

How Reincorporating In Texas May Alter Earnout Disputes

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Delaware companies are reincorporating in Texas — 10 in the first half of 2026, more than in all of 2025.

Many blame *Tornetta v. Musk* for this so-called DExit. After the Delaware Court of Chancery rescinded his \$56 billion Tesla compensation package in 2024, Elon Musk tweeted: "Never incorporate your company in the state of Delaware."

The DExit debate has focused on shareholder suits against companies. Far less attention has gone to what the move means for disputes between M&A counterparties.

Many merger agreements contain earnout provisions, making part of the purchase price payable after closing if the acquired business meets specified targets like revenue, regulatory approval or product milestones.

Earnout disputes often lead to high-stakes litigation, especially where the seller's contingent payment depends on postclosing performance by a company now controlled by the buyer — which also pays that consideration.

How will the newly established Texas Business Court — which took its first cases in September 2024 — handle these disputes?

Well, it depends. But both the M&A lawyers who draft merger agreements and the litigators who try them must understand how the changes in procedure, doctrine and decision-makers could affect earnout cases.

Fiduciary Duties Moved to Texas — Choice of Law in Mergers and Acquisitions Hasn't

Reincorporating in Texas will change the law governing a corporation's internal affairs, but it will not change the contractual choice-of-law provisions that decide which state's law governs an M&A contract.

In May 2025, Texas amended the Texas Business Organizations Code to make itself a more attractive corporate domicile, restricting derivative suits, codifying the business judgment rule for certain companies and limiting shareholder books-and-records requests.

While these are material changes for litigating "internal entity claims" — those arising from a business's internal affairs — they are not targeted at contract-based disputes. Even companies reincorporating to Texas may still default to Delaware law in their deal documents.[1]

Some Texas-centric deals have been using Texas choice-of-law provisions, but even these sometimes import fiduciary duties from Delaware.

Take SilverBow Resources Inc.'s 2022 purchase of Sundance Energy Inc. While Texas law governed the transaction generally, Delaware law governed issues relating to certain fiduciary obligations. Because SilverBow was Delaware-incorporated, Delaware would have supplied that fiduciary law anyway under the internal affairs doctrine — but saying so expressly shows that parties still reach for Delaware's fiduciary regime even when Texas law governs the contract.

Delaware may also remain popular for forum-selection clauses, though Texas companies may shift toward Texas venues as the state's case law develops. Tort claims, which often involve a most-significant-relationship analysis, may reach Texas courts under Texas law regardless of forum-selection or governing law clauses.

Ultimately, the Texas Business Court should see a growing share of earnout disputes — requiring litigators to consider how Texas courts will apply both Texas law and, when called for, Delaware law.

Why Forum Matters

The Texas Business Court is new, regional and untested.

The Delaware Court of Chancery is the preeminent corporate litigation court, with precedent spanning well over a century. Seven judges — one chancellor and six vice chancellors — serve 12-year terms that insulate them from politics.

The Texas Business Court currently has 10 well-qualified judges,[2] each licensed in Texas with at least 10 years of complex litigation or transactional experience. But they serve short, two-year terms across 11 regional divisions rather than one centralized court.

While the court's early decisions show capable, sophisticated reasoning, earnout litigators face particular uncertainty because of the dearth of Texas earnout case law and the higher likelihood of judge turnover midcase.

Jury trials are now a negotiation point.

Unlike the Delaware Court of Chancery, the Texas Business Court permits jury trials. Absent a jury trial waiver in a merger agreement, a jury decides a Texas-forum earnout dispute.

A jury trial thus becomes one more term to negotiate — and the stakes go beyond the size of the award. Earnout disputes are often technically complex, and a lay jury may struggle where a specialized judge would not. A buyer wary of large awards will press for a contractual waiver. And litigators without a jury trial waiver will have to consider how to try their case — if at all — on terms a jury will follow.

Motions to dismiss may fail more often in Texas.

Texas' pleading stage rules also favor plaintiffs. Texas had no analog to a federal Rule 12(b)(6) motion until 2013, and even now, such motions carry a residual fee-shifting risk.

Previously, the losing party on a motion to dismiss had to pay the other side's fees. Only recently has that been softened.

Now, a court may award fees to the winner, even if the loser was a nonmovant. A plaintiff-friendly history and fee risk may lead a seller anticipating an earnout dispute to prefer a Texas forum.

How Earnout Disputes Will Actually Play Out Under Texas Law

As Texas further develops its M&A law, Delaware precedent may be a helpful point of comparison.

On Jan. 12, the Delaware Supreme Court, sitting en banc, decided *Johnson & Johnson v. Fortis Advisors LLC* and largely affirmed the Court of Chancery's post-trial award of over \$1 billion to the purchased company's former stockholders.[3]

Fortis, which raised a slew of doctrinal questions central to earnout disputes — including integration clauses, antireliance provisions, commercially reasonable efforts, and the implied covenant of good faith and fair dealing — is now a leading earnout authority.

Each issue in *Fortis* could play out differently under Texas law.

Integration Clauses, Antireliance and the One-Way Problem

Earnout disputes are fertile ground for fraud claims. Statements made during negotiations — like assurances about the future operation of the business or achievable postclosing milestones — are often not included in the deal documents.

At first glance, Delaware and Texas treat integration clauses similarly. In both, a standard integration clause, standing alone, does not bar a postclosing fraud claim premised on extracontractual representations. Further, parties in both states can waive reliance on such representations through an explicit antireliance clause.

In *Fortis*, J&J argued that its exclusive-remedy and integration clauses together foreclosed the seller's extracontractual fraud claim. The Delaware courts disagreed, holding that an "exclusive remedy provision ... cannot ... eliminate *Fortis*' fraud claims," absent a clear antireliance disclaimer.^[4] A robust exclusive-remedy regime, in other words, is no substitute for an antireliance provision.

The leading Delaware case, *Abry Partners VP v. F&W Acquisition LLC*, decided by the Court of Chancery in 2006, distinguishes intracontractual fraud — which parties cannot disclaim — from extracontractual fraud, which they can disclaim through sufficiently powerful antireliance language.^[5]

In the Texas equivalent, *Italian Cowboy Partners Ltd. v. Prudential Insurance Co. of America*, the Texas Supreme Court held in 2011 that a merger clause does not waive fraud rights, and that language disclaiming reliance must be "unequivocal" — a similar standard.^[6]

But Texas courts routinely apply a second level of analysis that Delaware does not. Beyond the Italian Cowboy reliance-disclaimer test, courts apply the enforceability analysis from the Texas Supreme Court's 2008 decision in *Forest Oil Corp. v. McAllen*, which asks whether (1) the contract was "negotiated, rather than boilerplate"; (2) "the parties specifically discussed the [disputed] issue"; (3) "the complaining party was represented by counsel," (4) "the parties dealt with each other in an arm's length transaction"; and (5) "the release language was clear."^[7]

The practical upshot: Because *Forest Oil* introduces a fact-intensive enforceability question, a Texas court is less likely than a Delaware court to dispose of a fraud claim on the contract's face at the pleading stage. And *Forest Oil* remains good law despite the later-decided *Italian Cowboy*.

That said, the *Forest Oil* factors are likely to be satisfied by a negotiated merger agreement. The divergence here, then, is less about the ultimate result than about how quickly a Texas court will reach it.

Fortis also highlights a feature of antireliance drafting that matters regardless of which state's law applies: the direction of the antireliance disclaimer.

The operative merger agreement contained a one-sided antireliance provision. J&J disclaimed reliance on the seller's extracontractual statements, but the seller made no reciprocal disclaimer. When the seller's stockholder representative sued for fraud based on J&J's presigning assurances about milestone achievability, the buyer-only disclaimer did nothing to bar the claim.

Here, too, Texas law will likely track Delaware. Texas has not yet confronted the one-way disclaimer problem in an M&A earnout case. But under Texas law, a reliance disclaimer is a representation about a party's own reliance.

As articulated in *Forest Oil*: Parties "who contractually promise not to rely on extra-contractual statements ... should be held to their word." A disclaimer thus binds only the party that promised not to rely. Where a buyer disclaims reliance but the seller does not, the buyer would be held to its word while the seller's fraud claim would, as in *Fortis*, remain intact.

The drafting lesson is the same in both forums: In any earnout deal, the structure of the antireliance provision is important negotiating currency, and a buyer that disclaims its own reliance without extracting a reciprocal disclaimer protects the seller while leaving itself exposed.

Efforts Clauses

Antireliance provisions concern precontractual promises, but the efforts clause — the central battleground in most earnout disputes — concerns what the buyer must actually do post closing.

Deal practitioners generally understand "best efforts" as the most stringent standard, followed by "reasonable best efforts," "commercially reasonable efforts" and, finally, "good faith efforts."

Delaware courts resist those distinctions. As Chancellor Kathaleen McCormick explained in the Court of Chancery's 2022 decision in *Menn v. ConMed*, "courts applying the standards have struggled to discern daylight between them." Delaware instead takes a bespoke, contract-by-contract approach to efforts disputes.

For example, in *Fortis*, J&J agreed to commercially reasonable efforts comparable to those used for its own "'priority' devices." The Delaware courts found J&J breached this inward-facing clause — measuring its efforts against its own past practices, in contrast to an outward-facing clause keyed to an industry comparator or hypothetical reasonable actor.

Whereas Delaware courts may labor to untangle the intent behind a vague efforts provision, in Texas, they may just cut the knot. Texas courts may not enforce an efforts clause at all if it is vague — that is, if it fails to "set some kind of goal or guideline against which [the level of effort] may be measured," according to the 129th District Court of Harris County's 2024 decision in *Spain as Trustees of Linda & Barry Spain Trust v. Phoenix Electric Inc.*

This is a real risk for the bare "best efforts" or "commercially reasonable efforts" language common in merger agreements: A Texas court may treat an efforts promise without a measurable benchmark as too indefinite to enforce.^[8] Sellers drafting under Texas law thus should define the term with specificity, anchor it to a measurable benchmark and include express anti-avoidance language.

The Implied Covenant of Good Faith and Fair Dealing

The implied covenant of good faith and fair dealing is another avenue for challenging a buyer's self-interested postclosing conduct — and here, the Delaware-Texas gap is particularly fraught.

Under Delaware law, the implied covenant is unwaivable and inherent in every contract. It fills contractual gaps by protecting the parties' reasonable expectations and requiring that any contractual discretion be exercised reasonably and in good faith.

In *Fortis*, the Court of Chancery held that J&J breached the implied covenant by failing to pursue an alternative regulatory pathway after the U.S. Food and Drug Administration unexpectedly closed the route the parties had anticipated.

The Delaware Supreme Court reversed, holding that the risk was foreseeable and that "there [was] no genuine contractual gap."

But in Texas, there would have been no issue: Texas does not recognize a general implied covenant in commercial contracts at all.^[9]

Drafters of Texas earnout agreements must therefore build in the protections that Delaware's implied covenant supplies: a no-frustration covenant and an explicit prohibition on actions intended to avoid earnout payments. A Delaware seller that failed to negotiate those terms might invoke the implied covenant as a backstop; a Texas seller cannot.

Practical Takeaways

For Deal Drafters

Earnout provisions that may be litigated under Texas law should check a few boxes.

First, buyers should be intentional about the directionality of any antireliance provision. A one-way disclaimer protects the seller but leaves the buyer exposed.

Second, drafters must anchor efforts clauses to specific benchmarks — such as the buyer's past practices, an industry-standard comparator, or a defined timeline — and avoid bare "commercially reasonable efforts" or "best efforts" language.

Third, no-frustration covenants and explicit anti-avoidance language are important under Delaware law but indispensable in Texas, where express language is the seller's only protection absent the implied covenant.

Fourth, drafters should consider a separate jury trial waiver. Texas courts will enforce a bilateral waiver, but whether to include one is a strategic question.

For Litigators

Litigators handling earnout disputes in Texas should prepare for differences from Delaware practice.

Cases with disputed disclaimers are more likely to survive a motion to dismiss in Texas because the Forest Oil five-factor test is fact-dependent. And given Texas' short history with dispositive briefing at the pleading stage and the lingering possibility of fee shifting, such motions may be filed and granted less often.

Unlike the Delaware Court of Chancery, where all cases are tried to the bench, litigants in the Texas Business Court can try fraud and contract claims to a jury absent a waiver.

Because Texas does not recognize the implied covenant, a Texas earnout seller loses a contract-based avenue for challenging a buyer's bad faith postclosing conduct.

The thinness of Texas earnout precedent is itself an opportunity for early movers to shape the doctrine.

Conclusion

Earnout disputes will not disappear as more deals shift to Texas, but they will be litigated differently.

The Texas Business Court has not yet had its earnout moment — no published opinion on efforts-clause enforceability, antireliance or the implied covenant in the M&A context — and the deal and litigation bars will watch the first cases closely.

The time to think carefully about earnout drafting, choice-of-law provisions, forum selection and jury trial waivers for Texas deals is now, before your case becomes the precedent.

Disclosure: Selendy Gay represented Fortis Advisors in Johnson & Johnson v. Fortis Advisors.

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[1] Coinbase's 2025 acquisition of Sentillia B.V. and its earlier partnership with Circle were both governed by Delaware law, and recent M&A exits involving Andreessen Horowitz portfolio companies selected Delaware or California, not Texas; Chevron's recent acquisitions likewise chose Delaware; and the

largest deals of the year — Union Pacific (incorporated in Utah) with Norfolk Southern (incorporated in Virginia) and Netflix with Warner Brothers Discovery (both incorporated in Delaware) — both selected Delaware law.

[2] Though six more may soon be appointed if authorized by the Texas Legislature.

[3] Johnson & Johnson v. Fortis Advisors LLC , 352 A.3d 229 (Del. 2026).

[4] Fortis, 352 A.3d at 272.

[5] Abry Partners V LP v. F&W Acquisition LLC , 891 A.2d 1032 (Del. Ch. 2006).

[6] Italian Cowboy Partners Ltd. v. Prudential Insurance Co. of America , 341 S.W.3d 323 (Tex. 2011).

[7] Forest Oil Corp. v. McAllen , 268 S.W.3d 51 (Tex. 2008).

[8] See, e.g., Spain as Trs. of Linda & Barry Spain Tr. v. Phoenix Elec. Inc. , 2024 WL 971661, at *10 (Tex. App. Mar. 7, 2024) (best-efforts provision "too indefinite to be enforced as a contract"); Kevin M. Ehringer Enterprises Inc. v. McData Services Corp. , 646 F.3d 321 (5th Cir. 2011) (reversing a jury verdict because the defendant's "best efforts" promise was "not an enforceable promise and thus could not be the basis of a fraudulent inducement claim").

[9] See, e.g., Godfrey v. Sec. Serv. Fed. Credit Union , 356 S.W.3d 720, 726 (Tex. App. 2011) ("Texas does not recognize an implied covenant of good faith and fair dealing."). Texas does allow recovery in tort for breaches of the "duty of good faith and fair dealing," but only in "special relationships" such as insurer-insured. Id. at 726-27.

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