

Challenging Delaware: Texas' Rise in Company Formations

Drew Teague



While Delaware has been the go-to for more than a century, other states are making pushes to take over as a strong state for company formations.

For more than 120 years, Delaware was the premiere state for corporate laws. Long a tax haven for business with favorable laws, its grip on serving as the go-to state for company creation is slipping. There is a new contender in the ring, and that's Texas.

Delaware's Rise

In the 1890s, New Jersey began enacting laws to let businesses just do business as they pleased. These laws allowed companies to own stock, form for any purpose and set the duration of the company. Delaware took notice. New Jersey was raising a significant amount of money from the corporate filing fees, and franchise taxes it was collecting raised enough to pay off the state debt and abolish property taxes, as detailed by *The New York Times*. Delaware, another small state, copied New Jersey, but with an important change.

Delaware enacted its General Corporation Law in 1899 (the "1899 Law"), which began its rise as the go-to state for company creation. The key difference from New Jersey? It charged lower fees.

The 1899 Law allowed anyone to form a

company within the state, so long as they paid a fee and filed the company's articles of incorporation. It also helped lower taxes for companies on their capital without requiring the company to have their headquarters in the state. At the time, New Jersey was challenging Delaware in its corporate laws, but in the 1910s, a split arose.

Delaware began to hit its stride in 1913. By 1920, New Jersey had repealed its 1890s corporate reforms, and Delaware was there to take over in the corporate space.

Why does it matter where a company is formed? Its state law governs the company's governance, and that is the state law applied by courts. Over the past century, Delaware's Court of Chancery (the "Chancery Court") has developed case law for corporate governance and per its website, it "is widely recognized as the nation's preeminent form for determination of disputes involving the internal affairs of thousands upon thousands of Delaware corporations and other business entities through which a vast amount of the world's commercial affairs is conducted." The Chancery Court has one Chancellor and six Vice Chancellors, appointed for 12-year

terms. There are no juries involved in matters before the Chancery Court.

As of January 2025, Delaware was home to more than 2,000,000 companies, including more than two-thirds of Fortune 500 companies. The state's strong tax-friendly structure and the Chancery Court's expertise has created a strong company-friendly environment.

Lenders Prefer Delaware

Given this history, the laws and the Chancery Court, Delaware is the preferred state of formation in Commercial Mortgage-Backed Securities, commonly known as CMBS, loans. Most lenders who provide CMBS loans require their borrowers to be a Delaware limited liability company, which provides certainty for the investors. Other non-CMBS lenders or balance-sheet lenders generally require it as well, but can be more flexible depending on the loan amount or if the borrower will include a Delaware limited liability company as the non-Delaware borrower's sole member, which would provide many of the same protections.

(Continued on next page)



May 2026

Diversity and Inclusion Committee Corner

May is one of the richest months on the diversity calendar - a meaningful opportunity to reflect on who we serve and how we show up.

Awareness months give us a common starting point and a shared language for equity work that matters year-round.

Questions or ideas? Contact the DEI Committee through Lisa Murray at lmurray@loubar.org

AAPI Heritage Month

AAPI Heritage Month

AAPI attorneys remain underrepresented in firm leadership and the judiciary. Amplify AAPI colleagues' work, seek out AAPI-authored legal scholarship and examine your recruitment pipeline with fresh eyes.

◆ Tip: Move from mentorship to active sponsorship — advocate for a colleague's advancement by name.

Mental Health Awareness

Mental Health Awareness Month

Attorneys face some of the highest rates of depression and anxiety of any profession. The Health & Wellness Committee encourages open, honest conversation, because wellbeing is a professional priority, not a sidebar.

◆ Tip: Name KYLAP out loud at your next team meeting — not just buried in a benefits packet.

Jewish American Heritage

Jewish American Heritage Month

Jewish American attorneys and jurists have played historic roles in civil rights, labor law and constitutional law. Recognition and calendar awareness are simple, meaningful acts of inclusion.

◆ Tip: Check for religious observance conflicts before scheduling depositions or firm events.

Military Appreciation Month

Military Appreciation Month

Veteran attorneys bring discipline and a distinct perspective to the profession. Non-traditional career paths — including military service — are credentials, not red flags on a resume.

◆ Tip: Review how your firm evaluates candidates with unconventional career timelines.

◆ THIS MONTH, TRY THIS ◆

- Sponsor, not just mentor, a colleague from an underrepresented background.
- Audit your calendar for religious and cultural conflicts before finalizing events.
- Name KYLAP in a team meeting — leaders who talk about it change the culture around them.
- Reconsider what a non-traditional career path actually signals about a candidate.

BY THE NUMBERS

5% Only 5% of U.S. attorneys identify as Asian American, though AAPI Americans make up nearly 6% of the population. Representation in law starts with intentional action.

Source: ABA Profile of the Legal Profession

Lenders, especially in the commercial real estate space, require their borrowers (or their borrower's sole members) to be an SPE, or Special Purpose Entity/Single Purpose Entity, which requires it to only engage in the business of owning and operating the property that secures their loan. An SPE also has separateness requirements, to ensure the entity is independent and to avoid having its assets be substantively consolidated with the assets of an affiliate in connection with that affiliate's bankruptcy. Delaware has ample case law on these topics, which makes the lenders more comfortable knowing the outcome should things go awry with the loan.

These requirements are often included in the borrower's operating agreement but can also be included in the loan agreement or mortgage entered into between the lender and borrower. Lenders also require various legal opinions from their borrowers including certain corporate opinions from the state of formation, opinions regarding the Delaware LLC statute, an Authority to File Voluntary Bankruptcy Petition opinion and, depending on the loan amount, a Substantive Non-Consolidation opinion, all of which concern Delaware law.

With the strong backing of case law and essentially knowing outcomes, the lenders are most comfortable having Delaware law apply for a borrower's state of formation.

"DExit" Begins

While Delaware has been the go-to for more than a century, other states are making a push to take over as a strong state for company formations.

Nevada is among the states that have tried, and some companies, including TripAdvisor and Dropbox moved their incorporations to Nevada in 2023 and 2025, respectively.

However, Texas has started to gain the most traction. Two of Elon Musk's companies, SpaceX and Tesla, have moved to from Delaware to Texas after Musk claimed the Chancery Court was unpredictable after ruling against his corporate compensation plan in 2021. Musk and others felt that the Chancery Court substituted its judgment for the business judgment of the directors/stockholders of the companies. Coinbase also moved to a Texas incorporation in 2025, per its filings with the SEC.

Texas established a rival to the Chancery Court by creating the Texas Business Court (the "Business Court") on September 1, 2024. Per the Business Court's website, it is "a statewide, specialized trial court created to resolve certain complex business disputes." The Business Court will eventually have two judges appointed to 11 divisions; however, only five of those divisions currently have judges appointed by the governor, while the other six divisions remain without judges until at least July 1, 2026.

The governor appoints judges who have some subject matter expertise, including at least 10 years' experience in the aggregate in complex civil business litigation, transactional law and/or serving as a civil judge in Texas. Such appointees are to be confirmed by the Texas Senate.

Two glaring differences between Delaware and Texas exist: (i) Delaware's judges receive 12-year terms, while Texas' judges only have two-year terms with the possibility of reappointment, and (ii) Delaware has a century more case law and precedent to help provide certainty in the corporate landscape.

The large precedent helps the Chancery Court move quickly and adjudicate things efficiently, with judges who have developed deeper expertise in that specific section of the law over their extended tenure on the court. The Business Court's limited jurisdiction will limit the number of cases heard and may help cases get to resolution quicker. But its lack of precedent and certainty on how it will rule due to the potential regular turnover of judges every two years raise issues of lack of continuity and expertise development in the limited scope of the court.

Delaware Fights Back

Delaware saw the tides begin to change, starting a push to reform their laws in order to keep companies formed in the state and encourage new companies to look to Delaware as their state of formation. This includes changes to Section 144 and 220 of the 1899 Law, which, among other things, (i) allows company boards of directors to clear conflicts with controlling stockholders or interest directors by following the procedures laid out in the law, (ii) aims to reduce litigation by shareholders and clarify directors' independence and (iii) restricts shareholder access to the company's books to "core" documents.

Will Texas Overtake Delaware?

Given the youth of the Business Court and the lack of strong settled case law on Texas' corporate laws, Texas likely has work to do to overtake Delaware as the powerhouse of entity formation. Texas continues its legislative push to establish a business-friendly atmosphere, including codifying the Business Judgment Rule. Many entities may continue to make the jump and move their entity formations to Texas. However, it may take lenders a while to see Texas as Delaware's equal, with consistent, clear case law precedent to protect them (depending on how the Business Court rules and what precedent it creates).

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