WHY EXPANDING DIRECTOR POWER OVER CORPORATE BYLAWS COULD UNDERMINE CORE STOCKHOLDER RIGHTS: COMMENTS ON THREE SCARY PREDICTIONS OF THE FUTURE

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PROLOGUE

When we dare to predict the future—knowing that our predictions will not be published for another year—we necessarily assume the risk that events in the real world will give our readers the hindsight to know whether or not we got it right at the time of our predictions. At the time of the 2014 ILEP conference, the principal focus—for the authors whose articles I reviewed and for the audience that was truly engaged and concerned—remained on corporate directors' unilateral adoption of bylaws that required shareholders to litigate claims in arbitration. Many participants expressed concern about the notion that directors, who will be defendants in the lawsuits they send to arbitration, can decide the scope of discovery and make other procedural determinations that impair the viability of the arbitration. A central concern of the academics and audience, however, was the risk that directors could also undermine the ability of stockholders to even initiate suit, regardless of merit, by precluding any award of attorneys' fees to the successful shareholder plaintiff. That was exactly the case in *Katz v. CommonWealth REIT*,[1] a case I recently litigated. Many of the conference participants expressed concern that bylaws mandating arbitration could lead slowly to a world without class actions.

However, shortly after the ILEP conference, the Delaware Supreme Court issued its opinion in a decision that caught many by surprise, and that has accelerated the debate regarding the survival of shareholder class actions. In *ATP Tour, Inc. v. Deutscher Tennis Bund*, the court upheld a director-adopted bylaw that sidestepped the issue of litigation forum (including arbitration) altogether;[2]

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1. No. 24-C-13-001299 (Md. Cir. Ct. Feb. 19, 2014).
2. 91 A.3d 556 (Del. 2014).

specifically, the bylaw stated that shareholders who sue the corporation will be required to pay the corporation's attorneys' fees unless the shareholder achieves "substantially all" of the relief sought in the complaint.[3] For anyone who has ever litigated a corporate-law case, even the largest courtroom successes rarely achieve this level of victory. Dozens of companies have now emulated the *ATP* bylaw, or an even more aggressive version thereof.[4] There is now a very real and well-founded fear regarding the viability of both shareholder class action and derivative suits—a debate that continues as I submit this paper.[5] In light of *ATP*, fewer people are wondering whether mandated arbitration will mark a slow or indirect erosion of shareholder rights. Unless legislatively overruled or judicially limited in scope, *ATP* gives directors a potent tool to put an end to shareholder litigation altogether.

Getting back to the benefit of hindsight, as I type up and piece together my comments from the ILEP conference, I realize that some of my comments—and some of the predictions by the professors whose pieces I reviewed—were spot on, while others now appear to be far off the mark. Rather than trying to make myself look smarter or more prescient by altering my notes to account for the tectonic shift that would come just a few weeks later with the decision in *ATP*, I have done my best to be true to the comments I actually made at the conference. My memory of what I "ad-libbed" without written notes, admittedly, may not be perfect. But to be very clear, I am stunned by how quickly my warning about the absurdity of allowing corporate directors to rewrite bylaws to serve their own personal purposes has proven to be well founded. If anything, for all of my skepticism about giving directors broad powers, I was not cynical enough about the mischief that creative and self-interested minds can muster.

I. INTRODUCTION AND OVERVIEW

I'd like to thank ILEP for inviting me to comment on these three very important and provocative articles.[6]

These articles work together very nicely, giving me the same satisfaction I get when watching any great movie: I laughed, I cried, and I learned something

3. *Id*. at 556.

4. *See* Herbert F. Kozlov & Lawrence J. Reina, *Delaware Supreme Court Approves Fee-Shifting Bylaw for Non-Stock Corporations*, BUS. L. TODAY, June 2014, *available at* http://www.americanbar.org/publications/blt/2014/06/keeping_current_kozlov.html; Steven Davidoff Solomon, *A Ruling's Chilling Effect on Corporate Litigation*, N.Y. TIMES DEAL BOOK (May 23, 2014, 5:01 PM), http://dealbook.nytimes.com/2014/05/23/a-rulings-chilling-effect-on-corporate-litigation/?_r=0.

5. *See, e.g.*, J. Robert Brown, Jr., *Delaware's Top Five Worst Shareholder Decisions for 2014 (#3* ATP Tour v. Deutscher *and the Rewriting of the DGCL)*, RACETOTHEBOTTOM.ORG (Jan. 9, 2015, 6:00 AM), http://www.theracetothebottom.org/home/delawares-top-five-worst-shareholder-decisions-for-2014-3-at.html; Tom Hals, *Delaware Upholds Fee-Shifting Bylaw, Could Upend Class Actions*, REUTERS (May 9, 2014, 6:03 PM), http://www.reuters.com/article/2014/05/09/delaware-courts-fees-idUSL2N0NV1PK20140509.

6. Brian T. Fitzpatrick, *The End of Class Actions?*, 57 ARIZ. L. REV. 161 (2015); David H. Webber, *Shareholder Litigation Without Class Actions*, 57 ARIZ. L. REV. 201 (2015); Deborah A. DeMott, *Forum-Selection Bylaws Refrated Through an Agency Lens*, 57 ARIZ. L. REV. 269 (2015).

new. The key—which I only realized after rereading them—is to read them in a specific order.

Professor Fitzpatrick's piece is reminiscent of *Apocalypse Now* and *Armageddon*.[7] Like Captain Willard on his secret mission up the river in Vietnam, Professor Fitzpatrick looks objectively at the evolution of the law of arbitration provisions, and recognizes with increasing dread how a series of judicial opinions can provide for a dystopian outcome.[8] He shows the likely, if not inevitable, result of cases leading-up to and following the Supreme Court's cases *AT&T Mobility LLC v. Concepcion*[9] and *American Express Co. v. Italian Colors Restaurant*.[10] For those of us who believe that class and representative actions not only deserve a place in society, but that they are necessary to providing some balance between powerful corporations and the rights of individual and institutional investors, the endpoint of Professor Fitzpatrick's vision sure feels like *Armageddon*. A world where stockholders cannot protect their rights is a very scary proposition.

Professor Webber tries to envision the post-apocalyptic world to predict what will happen when individuals cannot band together to fight for their rights through collective-litigation efforts.[11] Many of Professor Webber's predictions seem spot on, and are likely answers to some of the problems raised by the elimination of the class and derivative action. For example, eliminating the class and derivative action conceivably would lead to a sharp increase in the number of appraisal actions filed by large shareholders who are dissatisfied by the price at which they are squeezed out of their equity investments. I also agree that smaller investors would be effectively foreclosed from bringing claims regardless of merit. However, Professor Webber's effort to see a bright-lining in some respects—including his supposition that investors could create their own claim monitoring systems and pursue positive-value claims on an individual basis—is misplaced. Like Charlton Heston at the end of *Planet of the Apes*,[12] there will come a point when we look around and realize that the experiment that attempted to curtail the so-called problems in the class action field has destroyed the field completely. Professor Webber will look around and want to scream: "[They] blew it up; damn you all to hell."[13]

Professor DeMott looks to the past in hopes of saving the future of class actions; she sees the world as it will be if the march towards mandatory arbitration continues unabated.[14] But, despite this depressing foresight, Professor DeMott refuses to give up hope and, instead, she proposes a solution. Professor DeMott uses tools from decades past that have always been with us but which people (including jurists) may forget or conveniently ignore in order to justify their

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7. APOCALYPSE NOW (Zoetrope Studios 1979); ARMAGEDDON (Touchstone Pictures 1998).

8. Fitzpatrick, *supra* note 6.

9. 131 S. Ct. 1740 (2011).

10. 133 S. Ct. 2304 (2013).

11. Webber, *supra* note 6.

12. PLANET OF THE APES (APJAC Productions, Inc. 1968).

13. *Id.*

14. DeMott, *supra* note 6.

favored results. Specifically, Professor DeMott points us to some basic propositions of agency law. Of course! By remembering that corporate directors remain agents of their beneficiaries, the shareholders, we remember that a board cannot in good faith—and, thus, should not have the power to—impose bylaws that destroy said-shareholders' personal property rights. In this sense, Professor DeMott presents a hopeful premise in spite of real risk—reminiscent of a fictional President leading the world back from the brink of an alien invasion, as in *Independence Day*.[15]

In all events, my big-picture fear is that the Delaware Chancery Court's opinion in *Boilermakers Local 154 Retirement Fund v. Chevron Corp.* almost inevitably raises the prospect of mandatory arbitration bylaws.[16] *Boilermakers* does not, in a sufficiently clear way, do justice to the agency principles that lie at the heart of restraining directors' ability to act in an abusive manner towards shareholders. First, I do not understand how a unilaterally adopted bylaw can be enforced like a true contract when it fails two of the most basic elements of contract law: consent and consideration. Consider a traditional contract between two parties, A and B, where the contract is alterable by Party A without regard to the rights of Party B—without consideration or an opportunity to reject or rescind the transaction. It seems fairly obvious that this type of contract is illusory. Second, how can anyone reconcile the self-interested nature of a bylaw mandating arbitration with the fiduciary overlay that is said to apply to all actions by a corporate director?

II. REVIEW OF THE THREE ARTICLES

First of all, why all the concern? So what if the courts are allowing companies to require shareholders to pursue any claims they have through arbitration? What is so wrong with that?

The answer, in my view, is that when you let the corporate directors dictate the way in which shareholders can pursue claims, you effectively let the directors stop shareholders from pursuing claims, thus placing the whole system at risk. Corporate governance is a common good; many of the most important developments in the area of corporate governance have come from litigation that does not even have a prospect of achieving a monetary recovery.[17] When shareholders fight to protect their voting rights, or fight to stop improper corporate practices, you have a healthy tug on the rope that creates the balance between director power and shareholder rights; this is the essence of corporate governance. If you make it unfeasible for shareholders, large and small alike, to bring corporate governance claims, the law and practice through which our corporations are run

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15. INDEPENDENCE DAY (Twentieth Century Fox Film Corp. 1996).

16. 73 A.3d 934, 954, 958 (Del. Ch. 2013) (holding that forum-selection bylaws adopted unilaterally by a corporation's board of directors are valid).

17. *See, e.g.*, Pontiac Gen. Emps. Ret. Fund v. Healthways, Inc., No. 9789–VCL (Del. Ch. Oct. 14, 2014) (transcript ruling); Third Point LLC v. Ruprecht, Nos. 9469–VCP, 9497–VCP, 9508–VCP, 2014 WL 1922029 (Del. Ch. May 2, 2014); Kallick v. Sandridge Energy, Inc., 68 A.3d 242 (Del. Ch. 2013); San Antonio Fire & Police Pension Fund v. Amylin Pharm., Inc., 983 A.2d 304 (Del. Ch. 2009); Carmody v. Toll Bros., Inc., 723 A.2d 1180 (Del. Ch. 1998).

will naturally evolve in only one direction. Whether or not shareholders bring suit, corporate advisors will naturally not only copy successful prior practices, they will try to outdo each other by further expanding the powers and discretion given to their clients. The result is a steady shift of practices in favor of corporate directors, and further shift away from empowering shareholders. That is not a good thing.

Currently, only a very small number of public companies have arbitration bylaws. Outside of a handful of foreign companies, the only U.S. public companies to my knowledge that require mandatory arbitration of shareholder claims are the public Real Estate Investment Trusts ("REITs") affiliated with the Portnoy family, all of which are incorporated in Maryland. It is important to consider what happened at CommonWealth REIT, because it demonstrates the implication of mandated arbitration.

The Portnoy family controls CommonWealth REIT, and has created a board comprised of handpicked directors who will do the family's bidding. As numerous shareholders, some of whom I represent, have alleged, the board has funneled hundreds of millions of dollars out of CommonWealth in the form of improper payments concealed through excessive "management fees." Naturally, the shareholders sued to stop these payments.[18]

However, when shareholders brought these claims in *Central Laborers' Pension Fund v. Portnoy*,[19] they noticed that the Portnoys had constructed a bylaw requiring shareholders to arbitrate any and all shareholder claims. Not just that, but the bylaw placed an absolute ban on any award of attorneys' fees, regardless of whether the shareholders succeeded on their claims. Further, another bylaw required shareholders to indemnify the company for any costs incurred in defending claims. When we fought against these provisions in Maryland state court, we provided the court with affidavits from 11 different academics, some of whom have publicly criticized many aspects of shareholder litigation. But each of these academics, led by former SEC Chairperson Harvey Pitt and by Harvard Law Professor Jesse Fried—both of whom insisted on writing their own affidavits separate from the group affidavit that the others signed—made clear that a world in which directors could bar attorneys' fee awards and require secret arbitrations is a world harmed by some truly bad policy.[20] We also provided the court with an affidavit from the head of corporate governance at California Public Employees' Retirement System ("CalPERS"), explaining in detail why its ability to pursue virtually any of the claims it currently pursues would be impaired if the CommonWealth bylaw was endorsed and became standard practice.[21]

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18. *See generally* Complaint, Central Laborers' Pension Fund v. Portnoy, No. 24-C-13-1966 (Md. Cir. Ct. Apr. 5, 2013).

19. *Id.*

20. Affidavit of 11 Law Professors and Other Corp. Governance Experts, Cent. Laborers' Pension Fund v. Portnoy, No. 24-C-13-1966 (Md. Cir. Ct. filed Jun. 10, 2013).

21. Affidavit of Peter H. Mixon, in Support of Plaintiffs' Opposition to Defendants' Petition for an Order to Arbitrate and For a Stay of Proceedings and Plaintiffs' Petition to Stay Arbitration, Cent. Laborers' Pension Fund v. Portnoy, No. 24-C-13-1966 (Md. Cir. Ct. filed Jun. 5, 2013) [hereinafter CalPERs Affidavit].

In the pendency of the court proceeding, many people doubted that *Portnoy* could lead to any noticeable harm—namely, because CommonWealth's mandatory-arbitration bylaw seemed like an outlier. Yet—as Professor Fitzpatrick seems to recognize—there was a sense that, if Delaware were to allow directors to unilaterally amend bylaws to mandate arbitration, the floodgates would surely open.[22] The concerns proved real when the *Portnoy* court, cited *Boilermakers* in upholding the nefarious bylaw provision.[23] *Boilermakers*, by approving forum-selection provisions, has given directors (at least of Delaware companies) leverage to assure that if they are sued, they are sued in Delaware.[24] Would other firms go further and adopt mandatory-arbitration provisions if they could? You bet. From the perspective of a corporate director, perhaps being sued in Delaware is preferable to being sued in California, or New York, or Alabama, or Tennessee. But from the perspective of that same director, not being sued at all is better than being sued in Delaware.

This background brings us to Professor Fitzpatrick's article. Albeit through less dramatic music or special effects, the article brings to mind the movie *Armageddon*—the meteor is coming. To appreciate why his warning is so spot-on, a careful analysis of the Supreme Court's ruling in *Concepcion* is critical.

I have heard lawyers say *Concepcion*[25] stands for the proposition that the Federal Arbitration Act ("FAA") preempts any state law that discriminates against arbitration. That is frankly not correct—the opinion's potential application is far broader. In *Concepcion*, the California law at issue was *not* about arbitration specifically; it simply had the indirect effect of favoring judicial process over arbitration.[26] Despite the fact that a California law had the incidental effect of favoring litigation over arbitration, the Supreme Court held that the FAA preempted the state law.[27]

The Court in *Concepcion* did not merely show support for arbitration in the abstract. Rather, the Court showed a staggering hostility to litigation itself. The Court expressed real contempt for small individual claims being pursued through the judicial process.[28] The overall message to the lower courts is clear and powerful: we are fine with curtailing class actions, and have no problem with preempting state laws that incidentally disfavor arbitration.

By grounding its hostility towards class actions in federal preemption, *Concepcion* raises a real risk—both for Delaware and for shareholders hoping that state corporate law will provide an answer to mandatory-arbitration bylaws. As we speak, there is comprised of prominent Delaware lawyers considering the question of mandatory-arbitration bylaws, whether mandated arbitration is a realistic problem, and whether the state legislature should do anything about it. I fear,

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22. *See* Fitzpatrick, *supra* note 6, at 191.
23. *Portnoy*, No. 24-C-13-1966.
24. Boilermakers Local 154 Ret. Fund v. Chevron Corp., 73 A.3d 934, 954, 958 (Del. Ch. 2013).
25. 131 S. Ct. 1740 (2011).
26. *Id.* at 1746–47.
27. *Id.* at 1746–47, 1753.
28. *Id.* at 1759–62.

however, that the committee assumes that the Delaware Court of Chancery will have the opportunity to tackle the mandatory-arbitration issue for itself—I do not share that optimism.

Under *Concepcion*, a state law that does not openly mention arbitration raises a question of federal preemption.[29] And, in *Concepcion*, the state law lost out to the FAA's preference for arbitration to resolve disputes.[30] So, what happens when a shareholder challenges a later adopted mandatory-arbitration bylaw, or the committee suggests a law that bars mandated shareholder arbitration? Suppose, the shareholder files suit in the Delaware Chancery, and the Chancellor were to even hint at his discomfort with the sum and substance of (and consequences arising from) the bylaw. However, the corporate board likes the idea of forcing shareholders to arbitrate their claims under rules tilting the playing field in the defendants' favor. That said, under *Concepcion*, the corporate board has the ability to remove the case to federal court, and have a district judge decide the matter, knowing the Supreme Court's preference for the FAA over countervailing state laws or doctrines that protect a right to seek judicial relief in the judicial system.[31]

So, we know that the Chancery Court may not even get the opportunity to decide whether a rule prohibiting arbitration bylaws is valid and enforceable. Further, *American Express*,[32] the most recent Supreme Court ruling in the FAA context casts serious doubt on whether a federal court would protect shareholders' rights to litigate their grievances. If a consumer does not have access to the court system, and thus cannot effectively vindicate their rights, forced arbitration under the terms accepted in *American Express* means that there can be no pursuit of the claims in the first place.

If that is the case, how do we protect the rights of shareholders? Perhaps we can't. But, if we can, I see only one avenue to do it—by distinguishing the nature of the consumer– or employee–corporation relationship from the shareholder–corporation relationship. I will get back to this when I discuss Professor DeMott's article, but the distinction must lie in the existence of fiduciary duties. There is no corporate duty of loyalty to consumers, and there is not really any such duty owed to employees. Shareholders, on the other hand, are owed a clear duty of loyalty and good faith.

Even if "effective vindication" is not a basis to invalidate a regular arbitration agreement (as was the outcome of *American Express*),[33] I question the propriety of a corporate board undermining the ability of shareholders to "effectively vindicate" their rights. Any such effort by a board should constitute a breach of fiduciary duty that precludes enforcement of the contract *ab initio*. In *American Express*, keep in mind that there was no dispute that the underlying arbitration agreement was valid and enforceable, other than on the basis that it should be deemed unconscionable.[34] Perhaps if the enforceability of bylaws is tied

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29. *Id.* at 1746.
30. *Id.* at 1748.
31. *Id.* at 1754–55.
32. 133 S. Ct. 2304 (2013).
33. *Id.* at 2310.
34. *Id.*

to their compliance with fiduciary duties, you kill the arbitration bylaw before getting to the FAA analysis altogether. But we cannot be sure.

Ultimately, I fear that Professor Fitzpatrick has objectively identified that the death of shareholder litigation, and, to a large extent, shareholder rights, may be right around the corner.

This brings us to Professor Webber's scholarly and provocative piece, which tries to envision a world without shareholder class and representative litigation.[35] Maybe we don't care. Maybe shareholders can protect themselves just fine without class actions, and without paying all those legal fees.

I think that while Professor Webber offers many astute predictions, some of his views of a world without shareholder litigation are a little too optimistic. At the end of the day, he will be as angry as Charlton Heston's character when he realizes that the humans destroyed their own world.

Let's focus on some of Professor Webber's predictions. In a world of mandatory-arbitration bylaws, governance cases and challenges to merger transactions are dead.[36] To understand this, just review the CalPERs affidavit I mentioned earlier.[37] In short, even if a claim is truly meritorious, the largest of investors cannot rationalize pursuing these cases on their own. And, it is unfair to ask them to do so because they would be creating a benefit for all shareholders, while bearing all of the cost.

Will transactional litigation move to appraisal if class actions are barred by arbitration clauses? Perhaps to an extent, but I'm not so sure about the viability of these appraisals as a replacement for meritorious class action claims. To bring appraisal actions, you still need a large investment. So as Professor Webber correctly observes, even if the larger shareholders will pursue appraisal claims for themselves, there is a significant shift of wealth away from the smallest shareholders, who will not be offered fair prices and have no real avenue to get those marginal dollars back.[38]

As Professor Webber discerns, you end up with a two-tier system for adjudicating shareholder claims.[39] Smaller investors effectively subsidize large holders. Worse, litigation is expensive, and only the very biggest losses can justify the cost of bringing individual claims. So no matter how badly directors act, the vast majority of the injured parties—shareholders—will have no means to take action. Also, appraisals simply do not address breaches of duty. The salutary benefits of challenging misconduct are not obtained through appraisals.

So, I agree with Professor Webber on this concern. Where am I more skeptical than he seems to be? I do not believe that any but the five or ten largest investors in the world would effectively do their own monitoring and case assessment. Frankly, this is a massive undertaking. At my firm, and at other large

35. Webber, *supra* note 6.
36. *Id.* at 265.
37. CalPERs Affidavit, *supra* note 21.
38. Webber, *supra* note 6.
39. *Id.* at 217.

shareholder–plaintiffs' firms that represent public pension and other institutional investors, we provide monitoring services for hundreds of investors at a time. There are economies of scale. But it takes a major commitment and investment to monitor markets, investigate potential claims for each separate investor, calculate potential losses, and so on.

The problem is that, if plaintiffs' firms do not monitor markets on behalf of their investor clients, I am not sure pension funds could efficiently replace these services without incurring significant expense, particularly for the smaller funds. Put simply, the fact that plaintiffs' firms have a profit motive to provide monitoring-related services allows funds to enjoy these complex services free of charge. If you eliminate the financial basis for plaintiffs' firms to bear the cost of providing monitoring services, it is not reasonable to think that investors will find a viable way to replace that service in order to pursue claims on their own. This does not mean monitoring is not important to those investors. Rather, just as institutions hire professionals to invest funds and make money, they really do need professionals identifying when losses, or a failure to maximize returns, are attributable to fraud or other corporate wrongdoing. Frankly, the next time a judge somewhere questions the propriety of a plaintiff's firms that provides a case-monitoring process to its clients at no charge, everyone should think about the substantial investment needed to create such a monitoring system.

Thus, I do not think shareholders can effectively replace the current system of vindicating shareholder rights and claims through collective actions, whether it is through class actions or derivative suits. But this is where Professor DeMott's piece comes in—Professor DeMott looks back into history and may bring a solution for the future. I am not, to be clear, comparing her to Marty McFly from *Back to the Future*.[40]

But can we solve the problems created by mandated arbitration of shareholder claims through agency law?[41] This strategy requires us to look back in time and to consider directors' proper role in exercising their bylaw-amendment power.

The answer may be right before us, but to get to that answer, we need the Delaware courts to elevate fiduciary obligations over arguments to let directors act unilaterally. Applied to bylaw amendments, I think the agency lens shows promise. In *CA, Inc. v. AFSCME Empls. Pension Plan*, the Delaware Supreme Court said that bylaws are process-based.[42] Specifically, when shareholders tried to unilaterally adopt bylaws that had a substantive element to them, the Court said those bylaws were improper, as they infringed on the rights and powers given to directors by the corporate statute.[43] Well, if bylaws must be process-based when shareholders adopt them without director approval, perhaps the goose-and-gander rule applies, and bylaws must also be process-based when considering director-adopted bylaws.

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40. BACK TO THE FUTURE (Universal Pictures 1985).
41. DeMott, *supra* note 6, at 290.
42. 953 A.2d 227, 234–35 (Del. 2008).
43. *Id*. at 237, 240.

Bylaws that specify a judicial forum, such as those in the *Boilermakers* case, are shareholder- and director-adopted bylaw hybrids. In many ways, they are procedural, as they simply tell shareholders where to bring suit. Whether in Delaware or the state of headquarters, most judicial fora have the same basic processes for adjudicating disputes, and the judges have to apply Delaware's substantive law to the best of their ability. I think if you have a bylaw mandating arbitration pursuant to rules dictated by the defendant–directors—like limitations on discovery or fee awards—there is a stronger argument that the bylaw affects the shareholders' personal, substantive rights. Alternatively, using the agency lens, a bylaw that so clearly insulates directors from accountability for breaches of duty must be subject to Delaware General Corporate Law ("DGCL") § 144 because that bylaw represents a conflicted transaction.[44]

Hence, we get to the basic point that led me to see opportunity from Professor DeMott's article. *Boilermakers* upholds a forum-selection bylaw through an inherently business-judgment-rule lens. The court does not address any fiduciary duty question. It assumes that imposing forum is a matter of corporate power, not of fiduciary propriety.[45] In other words, the opinion does not see any conflict or self-interest in requiring that shareholders sue in a particular forum, and therefore addresses the matter under the business judgment rule. But the reality of forced arbitration is that directors who try to shield themselves from accountability are plainly conflicted and self-interested. The decision to insulate yourself gets invalidated as a matter of loyalty before you have to consider the abstract question of corporate power to adopt bylaws. Herein lies the agency-based key to avoiding the calamity that Professor Fitzpatrick identifies, and that will exist even if Professor Webber is partially or even mainly right in his prediction of the future.

CONCLUSION

In sum, I think these are three very valuable articles. Coming from a perspective that does not make a moral judgment about shareholder litigation's strengths or flaws, or its value to society or lack thereof, I think Professor Fitzpatrick has objectively identified the greatest threat to the viability of the shareholder action. Professor Webber correctly points out some respects in which certain shareholders can protect themselves in a world without the class or derivative action, and he notes the inherent unfairness to smaller shareholders if the representative action is unavailable. Finally, Professor DeMott falls back onto core principles to show why bylaws unilaterally adopted by corporate directors may not comply with basic notions of the corporate allocation of power and fiduciary duty.

I fear what will happen when companies start to emulate the Portnoys' actions at CommonWealth and their other controlled entities. Perhaps the key to saving the future of shareholder rights is to recognize that using bylaws to tilt the rules substantively is a conflicted transaction, and will be void or voidable under the longstanding common law that renders all inherently conflicted transactions to the test of entire fairness.

44. DEL. CODE. ANN. tit. 8, § 144 (West 2014).
45. DeMott, *supra* note 6, at 271–72.

EPILOGUE

I started by noting that the *ATP* case was decided shortly after last year's ILEP conference, stunning the corporate world and making much of our conversation about arbitration seem a bit outdated. As I write this commentary, much of the corporate governance world is waiting to see whether the Delaware legislature will pass an amendment to the DGCL that would limit or effectively overrule the fee-shifting bylaw concept set forth in the *ATP* case. I don't know what the legislature will do, but with the U.S. Chamber of Commerce investing millions of dollars in trying to eliminate the ability of stockholders to bring suit, I have little comfort for the future. It would be far preferable if someone not directly subject to the influence of corporate political spending—a judge, for example—would take the steps needed to prevent public company boards from using bylaws to serve their personal interests at the expense of all public investors. I hope that by the time you read this sentence, hindsight shows that my concerns are misplaced.