Proposed Legislation Would Prohibit Fee-Shifting Bylaws for Delaware Stock Corporations
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Within weeks of the Delaware Supreme Court’s *ATP Tour, Inc. v. Deutscher Tennis Bund* decision\(^1\) upholding the facial validity of a bylaw provision adopted by a non-stock corporation shifting attorneys’ fees and expenses to unsuccessful plaintiffs in intra-corporate litigation, the Corporation Law Section of the Delaware State Bar Association has approved proposed amendments to the Delaware General Corporation Law (DGCL) that would prohibit the adoption of such a fee-shifting provision by Delaware stock corporations in their charters or bylaws. The proposed amendments will now be sent to the Delaware General Assembly for consideration. If approved before the end of the Delaware General Assembly’s current session, the amendments would become effective on August 1, 2014.

To avoid adopting a provision that could subsequently be rendered invalid, Delaware stock corporations considering whether to adopt a fee-shifting bylaw should wait to see whether the proposed amendments are enacted into law. Even if the amendments are not ultimately enacted into law, Delaware stock corporations should carefully consider whether a fee-shifting bylaw is in the corporation’s best interest and how and when to best adopt such a bylaw.

**Proposed DGCL Amendments**

New DGCL Section 331 would codify the limited liability nature of corporations by stating that a corporation’s charter and bylaws may not impose monetary liability, or responsibility for any of a corporation’s debts, on stockholders, except as expressly permitted by DGCL Sections 102(b)(6) (discussed below) and 202 (permitting stock transfer restrictions). A corresponding amendment to Section 114(b)(2) would make clear that the prohibition in Section 331 would not apply to non-stock corporations. As noted in the proposed amendments’ synopsis, these amendments are “intended to limit applicability of [the Court’s *ATP Tour* decision] to non-stock corporations, and to make clear that such liability may not be imposed on holders of stock in stock corporations.” Since Section 331 is broadly worded, it prohibits not only fee-shifting provisions in charters and bylaws, but practically all charter and bylaw provisions that would impose liability on stockholders.

The proposed amendments would also amend DGCL Section 102(b)(6), which permits a charter provision imposing personal liability for the corporation’s debts on its stockholders to a specified extent and upon specified conditions. Section 102(b)(6) would be amended to clarify that any such charter provision must impose liability “based solely on [a stockholder’s] stock ownership,” and not on any other status or action of the stockholder. As noted in the synopsis, stockholders would remain subject to possible liability arising not from a charter or bylaw provision, but rather on a stockholder’s specific act or omission, such as guaranteeing the corporation’s debt or tortious conduct.

The synopsis further notes that the amendments are not intended to limit a court’s power to impose sanctions under applicable law or the enforceability of any charter or bylaw provision that binds any person pursuant to any separate contract.

**Missed Opportunity?**

The Court’s *ATP Tour* decision created concern in some quarters that if the holding applied equally to Delaware stock corporations, it would deter potentially meritorious stockholder claims and also erode Delaware’s role as the leading arbiter of corporate jurisprudence in the United States. However, in the rush to address the concerns of the Delaware bar, it appears that the proposed legislative fix failed to even consider situations where fee-shifting provisions may be appropriate. Instead of invalidating all fee-shifting provisions included in stock corporations’ charters and bylaws, there might have been an attempt to evaluate the potential merit of a limited response to the *ATP Tour* decision, such as tailoring the amendments to include situations where, upon a balancing of the interests involved, fee-shifting provisions should be permitted. For example, should all intra-corporate suits be treated similarly (for example, claims involving a merger or acquisition compared to claims involving a private company internal conflict)?
Ultimately, it appears that an opportunity was lost to craft a solution to a well-established issue, the growing tide of intra-corporate stockholder litigation, that adequately balances the interests among:

- the corporations and the insurers that bear the cost of litigation and settlements for the suits settled on a “disclosure only” basis that result in little or no benefit to the stockholders whose interests are ostensibly being championed;
- the stockholders who truly have a legitimate grievance that would be effectively precluded from access to redress if fee-shifting bylaw and charter provisions were permitted;
- the State of Delaware to preserve its position as the dominant arbiter of corporate disputes; and
- other stakeholders, including the lawyers that derive their living from stockholder suits.

Andrews Kurth advises numerous public companies, including publicly traded partnerships, in a variety of industries and will continue to follow developments related to the topic of this client alert.

If you would like more information about the subject of this client alert and other corporate and securities law developments, please contact your Andrews Kurth representative in the Corporate Practice Section.