to revenue and earnings were significant. In its proxy statement, non-accelerated filer Rezolute, Inc., for example, asserted that the "approximately $200,000" it paid "annually in Delaware franchise taxes" was "prohibitive and not in the interests of the Company's stockholders" and that the savings would be significant.'[140] Yet, in the two fiscal years prior to the reincorporation vote, Rezolute had operating losses of $20.5 million and $25.9

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[134] See supra notes 117-118 and accompanying text.

[135] See Rick Geisenberger, The Delaware Corporation Franchise Tax, 30 Del. Law. 18, 20 (Fall 2012) ("Delaware's maximum franchise tax is the highest in the nation . . ..")

[136] Del. Code Ann., tit. 8, § 503(c) (defining "large corporate filers" and imposing an annual franchise tax of $250,000 thereon).

[137] Nev. Rev. Stat. § 78.150. There is also an annual state business license fee of $500. Nev. Rev. Stat. § 76.130.

[138] Green Technology Solutions, Inc., Notice of Action by Written Consent (Schedule 14C) 6 (July 7, 2014).

[139] Green Technology Solutions, Inc., Annual Report (Form 10-K) 14 (Mar. 31, 2014).

[140] Rezolute, Inc., 2021 Annual Meeting Proxy Statement (Schedule 14A) 23 (Apr. 28, 2021).

million respectively.[141] The claimed franchise tax savings would have amounted to reductions of only 0.98% and 0.77% in the annual losses in those years.

Save Foods Inc., a non-accelerated filer that had the ninth smallest float in our sample and reincorporated from Delaware to Nevada in 2023, suffered losses of $5.8 million in 2022 and $4.9 million in 2021.[142] The company's proxy statement claimed that "the Reincorporation will eliminate our obligation to pay the annual Delaware franchise tax, which we expect will result in substantial savings to us over the long term."[143] Yet, even assuming they saved the full $250,000 current Delaware franchise tax, their losses would have been reduced by only 4.3% and 5.1%, respectively. One may fairly wonder whether such savings are enough standing alone to overcome the inertia behind these companies' initial incorporation decision.

An even more surprising result is that all but one of the accelerated filers and all of the large accelerated filers cited reduced franchise taxes as a motivation for the reincorporation (see Table 12). Tesla had the largest float of any of the companies in our sample ($722.5 billion).[144] In 2023, the year prior to the Tesla shareholder vote on reincorporating from Delaware to Texas, Tesla reported earnings of $15.2 billion.[145] Although the proxy statement stated that reincorporating will result in "the Company saving $250,000 per year in franchise tax payments to Delaware,"[146] it seems unlikely that such savings are material. To the contrary, the tax savings would hardly rise to the level of a rounding error. To be sure, Tesla's size makes it an outlier in our sample. At the other end of the scale, Ashford Inc., the smallest accelerated filer in our sample ($40 million float), asserted that franchise tax it paid in Delaware ($146,443 in 2012) was "substantial relative to the state tax in Maryland" ($300).[147] Yet, the firm had suffered a net loss of $12 million in the year prior to the reincorporation vote (2015).[148] The asserted franchise tax savings would have put a very small dent in that loss.

In sum, despite its status as the most commonly cited DExit driver, it seems unlikely that franchise tax savings in fact are material to the decision of most public corporations considering reincorporating. As such, it seems unlikely that franchise

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[141] Rezolute, Inc., Annual Report (Form10-K) 31 (Oct. 13, 2020).

[142] Save Foods Inc. Annual Report (Form 10-K) F-5 (Mar. 27, 2023).

[143] Save Foods Inc., 2023 Annual Proxy Statement (Schedule 14A) 44 (Aug. 15, 2023).

[144] Dataset on file with author.

[145] Tesla, Inc. Annual Report (Form 10-K) 51 (Jan. 26, 2024).

[146] Tesla, Inc., 2024 Annual Meeting Proxy Statement (Schedule 14A) 24 (Apr. 29, 2024).

[147] Ashford, Inc., 2016 Special Meeting Proxy Statement (Schedule 14A) 8 (Oct. 7, 2016).

[148] Ashford, Inc., Annual Report (Form 10-K) 49 (Mar. 15, 2016).

taxes will generate a substantial flight from Delaware. For most companies, the savings will be minimal, especially when considered relative to the inertia that must be overcome. Instead, it seems likely to be at most a secondary factor for nano- and micro-cap firms considering reincorporation for other reasons.[149]

B. Home State

Upon initial review, it seemed curious that ten of the firms in the data set justified the reincorporation proposal as necessary to align their legal domicile with their business operations. Because we know that most firms choose between their home state and Delaware as their initial state of incorporation,[150] one assumes that most of these firms initially decided that the advantages of Delaware incorporation outweighed the benefits of home state incorporation. Pike Electric Corporation, for example, stated that "in 2005, the decision was made for the Company to launch an initial public offering ("IPO"). In connection with the IPO, the publicly-traded holding company, Pike Electric Corporation, was incorporated in Delaware, as is often done with companies launching IPOs."[151] Apparently, at least some of these corporations came to regret their decision.

In some cases, investor pressure may have driven the initial incorporation decision rather than an objective cost-benefit analysis. Three years prior to Pike Electric's IPO, for example, a private equity firm had "acquired a substantial ownership position in" the company.[152] Because pre-IPO investors often prefer Delaware and press for incorporation there,[153] it seems reasonable to infer that Pike Electric's initial decision was driven by the private equity firm's preferences rather than those of the incumbent board and managers.

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[149] In any case, it seems unlikely that Delaware will modify its franchise tax structure. Professors Kahan and Kamar persuasively argue that Delaware's franchise tax is an economically efficient price discrimination scheme, which tailors the tax so that the firms that benefit the most from Delaware incorporation pay the highest franchise taxes. Marcel Kahan & Ehud Kamar, Price Discrimination in the Market for Corporate Law, 86 Cornell L. Rev. 1205 (2001). Whether or not that is the case, Delaware certainly profits considerably from franchise tax revenues. In 2023, for example, franchise taxes represented 22.2% of the state's total revenue. Delaware Department of Finance, DEFAC General Fund Revenue Worksheet, https://financefiles.delaware.gov/DEFAC/05-24/Revenue-Worksheet.pdf. Absent a mass exodus, Delaware has strong reasons for maintaining its current tax structure. See generally Michal Barzuza, Delaware's Compensation, 94 Va. L. Rev. 521 (2008) (arguing that Delaware's franchise system is suboptimal, but conceding that Delaware lacks incentives to adopt a system she believes superior).

[150] See supra note 52 and accompanying text.

[151] Pike Electric Corp., supra note 120, at 46.

[152] Id.

[153] See supra note 55 and accompanying text.

Given the inertia behind the initial incorporation decision, however, mere regret would seem an inadequate explanation for the DExit decision. All ten of the firms that identified this factor as a motivating consideration also identified reducing their franchise tax burden as another DExit driver. Pike Electric, for example, explained that:

> North Carolina imposes a franchise tax on all corporations incorporated in North Carolina and all foreign corporations doing business in North Carolina. By reincorporating into North Carolina, the Company would eliminate its Delaware franchise tax obligation without affecting its North Carolina franchise tax obligation. Management estimates that the completion of the reincorporation would reduce the Company's aggregate state tax liabilities, based on present law and rates, by approximately $180,000 per year.[154]

The savings were modest relative to Pike Electric's earnings of $36.2 and $10.9 million in the two preceding years,[155] as was likely the case for the other nine companies in this category, since seven were either accelerated or large accelerated filers. As with all the other companies in this category, however, Pike Electric cited additional factors including a commitment to supporting their home state:

> The Company's North Carolina-based operations include its headquarter operations, senior management office, operations support team as well as its engineering division's headquarters, and the meetings of its Board and stockholders are held in North Carolina. Given Pike's significant operational presence in North Carolina, the Company is committed to supporting the North Carolina business community and the economic growth of both the Company and North Carolina and believes that reincorporating into North Carolina will increase its ability to fulfill this commitment. In contrast, the Company conducts minimal business in Delaware.[156]

In addition, the company explained that being incorporated in Delaware exposed it, its board, and managers, to litigation in Delaware, which effectively represents a foreign jurisdiction for it and them," and which necessitated retaining "special advisors regarding Delaware-specific issues."[157] In sum, despite the company being an accelerated filer, this was a mainly local business opting for local incorporation for both financial and cultural reasons. The same seems to have been true for other companies in this category.[158] The principal outlier is Tesla, which is hardly a local

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[154] Pike Electric Corp., supra note 120, at 46.

[155] Pike Electric Corp., supra note 78, at 22.

[156] Pike Electric Corp., supra note 120, at 47.

[157] Id.

[158] MarineMax, for example, likewise stated that:

business, but which cited business developments that made Texas its home state among many other reasons for DExit.[159]

C. Quality of New State Law

Several categories of the identified motivations spoke to various aspects of the perceived quality of the new state law relative to that of Delaware. For purposes of analysis, we consolidated them into three groups. First, claims that the new state has modern and/or effective corporate laws. Second, a trio of motivations related to flexibility, including that the new state offers flexible corporate laws, flexible and simplicity of corporate governance, and/or flexibility with respect to certain transactions. Third, a set of motivations speaking to perceived indeterminacy in Delaware law and resulting uncertainty, including assertions that Delaware law is more uncertain or complex than the of the new state, the new state offers a statute-based approach, and/or that the new state offers an abundance of case law. Strikingly, across all three categories, the proxy statement disclosures relating to each of these motivations typically was only one or two sentences.

> While MarineMax has been incorporated in Delaware since 1998, we are a Florida company in terms of operations and personnel. The majority of our employees are Florida residents, our headquarters and senior management are based in Florida, and a majority of the meetings of our shareholders and directors are held in Florida each year. We generate about half of our total revenues from Florida alone. Given our significant presence in Florida, MarineMax is committed to the state's business community and continued economic growth. We believe that reincorporating in Florida emphasizes this commitment in a lasting way. Additionally, reincorporating in Florida aligns our corporate domicile with our day-to-day business operations. Though we conduct very little business in Delaware, we currently have obligations to continuously file certain reports and documents in Delaware. Finally, as a Delaware corporation we are subject to the jurisdiction of its courts, despite its courts effectively functioning as a foreign jurisdiction. Reincorporating in Florida will allow us to align our operational and legal domiciles, which may have the effect of benefitting MarineMax if it is subject to litigation.

MarineMax, Inc., 2015 Annual Meeting Proxy Statement (Schedule 14A) 37 (Jan. 12, 2015). See also A.H. Belo, supra note 120, at 22 (explaining that "the Company's business is No [sic] longer national in scope and the Company finds itself essentially back to its Texas roots where it started as a newspaper company in 1842"); Scientific Games Corp., Special Meeting Proxy Statement (Schedule 14A) 4 (Oct. 20, 2017) ("Following the reincorporation merger, we will benefit from having our operational center, legal domicile and corporate office in Nevada, the gaming capital of the world, where we have strong roots and an extensive and growing employee base.").

[159] Tesla, supra note 146, at 24.

- "The Company believes that the Texas legislature has demonstrated a willingness to maintain modern and effective corporation laws to meet changing business needs."[160]
- "Our reincorporation in Nevada will also give us a greater measure of flexibility and simplicity in corporate governance than is available under Delaware law and will increase the marketability of our securities."[161]
- "Additionally, the Company regards certain aspects of Delaware law as more uncertain and complex than their Texas equivalents due to the large body of nuanced Delaware case law."[162]
- "We believe that the advantage of Nevada is that, unlike Delaware corporate law, much of which consists of judicial decisions that migrate and develop over time, Nevada has pursued a statute-focused approach that does not depend upon judicial supplementation and revision, and is intended to be stable, predictable and more efficient."[163]

The brevity of these arguments suggests an inference that their own drafters perceived than as makeweight or even throw away arguments, especially when coupled with their questionable merits as discussed below.

1. Modern and/or Comprehensive Law in New State

A total of 12 firms in the sample (representing 15.4%) identified the purported modernity of the new state's law as a DExit driver. Interestingly, seven of the firms citing that motive (28%) incorporated into states other than Nevada, with only (9.4%) of firms selecting Nevada citing that motive. Firms in all four filing statuses claimed this motivator in roughly equal numbers.

Five of the firms opting for Texas claimed this motivator (the sole exception being Tesla), and all used virtually identical language. Alset Ehome International's statement was typical. The company's board acknowledged that "some regard Delaware corporate law as the most extensive and well-defined body of corporate law in the United States," but asserted that "the Texas legislature has demonstrated

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[160] A.H. Belo, supra note 120, at 22.

[161] American Noble Gas, Inc., Information Statement (Schedule 14C) 5 (Nov. 5, 2021).

[162] Contango Oil & Gas Co., 2019 Annual Meeting Proxy Statement (Schedule 14A) 32 (Apr. 26, 2019).

[163] Biorestorative Therapies, Inc., 2021 Annual Meeting Proxy Statement (Schedule 14A) (Jul. 7, 2021).

a willingness to maintain modern and effective corporation laws to meet changing business needs."[164]

Firms choosing other states used slightly different formulations, while making similar claims. Cannae Holdings, for example, opined that "Nevada . . . has developed and advanced its corporate laws in order to provide businesses with a modern and predictable corporate governance framework, and as a result, Nevada has begun to compete with Delaware for public company incorporations."[165] Green Technology Solutions justified its recommendation on grounds that "Nevada has adopted a modern code governing the formation and operation of corporations."[166]

Two corporations redomiciling in Nevada cited a related motivation, claiming that Nevada provided a comprehensive, flexible, and/or progressive body of corporate law.[167] Both were smaller reporting companies. Both effected the transaction by written consent.

Although it may be the case that Nevada law is sufficiently modern and comprehensive to meet the needs of the firms opting to reincorporate there, a claim that Nevada has a more modern or comprehensive corporate law than Delaware would be difficult to take seriously. In seeking to explain Delaware's long dominance of the market for corporate charters, many commentators have argued that Delaware offers a robust body of high quality law that is kept up-to-date.[168]

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[164] Alset Ehome International, Inc., 2022 Special Meeting Proxy Statement (Schedule 14A) 7 (Apr. 25, 2022).

[165] Cannae Holdings, Inc., 2024 Annual Meeting Proxy Statement (Schedule 14A) 35 (Apr. 26, 2024).

[166] Green Technology Solutions, Inc., supra note 138, at 6.

[167] See American Noble Gas, Inc., supra note 161, at 6 ("Chapter 78 of the Nevada Revised Statutes, as amended (the "NRS") is generally recognized as one of the most comprehensive and progressive state corporate statutes."); Silver Horn Mining Ltd., Information Statement (Schedule 14-C) 13 (Feb. 20, 2014) ("Nevada is a nationally recognized leader in adopting and implementing comprehensive and flexible corporation laws that are frequently revised and updated to accommodate changing legal and business needs.").

[168] See, e.g., Brian J. Broughman & Darian M. Ibrahim, Delaware's Familiarity, 52 San Diego L. Rev. 273, 275 (2015) ("Voluminous literature on the topic largely credits Delaware's dominance in attracting incorporations to factors relating to the inherent quality of its corporate law and the business expertise of its judges who hear corporate law disputes."); Steven M. Davidoff, Fairness Opinions, 55 Am. U.L. Rev. 1557, 1625 (2006) (positing that Delaware is "generally regarded to have the most trenchant case law"); David B. Feirstein, Parents and Subsidiaries in Delaware: A Dysfunctional Standard, 2 N.Y.U.J.L. & Bus. 479 (2006) ("The state of Delaware arguably has the most developed body of corporate common law jurisprudence . . .."); Michael Klausner, Corporations, Corporate Law, and Networks of Contracts, 81 Va. L. Rev. 757, 842–43 (1995) ("Delaware's current body of high-quality case law . . .."); LoPucki, supra note 28, at 2106-07 ("The standard account is that Delaware won

Inferences about the high quality of Delaware law can be drawn from the fact that many state courts follow Delaware law when their own state law does not provide an answer to the question at bar.[169] Federal courts likewise have looked to Delaware law for assistance in interpreting federal law, as the Third Circuit observed in a case interpreting Bankruptcy Code § 328's requirement that indemnification provisions in employment agreements be reasonable:

> We look to Delaware corporate law as a guide primarily because it offers time-tested insights on how courts should best evaluate an issue similar to the one before us. Additionally, Delaware's law often cues the market.[170]

Even foreign countries look to Delaware corporate law for guidance.[171]

> The Republic of the Marshall Islands, for instance, has literally copied and pasted Delaware's corporate code wholesale into its domestic law, statutorily pegging its corporate law to be updated in accordance with Delaware's judicial precedents, as well. Other nations, including Panama, Israel, Malaysia, and Nevis have enacted corporate law statutes modeled after Delaware. Still other nations, including the Netherlands, Canada, and Japan have relied on Delaware's judicial precedents to varying degrees.[172]

Unless one assumes there is a global race to the bottom, the widespread use of Delaware law justifies favorable inferences about its quality.

Much of the credit for the quality of Delaware law goes to the Delaware judiciary, which has achieved a well-deserved "reputation as elite, national arbiters

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the race by developing corporate law expertise and striking the most efficient balance between the rights of managers and shareholders.").

[169] See, e.g., Dynamics Corp. of Am. v. CTS Corp., 794 F.2d 250, 253 (7th Cir. 1986), rev'd on other grounds, 481 U.S. 69 (1987) ("Indiana takes its cues in matters of corporation law from the Delaware courts, which are more experienced in such matters . . .."); Weinberger v. Am. Composting, Inc., 4:11CV00848 JLH, 2012 WL 1190970, at *5 (E.D. Ark. Apr. 9, 2012) (observing that "state courts often rely heavily upon Delaware law" when interpreting derivative suit statutes); Casey v. Brennan, 780 A.2d 553, 567 (N.J. Super. App. Div. 2001), aff'd, 801 A.2d 245 (N.J. 2002) ("When considering issues of first impression in New Jersey regarding corporate law, we frequently look to Delaware for guidance or assistance.").

[170] United Artists Theatre Co. v. Walton, 315 F.3d 217, 230 (3d Cir. 2003).

[171] See Omari Scott Simmons, Delaware's Global Threat, 41 J. Corp. L. 217, 246 (2015) ("Delaware, in the merger and acquisitions context, has influenced developments in Japanese takeover law, as well as statutory and other legal innovations in the United Kingdom, Canada, Australia, China, and India.").

[172] William J. Moon, Delaware's Global Competitiveness, 106 Iowa L. Rev. 1683, 1736–37 (2021).

of corporate law."[173] Indeed, some argue that the Delaware courts have achieved "a reputation that is unmatched by any other state or federal court."[174] The pool from which members of the Chancery Court is selected tends to consist of highly experienced corporate law practitioners and the process by which they are selected tends to be highly meritocratic.[175]

Once on the bench, Delaware jurists have strong incentives to maintain their court's reputation, which in turn creates incentives for them to maintain the quality and responsiveness of Delaware law.[176] They receive a level of media attention to

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[173] John Armour, Bernard Black, & Brian Cheffins, Delaware's Balancing Act, 87 Ind. L.J. 1345, 1389 (2012). See generally Jill E. Fisch, The Peculiar Role of the Delaware Courts in the Competition for Corporate Charters, 68 U. Cin. L. Rev. 1061 (2000) (arguing that Delaware courts play a key role in maintaining Delaware's dominance); Marcel Kahan & Edward Rock, Symbiotic Federalism and the Structure of Corporate Law, 58 Vand. L. Rev. 1573, 1591 (2005) ("The most noteworthy trait of Delaware's corporate law is the extent to which important and controversial legal rules are promulgated by the judiciary, rather than enacted by the legislature."). Even those who argue Delaware law unduly favors managers over shareholders admit that the technical quality of Delaware law is high. One of the most prominent modern proponents of the race to the bottom hypothesis, Lucian Bebchuk, concedes that Delaware possesses an "experienced and respected judiciary working with a well-developed jurisprudence" and that the "Chancery Court . . . is renowned for its expertise in corporate law matters." Lucian Arye Bebchuk & Allen Ferrell, A New Approach to Takeover Law and Regulatory Competition, 87 Va. L. Rev. 111, 145 (2001). Bebchuk has been called Delaware corporate law's "principal critic." Kenneth Ayotte & David A. Skeel, Jr., An Efficiency-Based Explanation for Current Corporate Reorganization Practice, 73 U. Chi. L. Rev. 425, 468 (2006).

[174] Robert B. Thompson & Randall S. Thomas, The New Look of Shareholder Litigation: Acquisition-Oriented Class Actions, 57 Vand. L. Rev. 133, 165 (2004).

[175] Bernard S. Black, Is Corporate Law Trivial?: A Political and Economic Analysis, 84 NW. U. L. Rev. 542, 590 (1990) ("Delaware's governor, mindful of the value of corporate charters, often deliberately appoints judges with corporate expertise."); Kahan & Kamar, supra note 33, at 708 ("Delaware chancery court judges are selected based on merit by a nominating commission . . ..").

[176] On judicial incentives generally, see John O. McGinnis, Legal Correctness, Not Popularity with People or Elites, is the Measure of Fairness, Library of Law and Liberty Blog, http://www.libertylawsite.org/2016/10/05/legal-correctness-not-popularity-with-people-or-elites- is-the-measure-of-fairness ("Judges [in states in which judges are elected] may want to skew their decisions to maximize their chances of reelection. But judges who do not face elections may also want to maximize personal advantages. And the most obvious objective to be maximized is their reputation ...."). On the incentives of Delaware jurists in particular, see Jeffrey N. Gordon, Corporations, Markets, and Courts, 91 Colum. L. Rev. 1931, 1969 (1991) ("Delaware Supreme Court justices seem to highly value their present status, and may be motivated to preserve it.").

which few other state court judges—especially trial court judges—can aspire.[177] They routinely get invited to headline high-profile academic and professional conferences to which other state court judges—especially at the trial court level—can only aspire.[178] Having achieved that status it would be surprising if the Delaware judiciary did not seek to preserve it by maintaining a reputation for a high quality product.[179]

The legal community in which the Delaware Chancery Court is embedded and from whom the court's members are chosen contributes to the quality of Delaware law.[180] Because of Delaware's small size, the Delaware bench and bar form a unique community that not only facilitates communication about the content and future direction of the law, but also provides strong incentives to get the law right.[181] Former Delaware Chancellor William Allen, himself a nationally respected leader in corporate law,[182] explained that Delaware provides "a smaller community in which deep knowledge about character and about talent is easily available and in which prestige or honor can be more easily constructed and used as a reward system."[183] In turn, "pride in the tradition of excellence and the importance that Delaware law has played nationally act as an important non-economic incentive for judges who serve under the light of national publicity to work hard and do their

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[177] Brian R. Cheffins, Delaware and the Transformation of Corporate Governance, 40 Del. J. Corp. L. 1, 26-28 (2015) (reviewing numerous high profile media reports on decisions of the Delaware judiciary).

[178] Lawrence A. Hamermesh, The Policy Foundations of Delaware Corporate Law, 106 Colum. L. Rev. 1749, 1759 (2006) ("The Delaware judges also participate in conferences throughout the world on the subject of corporate law as speakers, panelists, and audience members.").

[179] Jeffrey N. Gordon, Corporations, Markets, and Courts, 91 Colum. L. Rev. 1931, 1969 (1991) ("Delaware Supreme Court justices seem to highly value their present status, and may be motivated to preserve it.").

[180] Wilson Sonsini, supra note 16 ("The judges come from Delaware's generally respected and sophisticated bar—and often its corporate bar. As a result, the judges are generally well versed or expert in corporate law from the moment they take the bench.").

[181] See generally Stephen M. Bainbridge, Interest Group Analysis of Delaware Law: The Corporate Opportunity Doctrine as Case Study, in Can Delaware be Dethroned? Evaluating Delaware's Dominance of Corporate Law 120, 134-43 (Stephen M. Bainbridge, Iman Anabtawi, Sung Hui Kim, & James Park eds. 2018) (discussing the incentives of the Delaware legal system's actors to make quality corporate law).

[182] See Mark J. Loewenstein, Delaware as Demon: Twenty-Five Years After Professor Cary's Polemic, 71 U. Colo. L. Rev. 497, 513 (2000) (describing Chancellor Allen as "a highly respected jurist").

[183] William T. Allen, The Pride and the Hope of Delaware Corporate Law, 25 Del. J. Corp. L. 70, 73 (2000).

best. Part of the secret of Delaware law [thus] is you have judges who are very, very diligent."[184] Those judges, moreover, are situated in and benefit from constant interaction with a professional legal culture comprised of "expert lawyers who are continuously exposed to . . . a steady flow of corporate problems."[185]

The fact that so many of those problems inevitably end up before the Court of Chancery contributes both to the quality of Delaware law but also to its responsiveness to new developments. For some "eighty-five to ninety years, there has been a constant stream of corporate litigation, mostly in the Court of Chancery . . .."[186] The steady flow of new cases posing novel questions gives Delaware courts more than ample opportunity to keep the law up to date in response to changing conditions:

> Delaware has provided a stable and efficacious but responsive corporate law for decades. It reacts to business changes, it innovates when needed, and, if it errs, it corrects the errors quickly. Other states have fewer incentives and a lower capacity to be both stable and accommodating.[187]

In addition to ensuring the responsiveness of Delaware law, the steady flow of business ensures that Delaware maintains a vast library of legal precedents.[188] That quantity has a quality all its own is true not only in military matters, but in the law. Hence, Delaware law is not only up-to-date, but also highly comprehensive.[189]

Although much of the credit for the quality and responsiveness of Delaware law goes to the judicial system, the Delaware legislature also plays an important role.[190]

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[184] Id. An unnamed Delaware Chancery Court jurist was quoted in a 2002 law review article as saying Delaware judges are "driven by 'pride and service,'" and "we believe that we are doing something that benefits all of society, and that it is important to do this well." Marcus Cole, "Delaware Is Not a State": Are We Witnessing Jurisdictional Competition in Bankruptcy?, 55 Vand. L. Rev. 1845, 1875 (2002).

[185] Allen, supra note 183, at 73.

[186] E. Norman Veasey, Musings from the Center of the Corporate Universe, 7 Del. L. Rev. 163, 167 (2004).

[187] Mark J. Roe, Is Delaware's Corporate Law Too Big to Fail?, 74 Brook. L. Rev. 75, 79 (2008).

[188] *See* Fisch, supra note 173, at 1063 ("The large volume of business litigation in Delaware, coupled with Delaware's specialized court system, results in a well developed collection of corporate law precedent.").

[189] See Roberta Romano, Market for Corporate Law Redux, in 2 The Oxford Handbook of Law and Economics 358, 389 (Francesco Parisi ed., 2017) noting Delaware's "comprehensive body of case law").

[190] The predominance of the judicial role in making Delaware corporate law reflects a deliberate legislative decision to defer to the courts. Hamermesh, supra note 178, at 1777 (noting a policy of legislative "deference to the judicial branch").

Although the legislative annually tweaks the statute to account for new developments, the legislative role becomes particularly important when the judicial system is deemed to have erred. After all, as a saying traced back to Horace goes, even Homer nods.[191] When that happens, the legislature often steps in with amendments designed to clarify or reverse judicial interpretations of Delaware law.

Unusually, the Delaware legislature plays a minor role in maintaining the DGCL.[192] Amendments to the statute originate not in the legislature but in the Delaware State Bar Association's Corporation Law Section.[193] More precisely, it is the Section's governing body—the Council—that plays the dominant role in the process.[194] The Council is roughly divided between transactional lawyers and litigators, with a small minority representing the plaintiff's bar.[195] Most come from the largest corporate law firms in the state.[196] As a result, the task of improving the DGCL and adapting it to changing conditions is entrusted "not to politicians but to a body of experts who dedicate their professional lives to applying, discussing, and advising on those laws."[197] Those experts' livelihoods depend on keeping Delaware law up-to-date.

To be sure, the Council historically has exhibited a "'first do no harm' conservatism," which discourages change unless the benefits clearly outweigh the risks.[198] The Council also seeks to avoid change that might disrupt pre-existing

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[191] See Even Homer Sometimes Nods, Cambridge Dictionary, https://dictionary.cambridge.org/us/dictionary/english/even-homer-sometimes-nods (explaining that the phrase is "used to say that even an expert sometimes makes mistakes").

[192] See id. at 1754 ("The members of the Delaware General Assembly . . . have not taken on any significant role in initiating or drafting changes to the DGCL.").

[193] See id. at 1755 (noting that "for decades now the function of identifying and crafting legislative initiatives in the field of corporate law has been performed by the Corporation Law Section of the Delaware State Bar Association"); see also Francis G.X. Pileggi, Delaware Proposes New Fee-Shifting and Forum Selection Legislation, 25 No. 9 Westlaw J. Mergers & Acquisitions 1 (Mar, 20, 2015), 2015 WL 1276730, at *1 (stating that "the Corporation Law Section of the Delaware State Bar Association annually proposes amendments to the Delaware General Corporation Law for the Delaware Legislature to pass, in order to refine the DGCL on a regular basis and to make sure it adapts to changes in the marketplace").

[194] Hamermesh, supra note 178, at 1755.

[195] Id. at 1755-56.

[196] See id. at 1755 (explaining that, by tradition, the seven largest corporate law firms nominate two members each to the 21 person Council).

[197] Caitlin Kaplan, Lawrence A. Cunningham, & Anna T. Pinedo, United States: Cunningham Delivers 2024 Weinberg Lecture, Mondaq.com (April 22, 2024), https://www.mondaq.com/unitedstates/doddfrank-consumer-protection-act/1454588/cunningham-delivers-2024-weinberg-lecture.

[198] Hamermesh, supra note 178, at 1772.

commercial relationships and expectations.[199] Yet, the Council nevertheless has proven to be responsive to new developments, especially judicial developments raising concerns among the bar.

The Council's role as a check on the courts recently came into play with the 2024 amendments to the DGCL. A prominent Delaware lawyer whom I interviewed reported that his clients have voiced concerns about two areas of Delaware law. One set of concerns relates to decisions dealing with conflicted transactions involving controlling shareholders, such as the *Tornetta* opinion on Elon Musk's compensation package at Tesla.[200] The other set, which is the one pertinent to the present discussion. focus on technical issues in which recent judicial decisions upset settled market expectations.[201] He identified *Moelis*,[202] *Crispo*,[203] and *Activision*[204] as especially problematic decisions.[205] The concern is not so much that these cases have increased uncertainty or made Delaware law less determinate.

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[199] Id. at 1774-76.

[200] Personal off-the-record interview with Delaware corporate lawyer (May 9, 2024).

[201] See infra Part III.E.

[202] W. Palm Beach Firefighters' Pension Fund v. Moelis & Co., 311 A.3d 809 (Del. Ch. 2024). *Moelis* struck down a shareholder agreement of a sort now regularly employed to "implement internal governance arrangements." Id. at 819. Critics contend that the decision "upended existing practice and caused confusion about how such agreements should be prepared moving forward." Krebs, supra note 13.

[203] Crispo v. Musk, 304 A.3d 567, 584 (Del. Ch. 2023) (holding that a "Lost-Premium Provision is unenforceable unless the Merger Agreement conveys third-party beneficiary status to stockholders").

[204] Sjunde AP-fonden v. Activision Blizzard, Inc., No. 2022-1001-KSJM, 2024 WL 863290 (Del. Ch. Feb. 29, 2024), as corrected (Mar. 19, 2024) (holding that a board of directors must review a draft merger agreement containing the essential terms of the deal before approving the transaction).

[205] A New York-based corporate lawyer and a prominent academic independently offered similar taxonomies. Personal off-the-record interview with New York-based corporate lawyer (May 7, 2024); Personal off-the-record with corporate law academic (May 9, 2024). Press accounts confirm that these concerns are widely shared. See, e.g., John Stigi & Eugene Choi, How *Activision* Favors M&A Formalities Over Practice, Law360.com (Mar. 25, 2024), https://www.law360.com/articles/1816764/how-activision-ruling-favors-m-a-formalities-over-practice; Jennifer Kay, Musk's Tesla Threats Unlikely to Shake Delaware's Dominance, Bloomberg News (Apr. 2, 2024), https://news.bloomberglaw.com/litigation/musks-tesla-threats-unlikely-to-shake-delawares-dominance ("Some critics argue the court has introduced too much uncertainty into judicial reviews of insider deal conflicts, shareholder challenges to mergers, or boards amending shareholder pacts.").

Instead, the decisions were controversial mainly because they upset settled practitioner expectations.[206]

The question here is not whether those decisions were correctly decided. Instead, the key point is that the Council responded almost immediately to those decisions with proposed DGCL amendments. SB 313 was introduced in the Delaware Senate on May 23, 2024 and passed unanimously on June 13th.[207] It passed the House on June 20, 2024.[208] Section 1 authorized the class of shareholder agreements invalidated by *Moelis*.[209] Sections 2, 3, and 5 were intended to legislatively reverse various aspects of *Activision*.[210] Section 4 did likewise with respect to *Crispo*.[211] Given that the Nevada legislature meets only every other year, it would not have been possible for its legislature to respond as quickly to adverse court decisions as did Delaware's.[212]

In sum, Delaware's advantages with respect to the modernity and comprehensiveness of its laws are unlikely to erode. The Delaware legal system as a whole has made credible commitments to maintaining a modern and efficient corporate law.[213] As Roberta Romano, explained, for example, "Delaware's 'hostage-like dependence on franchise tax revenues' and its 'constitutional provision that requires a supermajority vote of two-thirds of both houses of the legislature to revise the corporation code contribute to the state's 'credible commitments.'"[214] Professor Omari Scott Simmons further explains that the elements evidencing Delaware's commitment to doing so include "investment in

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[206] Ann Lipton, What is the Value of the Corporate Form?, Bus. L. Prof. Blog (Mar. 29, 2024), https://lawprofessors.typepad.com/business_law/2024/03/what-is-the-value-of-the-corporate-form.html.

[207] Del. Gen. Assembly, S.B. 313 Bill Progress, https://legis.delaware.gov/BillDetail?LegislationId=141480.

[208] Id.

[209] Del. Gen. Assembly, S.B. 313 Synopsis § 1 (2024).

[210] Id., §§ 2-3, 5.

[211] Id., § 4.

[212] See Kahan & Kamar, supra note 33, at 719 ("Nevada's main draw for public corporations is allegedly its comprehensive corporation statute, yet its legislature meets only every two years—a feature hardly conducive to keeping its law up to date.").

[213] Jeffrey N. Gordon, Corporations, Markets, and Courts, 91 Colum. L. Rev. 1931, 1988 (1991).

[214] Roberta Romano, Market for Corporate Law Redux, in 2 The Oxford Handbook of Law and Economics 358, 389-90 (Francesco Parisi ed., 2017).

legal capital (i.e., judicial expertise, case law, a specialized bar, and a business-like Division of Corporations) and its reliance on franchise taxes."[215]

In contrast, the Nevada business court system is ill suited to generating the sort of high quality and comprehensive law provided by Delaware courts. In 2000, Nevada established its own business courts, inspired partly by Delaware's Court of Chancery, in an attempt to become the "Delaware of the West."[216] These courts feature unique procedures that can expedite dispute resolution compared to other state courts in Nevada.[217] Unlike the Delaware Chancery Court, however, the Nevada business courts have a number of deficiencies that impede ensuring that Nevada law is modern and comprehensive. The Nevada business courts generally do not publish written decisions, for example, resulting in a lack of case law on many recurring issues.[218] Consequently, the outcomes of disputes in these courts actually can be less predictable than those of Delaware.[219] In addition to the potential uncertainty created thereby, the quality of Nevada's judge-made corporate law is further compromised by a number of other factors. First, there are two separate business courts, each of which is part of a separate judicial district. Because the trial court districts are not obliged to follow one another's opinions, there is no guarantee that they will interpret the law in the same way or reach the similar results in similar cases.[220] Second, the judges are not necessarily chosen for their expertise. Instead, they are elected by the public as general trial judges and only then chosen by the district's chief judge to serve on the business courts.[221] As a result, you can have situations in which "there are no experienced judges in the district court to serve as business judges."[222] Third, the broader jurisdiction of the Nevada business courts results in heavy caseloads, which can distract judges and prevent them from developing the sort of highly specialized knowledge possessed

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[215] Simmons, supra note 32, at 1178-79.

[216] See Joshua Halen, Transforming Nevada into the Judicial Delaware of the West; How to Fix Nevada's Business Courts, 16 J. Bus. & Sec. L. 139, 143 (2015) (discussing the role of Nevada business courts in Nevada's efforts to compete with Delaware).

[217] See id. at 165 (noting the Nevada business courts' broad subject matter jurisdiction).

[218] See id. at 168 (discussing why Nevada business courts do not issue written opinions).

[219] John Lawrence, Danny David & Nathan Thibon, Comparing Corporate Law In Delaware, Texas and Nevada, Law360.com (Apr. 10, 2024), https://www.law360.com/articles/1820901/comparing-corporate-law-in-delaware-texas-and-nevada.

[220] Halen, supra note 216, at 169.

[221] Id.

[222] Id.

by Delaware jurists.[223] Finally, unlike the Delaware Chancery Court, the Nevada business courts retain juries, which means the decision is not ultimately in the hands of a single expert jurist.[224] Because corporate directors and officers prefer to try cases before a judge rather than a jury, Nevada's judicial system is at a considerable disadvantage in that regard.[225]

2. Flexibility

The proxy statements of eight companies in the sample— mostly non-accelerated filers reincorporating to Nevada—included a vague assertion that the new state's law provided "greater flexibility and simplicity in corporate governance."[226] Twelve companies, including two of the former, provided a more precise statement that their new state would provide greater flexibility with respect to effecting certain corporate transactions. Viewbox, Inc., for example, explained that reincorporation:

> [W]ill enable the Company to take corporate action more effectively and efficiently as a result of domiciling the Company in Nevada. For example, certain amendments to a certificate of incorporation of a company incorporated in Delaware require stockholder vote as a condition to the amendment becoming effective. This requirement results in a significant delay and expense for the Company. Nevada law provides greater flexibility to the board of directors to amend the articles of incorporation of a Nevada company. While both states' statutes require that an amendment to a company's charter requires the affirmative vote of the majority of the outstanding stock entitled to vote, Nevada permits the board of directors to decrease the number of authorized and issued and outstanding shares in the same proportion without the necessity of first obtaining stockholder approval.[227]

Most companies provided less detailed explanations, however. Several simply explained, for example, that "a reincorporation in Nevada will provide certain

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[223] Id. at 168-69. In particular, as part of the general trial courts system, members of the business court "are randomly assigned civil or criminal cases to go along with their business matters," which will impede their ability to specialize in corporate law. Id. at 165-66.

[224] See id. at 165 (noting the "retention of juries" as a major criticism of the Nevada business court system).

[225] See John F. Coyle, Business Courts and Interstate Competition, 53 Wm. & Mary L. Rev. 1915, 1954 (2012) ("Corporate litigants would, all things being equal, prefer to litigate intracorporate disputes before a judge instead of a jury; this is frequently mentioned as one of the reasons why businesses prefer to litigate in Delaware.").

[226] See, e.g., Bravo Multinational Inc.,

[227] Viewbix Inc., Notice of Action Taken by Written Consent of the Majority Stockholders in Lieu of a Meeting (Schedule 14C) (Feb. 5, 2024).

corporate flexibility in connection with certain corporate transactions, including reverse stock splits."[228] Save Foods explained that certain amendments to the articles required only board approval and that Nevada allowed a corporation to adopt a lower shareholder vote to amend the articles.[229] Finally, Green Technology Solutions explained that Nevada provides greater flexibility in raising capital.[230] None of these claims prove very persuasive.

As to flexibility in corporate governance generally, companies typically did not identify the specific aspects of corporate governance to which they referred. Indeed, it likely would be difficult for firms to do so, given the widely recognized flexibility of Delaware corporate law.[231] One important exception to that proposition, however, is suggested by TripAdvisor's emphasis that "Nevada provides directors with more discretion than Delaware in making corporate decisions, including decisions made in takeover situations."[232] As we shall see below, Nevada law in fact does provide considerably greater flexibility in that regard, albeit by imposing a much less demanding fiduciary duty on directors than Delaware.[233]

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[228] Silo Pharma, Inc., 2023 Annual Meeting Proxy Statement (Schedule 14A) 27 (Oct. 23, 2023); Smart for Life, Inc., 2023 Annual Meeting Proxy Statement (Schedule 14A) (Feb. 6, 2023); Biorestorative Therapies, Inc., supra note 163..

[229] Save Foods, Inc., supra note 143, at 44.

[230] Green Technology Solutions, supra note 143, at 6.

[231] See Off. Comm. of Unsecured Creditors of Wickes Inc. v. Wilson, No. 06 C 0869, 2006 WL 1457786, at *6 (N.D. Ill. May 23, 2006) ("Because of the flexible nature of Delaware's corporate laws and the subsequent number of businesses that incorporate in Delaware, courts and practitioners apply and practice Delaware law throughout the country in both state and federal courts."); In re Chalk Line Mfg., Inc., No. 93-42773 (11), 1994 WL 394978, at *10 (Bankr. N.D. Ala. July 26, 1994) ("Delaware has maintained its commitment to centralized control and director flexibility in its approach to corporate law . . .."); Jones Apparel Gp., Inc. v. Maxwell Shoe Co., 883 A.2d 837, 845 (Del.Ch.2004) (noting that the DGCL is "is widely regarded as the most flexible in the nation because it leaves the parties to the corporate contract (managers and stockholders) with great leeway to structure their relations, subject to relatively loose statutory constraints");

When Dynacq Healthcare, Inc. reincorporated from Delaware to Nevada in 2007, its proxy statement acknowledged as a disadvantage to doing so that "Delaware for many years has followed a policy of encouraging incorporation in that state and, in furtherance of that policy, has adopted comprehensive, modern and flexible corporate laws that Delaware periodically updates and revises to meet changing business needs." Dynacq Healthcare, Inc., 2007 Annual Meeting Proxy Statement (Schedule 14A) 2 (Jan. 8, 2007).

[232] Tripadvisor, Inc., 2023 Annual Meeting Proxy Statement (Schedule 14A) 35 (Apr. 26, 2023).

[233] See infra notes 277-281 and accompanying text.

As to flexibility with respect to specific transactions, Delaware and Nevada law both generally require that an amendment to the articles of incorporation be approved by both the board of directors and the shareholders.[234] Nevada allows a board of directors to change the number or par value of authorized shares without amending the articles,[235] thereby facilitating the reverse stock split to which several corporations specifically referred. To the extent firms considering reincorporation regard that as an attractive option, however, Nevada no longer has an advantage. After 2023 amendments to the DGCL, Delaware permits amendment of the articles by board action to change the corporation's name, to delete provisions relating to the incorporator, and amendments necessary to change the number of authorized shares and to effect certain reverse stock splits.[236] Under current law, Delaware thus provides for amendment without shareholder action with respect to a broader set of items than does Nevada.

3. Determinacy

Several of the asserted motivations speak to the relative determinacy of the new state's law versus that of Delaware. Fourteen companies, all of whom were moving to Nevada, cited Nevada's statute-focused law, which they claimed is not dependent on judicial decision making. Three companies, all of whom were reincorporating into Nevada, asserted that Nevada offers an abundance of case law, which will enhance predictability and certainty.[237] Four other companies, all of which were moving to states other than Nevada. claimed certain aspects of Delaware law were uncertain or complex. None of these claims are very persuasive.

To be sure, Keith Paul Bishop, a practitioner with deep knowledge of Nevada corporate law, argues that it offers a much more determinate body of law than does Delaware:

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[234] Compare Del. Code Ann., tit. 8, § 241(b) (2023) (setting out process for amendment) with Nev. Rev. Stat. § 78.390 (2023) (same).

[235] Nev. Rev. Stat. § 78.207(1) (2023).

[236] Del. Code Ann., tit. 8, § 241(d) (2023).

[237] Majesco Entertainment Co., for example, asserted that "Nevada courts have developed considerable expertise in dealing with corporate legal issues and have produced a substantial body of case law construing Nevada corporation laws," without providing any support. Majesco Entertainment Co., 2016 Annual Meeting Proxy Statement (Schedule 14A) 28 (Apr. 21, 2016). TMSR Holdings used precisely the same phrasing. TMSR Holding Co. Ltd., 2018 Special Meeting of Stockholders (Schedule 14A) 24 (May 11, 2018). The merits of that claim depend on how one defines substantial. In contrast to the substantial library of Delaware precedents, "there's not a lot of Nevada-specific case law." CSC Editorial Team, Delaware Versus Nevada: What Are the Critical Distinctions in Nevada Corporate and LLC Law?, https://blog.cscglobal.com/nevada-corporate-and-llc-law/. This is not surprising given the lack of written opinions issued by Nevada's business courts. See supra text accompanying note 218.

> One of my primary complaints about Delaware jurisprudence has been that you can read the Delaware General Corporation Law cover to cover and still know very little about Delaware corporate law. Many extremely important doctrines and standards are the product of case-law and subject to continuous refinement by the Delaware courts. … While Delaware's judge-made corporate law does evidence a high degree of legal sophistication, it also imposes significant costs on corporations due to the inherent uncertainty engendered by the ever evolving nature of Delaware jurisprudence. It also encourages litigants to test new theories of liability.[238]

In contrast, according to Bishop:

> Nevada statutorily eschews Delaware (and other state precedent) by providing [in Nevada Revised Statutes § 78.012 that]: "The plain meaning of the laws enacted by the Legislature in this title, including, without limitation, the fiduciary duties and liability of the directors and officers of a domestic corporation …, must not be supplanted or modified by laws or judicial decisions from any other jurisdiction."[239]

Bishop further observes that the Nevada statute provides that managers of Nevada corporations "may be 'informed by the laws and judicial decisions of other jurisdictions and the practices observed by business entities in any such jurisdiction, but the failure or refusal of a director or officer to consider, or to conform the exercise of his or her powers to, the laws, judicial decisions or practices of another jurisdiction does not constitute or indicate a breach of a fiduciary duty.'"[240] All of which would seem to support the arguments about Delaware law's indeterminacy made by companies reincorporating to Nevada and other states.

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[238] Keith Paul Bishop, Reasons To Quit Delaware Are Gettin' Bigger Each Day, Cal. Corp. & Sec. L. (Mar. 11, 2024), https://www.calcorporatelaw.com/reasons-to-quit-delaware..

[239] Id. Section 78.138 governs the fiduciary duties of directors and officers generally. Nev. Rev. Stat. § 78.138 (2023). Section 78.139 more narrowly governs director and officer fiduciary duties in connection with changes of control. Nev. Rev. Stat. § 78.139 (2023).

[240] Bishop, supra note 238. Various academics concur with at least portions of Bishop's arguments. See, e.g., William J. Carney & George B. Shepherd, The Mystery of Delaware Law's Continuing Success, 2009 U. Ill. L. Rev. 1, 17 (2009) (claiming that Delaware law is sufficiently indeterminate that it causes "delayed transactions and increased litigation costs"); Mohsen Manesh, Delaware and the Market for LLC Law: A Theory of Contractibility and Legal Indeterminacy, 52 B.C. L. Rev. 189, 223 (2011) ("Delaware corporate law is highly indeterminate."). Mea culpa. See Bainbridge, supra note 181, at 120 (stating that "it is becoming increasingly clear that important areas of Delaware corporate law in fact are sufficiently uncertain as to verge on indeterminacy"). My point herein is not that Delaware law is determinate, however, but rather that the argument made by some redomiciling corporations about the relative determinacy of Nevada and Delaware law is, at best, overstated.

One difficulty with Bishop's argument, however, is that the extent to which Nevada eschews Delaware is overstated. On its face, § 78.012 does not prevent a Nevada court from looking to Delaware court decisions for interpretive guidance even with respect to director and officer fiduciary duties so long as the courts do not disregard the statutory formulations of those duties in favor of more demanding Delaware standards.[241] In fact, Nevada courts have frequently looked to Delaware judicial decisions for guidance in interpreting the Nevada statute.[242] In particular, with respect to defining director fiduciary duties, Nevada courts have been accused of repeatedly ignoring legislative efforts to "to distinguish Nevada law from Delaware law."[243]

Another problem with Bishop's argument and the claims made by reincorporating firms about the statutory focus of Nevada law is that resolving corporate law disputes is just as much the province of the courts in Nevada as it is in Delaware.[244] As we saw above, the structure of Nevada's business court system

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[241] In 1999, the Nevada legislature included a provision in § 78.139 that was understood to ensure that Delaware's "famous, enhanced standards from *Unocal v. Mesa Petroleum, Revlon v. MacAndrews & Forbes Holdings,* and *Blasius Industries v. Atlas* do not apply to Nevada corporations." Michal Barzuza, Market Segmentation: The Rise of Nevada As A Liability-Free Jurisdiction, 98 Va. L. Rev. 935, 956 (2012). Section 78.012 extends that principle to fiduciary duties generally. Cf. Jim Penrose, Esq. & Paul Young, Esq., Nevada Senate Bill No. 203 (2017): An Important Development for Nevada Corporations and Their Counsel, 27 Nev. Law. 18, 19 (January 2019) (arguing that "counsel for Nevada corporations should resist any effort by opposing counsel, a judge or an arbitrator to apply the law of Delaware or any other jurisdiction in any context described by NRS 78.012").

[242] See, e.g., Am. Ethanol, Inc. v. Cordillera Fund, L.P., 252 P.3d 663, 667 (Nev. 2011) (adopting "Delaware's approach in determining fair value of a dissenting stockholder's shares of stock"); Shoen v. SAC Holding Corp., 137 P.3d 1171, 1184 (Nev. 2006) (adopting the demand futility standard set out by the Delaware Supreme Court test "in Aronson, as modified by Rales"); Bedore v. Familian, 125 P.3d 1168, 1173 (Nev. 2006) (adopting "the Delaware Supreme Court's reasoning in interpreting Nevada's indemnification statute").

[243] Adam Chodorow & James Lawrence, The Pull of Delaware: How Judges Have Undermined Nevada's Efforts to Develop Its Own Corporate Law, 20 Nev. L.J. 401, 425 (2020).

[244] Even a highly detailed statute requires interpretation and even interstitial law making. Like the Nevada statute, the Model Business Corporation Act is a highly detailed and comprehensive statute. See James D. Cox & Herbert S. Wander, The Model Business Corporation Act Financial Provisions: A Historical Snapshot, 74 L. & Contemp. Probs. 121 (Winter 2011) (noting that "the MBCA's statutory provisions" have evolved to become "more detailed and lengthy"); Rafael A. Porrata-Doria, Jr., The Proposed Pennsylvania Business Corporation Law: A Horse Designed by Committee, 59 Temp. L.Q. 437, 443–44 (1986) ("The MBCA is a much more detailed . . . statute than the DGCL."). Yet even the detailed MBCA "leaves room for the judiciary to fill in some interstices." E. Norman Veasey, On Corporate Codification: A Historical Peek at the Model Business Corporation Act and the American Law Institute Principles Through the Delaware Lens*,* 74 L. & Contemp. Probs. 95 (Winter 2011).

has a number of key deficiencies.[245] The rarity of written opinions, the division of the business court into two separate judicial districts, the lack of expert judges, the role of juries, and so on collectively introduce the risk of divergent and unpredictable outcomes.

Finally, the extent to which Delaware law is indeterminate and the problems caused thereby are both often exaggerated. To be sure, among American jurisdictions, Delaware corporate law is unique in being more a product of common law adjudication rather of legislation.[246] This is not to say that the Delaware General Corporation Law is unimportant; it is simply to say that it is a relatively bare-bones statute and thus leaves a great deal of room for courts to make law.[247] In fulfilling that role, Delaware courts have long prided themselves on providing predictability and certainty.[248]

Granted, even Delaware courts have acknowledged that at least some Delaware doctrines fall short of that goal.[249] Even so, however, Delaware case law provides an enormous body of precedents, which makes the bulk of its law more predictable

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[245] See supra notes 218-225 and accompanying text.

[246] See Valian A. Afshar, Note, A Blended Approach to Reducing the Costs of Shareholder Litigation, 113 Mich. L. Rev. 315, 339 (2014) ("Delaware's 'highly developed body of case law,' rather than the DGCL, comprises the bulk of Delaware corporate law."); Marcel Kahan & Edward Rock, Symbiotic Federalism and the Structure of Corporate Law, 58 Vand. L. Rev. 1573, 1577 (2005) ("Delaware's corporate law may be the last vestige of the classical 19th century common law model in America: most important legal rules are promulgated by a nonpartisan, expert judiciary . . ..").

[247] Philip S. Garon, Michael A. Stanchfield, & John H. Matheson, Challenging Delaware's Desirability As A Haven for Incorporation, 32 Wm. Mitchell L. Rev. 769, 806 (2006) ("The MBCA and similar statutes are much more detailed and extensive in scope than the Delaware statute and include more precise definitions of terms used in the statutes."); Marco Ventoruzzo, The Role of Comparative Law in Shaping Corporate Statutory Reforms, 52 Duq. L. Rev. 151, 162 (2014) ("Delaware statutory provisions leave a lot of room to case law").

[248] See, e.g., Beam ex rel. Martha Stewart Living Omnimedia, Inc. v. Stewart, 833 A.2d 961, 974 (Del. Ch. 2003) ("Delaware jurisprudence favors certainty and predictability."), aff'd, 845 A.2d 1040 (Del. 2004); Sternberg v. O'Neil, 550 A.2d 1105, 1125 (Del.1988) ("The Delaware courts and legislature have long recognized a 'need for consistency and certainty in the interpretation and application of Delaware corporation law ….'"); Harff v. Kerkorian, 324 A.2d 215, 220 (Del. Ch. 1974) ("It is obviously important that the Delaware corporate law have stability and predictability.").

[249] See, e.g., In re Edgio, Inc. Stockholders Litig., No. 2022-0624-MTZ, 2023 WL 3167648, at *9 (Del. Ch. May 1, 2023) (stating that, "while our law does not clearly state the *Unocal* framework is inapplicable to damages actions, its application in that context is, at best, uncertain"); Mercier v. Inter-Tel (Del.), Inc., 929 A.2d 786, 805 (Del. Ch. 2007) (stating that "our law has struggled to define with certainty the standard of review this court should use to evaluate director action affecting the conduct of corporate elections").

than that of other states, and from which counsel thus may draw guidance with confidence.[250] In addition, the Delaware judiciary provides the bar with guidance "outside the four corners of legal holdings, especially in the form of speeches and articles."[251] Members of the Chancery Court are particularly noted for using "speeches and articles to signal the evolutionary direction of [their] . . . jurisprudence" to provide predictability as to how the law will evolve.[252] Delaware judges further provide guidance by being active in law reform organizations.[253]

To be sure, no amount of guidance can alter the fact that Delaware corporate law consists mainly of standards rather than rules.[254] As Professor Edward Rock observed, "standards work very differently than rules, [because] standards are typically generated and articulated through a distinctively narrative process, leading to a set of stories that is typically not reducible to a rule."[255] At the same time, however, Professor Rock argued that reliance on standards does not lead to indeterminacy.[256] To the contrary, he posited that Delaware's process of common law adjudication leads to "reasonably determinate guidelines" and "reasonably precise standards proceeds through the elaboration of the concepts of independence, good faith, and due care through richly detailed narratives of good and bad behavior, of positive and negative examples, that are not reducible to rules or algorithms."[257]

Professor Robert Thompson argued that Delaware caselaw on director fiduciary duties can be distilled into a coherent system in which there are five key decision points: (1) whether the transaction involves a duty of loyalty claim; (2) whether the transaction has been properly cleansed; (3) whether demand is required or excused; (4) whether a properly constituted and functioning special litigation committee; and

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[250] See Kahan & Kamar, supra note 149, at 1235.

[251] Myron T. Steele & J.W. Verret, Delaware's Guidance: Ensuring Equity for the Modern Witenagemot, 2 Va. L. & Bus. Rev. 189, 214 (2007).

[252] Id. at 196.

[253] See id. at 214 (discussing law reform efforts of Delaware jurists)..

[254] See Edward B. Rock, Saints and Sinners: How Does Delaware Corporate Law Work?, 44 UCLA L. Rev. 1009, 1014-15 (1997) (describing content of Delaware law).

[255] Id. at 1016.

[256] See id. at 1017 ("My claim is not that Delaware law is unpredictable and indefinite.").

[257] Id. See also Jonathan R. Macey & Geoffrey P. Miller, Toward an Interest-Group Theory of Delaware Corporate Law, 65 Tex. L. Rev. 469, 472 (1987) (arguing that that what Delaware "offers corporations is a highly developed case law that provides not only a useful set of precedents, but also a substantial degree of certainty about legal outcomes").

(5) whether the transaction involves a change of control.[258] Thompson contended that that framework was consistent with that of other states.[259]

Some critics contend that, unlike earlier Delaware judges who would go out of their way to lay out roadmaps for dealing with new trends, the present generation of Chancery Court jurists have been deciding the case before them without providing the sort of broader dicta that provides greater certainty.[260] As we shall see below, there have been several highly controversial recent Delaware decisions allegedly illustrating the problem. In the first place, however, the controversies around those decisions have focused at least as much on their substance as their determinacy. In the second place, a certain amount of ambiguity is inevitable when new standards are announced.[261]

The incentives of all the relevant players—the Delaware bar, judiciary, and legislature—ultimately favor driving the law towards determinacy. Although some legal indeterminacy may be desirable from an interest group perspective, because it generates additional legal work for bench and bar,[262] excessive uncertainty "risks killing the proverbial goose that laid the golden egg because it is primarily the certainty and stability of Delaware law that creates the opportunities for profits in the first place."[263] Delaware's efforts to prevail in the regulatory competition for corporate charters thus does not result in indeterminate corporate law.[264] In support of that claim, Jens Dammann points to legal systems that are not subject to significant regulatory competition, such as the United Kingdom and Germany, which are no more determinate than Delaware corporate law.[265]

Even if that were not the case, however, one could still plausibly argue that judge-made corporate law will be superior to legislation. Adjudication likely will

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[258] Robert B. Thompson, Delaware's Disclosure: Moving the Line of Federal-State Corporate Regulation, 2009 U. Ill. L. Rev. 167, 170-74.

[259] Id. at 174.

[260] See, e.g., Mike Leonard, Novel Corporate Rulings Fuel Charged Debate on Delaware's Role, Bloomberg News (Mar. 28, 2024), https://news.bloomberglaw.com/esg/novel-corporate-rulings-fuel-charged-debate-on-delawares-role.

[261] See, e.g., Wilson Sonsini, supra note 16 (noting that, "in the 1980s, a serious debate emerged about the ongoing favorability of Delaware," which later subsided).

[262] On the incentives of Delaware actors to favor indeterminate corporate law standards, see Bainbridge, supra note 181, at 140-43 (discussing incentives of Delaware lawyers and jurists to favor indeterminate standards).

[263] Macey & Miller, supra note 257, at 505.

[264] Jens C. Dammann, Indeterminacy in Corporate Law: A Theoretical and Comparative Analysis, 49 Stan. J. Int'l L. 54 (2013).

[265] Id. at 100.

be more responsive to new developments. As we have seen, the Delaware bar constantly faces new business matters, which often turn into litigation.[266] Courts thus do not need to go looking for new problems to solve. In addition, of course, the role of the Delaware bar in the legislative process ensures that the Delaware legislature also will be responsive to new developments, especially when the bar perceives the Delaware courts as having erred in response to a new development.[267]

A related advantage of the Delaware approach is that the judicial process is far more transparent than the legislative process:[268]

> The litigation process itself is open to the public, and the pendency of legal questions is a matter of public record. Even nonlitigants have the opportunity to ensure that the court has the benefit of full information on an issue by submitting amicus briefs. Finally, by making law through the process of issuing written opinions, judges provide the business community and the public with an explanation of the reasons for their decisions.[269]

As German Chancellor Bismarck supposedly quipped, "there are two things you don't want to see being made—sausage and legislation."[270]

Finally, the assumption that indeterminacy is undesirable may be false:

> [C]riticism of Delaware fiduciary duty law because it is indeterminate is misplaced or disingenuous. A flexible or indeterminate regime, such as we have had in Delaware, is distinct from a rigid codification system that prevails in many systems outside the United States. That is part of the genius of our law. Life in the boardroom is not black and white; directors and officers make decisions in shades of gray all the time. A "clear" law, in the sense of one that is codified, is simply not realistic, in my view. There can be no viable corporate governance regime that is founded on a "one size fits all" notion. Fiduciary law is based on equitable principles. Thus, it is both inherently and usefully indeterminate, because it allows business practices and expectations to evolve, and enables courts to review compliance with those evolving practices and expectations.[271]

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[266] See supra text accompanying note 185

[267] See supra notes 190-212 and accompanying text.

[268] Fisch, supra note 173, at 1096.

[269] Id.

[270] Charles H. Slemp, III, A Shotgun Wedding at the Sausage Factory: A Legislative Case Study: The Tobacco Buyout and the American Jobs Creation Act of 2004, 9 Appalachian J.L. 121, 121–22 (2009).

[271] E. Norman Veasey & Christine T. Di Guglielmo, What Happened in Delaware Corporate Law and Governance from 1992-2004? A Retrospective on Some Key Developments, 153 U. Pa. L. Rev. 1399, 1412–13 (2005). Professor Jill Fisch similarly argued

In any case, the point is not that Delaware law is determinate and Nevada law is not. Neither is the point that Delaware law is more determinate than Nevada law. The point is simply that the alleged indeterminacy of Delaware law is not a very persuasive motive for redomiciling to Nevada, especially given the inertia towards staying put.

D. Director and Officer Litigation Risk

1. Comparing Delaware and Nevada Law

There is a widely shared perception that Delaware courts—especially the Chancery Court—have become more receptive to shareholder litigation in recent years. Several of the lawyers with whom I conducted off-the record interviews mentioned this perception as one of the main DExit drivers. A prominent Delaware trial lawyer, for example, opined that Chancellor McCormick and Vice Chancellor Laster especially evince greater respect for shareholder litigation than earlier generations of Delaware judges, creating at least the impression of greater liability risk.[272] This perceived shift also has been noted in public commentary. A recent comment by three Baker Botts attorneys comparing Delaware, Nevada, and Texas law, for example, noted a "perception that Delaware courts have in recent years tightened the reins on corporations and expanded stockholders' abilities to maintain lawsuits against companies and their officers and directors," which they believe is encouraging corporations to consider "incorporating or reincorporating outside of Delaware."[273]

There is also a widely shared perception that Nevada law is significantly more protective of directors and officers than is Delaware. Indeed, so much so that some

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that "Delaware lawmaking offers Delaware corporations a variety of benefits, including flexibility, responsiveness, insulation from undue political influence, and transparency. These benefits increase Delaware's ability to adjust its corporate law to changes in the business world." Fisch, supra note 173, at 1064.

[272] Personal off-the-record interview with Delaware trial lawyer (May 9, 2024).

[273] John Lawrence, Danny David & Nathan Thibon, Comparing Corporate Law In Delaware, Texas and Nevada, Law360.com (Apr. 10, 2024), https://www.law360.com/articles/1820901/comparing-corporate-law-in-delaware-texas-and-nevada.

regard Nevada law as "lax."[274] Hence, some claim Nevada is competing with Delaware in a modern version of Cary's race to the bottom.[275]

Nevada long has sought to differentiate itself from Delaware by offering corporate managers greater protection from liability and takeover risk. As early as 1987, for example, Nevada adopted an exculpation statute significantly broader than Delaware's comparable statute.[276] Likewise, in the late 1980s and early 1990s, Nevada adopted a series of antitakeover statutes that collectively gave managers of Nevada corporations almost unmatched protection against hostile takeovers.[277] In 1999, following a federal district court decision perceived as aligning Nevada takeover law with that of Delaware,[278] the legislature passed clarifying that Nevada directors considerably greater discretion to resist hostile takeover bids than allowed by Delaware law.[279]

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[274] See, e.g., Barzuza, supra note 241, at 942 ("Nevada leverages its own competitive advantage by offering lax law."); Ofer Eldar, Can Lax Corporate Law Increase Shareholder Value? Evidence from Nevada, 61 J.L. & Econs. 555, 556 (2018) ("The migration of firms to Nevada seems to be driven by the laxity of its corporate law with respect to managers . . .."). But see Jens Dammann, How Lax Is Nevada Corporate Law? A Response to Professor Barzuza, 99 Va. L. Rev. In Brief 1, 5 (2013) (arguing that "there is reason to doubt that Nevada corporate law is as shockingly lax as it is made out to be").

[275] See, e.g., Roger Lowenstein, Origins of the Crash: The Great Bubble and Its Undoing 87 (2004) ("Delaware, Nevada, and the rest competed to see which could write the most notoriously lenient rules . . ..").

[276] Michal Barzuza, Nevada v. Delaware: The New Market for Corporate Law 16 (Mar. 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4746878. Professor Barzuza opines that Nevada's exculpation statute "is materially more protective to directors and officers than Delaware's law" and "is significantly more lax in how it contemplates and polices the duty of loyalty and the duty of care." Id. at 26. For example, Delaware took an opt-in approach to director and officer exculpation, while Nevada makes exculpation automatic. Compare Del. Code Ann., tit. 8, § 102(b)(7) with Nev. Rev. Stat. §78.138.

[277] Guhan Subramanian, The Influence of Antitakeover Statutes on Incorporation Choice: Evidence on the "Race" Debate and Antitakeover Overreaching, 150 U. Pa. L. Rev. 1795, 1856 (2002) ("Only eight states provide the same array of protections as Nevada . . ..").

[278] See Hilton Hotels Corp. v. ITT Corp., 978 F. Supp. 1342, 1346 (D. Nev. 1997) (concluding that the existing Nevada statutory scheme did not "provide clear guidance" as to the fiduciary duties of directors responding to a hostile takeover bid and therefore applying Delaware law).

[279] Nev. Rev. Stat. § 78.139. See generally Adam Chodorow & James Lawrence, The Pull of Delaware: How Judges Have Undermined Nevada's Efforts to Develop Its Own Corporate Law, 20 Nev. L.J. 401, 416 (2020) (explaining how § 78.139 "precluded courts from reviewing director conduct with any greater scrutiny than the business judgment rule, even in takeover situations").

The 1999 legislation included a nonshareholder constituency statute that expressly allows directors to consider the impact of their decisions not only on shareholders, but also on a laundry list of other corporate stakeholders, such as employees.[280] This provision applies not only to takeovers, but to all board of director decisions. This provision is a substantial departure from Delaware law, as it expressly allows directors of Nevada corporations discretion to put stakeholder concerns ahead of shareholder interests.[281]

In 2001, Nevada launched an especially aggressive attack on Delaware's dominance. "as part of a plan to significantly raise franchise taxes for Nevada corporations," by amending its corporation statute to offer substantially increased protection for managers against liability risk.[282] As thereby amended, under Nevada law, unless the articles of incorporation provide otherwise or certain specified statutory exceptions apply, directors and officers are not individually liable to the corporate entity or its shareholders or creditors for caused by an act or failure to act unless the plaintiff successfully rebuts the statutory presumption of good faith and proves both that the act or failure to act constituted a breach of fiduciary duty as a director or officer and such breach involved intentional misconduct, fraud or knowing violation of the law.[283] Nevada thus "explicitly rejects the use of any standard other than the business judgment standard, even in the case of interested transactions."[284] As a result, the fiduciary duty violations that are at the heart of most state-based shareholder litigation are no longer subject to litigation."[285] As D&O liability expert Kevin LaCroix observed, this factor, more than any other,

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[280] Nev. Rev. Stat. 78.138.

[281] Chodorow & Lawrence, supra note 279, at 416. On Delaware law's requirement that directors have a fiduciary obligation to maximize shareholder value, see Stephen M. Bainbridge, Why We Should Keep Teaching Dodge v. Ford Motor Co., 48 J. Corp. L. 77, 100-11 (2022)

[282] Bruce H. Kobayashi & Larry E. Ribstein, Nevada and the Market for Corporate Law, 35 Seattle U.L. Rev. 1165, 1170 (2012). In the wake of the 2001 legislation, Nevada raised its maximum annual franchise tax from $85 to $11,100. Michal Barzuza, Market Segmentation: The Rise of Nevada As A Liability-Free Jurisdiction, 98 Va. L. Rev. 935, 948 (2012).

[283] Nev. Rev. Stat. § 78.138(7). As for the statutory presumption of good faith, § 138 further provides that, except for actions taken to resist a change in control, directors and officers, in deciding upon matters of business, are presumed to act in good faith, on an informed basis and with a view to the interests of the corporation. Id., § 78.138(3).

[284] LaCroix, supra note 13.

[285] Dain C. Donelson & Christopher G. Yust, Litigation Risk and Agency Costs: Evidence from Nevada Corporate Law, 57 J.L. & Econs. 747, 753 (2014). Accordingly, Bishop posits that Nevada sets "the liability bar high." Bishop, supra note TBA.

tends to underscore the perception that directors and officers are less likely to be held liable under Nevada law, and less likely to be subject to liability litigation."[286]

At the time the amendments were adopted, one Nevada legislator objected that they would "protect some corporate crooks" and come "at a terrible price."[287] Another complained that if the amendments were adopted "corporate officers and directors would be able to 'commit virtually any act and get away with it and waste your money .... Scoundrels can move here.'"[288] Overall, critics predicted, the legislation would "impair shareholder litigation rights significantly, and facilitate self-dealing transactions, poor corporate governance practices, and managerial misconduct."[289] There thus is little doubt that Nevada law is intentionally more protective of directors and officers than is Delaware law.[290]

2. Data

Two DExit driver categories relate to reducing director and officer liability. Obtaining greater protection against the risk of such liability was cited by twenty-five percent of firms in our dataset. Just under twenty percent cited the ability to limit or eliminate such liability as a motivator. Sixteen out of 71 (22.5%) cited both drivers. Strikingly, all but one of the firms citing these DExit drivers were redomiciling to Nevada. That result is especially striking because only four of the eight companies in the dataset that had experienced fiduciary duty litigation against officers and directors during the five years prior to the reincorporation vote reincorporated in Nevada (see Table 7).

Some firms provided detailed explanations of the anticipated savings from DExit. Large accelerated filer Fidelity National Financial, Inc., for example, asserted that "in recent years there has been an increased risk of opportunistic

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[286] LaCroix, supra note 13. In addition to limitations on director and officer liability, Nevada restricts shareholder inspection rights significantly. A shareholder must have held stock for at least six months or own more than five percent of the issuer's stock to have any inspections rights and, moreover, that shareholder is entitled only to inspect the articles of incorporation, bylaws, stock ledger. Nev. Rev. Stat. 78.105. Only a shareholder who owns fifteen percent or more of the stock is entitled to inspect corporate financial records and even that right is denied if the corporation files annual reports with the SEC. Nev. Rev. Stat. 78.257.

[287] Donelson & Yust, supra note 285, at 753.

[288] Id.

[289] Barzuza, supra note 276, at 6. For a somewhat dated argument that "the difference between Nevada law and Delaware law is not as stark as it might appear," see Kobayashi & Ribstein, supra note 282, at 1171.

[290] See Palkon v. Maffei, 311 A.3d 255, 277 (Del. Ch. 2024) ("At the pleading stage, it is reasonable to infer from the complaint's allegations that Nevada law provides greater protection to fiduciaries and confers a material benefit on the defendants."), cert. denied, No. 2023-0449-JTL, 2024 WL 1211688 (Del. Ch. Mar. 21, 2024).

litigation for Delaware public companies, which has made Delaware a less attractive place of incorporation due to the substantial costs associated with defending against such suits."[291] Anticipating lower litigation risk in Nevada, the firm expected not just direct litigation costs to decline, but also incidental expenses such as "indemnification obligations, distraction to Company management and employees, and increased insurance premiums."[292] As for insurance premiums, Fidelity National explained that "the Company's D&O premium increased . . . from approximately $3.68 million in 2021-2022, to approximately, $4.87 million in 2022-2023." In comparison, the company had net earnings of $518 million in 2023.[293]

Large accelerated filer Canna Holdings, Inc., similarly stated that it anticipated:

> Potential cost savings in director and officer (D&O) insurance premiums from reduced litigation and litigation costs, including attorneys' fees, which can be significant for corporate litigation. For example, the Company's D&O premiums have increased from approximately $0.7 million in 2017-2018 to approximately $2.7 million in 2023-2024.
>
> In addition, the Board believes that in recent years there has been an increased risk of opportunistic litigation for Delaware public companies, which has made Delaware a less attractive place of incorporation due to the substantial costs associated with defending against such suits. These costs are often borne by the Company's stockholders through, among other things, indemnification obligations, distraction to Company management and employees, and increased insurance premiums.[294]

It might seem surprising, given the apparent fear of litigation on the part of DExit corporate directors and managers, that only eight out of the 71 firms in our dataset (11.3%) experienced such litigation in the five years prior to their respective reincorporation votes (see Table 7). Only one (Tesla) experienced more than one such suit (see Table 7). Upon reflection, however, this disparity is not particularly surprising. Prior research found that corporate directors' actual risk of legal liability is much lower than what they believe to be the case.[295] As such, their decisions

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[291] Fidelity National Financial, Inc., 2024 Annual Meeting Proxy Statement (Schedule 14A) 33 (Apr. 26, 2024).

[292] Id.

[293] Fidelity National is not included in our data set, as its pending reincorporation proposal failed in June 2024. See Fidelity National Financial, Inc., Current Report (Form 8-K) (June 12, 2024) (explaining that although a majority of the shares present and voting at the meeting voted in favor of the proposed reincorporation, the proposal did not receive the requisite affirmative vote of a majority of the outstanding shares).

[294] Cannae Holdings, Inc., supra note 165, at 33.

[295] See, e.g., Bernard Black et. al., Outside Director Liability, 58 Stan. L. Rev. 1055, 1055 (2006) ("We analyze the out-of-pocket liability risk facing outside directors empirically,

likely are driven by fear rather than either reality or the best interests of the company.[296]

Having said that, however, there were several Delaware events during the period covered by our dataset that one might have expected to increase at least the perceived liability exposure of directors and officers of Delaware corporations. In 2015, for example, the Delaware legislature adopted an amendment to DGCL § 102(f), which banned fee-shifting bylaws.[297] The legislation reversed the Delaware Supreme Court's decision in *ATP Tour, Inc. v. Deutscher Tennis Bund*,[298] which held that such bylaws were "not invalid *per se*."[299] Commentary described this as a "self-inflicted wound" that might threaten Delaware's dominance, because it eliminated a potentially potent tool for discouraging frivolous shareholder lawsuits.[300]

Another significant development has been the apparent expansion of *Caremark* liability.[301] At one time, *Caremark* was regarded as "possibly the most difficult theory in corporation law upon which a plaintiff might hope to win a judgment."[302]

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legally, and conceptually and show that this risk is very low, far lower than many commentators and board members believe . . ..); Christopher M. Bruner, Good Faith, State of Mind, and the Outer Boundaries of Director Liability in Corporate Law, 41 Wake Forest L. Rev. 1131, 1176 (2006) ("It remains the case that outside directors routinely overestimate out-of-pocket liability exposure . . ..").

[296] See Leo E. Strine, Jr., Documenting the Deal: How Quality Control and Candor Can Improve Boardroom Decision-Making and Reduce the Litigation Target Zone, 70 Bus. Law. 679, 706 (2015) ("I do not ignore the fact that for many independent directors, their self-interest causes them to focus on litigation risk.").

[297] S.B. 75, 2015 Leg., 148th Gen. Assemb., Reg. Sess. (Del. 2015).

[298] 91 A.3d 554 (Del. 2014).

[299] Id. at 560. The bylaw in question would shift "all litigation expenses to a plaintiff in intra-corporate litigation who 'does not obtain a judgment on the merits that substantially achieves, in substance and amount, the full remedy sought.'" Id. at 557.

[300] See Stephen M. Bainbridge, Fee-Shifting: Delaware's Self-Inflicted Wound, 40 Del. J. Corp. L. 851, 872 (2016) (predicting that the Delaware legislature's banning of fee shifting bylaws could encourage DExit).

[301] Under In re Caremark Int'l Inc. Derivative Litig., 698 A.2d 959 (Del. Ch. 1996), liability arises where "(a) the directors utterly failed to implement any [corporate compliance] reporting or information system or controls; or (b) having implemented such a system or controls, consciously failed to monitor or oversee its operations thus disabling themselves from being informed of risks or problems requiring their attention." Stone v. Ritter, 911 A.2d 362, 370 (Del. 2006).

[302] *Caremark*, 698 A.2d at 967.

A series of cases beginning in 2019, however, is thought to have increased the ability of *Caremark* claims to at least survive a motion to dismiss.[303]

As we have seen, however, although the number of DExit transactions has fluctuated from year to year, there appears to be a very modest trend towards more frequent DExit transactions in the latter part of the study period(see Table 3). Between 2012 and 2017, the average number of DExit transactions per year was 5.0. Between 2018 and 2024, the average was 5.2.

To further test whether these developments affected DExit decisions, we conducted a time series to determine whether the two relevant motivations were becoming more common. Although there is no indication that the fee-shifting legislation impacted DExit decisions, the uptick in 2022 and 2023 correlates with the perceived increase in *Caremark* liability exposure risk.

Table 13. Time Series of Litigation Risk Motivations

Year	Greater protection from litigation risk	Limit or eliminate liability of directors / officers
2012	2	2
2013	0	0
2014	0	0
2015	0	0
2016	0	1
2017	0	0
2018	1	1
2019	0	0
2020	1	1
2021	0	0
2022	3	2

[303] See, e.g., Roger A. Cooper et al., *Caremark* Claims on the Rise Fueled by Section 220 Demands (Jan. 11, 2021), https://www.clearygottlieb.com/news-and-insights/publication-listing/caremark-claims-on-the-rise-fueled-by-section-220-demand (pointing out "a notable rise in the number of cases in which Delaware courts are allowing *Caremark* claims against company directors to survive motions to dismiss"); see generally Stephen M. Bainbridge, Don't Compound the *Caremark* Mistake by Extending It to ESG Oversight, 77 Bus. Law. 651, 664 (2022) (describing series of *Caremark* claims surviving a motion to dismiss).

2023	6	4
2024	1	1
Pending	3	2

3. Will Litigation Exposure Drive Mass DExit?

The data suggest there is a subset of DExit firms for whom fear of director and officer liability is a motivating factor and at least weakly suggest that this fear is becoming more important. Nevada law provides directors and officers of such firms with considerably greater protections than does Delaware law. Two questions thus arise.[304] First, is Delaware's dominance of the market for corporate charters threatened by Nevada's advantage in this regard? Second, if so, will Delaware compete with Nevada by adopting more lax standards?

There likely are some firms for whom the benefits to both managers and shareholders from reduced litigation risks and lower governance costs outweigh the benefits of the enhanced accountability provided by Delaware's more rigorous regime.[305] In particular, a subset of firms likely prefer bright line rules that reduce the risk of judicial error to a more complex regime comprised of standards.[306] In particular, firms with strong extra-legal constraints on agency costs, such as those with concentrated share ownership, are less dependent on fiduciary duty litigation to constrain cheating and shirking by managers.[307]

Critically, however, Nevada's success in attracting such firms is unlikely to extend beyond that seemingly rather small subset. In their study of the competition for corporate charters, Eldar and Magnolfi developed a formal model to investigate

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[304] Another question suggested by the data is whether shareholders who approve reincorporation proposals are voting against their interests. The extent to which Nevada's law allows rent seeking by management has been the subject of considerable debate. Barzuza found that "firms in Nevada are significantly more prone to file accounting restatements than firms in other jurisdictions." Barzuza, supra note 206, at 944. For a critique of Barzuza's argument, see Kobayashi & Ribstein, supra note 282, at 1180-83. Donelson and Yust found a significant decline in the value of Nevada corporations relative to that of non- Nevada corporations after the 2001 amendments, which the authors attributed to the changes having increased agency costs and thereby harming shareholder interests. Donelson & Yust, supra note 285, at 749. On the other hand, research by Ofer Eldar suggests that the subset of corporations that traditionally opt for reincorporation in Nevada—i.e., small firms with low levels of institutional shareholding and high levels of insider ownership—actually benefit from Nevada's fiduciary duty regime. See Eldar, supra note 274, at 567-68 (finding that firms incorporated in Nevada, especially smaller ones, tend to have a higher Tobin's Q than those incorporated elsewhere, indicating a potentially higher firm value).

[305] See Eldar, supra note 274, at 587-97 (describing the argument that such firms exist).

[306] Kobayashi & Ribstein, supra note 282, at 1175.

[307] Id. at 1174.

whether firms prefer laws that are shareholder-friendly or those that favor managerial interests and, if so, whether that preference is strong enough to cause market shifts when states modify their corporate laws.[308] In particular, they focused on differences in state antitakeover laws and director and officer liability exposure.[309]

Their model accommodated differences among firms, such as size and percentage of institutional shareholders, allowing for a nuanced analysis of firms' preferences. They found, for example, a slight negative correlation between managerial ownership and firm preferences for liability protection, though it was not statistically significant.[310] On the other hand, small firms with low institutional shareholding showed a strong preference for liability protection.[311] They further found that larger corporations tend to hire national law firms to advise them on incorporation decisions, arguing that national "law firms are likely to advise firms to incorporate in states that have market-oriented laws."[312] They concluded:

> The emerging equilibrium that we observe is one of market differentiation. Delaware offers market-oriented laws that are relatively favorable to shareholders, while the laws of most of other states cater primarily to local interests, such as those of employees and local businesses. Within this equilibrium, a third alternative has emerged for small firms that presumably have limited local influence, but seek a system that is responsive to the needs of small firms with high insider ownership and strong managers.[313]

Nevada's increased market share likely thus is attributable to its provision of such an alternative, as it offers "strong liability protections for officers," which "appeal to the preferences of small firms with low institutional shareholding."[314]

Several findings from the present study support the market segmentation thesis. First, Nevada captures a substantial majority of reincorporations (see Table 2). Second, Nevada captures an even more substantial majority of the smaller firms in the data set, while being less successful with respect to larger firms (see Table 3). Third, despite the possible recent uptick in reincorporations motivated by litigation

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[308] Eldar & Magnolfi, supra note 15, at 66.

[309] Id.

[310] Id. at 80.

[311] Id. at 79.

[312] Eldar & Magnolfi, supra note 15, at 90.

[313] Id. at 92.

[314] Id. at 62.

risk, the number of reincorporations remains tiny, both in absolute terms and relative to Delaware's continued ability to capture new incorporations.

As to the second question, the market segmentation explanation for Nevada's success suggests that Delaware and Nevada are not in direct competition. Unlike Nevada's focus on a small firm market segment, Delaware caters to "larger firms that pay higher franchise fees."[315] Because those firms dislike liability protection for officers, Delaware is unlikely to increase the laxity of its laws to match Nevada, while Nevada is unlikely to toughen its laws to match Delaware.[316] In other words, contrary to Cary's model of state competition, Delaware will not compete with Nevada in a race to the bottom.

Another important constraint on Delaware's ability to pursue Nevada-style laxity is the risk of federal intervention. There is an emerging consensus that Delaware's chief competition is no longer other states but rather the federal government.[317] Although the federal government typically intervenes in corporate governance only in response to financial crises,[318] Delaware is nevertheless highly aware of the threat of federal preemption.[319] Former Delaware Chief Justice Norman Veasey, for example, has repeatedly warned that Congress may preempt Delaware law if Delaware courts fail to uphold its fiduciary duty standards.[320]

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[315] Id.

[316] Id. at 94 (arguing that "Delaware faces competitive pressures to adopt corporate laws that are relatively shareholder-friendly"). See also Barzuza, supra note 241, at 968 (advancing multiple reasons Delaware does not seek to compete by protecting managers).

[317] See, e.g., Marcel Kahan, Delaware's Peril, 80 Md. L. Rev. 59, 67–68 (2020) (arguing that the "threat is not that some other state beats Delaware in competing for incorporations but rather that the federal government ends state competition in its entirety"); Mark J. Roe, Delaware's Competition, 117 Harv. L. Rev. 588, 600-34 (2003) (arguing that the federal government is Delaware's main competitor).

[318] See Stephen M. Bainbridge, Corporate Governance after the Financial Crisis 37-38 (rev. ed. 2016) (arguing that the federal government tends to regulate corporate governance only in response to financial crises); Larry E. Ribstein, Bubble Laws, 40 Hous. L. Rev. 77, 77-78 (2003) (describing "a centuries-old cycle of capital market booms followed by busts and regulation").. But see Usha R. Rodrigues, Dictation and Delegation in Securities Regulation, 92 Ind. L.J. 435, 442-46 (2017) (criticizing this argument).

[319] See Jeffrey N. Gordon, Executive Compensation: If There's A Problem, What's the Remedy? The Case for "Compensation Discussion and Analysis," 30 J. Corp. L. 675, 692 (2005) ("Delaware courts have become much more aware of the centrality of compensation concerns, if only because of the fear of further federal encroachment on traditional state domains."); Mark J. Roe, Delaware's Politics, 118 Harv. L. Rev. 2491, 2498 (2005) (arguing that Delaware has "often shown itself to be aware that federal authorities might act").

[320] See, e.g., E. Norman Veasey, What Would Madison Think? The Irony of the Twists and Turns of Federalism, 34 Del. J. Corp. L. 35, 54 (2009) (noting "that Congress may chip away" at corporate law); E. Norman Veasey & Christine T. Di Guglielmo, What Happened in

Noting these developments, Professor Barzuza argues an effort by Delaware to compete with Nevada by weakening shareholder protections might trigger federal intervention.[321] Given Delaware's reliance on maintaining its franchise tax revenue, Delaware cannot risk federal preemption.[322] In contrast, because Nevada corporate law does receive the same level of attention as paid to Delaware law, Nevada's laxity poses a much lower risk of triggering federal intervention.[323]

To the extent liability risk becomes a matter of considerable concern for the large firms to which it caters, moreover, Delaware has shown in the past that it is willing to address those concerns. Until recently, for example, virtually every merger involving Delaware corporations triggered one or more lawsuits.[324] As the Chancery Court itself explained, those suits were typically settled with the targeted firms providing additional disclosures and paying the plaintiff's legal fees, which served "no useful purpose for stockholders."[325] But rather served "only to generate fees for certain lawyers who are regular players in the enterprise of routinely filing hastily drafted complaints on behalf of stockholders on the heels of the public announcement of a deal and settling quickly on terms that yield no monetary compensation to the stockholders they represent."[326] Former Delaware Chief Justice Leo Strine described these disclosure only settlements as a deal tax on mergers.[327] In *Trulia*, however, the Chancery Court announced that "practitioners should expect that disclosure settlements are likely to be met with continued

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Delaware Corporate Law and Governance from 1992-2004? A Retrospective on Some Key Developments, 153 U. Pa. L. Rev. 1399, 1503 (2005) ("Delaware's corporate preeminence is more vulnerable to a pervasive federal encroachment now than it was before the turn of the century . . .."); see also Renee M. Jones, Rethinking Corporate Federalism in the Era of Corporate Reform, 29 J. Corp. L. 625, 645 (2004) ("Acknowledging the Delaware courts' role in forestalling the preemptive threat, the chief justice bluntly stated: '[i]f we don't fix it, Congress will, but I hope they've gone as far as they're going to have to go.'").

[321] Barzuza, supra note 241, at 967.

[322] See id. ("Since federal intervention could take many forms, even, in the most extreme scenario, the sweeping federalization of corporate law, Delaware cannot afford to degrade its law as much as Nevada does.").

[323] Id.

[324] See In re Trulia, Inc. Stockholder Litig., 129 A.3d 884, 891 (Del. Ch. 2016) ("Today, the public announcement of virtually every transaction involving the acquisition of a public corporation provokes a flurry of class action lawsuits alleging that the target's directors breached their fiduciary duties by agreeing to sell the corporation for an unfair price.").

[325] Id. at 892.

[326] Id.

[327] Zachary A. Paiva, Note, Quasi-Appraisal: Appraising Breach of Duty of Disclosure Claims Following "Cash-Out" Mergers in Delaware, 23 Fordham J. Corp. & Fin. L. 339, 348 (2017).

disfavor in the future unless the supplemental disclosures address a plainly material misrepresentation or omission, and the subject matter of the proposed release is narrowly circumscribed to encompass nothing more than disclosure claims and fiduciary duty claims concerning the sale process, if the record shows that such claims have been investigated sufficiently."[328]

Trulia is consistent with Edgar and Magnolfi's argument that Delaware will favor shareholder over management interests. The decision did not alter the fiduciary duties of Delaware directors and officers. Instead, *Trulia* altered the financial incentives of plaintiff lawyers to bring merger suits of dubious merit and for firms to buy them off, which would be in the shareholders' interest.[329]

A more recent test of Edgar and Magnolfi's argument was provided by Delaware's expansion of its exculpation statute to include officers.[330] The amendment was not intended to increase the laxity of Delaware law. Instead, it was intended to protect officers from a perceived increase in frivolous claims.[331] Because the amendment limits exculpation to duty of care claims, it does not significantly alter the risks to shareholders of officer malfeasance, as illustrated by shareholder proxy advisory firm ISS' general support for charter amendments adopting an exculpation clause.[332]

In sum, Delaware is unlikely to make sweeping changes that would move its law towards substantially increased liability protections for directors and officers. Doing so could trigger flight by the large firms that are attracted by its current balance of protection and accountability. It could also trigger federal intervention. Instead, Delaware is likely to make only minor tweaks to director and officer liability exposure and only when doing so is in the interests of investors.

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[328] *Trulia*, 129 A.3d at 898.

[329] See, e.g., Jessica Erickson, The Gatekeepers of Shareholder Litigation, 70 Okla. L. Rev. 237, 277 (2017) ("Corporate boards and shareholders have an interest in using governance documents to limit frivolous litigation . . .."); Patrick M. Garry et. al., The Irrationality of Shareholder Class Action Lawsuits: A Proposal for Reform, 49 S.D. L. Rev. 275, 297 (2004) (arguing that, "because frivolous lawsuits impose an unnecessary expense on the corporation in which they have an ownership interest, shareholders would want to eliminate them").

[330] Del. Code Ann., tit. 8, § 102(b)(7) (2024).

[331] See Delaware Extends Exculpation from Personal Liability to Senior Officers, ClearyGottlieb.com (Jan. 17, 2023) (arguing that the amendment corrected "an imbalance that plaintiffs' lawyers have been exploiting to bring often frivolous claims against officers that could not be maintained against directors, only to increase the settlement value of those lawsuits"), https://www.clearygottlieb.com/news-and-insights/publication-listing/delaware-extends-exculpation-from-personal-liability-to-senior-officers.

[332] Id.

E. Controlling Shareholder Litigation Risk

1. Data and Anecdotes

None of the companies in our dataset identified controlling shareholder liability exposure as a motivation for reincorporating, but there is reason to suspect that it was an important motivator for a subset of the redomiciling corporations in our study.[333] First, seventeen corporations in the dataset (23.9%) reported having a controlling shareholder (see Table 8). Second, twenty-six out of the 71 firms in the dataset—36.6%—had a shareholder or shareholder group that owned more than fifty percent of the stock, which is significant because under Delaware law such a shareholder is deemed per se to be a controller (see Table 9).[334] Third, twenty nine firms had a CEO who owned ten percent or more of the voting stock (see Table 10), which is significant in light of recent emphasis on the controller status of "superstar CEOs."[335] Looking at a time series of the data suggests a slight uptick in controlled company transactions post 2022 (see Table 14).

Table 14. Time Series of Controlled Company Transactions

Reincorporation Year'	Controlling Shareholder	Shareholder >15%	CEO >10%
2012	1	5	3
2013	1	3	1
2014	0	4	1
2015	0	4	0
2016	1	3	3
2017	2	3	2
2018	3	5	4
2019	0	2	1
2020	2	6	4
2021	1	4	3
2022	1	5	3
2023	2	6	2
2024	0	1	1

[333] If correct, this finding suggests that future plaintiff shareholder challenges to reincorporations should consider whether failure to disclose the motivations of a controlling shareholder violate either the state duty of candor or the federal proxy laws.

[334] See infra note 352 and accompanying text (setting out standard).

[335] See infra note 350-355 and accompanying text (discussing trend).

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Turning from data to anecdote, although the issue did not appear on TripAdvisor's proxy statement, there is reason to suspect avoiding controller liability was a factor in the decision to reincorporate in Nevada. A presentation by management to the board of TripAdvisor's controlling shareholder, Liberty TripAdvisor Holdings, Inc., stated that "[r]ecent case law developments in Delaware, in particular with respect to conflicted controller and 'change of control' transactions, have increasingly emboldened plaintiffs' law firms to bring claims against directors and officers, significant stockholders and the company and have increased potential exposure for these parties[.]"[336] The presentation further noted that an affiliated company, Liberty Media, had been "involved in in at least 8 stockholder lawsuits in Delaware since 2012 (5 of which were brought in the last 5 years) which have resulted in substantial time and expense to defend and resolve[.]"[337]

An even more prominent case, of course, is Elon Musk's effort to reincorporate Tesla in Texas. Consider, for example, the wording of Musk's anti-Delaware tweet, which was quite revealing. Recall that he recommended that one should never incorporate "your company in the state of Delaware."[338] Even though Musk did not found Tesla and despite Tesla's status as a public corporation, Musk apparently thinks of Tesla as his company. If so, personal reasons likely formed a large part of the motivation for reincorporating out of Delaware. Specifically, in Musk's case, getting out of from under the Delaware judicial system likely was his primary motivator. Musk's dissatisfaction with Delaware courts is long standing. As we have noted, Musk and/or his fellow Tesla directors and officers had been sued at least eight times by shareholders in the five years prior to the reincorporation vote, resulting in four judicial decisions in the Delaware Chancery Court since 2022 alone.[339] His loss in the *Tornetta* case prompted him to tweet that Chancellor McCormick "has done more to damage Delaware than any judge in modern history."[340] On X.com, "Musk has also promoted those falsely belittling her as an

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[336] Palkon v. Maffei, 311 A.3d 255, 265 (Del. Ch. 2024).

[337] Id.

[338] See supra text accompanying note 10.

[339] Tornetta v. Musk, 310 A.3d 430 (Del. Ch. 2024); Police and Fire Ret. System of City of Detroit v. Musk, No. 2020-0477-KSJM, 2023 WL 1525022 (Del. Ch. Jan. 31, 2023); In re Tesla Motors, Inc., 2022 WL 1267229 (Del.Ch. 2022), aff'd, 298 A.3d 667 (Del. 2023); Twitter, Inc. v. Musk, No. 2022-0613-KSJM, 2022 WL 4095969 (Del. Ch. Sept. 7, 2022)

[340] Elon Musk (@elonmusk), X (Feb. 1, 2024, 8:17 PM), https://x.com/elonmusk/status/1753271394408829106.

art graduate from Harvard . . .."[341] In short, it seems as though Musk has issued "a declaration of a war on the state of Delaware as the place for companies to be in business."[342] Granted, the decision to recommend reincorporation was formally made by a special board committee, but Musk's influence with Tesla's board is well established.[343]

2. Discussion

In fairness to Musk, Delaware courts have decided a series of recent high profile cases that have raised controller's liability exposure. Specifically, in cases "involving Tesla Inc., TripAdvisor Inc., Moelis & Co., and Sears Hometown and Outlet Stores Inc.," the court has "sought to tighten the standards for conduct by controlling stockholders."[344] Areas in which the Chancery Court is perceived to have tightened standards respecting controllers include a broader definition of who is in control, expanding the class of conflicted transactions requiring cleansing, and the strictness with which the standards for cleansing are applied, especially with respect the definition of who is an independent director.[345]

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[341] Christian Hetzner, Elon Musk Blasts Judge Who Voided His $56 billion Tesla Pay Package, Yahoo Finance (Feb. 2, 2024), https://finance.yahoo.com/news/elon-musk-blasts-judge-voided-124746437.html.

[342] Ian Thomas, How Elon Musk's War on Delaware Could Change the Way Corporations Make Some of Their Biggest Decisions, CNBC (Feb. 14, 2024), https://www.cnbc.com/2024/02/14/elon-musk-war-on-delaware-may-change-how-companies-make-big-decisions.html.

[343] See Tornetta v. Musk, 310 A.3d 430, 504 (Del. Ch. 2024) ("Musk wields considerable power in the boardroom by virtue of his high-status roles and managerial supremacy.").

[344] Mike Leonard, Crackdown on Corporate Insiders Collides With New Era of Control, Bloomberg L. (Apr. 23, 2024), https://news.bloomberglaw.com/esg/crackdown-on-corporate-insiders-collides-with-new-era-of-control. It might be more precise to say that the tightening of controller standards is being driven by two members of the Chancery Court rather than the entire court. All four of the highlighted cases were litigated before either Chancellor McCormick or Vice Chancellor Laster. W. Palm Beach Firefighters' Pension Fund v. Moelis & Co., 311 A.3d 809 (Del. Ch. 2024) (Laster, V.C.); Palkon v. Maffei, 311 A.3d 255 (Del. Ch. 2024) (Laster, V.C.), cert. denied, No. 2023-0449-JTL, 2024 WL 1211688 (Del. Ch. Mar. 21, 2024); Tornetta v. Musk, 310 A.3d 430 (Del. Ch. 2024) (McCormick, Ch.); In re Sears Hometown and Outlet Stores, Inc. Stockholder Litig., 309 A.3d 474 (Del. Ch. 2024) (Laster, V.C.). McCormick and Laster were identified by two of the lawyers with whom I conducted off-the-record interviews as being the most hostile members of the court to controlling shareholders and as driving the developments in this area. Off-the-Record Interview with New York-based Corporate Lawyer (May 7, 2024); Off-the-Record Interview with Delaware-based Corporate Lawyer (May 9, 2024).

[345] Off-the-Record Interview with Delaware Academic (May 9, 2024).

As to the definition of controller, for example, former Delaware Chief Justice Leo Strine opined that the new cases have posed doctrinal questions requiring clarification, "such as what constitutes control and who is a controller under Delaware's entire fairness doctrine."[346] In a client memo, Dechert LLP identified increasing concerns "about the caselaw of conflicted controller transactions," including "uncertainty as to who is a controller . . .."[347] Although uncertainty as to that issue is a widely shared concern, a prominent Delaware practitioner told me that the problem is not just uncertainty.[348] Instead, that practitioner believes the substance of the law is a problem, as the law is evolving to be unnecessarily restrictive on controllers.[349]

According to a New York-based corporate lawyer, the Chancery Court's treatment of CEOs who own less than 50% of stock is a particular problem, especially for tech firms who tend to have powerful CEOs with large holdings.[350] Consider, for example, Chancellor McCormick's embrace in *Tornetta* of an academic proposal to treat "superstar CEOs" as controllers.[351] Doing so helped her fit Elon Musk into Delaware's definition of controller, which might otherwise have been a more difficult task. Under Delaware law, a shareholder is deemed to have control if the shareholder either owns a majority of the voting power or otherwise exercises control over corporate decision making.[352] If the alleged controller owns less than 50 percent of the voting power, plaintiff must show evidence of actual control of corporate conduct.[353] Indeed, it long was Delaware law that "a shareholder who owns less than 50% of a corporation's outstanding stock does not,

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[346] Krebs, supra note 13.

[347] In Long-Awaited Match Decision, Delaware Supreme Court Expands MFW Requirements in Conflicted Controller Transactions, Dechert.com (Apr. 24, 2024), https://www.dechert.com/knowledge/onpoint/2024/4/in-long-awaited-match-decision--delaware-supreme-court-expands-m.html.

[348] Off-the-Record Interview with Delaware Practitioner (May 9, 2024).

[349] Id.

[350] Off-the-Record Interview with New York Practitioner (May 7, 2024).

[351] Tornetta v. Musk, 310 A.3d 430, 508 (Del. Ch. 2024).

[352] See, e.g., Solomon v. Armstrong, 747 A.2d 1098, 1116 n. 53 (Del.Ch.1999) ("Under Delaware law, the notion of a 'controlling' stockholder includes both de jure control and de facto control.").

[353] See, e.g., Emerald Partners v. Berlin, 726 A.2d 1215, 1221 n. 8 (Del.1999) (holding that "a shareholder who owns less than 50% of a corporation's outstanding stock, without some additional allegation of domination through actual control of corporation conduct, is not a "controlling stockholder" for fiduciary duty purposes"); Kahn v. Lynch Commc'n Sys., 638 A.2d 1110, 1114 (Del. 1994) ("For a dominating relationship to exist in the absence of controlling stock ownership, a plaintiff must allege domination by a minority shareholder through actual control of corporation conduct.").

without more, become a controlling shareholder of that corporation, with a concomitant fiduciary status."[354] Proving sufficient actual control over the corporation to satisfy that requirement historically was difficult.[355]

In contrast, the academics who brought forward the superstar CEO concept McCormick adopted in *Tornetta* emphasized "that significant share ownership is not a necessary condition of superstar status."[356] As to what conditions are required for such status, they merely posit that superstar CEOs are "individuals who directors, investors, and markets believe make a unique contribution to company value" while opining "the precise factors that could make certain individuals uniquely valuable are less important."[357] It is thus difficult to quibble with Chief Justice Strine's observation that this is an area requiring clarification.[358]

Even with clarification, however, Chancellor McCormick's broadened approach will still be problematic.[359] Two respected former Delaware jurists—Chief Justice Strine and Justice Jack Jacobs—and prominent academic Larry Hamermesh have argued that the superstar CEO approach is flawed, as the proposition that "Musk was so talented and visionary that the company could not succeed without him" did "not rationally imply that he was a controlling stockholder."[360] The question is not whether one is valuable, after all, the question is whether one controls.

Once control is established, Delaware courts increasingly evince a "reflexive suspicion" of transactions involving the controller.[361] Yet, here again there is growing uncertainty as to what controller transactions trigger the exacting entire

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[354] Gilbert v. El Paso Co., 490 A.2d 1050, 1055 (Del. Ch. 1984), aff'd, 575 A.2d 1131 (Del. 1990).

[355] See Lawrence A. Hamermesh, Jack B. Jacobs, and Leo E. Strine, Jr., Optimizing the World's Leading Corporate Law: A Twenty-Year Retrospective and Look Ahead, 77 Bus. Law. 321, 345 (2022) ("Under Delaware law, it was historically difficult to establish that a stockholder having less than majority ownership was a controlling stockholder.").

[356] Assaf Hamdani & Kobi Kastiel, Superstar CEOs and Corporate Law, 100 Wash. U. L. Rev. 1353, 1376 (2023).

[357] Id. at 1367-68.

[358] See supra text accompanying note 346.

[359] Hamermesh et al., supra note 355, at 346.

[360] Id.

[361] See, e.g., Tornetta v. Musk, 250 A.3d 793, 812 (Del. Ch. 2019) (acknowledging "the Court's reflexive suspicion of Musk's coercive influence over the outcome").

fairness standard and thus require cleansing.[362] Hamermesh, Jacobs, and Strine describe the problem as "*MFW* creep."[363] They propose returning to an earlier Delaware standard, which they argue invoked the protections of the business judgment rule upon approval of the transactions by disinterested directors unless the transaction required a shareholder vote.[364]

While the class of cases requiring cleansing has expanded, meeting the conditions required for cleansing also has become more difficult.[365] This is particularly true of the requirement that the transaction be approved by independent directors. Under Delaware law, director independence is now a highly factual inquiry conducted on a case-by-case basis.[366] It contemplates an inquiry into the "entire panoply of human relationships,"[367] which is hardly a well-defined or closely constrained set of considerations. As former Chief Justice Strine acknowledged, the inquiry is "admittedly imprecise."[368] Yet, Delaware "caselaw around what social and professional relationships will call into question a director's independence" continues to evolve.[369]

As such, concerns about both the application of the law and the tone of the opinions are mounting. A New York-based corporate law partner observed that uncertainty about the definition of independence is a major concern among those voicing skepticism about the direction of Delaware law.[370] The same partner noted a growing impression that certain Delaware Chancery Court judges have developed

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[362] Dechert, supra note 347 (noting uncertainty as to "what constitutes a conflicted controller transaction requiring each of the MFW procedures to restore the protections of the business judgment rule").

[363] Hamermesh et al., supra note 355, at 337.

[364] Id. at 339.

[365] Stockholder Agreements, Controller Transactions & Non-Compete Covenants, GinsonDunn.com (Jun. 18, 2024) (noting a "trend of *MFW* conditions becoming more difficult to meet"), https://www.gibsondunn.com/wp-content/uploads/2024/06/WebcastSlides-Stockholder-Agreements-Controller-Transactions-and-Non-Compete-Covenants-18-JUN-2024.pdf.

[366] See Teamsters Union 25 Health Services & Ins. Plan v. Baiera, 119 A.3d 44, 61 (Del. Ch. 2015) ("Delaware law does not contain bright-line tests for determining independence but instead engages in a case-by-case fact specific inquiry . . .").

[367] Randy J. Holland, Delaware Independent Directors A Judicial Contextual Evolution, 24 U. Pa. J. Bus. L. 781, 790 (2022).

[368] Sandys v. Pincus, 152 A.3d 124, 128 (Del. 2016).

[369] Dechert, supra note 347.

[370] Off-the-Record interview (May 7, 2024).

a skeptical attitude towards independence of directors of Silicon Valley firms.[371] Similar sentiments were expressed by both a prominent Delaware academic and a leading Delaware practitioner.[372] On her group blog, Professor Ann Lipton likewise speculated that these developments may "hit Silicon Valley companies particularly hard, because of the chumminess of the tech world, and it's not surprising that once independence is questioned, the tone of the opinions is going to come off as skeptical, in a manner that defendants do not like."[373] The observations by Lipton and the New York partner are supported by recent law firm commentary confirming that uncertainty in this area is a matter of growing concern.[374]

The merits of these concerns are beyond the scope of this article.[375] Suffice it for now to say that multiple sources have identified controlling shareholder liability exposure as the key DExit driver. A prominent Delaware-based practitioner told me that if "you're advising a controlled Silicon Valley company preparing for an IPO, why would you advise them to go public in Delaware. You'd be exposing your client to rent seeking."[376] A leading Delaware-based plaintiff's lawyer quipped that "Elon-wannabe CEOs may follow" him out of state.[377] A New York-based corporate law partner opined that the recent changes in the law governing conflicted controller transactions is the key motivation and predicted that most firms that move will be controlled.[378]

Having said that, however, it is not clear that reincorporating out of Delaware will provide controllers with significant liability protection. Nevada's fiduciary

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[371] Id.

[372] Off-the-Record Interview with Delaware Academic (May 9, 2024) (stating that distrust of ostensibly independent directors has led to enhanced judicial scrutiny); Off-the-Record Interview with Delaware Practitioner (May 9, 2024) (arguing that the changing definition of independence is making it harder to satisfy *MFW*).

[373] Ann Lipton, The Delaware Contretemps Continues, Bus. L. Prof. Blog (Apr. 26, 2024), https://lawprofessors.typepad.com/business_law/2024/04/the-delaware-contretemps-continues.html.

[374] See, e.g., Dechert, supra note 347 (noting "the continuously evolving caselaw around what social and professional relationships will call into question a director's independence"), Wilson Sonsini, supra note 16 (noting "the uncertainty that can exist in assessing board independence in some scenarios, along with the frequent occurrence that the independence of excellent board members is a close judgment call").

[375] I plan to address the substance of Delaware law governing controller transactions in a companion article, A Course Correction for Controller Transaction Law, __ Del. J. Corp. L. __ (forthcoming).

[376] Off-the-Record Interview with Delaware corporate lawyer (May 9, 2024).

[377] Off-the-Record Interview with Delaware trial lawyer (May 9, 2024).

[378] Off-the-Record Interview with New York corporate lawyer (May 7, 2024).

duty statute applies only to directors and officers, leaving controller liability to case law.[379] But there is very little Nevada case law on point. In *Cohen v. Mirage Resorts, Inc*.,[380] the Nevada Supreme Court held that minority shareholders could seek damages for breach of fiduciary duty if a "merger was accomplished through the wrongful conduct of majority shareholders," citing a Delaware case as support for that proposition.[381] The court offered no guidance as to the definition of a controlling shareholder or the standard of review applicable to conflicted controller transactions.

In *Peddie v. Spot Devices, Inc*.,[382] the court discussed the definition of controlling shareholder, citing Delaware precedents for the proposition that "a minority shareholder exercising actual control over a corporation may be deemed a controlling shareholder with a concomitant fiduciary duty to the corporation and other shareholders."[383] In doing so, the court noted that "Nevada courts frequently look to [Delaware law to] determine corporate questions."[384] The court did not specify the standard of review applicable to conflicted controller transactions.

The U.S. District Court for the District of Nevada predicted that the Nevada Supreme Court would look to Delaware law for guidance on conflicted controller transactions.[385] The transaction before the court involved a tender offer by a controlling shareholder for all of the corporation's outstanding preferred stock.[386] Citing Delaware precedents, the court predicted Nevada would apply the entire fairness standard if the offer were deemed coercive.[387]

In sum, the case law does not support the proposition that Nevada law is more protective of controlling shareholders than is Delaware law. To the contrary, it suggests that Nevada courts are likely to apply the Delaware standards with respect

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[379] See Nev. Rev. Stat. § 78.138 ("The fiduciary duties of directors and officers . . ..").

[380] 62 P.3d 720 (Nev. 2003).

[381] Id. at 727 (citing Parnes v. Bally Entertainment Corp., 722 A.2d 1243, 1245 (Del.1999)). See also Guzman v. Johnson, 483 P.3d 531, 538 (Nev. 2021) (discussing fiduciary duty of controlling shareholder in connection with a merger).

[382] 2019 WL 13324088, at *6 (Nev.Dist.Ct.).

[383] Id. at *6.

[384] Id.

[385] See Brown v. Kinross Gold U.S.A., Inc., 531 F. Supp. 2d 1234, 1245 (D. Nev. 2008) ("Because the Nevada Supreme Court frequently looks to the Delaware Supreme Court and the Delaware Courts of Chancery as persuasive authorities on questions of corporation law, this Court often looks to those sources to predict how the Nevada Supreme Court would decide the question.").

[386] Id. at 1239.

[387] Id. at 1245.

to who is a controller, what standard of review is applicable to conflicted controller transactions, and how such transactions may be cleansed. The paucity of pertinent case law also calls into question the extent to which Nevada law can compete with that of Delaware on factors such as comprehensiveness and determinacy. Accordingly, predictions that other controllers will follow Musk out of Delaware likely are overstated.

IV. Conclusion

The dataset discussed herein allows us to draw two conclusions. One is transactional, while the other is systemic. As to the former, almost all the stated motivations for reincorporating seem implausible even before one considers the inertia that mitigates against reincorporation. The proxy disclosures are blatantly cribbed from prior proxy statements, they are uniformly quite thin, and they make no sense on their own terms. If DExit does become more common, plaintiff lawyers would be well advised to press on the validity of those disclosures. Plaintiff counsel should also take note that the only really plausible motivations relate to enhanced liability protections for controllers, directors, and officers, which suggests basing challenges to reincorporation on duty of loyalty grounds. There is an argument to be made that many of these transactions involve a conflict of interest potentially triggering entire fairness review.

As for the systemic implications, it is worth starting analysis by remembering that we have been here before. Over the years, many commentators have predicted that one development or another will erode Delaware's dominance of the market for corporate charters. Mea culpa.[388] As the data recounted herein demonstrates, however, these Cassandra voices have yet to be proven correct.[389] The number of reincorporations out of Delaware remains tiny, both as an absolute matter and relative to the tens of thousands of new incorporations Delaware captures each year. To be sure, the recent Delaware caselaw developments surrounding controller liability may yet motivate a subset of firms—especially tech firms with superstar CEOs—to consider DExit. As we have seen, however, Nevada's controller law not sufficiently protective to justify DExit. Overall, given the substantial inertia behind incorporation decisions and the weakness of the various DExit drivers, it seems unlikely that Delaware's Cassandras will prove correct anytime soon. To use a colloquial expression, DExit is not a thing and is unlikely to become a thing.

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[388] See supra note 300 and accompanying text.

[389] See supra Part II.A.