

Delaware Corporation Law Amendments Address Fee-Shifting and Exclusive Jurisdiction Provisions

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Recently enacted amendments to the Delaware General Corporation Law will prohibit the certificates of incorporation and bylaws of Delaware corporations from including “loser pays” litigation provisions with respect to internal corporate claims, including claims with respect to breaches of directors’ fiduciary duties. At the same time, these amendments also expressly permit Delaware corporations to require that internal corporate claims be brought exclusively in Delaware courts. Both amendments become effective August 1, 2015.

The issue of “loser pays” or “fee-shifting” litigation provisions was highlighted when, in May 2014, the Delaware Supreme Court found that such a provision, in the context of the bylaws of a Delaware non-stock corporation, can be valid and enforceable. *ATP Tour, Inc. v. Deutscher Tennis Bund*. The bylaw provided that if a claiming party did not “obtain a judgment on the merits that substantially achieves, in substance and amount, the full remedy sought,” such claiming party must reimburse the counterparties for “all fees, costs and expenses of every kind” incurred in connection with such claim. According to a survey by Thomson Reuters, from June 2014 through May 2015, 32 Delaware publicly traded companies proceeded to adopt bylaws which require plaintiff stockholders to reimburse the corporation for expenses incurred in connection with unsuccessful lawsuits.

Critics of fee-shifting provisions argue that they have a chilling effect on legitimate stockholder litigation, while proponents say they are a proper response to the inevitable litigation that accompanies practically every public company transaction. According to Cornerstone Research’s Review of 2014 M&A Litigation, 93 percent of M&A transactions valued over US\$100 million were litigated.

Delaware’s new amendments expressly prohibit Delaware certificates of incorporation and bylaws from containing “any provision that would impose liability on a stockholder for the attorneys’ fees or expenses of the corporation or any other party in connection with an internal corporate claim.” Internal corporate claims are expressly defined as claims that are based upon a violation of an officer’s, director’s or stockholder’s duty or as to which the Delaware General Corporation Law confers jurisdiction on the Court of Chancery.

In contrast to expressly prohibiting fee-shifting litigation provisions, the recent amendments to the Delaware General Corporation Law expressly permit certificates of incorporation and bylaws to include provisions requiring that internal corporate claims be brought exclusively in the courts of Delaware. In addition, certificates of incorporation and bylaws may not prohibit stockholders from bringing internal corporate claims in Delaware.

Prior to these amendments, Delaware courts had held forum selection bylaws requiring internal corporate claims be brought in Delaware courts to be facially valid. *Boilermakers Local 154 Retirement Fund v. Chevron Corp.* In addition, Delaware courts had upheld forum selection bylaws requiring internal corporate claims be brought exclusively in a court outside Delaware. *City of Providence v. First Citizen Bancshares, Inc.* Such a bylaw is now prohibited by the Delaware General Corporation Law if it does not permit claims to be brought in Delaware courts.

While these recent Delaware amendments restrict what may be contained in a corporation's certificate of incorporation or bylaws, they do not restrict what stockholders may agree to in a separate writing, such as a stockholders agreement. As a result, parties may increasingly see items such as fee-shifting litigation arrangements proposed in such agreements. Even if such "loser pays" provisions are included in an agreed-upon stockholders agreement, it remains to be seen how effective they will be. Since most cases will continue to be settled prior to final adjudication by a court, it is more likely that these provisions will simply give defendant corporations additional leverage and require plaintiffs to be more confident in the validity of their claims.

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