

Bloomberg Law News 2025-03-03T04:30

[When Incorporating Your Business, Skip Delaware and Head to Ohio](#)

By Edward Babbitt 2025-03-03,T04:30

- Thompson Hine attorney assesses options to reincorporate
- Delaware Supreme Court paves way for move to other states

Delaware's status as the preeminent jurisdiction for incorporation is in question as prominent companies openly consider moves out of the state, and a recent Delaware Supreme Court decision paved the way for boards to approve corporate relocations without exposing themselves to personal liability.

Nevada and Texas have received most of the attention from companies searching for a Delaware alternative, but they are by no means the only, or even the best, option. Ohio—already the state of incorporation for more than 15 Fortune 500 companies—offers its own attractive mix of pro-business policy preferences. Companies exploring a move—or simply reviewing their options—should consider the Buckeye State as they decide how to respond to this evolving corporate landscape.

For decades, Delaware has enjoyed a reputation as the jurisdiction of choice for the country's top companies. This reputation is well earned. Delaware has a developed body of law, skilled and experienced jurists, and a dedicated court system that acts with speed and efficiency. Many investors also value the significant protections afforded by Delaware law and may pay a premium to obtain them.

Yet a small but vocal minority of companies raised concerns that Delaware's judicially developed standards of review both overexpose directors and officers to personal liability and unduly constrain boards' ability to act in certain contexts. According to its critics, Delaware's heightened standards have emboldened stockholder-plaintiffs and invite litigation over a wide range of corporate actions—in particular, controlling stockholder or change-in-control transactions.

These concerns came to a head recently with the Court of Chancery's [ruling](#) voiding Elon Musk's historic pay package with Tesla, and Tesla's subsequent departure from Delaware. Several other companies, such as [Meta](#), [Dropbox](#), and [Pershing Square](#), are reportedly considering following suit.

And just this month, the Delaware Supreme Court ruled that directors generally don't subject themselves to personal liability for approving a company's move out of Delaware—further paving the way for boards considering their options.

And if there was any doubt about whether Delaware is taking these concerns seriously, look no further than the Delaware legislature's [recent proposed changes](#) to its corporate statute, which, among other things, propose lowering the standard of review for some controlling stockholder transactions. It

Reproduced with permission. Published March. 3, 2025. Copyright 2021 by The Bureau of National Affairs, Inc. (800-372-1033) <http://www.bloombergindustry.com>

remains to be seen whether these proposals will be enough for companies searching for a different mix of policy choices than what Delaware has to offer.

So where to, for companies looking for a Delaware alternative? Nevada and Texas are the most oft-cited jurisdictions. The reasons are no mystery. Nevada offers a more predictable statutory regime that broadens the ability of companies to insulate directors from personal liability and eliminates heightened scrutiny over many controller and change-in-control transactions.

And while differences between the corporate law of Texas and Delaware are less clearly defined, Texas has successfully positioned itself as a pro-business jurisdiction and recently established a specialized business court dedicated to handling commercial disputes.

But Nevada and Texas are not the only (or even the best) options for companies looking beyond Delaware. Ohio offers an attractive blend of business-friendly policy choices that prioritize predictability and afford directors heightened protections and reduced risk of personal liability. These policy choices not only distinguish Ohio from Delaware, but—in several key respects—from Nevada and Texas as well.

Ohio's statute-based approach to corporate law. Ohio's version of the business judgment rule has been defined by statute since 1986. By contrast, the business judgment rule in jurisdictions such as Delaware and Texas have been developed primarily by courts through judicial decisions, which can be more difficult to predict than statute-based regimes. Unsurprisingly, Ohio courts often still look to Delaware case law to fill in gaps in the law. But even so, companies that prioritize predictability over an evolving body of law may find more of it in Ohio's statute-based regime.

Ohio permits broader exculpation. Delaware and Texas don't allow companies to exculpate directors for good-faith breaches of the duty of loyalty. Ohio does, so long as directors aren't intentionally harming the company or recklessly disregarding its interests. Ohio directors are also automatically exculpated from liability unless a company's governing documents say otherwise, while in Delaware companies are required to opt in to exculpation.

Ohio directors may consider constituencies beyond stockholders. In exercising their fiduciary duties, Delaware directors are required to focus solely on the interests of stockholders. By contrast, directors of Ohio companies have broader discretion (but not the obligation) to consider other constituencies beyond shareholders, such as employees or communities.

Ohio's clear and convincing standard for director liability. Stockholders bringing fiduciary duty claims against Ohio officers or directors generally must prove their claims by clear and convincing evidence. This heightened standard of proof—which also applies to exculpation and a director's obligation to repay an advancement of legal costs by the company—underscores Ohio's policy of ensuring directors are free to use their judgment in making business decisions without undue concern for personal liability. Delaware, Nevada, and Texas apply a less rigorous "preponderance of the evidence" standard.

No enhanced scrutiny of takeover defenses or change of control transactions. Ohio's legislature has also made clear that directors are held to the same standard of review, regardless of whether they are

addressing ordinary course business decisions, responding to a takeover threat, or approving a change of control transaction.

This distinguishes Ohio from Delaware, where actions in the latter two contexts are generally subject to enhanced judicial scrutiny requiring directors to justify their actions. Ohio also has strong statutory takeover defenses, including its control share acquisition act and anti-greenmail statute, that further underscore Ohio's firmly entrenched policy of protecting its companies from hostile takeovers.

Limitation on squeeze-out remedies. Ohio also limits post-merger challenges by minority stockholders where the only issue is whether a fair price was paid to the remedy of appraisal—i.e., no fiduciary duty suit against individual directors—another policy choice intended to limit personal liability for individual directors in certain circumstances.

Other factors also make Ohio worth considering. Like Texas, Ohio's corporate hubs—e.g., Cincinnati, Columbus, Cleveland—all have separate commercial dockets that specialize in handling complex commercial disputes.

While not as experienced as Delaware's Court of Chancery, these specialized courts have been adjudicating business disputes for more than 15 years and offer corporate litigants greater expertise and expediency than they might receive on a general court docket.

Ohio likewise benefits from a robust and deep-rooted business community, numerous Fortune 500 companies that choose to be governed by Ohio law, a responsive corporate bar, and a state legislature that has demonstrated both an understanding of corporate concerns and a willingness to act quickly and proactively to address them.

Deciding where to incorporate is a significant decision that requires understanding a company's corporate objectives and weighing competing policy considerations.

No jurisdiction is perfect, and Delaware may well continue to be the right fit for many companies. But for those considering a new home, Ohio's predictable statutory framework and strong pro-business community offer an attractive alternative that boards and their advisors are wise to consider.

This article does not necessarily reflect the opinion of Bloomberg Industry Group, Inc., the publisher of Bloomberg Law and Bloomberg Tax, or its owners.

Author Information

[Edward "Ned" Babbitt](#) is partner in Thompson Hine's business litigation practice group.

Write for Us: [Author Guidelines](#)

To contact the editors responsible for this story:

Alison Lake at alake@bloombergindustry.com;

Max Thornberry at jthornberry@bloombergindustry.com