When the Camel's Nose Gets Under the Tent: Fee-Shifting and Forum Selection in Delaware

By Ralph C. Ferrara and Rachel O. Wolkinson

On May 8, 2014, the Supreme Court of Delaware held in *ATP Tour, Inc. v. Deutscher Tennis Bund*,[1] that "fee-shifting provisions in a non-stock corporation's bylaws can be valid and enforceable under Delaware law."[2] Two weeks later, on May 22, 2014, the Corporation Law Section of the Delaware State Bar Association (DSBA) was provided with a proposed amendment to the Delaware General Corporation Law (DGCL) that would eliminate the ability of Delaware stock corporations to adopt bylaw and charter provisions imposing liability on shareholders, including provisions that would impose fee-shifting liability.[3] The proposed amendment was approved by the Corporation Law Section and the Executive Committee of the DSBA and was sent for consideration to the Delaware legislature as Senate Bill, No. 236.[4] The US Chamber Institute for Legal Reform forcefully opposed the legislation and requested that the state lawmakers reject, or at least, delay a vote on the amendment and refuse to overturn the Supreme Court of Delaware's decision in *ATP*.[5]

Senator Bryan Townsend, D-Newark, has delayed debating the proposed legislation until the Delaware legislature reconvenes in January 2015.[6] In addition, he sponsored a resolution asking the Corporate Law Section of the DSBA to further examine measures that would address fee-shifting. The Senate unanimously approved the resolution.[7]

Corporate general counsels and their litigators are grappling with the implications the Court's decision in *ATP* and the proposed amendment might have on corporate bylaws and shareholder litigation. As discussed in more detail below, even if the proposed amendment is enacted, it is limited to stock corporations and does not apply to nonstock corporations—the very group of companies ruled on by the Court in *ATP*. This article examines the recent trend by the Delaware courts to permit boards to create litigation-defining bylaws and the pushback the Delaware courts might face in the future.

Ralph C. Ferrara and Rachel Wolkinson are attorneys at Proskauer Rose LLP in Washington, DC. Mr. Ferrara provided the inspiration and direction for this article, while Ms. Wolkinson provided its intellectual content. The authors wish to acknowledge their colleague, Bradley I. Ruskin, who argued ATP Tour, Inc. v. Deutscher Tennis Bund *before the Supreme Court of Delaware.*

ATP Tour, Inc. v. Deutscher Tennis Bund: Case History and Discussion

ATP Tour, Inc. (ATP) is a Delaware "membership corporation" (*i.e.*, a nonstock corporation)

the Corporate Governance advisor

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that operates a global professional men's tennis tour. Its members include professional men's tennis players and entities that own and operate professional men's tennis tournaments.[8] Upon joining ATP, its members agree to be bound by ATP's bylaws, which may be amended by its board of directors.[9]

In 2006, ATP's board amended its bylaws by adding a fee-shifting provision providing that when any member asserts a claim against ATP or another member and "does not obtain a judgment on the merits that substantially achieves, in substance and amount, the full remedy sought," then the claiming member "shall be obligated… to reimburse [ATP]… all fees, costs and expenses of any kind and description (including, but not limited to, all reasonable attorneys' fees and other litigation expenses)… that the parties may incur in connection with such Claim."[10]

In 2007, ATP's board voted to change the Tour schedule and format and downgraded certain tournaments from the highest tier to the second highest tier. Unhappy with these changes, members sued ATP and six of its board members in federal district court, alleging both federal antitrust claims and Delaware fiduciary duty claims.[11]

After a ten-day jury trial, ATP prevailed on all claims.[12] Thereafter, ATP moved to recover its legal fees, costs, and expenses pursuant to the fee-shifting provision of ATP's bylaws. The federal district court denied ATP's fees request due to the members' antitrust claims and held that "federal law preempts the enforcement of fee-shifting agreements when antitrust claims are involved."[13] ATP appealed, and the Third Circuit vacated the federal district court's order and found that the district court should have decided whether the fee-shifting provision of the bylaws was enforceable as a matter of Delaware law before reaching the federal preemption question.[14]

Certified Four Questions of Law

On remand, the federal district court certified the following four questions of Delaware law to the Supreme Court of Delaware:

(1) May the Board of a Delaware *nonstock corporation* lawfully adopt a bylaw (i) that applies in the event that a member brings a claim against another member, a member sues the corporation, or the corporation sues a member (ii) pursuant to which the claimant is obligated to pay for "all fees, costs, and expenses of every kind and description (including, but not limited to, all reasonable attorneys' fees and other litigation expenses)" of the party against which the claim is made in the event that the claimant "does not obtain a judgment on the merits that substantially achieves, in substance and amount, the full remedy sought"?[15]

(2) May such a bylaw be lawfully enforced against a member that obtains no relief at all on its claims against the corporation, even if the bylaw might be unenforceable in a different situation where the member obtains some relief?[16]

(3) Is such a bylaw rendered unenforceable if one or more Board members subjectively intended the adoption of the bylaw to deter legal challenges by members to other potential corporate action then under consideration?[17]

(4) Is such a bylaw enforceable against a member if it was adopted after the member had joined the corporation, but where the member had agreed to be bound by the corporation's rules "that may be adopted and/or amended from time to time" by the corporation's Board, and where the member was a member at the time that it commenced the lawsuit against the corporation?[18]

Court's Answers to Certified Questions of Law

The Supreme Court of Delaware provided answers to each of the federal district court's certified questions of law. The Court held that "[f]ee-shifting bylaws are permissible under Delaware law."[19] A fee-shifting bylaw "is

facially valid" under Delaware law. Moreover, 'a bylaw that allocates risk among parties in intra-corporate litigation would also appear to satisfy the DGCL's requirement that bylaws must "relat[e] to the business of the corporation, the conduct of its affairs, and its right or powers or the rights or powers of its stockholders, directors, officers or employees."'[20] In addition, "no principle of common law prohibits directors from enacting fee-shifting bylaws."[21]

The Court explained that although Delaware follows the American Rule, by which parties to litigation generally pay their own attorneys' fees and costs, "it is settled that contracting parties may agree to modify the American Rule and obligate the losing party to pay the prevailing party's fees." The Court reasoned that corporate bylaws are contracts among a corporation's shareholders, therefore, "a fee-shifting provision contained in a non-stock corporation's validly-enacted bylaw would fall within the contractual exception to the American Rule."[22]

The Court further noted that a facially valid fee-shifting bylaw will not be enforceable if it is "adopted or used for an inequitable purpose."[23] The Court explained that "the enforceability of a facially valid bylaw may turn on the circumstances surrounding its adoption and use."[24] Because the Court was answering certified questions of law, it did not determine whether the ATP fee-shifting bylaw was enacted for a proper purpose and whether it was properly applied.[25]

The Court held that subject to the limitation set forth in its answer to the district court's first question, the bylaw could shift fees if a plaintiff obtained no relief in the litigation.[26] The Court refused to "respond fully" as to whether the bylaw is unenforceable if it is intended to deter legal challenges. The Court reasoned that fee-shifting provisions, "by their nature, deter litigation. Because fee-shifting provisions are not *per se* invalid, an intent to deter litigation would not necessarily render the bylaw unenforceable in equity."[27] Finally, the Court held that fee-shifting bylaw amendments are generally enforceable against members who joined the corporation before the bylaws were adopted.[28]

Impact of ATP

Is ATP's holding limited to nonstock corporations, or does it also apply to stock corporations? This remains an open question. However, arguments can be made based on the Court's analysis in *ATP* to support both outcomes.

In the Court's Answer to Question 1, and several other times in its opinion, the Court repeats that the company at issue is a "Delaware non-stock corporation," supporting the argument that the holding is limited to Delaware nonstock corporations. This narrow reading of the decision is sensible and likely to be argued.

However, a more liberal reading of the decision suggests that the holding should apply to stock corporations in the same way that it applies to non-stock corporations. In its Answer to Question 1, the Court includes a footnote after the words "Delaware non-stock corporation," explaining that provisions of the DGCL, including Section 109(b) pertaining to bylaws, "apply to non-stock corporations and all references to the stockholders of a corporation are deemed to apply to the members of a non-stock corporation."[29]

Rather than having separate statutes for stock and nonstock corporations like many other states, Delaware has the DGCL that applies to both stock and nonstock companies. Prior to the 2010 Amendments to the DGCL, it was unclear whether Section 109(b) applied to nonstock corporations because the preamendment Section 109(a) expressly included language regarding nonstock corporations, while the preamendment Section 109(b) did not. Importantly, as the Court points out in its decision, the 2010 amendments make it clear that Section 109(b) applies in its entirety to nonstock corporations.[30] Because Section 109(b) applies equally to nonstock and stock corporations, arguably fee-shifting

bylaws will apply equally to nonstock and stock corporations.

Also enhancing this argument is the fact that in reaching its conclusion to approve fee-shifting bylaws for nonstock corporations, the Court cites to cases upholding the adoption of restrictive bylaw provisions by stock corporations.[31]

What constitutes "inequitable" or "improper" purpose? The Court explains that in determining whether a facially valid bylaw is enforceable, it may examine "the circumstances surrounding its adoption and use."[32] A facially valid bylaw "may be enforceable if adopted by the ***appropriate corporate procedures and for a proper corporate purpose.***"[33] It then explains that if the bylaw is adopted for "an improper purpose" it is "unenforceable in equity."[34] Foreseeing arguments that fee-shifting bylaws should be deemed improper because they deter litigation, the Court provides that "[t]he intent to deter litigation … is not invariably an improper purpose. Fee shifting provisions, by their nature, deter litigation. Because fee-shifting provisions are not *per se* invalid, an intent to deter litigation would not necessarily render the bylaw unenforceable in equity."[35]

American Rule vs. English Rule on Attorney Fees

As stated by the Court (and discussed above), the American Rule, followed by Delaware, is that parties each pay their attorney fees, win or lose. The English Rule, applied in most Western legal systems other than the United States, requires the losing party to pay the winner's reasonable attorney fees.[36] Various proposals have been previously introduced in the US Congress and state legislatures to implement some form of loser-pays rule in the United States.[37] Nonetheless, these proposals have been successfully resisted for fear that a loser-pays provision would "deter middle-income persons from pursuing reasonable claims or defenses, and place them at an unfair disadvantage in disputes with risk-neutral parties."[38]

It is interesting, however, to note that even though the English Rule provides a loser-pays rule, plaintiffs appear not to have been prevented, or even deterred, from filing suit in English courts. Although the culture of litigation is certainly not as robust in the UK as in the US, it certainly is a fully matured forum for redressing injury—both personal and economic. Indeed, the UK Parliament and courts have expanded the opportunity for plaintiffs to redress injury by relieving prosecuting barristers of restraints against contingent fee payments, which are common place in this country but historically anathema to the English courts. In doing so, the British jurists have observed and embraced the notion that, "Conditional fees [*i.e.*, contingent fee arrangements] are now permitted in order to give effect to another facet of public policy—the desirability of access to justice. Conditional fees are designed to ensure that those who do not have the resources to fund advocate or litigation services should none the less be able to obtain these in support claims which appear to have merit."[39] Sound familiar?

Trend in Delaware Courts to Permit Bylaws Restricting Intra-Corporate Litigation

The Delaware Supreme Court's decision in *ATP* is not the first time a court in Delaware has permitted a bylaw defining the bounds of shareholder litigation. Last year, the Delaware Court of Chancery upheld the validity of board-adopted forum selection bylaws. In *Boilermakers Local 154 Retirement Fund*,[40] cited by the Delaware Supreme Court in *ATP*, the Delaware Chancery Court issued a single ruling in the cases against Chevron and FedEx and held that a board of directors has the statutory authority to unilaterally adopt forum selection bylaws if the corporation's certificate of incorporation permits the board to amend its bylaws.[41] The Court of Chancery noted that board-adopted forum selection bylaws are statutorily valid because they are process-oriented and not substantive because they concern

when a shareholder may sue a corporation (not whether a shareholder may sue or the type of remedy a shareholder may recover). This process-oriented bylaw is a matter concerning the rights of shareholders that bylaws properly may address under 8 Del. C. Section 109(b).[42]

The Chancery Court also found that the forum selection bylaws were contractually valid and enforceable, rejecting plaintiffs' argument that the board-adopted bylaws could not be a contractual forum selection clause because the stockholders had not approved such provisions. Title 8 Del. C. Section 109(a) permits a corporation, through its certificate of incorporation, to grant the directors the unilateral power to adopt and amend the bylaws. The Chevron and FedEx boards have the power to amend the corporation's bylaws under its certificate of incorporation. Therefore, the Court of Chancery reasoned, when investors purchased stock in these corporations, they agreed to be bound by any board-adopted bylaws as "part of a binding broader contract among the directors, officers, and stockholders formed within the statutory framework of the DGCL."[43] In addition, the Chancery Court noted that because of this "flexible contract" between the shareholders and the corporations, shareholders who object to forum selection bylaws have the option to amend or repeal the bylaws and the opportunity to elect directors on an annual basis.[44]

The shareholders challenging the bylaws in *Boilermakers Local 154 Retirement Fund* appealed the Chancery Court's decision to the Delaware Supreme Court. However, they voluntarily dismissed their appeals. Therefore, the Chancery Court's decision in these cases is no longer subject to appeal.[45] Nonetheless, the validity of such bylaws under Delaware law is far from settled. On June 25, 2014, a California federal judge refused to declare Delaware state court as the sole forum for shareholder suits against Chevron.[46] In addition, Judge Jon Tigar denied Chevron's motion to have the Delaware Supreme Court certify the state law question regarding the validity of a forum selection bylaw.[47]

Because the shareholders in *Boilermakers Local 154 Retirement Fund* had dismissed their appeals, Chevron has asked a California federal judge overseeing a similar case to certify the state law question.[48] Chevron in its motion explained that "how the Delaware Supreme Court resolves the validity of the forum selection bylaw issue will have significant—and perhaps dispositive—impact on this case, as well as on other cases nationwide."[49]

Impact of Exclusive Forum Provisions in Corporate Bylaws

Between the date of the issuance of the *Boilermakers Local 154 Retirement Fund* decision and late September 2013, approximately 70 companies, including 21st Century Fox, DuPont, JCPenney, Electronic Arts, and Air Product & Chemicals, have adopted an exclusive forum provision.[50] Boards of directors of Delaware corporations can now consider whether to adopt forum selection bylaws, to the extent they are permitted to do so in accordance with their corporation's certificate of incorporation. The board of directors should review the corporation's shareholder base and consult with the corporation's investor relations team and proxy solicitation firm, because stockholder and proxy advisory firms could very well react negatively to such bylaws. Institutional Shareholder Services (ISS) has advised that it will review exclusive venue proposals on a case-by-case basis, taking into account: (1) whether the company has been materially harmed by shareholder litigation outside its jurisdiction of incorporation, based on disclosure in the company's proxy statement; and (2) whether the company has the following good governance features: (a) an annually elected board; (b) a majority vote standard in uncontested director elections; and (c) the absence of a poison pill, unless the pill was approved by shareholders.[51]

Glass Lewis & Co., another proxy advisory firm, takes the position that exclusive forum bylaws generally are not in shareholders' best interests because they unnecessarily limit full legal recourse by preventing shareholders from bringing suit in a forum of their choosing. In

addition, such bylaws might effectively discourage the use of shareholder derivative claims by increasing their associated costs and make them more difficult to pursue. Glass Lewis believes shareholders should have the opportunity to vote on the adoption of all bylaws affecting their rights.[52]

Glass Lewis recommends that shareholders vote against any bylaw or charter amendment seeking to adopt an exclusive forum provision unless the company: (1) provides a compelling argument on why the provision would directly benefit shareholders; (2) provides evidence of abuse of legal process in other, nonfavored jurisdictions; and (3) maintains a strong record of good corporate governance practices.[53]

In addition, in the event a board seeks shareholder approval of a forum selection clause pursuant to a bundled bylaw amendment, instead of a separate proposal, Glass Lewis will weigh the importance of the other bundled provisions when deciding the vote recommendation on the proposal. Nonetheless, Glass Lewis will recommend voting against the chair of the governance committee for bundling disparate proposals into a single proposal.[54]

What's Next? Selection of Mandatory Arbitration or Alternative Dispute Methods and Proposed Amendment to Delaware General Corporation Law

The courts in *ATP* and *Boilermakers Local 154 Retirement Fund* have not addressed whether Delaware corporations may select mandatory arbitration or other alternative dispute resolution methods for all intracorporate disputes. The Delaware courts have applied contract law principles in determining that fee-shifting and forum selection bylaws are permissible under Delaware law. Moreover, in *ATP*, the Delaware Supreme Court explained that intent to deter litigation "is not invariably an improper purpose."[55] Nonetheless, discouraging litigation is different than disallowing litigation, and this would not be the first time a mandatory arbitration bylaw would be construed as contrary to the public interest and harmful to shareholders.

As a result of pressure by shareholder rights activists, potential investors, and the Securities and Exchange Commission (SEC), the Carlyle Group withdrew its mandatory arbitration clause included in its registration statement filed with the SEC.[56] Historically, the SEC has disfavored mandatory shareholder arbitration provisions, and as a matter of policy, will not declare a registration statement effective if the company's charter or bylaws contain a mandatory arbitration provision. In 1990, the SEC blocked a stock sale by Franklin First Financial Corp. that had also included a mandatory arbitration clause in its corporate charter. According to John Nester, an SEC spokesman, the agency was ready to take similar action in response to Carlyle's IPO.[57]

Finally, lawmakers in Delaware might have their own plans to better protect shareholders. As mentioned above, the Delaware legislature is in the process of reviewing a proposed amendment to the DGCL that would preclude fee-shifting in charters and bylaws of stock corporations. The effective date of the bill is August 1, 2014.[58]

The purpose of the amendment is to eliminate the ability of Delaware stock corporations to adopt bylaws or charter provisions imposing liability on stockholders by imposing fee-shifting liability. Interestingly, the stated purpose of the amendment is not related to the risk to shareholders by hampering their rights to litigate. Rather, the focus is on personal financial liability. As explained in the original notice to the Corporation Law Section that accompanied the proposed amendment before it was sent for consideration to the Delaware legislature, because the *ATP* decision held that the adoption of a bylaw provision that exposed stockholders to personal liability was facially valid, it created the possibility that a wide variety of provisions imposing personal liability on stockholders also might be facially valid. The notice warned that the "extension of the contract theory of corporate constitutional

documents to permit monetary liability may have unforeseen consequences on capital formation, even if subject to equitable constraints." Because of these worries, the proposed amendment is not limited to addressing fee-shifting bylaws, but rather also precludes most charter or bylaw provisions that would impose liability on stockholders.[59]

Importantly, the proposed new amendment only applies to stock corporations and will not affect a narrow reading of the Court's holding in *ATP* permitting fee-shifting provisions in non-stock corporations' bylaws. It remains to be seen what impact the proposed amendment will have on shareholder litigation. Moreover, because the fee-shifting vote has been delayed until at least January 2015, perhaps new legislation will be introduced addressing the concerns raised by the US Chamber of Commerce when the legislature reconvenes.

Where does this leave general counsels and others in advising corporate boards eager to insulate themselves from nuisance litigation? Be alert, stay informed, know your institutional base, develop a risk/indemnity/D&O insurance exposure profile for your company, consider that some courses (*e.g.*, forum selection) may be safer bets for the time being than others (*e.g.*, fee shifting)—and above all else, assure that their boards know that they are on top of the issue.

Notes

1. *ATP Tour, Inc. v. Deutscher Tennis Bund*, No. 534, 2013 (Del. May 8, 2014).

2. *Id*. at 3.

3. *Proposed Amendment to Delaware General Corporation Law Would Preclude Fee-Shifting in Charters and Bylaws of Stock Corporations*, Morris Nichols Arsht & Tunnell: Delaware Corporate Counsel Group UPDATE (May 2014).

4. Act to Amend Title 8 of the Delaware Code Relating to the General Corporation Law, S.B. 236, 147th Gen. Assemb. (Del. 2014).

5. Letter from Andrew Wynne, Director, State Legislative Affairs, U.S. Chamber Institute of Legal Reform to Sen. Bryan Townsend (June 5, 2014); Letter from Lisa A. Rickard, President, U.S. Chamber Institute of Legal Reform to Members of the Delaware Gen. Assembly (June 9, 2014).

6. *See* Jonathan Starkey, "Fee Shifting Vote Delayed Until January," *The News Journal* (June 18, 2014), *http://www.delawareonline.com/story/firststatepolitics/2014/06/18/fee-shifting-vote-delayed/10803959/*.

7. S.J. Res. 12, 147th Gen. Assemb. (Del. 2014).

8. *ATP Tour, Inc., supra* n.1 *at* 3.

9. *Id*. at 4.

10. *Id*.

11. *Id*. at 4-5.

12. *Id*. at 5.

13. *Id*.

14. *Id*. at 6.

15. *Id*. at 6. (emphasis added).

16. *Id*. at 7.

17. *Id*.

18. *Id*.

19. *Id*. at 8.

20. *Id*. at 9.

21. *Id*.

22. *Id*. at 9-10.

23. *Id*. at 10

24. *Id*. at 12.

25. *Id*.

26. *Id*. at 13.

27. *Id*. at 13-14.

28. *Id*. at 14.

29. *Id*. at 8 n.10.

30. *See* John M. Zeberkiewicz & Blake Rohrbacher, "New Day for Nonstock Corporations: The 2010 Amendments to Delaware's General Corporation Law," 66 *Bus. Law*. 271 (2011).

31. *See, e.g*. *Frantz Mfg. Co. v. EAC Industries*, 501 A.2d 401 (Del. 1985) (holding that "bylaw amendments properly enacted by the shareholders consent procedure are not inequitable under the circumstances."); *Boilermakers Local 154 Ret. Fund v. Chevron Corp*., 73 A.3d 934, 952 (Del. Ch. 2013) (upholding a forum-selection bylaw).

32. *ATP Tour, Inc., supra* n.1, at 12.

33. *Id*. (emphasis added).

34. *Id*. at 13.

35. *Id*. at 13-14.

36. Theodore Eisenberg & Geoffrey P. Miller, "The English Versus the American Rule on Attorney Fees: An Empirical Study of Public Company Contracts," 98 *Cornell L. Rev.* 327, 328-329 (2013).

37. *Id*. at 334.

38. *Id*. citing H.R. REP. NO. 104-62, at 28 (1995).

39. *Regina (Factortame Ltd and others) v. Sec. of State for Transport, Local Government and Regions (No 8)*, [2002] EWCA Civ 932 (Ct. of App. 2002).

40. *Boilermakers Local 154 Ret. Fund v. Chevron Corp*., 73 A.3d 934, 952 (Del. Ch. 2013).

41. *Id*. at 939.

42. *Id*. at 951.

43. *Id*. at 939.

44. *Id*. at 939-940.

45. Notice of Voluntary Dismissal of Appeal, *Boilermakers Local 154 Ret. Fund v. Chevron Corp*., 73 A.3d 934, No. 433, 2013 (Del. Sup. Ct. Oct. 15, 2013).

46. Dan Ivers, "Chevron Loses Big to Hear All Investor Suits in Delaware," *Law360* (Jun. 26, 2014), *http://www.law360.com/classaction/articles/551974/chevron-loses-bid-to-hear-all-investor-suits-in-delaware*.

47. Order Den. Mot. to Certify Question to Delaware Supreme Ct., *Bushansky v. Armacost et al*., 2012 U.S. Dist. LEXIS 112315 (N.D.Cal. Aug. 9, 2012) (No. 12-CV-01597-JST).

48. *See* Ivers, *supra* n.46.

49. Def.'s Notice of Mot., and Mem. in Supp. of Mot. to Certify Question of State Law to Delaware Supreme Ct. at 3, *Bushansky v. Armacost et al.*, 2012 U.S. Dist. LEXIS 112315 (N.D.Cal. Aug. 9, 2012) (No. 12-CV-01597-JST).

50. *See* Glass Lewis on Exclusive Forum Provisions, Sept. 25, 2013, available at *http://www.glasslewis.com/blog/glass-lewis-on-exclusive-forum-provisions/*.

51. *See* ISS 2014 U.S. Proxy Voting Summary Guidelines, Mar. 12, 2014, available at *http://www.issgovernance.com/file/2014_Policies/ISSUSSummaryGuidelines2014March12.pdf*.

52. *See* Glass Lewis *supra* n.50.

53. *See* Glass Lewis & Co.: "Proxy Paper Guidelines, 2014 Proxy Season," available at *http://www.glasslewis.com/assets/uploads/2013/12/2014_GUIDELINES_United_States2.pdf*.

54. *Id*.

55. *ATP Tour, Inc., supra* n.1, at 13.

56. Letter from Pamela Long, Assistant Director, U.S. Securities and Exchange Commission to Jeffrey W. Ferguson, General Counsel, The Carlyle Group L.P., re The Carlyle Group L.P. Amendment No. 2 Registration Statement on Form S-1 Filed January 10, 2010 (Feb. 3, 2012).

57. "Carlyle Drops Class-Action Lawsuit Ban as Opposition Mounts (3)," *BLOOMBERG NEWS* (Feb. 3, 2012) *http://www.bloomberg.com/apps/news?pid=20602011&sid=aZezcngC6upo*; Carl W. Schneider, "Arbitration Provisions in Corporate Governance Documents," Insights: *The Corp. and Sec. Law Advisor*, Mar. 31, 2012.

58. S.B. 236, *supra* n.4.

59. "Proposed Amendment to Delaware General Corporation Law Would Preclude Fee-Shifting in Charters and Bylaws of Stock Corporations," *Del. Corp. Counseling Group Update* Morris Nichols Arsht & Tunnell, Wilmington, Del.), May 2014.

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