NEVADA V. DELAWARE

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I thank participants at the faculty workshop at UVA Law School, the Fisher Center Corporate Workshop at TelAviv University, the Competitive Company Law Conference at Oxford University, the Annual Meeting of the American Law and Economics Association, the HEC Conference on Law, Economics and Regulation, and the Annual Meeting of the Corporate Sectio?

Abstract

Nevada corporate law has become a central focus of corporate America. Nevada has emerged as Delaware's principal competitor, second only to Delaware in out-of-state incorporations and a top destination for firms leaving Delaware. The competitive pressure is evident: Delaware reduced its scrutiny of selfdealing transactions, and Texas incorporated elements of Nevada's broad exculpation. Whether or not Delaware maintains its dominance, Nevada's rise is already transforming American corporate law. This Article demonstrates that Nevada corporate law virtually forecloses shareholder litigation, contradicting claims by Nevada officials and commentators that its divergence from Delaware is modest. Analyzing Nevada's provisions as a whole, it exposes an overlooked, preclusive interaction: shareholders must plead intentional wrongdoing to survive dismissal, yet Nevada uniquely bars access to the books and records needed to meet it. Dismissal turns not on the merit of these suits but on whether the requisite intent happens to surface independently?through a public board rupture, a parallel fraud or other proceeding. Nevada's legislature has repeatedly amended its corporate law, positioning the state as more protective than Delaware. Recently in response to Delaware's S.B. 21 Nevada adopted A.B. 239?a far more potent measure whose controller exculpation and other changes leave virtually no scrutiny of self-dealing. The Article analyzes the fragile market for corporate law and the risk of cascading degradation. As Delaware moves closer to Nevada's standards to retain incorporations, barriers to leaving Delaware fall and its competitive advantage erodes. Other states, like Texas, are already joining, threatening to accelerate a race to the bottom. These findings require a reassessment of the costs and benefits of federal intervention in corporate law, including novel approaches such as adopting Delaware's fiduciary-duty standards as federal minimums or requiring majority-ofthe-minority shareholder approval for reincorporations. * Nicholas E. Chimicles Research Professor of Business, Law & Regulation at the University of Virginia School of Law. I am grateful to Liam O. Zeya for his invaluable research assistance. For helpful comments and suggestions, I thank participants at the faculty workshop at UVA Law School, the Fisher Center Corporate Workshop at TelAviv University, the Competitive Company Law Conference at Oxford University, the Annual Meeting of the American Law and Economics Association, the HEC Conference on Law, Economics and Regulation, and the Annual Meeting of the Corporate Section of the American Bar Association. 2

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This Article demonstrates that Nevada corporate law virtually forecloses shareholder litigation, contradicting claims by Nevada officials and commentators that its divergence from Delaware is modest. Analyzing Nevada's provisions as a whole, it exposes an overlooked, preclusive interaction: shareholders must plead intentional wrongdoing to survive dismissal, yet Nevada uniquely bars access to the books and records needed to meet it. Dismissal turns not on the merit of these suits but on whether the requisite intent happens to surface independently—through a public board rupture, a parallel fraud or other proceeding. Nevada's legislature has repeatedly amended its corporate law, positioning the state as more protective than Delaware. Recently in response to Delaware's S.B. 21 Nevada adopted A.B. 239—a far more potent measure whose controller exculpation and other changes leave virtually no scrutiny of self-dealing.

The Article analyzes the fragile market for corporate law and the risk of cascading degradation. As Delaware moves closer to Nevada's standards to retain incorporations, barriers to leaving Delaware fall and its competitive advantage erodes. Other states, like Texas, are already joining, threatening to accelerate a race to the bottom. These findings require a reassessment of the costs and benefits of federal intervention in corporate law, including novel approaches such as adopting Delaware's fiduciary-duty standards as federal minimums or requiring majority-of-the-minority shareholder approval for reincorporations.

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"The absurdity of this race for the bottom, with Delaware in the lead…should arrest the conscience of the American bar…"

Bill Cary, *Federalism and Corporate Law: Reflections upon Delaware*, YLJ (1974)

I. INTRODUCTION

Nevada corporate law has become a central focus of corporate America. Nevada has emerged as Delaware's principal competitor, second only to Delaware in attracting out-of-state incorporations and a top destination for firms leaving Delaware.[1] Firms cite reduced litigation exposure, and codified predictable corporate law as key advantages of incorporating in Nevada.[2] The competitive pressure from Nevada is evident: Delaware amended its law to reduce scrutiny of self-dealing transactions,[3] and Texas has incorporated elements of Nevada's statutory scheme.[4]

Nevada's rise has sparked renewed debate. A decade ago, this author found that Nevada's exculpation statute uniquely extends to duty of loyalty breaches and argued that Nevada is an "almost liability-free" regime.[5] Nevada Secretary of State Francisco V. Aguilar, UNLV law professor Benjamin Edwards, and several prominent commentators have

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[1] *See e.g.,* Michal Barzuza & David C. Smith, *What Happens in Nevada? Self-Selecting into Lax Law*, 27 REV. FIN. STUD. 3593, 3599-3601 & Tbl.2 (2014) (finding that Nevada is second to Delaware in attracting out of state incorporations); Stephen M. Bainbridge, *Dexit Drivers: Is Delaware's Dominance Threatened*, 50 J. CORP. L. 823, at 825 (2025) (stating that "Today, Nevada emerges as a notable challenger, actively promoting "DExit"," and finding that between 2012-2024 Nevada was "by far the leading choice" for firms leaving Delaware.); Benjamin P. Edwards, *Final 2025 Nevada and Texas Reincorporation Lists*, BLPB (Feb 3, 2026) reporting that in 2025, 26 companies attempted to reincorporate from Delaware to Nevada, and 7 from Delaware to Texas). https://www.businesslawprofessors.com/2026/02/final-2025-nevada-and-texas-reincorporation-lists/.

[2] *See e.g., The Trade Desk Inc.*, PROXY STATEMENT (SCHEDULE 14A), at 13-14 (2024) ("…Nevada can offer more predictability and certainty in decision-making because of its statutory regime…Nevada Reincorporation will result in less unmeritorious litigation against the corporation and our directors and officers, which in turn would better allow our directors and officers to focus on the business and save the Company the costs of such litigation.") https://www.sec.gov/Archives/edgar/data/1671933/000119312524223756/d854378dpre14a.htm#toc854378_11

[3] Senate Bill 21, 153RD GEN. ASSEMB. (DEL. 2025).

[4] Texas amended its law to include Nevada exculpation as an opt-in liability limitation. *See* Act of May 14, 2025, 89TH LEG., R.S., S.B. 29 (to be codified at TEX. BUS. ORGS. CODE ANN. § 21.419).

[5] *See* Michal Barzuza, *Market Segmentation: The Rise of Nevada as a Liability Free Jurisdiction,* 98 VA. L. REV. 935, at 935 (2012) ("This Article exposes and analyzes the rise of Nevada as an almost liability-free jurisdiction.").

challenged this characterization.[6] Aguilar recently filed an amicus brief in the Delaware Supreme Court defending Nevada's law.[7] Aguilar and others contend that the differences between Nevada's exculpation statute and Delaware's are not material, and that academic arguments exaggerate the laxity of Nevada law while misrepresenting its exculpation statute.[8] Nevada merely makes different policy choices, they argue, protecting directors from liability for mistakes without fundamentally altering the balance between management and shareholders.[9]

In contrast, this Article shows that Nevada corporate law virtually forecloses shareholder litigation over fiduciary-duty breaches. Analyzing the Nevada Revised Statutes as a whole, it makes two findings. First, Nevada's inspection rights are far narrower than has been recognized; for public companies, they are virtually non-existent, depriving shareholders of the mechanism through which they ordinarily gather facts. Second, and more consequential, that restriction, combined with Nevada's heightened pleading standard, produces an overlooked *preclusive interaction*: to survive dismissal, shareholders must plead particularized facts of intentional wrongdoing, yet Nevada bars the inspection rights needed to obtain them. Dismissal is nearly certain—and it turns not on the merit of these suits but on whether the requisite intent happens to surface through an outside channel—a public board rupture, parallel fraud or conspiracy litigation, or even insider trades disclosed in SEC filings. Absent such fortuity, even meritorious claims fail.

Nevada's exculpation statute, N.R.S. 78.138(7), departs significantly from Delaware's. Delaware limits exculpation to duty-of-care violations, but Nevada extends it to duty-of-loyalty breaches—including self-dealing—unless the conduct constitutes "intentional misconduct, fraud, or

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[6] *See* Francisco V. Aguilar & Benjamin P. Edwards, *Why Public Companies Are Leaving Delaware for Nevada,* WALL ST. J. (June 9, 2024); Steven Davidoff Solomon, *The Trade Desk Inc.*, PROXY STATEMENT, (SCHEDULE 14A) (EXHIBIT E) (2024). https://www.sec.gov/Archives/edgar/data/1671933/000119312524231685/d854378ddef14a.htm

[7] *See* Brief of the State of Nevada, ex rel. Francisco V. Aguilar, Secretary of State of Nevada, in his Official Capacity, as Amicus Curiae, Supporting Appellant and Reversal *Maffei v. Palkon*, C.A. NO. 125, 2024.

[8] *See id,* at 7 ("The description of Nevada as a "no liability" regime, while colorful, remains academic exaggeration"); Solomon, *supra* note 6, at E13-E14 (arguing that "commentators have mischaracterized the scope and effect of Nevada law," and that "in many cases, Nevada law and particularly its approach to director fiduciary duties and exculpation is misrepresented.")

[9] *See* e.g., Aguilar & Edwards, *supra* note 6 ("Nevada law makes directors liable when they know that they have done something wrong. It doesn't impose liability for innocent mistakes.")

knowing violation of law."[10] Nevada's Secretary of State contends that this rarely shields directors, reasoning that most loyalty violations, such as self-dealing, are intentional.[11] This Article demonstrates otherwise. Nevada courts require shareholders to plead particularized facts of intentional wrongdoing[12] —a standard Delaware does not impose for self-dealing—and proving intent is difficult even in Delaware, where shareholders can obtain board minutes. Without that access, it is all but impossible.[13]

Thus, Nevada and Delaware diverge on self-dealing transactions. Indeed, in *Guzman v. Johnson,* the Supreme Court of Nevada decided that N.R.S.78.138(7) precludes entire fairness in a going-private transactions.[14] Furthermore, applying Nevada law courts have dismissed self-dealing cases with clear conflicts and even with outrageous alleged facts. In *McFarland v. Long*,[15] for example, the plaintiff alleged that executives set their own pay while the sole outside director exercised no oversight,[16] allowing them to capture the bulk of the company's gross profits[17] and gain majority control of its voting rights[18] — yet the federal district court

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[10] *See* NEV. REV. STAT. § 78.138(7) (2023)

[11] *See* Aguilar, *supra* note 7, at 9 ("Of course, most violations of the duty of loyalty, such as self-dealing, are intentional.")

[12] *See Infra* Part III.C.

[13] *See Infra* Part III.D.

[14] *See Guzman v. Johnson*, 137 NEV. 126 (2021).

[15] *McFarland v. Long*, No. 2:16-cv-00930-RFB-PAL, 2017 WL 4582268 (D. Nev. Oct. 6, 2017) (unreported).

[16] *McFarland v. Long, id.*, at 2 (alleging that "With Kirby failing to exercise any oversight, between 2007 and 2012 Long, Hoch, Keller, and Morrison paid themselves excessive salaries and cash bonuses."); *Complaint, McFarland v. Long*, No. 2:16-cv-00930-RFB-GWF (D. Nev. Apr. 25, 2016) [hereinafter, *McFarland Shareholder Complaint*], at 3 ("by 2008 Kirby relinquished his fiduciary duties altogether").

[17] *See id.,* at 2 ("The executive officers responded by awarding themselves most of Payment Data's gross profits as compensation…Between 2007 and 2012, Payment Data made gross profits of approximately $7.4 million, while the Officer Defendants took for themselves in excess of $3.14 million in the form of self-determined salaries and cash bonus payments, 42.45%").

[18] *See id.,* at 2 ("As a consequence of the stock transfers, by December 31, 2012, the Officer Defendants owned 54.13% of Payment Data's outstanding common stock, and had the power to approve any action that would otherwise require approval of a majority of Payment Data's shareholders"); *See also McFarland Shareholder Complaint*, *supra* note 16, at 10 (presenting data from the firm's proxy materials which shows that the defendants ownership grew from 8.86% to 54.13%. Out of the 54.13% 4.2 was held by two other executives – Keller and Morrison).

in Nevada dismissed the suit for failure to plead the wrongful intent Nevada law requires.[19]

Third, the legislative history shows that Nevada corporate law does not reflect mere "different policy choices" but was shaped primarily by a drive to offer what Delaware does not. Nevada's legislature has repeatedly amended its corporate law, positioning the state as more protective than Delaware. Nevada seized each Delaware judicial scrutiny standard as an opportunity to differentiate with less scrutiny.[20] Recently, in response to Delaware's S.B. 21, Nevada adopted A.B. 239—a far more potent measure whose controller exculpation and other changes leave virtually no scrutiny of self-dealing.[21]

Fourth, and related, commentators repeatedly cite *Wynn Resorts*[22]—a derivative lawsuit against the company's directors for failing to oversee and disclose Steve Wynn's sexual harassment of Wynn employees—as a counterexample showing that Nevada is not liability-free.[23] This Article demonstrates that Wynn Resorts actually supports the opposite conclusion. What commentators missed was that case survived dismissal only because of extraordinary circumstances: a public fight between Steve Wynn and his ex-wife, board member Elaine Wynn, led to fillings, and press releases that included information showing that directors knew of Wynn's harassment and of their legal obligation to report it.[24] This publicly available information gave shareholders the particularized facts needed to plead a knowing violation of law—facts they could never have obtained through Nevada's near-nonexistent books-and-records access. Far from disproving the barriers to shareholder litigation, Wynn

[19] *Id.* at *5 (holding the allegations "do not amount to 'knowledge of wrongfulness' or 'intentional misconduct' sufficient to overcome the strict Nevada statutory bar to liability").

[20] *See Infra* Part III.B.

[21] Assemb. B. 239, 83d Leg., Reg. Sess. (Nev. 2025) (enacted) (codified in scattered sections of Nev. Rev. Stat. chs. 78, 82, 86, 87A, 88, 92A). Governor Lombardo signed A.B. 239 into law on May 30, 2025, effective immediately.

[22] *In re Wynn Resorts, Ltd. Derivative Litig.*, Lead Case No. A-18-769630-B, slip op. (Nev. Dist. Ct. Clark Cnty. Sept. 4, 2018). https://www.cohenmilstein.com/wp-content/uploads/2023/07/Wynn-Order-Denying-MTD-Granting-Motion-to-Strike-09062018.pdf

[23] *See e.g.,* Aguilar, *supra* note 7, at 7 ("Even Professor Michal Barzuza, a critic on whom Plaintiff relies, implicitly concedes as much in her recent paper describing a derivative lawsuit against the directors of Wynn Resorts, Ltd., that survived a motion to dismiss in Nevada state court.."); Solomon, *supra* note 6, at E23-E24 (noting that the litigation against Wynn Resorts that survived a motion to dismiss, and settled for $41 million cash payment and corporate governance reforms, shows that there are also large settlements in Nevada, which may "render many of the distinctions in Delaware and Nevada law less relevant.")

[24] *See Infra* Part III.E.

Resorts illustrates how idiosyncratic circumstances allow shareholders to prevail.

Fifth, the Article also shows that Nevada gives directors near-absolute latitude to use defensive tactics. Nevada replaces Delaware's *Unocal* and *Revlon* standards with the business judgment rule.[25] As a result, as long as they do not intervene with shareholder franchise, managers may sell the company to the lowest bidder simply because that bidder keeps them in office, with no intervention from Nevada courts. This effectively blocks the market for corporate control—the primary market force that disciplines managers. When shareholder litigation is foreclosed and the threat of takeover is neutralized, managers face virtually no constraints on self-interested behavior.

Finally, the Article shows that Nevada's own marketing materials contradict official claims about the state's framework. The legal section titled "*Why Nevada?*" on the Secretary of State's portal, *Silverflume*, explicitly promotes Nevada's liability protections as advantages for directors and officers.[26] These materials explain that in Nevada, unlike in Delaware, directors are liable for duty of loyalty breaches only if there is also intentional misconduct, fraud, or knowing violation of law—precisely the broad exculpation that Aguilar publicly claims does not exist.[27] The contradiction is striking: on his own office's website, the Secretary of State markets the very protections he elsewhere characterizes as exaggerated misrepresentations of Nevada law.

The stakes for corporate law, corporations, capital markets, and the economy are high. As more firms incorporate in Nevada, more will be governed by this framework. Furthermore, Nevada's law is also prompting changes in other states. Delaware faces pressure to relax legal constraints on managers and has begun responding. Delaware recently enacted S.B. 21, narrowing judicial scrutiny of self-dealing transactions.[28] Texas amended its law to include Nevada exculpation as an opt-in

[25] *See Infra* Part III.F.
[26] *See Why Nevada? Legal Advantages: A Comparison with Delaware and California*, Lionel Sawyer & Collins and Parsons Behle & Latimer Law Firms (August 15, 2012) (providing reasons to incorporate in Nevada including "director immunity from lawsuits" and "stronger personal liability protections").
https://www.nvsilverflume.gov/documents/CorporateLawComparison.pdf
[27] *See Infra* Part III.G.
[28] *See* S.B. 21, 153RD GEN. ASSEMB., REG. SESS. (Del. 2025).

liability limitation.[29] *Whether or not firms leave Delaware, Nevada law is changing American corporate law*.[30]

The findings of this Article have implications for the race-to-the-top/race-to-the-bottom debate.[31] Decades ago, Bill Cary warned that Delaware was leading a race to the bottom. Nevada's emergence marks a fundamental shift: Nevada, not Delaware, now drives the competitive dynamic.[32] This matters because Nevada's incentives and institutional factors are different from Delaware's.[33] Delaware, however, faces significant pressure to respond—and is responding.[34] The danger is greater than in Cary's era: the market is fragile and at risk of cascading degradation.[35] Nevada has already responded to Delaware's changes by extending its exculpation to controlling shareholders.[36] Furthermore, as Delaware adjusts its standards to compete, it erodes its own advantages which in turn could accelerate the race to the bottom.[37]

The study also has welfare implications. First, studies on the effect of the Nevada 2001 and 2017 amendments found that they had a negative effect on the value of Nevada firms.[38] Second, while some argue that differentiation in corporate law could lead to efficient self-selection, the evidence suggests otherwise. In prior work, David Smith and I found that Nevada attracts firms that use aggressive accounting methods and frequently restate earnings—suggesting relatively high agency costs.[39]

The Article's findings have policy implications. Given the risk of continued degradation, it suggests reassessing the costs and benefits of federal intervention and exploring different forms such intervention could take. The Article proposes to consider a novel approach: adopting Delaware's fiduciary duties, standards of review, and exculpation statute as federally mandated minimums. This approach would limit the race to the bottom while minimizing the typical costs of federal intervention. Adopting Delaware law as the floor would benefit from Delaware's

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[29] Texas amended its law to include Nevada exculpation as an opt-in liability limitation. *See* Act of May 14, 2025, 89TH LEG., R.S., S.B. 29 (to be codified at TEX. BUS. ORGS. CODE ANN. § 21.419).
[30] *See Infra* Part IV.A.
[31] *See Infra* Part IV.B.
[32] William L. Cary, *Federalism and Corporate Law: Reflections upon Delaware*, 83 YALE L.J. 663 (1974).
[33] *See Infra* Part IV.A.
[34] *See* S.B. 21, 153RD GEN. ASSEMB., REG. SESS. (Del. 2025).
[35] *See Infra* Part IV.B.
[36] *See* ASSEMB. B. 239, 83RD SESS. § 5.5 (Nev. 2025) (enacted).
[37] *See Infra* Part IV.B.
[38] *See Infra* Part IV.C.
[39] *See* Barzuza & Smith, *supra* note 1.

accumulated expertise and responsiveness while removing the competitive pressure that is pushing Delaware toward Nevada's lax standards. Second, the Article proposes that since reincorporations statutorily require a shareholder vote, courts or federal law should require supporting votes from a majority-of-the-minority ("MOM") shareholders as a condition for reincorporation. [40]

The Article proceeds as follows. Part II reviews the debate over Nevada corporate law. Part III provides a comprehensive analysis of Nevada's statutory amendments, legislative history, and case law, demonstrating how Nevada forecloses shareholder litigation. Part IV discusses implications for American corporate law, the race-to-the-top/race-to-the-bottom debate, welfare, and policy. Part V concludes.

II. NEVADA RISE AND INFLUENCE

A. Nevada Rise

For decades, Delaware has been the favored legal domicile for America's largest corporations, facing little competition as half of all publicly traded companies chose it for incorporation, with most others incorporating in their home states.[41] Recently, however, Delaware's position has been seriously contested. After a Delaware judge's 2024 ruling against Elon Musk's $56 billion compensation package,[42] Musk criticized Delaware on Twitter[43] and moved his companies, including X (formerly Twitter), Neuralink, and x.Ai to Nevada,[44] and SpaceX, and Tesla to Texas. TripAdvisor, a major player in online booking, has become another high-profile case, with shareholders suing in Delaware to prevent the

[40] See Lawrence A. Hamermesh, Jack B. Jacobs, and Leo E. Strine, Jr., *Optimizing The World's Leading Corporate Law: A 20-Year Retrospective and Look Ahead*, 77(2) Bus.L 321 (2022). (advocating applying MFW requirements - a supporting vote by Majority of Minority, and by an independent board committee - "when a statute requires the approval of both the board and the stockholders.")

[41] *See, e.g.*, 2022 *Annual Report*, DEL. DIV. OF CORP. (2022), https://corp.delaware.gov/stats/(noting that 68.7% of Fortune 500 companies are incorporated in Delaware); *See also* Marcel Kahan & Ehud Kamar, *The Myth of State Competition in Corporate Law*, 55 STAN. L. REV. 679 (2002) (arguing that no state competes with Delaware); Lucian A. Bebchuk & Assaf Hamdani, *Vigorous Race or Leisurely Walk: Re-considering the Competition over Corporate Charters,* 112 YALE L.J. 553 (2002) (arguing that Delaware's dominant position imposes insurmountable barriers to entry).

[42] *Tornetta v. Musk*, No. 2018-0408-KSJM (Jan. 30, 2024).

[43] *See* Elon Musk, @elonmusk, X, (Jan. 30, 2024, 5:14 PM).
https://x.com/elonmusk/status/1752455348106166598

[44] *See e.g.,* Tom Krisher, *Elon Musk's Neuralink moves legal home to Nevada after Delaware judge invalidates his Tesla pay deal, Business*, ASSOCIATED PRESS (February 10, 2024)
https://apnews.com/article/elon-musk-neuralink-brain-implant-corporate-move-nevada-delaware-09c2eee269beebccf9a701f21ea2b9f7

company's move to Nevada.[45] The backlash against Delaware has drawn substantial media attention[46] and prompted commentary from the Chief Justice of the Delaware Supreme Court.[47] Delaware dominance was a central topic at the 2024 Tulane Law School Corporate Law Institute in New Orleans.[48] Participants were contemplating whether Nevada or Texas might be a favorable domicile for some firms.[49] The Economist columnist visited Nevada to have a first impression of the state's prospects as a corporate domicile.[50]

Against this background, Nevada emerges as the dominant alternative to Delaware. Reincorporations from Delaware to Nevada are on the rise, and Nevada is clearly the top destination for firms that leave Delaware.[51] In recent years, Nevada attracted known names, including TripAdvisor, Roblox, Dropbox, AMC Network, DraftKings, and the cloud

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[45] *Palkon v. Maffei*, C.A. NO. 2023-0449-JTL (Feb. 20, 2024).
[46] *See e.g.*, Theo Francis & Erin Mulvaney, *Elon Musk Isn't the Only Billionaire Fighting Delaware*, WALL ST.J. (Feb. 11, 2024) https://www.wsj.com/business/elon-musk-isnt-the-only-billionaire-fighting-delawares-grip-on-u-s-business-e9fe299a?; Akiko Fujita, *Elon Musk threatens Delaware hold on corporation*s, YAHOO FINANCE (February 13, 2024) https://finance.yahoo.com/video/elon-musk-threatens-delaware-hold-173430661.html; Lydia Moynihan, *Why CEOs are Rolling the Dice on a Move to Nevada*, NYPOST, Business (April 27, 2023) https://nypost.com/2023/04/27/why-ceos-are-rolling-the-dice-on-a-move-to-nevada/; Sarah McBride, *Musk's Neuralink Ditches Delaware, Reincorporates in Nevada*, BLOOMBERG NEWS (Feb. 9, 2024) bloomberg.com/news/articles/2024-02-09/musk-s-neuralink-ditches-delaware-reincorporates-in-nevada; Andrew Ross Sorkin et al., *Elon Musk Extends His Anywhere-but-Delaware Campaign,* DealBook, N.Y.TIMES (Feb. 15, 2024) https://www.nytimes.com/2024/02/15/business/dealbook/musk-spacex-delaware-tesla.html
[47] Chief Justice Collins J. Seitz, Jr., *Presentation for the Judiciary*, Joint Finance Committee of the 152nd General Assembly, (Del. 2024) ("as you've probably read in the newspaper - there's a lot of competition for corporate business across the United States. Nevada has tried, through enacting what might be called fairly liberal laws that maybe do not require as much supervision over companies, and then Texas has started its own business court.")
[48] *See* Rose Krebs, *Delaware's Corp. Law Dominance A Hot Topic At Tulane Conference*, LAW360.COM (Mar. 7, 2024).
[49] *See e.g.*, Ellen Bardash, *A Legal 'Doomsday'?: Delaware Faces Criticism at Tulane Conference.* LAW.COM (March 8, 2024) https://www.law.com/delbizcourt/2024/03/08/a-legal-doomsday-delaware-faces-criticism-at-tulane-conference/
[50] *See Elon Musk is Not Alone in Having Delaware in his Sights*, The Economist (March 14, 2024) https://www.economist.com/business/2024/03/14/elon-musk-is-not-alone-in-having-delaware-in-his-sights
[51] *See e.g.,* Edwards, *supra* note 1; Bainbridge, *supra* note 1, at 825 (stating that "Today, Nevada emerges as a notable challenger, actively promoting "DExit" – a push for companies to leave Delaware," and finding that between 2012-2024 Nevada was "by far the leading choice" for reincorporations out of Delaware); Solomon, *supra* note 6, at E-5 ("My analysis of recent reincorporations shows that 41 percent of U.S. domestic reincorporations since 2021 have been to Nevada").

observability firm Datadog.[52] To be sure, there are still only a few reincorporations, and primarily by firms with controlling shareholders who hold a large fraction of the votes.[53] Yet, Nevada's share of IPO firms also shows signs of a potential rise. [54] Furthermore, as shown below, the current equilibrium is unstable; the flow to Nevada may rise and expand beyond the controlling shareholders.[55]

Most importantly, Nevada's rising power is demonstrated by the competitive pressures it exerts on Delaware and other states, and by its influence on their corporate law. Recently, Delaware changed its law to become closer to Nevada by adopting SB21.[56] Texas adopted Nevada's broad exculpation statute as an opt-in liability limitation.[57] Thus, *whether or not Delaware maintains its dominance, Nevada's rise is already transforming American corporate law.*

B. Debate over Nevada Law v. Delaware Law

With the rising criticism of Delaware and high-profile reincorporations, Nevada law has assumed center stage. Practitioners compare Delaware and Nevada as incorporation destinations.[58] Firms that reincorporate to Nevada point to increased uncertainty in Delaware corporate law and lower litigation costs in Nevada.[59] Shareholders are less enthusiastic. In

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[52] *See e.g.,* Leave Delaware, @leavedelaware, X, (Feb. 10, 2026, 12:19 PM). https://x.com/LeaveDelaware/status/2021272895012393364

[53] *See e.g.,* Sam Nolledo et al., *The State of US Reincorporation in 2025: The Growing Threat and Reality of "DEXIT"*, GLASS LEWIS (October 9, 2025) (reporting that "55% of reincorporation proposals this proxy season involved companies with significant or controlling shareholders.") https://www.glasslewis.com/article/state-of-us-reincorporation-2025-growing-threat-reality-dexit

[54] *See* Benjamin P. Edwards, *PLI Panel – Reincorporations and Redomestication*, BLPB (Feb. 11, 2026). (whereas in the past Delaware used to attract 80% of IPO, during 2025 it attracted 62% and Nevada attracted 17%).

[55] *See Infra* Part IV.B.

[56] Senate Bill 21, 153RD GEN. ASSEMB. (DEL. 2025).

[57] Act of May 14, 2025, 89TH LEG., R.S., S.B. 29 (to be codified at TEX. BUS. ORGS. CODE ANN. § 21.419).

[58] *See e.g.,* Wendy Gerwick Couture, *Nevadaware Divergence in Corporate Law*, 19(2) VA. L. & BUS. REV. 145 (2024) ("The differences between Nevada and Delaware corporate law—which I call "Nevadaware divergence"—are the subject of media attention, scholarly critique, and current litigation"); Josh Bloom, *The Grass Isn't Necessarily Greener: Carefully Considering the Risks of Corporate Redomiciling,* Latest News, NEW YORK STATE BAR ASSOCIATION (July 15, 2024). https://nysba.org/the-grass-isnt-necessarily-greener-carefully-considering-the-risks-of-corporate-redomiciling/?srsltid

[59] *See e.g.,* Datadog Inc., PROXY STATEMENT (SCHEDULE 14A), at 15-16 (2026) ("Nevada courts follow a more statute-based approach to director and officer duties that is less dependent on judicial interpretation," and that reincorporating to Nevada "Will Reduce

TripAdvisor's migration to Nevada, only 5% of public shareholders voted in support of the reincorporation.[60] Asking the Delaware courts to block the reincorporation, shareholders argued that Nevada law would deprive them of their litigation rights.[61] Several commentators have indeed criticized the laxity of Nevada corporate law. This author, in particular, previously argued that Nevada is a "no liability regime." [62]

Importantly, on June 7, 2024, Nevada Secretary of State Francisco V. Aguilar weighed in by submitting an amicus curiae brief to the Delaware Supreme Court in support of TripAdvisor's reincorporation attempt.[63] Aguilar contends that Nevada law is not significantly different from Delaware law and that a move to Nevada will not materially harm shareholders' litigation rights. [64] Aguilar encourages the court not to listen to mere "academic statements."[65] In an expert opinion to The Trade Desk's board regarding reincorporation from Delaware to Nevada, Steven Davidoff Solomon raises similar observations, arguing that descriptions of the Nevada legal system are exaggerated and misrepresent Nevada law.[66]

Aguilar and the legal commentators present several arguments to support their position. First, Aguilar argues that Nevada and Delaware merely reach different conclusions in balancing policy considerations.[67] Davidoff similarly argued that "the differences between Nevada and Delaware law…stem from each state's policy choices."[68] To be sure, even if the differences merely reflect different policy choices, they could still be significant for shareholder interests. Yet, these statements, the Article

the Risk of Unmeritorious and Costly Litigation") https://www.sec.gov/Archives/edgar/data/1561550/000119312526043680/d700416dpre14a.htm#toc700416_3; The Trade Desk Inc., PROXY STATEMENT (SCHEDULE 14A), at 13-14 (2024) ("We believe that Nevada can offer more predictability and certainty in decision-making because of its statutory regime…We believe the Nevada Reincorporation will result in less unmeritorious litigation against the corporation and our directors and officers, which in turn would better allow our directors and officers to focus on the business and save the Company the costs of such litigation.")

[60] *See Palkon v. Maffei*, C.A. No. 2023-0449-JTL (Feb. 20, 2024).

[61] *See Id,.* at 11.

[62] *See* Barzuza, Market Segmentation, *supra* note 5.

[63] *See* Aguilar, *supra* note 6.

[64] *See id.,* at 3. ("Redomestication from Delaware to Nevada does not constitute a non-ratable benefit for corporate directors").

[65] *Id*., at 7 ("The description of Nevada as a "no liability" regime, while colorful, remains academic exaggeration").

[66] *See* Solomon, *supra* note 6 (arguing that "commentators have mischaracterized" Nevada law).

[67] *See* Aguilar, supra note 6.

[68] *See* Solomon, supra note 6; Couture similarly argues that these differences are about "each state's balance of the competing policies underlying corporate law."

shows, are not aligned with the legislative history of Nevada corporate law. As shown below, the legislative amendments and the legislative history documents, Nevada legislators were guided primarily by the following principle: In order to attract more firms, we should offer more protection from liability than Delaware does. [69]

Second, Aguilar asserts that the Nevada exculpation statute does not protect directors in most cases involving breaches of the duty of loyalty. Intentional misconduct, he argues, also covers self-dealing transactions, the core of breaches of duty of loyalty in Delaware.[70] Accordingly, he contends, Nevada law protects directors only from good-faith errors in judgment. In an op-ed in the Wall Street Journal, Aguilar similarly argues that "Nevada law holds directors accountable when they know they have done something wrong. It does not impose liability for innocent mistakes."[71] Yet, while the Secretary's interpretation could have been true theoretically, this Article shows that it is not valid in Nevada. As shown below, Nevada courts applied the term intentional misconduct in a narrow way, which is aligned with the legislative intent. Particularly, for an act to be non-exculpated, the Nevada court required the plaintiff to show particularized facts that demonstrate intention for wrongful acts, which is a high burden in the pre-discovery motion to dismiss stage. Furthermore, Nevada does not provide shareholders with access to books and records, which is necessary even for meeting lower burdens such as in Delaware.[72]

Finally, Aguilar and Davidoff point to the *Wynn Resorts* case as an example that Nevada is not a liability-free jurisdiction.[73] In *Wynn Resorts*, the court did not dismiss a case against the board of Wynn Resorts, for knowing violation of the law, since the board did not report to the SEC the series of sexual harassment allegations against Steve Wynn.[74] *Wynn Resorts*, however, the Article shows, is an outlier case that involved a public fight and leaks of information to the press. The court relied on this information in deciding not to dismiss the case. Thus, the case demonstrates how impossible it is for shareholders to sue in Nevada.[75]

The following Part analyzes Nevada law and shows that, contrary to Aguilar's, Davidoff's, Edwards' and Couture's statements, Nevada law

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69 *See Infra* Part III.B.
70 *Id., at* 9 ("Of course, most violations of the duty of loyalty, such as self-dealing, are intentional.")
71 *Id.,* at 9-10; *See also* Aguilar & Edwards, *supra* note 6.
72 *See Infra* Parts III.C-D
73 *See Infra* Part III.E.
74 *See Infra* Part III.E.
75 *See Infra* Part III.F

differs significantly from Delaware's. In Nevada, many breaches of the duty of loyalty are protected, whereas Delaware law does not afford the same protections. With a few exceptions, shareholders in Nevada have no inspection rights. Nevada cases demonstrate that these differences create substantial hurdles for shareholder litigation. Finally, as the following sections show, Nevada's legislative history indicates a clear intent and consistent actions to diverge from Delaware by restricting shareholder litigation.

III. NEVADA CORPORATE LAW AND STRATEGY

A. How Lax is Nevada Corporate Law?

The rising debate with respect to the content of Nevada law is not surprising. The specific details of how Nevada law shields management from liability compared to Delaware were not well understood or even known. Legal scholarship and education primarily focused on Delaware, unaware of Nevada's distinct approach. This oversight persisted for decades, due to a widely held assumption that Nevada actually *mimicked* Delaware's statutes and case law.[76] A decade ago, this author published an article in the *Virginia Law Review* that exposed Nevada's strategy to diverge from Delaware with a broader exculpation statute.[77] The Article shifted the conventional assumption, yet academics, jurists, and even corporate attorneys did not fully recognize the exact contours of Nevada law. As demonstrated above, currently, scholars and policy-makers have debated the extent to which it diverges from Delaware Law. [78]

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[76] *See, e.g.*, *Hilton Hotels Corp. v. ITT Corp.*, 978 F. SUPP. 1342, 1346 (D. Nev. 1997) (noting in dicta that Nevada follows Delaware's standards); Jill E. Fisch, *The Peculiar Role of the Delaware Courts in the Competition for Corporate Charters*, 68 U. CIN. L. REV. 1061, 1067 (2000); Ehud Kamar, *A Regulatory Competition Theory of Indeterminacy in Corporate Law*, 98 COLUM. L. REV. 1908, 1911 (1998) ("Nevada adopted Delaware law wholesale and yet failed to make significant inroads into Delaware's market share"); Kresimir Pirsl, *Trends, Developments, and Mutual Influences between United States Corporate Law(s) and European Community Company Law*, 14 COLUM. J. EUR. L. 277, 317 (2008) ("Nevada was the only state that actively tried to take incorporation business from Delaware, copying the Delaware General Corporation Code almost to the letter"); Jonathan R. Macey, *Federal Deference to Local Regulators and the Economic Theory of Regulation: Toward a Public-Choice Explanation of Federalism*, 76 VA. L. REV. 265, 277 n.41 (1990) ("Nevada has attempted to duplicate Delaware's doctrine").

[77] *See* Barzuza, *Market Segmentation, supra* note 5; *See also* Melissa Castro Wyatt, *Professor Saw Elon Musk and TripAdvisor Moves to Nevada Coming – 11 Years Ago*, UVATODAY (June 13, 2023)

[78] *See e.g.*, Jens Dammann, *How Lax Is Nevada Corporate Law? A Response to Professor Barzuza*, 99 VA. L. REV. IN BRIEF 1, 10 (2013); Keith Paul Bishop, *Scholars Ask "Just How Lax Is Nevada Corporate Law?* C.A. CORP. & SEC. L.(Feb 7, 2013) https://www.calcorporatelaw.com/2013/02/just-how-lax-is-nevada-corporate-law

This Article conducts a comprehensive analysis of Nevada law, legislative history, and cases. The analysis shows that Nevada law poses insurmountable impediments to shareholder litigation. In contrast to the Secretary of State' and prominent commentators 'opinions, it finds that Nevada law differs from Delaware significantly and materially.

Part B will show that Nevada legislative intent has clearly been to offer greater protection from liability than Delaware. Part C will show Nevada courts interpret the exculpation statute broadly, in line with the legislative intent. In particular, they require plaintiff shareholders to bring particularized facts showing wrongful intent or knowing violation of the law. Part D will show that, unlike Delaware and other states, Nevada does not allow access to books and records. The combination of showing intent with no access to board minutes makes the task close to impossible. Part E will show that the Wynn Resorts case demonstrates the opposite: shareholders can't sue in Nevada. Part F will show that Nevada also differentiates from Delaware by replacing Unocal and Revlon cases with the high deference Business Judgment Rule. Part G will show that even the Secretary of State website includes marketing materials that present Nevada as a no-liability regime.

B. Nevada Corporate Code – Content, Amendment, and Legislative History

This part provides an analysis of significant amendments to Nevada law with respect to the core focus of corporate law – Directors, officers and controlling shareholders' fiduciary duties. It presents important legal amendments over the years, and the legislative history behind them. Nevada law is code based. Thus, Nevada code should be a major source to assess the content of Nevada corporate law.[79] Nevada legislature has been active and persistent in amending Nevada law.

The legislative history demonstrates that Nevada legislature was motivated by one central consideration – to provide strong bars from litigation, and in particular stronger than Delaware provides. Thus, in contrast to commentators' and officials' assertions that Nevada reached a different policy balance, Nevada law was not derived through a careful process of balancing policy consideration. Over the years, Nevada lawmakers have explicitly and consistently amended their statute to

[79] *See* Aguilar & Edwards, *supra* note 6 ("Unlike Delaware's shifting, judicially crafted standards, Nevada's statute provides the sole avenue for director liability.")

assure that it provides higher bars to litigation and lower accountability than Delaware law. These amendments encompass several channels directed at attracting incorporations, including adding more liability protections, facilitating incorporation tax raises, and ensuring courts' enforcement of the legislative intent by codifying the internal affairs doctrine.

Broad Exculpation 1987

Nevada's first clear deviation from Delaware occurred in 1987, with the enactment of its expansive exculpation statute for corporate directors and officers.[80] Delaware exculpation statute, enacted in 1986, allows firms to amend their charter to protect directors from liability for gross negligence. The statute provided protection for breaches of duty of care *but not* for breaches of duty of loyalty or good faith.[81] Furthermore, the statute allowed firms to implement exculpation only with shareholder approval. The enactment attracted firms to Delaware.[82] Other states followed with similar statutes.[83]

Adopted in 1987, NRS §78.138(7) was significantly broader than Delaware's §102(b)(7) and from other states' exculpation statutes.[84] In contrast to Delaware and other states, Nevada's exculpation statute allowed firms to waive liability for the duty of loyalty and the duty of good faith, except for acts that amount to "intentional misconduct, fraud, or knowing violation of the law."[85] The legislative history relating to this bill couldn't be clearer on the legislative intent: Nevada state officials directly contemplated these liability protections as a strategy to attract corporations. [86] Senator William Raggio, in his testimony, "reminded the committee that Nevada has, for many years, been trying to make the state attractive for incorporation."[87] The Senator advised the committee that, to that end:

> "[The proposed bill] *broadens the immunity of directors to include the "breach of duty of loyalty to the corporation or its shareholders, … this*

[80] *See* NRS 78.037

[81] *See* DGCL 102(b)(7).

[82] *See* Sarath Sanga, *The Origins of the Market for Corporate Law*, 24 AMER. L. ECON. REV. 369 (2022).

[83] Texas, for example, followed Delaware by adopting Nevada exculpation as an opt-in provision.

[84] *See* discussion *infra* Section III.C.

[85] *See* NRS 78.037(7)

[86] *Hearing on S.B. 46 Before the S. Comm. on Judiciary*, 1987 LEG., 64TH SESS. (Nev. 1987).

[87] *Id*. (Testimony of Senator William Raggio).

matter is ...essential for the State of Nevada if it continues to be a leading state for incorporation." [88]

The senator said that these broader protections would "…go a long way in making Nevada competitive with Delaware."[89] The fact that the bill was exceptionally broad is evident also from the response of those who opposed it. For example, Senator Wagner warned that the bill is "very far-reaching" and "goes farther than any other bill in the nation in this area."[90] The Nevada Secretary of State, however, urged the committee to approve the amendment as it was incumbent on the state to "do as much as [it] can to out Delaware."[91]

Eliminating Shareholder Approval Requirement – to Increase Incorporation Fees 2001

In 2001, Nevada's exculpation statute was amended to further differentiate it from Delaware's, in order to facilitate raising incorporations fees. Similar to Delaware and other states, Nevada's initial provision required shareholder approval. In 2001, however, Nevada made its exculpation statute mandatory. In 2003, the state converted it to a default rule with an opt out charter amendment provision.[92] Nevada's protections, thus, apply automatically unless both managers and shareholders affirmatively opt out of them. This amendment also was not justified by policy considerations. No one explained why Nevada should deprive shareholders of the opt-in authority they retain in every other state. Quite the contrary, the bill was motivated by one reason: to cover a budget deficit with incorporation fees.

Senator James opened the hearings before the Assembly Committee on Judiciary by revealing that the state budget was underfunded by more than $120 million.[93] Instead of cutting the budget, S.B. 577 would increase Nevada's incorporation tax fees for domestic companies. Higher fees could harm Nevada's competitiveness, but removing the requirements of shareholder approval for exculpation could compensate for that. Since "Directors are the ones who decide where to incorporate," Senator James explained, applying the Nevada exculpation statute to all firms, even

[88] *Id.*
[89] *Id.*
[90] *Id.*
[91] *Id.*
[92] Barzuza, *supra* note 5, at 953 (in fact it was even amended as a mandatory rule, and then in 2003, was relaxed a bit to become the default).
[93] *Hearing on S.B. 577 Before the A. Comm. on Judiciary*, 2001 LEG., 71TH SESS. (Nev. 2001).

without a shareholder vote, "will be a major incentive." [94] The Assembly committee received a letter from S. Craig Tompkins, a director of several public companies, similarly stating that the amendment "would increase the attractiveness of Nevada as a state of incorporation for major public companies" and would "mitigate the negative impact of increasing the fees assessed against companies choosing to incorporate in Nevada."[95] Thus, minutes from the legislative sessions of this 2001 amendment show how the Nevada legislative body took another step up in promoting the goal of increasing Nevada's revenues from incorporations, by further differentiating Nevada's law from Delaware.

Takeover Standards 1999

The efforts to differentiate from Delaware were not limited to the exculpation statute. In 1999, for example, Nevada amended its corporate code to apply the highly deferential *business judgment rule* to management's use of defensive tactics, giving managers wide latitude to block hostile bids, and full control on managing a sell process.[96] The legislative history clarifies that this amendment as well was enacted with a clear purpose: to reject two landmark Delaware cases—*Unocal*[97] and *Revlon*[98]—which applied a higher level of scrutiny to managers' use of defensive tactics. The legislature maintained enhanced standards only to defensive tactics that amount to intervention in shareholder franchise. [99]

The amendment was adopted in response to *Hilton Hotels Corp. v. ITT Corp.*, in which the District Court of Nevada held in dicta that like Delaware Nevada applies enhance fiduciary duties to use of defensive tactics, even when there is no intervention in shareholder franchise.[100] The amendment thus was implemented to explicitly reject Delaware enhanced duties in change of control situations.

Enforcing Differentiation 2017

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[94] *Id.*
[95] Letter from S. Craig Tompkins, a director of a number of public companies, in support of S.B. 577, *Hearing on S.B. 577 Before A. Comm. on Judiciary*, 2001 LEG., 71TH SESS. (Nev. 2001) (Exhibit J).
[96] NRS 78.138(3).
[97] *Unocal Corporation v. Mesa Petroleum Co.*, 493 A.2D 946 (Del. 1985).
[98] *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2D 173 (Del. 1986).
[99] NRS 78.139
[100] *Hilton Hotels Corp. v. ITT Corp* 9718 F. Supp. 1342 (D. Nev. 1997); *see also* Keith Paul Bishop, *Nevada Legislature Ponders Rejection of Unocal and Revlon Standards*, C.A. CORP. LAW (March 23, 2017) https://natlawreview.com/article/nevada-legislature-ponders-rejection-unocal-and-revlon-standards?amp

The goal of differentiation from Delaware with less liability was so central that the Nevada legislature also acted to ensure that Nevada judges follow this legislative intent. In 2017, Nevada codified the legislative intent to differentiate itself from Delaware. NRS § 78.012 determines that Nevada law governs the internal affairs of domestic corporations, including "the rights, privileges, powers, duties, and liabilities, if any, of its directors, officers, and stockholders…".[101] And if that wasn't sufficiently clear, the legislature added that the liability of directors and officers in Nevada "…must not be supplanted or modified by-laws or judicial decisions from any other jurisdiction."[102]

And once again, the legislative history bears this interpretation: lawmakers explained that the language indicates that Nevada statutes should control business disputes in the state and that "Delaware cases that reflect a different law" should not be applied.[103] With the adoption of § 78.012, Nevada ensured enforcement of its conscious differentiation from Delaware. As shown below, Nevada courts heard the message and, citing the 2017 amendment, Nevada courts applied the protections to directors and officers even more vigorously than before. [104]

AB239 Limiting Controlling Shareholder Fiduciary Duties 2025

Finally, after Delaware Passed S.B.21,[105] Nevada's legislature rushed to impose tighter limitations on controlling shareholder duties. Yet again, this amendment demonstrated Nevada commitment and determination to impede shareholder litigation, and judicial scrutiny, even with respect to self-dealing transactions. A.B.239 is significantly more protective than S.B.21, to the point that it virtually bars judicial scrutiny of controlling shareholder self-dealing transactions, including going private transaction to which S.B.21 safe harbor does not apply.

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[101] NRS 78.012 (2)

[102] NRS 78.012 (3)

[103] *Proposed Amendment to S.B. 203*, *Hearing on S.B. 203 Before the S. Comm. on Judiciary*, 2017 LEG., 79TH SESS. (Nev. 2017) (testimony of Lorne Malkiewech, U-Haul International Inc.). U-Haul owners were the subject of litigation in Nevada. Thus, in addition to attracting incorporation it is possible that Nevada also responds to lobbying from within.

[104] *See* discussion *infra* Section III.C.

[105] S.B. 21, 153d Gen. Assemb., Reg. Sess. (Del. 2025) (enacted) (codified at Del. Code Ann. tit. 8, §§ 144, 220 (2025)). Governor Meyer signed S.B. 21 into law on March 25, 2025; the amendments establish safe-harbor procedures that insulate controlling-stockholder transactions from entire-fairness review when approved by disinterested directors or disinterested stockholders. *See* Del. Code Ann. tit. 8, § 144(b).

To begin with A.B.239, which took effect May 2025,[106] a controlling shareholder has only one fiduciary duty: to avoid pressuring directors or officers into breaching their non-exculpated fiduciary obligations. [107] In particular, the controller's duty only triggers when three things happen: (1) the controller pressures a director or an officer, (2) that director or officer breaches a duty badly enough to face personal liability under Nevada's *exculpation statute*, §78.138(7); and (3) the controller walks away with something the other shareholders don't get.[108]

If that wasn't enough a shareholder will be considered as controlling, and thus have this single duty, only if he has the voting power to elect a majority of the board.[109] And even where that test is satisfied, approval of the transaction by a committee composed solely of disinterested directors—or by the board acting on such a committee's recommendation—raises a rebuttable presumption that the controlling shareholder did not breach the duty. [110]

With this amendment, Nevada effectively extended the protection of its exculpation standard to controlling shareholders, not just directors and

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[106] Assemb. B. 239, 83d Leg., Reg. Sess. (Nev. 2025) (enacted) (codified in scattered sections of Nev. Rev. Stat. chs. 78, 82, 86, 87A, 88, 92A). Governor Lombardo signed A.B. 239 into law on May 30, 2025, effective immediately.

[107] Nev. Rev. Stat. § 78.240(3) (2025) (providing that a controlling stockholder's "only fiduciary duty," in that capacity, is to refrain from exerting undue influence over a director or officer with the purpose and proximate effect of inducing a breach of the fiduciary's duties to the corporation).

[108]*Id.* The duty is triggered only where the controller's undue influence induces a breach that (1) subjects the director or officer to liability under Nev. Rev. Stat. § 78.138 and (2) directly relates to a contract or transaction in which the controller holds a material, non-speculative financial interest and from which the controller derives a benefit not shared ratably with the other stockholders. On the underlying liability standard, *see* Nev. Rev. Stat. § 78.138(7) (2025) (limiting director and officer monetary liability absent fraud, intentional misconduct, or a knowing violation of law).

[109] *See* Nev. Rev. Stat. § 78.240(6)(d) (2025) (defining a "controlling stockholder" as one having the voting power, by virtue of relative beneficial ownership of shares or otherwise pursuant to the articles of incorporation, to elect at least a majority of the corporation's directors). This single, functional test is considerably narrower than Delaware's multi-pronged definition, which reaches a stockholder who owns a majority of the corporation's voting power, one who controls at least one-third of the voting power and exercises managerial authority, or one with the right to cause the election of a majority of the board. *See* Del. Code Ann. tit. 8, § 144(e)(2) (2025).

[110] Nev. Rev. Stat. § 78.240(4) (2025) (approval by a committee of only disinterested directors, or by the board in reliance on such a committee's recommendation). The presumption is rebuttable: a controlling stockholder is individually liable only where the presumption has been rebutted and a breach of the subsection 3 duty is proven. *Id.* § 78.240(5). A "disinterested director" must have no material, nonspeculative financial interest in, and not be a party to, the transaction, and must satisfy the audit-committee independence standards of Exchange Act § 10A(m). *Id.* § 78.240(6)(e).

officers, in self-dealing transactions.[111] The implications are substantial. In Delaware under S.B. 21, a self-dealing controller transaction can be insulated from equitable relief and damages by at least one cleansing mechanism—approval by a committee of disinterested directors or a majority-of-the-minority vote—with going-private transactions the lone exception, which require both; absent any qualifying approval, the transaction remains subject to entire-fairness review.[112] The result carries a be-careful-what-you-wish-for message. The fight over S.B. 21 was about how much process a controller transaction should require—an independent committee, a minority vote, or both—not about whether controllers self-dealing should be scrutinized at all. Even the most aggressive proposals in the Delaware debate stopped well short of Nevada's approach.[113] Companies that reincorporate in Nevada, and the shareholders who come with them, may not fully realize what they have given up: a controller can now extract value from a self-dealing deal with little fear of court review, and minority investors are left with almost no way to challenge it.[114] The contest among states to win charters by stripping away minority protections risks a race to the bottom that erodes the investor protections on which public markets rest. What looks like a move from Delaware's uncertainty to cleat certainty, in short, may prove a costlier bargain than anyone in the S.B. 21 debate, or shareholders that reincorporate to Nevada, imagined.

[111] The protection operates by incorporation rather than by literal amendment of the exculpation statute: the controlling stockholder's duty under Nev. Rev. Stat. § 78.240(3)(a) (2025) turns on whether the induced director or officer is liable under Nev. Rev. Stat. § 78.138, that is, on whether the breach falls outside the liability limitation in § 78.138(7). Exculpation statutes elsewhere reach only directors and officers, not controlling stockholders. *See* Del. Code Ann. tit. 8, § 102(b)(7) (2025).

[112] Del. Code Ann. tit. 8, § 144(b) (2025) (shielding a controlling-stockholder transaction, other than a going-private transaction, from equitable relief and damages if approved by either a committee of disinterested directors or a majority of the disinterested stockholders). Going-private transactions require both mechanisms. *Id.* § 144(c). Absent qualifying approval, the transaction remains subject to entire-fairness review.

[113] Even at its most controller-friendly, S.B. 21 preserved entire-fairness review as the default and left controlling stockholders subject to fiduciary duties; the debate was over how a conflicted transaction could be cleansed, not whether controllers remained accountable for self-dealing at all. *See* Del. Code Ann. tit. 8, § 144(b)–(c) (2025) (precluding equitable relief and damages only where a statutory cleansing mechanism is satisfied); *Rutledge v. Clearway Energy Grp. LLC*, No. 248, 2025 (Del. Feb. 27, 2026) (confirming that the amendments did not eliminate fiduciary-duty claims against controllers or divest the Court of Chancery of jurisdiction to adjudicate them). A controller transaction that satisfies no cleansing mechanism thus remains subject to entire-fairness review. Nevada, by contrast, pared the controller's fiduciary obligation down to a single narrow duty and made even that presumptively satisfied by disinterested-committee approval—an approach that appears to have no analogue in Delaware or any other state.

[114] *See* Nev. Rev. Stat. §§ 78.138(7), 78.240(3) (2025).

C. Broad Exculpation Statute – Duty of Loyalty Exception Replaced with Fraud

Nevada Exculpation statute has particular importance, since it does not include the exceptions that Delaware and other states apply to exculpation – Duty of Loyalty and Duty of Good Faith. These duties are in fact mandatory in Delaware, and there are good reasons why Delaware law mandates them. As shown below, the duty of loyalty is distinct in its importance and consequences.

The Business Judgment Rule

Starting with some background, both Nevada and Delaware apply the business judgment rule ("BJR") to management decisions. The rule is a "presumption that in making a business decision, the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the company's best interests."[115] The rule allows directors to make informed business decisions with an expectation of deference from courts. Namely, if directors were diligent and disinterested the court will not judge their decision with a hindsight. Even if it is clear that the decision was mistaken.

The rationale for this principle has been spelled out extensively in case law and academic commentary. One fundamental justification flows from a posture of judicial humility: courts recognize that their expertise lies in ruling on the proper process surrounding business decisions and not the substance of those decisions themselves.[116] Another rationale (reflected throughout Delaware's approach to corporate law) involves efficiency. Proceeding with a broad, deferential default like the business judgment rule means avoiding costly and lengthy litigation. Third, it is intended to protect directors decisions from potential chiiling efect. Thus, it also allows boards — and their shareholders — to make business planning decisions with predictability.

Accordingly, Delaware courts apply the rule consistently, even in cases where managerial decisions are wrong. For example, in *Kamin v. American Express*, the board of American Express made a relatively straightforward accounting error that resulted in the company having to pay an additional $6 million in taxes that could have been saved.[117] When

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115 *Aronson v. Lewis*, 473 A.2D 805, 812 (Del. 1984).

116 *See, e.g.*, *Dodge v. Ford Motor Co.*, 204 MICH. 459, 500 (Mich. 1919) ("The discretion of the directors will not be interfered with by the courts unless there has been bad faith, willful neglect, or abuse of discretion.").

117 86 MISC. 2D 809, 812 (N.Y. Sup. Ct. 1976).

shareholder plaintiffs brought suit seeking damages for a breach of the duty of care, the court disposed of the action by applying the business judgment rule. In its opinion, the court held that "[i]t is not enough to allege, as plaintiffs do here, that the directors made an imprudent decision… [m]ore than imprudence or mistaken judgment must be shown."[118] Because the American Express directors considered the potential tax consequences of the decision, and because elements like fraud or conflicts were not present, the court deferred to the board's action even though It recognized that it might be "unwise" in hindsight.[119]

To refute the business judgement rule - both in Nevada and in Delaware, the plaintiff has the burden to prove that either directors breached their duty of care (were grossly negligent) or that directors breached their duty of loyalty (i.e., acted in a conflicted way).

Duty of Care & Duty of Loyalty

In Delaware and in Nevada directors owe two core fiduciary duties to the firm and its shareholders – the duty of care and the duty of loyalty (the duty of good faith is embedded in the duty of loyalty). [120] The duty of care—an obligation to make deliberative and informed decisions—and duty of loyalty—a responsibility to act on behalf of the best interests of the company and its shareholders—together make up the heart of much of corporate law doctrine, as they both serve as vehicles for courts to review challenged corporate conduct.

The Duty of Care is tied to "concepts of gross negligence."[121] Directors have to make good faith attempts to be informed and diligent. For example, directors under the duty of care are obligated "to inform themselves, before making a business decision, of all material information reasonably available to them."[122]

The duty of loyalty is tied to "conflicts of interest". It applies primarily to self dealing situations in which the director or officers are on both sides of the deal, and thus have a conflict of interest with the shareholders. It also applies to situations in which the directors did not make good faith

[118] *Id*. at 813.
[119] *Id.* (quoting *Pollitz v Wabash R.R. Co.*, 207 N.Y. 113, 124).
[120] *See Stone v. Ritter*, 911 A.2d 362 (Del. 2006)
[121] *Aronson v. Lewis*, 473 A.2D 805, 812 (Del. 1984).
[122] *Id*.

efforts to fulfill their duties, but rather consciously disregarded their duties.[123]

Conflicts can arise in all sorts of corporate transactions. For example, a board member who provides consulting services to a company and is paid for these services is interested in receiving a high pay. If she participates in the corporation's decision to hire her consulting services, that decision is affected by self-interest.[124] Another example might arise when a controlling shareholder wants the company he controls to buy another company he owns (a company in which he has a higher share).[125] In such a scenario, the controlling shareholder would be interested in receiving a higher price. A controlling shareholder who wants to take the company she controls private would face a similar conflict, except with interest being in the opposite direction — minimizing what she pays for the other outstanding shares to execute the transaction.[126]

Delaware courts have maintained their focus on protecting shareholders from breaches of the duty of loyalty. To review these forms of dealing, the courts have generally proceeded by application of the demanding entire fairness test. [127] The test involves a far more scrutinizing level of review, assessing both "fair dealing and fair price" in the context of the challenged transactions.[128] This test is generally seen as the highest form of scrutiny that Delaware courts apply and starkly contrasts with the highly deferential business judgment rule discussed above.

Managers and controlling shareholders, however, can use cleansing mechanisms in order to avoid the high scrutiny of entire fairness. Recently, in response to the backlash, Delaware passed Senate Bill 21, which limits the scrutiny on self-dealing transactions.[129] This amendment reduces scrutiny of self-dealing transactions but doesn't release them from scrutiny, as Nevada does. In particular, post S.B. 21 managers and controlling shareholders could replace the high scrutiny of entire fairness with the high deference of the business judgment rule if they use one of the following cleansing mechanisms: (1) a committee of independent directors (2) a supporting vote of the majority of the shareholders who

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123 Conscious disregard results in a breach of the duty of good faith which is subsumed in within the duty of loyalty. *See Stone v. Ritter*, 911 A.2d 362 (Del. 2006)

124 *See, e.g.*, *In re Ezcorp Inc.*, C.A. No. 9962-VCL, 24 (Del. Ch. Jan. 25, 2016).

125 *See, e.g.*, *In re Southern Peru Copper Corp.. S'holder Derivative Litig.*, 30 A.3D 60, 90 (Del. Ch. 2011) (describing "deficiencies in the substance of the special committee's negotiations" in finding an unfair transaction).

126 *Kahn v. M&F Worldwide Corp.* (*MFW*), 88 A.3D 635, 647 (Del. 2014).

127 *Weinberger v. UOP, Inc.*, 457 A.2d 701, 711 (1983).

128 *Weinberger v. UOP, Inc.*, 457 A.2d 701, 711 (1983).

129 *See* S.B. 21, 153RD GEN. ASSEMB., REG. SESS. (Del. 2025).

are not self-interested. If they didn't meet any of these mechanism, entire fairness would apply.

(a) Delaware's Exculpation Statute: D.G.C.L §102(b)(7)

In 1986 Delaware legislature passed D.G.C.L §102(b)(7). The amendment allows directors and officers to be exculpated from monetary liability for breaches of duty of care (but does not allow exculpation for breach of duty of loyalty or good faith).

The passage of §102(b)(7) is traceable to a single case. In *Smith v. Van Gorkom*, decided in 1985, the Delaware Supreme Court declined to give the directors of an acquired company business judgment deference, even though they had accepted an offer that offered a substantial premium to shareholders.[130] The court took issue with the directors' process regarding the deal, holding that they had not kept themselves adequately informed and the significant failures in process constituted gross negligence and thus a breach of the duty of care.[131]

The holding was met with fierce criticism from the business and academic community.[132] Director and officer insurance rates in Delaware increased with this new risk.[133] One well-regarded corporate law scholar even called *Van Gorkom* surely one of the worst decisions in the history of corporate law."[134]

The reaction and correction from Delaware lawmakers was swift: it adopted D.G.C.L §102(b)(7), which allowed Delaware firms to exculpate directors from monetary liability for breaches of the duty of care, with shareholder approval.[135] In the decades since, most firms have adopted such a provision.[136] More recently, in 2022, Delaware amended §102(b)(7) again to extend its optional exculpation provisions to senior officers.[137]

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[130] 488 A.2d 858 (Del. 1985).
[131] *Id.*
[132] Christopher M. Bruner, *Good Faith, State of Mind, and the Outer Boundaries of Director Liability in Corporate Law*, 41 WAKE FOREST L. REV. 113, 1143 (2006) ("As of late 1985, pressure was mounting on Delaware's legislature to intervene.")
[133] Daniel Fischel, *The Business Judgment Rule and the Trans Union Case*, 40 BUS. LAW. 1437, 1440 (1985).
[134] *Id.* at 1455.
[135] *See* D.G.C.L § 102(b)(7).
[136] Sean Sheely & Mark Reindheart, *Delaware's 102(b)(7) Exculpation of Senior Officers - One Year Later*, Jenner & Block (September 2023) https://www.jenner.com/en/news-insights/publications/delawares-102b7-exculpation-of-senior-officers-one-year-later.
[137] *Id.*

Delaware's intent with this provision was, in part, to cultivate an environment where directors would not be deterred from serving on the boards of Delaware corporations. Furthermore, allowing personal liability to attach to risky business calls could incentivize directors to prefer low-risk decisions, which would hurt the long-term returns of shareholders. Finally, it avoided the problem of allowing directors to constantly be judged by hindsight if decisions they made in good faith turned out to be wrong. In the decades since most Delaware firms have opted into the §102(b)(7) exculpation protections.[138] Delaware recently amended §102(b)(7) to include exculpation for senior officers.[139] These devices can only enter a firm's charter with shareholder approval.

The other side of §102(b)(7) is also essential: it lists exceptions to which Delaware firms are prohibited from exculpating their directors from personal liability.[140] These include breaches of the duty of loyalty and the duty of good faith, intentional misconduct, and knowing violation of law.[141] Delaware thus, creates a clear dichotomy between the duty of care and the duty of loyalty (and the duty of good faith which is subsumed in the duty of loyalty). The duty of care is waivable, but the duty of loyalty is mandatory. The dichotomy is justifiable because the rationale that applies to the duty of care exculpation does not apply to the duty of loyalty. Firms can waive liability to gross negligence, since such liability might chill directors from undertaking profitable risky investments. The duty of loyalty however, applies to transactions involving a conflict of interest. When conflicts of interest arise, directors, controlling shareholders, or managers could extract private benefits, sometimes significant ones, that put their self-interests at odds with the company's interests.[142] Judicial deference could foster opportunistic behavior, potentially causing substantial harm to firms and shareholders. Because of that, Delaware law does not allow directors and officers to be exculpated from liability for self-dealing transactions (breaches of the duty of loyalty).[143] It also does not shield these transactions from judicial scrutiny through a consistent presumption of business judgment deference. Instead, Delaware courts apply an exceptionally high level of judicial review to these types of conflicted transactions - the Entire Fairness standard, which, as described above, assesses both fair dealing and fair price.[144]

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138 Sheely & Reindheart, *supra* note 136.
139 *Id.*
140 D.G.C.L § 102(B)(7)(I)–(V).
141 *See* D.G.C.L §102(B)(7)(I)-(II)
142 *See Kahn v. Lynch Communication Systems*, 638 A.2d 1110, 1117 (Del. 1994).
143 DGCL § 102(B)(7). But they are not exculpated for derivative claims.
144 *Weinberger v. UOP, Inc.*, 457 A.2D 701, 711 (1983).

(b) Nevada's Exculpation Statute: N.R.S. §78.138

Nevada exculpation statute deviates sharply from the approach taken by Delaware and many other states. Nevada exculpation does not have an exception for the duty of loyalty or the duty of good faith. Rather, it replaced these exceptions with "fraud". Under Nevada's exculpation statute, thus, directors and officers face monetary liability only if their breach of duty amounts to *intentional misconduct, fraud or knowing violation of law*."[145]

As discussed above, Nevada Secretary of State argues that this difference is not significant, Nevada exculpation statute exclude intentional misconduct and "[o]f course, most violations of the duty of loyalty, such as self-dealing, are intentional".[146] In a *WSJ* co-ed Aguilar and Professor Ben Edwards argue that the difference is merely that Nevada "doesn't impose liability for innocent mistakes."[147] Nevada law, they argue "makes directors liable when they know that they have done something wrong."[148]

Yet, in Delaware, alleging self-dealing does not require the plaintiff to allege an intentional wrongful act. Rather, when a fiduciary self-deals with the company, "the entire fairness standard of review applies in the first instance".[149] As a result, this fiduciary, "despite acting in subjective good faith, may be found liable for acting disloyally."[150] Intention is not required in Delaware since "even a subjectively well-motivated fiduciary might deal with himself less aggressively than he would with a third party."[151]

Furthermore, Nevada consciously adopted broad exculpation (and broader than Delaware).[152] This goal was reinforced in the 2017 amendment which require courts to apply 78.138 and 78.139 rather than rely on cases from other states. In accordance with the legislative intent, gradually, and especially following the 2017 amendment, Nevada courts applied the "intentional" and "knowing" requirements of the Nevada

[145] NRS 78.138(7)(B)(2).
[146] *Aguilar, supra* note 7, at 9.
[147] *Id.*
[148] Aguilar & Edwards, *supra* note 6.
[149] *Id.*
[150] Leo E. Strine, Jr., Lawrence A. Hammermesh, R. Franklin Balotti, Jeffrey M. Gorris, *Loyalty's Core Demand: The Defining Role of Good Faith in Corporate law*, 93 GEORGT. L. J., 629, 634 (2010)
[151] *Id.*, at 634.
[152] *See Infra* Section III.B.

exculpation statute – as posing a high bar - to require the plaintiff showing wrongful intent, or knowledge of wrongfulness.

This difference is significant: showing knowledge of wrongfulness is a high bar at the pre-discovery pleading stage. To avoid early dismissal, shareholders in derivative lawsuits are traditionally required to establish "demand futility," which effectively shows that a board of directors is compromised in some way to proceed with the lawsuit.[153] In Delaware, to adequately plead to demand futility, plaintiffs must plead with particularity that at least half of the board would not "be able to bring their impartial business judgment to bear on a litigation demand."[154] Directors may not be able to decide on demand if they face the likelihood of liability, are self-interested, or are beholden to a third party that faces liability risk. Importantly, to show risk for liability, the plaintiff cannot rely on exculpated claims "because they do not expose directors to a substantial likelihood of liability."[155]

The process has similar contours under Nevada law.[156] Yet, the state's broad exculpation statute makes this stage of litigation much more difficult for plaintiffs seeking to bring a derivative lawsuit. As Keith Bishop, a highly reputable and influential commentator of Nevada law, has noted, the Nevada exculpation provisions "make it exceedingly difficult to convince judges that a substantial likelihood of personal liability exists for purposes of establishing demand futility."[157]

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[153] *United Food & Commercial Workers Union & Participating Food Indus. Employers Tri-State Pension Fund v. Zuckerberg*, 262 A.3D 1034, 1074 (Del. Sept. 23, 2021) ("The purpose of the demand- futility analysis is to assess whether the board should be deprived of its decision-making authority because there is reason to doubt that the directors would be able to bring their impartial business judgment to bear on a litigation demand. ").

[154] *Id.* In Zuckerberg, the court held that the following three questions should be asked of each director: "(i) whether the director received a material, personal benefit from the alleged misconduct that is the subject of the litigation demand; (ii) whether the director faces a substantial likelihood of liability on any of the claims that would be the subject of the litigation demand; and (iii) whether the director lacks independence from someone who received a material personal benefit from the alleged misconduct that would be the subject of the litigation demand or who would face a substantial likelihood of liability on any of the claims that are the subject of the litigation demand." Demand is to be excused if the answer to any of the questions is yes for at least half of the directors. *Id.* at 1075.

[155] *Id.* at 1039.

[156] *City of Warren Police & Fire Ret. Sys. v. Tenet Healthcare Corp.*, NO. 05-19-00260-CV, 10 (Tex. App. Sep. 28, 2020) (citing *Shoen v. SAC Holding Corp.*, 137 P.3D 1171, 1179–80 (Nev. 2006)) ("In analyzing demand futility, Nevada courts generally follow the approach and reasoning of Delaware law.").

[157] Keith Bishop, *Nevada's Director Liability Standard Defeats Another Derivative Suit,* CA. CORP. L. & SEC. BL. (Oct 26, 2020)

Accordingly, the "intentional" and "knowing" requirements of the Nevada exculpation statute have been interpreted by courts to confer an exceptionally high pleading standard. The Nevada Supreme Court clarified this requirement in the 2006 case, *Shoen v. SAC Holding Corp*,[158] explaining what plaintiffs must show to successfully plead to demand futility in a derivative lawsuit against a Nevada corporation. The Supreme Court held that in Nevada, "directors and officers may only be found personally liable for breaching their fiduciary duty of loyalty if that breach involves intentional misconduct, fraud, or a knowing violation of the law. Accordingly, interestedness through potential liability is a difficult threshold to meet."[159]

Relying on *Shoen, In re Zagg Inc., S'holder Derivative Action* the United States Court of Appeals for the Tenth Circuit applied Nevada exculpation as pleading standard. [160] The case involved a shareholder challenge to a CEO and chairman of the board who pledged company stock for a margin loan without disclosure, violating SEC rules. In affirming the lower court's dismissal of the complaint, the 10th Circuit engaged in an extended interpretation of the exceptionally high level of protection that NRS §78.138 offers to directors accused of wrongdoing:

> "The **likelihood of liability is greatly reduced in Nevada by an "exculpatory" statute that limits the personal liability of corporate directors**…The exculpatory statute's purpose is to limit corporate directors' liability. Under the narrower interpretations of intentional and knowing that does not require knowledge of wrongfulness, a director would not be protected if the director knew their actions—such as signing a document with knowledge of its contents. But that state of mind would be present for virtually any conduct that could lead to the director's liability to the corporation, its stockholders, or creditors. The exculpatory statute would be an empty gesture. To give the statute a realistic function, it must protect more than just directors (if any) who did not know their actions; it should protect directors who knew what they did but not that it was wrong."[161]

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https://www.calcorporatelaw.com/nevadas-director-liability-standard-defeats-another-derivative-suit

[158] 122 NEV. 621, 137 P.3D 1171 (Nev. 2006) (abrogated in part by Chur v. Eighth Judicial Dist. Court of Nev., 136 Nev. 68, 72, 458 P.3d 336, 340 (2020)). *Shoen* was misunderstood to suggest that exculpation does not apply to gross negligence acts. Yet Nevada Supreme Court clarified this confusion

[159] *Id., at* 640.

[160] *In re Zagg Inc., S'holder Derivative Action* 826 F.3d 1222 (10th Cir. 2016).

[161] *Id*. (emphasis added). The court noted that there is no need for this case to make a final decision on whether it is required to show actual knowledge of law, or whether constructive knowledge would suffice since while "[t]he Director Defendants' appellate

The court dismissed the case, deciding that the plaintiff did not show that directors who approved the margin loans knew that the lack of disclosure of these loans violated SEC rules,[162] and such knowledge is required under NRS 78.138(7)(b).[163] As one commentator opined on *Zagg*:

> "The decision confirms the extensive personal liability protection Nevada affords officers and directors of Nevada corporations. It also illustrates how, by broadly limiting director and officer liability, Nevada further allocates to boards of directors (as opposed to stockholders) the power to control the corporation's decision to litigate..."[164]

In *Chur v. Eighth Judicial District Court*, the Nevada Supreme Court formally adopted the Tenth Circuit's *Zagg* interpretation, establishing that a 'knowing violation of law' under Nevada's exculpatory statute requires proof of actual knowledge of wrongdoing.[165] Crucially, the *Chur* decision solidified NRS 78.138 as the *sole avenue* for holding corporate directors and officers personally liable:

> "…NRS 78.138(7) provides the sole avenue to hold directors and officers individually liable for damages arising from official conduct."[166]

In *Chur* , the Commissioner of Insurance for the State of Nevada argued that directors of an insurance company did not keep themselves informed about the firm's status and that this lack of oversight contributed to the firm's eventual insolvency.[167] The complaint included

brief asserted that they are liable only if they knew their conduct to violate the law, and Plaintiffs did not contest the point in their reply brief." *Id.*

[162] *Id*. at 1234. In applying the standards the court refers to a Delaware decision, for the proposition that the particularized facts that are required to plead knowledge, could not rely merely on directors serving on a particular committee ("In short, "[a]s numerous Delaware decisions make clear, an allegation that the underlying cause of a corporate trauma falls within the delegated authority of a board committee does not support an inference that the directors on that committee knew of and consciously disregarded the problem.")

[163] *Id*. The court potentially left some room for constructive knowledge, stating that "We doubt that board members are expected to know the minutiae of SEC regulations." *Id.*

[164] *See* John M. Landry, *Tenth Circuit Upholds Nevada Law By Denying Stockholders Standing to Bring Claims on Behalf of Nevada Corporation,* Sheppard (July 1, 2016). https://www.sheppard.com/insights/blogs/tenth-circuit-upholds-nevada-law-by-denying-stockholders-standing-to-bring-claims-on-behalf-of-nevada-corporation

[165] *Id.,* at 74-75.

[166] *Id.,* at 72-73.

[167] *Chur v. Eighth Judicial District Court*, 458 P.3d 336, 341–42 & n.5 (Nev. 2020) (*Chur I*)

allegations that "the Board knew that reliance on the information presented to it ... could not be relied on" and that the directors proceeded "despite this knowledge of the Board regarding the wholly inadequate and inaccurate information provided".[168] Yet, the complaint only pleaded gross negligence — which by itself was sufficient ground for dismissal.[169]

Following *Chur*, Nevada Supreme Court in *Guzman v. Johnson*, applied NRS 78.138(7) to a *self-dealing*, *going private*, transaction.[170] The court dismissed a shareholder class-action lawsuit arising from AMC Networks' buyout of RLJ Entertainment (RLJE), ruling that NRS 78.138(7) precludes entire fairness:

> "Our recent decision in *Chur* guides our analysis here … Importantly, we held that "NRS 78.138(7) provides the **sole avenue** to hold directors and officers individually liable for damages arising from official conduct." … Applying the same rationale, we now conclude that **the inherent fairness standard cannot be utilized to rebut the business judgment rule** and shift the burden of proof to the individual directors. Such a standard **would contravene the express provisions of NRS 78.138(7) and render meaningless the statute's requirement** that the plaintiff must establish a breach involving intentional misconduct, fraud, or a knowing violation of law. "[171]

In deciding that NRS 78.138(7) trumps entire fairness the Supreme Court relied also on Nevada's 2017 amendment:

> "…adhering to the inherent fairness standard would also frustrate the purpose of NRS Chapter 78, which is "for the laws governing domestic corporations to be clear and comprehensible." NRS 78.012(1). While a plaintiff may rebut the business judgment rule's presumption of good faith by, for instance, showing that the fiduciary had a personal interest in the transaction… we

[168] *Chur*, 136 Nev. at 75 n.5,
[169] The Commissioner interpreted *Shoen* language as deciding that exculpation does not trump gross negligence. The commissioner requested to amend the pleading, the court refused. The case was returned to the Nevada Supreme Court in *State Commissioner of Insurance v. Chur*, 141 Nev., Adv. Op. 69, 581 P.3d 441 (2025), (*Chur II*), which held that the district court should have permitted the Commissioner to amend the complaint to plead intentional misconduct or knowing violation of law under the post-*Chur I* standard. The merits outcome on the amended complaint remains unresolved on remand.
[170] *Guzman v. Johnson*, 137 Nev. 126 (2021).
[171] *Id.,* at 132.

> abrogate *Foster* and *Shoen* to the extent they conflict with the plain language of NRS 78.138(7) and our decision in *Chur*."

Law firms responded by distributing memos that Nevada statute trumps entire fairness for directors in self-dealing transactions. [172]

Since exculpation applies only to directors and officers, however, the *Guzman* court did apply entire fairness to the controlling shareholder, AMC. The court decided that "Guzman failed to allege particularized facts to demonstrate a lack of fair dealing or lack of fair price" [173]

Thus, following Guzman 78.138(7) governed directors' liability for self-dealing transactions, but not controlling shareholder liability. Yet, in May 2025, in another intervention, Nevada legislature also closed this path. AB239 limits controlling shareholder liability only to refrain from exerting undue influence on director to breach his non exculpated duty in a transaction from which the controller extracts non ratable benefits.

Under AB239 sufficiently plead breach a controlling shareholder fiduciary duty, a plaintiff must establish each of the following:

1. **Status**—the defendant is a controlling stockholder, a stockholder with the voting power to elect at least a majority of the board. [174]
2. **Predicate breach**—a director or officer breached a fiduciary duty, and the breach is non-exculpated because it involved intentional misconduct, fraud, or a knowing violation of law, exposing the fiduciary to personal liability under NRS 78.138. [175]

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[172] *See e.g., Nevada's Statutory Business Judgment Rule Trumps "Inherent Fairness" Standard, Admits No Exceptions*, Sullivan & Cromwell LLP (Apr. 22, 2021), https://www.sullcrom.com/insights/memo/2021/April/Nevada-Supreme-Court-Holds-Statutory-Business-Judgment-Rule-Applies-to-All-Claims-Against-Corporate-Officers-and-Directors.

[173] *See Guzman*, supra note 14, at 134. Justice Pickering dissented with respect to AMC. In her view, the side deals, the rejection of a majority-of-the-minority provision and a market check, and a downward revision of RLJE's forecasts were sufficient to state fair-dealing and fair-price claims warranting discovery. *Id.*, at 136-138 (Pickering, J., concurring in part and dissenting in part).

[174] Nev. Rev. Stat. § 78.240(5)(a), (6)(d) (2025).

[175] Nev. Rev. Stat. § 78.240(3)(a) (2025); *see* Nev. Rev. Stat. § 78.138(3), (7) (2025) (establishing the business-judgment presumption for directors and officers and limiting their liability to breaches involving intentional misconduct, fraud, or a knowing violation of law).

3. **Inducement**—the controller exerted undue influence over that director or officer with the purpose and proximate effect of inducing the breach.[176]
4. **Conflicted transaction**—the breach directly relates to a contract or transaction in which the controller, or an affiliate or associate, is a party or has a material, nonspeculative financial interest.[177]
5. **Non-ratable benefit and harm**—the transaction confers on the controller a material, nonspeculative, non-ratable financial benefit and inflicts a material, nonspeculative detriment on the other stockholders generally.[178]
6. **Rebutting the committee presumption**—if a committee of only disinterested directors, or the board on such a committee's recommendation, approved the transaction, the plaintiff must also rebut the resulting presumption of no breach.[179]

The practical upshot is that controller self-dealing in Nevada faces minimal judicial scrutiny.[180]

With this line of cases, Nevada exculpation presents exceptionally high pleading bars for shareholders lawsuits. To sufficiently plead self-dealing, for example, while in Delaware the plaintiff could rely on structural aspects of the transaction, in Nevada the plaintiff is required to raise particular facts that show wrongful intent, or otherwise face an early dismissal.

Demand futility is an integral part of shareholder derivative litigation. Shareholders must meet these pleading standards pre-discovery. In Delaware they typically rely on their inspection rights to ask for internal documents such as board minutes. Board minutes could provide information on for example, whether or not the board discussed the risk or ignored it completely. It is less likely, however, that board minutes will provide information that if proven would establish wrongful intent. Furthermore, in Neveda, as the following part shows, the high bar turns close to impossible to meet. Strikingly, on top of its broad exculpation, Nevada does not provide shareholders with access to the books and records, they need. Put differently, in Nevada shareholders are required

[176] Nev. Rev. Stat. § 78.240(3) (2025) (requiring undue influence exerted "with the purpose and proximate effect of inducing" the breach).
[177] Nev. Rev. Stat. § 78.240(3)(b)(1) (2025).
[178] Nev. Rev. Stat. § 78.240(3)(b)(2) (2025).
[179] Nev. Rev. Stat. § 78.240(4), (5)(b) (2025).
[180] *See* Nev. Rev. Stat. §§ 78.138(7), 78.240(3) (2025); Michal Barzuza, *In Nevada, Controlling Shareholders Are Off the Hook*, CLS Blue Sky Blog (Mar. 3, 2026), https://clsbluesky.law.columbia.edu/2026/03/03/in-nevada-controlling-shareholders-are-off-the-hook/.

to plead wrongful intent, even in self-dealing transactions, and with no access to board minutes.

Thus, Nevada corporate law imposes additional, informational impediments to shareholder litigation, which underscores the importance and the implications of the differences in the states' exculpation statutes. These informational impediments make it difficult to succeed *even when the defendants acted with wrongful intention*.

D. Inspection Rights – No Access to Books and Records

Another critical difference between Nevada and Delaware concerns shareholders' rights to inspect corporate books and records. This right, to inspect firms' internal documents, including board minutes, is essential to a shareholder's broader litigation rights. Due to its preliminary stage of the initial motion to dismiss, plaintiff have to meet the demand futility requirement pre-discovery. Inspection rights, and especially access to board minutes, assist plaintiffs to plead demand futility with particularized facts, as required.

In fact, since the motion to dismiss is decided pre-discovery, inspection rights could determine the fate of a case.[181] Access to board meeting minutes, for example, could help the plaintiff in bringing particularized facts that show lack of independence in board decision-making, a lack of oversight, or conflicts of interest.[182] Inspection rights thus are considered an integral part of American corporate law and accordingly are offered to shareholders under Delaware law, the Revised Model Business Corporation Act, and all other states' laws. [183]

In Delaware, under D.G.C.L. § 220 which covers inspection rights,[184] Shareholders must articulate a "proper purpose" under § 220 to get inspection rights; a shareholder seeking to investigate misconduct must show a "credible basis" for a court to infer such wrongdoing.[185] The Delaware Supreme Court has called the credible basis standard in the

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[181] *See generally*, Roy Shapira, *The New Caremark Era: Causes and Consequences*, 98 WASH. U. L. REV. 1857 (2021)

[182] *See id.*, at 1981 (describing how access to board minutes in Marchand assisted plaintiffs to fight dismissal)

[183] *See* Lynn Bai, *Shareholder Inspection Rights: From Credible Basis to Rational Belief*, 10 EMORY CORP. GOV. & ACC. REV. 193 (2023) (reporting how some states require a rational belief which is a lower bar than proper purpose).

[184] DGCL § 220(c)(3).

[185] *Amerisourcebergen Corp. v. Lebanon County Emps.' Retirement Fund*, 243 A.3d 417, 425 (Del. 2020).

preliminary § 220 analysis the "lowest possible burden of proof."[186] In short, the barrier to receiving books and records for Delaware shareholders looking into potential wrongdoing is relatively low. Other states similarly allow shareholder access to firms' books, records, board, and committee minutes, and other actions taken by the board, based on a proper purpose.[187] Some states adopt even a lower burden than Delaware, replacing the "proper purpose" with a "rational belief." [188]

In recent years, Delaware courts have broadened the definition of proper purpose.[189] Delaware case law had also expanded the materials reachable through inspection. Beyond traditional books and records, stockholders could obtain emails and other electronic communications—though only where formal records were lacking and the communications were "necessary and essential" to the stockholder's purpose.[190] Those informal communications proved especially useful to plaintiffs probing directors' independence. [191] S.B. 21 cut that back. Emails and texts now fall outside the defined list of "books and records," [192] reachable only as the "functional equivalent" of formal records the corporation failed to keep, or on a "compelling need" shown by clear and convincing evidence that the records are necessary and essential to a proper purpose. [193]

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[186] *See Seinfeld v. Verizon Commc'ns, Inc.*, 909 A.2D 117, 123–24 (DEL. 2006)

[187] *See* Gail Weinstein, *Section 220 Decisions Amplify Stockholders' Rights to Inspect Books and Records*, HARV. L. SCH. FORUM CORP. GOV. (Oct. 3, 2022), https://shorturl.at/hsL02 (exploring recent § 220 holdings in Delaware and how they reflect a more permissive approach to books and records demands).

[188] *See e.g.*, MODEL BUS. CORP. ACT § 16.02 (AM. BAR ASS'N 2021); *See also* Lynn Bai, *Shareholder Inspection Rights: From Credible Basis to Rational Belief*, 10 EMORY CORP. GOV. & ACC. REV. 193 (2023) (surveying shareholder inspection rights in many states, and findings that some states have broader inspection rights than Delaware).

[189] *See generally*, Roy Shapira, *The New Caremark Era: Causes and Consequences*, 98 WASH. U. L. REV. 1857 (2021)

[190] *See e.g.*, *KT4 Partners LLC v. Palantir Techs. Inc.*, 203 A.3d 738 (Del. 2019) (confirming that emails and other electronic communications fall within the scope of Section 220, but only where "necessary and essential" to the stockholder's purpose, and ordering their production because the corporation conducted its business informally and lacked sufficient formal, board-level records); Amalgamated Bank v. Yahoo! Inc., C.A. No. 10774-VCL, slip op. at 52 (DEL. CH. FEB. 2, 2016); *See also*, Roy Shapira, *The New Caremark Era: Causes and Consequences*, 98 WASH. U. L. REV. 1857 (2021).

[191] *See* Roy Shapira, *Corporate Law, Retooled: How Books and Records Revamped Judicial Oversight*, 42 CARD. L. REV. 1949 (2021).

[192] Del. Code Ann. tit. 8, § 220(a)(1) (2025) (enumerating the formal categories that constitute a corporation's "books and records," a list that does not include emails or other informal electronic communications).

[193] Del. Code Ann. tit. 8, § 220 (2025). A stockholder may reach records beyond the enumerated categories in two situations: where the corporation lacks the specified formal records, a court may order their "functional equivalent" to the extent necessary and essential; and where the stockholder shows a "compelling need" and proves by clear and convincing evidence that the specific records are necessary and essential to a

Nevada turns this posture of permissiveness on its head. It does offer its provision covering the rights of stockholders to inspect company records, which includes procedural requirements[194] for the request and a roughly analogous provision to Delaware, suggestive of a "purpose" requirement.[195] However, the Nevada provision also contains a powerful catch-all. Critically, under NRS 78.257(7) these inspection rights do not apply to any corporation that furnishes its stockholders with a detailed, annual financial statement.[196] In other words, this provision *excuses the vast majority of publicly traded Nevada corporations from respecting stockholder inspection rights*. So long as the firm furnishes its shareholders with the bare minimum required by federal law, it cannot be forced to share internal corporate records.

The Nevada exception allows firms to withhold one trove of vital information—board minutes and communication—from stockholders, even when there may be suspected wrongdoing. This enormously protective policy is almost the opposites of Delaware's rather expansive approach, and it presents yet another barrier to shareholders of Nevada firms who might otherwise seek to exercise their litigation rights in court.

In describing Nevada inspection rights, Aguilar Acknowledges that "Nevada's statute limits books-and-records requests based upon both the scope of information that can be requested and the amount of stock that must be held by a requesting stockholder."[197] Yet, he argues, "it also contains stockholder protections lacking in Delaware's Section 220."[198] Summing the differences, he contests that, in effect, Nevada requires individual stockholders to internalize the benefit or cost they incur in making demands for inspection. But that benefits the *corporation*, not directors."[199] Yet, this description of Nevada inspection rights omits the most significant section in Nevada statute – the N.R.S. 78.257(7) exception, which renders these inspection rights unavailable to publicly

proper purpose. *Id.* § 220(g). That clear-and-convincing standard is higher than the preponderance standard that governed before the amendment.

194 NRS 78.257(1).

195 NRS 78.257(2) (requiring that the stockholder submit an "affidavit to the corporation stating that the inspection… is not desired for any purpose not related to his or her interest as a stockholder.").

196 NRS 78.257(7). The rights might still apply in a narrow case in which the company "shares are not listed or traded on any recognized stock exchange", and the shareholder who request to inspect has 15% of the voting power. *id*.

197 *See* Brief of the State of Nevada, ex rel. Francisco V. Aguilar, Secretary of State of Nevada, in his Official Capacity, as Amicus Curiae, Supporting Appellant and Reversal *Maffei v. Palkon*, C.A. NO. 125, 2024., at 11.

198 *Id.*

199 *Id.*

traded companies that comply with SEC filing requirements, and thus denies inspection rights to *TripAdvisor* shareholders.

Furthermore, given the high requirement that Nevada poses to the plaintiff in the motion to dismiss stage – to argue with particularized facts that directors' or executives' acts amount to intentional misconduct, fraud, or knowing violation of law, the lack of inspection rights is especially damaging.

Importantly, even if directors conducted intentional misconduct, many of these lawsuits might not succeed since the plaintiff has no access to information that could establish particularized facts to support it. As a result, it is not correct that "Nevada law makes directors liable when they know that they have done something wrong. It doesn't impose liability for innocent mistakes."[200] Without inspection rights, however, it is exceedingly hard for plaintiff shareholders to show directors knew that they did something wrong.

E. High Pleading Standards & No Inspection Rights

The combination of high pleading standards with virtually no inspection rights, result in an anomaly. Cases that could pass the motion to dismiss are the ones that include both (1) wrongful intent or knowledge of wrongfulness; and (2) outside information. For example, if there is parallel litigation for securities fraud, conspiracy, insider trading, the plaintiff might have access to relevant information from the parallel litigation. The following cases demonstrate this anomaly. In the first case despite clearly conflicted transactions, and lack of oversight, the plaintiff did not manage to sufficiently plead intentional misconduct fraud or knowing violation of law. In the second case, plaintiffs succeed to meet the pleading standard, since the complaint and the decision relied on information that was exposed in a public fight between Steve Wynn and his ex-wife Elaine Wynn which was also a director in the company and a large shareholder.

The following parts will demonstrate how Nevada's broad exculpation statute, the demand futility requirement to allege non-exculpated claims with particularized facts, and the lack of inspection rights result in the dismissal of cases with extreme facts of directors' and officers' misbehavior. It will also show how cases that succeed are those that have access to information

[200] *See* Aguilar and Edwards, *supra* note 6.

1. *McFarland v. Long* – The Executives Who Paid Themselves

The following case illustrates how Nevada's pleading requirements and lack of shareholder inspection rights can foreclose shareholder litigation even in cases of egregious self-dealing. In *McFarland v. Long*, the United States District Court for the District of Nevada dismissed derivative and direct breach-of-loyalty claims brought by a minority stockholder of Payment Data Systems against the company's officers and its lone outside director.[201] The court accepted as well-pleaded an extreme set of facts: executives setting their own pay, capturing the bulk of the company's gross profits, with no intervention from the outside director.[202] Yet, the court dismissed the complaint because the allegations did not meet Nevada's statutory liability standard which requires *intentional misconduct, fraud, or a knowing violation of law.* [203]

The plaintiff, a minority shareholder in *Payment Data Systems*, alleged a severe breakdown of corporate governance and extensive executive self-dealing. According to the alleged facts following the resignation of four board members,[204] by 2004 the company board included only three members – co-founder Long, the company CEO; co-founder Hoch, the company president; and "just one "purportedly independent" director Kirby."[205] Between 2004 and 2007, Kirby was the only member of the compensation committee. After 2007, however, "the Company's public filings no longer mention the existence of a Compensation Committee"[206] Rather, "beginning in 2007, Kirby simply allowed the executive officers

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[201] *McFarland v. Long*, No. 2:16-cv-00930-RFB-PAL, 2017 WL 4582268 (D. Nev. Oct. 6, 2017). The U.S. District Court for the District of Nevada is the sole federal trial-level court within the state of Nevada. Exercising diversity and supplemental jurisdiction, it interprets Nevada corporate law. Firms may select this court, as part of an exclusive forum bylaw provision, as the sole alternative to Nevada state courts for internal affairs and derivative actions. *See, e.g.,* GPGI, Inc., Proxy Statement (Form DEF 14A) app. A, Bylaws § 9.16 (Apr. 20, 2026).

[202] *McFarland v. Long*, *id.*. The court outlined the standard: "All well-pleaded allegations of material fact in the complaint are accepted as true and are construed in the light most favorable to the non-moving party". *Id.,* at 3; The court applied Nevada's strict statutory framework to those facts, stating: "These allegations do not amount to 'knowledge of wrongfulness' or 'intentional misconduct' sufficient to overcome the strict Nevada statutory bar to liability regarding executive compensation decisions" *Id.*, at 4.

[203] *Id.*

[204] *See* Payment Data Systems, Inc., Current Report (Form 8-K) (Mar. 18, 2003) (filed under previous name Billserv.com, Inc.; subsequently rebranded as Usio, Inc.). The departures followed the collapse of the dot-com bubble, during which the firm stock declined from more than $200 in 2000 to under $2 by 2002.

[205] *McFarland, supra* note 15 at 1.

[206] *Id*, at 1 ("After 2007, the Company's public filings no longer mention the existence of a Compensation Committee.")

themselves to decide how they would be paid."[207] Literally, each executive wrote his own contract, and the other signed it. Through these self-authored agreements, the executives defendants increased their combined stock ownership from a small minority stake to approximately 50% of the firm's cash flow and voting rights.[208] As Kirby "relinquished his fiduciary duties altogether,"[209] plaintiff alleged, to the point he was "failing to exercise any oversight",[210] the executives extracted excessive compensation, awarding "themselves most of Payment Data's gross profits as compensation."[211] Furthermore, in 2013, "in large part due to the compensation payments, Payment Data suffered a net loss of $789,039."[212] By late 2014, the defendants collective voting power dropped under 43% due to personal margin loans and a large acquisition. [213] In December 2014, allegedly to reinstate their corporate control, the executives awarded themselves striking 22 million shares awards. [214] This time the board also awarded Kirby 500,000 shares of common stock, which the plaintiffs allege was a "quid pro quo" for his support of the strikingly large stock awards. [215] Following the 2014 stock award the plaintiff submitted their claim, which the court dismissed.

The court first rejected all claims that pertain to compensation before April 2013 due to Nevada's statute of limitations, which, unlike Delaware's, applies strictly to fiduciary duty claims. [216] Turning to the 2013-2014 compensation packages, relying on *In re Zagg,* the court determines that to find directors liable for monetary damages Nevada law requires *intentional misconduct fraud or knowing violation of law*.[217] Accordingly, the court rejected the plaintiff's argument that entire

[207] *Id.,* at 2.
[208] *Id*, at 2 ("As a consequence of the stock transfers, by December 31, 2012, the Officer Defendants owned 54.13% of Payment Data's outstanding common stock, and had the power to approve any action that would otherwise require approval of a majority of Payment Data's shareholders"); *McFarland Shareholder Complaint*, *supra* note , at 10 (presenting data from the firm's proxy materials which shows that the defendants ownership grew from 8.86% in 2003 to 54.13% in 2012. Out of the 54.13% 4.2 was held by the two defendant executives that were not on the board – Keller and Morrison).
[209] *See McFarland Shareholder Complaint*, *supra* note 16, at 3 ("by 2008 Kirby relinquished his fiduciary duties altogether.")
[210] *McFarland v. Long, supra* note 15, at 2.
[211] *See id.,* at 2.
[212] *See id.,* at 2. During 2013 the executives awarded themselves a striking 74.28% of the Company's gross profits. *Id.*
[213] *See id.,* at 7-8.
[214] *Id.*
[215] *Id*. At 8, 14.
[216] *See id.,* at 9 ("The Court held a hearing on the earlier Motions on January 10, 2017. The Court … dismiss[ed] claims related to conduct prior to April 25, 2013… Plaintiff was permitted to file an Amended Complaint.")
[217] *See id.,* at 4.

fairness applies, determining that "the plain language of N.R.S. 78.138.7(b), a higher requirement, "intentional misconduct" applies to all officer and director claims."[218] Specifically, with respect to the stock award component, entire fairness doesn't apply also because "N.R.S. 78.211(1) states the "judgment of the board of directors as to the consideration received for" shares issued by the Company "is conclusive in the absence of *actual fraud* in the transaction."[219] Namely, with respect to stock-based compensation awards, the threshold in Nevada is even higher: the plaintiff has to argue with particularized facts that the board's actions in awarding the stock amounted to actual fraud.[220]

Deciding on the facts alleged, the court also determine that the plaintiff did not meet Nevada's "heightened pleading requirement," required to establish demand futility.[221] Demand futility requires the plaintiff to show that a majority of the board is not qualified to decide on the demand requirement when the complaint was filed. With the small board, it would have been enough for the plaintiff to raise particularized facts for the lability risk and interestedness of Hoch and Long. Yet, on April 25, 2015, two months prior to the initial fillings,[222] the board nominated two new members – Miguel Chapa and Kirk Taylor.[223] Thus, to meet the majority requirement with a five-member board, plaintiffs had to plead allegations against Kirby in addition to Long and Hoch.[224] With respect to the plaintiff's claim that Kirby faces the likelihood of liability since he failed to implement adequate internal controls, the court decided that since the "plaintiff must allege intentional misconduct, fraud, or a knowing violation of the law…plaintiff's allegations that Kirby failed to implement adequate internal controls do not amount to an adequate showing for demand futility."[225] In other words, the District court here

[218] *Id* ("Plaintiff argues that Delaware's "entire fairness" doctrine applies to the compensation awards. However, the plain language of N.R.S. 78.138.7(b) states that a higher, "intentional misconduct" standard applies to all officer and director claims. Furthermore, as to the December 2014 stock disbursement, N.R.S. 78.211(1) states the "the judgment of the board of directors as to the consideration received for" shares issued by the Company "is conclusive in the absence of actual fraud in the transaction." The Court therefore finds that the plain language of the text of the Nevada statute governs the claims in this case.")
[219] *Id.,* at 6; NRS 78.211(1).
[220] *Id.*, at 6.
[221] *Id.*, at 6.
[222] The initial filling was on June 26, 2015 (After a failure to serve, the complaint was refilled on April 25, 2016), the new directors were appointed April 25 2015.
[223] Payment Data Systems, Inc., Current Report (Form 8-K) (Apr. 24, 2015), https://www.sec.gov/Archives/edgar/data/1088034/000135448815002032/pyds_8k.htm.
[224] *Id.*, at 6.
[225] *Id.*, at 6.

decides that Nevada exculpation statute trumps Delaware *Caremark* duties. Failure to implement internal controls, as blunt as it could be, is not sufficient to plead intentional misconduct.

Furthermore, this failure is not considered intentional misconduct even though Kirby received a stock award himself, which the plaintiff argued was a "*quid pro quo*". Since the plaintiff "failed to plead any other specific facts related to the alleged "quid pro quo,"[226] His allegations, the court decided "do not amount to "knowledge of wrongfulness" or "intentional misconduct" sufficient to overcome the strict Nevada statutory bar to liability."[227] Furthermore, citing *Shoen*, the court decides that these allegations are also not sufficient to show that Kirby was interested since, given the Nevada exculpation statute, "interestedness through potential liability is a difficult threshold to meet."[228]

Finally, the court also dismissed the direct claims against the executives for the December 2014 stock award since the allegations "do not show that the challenged awards were illegal, nor does Plaintiff allege that the awards were prohibited by the Company's charter or bylaws or other formation documents, nor that there were any intentional wrongdoings or fraudulent activities."[229]

Thus, the Court finds that the derivative claim fails because the plaintiff, who lacked access to books and records, did not adequately plead particularized facts demonstrating knowledge of wrongfulness, or wrongful intent.[230] The result speaks volumes. There is no compensation committee, and executives have set their own compensation for years. They extracted the firm's assets and gained control over the company. When their ownership declined, they awarded themselves 22 million shares, 500,000 shares to the only independent director, who failed to exercise oversight. Nevertheless, the Nevada court found that, due to the lack of particular facts that demonstrate intentional misconduct, the case should not proceed.

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[226] *Id.*, at 6.

[227] *Id.*

[228] *Id.*, at 6. ("Because a plaintiff must allege intentional misconduct, fraud, or a knowing violation of the law for directors and officers to be found personally liable for breaches of the fiduciary duty of loyalty, "interestedness through potential liability is a difficult threshold to meet." Id. at 640. Given this standard, Plaintiff's allegations that Kirby failed to implement adequate internal controls do not amount to an adequate showing for demand futility.")

[229] *Id.*, at 4. With respect to the stock award "Plaintiff has not pled fraud, and therefore, the Board's judgment is conclusive that the Company received adequate consideration for the December 2014 stock grant." *Id.*

[230] *Id.*

In Delaware, in *Tornetta v. Musk*, Chancellor McCormick rescinded Elon Musk's compensation package of $56 billion, which the Tesla board awarded him.[231] The compensation was performance-based and approved by shareholder vote. The case that triggered Musk's attacks on Delaware applied the Delaware approach to self-dealing transactions. The Chancellor found that the Tesla board was not independent of Musk, the shareholder vote was not sufficiently informed, and the transaction and the price (the compensation amount) were not fair.[232]

The result of this case stands in stark contrast not only to *Tornetta v. Musk* but also to any straightforward application of Delaware and other states' corporate law. To start, in Delaware, conscious disregard of duties is considered bad faith and thus is not protected by 102(b)(7).[233] Thus, Kirby would have faced liability risk for the purpose of demand futility. Second, since Kirby acted in a controlled mindset, and since he himself was awarded stock, and also since the court found that he did not have any other source of compensation, he could be considered interested or beholden to Long and Hoch, who are self-interested, which is sufficient for the demand futility requirement.

Furthermore, the appointment of the new directors would have been scrutinized under Delaware law. It is possible that the board nominated two members to increase the burden of the plaintiff to meet demand futility requirement. In *Park Emps.' & Ret. Bd. Emps.' Annuity & Benefit Fund of Chi. v. Smith*, the Delaware Court of Chancery held that equitable principles allow the court to measure demand futility against a new, independent board that replaced a conflicted board immediately following a lawsuit's filing.[234] Addressing potential abuses, Vice Chancellor Glasscock affirmed the court's capability to detect and reject strategic, bad-faith corporate manipulation of board composition.[235] If Delaware decides that the small board is the relevant board for demand futility than it would be difficult to argue that a majority of the board would not face a risk of liability.

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231 *Tornetta v. Musk*, No. 2018-0408-KSJM (Jan. 30, 2024).
232 *Id.*
233 *In re Walt Disney Derivative Litigation*, 907 A.2d 693 is (Del. Ch. 2005).
234 *See Park Emps.' & Ret. Bd. Emps.' Annuity & Benefit Fund of Chi. v. Smith*, No. CA 11000-VCG, 2016 WL 3222996, at *12 (Del. Ch. May 31, 2016), *aff'd*, 175 A.3d 621 (Del. 2017). *See also Braddock v. Zimmerman*, 906 A.2d 776 (Del. 2006) .
235 *Id.* On the one hand, the company was planning relisting on Nasdaq, and the new members would have been required to meet the independence majority requirement. On the other hand, the board did not wait for the annual meeting (which would have occurred after the lawsuit was submitted) but rather nominated the directors by filling empty seats.

Even if the new directors count, under Delaware law Kirby breached his duty of good faith, by letting the executives to set their own pay. Applying entire fairness, Long and Hoch's self-dealing was not approved by an independent committee, nor by a vote of disinterested shareholders. Since the process was close to horrific and the judge found that the executives paid themselves most of the company's profits, the transactions are unlikely to pass the entire fairness test, which requires the defendant to prove fair process and fair price.

McFarland demonstrates how courts apply Nevada law with high bars. A member of the compensation committee that abandoned his oversight duties, allowed executives to set their own pay, and did not intervene despite the striking stock and high compensation they awarded themselves, consciously disregarded his duties. Yet the court determined that these alleged facts are not sufficient to establish intentional misconduct fraud or knowing violation of law.

The case also demonstrates the impossibility of Nevada's pleading burden without books and records access. To plead "intentional wrongdoing" with the particularity Nevada courts require, shareholders would need, at the very least, access to board minutes, internal communications, and other corporate documents showing the executives' subjective intent. Nevada provides no such access. Shareholders are expected to plead facts they cannot possibly obtain.

The next case demonstrates how an incidental access to information could result in the plaintiff shareholders successfully pleading demand futility.

2. *Wynn Resorts* – The Exception That Proves the Rule

Commentators frequently cite *Wynn Resorts* as evidence that Nevada is not liability-free. Thus, the Secretary of State and Professor Solomon argue that the case refutes the argument that Nevada law poses significant barriers to shareholder litigation:

> "..litigation against Wynn Resorts, Ltd., survived a motion to dismiss in Nevada state court based on allegations concerning a pattern of sexual harassment. The case later settled for a $41 million cash payment and corporate governance reforms. The fact that there is significant litigation in Nevada highlights that the ability to bring shareholder litigation may be more important than a judgment at trial in such litigation. This may

render many of the distinctions in Delaware and Nevada law less relevant…" [236]

The Secretary of State echoed this view:

> "The description of Nevada as a "no liability" regime, while colorful, remains academic exaggeration. Even Professor Michal Barzuza, a critic on whom Plaintiff relies, implicitly concedes as much in her recent paper describing a derivative lawsuit against the directors of Wynn Resorts, Ltd., that survived a motion to dismiss in Nevada state court based on allegations concerning a pattern of sexual harassment"

This characterization however is misguided. *Wynn Resorts* does not disprove Nevada's barriers to shareholder litigation—it illustrates precisely how insurmountable those barriers are under normal circumstances. It also illustrates that Nevada cases may succeed for reasons that are incidental the case merits. Commentators missed that the court relied on actual information - that showed that directors knew their legal obligations; And, that this information was publicly available due to a public fight between the firm's co-founders. [237]

Facts

The Wynn Resorts litigation arose from allegations that Steve Wynn, the company's founder and CEO, had engaged in a pattern of sexual harassment and assault of company employees. In early 2018, the *Wall Street Journal* reported that dozens of people, among them employees, recounted patterns of sexual harassment and misconduct by Steve Wynn over several decades.[238] In response to the *WSJ* article, Wynn Resort's stock declined more than ten percent in one day and continued to fall in the following days.[239] Less than two weeks after the report, Steve Wynn

[236] *See* Aguilar, supra note - at 7–8; Solomon, supra note 2, at E-24.
[237] *In re Wynn Resorts, Ltd. Derivative Litig.*, Lead Case No. A-18-769630-B, slip op. (Nev. Dist. Ct. Clark Cnty. Sept. 4, 2018). https://www.cohenmilstein.com/wp-content/uploads/2023/07/Wynn-Order-Denying-MTD-Granting-Motion-to-Strike-09062018.pdf
[238] Alexandra Berzon, Chris Kirkham, Elizabeth Bernstein & Kate O'Keeffe, *Dozens of People Recount Pattern of Sexual Misconduct by Las Vegas Mogul Steve Wynn*, WALL ST. J. (Jan. 27, 2018), https://www.wsj.com/articles/dozens-of-people-recount-pattern-of-sexual-misconduct-by-las-vegas-mogul-steve-wynn-1516985953.
[239] Lucinda Shen, *Wynn Resorts Loses $3.5 Billion After Sexual Harassment Allegations Surface About Steve Wynn*, FORTUNe (Jan. 29, 2018), https://fortune.com/2018/01/29/steve-wynn-stock-net-worth-sexual-misconduct/.

resigned as CEO and Chairman of the board of Wynn Resorts.[240] In 2005, Wynn paid a multimillion-dollar settlement to a former employee who alleged sexual misconduct. The court decided that plaintiffs sufficiently alleged that directors knew of the settlement and Wynn's pattern of misconduct *and* they knew about their obligation to disclose this information to gaming regulators and shareholders.[241] Thus plaintiffs met the high burden of pleading knowing violation of law in Nevada.[242]

Why Wynn Resorts survived dismissal?

To plead a knowing violation of law, the plaintiff had to bring particularized facts from which one could reasonably infer not only (1) that the directors violated the law, but (2) that they knew their conduct was wrongful — here, that they knew of their obligation to report and failed to act on it.[243] The second is the harder showing, especially with no access to board minutes. As *Zagg*, discussed above, illustrates, the same standard readily defeats a plaintiff who lacks such a fact: the Tenth Circuit held that signing SEC filings and serving on the audit committee did not support an inference that directors knew disclosure was required, because knowledge of wrongfulness cannot be inferred from board position alone.[244]

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[240] Maggie Astor & Jullie Creswell, *Steve Wynn Resigns From Company Amid Sexual Misconduct Allegations*, N.Y. TIMES (Feb. 6, 2018), https://www.nytimes.com/2018/02/06/business/steve-wynn-resigns.html.

[241] *In re Wynn Resorts, Ltd. Derivative Litig.*, Lead Case No. A-18-769630-B, slip op. (Nev. Dist. Ct. Clark Cnty. Sept. 4, 2018).
https://www.cohenmilstein.com/wp-content/uploads/2023/07/Wynn-Order-Denying-MTD-Granting-Motion-to-Strike-09062018.pdf

[242] Notably, the court also found an independent ground for demand futility based on suspicious, non-10b5-1 insider stock sales executed by five board members after they became aware of the misconduct. *Wynn Resorts*, slip op. at 7. The insider trading allegations make Wynn Resorts an even weaker example for enforcement of fiduciary duties. True, Steven Davidoff Solomon and the Nevada Secretary of State were right to argue that the court decided that independently that directors face a substantial likelihood of liability for failing to respond to sexual harassment allegations and to disclose them. Yet, the additional insider trading allegations contributed to the large amount.

[243] The court applied the ordinary demand-futility standard: a plaintiff "need not show a 'smoking gun of Board knowledge'" and may rely on inferences drawn from circumstantial evidence. *Wynn Resorts, supra* note , at 3–4 (Nev. Dist. Ct. Sept. 4, 2018) (quoting *Rosenbloom v. Pyott*, 765 F.3d 1137, 1155–56 (9th Cir. 2014) (applying Delaware law) (referred to in the order as "*Allergan*")); *see id.* at 3 (drawing the demand-futility framework from *Shoen* and *Aronson*).

[244] *See Zagg*, supra note 160, at 1232–34 (knowing violation and intentional misconduct require knowledge that the conduct was wrongful; declining to decide whether constructive knowledge may suffice, and holding that on these facts such knowledge

Wynn Resorts cleared the bar that *Zagg* did not, because, for incidental reasons, the information was disclosed via SEC filling and press releases. The litigation arose against the backdrop of a bitter public dispute between Steve Wynn and his ex-wife, Elaine Wynn — a company co-founder, former director, and significant shareholder — which generated filings and press releases containing information regarding the sexual harassment. Importantly, in response to Ms. Wynn's accusations that the board had known of the systematic harassment and failed to disclose it to shareholders and gaming regulators, the company made public admissions that established directors' knowledge of their legal obligations to disclose. The court relied on a March 28, 2016 press release to infer the board's knowledge of wrongfulness:

> "According to the Amended Complaint, a March 28, 2016, press release shows that the Board knew of the Settlement, of Steve Wynn's pattern of sexual misconduct, and also that it understood its obligation to report such conduct to gaming regulators and shareholders, stating: '[a]s a leader in a *highly regulated* industry, Wynn Resorts prides itself on transparency and full disclosure to regulators and shareholders. *Allegations made by Ms. Wynn that the company would hide any relevant activities from our regulators are patently false.*'"[245]

This press release demonstrated that: (1) the Board knew of the Settlement; (2) the Board knew of Steve Wynn's pattern of sexual misconduct; and (3) the Board understood its legal obligation to report such conduct to gaming regulators. The court accordingly held that the plaintiffs satisfied demand futility because they alleged particularized facts showing the directors could face liability:

> "…for knowingly failing to take action in the face of credible and corroborated reports that Steve Wynn sexually harassed and abused Wynn Resorts employees, including failing to notify

could not be inferred from execution of SEC filings or audit-committee membership alone).

[245] *In re Wynn Resorts*, supra note 22, at 5. The court found demand futility satisfied because the complaint sufficiently alleged the board knowingly failed to act in the face of corroborated reports, hiding material suitability risks from gaming authorities and shareholders. Notably, the court also found an *independent* ground for demand futility based on suspicious, non-10b5-1 insider stock sales executed by five board members after they became aware of the misconduct. *Id.* at 7.

> regulators of information material to Steve Wynn's suitability as a gaming licensee…."[246]

The key point is what made *Wynn Resorts* lawsuit survival. To plead a knowing violation of law under Nevada's exculpation statute, shareholders must demonstrate not only that directors violated the law, but that directors knew they were violating it. This requires access to evidence of directors' subjective knowledge—board minutes, internal emails, memoranda from counsel, and other internal documents.

Nevada provides no books and records access. In a typical case, shareholders have no means to obtain evidence of directors' knowledge. They cannot access board minutes discussing the misconduct. They cannot review internal legal advice about reporting obligations. They cannot examine communications showing directors' awareness of their duties. Without this incidental access, shareholders cannot plead the particularized facts Nevada courts require.

Wynn Resorts Confirms Nevada's Barriers

Far from contradicting this Article's thesis, *Wynn Resorts* confirms it. The case shows that even with egregious facts—a pattern of sexual harassment, a multimillion-dollar settlement, and failure to comply with gaming regulations—shareholders can proceed only when unusual circumstances force information into public view. The fact that commentators must point to this single, highly unusual case as Nevada's counterexample actually proves the rule: absent a public spectacle that generates press coverage and corporate admissions, Nevada shareholders cannot overcome the pleading barriers.

F. Business Judgement Rule for Takeover Defenses

Nevada is different from Delaware also in the standards that it applies to management use of defensive tactics.

(a) Delaware's Intermediate Standards

Delaware courts apply an intermediate standard of review to managers' use of defensive tactics in the face of takeovers. This has long been a challenging area of conduct to adjudicate: as Professors Ronald J. Gilson and Reinier Kraakman wrote in 1989:

[246] *In re Wynn Resorts*, supra note 22, at 5.

> "The courts have long struggled with a standard for reviewing management's efforts to deter or defeat hostile takeovers… Because evaluating a sale of the company is a complex business decision, management's response to a takeover bid resembles the normal business decisions that the business judgment rule largely insulates from judicial review. At the same time, however, a hostile takeover creates a potential conflict of interest, no matter what response it evokes from management."[247]

Over time, Delaware courts have developed three enhanced standards of scrutiny to review different kinds of corporate conduct resulting from defensive, antitakeover tactics.

In *Unocal v. Mesa Petroleum Co.*, the Delaware Supreme Court held that directors can take defensive actions in the case of a threatened takeover if "they had reasonable grounds for believing that a danger to corporate policy and effectiveness existed" and that the defensive measures taken by the board were "reasonable in relation to the threat posed."[248] The *Unocal* standard aimed to balance a tradition of deference for business decisions and the dangers inherent in conflicted decision-making: as the court described, the approach was "designed to ensure that a defensive measure to thwart or impede a takeover is indeed motivated by a good faith concern for the welfare of the corporation and its stockholders."[249] Another critical concern often discussed by courts here is the concept of "entrenchment:" the idea that boards would take steps to entrench themselves in their positions at the expense of shareholders or the company itself. *Unocal* is still good law and applies where directors attempt to fend off hostile takeovers and threats from activist investors.[250]

Next, in *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, the Delaware Supreme Court held that, in situations where a company's sale or dissolution becomes inevitable, directors are charged with getting the best price possible for shareholders.[251] As the court described, once a change of control was guaranteed, the board's role shifts "from defenders of the corporate bastion to auctioneers charged with getting the best price

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[247] Ronald J. Gilson & Reinier Kraakman, *Delaware's Intermediate Standard for Defensive Tactics: Is There Substance to Proportionality Review*, 44 BUS. L. 247, 247 (1989).
[248] *Id*. at 955, 949.
[249] *Id*. at 955.
[250] *See, e.g., In re Ebix, Inc. Stockholder Litigation*, C.A. No. 8526-VCN, 2016 WL 208402 (Del. Ch. Jan. 15, 2016) (holding that *Unocal* enhanced scrutiny applies to a board that adopted certain defensive bylaw amendments in the face of a threat from an activist investor).
[251] 506 A.2D 173, 182 (Del. 1986).

for the stockholders at a sale of the company."[252] Where *Unocal* applies to boards that still have the opportunity to maintain control, courts apply *Revlon* to review the conduct of boards that engage in the sale process. *Revlon* explicitly contemplates the dangers of boards "playing favorites" in the auction or sale process as the chief danger the test is trying to defend against.[253]

Finally, in *Blasius Indus. v. Atlas Corp.*, the Court of Chancery held that boards must demonstrate a "compelling justification" for any acts interfering with shareholder votes.[254] Protecting the shareholder vote was the critical focus of *Blasius*: as the court held, "[t]he shareholder franchise is the ideological underpinning upon which the legitimacy of directorial power rests."[255] Delaware courts' particular sensitivity to intrusions on the shareholder franchise has drawn out a test for enhanced scrutiny that deals with these inclusions. Indeed, it applies both in the takeover context and outside of it. *Blasius* is important enough that the Delaware Supreme Court has held it is distinguished from the stringent entire fairness standard in the scope of protection it affords, characterizing *Blasius* as a "different and necessary [type] of judicial review."[256] In 2021, in *UIP v. Coster* Delaware Supreme Court applied a unified *Unocal* enhanced scrutiny standard for franchise interventions with "special sensitivity," looking at whether the board's action was a proportionate response to a legitimate threat.[257] *Coster* folded Blasius into a unified *Unocal* standard, with a context-specific inquiry, that preserved the higher scrutiny approach to intervention in shareholder franchise.[258]

These three —*Unocal*, *Revlon*, and *Blasius*—form the basis for "enhanced scrutiny" of director and manager actions taken in the face of threats to corporate control. Over time they folded into an enhanced scrutiny

[252] *Id.*
[253] *Id.* at 184.
[254] 564 A.2D 651, 661 (Del. Ch. 1988).
[255] *Id.* at 659.
[256] Id. at *17.
https://corpgov.law.harvard.edu/2021/07/29/delaware-supreme-courts-response-to-chancery-for-turning-away-stockholders-claims/
[257] *See Marion Coster v. UIP Companies, Inc.*, NO. 49, 2020 (Del. June 28, 2021).
[258] *See* Jay Kesten and Lucy Heady, *Why Coster Failed to Fix Blasius* (working paper 2026) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=6328859. (finding that "After Coster, no board has prevailed following a fully developed application of the hybrid Blasius–Unocal framework on the merits. The shift has changed the vocabulary of judicial reasoning, not the results.")

unified standard that balance business judgment decisions with inherent conflict of interest in change of control. [259]

(b) Nevada and NRS 78.139

Nevada has taken a sharply different approach to reviewing anti-takeover actions by directors and officers. In 1999, the legislature adopted NRS 78.139 concerning the duties, presumptions, and powers of officers and directors confronted with a potential change of control.[260] These provisions developed out of an intent to differentiate from Delaware: they were adopted two years after the decision in *Hilton Hotels Corp. v. ITT Corp.*, in which the District Court of Nevada held that Nevada law was governed by Delaware caselaw (namely, *Unocal* and *Blasius*) in the antitakeover context.[261] In considering the 1999 change, Nevada legislators expressly contemplated the implications of the *Hilton Hotels* decision for their law: "The Executive Committee believes the [*Hilton Hotels*] decision contained language which could be interpreted too broadly and wish[es] to clarify Nevada law by changing NRS 78.138."[262]

The legislature rejected the idea of enhanced liability as long as there is not intervention in shareholder franchise. Thus, the Nevada legislature replaced both the *Unocal* and *Revlon* enhanced standards of scrutiny with simple business judgment deference.[263] This means that directors who engage in defensive tactics receive deference from the court in Nevada, and the balancing analysis set out in *Unocal* for Delaware corporations is wholly set aside. Similarly, even when a sale is inevitable, Nevada directors will still receive business judgment deference, which abrogates any *Revlon*-style obligation to get the best price for shareholders in the state.

Second, Nevada legislature did support the result in *Hilton Hotels* which applied an enhanced standard of review when managers acts interfere

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[259] *See e.g.,* Travis J. Laster, *An Eras Tour Of Delaware Corporate Law*, 50 J. CORP. L. 463 (2025) (detailing how *Coster* formally unified the standards into a singular enhanced scrutiny).
[260] NRS 78.139.
[261] *Hilton Hotels Corp. v. ITT Corp* 9718 F. Supp. 1342 (D. Nev. 1997); *see also* Keith Paul Bishop, *Nevada Legislature Ponders Rejection Of Unocal And Revlon Standards*, C.A. CORP. LAW (March 23, 2017) https://natlawreview.com/article/nevada-legislature-ponders-rejection-unocal-and-revlon-standards?amp
[262] Memorandum from John P. Fowler, Chair, Exec. Comm., BUS. LAW SECTION, STATE BAR OF NEV. TO S. JUDICIARY COMM., STATE OF NEV. 5 (Feb. 3, 1999).
[263] *See* NRS 78.138(3) ("Except as otherwise provided in subsection 1 of NRS 78.139 [concerning board actions that impede the stockholder franchise], 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.")

with shareholder franchise.[264] Yet, rather than adopting Delaware *Blasius* standard which required management to show a *compelling justification* for their actions. Instead, they replaced *Blasius* demanding test with the requirements in *Unocal*. In other words, if directors in Nevada impede shareholders' right to vote, they have the burden to show that i) there was a cognizable threat to corporate policy and that ii) the interference with shareholder franchise was reasonable in relation to the threat posed.[265] When the standard was adopted it was clearly laxer than *Blasius* compelling justification standard.

The following Table presents the differences between Nevada and Delaware with respect to the standards that apply to use of defensive tactics in Nevada and in Delaware. [266]

Table 1: Standards of Review of Managers Use of Defensive Tactics

	Delaware	Nevada
Use of Defensive Tactics	Unocal	BJR
Sale of the Company when sale becomes inevitable	Revlon	BJR
Interfere with Shareholder Franchise	Blasius/Unocal[267]	Unocal

[264] In *Hilton Hotels*, to circumvent the requirement of shareholder vote to implement staggered board, *Hilton Hotels*' board established a sub company, used their votes to implement a staggered board in the sub, and transferred Hilton hotels assets to the sub.
[265] NRS 78.139(1)(a)–(b).
[266] *See also* Sean Donahue et al., *Reincorporating in Nevada: Considerations for Public Companies*, PAUL HASTINGS: INSIGHTS (Sept. 4, 2025), https://paulhastings.com (providing a similar comparison between Nevada and Delaware's standards for change of control).
[267] *See Coster v. UIP Cos.*, 2020 WL 429906 (Del. Ch. Jan. 28, 2020) (stating that Unocal applies when there is intervention in shareholder franchise ...).

G. Nevada *Silverflume* Portal – Marketing the State's "No Liability" Law

Strikingly, Aguilar's statements are also not consistent with the position the state has taken on Nevada Secretary of State portal – *Silverflume*.[268] The memo, which is titled "Why Nevada"?, illustrates the advantages of reincorporating in Nevada relative to Delaware and California. Among these advantages, the legal memo counts as "Director Immunity from Lawsuits."[269] It explains that "Nevada Provides Stronger Personal Liability Protection to Officers and Directors."[270]

The memo further elaborates that in contrast to Nevada, "under Delaware and California law, a director may be held liable for a breach of a fiduciary duty absent intentional misconduct, fraud or a knowing violation of the law." [271] The memo further explains that unlike Nevada, Delaware and California require a shareholder vote for the protections to apply. [272]

IV. IMPLICATIONS

A. Implications to Race to the Top/Bottom Debate – Snowballing to the Bottom

This Part demonstrates that for several reasons, the current equilibrium is particularly unstable. The fragility of the market could result in a snowballing decline, degrading American corporate law to zero accountability. In the current dynamic, Section 1 argues, since Nevada is leading a race to bottom, and Nevada is less restrained than Delaware, the pull to bottom is stronger. Section 2 demonstrates that Delaware responding by getting closer to Nevada, could backfire by further facilitating reincorporations to Nevada.

1. Race to the Bottom – Nevada Leads, Delaware Dragged

[268] *See Why Nevada? Legal Advantages: A Comparison with Delaware and California*, Lionel Sawyer & Collins and Parsons Behle & Latimer Law Firms (August 15, 2012), at 3-4. https://www.nvsilverflume.gov/documents/CorporateLawComparison.pdf
[269] *Id.*
[270] *Id.*
[271] *Id.*
[272] *Id.*

Fifty years have passed since Bill Cary published his seminal article in the Yale Law Journal, where he argued that the state of Delaware was *leading* a race to the bottom in the market for corporate law.[273] The article initiated a central debate in corporate law involving top scholarship by top corporate law scholars. Chicago School scholars Ralph K. Winter, Jr., Frank H. Easterbrook, and Daniel R. Fischel criticized Cary's argument for not considering market forces that penalize firms that choose inferior law and, in turn, Delaware for offering such a law.[274] Roberta Romano argued that Delaware is racing to the top, and Rob Daines found that Delaware firms are traded at a premium.[275] On the other hand, Lucian Bebchuk and others have pointed to the limitations market forces have in disciplining managers.[276]

More recent literature challenged the assumption that competition even exists.[277] Most states, these studies argued, did not establish business courts; their courts decide cases with juries and seldom publish their cases.[278] Similarly, other than Delaware, no state charges a significant incorporation tax,[279] and even if some states did, for the vast majority of them, that would not constitute a significant portion of their budget.[280]

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[273] William L. Cary, *Federalism and Corporate Law: Reflections upon Delaware*, 83 YALE L.J. 663 (1974).

[274] *See* Ralph K. Winter, Jr., *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 J. LEGAL STUD. 251, 254–58 (1977); Frank H. Easterbrook & Daniel R. Fischel, THE ECONOMIC STRUCTURE OF CORPORATE LAW, 212–27 (1991).

[275] *See* Roberta Romano, THE GENIUS OF AMERICAN CORPORATE LAW 14–31 (1993); Roberta Romano, *Law as a Product: Some Pieces of the Incorporation Puzzle*, 1 J.L. ECON. & ORG. 225, 225–32 (1985); Robert Daines, *Does Delaware Law Improve Firm Value?*, 62 J. Fin. Econ. 525 (2001).

[276] *See e.g.,* Lucian A. Bebchuk, *Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law*, 105 HARV. L. REV. 1435 (1992); Lucian A. Bebchuk, Alma Cohen & Allen Ferrell, *Does the Evidence Favor State Competition in Corporate Law?*, 90 CAL. L. REV. 1775 (2002), Lucian A. Bebchuk & Allen Ferrell, *Federalism and Corporate Law: The Race To Protect Managers from Takeovers,* 99 COLUM. L. REV. 1168 (1999) ; Lucian Arye Bebchuk & Allen Ferrell, *A New Approach to Takeover Law and Regulatory Competition*, 87 VA. L. REV. 111 (2001); Oren Bar-Gill, Michal Barzuza & Lucian A. Bebchuk, *The Market for Corporate Law*, 162 J. INSTIT. & THEORETICAL ECON. 134, 134–38 (2006).

[277] *See* Lucian A. Bebchuk & Assaf Hamdani, *Vigorous Race or Leisurely Walk: Reconsidering the Competition over Corporate Charters*, 112 YALE L.J. 553, 563–64 (2002) (arguing that Delaware's dominant position imposes insurmountable barriers to entry); Marcel Kahan & Ehud Kamar, *The Myth of State Competition in Corporate Law*, 55 STAN. L. REV. 679, 684–85 (2002) (arguing that no state competes with Delaware).

[278] *See* Kahan & Kamar, *supra* note 41, at 712–13.

[279] *See id.*, at 687–92.

[280] *Since* Delaware is a small state, incorporation taxes constitute a considerable portion of its annual budget. *See* Roberta Romano, *Empowering Investors: A Market Approach to Securities Regulation*, 107 YALE L.J. 2359, 2429 TBL.1 (1998)

Furthermore, Delaware’s high incorporation tax indicates its market power and the barriers to entry it poses for other states.[281]

The combination of Nevada’s lax laws and the backlash against Delaware created a new dynamic: *Nevada leads a race to the bottom*, and Delaware is dragged along. This difference is significant. Race to the Bottom critiques argued that Delaware incentives are not aligned with the concept of "racing to the bottom”. The argument is less valid in Nevada. Nevada faces fewer restraints and holds more credibility to commit to racing toward the bottom. The Nevada brand is already lax; thus, racing to the bottom could only contribute to its brand. Nevada’s internal politics, as indicated by the state's overall laxity, also supports laxity with respect to corporate law. Lastly, Nevada’s competitive advantage is its commitment to lax law.

Since Nevada lacks Delaware‘s restraints, it is expected to race to the bottom further than any other state. In turn, other states might follow in order to stay in the game. The current race to the bottom could end up much lower than when Delaware was the leader. This race, thus, is significantly more consequential than the one described by Bill Cary.

2. The Risk of Snowballing to the Bottom

The fragility of the market, combined with Nevada law, this Section argues, invokes a risk of snowballing to the Bottom. When Delaware chooses to respond, it is difficult to control the extent of the response.

Should Delaware amend its law or apply its cases to match Nevada protections, or even get closer to Nevada, the first-order effect will, of course, be to establish a much more hospitable environment for directors, officers and controlling shareholders. Delaware, however, may also face second-order risks from this amendment: the bill could potentially create a “snowball effect” by making it *easier* for other Delaware firms to move to Nevada.

Delaware moving in Nevada's direction could have two consequences that would ease reincorporations to Nevada: (a) eroding the value of Delaware's advantages, namely the experienced judiciary and body of case law, and (b) reducing the barriers to reincorporation. With lower constraints and lower costs for the Nevada disadvantage, Delaware may face pressure to move further toward Nevada.

[281] *See* Bebchuk & Hamdani, *supra* note 41.

(a) Eroding Delaware’s Advantages

Moving toward Nevada could have a costly secondary effect—eroding Delaware's advantages over Nevada. Delaware's superiority is highly tied to the value of its courts and specialized judiciary. Another key benefit associated with Delaware, the fact that there are network benefits because most firms are incorporated there, would also decline if more firms move to Nevada.

Yet, Nevada law, by limiting liability to “intentional misconduct, fraud or knowing violation of law,” renders the need for judicial expertise to apply directors' fiduciary duties. It will also erode the value of Delaware's other, related advantages – a rich body of case law, and network and learning externalities. These are not mere speculations. In fact, Delaware's recent amendment has been criticized for diminishing the significance of the state’s judiciary.[282] diminish the significance of Delaware’s judiciary; if, for example, the only way to impose liability on a director or officer is through intentional misconduct, the need for a bench with business-specific expertise is reduced.

Thus, while such changes might stop some firms from reincorporating in Nevada, other firms might find that there are fewer reasons to stay in Delaware and pay Delaware a significantly higher incorporation tax.

(b) Lowering Reincorporation’s Barriers

Second, and counterintuitively, amending Delaware law to align more closely with Nevada law could *facilitate* reincorporations into Nevada. Most recent reincorporations in Nevada were enabled by the votes of the firms’ controlling shareholders. Yet, if Delaware law degrades toward Nevada law, shareholders might feel less reluctant to support such a move. Indeed, given the impediments it poses to shareholder litigation, shareholders were not inclined to vote in favor of reincorporating from Delaware to Nevada. In fact, index funds’ voting guidelines regarding reincorporations specifically require comparison between shareholder protection in both states. For example, BlackRock voting guidelines for reincorporation state that:

> “We will evaluate the economic and strategic rationale behind the company’s proposal to reincorporate on a case-by-case basis. In all instances, we will evaluate the changes to shareholder protections

[282] *See* Charles Elson, *Delaware is Jettisoning its Traditional Approach of Protecting Investors*, FINANCIAL TIMES (July 10, 2024) https://www.ft.com/content/727c3850-335b-4a30-b59b-399e611aec07

under the new charter/articles/bylaws to assess whether the move increases or decreases shareholder protections. Where we find that shareholder protections are diminished, we may support reincorporation if we determine that the overall benefits outweigh the diminished rights." [283]

Based on these guidelines, index funds vote against reincorporation in Nevada. If, however, Delaware changes its law significantly, funds might conclude that the differences between the states are not material, and thus reduce their reluctance to support the reincorporation. With low barriers, more firms might move to Nevada. This, in turn, could pressure Delaware to further relax its corporate laws to discourage reincorporations from the state.

Furthermore, so far, shareholder approval has been a significant impediment to reincorporating in Nevada. So much so that most of the firms that reincorporated relied on the votes of a large controlling shareholder. The group of firms that are controlled by shareholders with high voting rights is limited, and so is the reincorporation to Nevada. If, however, index funds start voting in favor of reincorporation, the threat of mass migration from Delaware could become real, and the pressure on Delaware could mount.

3. Pressure on Delaware to Further Degrade its Law

Suppose that following an amendment to its law, Delaware could find itself in such a situation, with the barriers to reincorporation lowered and the risk of corporate exodus heightened. If more firms reincorporate out of Delaware, officials might be pressured to incorporate additional changes in their corporate law. This sort of degradation could diminish the significance of Delaware's judiciary; if, for example, the only way to

[283] *See* BlackRock Voting Guidelines (January 2025) https://www.blackrock.com/corporate/literature/fact-sheet/blk-responsible-investment-guidelines-us.pdf; *See also* Reincorporation Proposals, ISS Voting Guidelines at 33. 2025 https://www.issgovernance.com/file/policy/active/americas/US-Voting-Guidelines.pdf ("Reincorporation Proposals General Recommendation: Management or shareholder proposals to change a company's state of incorporation should be evaluated case-by-case, giving consideration to both financial and corporate governance concerns including the following: Reasons for reincorporation; Comparison of company's governance practices and provisions prior to and following the reincorporation; and Comparison of corporation laws of original state and destination state. Vote for reincorporation when the economic factors outweigh any neutral or negative governance changes")

impose liability on a director or officer is through intentional misconduct, the need for a bench with business-specific expertise is reduced.

In other words, high standards are difficult to maintain, and the current fragility of the corporate law market makes them even more difficult. Not reacting may result in corporate migrations, but reacting is also not safe, as long as Delaware does not effectively match Nevada protection, as it did with the Paramount decision in response to other states' passage of antitakeover statutes.

B. Implications For American Corporate Law

1. Erosion of Delaware Law

Despite Delaware's dominance, the state's officials have long been aware of and responsive to the threat of losing corporations to other states. They have responded to it more than once by issuing management-protective decisions and amending its corporate law. Delaware has responded swiftly and vigorously to the current pressure, passing S.B. 21, which relaxed the scrutiny of self-dealing transactions.

History of Responding

For example, the Delaware Chancery Court attracted harsh criticism when, amid a hostile takeover wave, Chancellor Allen issued a decision that limited management's use of the poison pill.[284] In *City Capital Associates v. Interco Inc.,* Allen held that managers could use the pill for a limited time and only to solicit a better offer for shareholders or to prove that their long-term plan for the company was superior to the premium the hostile bidder offered.[285] The decision caused Martin Lipton, the inventor of the poison pill, to publish a client memorandum arguing that it was time to consider moving out of Delaware to other states that would better empower managers to defend against hostile bidders.[286] Importantly, in the background, other states have passed antitakeover rules that give management the power to defend against and even block hostile takeovers. The Delaware Supreme Court responded quickly, reversing *Interco* and allowing managers to use the poison pill to "just

[284] *City Capital Associates v. Interco Inc.*, 551 A.2D 787 (DEL. CH. 1988).
[285] *Id.* at 802.
[286] Martin Lipton, *Client Memorandum: The* Interco *Case*, Wachtell, Lipton, Rosen & Katz (Nov. 3, 1988) https://theliptonarchive.org/wp-content/uploads/340-The-Interco-Case-dated-November-3-1988.pdf

say no" to hostile bidders and remain independent at all costs.[287] By applying a just-say-no approach, Delaware's response was sufficiently strong to basically match the protection that antitakeover statutes provided.[288]

A similar dynamic took place in Delaware after *Smith v. Van Gorkom*.[289] In this case, the Delaware Supreme Court declined to give the directors of a target company business judgment deference after they accepted an acquisition that offered a substantial premium over the market price to shareholders.[290] The decision that exposed directors to personal liability in selling their firm at a significant premium was met with fierce criticism from the business and academic community: one preeminent corporate law scholar called Van Gorkom, "surely one of the worst decisions in the history of corporate law."[291] This time, the reaction and correction from the legislature was swift: Delaware adopted D.G.C.L §102(b)(7), which allowed Delaware firms to exculpate directors from personal liability for breaches of the duty of care, with shareholder approval.[292] In the decades since, most firms have adopted such a provision.[293] More recently, in 2022, Delaware amended §102(b)(7) again to extend its optional exculpation provisions to senior officers, mirroring the protections that Nevada law provides to corporate officers.[294]

Indeed, the Delaware legislature has already acted to reverse one of the cases that drew the current wave of criticism. In *West Palm Beach Firefighters' Pension Fund v. Moelis & Co* Delaware Chancery Court invalidated provisions in an agreement between Moelis & Company and

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[287] *See Paramount Communications, Inc. v. Time, Inc.*, 571 A.2D 1140 (DEL. 1989) (holding that the court would defer to managers who genuinely believe that their long-term plan is superior to an outside bid, regardless of the size of the premium it offers to shareholders above the current market price); Guhan Subramanian, *The Disappearing Delaware Effect*, 20 J. L. ECON. & ORG. 32, 52 (2004) (discussing Delaware's "just say no" doctrine); *Airgas, Inc. v. Air Products and Chemicals, Inc.,* No. 649, 2010 (Del. 2010) (holding that Delaware courts may not intervene in the use of a poison pill even when its used by an entrenched, staggered board and thus provides a potent defensive tactic).
[288] *See e.g.,* Emiliano M. Catan & Marcel Kahan, *The Law and Finance of Antitakeover Statutes*, 68 STAN. L. REV. 629 638-639 (2016) (arguing that following Paramount antitakeover statutes did not add additional protection over the poison pill).
[289] 488 A.2D 858 (DEL. 1985).
[290] *Id.*
[291] Daniel Fischel, *The Business Judgment Rule and the Trans Union Case*, 40 BUS. L. 1437, 1455 (1985).
[292] *See* D.G.C.L §102(b)(7).
[293] Sean Sheely & Mark Reindheart, *Delaware's 102(b)(7) Exculpation of Senior Officers - One Year Later*, Jenner & Block (September 2023). https://www.jenner.com/en/news-insights/publications/delawares-102b7-exculpation-of-senior-officers-one-year-later
[294] *Id.*

Ken Moelis, the company founder, CEO, and president.[295] The agreement provided Moelis with sweeping powers over board composition and actions. The court decided that all provisions except for three, violate section 141(a) of the DGCL,[296] which provides that "the business and affairs of every corporation... shall be managed by or under the direction of a board of directors..."[297] However, the court also noted that many of the governance provisions could have been legitimately by incorporating them into the company's charter.[298] The decision triggered a wave of criticism. Opponents argued that the decision would invalidate stockholder agreements that were adopted by many firms and, as a result, would also infuse excessive uncertainty for future corporate decisions and actions.[299] The response of the Delaware Bar was vigorous and swift. On July 21, 2024, the Delaware governor signed a highly controversial amendment to Delaware corporate law. S.B.313 added § 122(18) to the DGCL, allowing corporations to contract with shareholders around Delaware law, including terms that would limit the board's powers to manage the corporation. The swift amendment pre-empted, for the first time in history, a response to the cases from the Delaware Supreme Court. The legislative process and the content of the amendments have sparked considerable discussion and dissent, reflecting concerns about the speed of the legislative process and the potential effects of allowing contracting around Delaware law.[300]

Recent Reaction – S.B.21

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[295] *West Palm Beach Firefighters' Pension Fund v. Moelis & Co.*, NO. 2023-0309-JTL (DEL. CH. FEB. 23, 2024).
[296] *Id.*
[297] D.G.C.L § 141.
[298] *Id.*
[299] *See e.g.*, Katie Tabeling, *House Sends Corporate Law Amendments to Governor,* DELAWARE BUSINESS TIMES (June 20, 2024).(""Investors have invested millions of dollars in corporations and they don't know if the rights they have are valid," Srinivas Raju, a Delaware corporate lawyer who helped draft the bill, told lawmakers.") https://delawarebusinesstimes.com/news/corporate-law-amendments-govenor/;
Tom Hals, *Delaware Law to Allow Big Investors Greater Sway Over US Boards,* RUETERS (June 25, 2024) https://www.reuters.com/markets/us/delaware-law-allow-big-investors-greater-sway-over-us-corporate-boards-2024-06-25/ ("William Chandler, a former chancellor on the court and now with the Wilson Sonsini law firm, urged Delaware House members to ignore academics and judges and follow the state bar, which drafted the bill. "At the moment the corporate market is not feeling too good about Delaware because of the uncertainty and unpredictability of a few decisions by just two judges," Chandler told lawmakers on June 20. "Judges don't need to intrude upon the process of making law."")
[300] *See e.g.*, Cydney Posner, *Delaware SB 313, Controversial Proposed Corporate Law Amendments, Heads to Governor for Signature*, COOLEY PUBCO, (June 25, 2024) https://cooleypubco.com/2024/06/25/delaware-sb-313-to-governor/

Delaware Response to the Current Backlash and Competition has been significant and notable. Chancellor McCormick's January 2024 decision voiding Elon Musk's $56 billion Tesla compensation package[301] prompted Musk to threaten corporate exodus and incorporate new ventures in Nevada and Texas.[302] The other controlling shareholder contemplated or even moved from Delaware to Nevada. Governor Matt Meyer convened urgent February 2025 meetings with corporate lawyers who had represented both Musk and Zuckerberg, resulting in SB21 legislation crafted with remarkable speed.[303] The bill passed March 25, 2025, with Governor Meyer thanking lawmakers for "swift passage of this critical update to Delaware's corporate law, aimed at ensuring the state remains the premier home for U.S. and global businesses." [304]

S.B.21 abandoned the dual-cleansing framework: controlling stockholder transactions (excluding going-private transactions) now escape entire fairness review through *either* special committee approval or majority-of-the-minority ratification, not both. The practical effect is stark. Where *Match* required both procedural safeguards and demanded all committee members be independent, SB21 permits committee approval alone with relaxed independence standards. Controllers gain flexibility previously unavailable: negotiate the deal, then choose your cleansing path.

Furthermore, the amendment eased the requirement for these directors to be independent when approving self-dealing transactions. Under the new law, public company directors swho satisfyexchange listing standards are presumed disinterested; rebuttal requires substantial and particularized facts showing a material interest or material relationship. This is significant. Delaware courts had developed nuanced, fact-intensive independence inquiries. S.B.21 replaces judicial discretion with mechanical reliance on NYSE/NASDAQ rules, which focus primarily on the presence of a financial relationship of the director with the company. The structural bias argument—that controllers' hand-picked directors cannot negotiate at arm's length—has no bite.

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301 *Tornetta v. Musk*, NO. 2018-0408-KSJM (JAN. 30, 2024).

302 *See* Elon Musk, @elonmusk, X, (Jan. 30, 2024, 5:14 PM). https://x.com/elonmusk/status/1752455348106166598

303 Competitive pressure was not the sole driver of SB21. *See* Marcel Kahan & Edward Rock, *The New Political Economy of Delaware Corporate Lawmaking* (2025) (arguing that prominent law firms accumulated lobbying power in Delaware, which they use for the interests of their clients).

304 *See* Office of the Governor, *Governor Meyer Signs SB21 Strengthening Delaware Corporate Law*, DELAWARE NEWS (March 25, 2025). https://news.delaware.gov/2025/03/26/governor-meyer-signs-sb21-strengthening-delaware-corporate-law/

The amendment also narrowed the definition of controlling shareholder by replacing Delaware's contextual control inquiry with bright lines: below one-third voting power cannot establish effective control regardless of circumstances. Between one-third and mthe ajority, control requires also showing that the controlling shareholder possessed power to exercise managerial authority.

S.B.21 made another change that moved Delaware closer to Nevada. Reversing Delaware decisions that recently broadened the access to include electronic communication, the section excluded emails and texts from the sources that shareholders may have access to. Board minutes however are sanitized. Real deliberation—conflicts, doubts, pressure—shows up in emails and texts. The amendment also increased the procedural requirements for accessing books and records. Previously, courts required only a credible basis to suspect wrongdoing for investigating possible mismanagement. A credible basis was deliberately modest—Delaware courts wanted pre-litigation fact-finding to screen weak claims before filing. Under the amendment shareholders must describe the purpose and records with "reasonable particularity," and records must be "specifically related" to the proper purpose.

2. Further Degradation of Nevada Law- an Arms Race to the Bottom

Nevada didn't let the Delaware amendment pass with no reaction. Rather, Nevada just codified controlling shareholder duties in A.B. 239, which took effect May 2025. The move matters because Nevada had virtually nothing on the books about controllers before—courts just borrowed Delaware law when these cases came up. Now, Nevada's put down a marker: we're not Delaware, and we're not pretending to be.

Under A.B. 239, the controllers' fiduciary duty is highly limited. The controller's only duty is to avoid pressuring directors or officers into breaching their non-exculpated fiduciary obligations. The controller's duty only triggers when three things happen: the controller pressures a fiduciary, that fiduciary breaches a duty badly enough to face personal liability under Nevada's exculpation statute, and the controller walks away with something the other shareholders don't get. transaction.

Nevada already protects directors from liability unless they commit intentional misconduct, fraud, or knowing law violations. The new controller provision ties into that same framework. Thus, with this amendment, Nevada practically extended its exculpation statute to also protect controlling shareholders. The implications are substantial. In Delaware and in other states, exculpation applies only to directors and officers. Extending Nevada exculpation to controlling shareholders results in minimal judicial scrutiny of self-dealing transactions.

3. Texas (and potentially other states') Law

Recently, Texas has entered the market by proactively catering to firms. Texas established a new system of specialized business courts and publicized them extensively.[305] The business courts have several features designed to attract incorporations: concurrent civil jurisdiction over matters exceeding $5 million in controversy, including derivative proceedings, corporate governance actions, self-dealing claims, and other corporate disputes, with both injunctive and remedial powers.[306]

Texas has attracted only a few corporations so far, but the state has acted swiftly to amend its corporate law. To attract incorporations, Texas moved closer to Nevada's approach. Texas adopted Nevada's exculpatory statute as an opt-in limitation on liability.

Furthermore, the state also introduced new provisions, including eligibility requirements for derivative litigation that further restrict shareholder enforcement.[307] Thus, Texas is not only piggybacking on Nevada but also promotes other innovations that could further degrade corporate law and accountability.

4. The Elimination of American Corporate Law

The recent dynamics have fundamental implications for American corporate law. Scholars, practitioners, and policymakers are debating the desirability of SB 21, with many raising concerns about Delaware's reduced scrutiny of self-dealing transactions. Yet Nevada offers far more dramatic limitations on such scrutiny.

As demonstrated above, Nevada law results in zero judicial scrutiny of most self-dealing transactions. Also in self-dealing transactions, plaintiff shareholders must plead particularized facts showing intentional wrongfulness, with no inspection rights to obtain the necessary evidence.

Nevada also replaced Delaware's *Unocal* and *Revlon* standards with the business judgment rule, eliminating scrutiny of management's use of defensive tactics. The implications are striking: Nevada managers could sell the company to the lowest bidder simply because that bidder retains

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[305] TEX. GOV'T CODE § 25A.
[306] TEX. GOV'T CODE §25A.008(A)(4).
[307] *Id.*

them in office, and shareholders could not obtain an injunction to block the sale.

Finally, Nevada applies its exculpation statute to directors' oversight duties. Conscious disregard—which Delaware treats as a breach of the duty of good faith and therefore a breach of the duty of loyalty—receives protection under Nevada's exculpation statute. In sum, all of Delaware's enhanced and intermediate scrutiny standards are replaced by either the business judgment rule or Nevada's exculpation statute.

Historically, when Delaware faces competitive pressure, it adjusts its law to match other states' standards. If history repeats itself, SB 21 will not be the end of changes to Delaware law. The benchmark Delaware may move toward, however—Nevada law—has practically eliminated causes of action for breaches of fiduciary duties. Firms leaving Delaware may cite increased uncertainty as their motivation, but Nevada law offers a problematic solution that eliminates accountability rather than providing clarity.

C. Welfare Implications

1. Value of Nevada Firms

Comparison of Nevada and Non-Nevada Firms

The question of whether Nevada firms have a different value than non-Nevada firms remains inconclusive in empirical literature. Daines's seminal work identified a significant incorporation premium for Delaware firms, suggesting that sophisticated corporate law regimes generate measurable shareholder value.[308] Subramanian's subsequent reexamination, however, challenged this finding, demonstrating that the Delaware premium largely disappears in subsequent years.[309] Against this backdrop, Barzuza and Smith's investigation of Nevada incorporation found no statistically significant premium or discount, suggesting that Nevada's distinctive legal regime—despite its notable departures from Delaware law—produces neutral valuation effects.[310]

[308] Robert Daines, *Does Delaware Law Improve Firm Value?* 62(3) J. FIN. ECON. 525 (2001).
[309] Guhan Subramanian, *The Disappearing Delaware Effect*, 20 J.L. ECON. & ORG. 32 (2004) (showing that this effect (1) existed only for small firms (2) decreases and dissapears in subsequent years).
[310] *See* Barzuza & Smith, *supra* note 1, at 3598, 3618-20 & Tbl 11 (finding no statistically significant effect for the valuation of NV firms and stating that "Overall, our valuation findings are inconclusive and make it difficult to draw strong conclusions regarding the efficiency of the decision to incorporate in Nevada.").

More recently, Eldar has enriched this picture further, identifying a premium for certain subsets of Nevada firms, though the heterogeneity of these effects raises questions about their generalizability.[311]

Yet the entire enterprise of testing for incorporation value through market valuation studies confronts several fundamental methodological obstacles that may render the results unreliable or, at a minimum, require substantial interpretive caution. First, survivorship bias presents a particularly acute problem in the Nevada context. Nevada-incorporated firms exhibit exceptionally high failure and delisting rates compared to their Delaware and domestic-state counterparts.[312] Thus, when one measures firm value using existing publicly traded companies, one necessarily examines a selected sample—those firms that survived long enough to appear in the dataset. This creates a systematic upward bias in measured valuations: we observe only the "winners," while the numerous failed Nevada incorporations are entirely absent from our sample. The resulting estimates, therefore, may tell us more about the characteristics of surviving firms than about the causal effect of Nevada law itself. This selection problem is not merely technical; it fundamentally undermines the ability to make inferences about Nevada's value proposition for the average incorporating firm.

Second, the distinctive size characteristics of Nevada firms amplify measurement sensitivity to an unusual degree. Nevada attracts predominantly small-cap and micro-cap companies—firms whose market capitalizations place them in the lowest quintiles of publicly traded entities.[313] For such firms, even modest absolute changes in market value translate into large percentage movements in valuation metrics. This size effect becomes particularly problematic when employing Tobin's Q as a valuation measure, as is standard in the incorporation premium literature. Tobin's Q (the ratio of market value to replacement cost of assets) is notoriously sensitive to measurement error in small firms, where both the numerator (market capitalization) and denominator (asset values) may be subject to considerable noise. Small denominators amplify any imprecision in the numerator, potentially generating large swings in the Q ratio that reflect measurement artifacts rather than genuine economic differences. This statistical property means that Nevada studies face inherently greater variance in their dependent

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[311] *See* Ofer Eldar, *Can Lax Corporate Law Increase Shareholder Value? Evidence from Nevada,* 61(4) J.L. & ECON 555 (2018)

[312] *See* Barzuza & Smith, *supra* note 1, at 3599-3601 & Tbl. 2 (Nevada firms account "for roughly 10% of all Compustat exits from 2007 to 2011").

[313] *See* Barzuza & Smith, *supra* note 1.

variable, reducing statistical power and increasing the likelihood of both false positives and false negatives.

Third, Nevada firms exhibit distinctive financial reporting patterns that complicate valuation comparisons. Empirical evidence suggests that Nevada-incorporated companies demonstrate significantly higher rates of accounting restatements.[314] The high rate of restatements means that measured market values for Nevada firms may not be directly comparable to those of Delaware or domestic-state incorporations, as the information environment itself differs systematically across incorporation regimes. Put differently, restatement typically correct mistatments, where firms report excessively good performance.

Affects of Legal Amendments – Natural Experiments

These cumulative methodological challenges suggest that a more promising empirical strategy would focus not on aggregate valuation effects but rather on the changes to Nevada law, as an exogenous shock on firms value. Rather than asking whether Nevada incorporation correlates with higher or lower Tobin's Q—a question beset by selection, measurement, and comparability problems—we should instead examine how particular Nevada legal provisions affected identifiable corporate behaviors and outcomes. Event studies on the adoption of specific Nevada provisions, difference-in-differences designs that exploit variation in firms' exposure to particular rules, offer more methodologically sound approaches to understanding Nevada's value proposition.

Two studies have done exactly that. Studying the effect of the 2001 amendment that applies the Nevada exculpation statute to all firms,[315] Donelson and Yust found a decline in shareholder value and in the operating performance of Nevada firms.[316] Applying a similar research design to study the effect of the 2017 amendment, which codified the internal affairs doctrine,[317] finds a significant decline in the value of Nevada firms in response to the passage of the law, as well as long-term

[314] *See id.*
[315] *See supra* Part III.B.
[316] Dain Donelson and Christopher G Yust, *Litigation Risk and Agency Costs: Evidence from Nevada Corporate Law,* 57 J. OF L. & ECON. 747.
[317] *See supra* Part III.B.

underperformance. Nevada firms underperformed for two years following the reform. [318]

Finally, as discussed above, in 2025 Nevada amended its law to extend exculpation to controlling shareholders. This amendment which most likely will impact Nevada firms, is not factored yet in assesments of Nevada firms value.

2. Types of Firms that Nevada Attracts

Nevada firms are different in other measures of corporate governance. A study by David Smith and this author studied the reporting practices of Nevada firms.[319] The study finds that Nevada firms have a significantly high frequency of accounting restatements. That is, Nevada firms are more inclined to amend their reported performance figures retroactively, typically to admit that they performed worse than they originally reported. We also find that Nevada firms ranked as aggressive on an accounting metric derived from individual firms' audit integrity.

Nevada firms' increased incidence of financial restatements relative to firms in other states is consistent with the theory that Nevada attracts firms with higher agency costs. Two recent studies also support this theory. In the first study, researchers found that a disproportionately high number of Nevada firms were subjected to SEC trading suspensions in 2013 and SEC trading suspensions of marijuana stock at the beginning of 2014.[320] In the second, Professor Jordan Siegel examined cross-mergers of foreign companies into U.S. shells. Siegel found that "[a]doption of Nevada's corporate law is associated with some of the most serious restatements involving real corporate governance and data manipulation problems."[321] Overall, the evidence is consistent with the hypothesis that Nevada's lax laws attract at least some questionable firms.

It is frequently argued that variations in corporate law are desirable since "one size does not fit all". Yet, this assertion assumes that firms will self

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318 Benjamin Bennet, Rene M. Stulz and Zexi Wang, *What are the Costs of Weakening Shareholder Primacy? Evidence from a U.S. Quasi-Natural Experiment,* working paper (2025). https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5252884

319 *See* Barzuza & Smith, *supra* note 1.

320 A.J. Cataldo II, Thomas Miller, Lori Fuller & Brian J. Halsey, *The U.S. State of Nevada Consumes a Disproportionate Share of U.S. Securities and Exchange Commission Regulatory Resources*, 5(8) INT. RES. J. OF APP. FIN. 1222 (2014).

321 Siegel, J.I., & Wang, Y. (2012). "Cross-border reverse mergers: Causes and consequences." Harvard Business School Strategy Unit Working Paper No. 12-089, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2192472.

select efficiently. The evidence seems to suggest otherwise. Firms that need constraints are more likely to opt for lax law. [322]

D. Policy Implications

1. Implications for the Desirability and Potential Form of Federal Intervention

(a) Reconsidering Federal Intervention

Federal intervention has been proposed before as a measure to restrain a race ot the bottom, but it comes with well-known costs.[323] Federal standards reduce the information generated by state experimentation. They eliminate the flexibility states have to respond to changing business conditions. They also lack states' incentives to invest in their legal system to attract and retain corporations, potentially diminishing the benefits of regulatory competition.[324]

The analysis in this Article however, exposes a significant risk of continued degradation in corporate law. Nevada's framework forecloses shareholder litigation, and the competitive pressure it creates threatens to drag Delaware and other states toward lax standards. The market shows no mechanism for self-correction or even to restrain a potential snowballing to the bottom.

Thus, the analysis here requires an investigation into the costs and benefits of federal intervention compared to the costs and benefits of the recent changes to American Corporate law.

(b) Considering Federal Minimum Standards Based on Delaware Law

In addition, this Article proposes for consideration a novel approach for federal intervention in corporate law: adopting Delaware's current

[322] *See* Michal Barzuza, *Inefficient Tailoring: The Private Ordering Paradox in Corporate Law*, 8 HAR. BUS. L. REV. 131–181 (2018) (developing a theory and discusses evidence of inefficient self-selection.)
[323] *See, e.g.*, Ralph K. Jr. Winter, *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 J. OF LEG. STUD. 270, 291 (1977) ("Because federal legislation does not face direct competition with other legal systems, the behavior of investors under differing rules cannot be observed and we can only theorize about which rules optimize the underlying economic relationships.")
[324] *See* Roberta Romano, THE GENIUS OF AMERICAN CORPORATE LAW 14–31 (1993).

fiduciary duties and exculpation standards as federal minimums. Specifically, Delaware law—including the standards governing self-dealing transactions under enhanced scrutiny, *Unocal* and *Revlon* for takeover, and exculpation statute—should serve as the floor. States would remain free to provide greater protections for shareholders but could not fall below Delaware's baseline.

This approach maintains the advantages of the current system. By piggybacking on Delaware law, it benefits from Delaware's accumulated case law, institutional expertise, and responsiveness to corporate developments. States can still experiment and differentiate, but only in a way that strengthens not weakens, shareholder protections.

Second, minimum standards identical to Delaware law could boost shareholder protections. Delaware currently faces pressure to degrade its standards to compete with Nevada and other states.[325] A federal floor would remove this pressure. Delaware could continue to refine its law through judicial development without fear that maintaining rigorous standards will cost it incorporations. The competitive dynamic would shift: states would compete by offering additional protections rather than by racing to the bottom. The recent enactment of S.B, 21 demonstrates this. Delaware narrowed judicial scrutiny of self-dealing transactions in response to competitive pressure. A federal floor set at Delaware's pre-or even post-S.B.21 standards would cap the potential degradation while preserving state flexibility to innovate in shareholder-protective directions.

This proposal is not without costs. It would constrain state autonomy and reduce experimentation and differentiation in lax directions. Some argue that such differentiation allows efficient sorting—firms with low agency costs can choose lax jurisdictions, while firms that need credible commitment choose stricter ones. But the evidence suggests otherwise. Nevada attracts firms with aggressive accounting practices and frequent restatements, indicating high rather than low agency costs.[326] The market does not appear to be sorting efficiently.

To sum up, federal minimum standards based on Delaware law would limit degradation while preserving the core benefits of federalism in

[325] *See, e.g.,* Roberta Romano, *Competition for Corporate Charters and the Lesson of Takeover Statutes*, 61 FORDHAM L. REV 843, 859-860, ("[I]t is arguable that Delaware would not have enacted any takeover legislation in the absence of state competition.")
[326] *See,* Barzuza & Smith, *supra* note 1 ; Michal Barzuza, *Inefficient Tailoring: The Private Ordering Paradox in Corporate Law*, 8 HAR. BUS. L. REV. 131–181 (2018).

corporate law. It offers a middle path between the costs of comprehensive federal corporate law and the risks of unrestrained state competition.

2. The Standard of Review that Applies to Reincorporation

The analysis has implications for the standard of review that should apply to reincorporations. This question was at the center of the recent case regarding TripAdvisor reincorporation from Delaware to Nevada.

TripAdvisor Reincorporation

TripAdvisor is one of the world's largest travel websites, with online visitors reaching hundreds of millions annually.[327] A Delaware corporation, it is owned and controlled by its Delaware parent company, Liberty TripAdvisor Holdings.[328] Liberty, in turn, is controlled by its CEO and Chairman, Gregory Maffei, who controls 43% of its voting power.[329] Maffei is thus the controlling shareholder of both Liberty and the TripAdvisor subsidiary. The decision to convert to a Nevada corporation followed several litigations against Maffei in Delaware courts. Late in 2022, TripAdvisor's management presented to its board about a potential conversion to a Nevada corporation.[330] Among the advantages discussed were the following: TripAdvisor's management believed that "Nevada law generally provides greater protection from liability to the Company and its directors and officers, than Delaware law," and also pointed to the fact that Delaware's *Revlon* duties obligating boards to get the highest price available in a sale context did not exist in Nevada.[331] Also discussed was the extensive litigation that Maffei and Liberty had faced in Delaware in the preceding years, along with the "substantial time and expense" this litigation caused.[332]

TripAdvisor's proxy materials to the shareholders who were asked to vote on the conversion similarly stated, "We believe, in general, Nevada law generally provides greater protection from liability to the Company and its directors and officers, than Delaware law."[333] It also disclosed that "[t]he Redomestication will result in the elimination of any liability of an

[327] TripAdvisor Inc., *Annual Report* (Form 10-K) (2023), U.S. SECURITIES AND EXCHANGE COMMISSION. (February 16, 2024).
[328] *Palkon v. Maffei*, C.A. No. 2023-0449-JTL , at 7 (Feb. 20, 2024).
[329] *Id.*
[330] *Id.*
[331] *Id.* at 10.
[332] *Id.* at 9. Liberty has dealt with at least eight stockholder lawsuits in Delaware since 2012.
[333] *Id.* at 10.

officer or director for a breach of the duty of loyalty unless arising from intentional misconduct, fraud, or a knowing violation of law."[334] In June 2023, a majority of the stockholders approved the redomestications to Nevada. However, this result was driven by Maffei's control of Liberty and Liberty's control of TripAdvisor. Only about 5% of minority TripAdvisor shareholders (unaffiliated with Liberty) and about 30% of minority Liberty shareholders voted to approve the conversion.[335]

Chancery Court Decision

Plaintiff Shareholders filed a lawsuit in the Delaware Court of Chancery to challenge the conversion transaction, asserting that it was self-interested and failed to meet the scrutiny imposed by the *entire fairness review*.[336] The plaintiffs sought an injunction of the transaction and damages.[337] The plaintiffs argued that "Nevada law offers fewer litigation rights to stockholders and provides greater litigation protections to fiduciaries like the directors and the CEO/Chair."[338] Thus, they argued Maffie is using his control "to force the company and its minority investors to give up all of Delaware law's protections, with the sole purpose being to insulate the conflicted controller and insiders from accountability.[339]

After a hearing on the motion to dismiss, Vice Chancellor Travis Laster issued an opinion on *Palkon v. Maffei* in February 2024.[340] The court denied the injunction but allowed the damage claim to proceed.[341] Vice Chancellor Laster accepted the argument that material changes to litigation rights could constitute non-ratable benefits to insiders. Since "[e]conomic rights and governance rights remain meaningful only to the extent that litigation rights back them up,"[342] Laster determined that "[f]rom the perspective of equity, Delaware law should be just as concerned about transactions that reduce stockholders' litigation rights as it is about transactions that reduce their economic rights or governance rights."[343]

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334 *Id.*
335 *Id.* at 11.
336 Complaint at 3, *Palkon v. Maffei*, C.A. NO. 2023-0449-JTL (Feb. 20, 2024).
337 *Id.* at 35.
338 *Palkon v. Maffei*, C.A. No. 2023-0449-JTL at 7 (Feb. 20, 2024).
339 *Id.* at 7.
340 *Palkon v. Maffei*, C.A. No. 2023-0449-JTL (Feb. 20, 2024).
341 The opinion denied the plaintiff's request for an injunction, effectively allowing the conversion to proceed *Id.* at *51*–52 (stating that injunction is provided only when "other remedies are inadequate.", and here monetary damages could provide "fully adequate remedy").
342 *Id*. at 46–47.
343 *Id*. at 47.

With respect to whether Nevada law materially reduces litigation rights, based on statements from Tripadvisor management and the firm proxy materials, Laster decided that "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."[344] That is, that Nevada's "litigation rights are inferably less than what Delaware provides", was sufficient for the purpose of the pleading stage. If the case proceeds to hearings, and defendants still "wish to show that Delaware law and Nevada law are equivalent," Laster decided, "they can attempt to make that showing at a later phase of the case." [345]

Delaware Supreme Court Grants Interlocutory Review

On April 16, 2024, the Supreme Court of Delaware granted the defendant's motion for an interlocutory appeal.[346] In a five-page order, Justice Karen L. Valihura wrote that the Chancery decision "involves a question of law regarding reincorporation in another jurisdiction that was decided for the first time in this state."[347] Thus, and since "Certainty regarding the standard of review applicable to a decision to reincorporate in another jurisdiction would be beneficial," the "application for interlocutory review meets the strict standards for certification under Rule 42(b)."[348] Delaware Supreme Court denies most requests for interlocutory appeals. The order reflects the Supreme Court's view that the questions require expedient review and clarity from Delaware courts. Furthermore, the court scheduled oral hearings *en banc* for October 2024. The court also allowed the Secretary of State of Nevada, Francisco V. Aguilar, to submit an amicus curiae in the case.

Delaware Supreme Court Applies the Business Judgement Rule to TripAdvisor Reincorporation

On February 4, 2025, the Delaware Supreme Court issued its decision in Maffei v. Palkon. Reversing the Chancery Court decision, the court decided that Tripadvisor reincorporation to Nevada should be governed by the Business Judgement Rule. Yet, the court made no determination regarding the differences between Nevada and Delaware Corporate laws. Rather, the court adopted a temporal distinction between future and past liability. Reviewing Delaware precedents, the Delaware

[344] *Id*. at 47
[345] *Id*. at 47.
[346] *Id*.
[347] *Id*., at 6
[348] *Id*., at 6

Supreme Court concludes that "temporality weighs heavily in determining materiality here and, ultimately, whether a non-ratable benefit exists that triggers entire fairness review."[349] Plaintiffs did not argue that Tripadvisor attempts to avoid liability for past acts but rather that it seeks bars from litigation with respect to future acts. Thus, that was sufficient for the Supreme Court to determine that in this case the reincorporation does not result in non-ratable benefits that are sufficient to trigger entire fairness.

Yet, if a firm reincorporates in Nevada in the face of a pending case, the question will arise again: What is the standard that should apply to reincorporation from Delaware to Nevada?

Implications for Reincoporations from Delaware to Nevada

The findings offered by this article suggest that when all is said and done—the differences in shareholder rights and managerial insulation between Nevada and Delaware are too vast to be immaterial. Nevada's exculpation statute, as applied by Nevada courts, combined with its limited inspection rights, results in the dismissal of cases that could not be dismissed under Delaware law. Nevada antitakeover statute applies the business judgment rule, and explicitly rejects Delaware standards. Shareholders' litigation rights are diminished as a result of reincorporation in Nevada. Thus, courts, at the very least, should apply the entire fairness standards to reincorporation to Nevada. To be sure, under S.B.21 it will be easier to pass this scrutiny, but even weaker scrutiny is better than nothing. Optimally, to avoid a result like in TripAdvisor that only the controlling shareholder supported the reincorporation, courts or federal law should require a supporting vote by a majority of the minority of the shareholders as a condition for reincorporation. In fact, the promoters of S.B.21 advocated a rule that requires an approval of a majority of minority ("MOM") when there is a statutory requirement for shareholder vote.[350] Since reincorporation statutorily requires shareholder approval, requiring MOM for reincorporation is consistent with that approach.

[349] *See Maffei v. Palkon* decision (No. 125, 2024 (Del. Feb. 4, 2025)),

[350] See Lawrence A. Hamermesh, Jack B. Jacobs, and Leo E. Strine, Jr., *Optimizing The World's Leading Corporate Law: A 20-Year Retrospective and Look Ahead*, 77(2) Bus.L 321 (2022). (advocating applying MFW requirements - a supporting vote by Majority of Minority, and by an independent board committee - "when a statute requires the approval of both the board and the stockholders.")

V. CONCLUSION

This Article exposed the true content of Nevada corporate law. It provides the first systematic analysis of Nevada's statutory amendments, legislative history, and case law. The analysis shows that Nevada corporate law forecloses shareholder litigation. Plaintiff shareholders must plead intentional wrongdoing to survive dismissal, yet Nevada uniquely bars access to the books and records necessary to meet this burden. Nevada courts apply the exculpation statute broadly, even to extreme facts like insiders signing each other's self-written compensation contracts. The state also gives directors near-absolute latitude to use defensive tactics. Nevada law was shaped by what Delaware doesn't provide—the legislature repeatedly amended the law to ensure more protections from liability than Delaware, seizing each Delaware scrutiny standard as an opportunity to differentiate.

The Article's second contribution analyzes the market for corporate law in light of the current competitive pressure on Delaware. Nevada's rise creates a fragile market vulnerable to degradation. Nevada's incentives and institutional factors are less restrained than Delaware's. As Delaware faces pressure to retain incorporations, it may degrade its standards to approach Nevada's lax framework. Delaware's recent enactment of SB 21, narrowing judicial scrutiny of self-dealing transactions, demonstrates this risk. Other states like Texas are already copying Nevada's approach, potentially accelerating the race. The combination of Nevada's strategy with competitive pressure on Delaware could result in a significant degradation of American corporate law.

The welfare implications are concerning. Nevada attracts firms with aggressive accounting practices that frequently restate earnings, suggesting high agency costs. The market does not appear to be sorting efficiently—instead, lax laws attract precisely the firms that most need oversight. With Nevada's recent amendment, controlling shareholders will benefit from Nevada's broad exculpation. This could lead to highly inefficient transactions driven by insiders' private benefits.

Given these conditions, federal intervention may be warranted. This Article proposes assessing the costs and benefits of different forms of federal intervention, including a novel one: adopting Delaware's fiduciary duties, standards of review, and exculpation statute as federal minimums. This approach would limit degradation while preserving the core benefits of federalism in corporate law. By piggybacking on Delaware law, it would benefit from Delaware's institutional expertise and responsiveness. It would also remove the competitive pressure currently pushing Delaware toward lax standards.

Nevada's emergence marks a turning point for American corporate law. Without intervention, the market for corporate law may continue its descent, with consequences extending beyond corporate governance to capital markets and the broader economy. Understanding what Nevada law actually provides—and what that means for the future of corporate law—is essential to addressing this challenge.

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