

REMINDER: January 9 Deadline to Join \$2 Trillion in Institutional AUM Supporting Ban on "Fee-Shifting" Bylaws and Charter Provisions

January 6, 2015

On November 24, 2014, institutional investors managing nearly \$2 trillion in assets petitioned the Delaware legislature and major proxy advisors regarding an issue of critical importance to shareholders' rights. A copy of the letter sent to Delaware Governor Jack Markell is available by clicking on [this link](#). At issue is the recent decision by the Delaware Supreme Court in *ATP Tour v. Deutscher Tennis Bund* ("ATP Tour") in which fee-shifting corporate bylaws adopted unilaterally by directors (i.e., without stockholder approval) have been ruled valid and enforceable under Delaware law.

Such bylaws and charter provisions seek to eliminate the feasibility of investor suits for management misconduct, no matter how egregious, by shifting a corporation's entire legal bill onto any shareholder that brings a legal action against the corporation, its officers or directors. These provisions make it prohibitively risky for shareholders to bring suit, thereby effectively immunizing corporate executives and boards from civil liability.

The fee-shifting bylaw has been described by legal experts as a "nuclear weapon against shareholders." Under the *ATP Tour* ruling, in which the board adopted a bylaw unilaterally, a suing shareholder must fund the company's legal fees and expenses, absent a "judgment on the merits that substantially achieves, in substance and amount, the full remedy sought." In other words, the suing shareholder must foot the corporation's entire legal bill unless it wins at trial on all claims and for all of the damages sought. In practice, plaintiffs rarely recover all claimed damages or equitable relief sought, and the *ATP Tour* ruling effectively requires suing shareholders to pay the corporation's legal bill in every shareholder dispute.

Following the Delaware Court's decision in *ATP Tour*, numerous corporate boards adopted sweeping bylaws or amended their corporate charters to include provisions that impose all legal fees, costs, and expenses on suing shareholders who do not obtain "substantially all" of the relief sought in the complaint. Legal experts anticipate that more corporations will enact these bylaws. As Columbia Law School Professor John C. Coffee Jr. warned, if swift action is not taken to prohibit such bylaws, they "will predictably become widely prevalent." Professor Coffee also expressed concern that the *ATP Tour* opinion could trigger a "race to the bottom" among states soliciting re-incorporation in their jurisdiction to increase revenue from corporate franchise taxes.

The potential impact of fee-shifting provisions on investors' rights and the integrity of our capital markets cannot be overstated, and securities regulators have been slow to recognize the gravity of the threat. Defrauded investors confronted with a fee-shifting bylaw or charter provision will rationally decide not to bring shareholder lawsuits against corporate wrongdoers, even when the misconduct is egregious and the legal claims are strong. Put simply, unless immediate action is taken to stop fee-shifting provisions from spreading, meritorious shareholder litigation may soon become a thing of the past.

The Delaware Corporation Law Council, a non-partisan group of representatives from both the defense and plaintiff bars, has voiced its serious concerns about the *ATP Tour* decision and its potential impacts on our capital markets.

Shortly after the Court's decision in *ATP Tour*, the Council drafted a proposed amendment to the Delaware General Corporation Law to prohibit stock corporations from imposing fee-shifting. The Delaware legislature was set to vote on the new amendment on June 10, 2014, but the U.S. Chamber of Commerce successfully lobbied to delay any consideration of the matter until well into 2015. Meanwhile, more companies adopt these nefarious bylaws and charter provisions every week.

We request your support

We are requesting additional support from the institutional investor community to petition the Delaware legislature and the major proxy advisors to oppose fee-shifting provisions through an amendment to Delaware's General Corporation Law. Working with the heads of corporate governance at several major institutions, other shareholder advocates and law firms representing institutional investors, we respectfully ask that you join this growing coalition of investors who signed or support the November 24, 2014 letters to the Delaware legislature and the major proxy advisors. The letter we ask you to support makes clear that investors oppose fee-shifting provisions and support the Delaware Corporation Law Council's proposed ban on fee-shifting bylaws and corporate charter provisions. The Delaware legislature, in particular, needs to know that investors are outraged about the trampling of their core stockholder rights.

Click on [this link](#) to review the letters we ask you to support in this crucial and historic effort.

If your fund or financial institution is willing to join this important cause, please let BLB&G partner Mark Lebovitch (markl@blbglaw.com) know by email as soon as possible, but no later than **January 9, 2015**. There are no costs or expenses associated with supporting the letters. If you have any questions, please contact Mr. Lebovitch at 212-554-1519.