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Delaware's Ban on Fee-Shifting

A FAILED ATTEMPT TO PROTECT SHAREHOLDERS AT THE EXPENSE OF OFFICERS AND DIRECTORS OF PUBLIC CORPORATIONS

INTRODUCTION

When a U.S. company is deciding where to establish its place of incorporation, Delaware is undoubtedly given serious consideration. Known for its pro-business legislature and favorable corporate laws, Delaware has attracted over one million companies to incorporate within its borders—including 50% of all publicly traded companies¹ and 66% of Fortune 500 companies.² After the Delaware Legislature's recent blunders, however, which incentivize frivolous shareholder litigation and misconduct by plaintiffs-attorneys, the once “business friendly” state might in fact be the exact opposite, deterring companies from incorporating within its borders and forcing them to take their business elsewhere.³

Effective August 1, 2015, the Delaware Legislature enacted three amendments to Title 8 of the Delaware Code⁴ that substantially affected what “stock companies” (or “publicly traded companies”)⁵ incorporated in the state may include in

¹ This number is based on data from the year 2013. *About Agency*, STATE OF DEL., <https://corp.delaware.gov/aboutagency.shtml> [<https://perma.cc/9WEM-6PF3>].

² This number is based on data from the year 2015. JEFFREY W. BULLOCK, DELAWARE DIVISION OF CORPORATIONS 2015 ANNUAL REPORT (2015), https://corp.delaware.gov/Corporations_2015%20Annual%20Report.pdf [<https://perma.cc/9RUW-QQAG>].

³ See DEL. STATE BAR ASS'N, EXPLANATION OF COUNCIL LEGISLATIVE PROPOSAL 10, https://www.andrewskurth.com/assets/htmldocuments/15137_Proposed_DGCL_Amendments_Rel_Docs_2.pdf [<https://perma.cc/YQ7N-SPFY>] (recognizing this risk by stating: “Those who have advanced that criticism have argued, and probably will argue, that other states may take steps to accommodate fee-shifting charter and bylaw provisions, and that businesses will therefore choose to incorporate in those other states, rather than in Delaware. That is indeed a risk, but recognizing that risk refutes the very criticism that the Council is acting out of self-interest.”).

⁴ DEL. CODE ANN. tit. 8 (2017). Title 8 of the Delaware Code is referred to as the “Delaware General Corporation Law” and is the governing doctrine of law over Delaware corporations.

⁵ *Stock Corporation*, BLACK'S LAW DICTIONARY (10th ed. 2014) (“A corporation in which the capital is contributed by the shareholders and divided into shares . . .”). This note will primarily focus on “publicly traded companies,” which are a specific type of stock corporation defined as “corporation[s] whose shares are traded to and among the general public.” *Public Corporation*, BLACK'S LAW DICTIONARY (10th ed. 2014).

their bylaws and articles of incorporation.⁶ The bylaws and the articles of incorporation of a company lay the foundation for, and are the driving forces behind, what the company and its members can and cannot do. Generally speaking, the bylaws of a company are its internal rules that regulate and govern the “conduct of the business and the rights and liabilities of [its] members.”⁷ The articles of incorporation (often referred to as the “charter” or “certificate of incorporation”), on the other hand, is mainly designed to disclose general information regarding the company to the public and to its shareholders, such as “the purpose or purposes for which the corporation is being organized, the place of business . . . the number of directors, the names and addresses of the directors for the first year, and the names and addresses of the incorporators.”⁸

The Delaware Legislature’s three additions to the Delaware General Corporation Law (DGCL) included the enactment of Sections 102(f)⁹ and 115,¹⁰ and the amendment of Section 109(b).¹¹ DGCL Sections 102(f) and 109(b) prohibit the inclusion of “fee-shifting provisions” in the articles of incorporation and bylaws, respectively, of any publicly traded company that is incorporated in Delaware in regard to “internal corporate claims.”¹² Fee-shifting is “[t]he transfer of responsibility for paying

⁶ Joseph P. Boeckman & Ashley E. Graffeo, *Delaware General Corporation Law Amended Regarding Fee-Shifting and Forum Selection Clauses*, BAKERHOSTETLER (June 30, 2015), <http://www.bakerlaw.com/alerts/delaware-general-corporation-law-amended-regarding-fee-shifting-and-forum-selection-clauses> [<https://perma.cc/AU9S-QWJT>].

⁷ *By-Laws*, BALLENTINE’S LAW DICTIONARY (3d ed. 2010).

⁸ *Articles of Incorporation*, BALLENTINE’S LAW DICTIONARY (3d ed. 2010); see generally DEL. CODE tit. 8, § 102 (2017) (setting forth the requirements for a certificate of incorporation).

⁹ DEL. CODE ANN. tit. 8, § 102(f) (“The certificate of incorporation may not contain 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, as defined in § 115 of this title.”).

¹⁰ Section 115 of the Delaware Code states:

The certificate of incorporation or the bylaws may require, consistent with applicable jurisdictional requirements, that any or all internal corporate claims shall be brought solely and exclusively in any or all of the courts in this State, and no provision of the certificate of incorporation or the bylaws may prohibit bringing such claims in the courts of this State. “Internal corporate claims” means claims, including claims in the right of the corporation, (i) that are based upon a violation of a duty by a current or former director or officer or stockholder in such capacity, or (ii) as to which this title confers jurisdiction upon the Court of Chancery.

Id. § 115.

¹¹ *Id.* § 109(b) (“The bylaws may not contain 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, as defined in § 115 of this title.”).

¹² See generally *id.* §§ 102(f), 109(b); see also Michael Greene, *Delaware Fee-Shifting Bill Signed Into Law; Also Endorses Exclusive Forum Clauses*, BLOOMBERG

fees, esp[ecially] attorney's fees, from the prevailing party to the losing party" at the conclusion of litigation.¹³ The prohibition applies to "internal corporate claim[s]," which, according to DGCL Section 115,¹⁴ include, *inter alia*, shareholder derivative suits,¹⁵ which will be the main focus of this note.¹⁶ Fee-shifting can heavily impact litigation and a plaintiff's decision to file suit against a potential defendant, especially in regard to shareholder derivative suits where the final attorneys' fees generally range in the hundreds of thousands of dollars,¹⁷ and even sometimes (albeit rarely) in the hundreds of millions.¹⁸ Although fee-shifting was once a useful deterrent to prevent frivolous litigation, now that the Delaware Legislature has banned it, a Delaware corporation's last hope is to turn to DGCL Section 115, which, unfortunately, will not be the safe haven it purports to be.

DGCL Section 115, which this note discusses only as a failed mitigation tool for the implications imposed by Sections 102(f) and 109(b), permits the inclusion of a "forum-selection clause"¹⁹ in the bylaws and articles of incorporation of any company that is incorporated in Delaware with respect to internal corporate claims, provided that the state of Delaware is among those forums that the corporation selects in its forum-selection clause.²⁰

BNA (June 26, 2015), <http://www.bna.com/delaware-feeshifting-bill-n17179928834> [<https://perma.cc/VDZ3-RSZ6>] (providing a brief synopsis of the new amendments).

¹³ *Fee-Shifting*, BLACK'S LAW DICTIONARY (10th ed. 2014).

¹⁴ DEL. CODE ANN. tit. 8, § 115 (defining internal corporate claims as "claims, including claims in the right of the corporation, (i) that are based upon a violation of a duty by a current or former director or officer or stockholder in such capacity").

¹⁵ *Derivative Action*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("A suit by a beneficiary of a fiduciary to enforce a right belonging to the fiduciary; esp[ecially], a suit asserted by a shareholder on the corporation's behalf against a third party (usu[ally] a corporate officer) because of the corporation's failure to take some action against the third party.").

¹⁶ The term "internal corporate claims," as defined by the Delaware Code Section 115, can include any action, not just a derivative suit, based upon a breach of fiduciary duty brought against a current or former director, officer, or stockholder. *See id.* All other such actions are outside the scope of this note.

¹⁷ OLGA KOUMRIAN, CORNERSTONE RESEARCH, SETTLEMENTS OF SHAREHOLDER LITIGATION INVOLVING MERGERS AND ACQUISITIONS: REVIEW OF 2013 M&A LITIGATION 1, 3 (2014), <https://www.cornerstone.com/GetAttachment/7bd80347-124b-4b69-add5-575e33c3f61b/Settlements-of-M-and-A-Shareholder-Litigation.pdf> [<https://perma.cc/KTF6-K5HX>] ("Plaintiff attorneys requested an average of \$1.1 million in fees for 2013 settlements Average plaintiff attorney fees requested in disclosure-only settlements were \$500,000 in 2013").

¹⁸ *Ams. Mining Corp. v. Theriault*, 51 A.3d 1213, 1219 (Del. 2012) (affirming the Delaware Chancery Court's decision to award plaintiff's counsel more than \$304 million in attorneys' fees).

¹⁹ *Forum-Selection Clause*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("A contractual provision in which the parties establish the place (such as the country, state, or type of court) for specified litigation between them.").

²⁰ *See* Greene, *supra* note 12.

The Delaware Legislature enacted DGCL Section 102(f) and amended DGCL Section 109(b) in direct response to the Delaware Supreme Court's decision in *ATP Tour, Inc. v. Deutscher Tennis Bund* in 2014.²¹ In that case, the court upheld a fee-shifting provision in the bylaws of a nonstock corporation²² as facially valid.²³ Fearing a slippery slope and the possibility of the court's decision extending to publicly held corporations as well,²⁴ the Delaware House of Representatives unanimously voted, along with two thirds of the Delaware Senate, to enact DGCL Section 102(f) and amend Section 109(b).²⁵ Now, publicly traded corporations in Delaware are burdened with the negative repercussions of the Delaware Legislature's decision.

Part I of this note provides a history and overview of shareholder derivative suits and explains the difference between the American Rule's and English Rule's allocations of attorneys' fees. This difference is notable due to DGCL Section 102(f)'s and 109(b)'s codification of the American Rule, which provides that litigants pay their own attorneys' fees,²⁶ as opposed to the English Rule, which provides that the unsuccessful litigant pays the attorneys' fees of the successful litigant.²⁷ Part II discusses the legislative history behind DGCL Sections 102(f) and 109(b), including the Delaware Supreme Court's decision in *ATP Tour*. Part III discusses the future repercussions of Sections 102(f) and 109(b) on shareholder derivative suits. Finally, Part IV discusses the relationship between DGCL Sections 102(f) and 109(b) and DGCL Section 115, and describes the most effective solution to said repercussions.

Specifically, this note argues that the implementation of DGCL Sections 102(f) and 109(b) will not protect shareholders,

²¹ S.B 75, 148th Gen. Assemb., 1st Reg. Sess. (Del. 2015) ("Committee Findings: The committee discussed the implications of the fee-shifting ban and heard testimony explaining the reasoning behind the proposed updates. The proposed amendments would prevent corporations from creating bylaws that impose liability for certain legal fees on litigating shareholders. This statutory change was prompted by the Delaware Supreme Court decision in *ATP Tour, Inc. v. Deutscher Tennis Bund*, 91 A.3d 554 (Del. 2014), which upheld a facially valid bylaw imposing such liability on shareholders.").

²² *Nonstock Corporation*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("A corporation that does not issue shares of stock as evidence of ownership but instead is owned by its members in accordance with a charter or agreement.").

²³ *ATP Tour*, 91 A.3d at 555.

²⁴ See DEL. STATE BAR ASS'N, *supra* note 3, at 3 (noting that "[t]he Council believes that absent legislation, many Delaware corporations will eventually adopt ATP-type provisions").

²⁵ *Senate Bill 75: 148th General Assembly (2015–2016)*, DEL. GEN. ASSEMBLY, <http://legis.delaware.gov/BillDetail?LegislationId=24380> [<https://perma.cc/JV4H-UVPC>].

²⁶ *American Rule*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("The general policy that all litigants, even the prevailing one, must bear their own attorney's fee.").

²⁷ *English Rule*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("The requirement that a losing litigant must pay the winner's costs and attorney's fees.").

contrary to the Delaware Legislature's intentions, but instead will incentivize frivolous shareholder litigation, which in turn will have additional negative implications. These negative implications include potential plaintiff-attorney misconduct, an increase in mergers and acquisitions litigation, harm to shareholders, and a decrease in the desirability of holding a position on the board of directors or holding an officer position in any publicly traded company that is incorporated in Delaware. Furthermore, this note argues that the implementation of DGCL Section 115, while perhaps having some mitigating effect on the potential consequences of Sections 102(f) and 109(b), will not act as a sufficient buffer between Sections 102(f) and 109(b) and frivolous shareholder litigation. The proposed solution to the aforementioned implications is one that recommends redrafts of Sections 102(f) and 109(b), which will allow publicly traded corporations to enact a fee-shifting provision in their certificates of incorporation or bylaws, provided that such clause (1) allows fee-shifting in both directions (i.e., two-way fee-shifting),²⁸ and (2) places a cap on the amount of attorneys' fees, costs, and expenses for which an unsuccessful litigant would be liable to the successful litigant in regard to shareholder derivative actions. These procedural safeguards will not only deter frivolous litigation and plaintiff-attorney misconduct, but will also give some autonomy back to the corporation to decide what is best for its shareholders.

I. MECHANICS OF SHAREHOLDER DERIVATIVE SUITS AND THE HISTORY OF FEE-SHIFTING

A. *Shareholder Derivative Suits and the Concept of Fee-Shifting*

In order to fully comprehend the Delaware Legislature's new additions to Title 8 of the Delaware Code, one must understand the scope of DGCL Sections 102(f) and 109(b). These new sections apply only to claims that are considered "internal corporate claims" as defined by DGCL Section 115,²⁹ which necessarily include shareholder derivative suits.³⁰ The shareholders of a corporation bring shareholder derivative suits,

²⁸ Such a reformulation would be in contrast to the current Delaware General Corporation Law Sections 102(f) and 109(b), which only prohibit one-way fee-shifting clauses—specifically, those that shift the corporation's attorneys' fees, costs, and expenses onto the stockholder. *See* DEL. CODE ANN. tit.8, §§ 102(f), 109(b) (2017).

²⁹ *See id.* §§ 102(f), 109(b) (prohibiting fee-shifting clauses in connection with any "internal corporate claim[s]").

³⁰ *Id.*

on behalf of the corporation, against the officers and directors of that corporation for violations of fiduciary duties.³¹ In these cases, since the plaintiff in the litigation is technically the corporation, any damages recovered against the defendant-board of directors or officers will go back into the corporation and not directly to the shareholders themselves.³² As such, plaintiff-shareholders generally will only receive an indirect benefit of the corporation's recovery.³³ In addition to the detrimental financial consequences for the defendant-board of directors and officers of a corporation (who may be forced to pay excessive sums of money to the corporation), the substantial attorneys' fees awarded to plaintiff-attorneys will be given at the expense of the corporation and its shareholders.³⁴ Moreover, shareholder derivative suits often only result in intangible modifications to corporate disclosure requirements³⁵ or corporate governance;³⁶ however, in such situations, although the corporation and the plaintiff-shareholders are not receiving any monetary benefit, the

³¹ See *Derivative Action*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("[A] suit asserted by a shareholder on the corporation's behalf against a third party (usu[ally] a corporate officer) because of the corporation's failure to take some action against the third party."); Jessica Erickson, *Corporate Misconduct and the Perfect Storm of Shareholder Litigation*, 84 NOTRE DAME L. REV. 75, 81 (2008) ("In a derivative suit, the corporation is the functional plaintiff—the real party in interest—and the allegations are that the corporation's current or former officers and directors breached their fiduciary duty to the corporation." (footnote omitted)).

³² Erickson, *supra* note 31, at 100 ("[A]ny recovery in a derivative suit is returned to the corporation and even a substantial recovery for the corporation will provide only a small pro rata indirect benefit to the shareholder.").

³³ *Id.*

³⁴ See Stephen M. Bainbridge, *Fee Shifting: Delaware's Self-Inflicted Wound* 11–12 (UCLA School of Law, Law & Econ., Research Paper No. 15-10, 2016) ("In sum, shareholder litigation mainly serves as a means of transferring wealth from investors to lawyers. At best, such suits take money out of the firm's residual value—at the expense of current shareholders—and return it to former shareholders, minus substantial legal fees. In many cases, moreover, no money is returned to the shareholders or the corporate entity, but legal fees are almost always paid." (footnotes omitted)).

³⁵ OLGA KOUMRIAN, CORNERSTONE RESEARCH, SHAREHOLDER LITIGATION INVOLVING MERGERS AND ACQUISITIONS: REVIEW OF 2014 M&A LITIGATION 1, 5 (2014), <https://www.cornerstone.com/Shareholder-Litigation-Involving-Acquisitions-2014-Review.pdf> [<https://perma.cc/SK67-AVQD>] ("Nearly 80 percent of settlements reached in 2014 provided only disclosure.").

³⁶ See Bainbridge, *supra* note 34, at 11 n.71 (citing Jessica Erickson, *Corporate Governance in the Courtroom: An Empirical Analysis*, 51 WM. & MARY L. REV. 1749, 1798–99 (2010) ("reporting that settlements in 18 suits (42.9 percent) included the payment of money or other financial consideration, as well as corporate governance reforms. In another 17 suits (40.5 percent), the only consideration for the settlement was corporate governance reforms.")). Professor Erickson's study further reported, however, that "nearly 70 percent of the resolved cases . . . ended with an involuntary or voluntary dismissal—resolutions that do not provide any significant tangible benefit to the plaintiff corporations." Erickson, *supra*, at 1794.

attorneys still collect their fees³⁷ under a “common benefit” theory.³⁸ Recent signs, however, show that these “disclosure only” settlements are in fact coming to an end (as discussed *infra*), leaving monetary settlements between parties as one of the only options on the table.³⁹

In order to combat the issues surrounding shareholder derivative suits, corporations once had the ability to turn to fee-shifting provisions. Fee-shifting, as used in this note, is the allocation of responsibility for the payment of attorneys’ fees from the successful party to the unsuccessful party.⁴⁰ As such, a fee-shifting provision in a company’s bylaws or certificate of incorporation “impose[s] a ‘loser pays’ rule” that deviates from the standard American Rule—which generally provides that both parties pay their own legal expenses⁴¹—and instead conforms with the English Rule—which provides that the “loser” of the litigation pays the legal fees of the “winner.”⁴² Fee-shifting under the English Rule is commonly executed by one of two methods: “one-way” fee-shifting provisions or “two-way” fee-shifting provisions.

One-way fee-shifting provisions dictate that “fees are to be shifted in favor of only one party.”⁴³ Put simply, a one-way fee-shifting provision in a contract will provide for the allocation of attorneys’ fees to the benefit of only one of the contracting parties. For example, if company *A* and company *B* entered into

³⁷ Bainbridge, *supra* note 34, at 11–12 (“In many cases, moreover, no money is returned to the shareholders or the corporate entity, but legal fees are almost always paid.”); see also KOUMRIAN, *supra* note 17, at 1, 3.

³⁸ Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs’ Attorney’s Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 25 (1991) (“Common benefit cases are typically shareholder’s derivative suits in which the plaintiffs’ attorney does not generate a fund, but rather causes the defendant to do something that confers a nonpecuniary benefit on the corporation In common benefit and fee-shifting cases the attorneys’ fee comes from the defendant rather than the class recovery.”).

³⁹ See *In re Trulia, Inc. Stockholder Litig.*, 129 A.3d 884, 887 (Del. Ch. 2016) (holding that “the terms of th[e] proposed settlement are not fair or reasonable because none of the supplemental disclosures were material or even helpful to Trulia’s stockholders, and thus the proposed settlement does not afford them any meaningful consideration to warrant providing a release of claims to the defendants”); Monica K. Loseman, *An End to Disclosure-Only Settlements?*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Oct. 6, 2015), <http://corpgov.law.harvard.edu/2015/10/06/an-end-to-disclosure-only-settlements/> [<https://perma.cc/47GM-FUXY>] (detailing a 2015 Delaware Court of Chancery opinion in which the Court signaled that disclosure-only settlements may be coming to an end).

⁴⁰ *Fee-Shifting*, *supra* note 13.

⁴¹ Steven W. Lippman, *A Corporation’s Securities Litigation Gambit: Fee-Shifting Provisions That Defend Against Fraud-on-the-Market*, 49 U. RICH. L. REV. 1321, 1336 (2015); see also *American Rule*, *supra* note 26.

⁴² See *English Rule*, *supra* note 27.

⁴³ John F. Vargo, *The American Rule on Attorney Fee Allocation: The Injured Person’s Access to Justice*, 42 AM. U. L. REV. 1567, 1589–90 (1993).

a contract that included a one-way fee-shifting provision in favor of A, in the event of litigation, if A were deemed the successful litigant, A would be entitled to recover its attorneys' fees from B. On the other hand, if B were deemed to be the successful litigant, B would not be able to recover its attorneys' fees from A.

To the contrary, two-way fee-shifting provides for the opposite, dictating that "the loser, whether plaintiff or defendant, must pay the winner's attorney's fees."⁴⁴ Taking the example described above, in the event of litigation, a contract between A and B that contains a two-way fee-shifting provision will allow for the successful litigant to recover its attorneys' fees from the unsuccessful litigant, irrespective of whether the successful litigant is company A or company B. This two-way fee-shifting regime deviates substantially from the standard American Rule, and is the truest form of the English Rule.

B. *The American Rule Versus the English Rule*

1. The American Rule

Throughout the modern world and its many legal systems, there are variations and different approaches to how litigating parties should allocate attorney fees and costs. One of the main approaches among these variations includes the "American Rule." As described above, the American Rule (which is mainly used only in the United States)⁴⁵ requires both sides of a dispute to pay their own attorneys' fees, despite who wins or who loses.⁴⁶

The Supreme Court has explicitly held that the American Rule is ordinarily the default rule when it comes to the allocation of attorney fees; however, there are exceptions that exist which

⁴⁴ *Id.* at 1590.

⁴⁵ 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, 329 (2013) (noting that every U.S. state (subject to exceptions) uses the American Rule as its "prevailing norm," except for Alaska, which uses the English rule); see also *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 (1975) ("In the United States, the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser."); Brandon Chad Bungard, *Fee! Fie! Foe! Fum!: I Smell the Efficiency of the English Rule Finding the Right Approach to Tort Reform*, 31 SETON HALL LEGIS. J. 1, 34 (2006) ("There is no doubt that on the international level the American Rule serves as the exception rather than the rule.").

⁴⁶ Eisenberg & Miller, *supra* note 45, at 328–29 ("The American rule on attorney fees ordinarily requires parties litigating disputes to compensate their own attorneys regardless of the outcome."); see also *American Rule*, *supra* note 26 ("The general policy that all litigants, even the prevailing one, must bear their own attorney's fees."); Vargo, *supra* note 43, at 1569 ("In the United States, the losing party does not generally pay the winner's legal fees. Each party is only obligated to pay his or her own attorney's fees, regardless of the outcome of the litigation." (footnote omitted)).

would allow for the shifting of these fees.⁴⁷ The courts have generally recognized six exceptions to the American Rule: contracts, common fund, Substantial Benefit Doctrine, contempt, bad faith, and statutes and rules of procedure.⁴⁸ Among these exceptions, the most applicable to the analysis at hand are the “contracts” and the “statutes and rules of procedure”⁴⁹ exceptions.

Under the contracts exception, courts, including the United States Supreme Court and the Delaware Supreme Court, have allowed contracting parties to forgo the American Rule and allocate attorneys’ fees in whatever fashion they agree upon.⁵⁰ The most common types of contractual agreements into which parties choose to “incorporate fee-shifting provisions include promissory notes, bills of sale, mortgage instruments, and insurance contracts.”⁵¹ Moreover, and most importantly, the Delaware Supreme Court has explicitly held that the bylaws of a publicly held corporation act as a contract between the stockholders and the corporation itself.⁵² As such, one would assume that a corporation could include this exception in its bylaws and shift the liability for attorneys’ fees onto a losing party.

The statutes and rules of procedure exception allows states to enact legislation that deals directly with the allocation of attorneys’ fees, and thus, if desired, forgo the default

⁴⁷ *Alyeska Pipeline*, 421 U.S. at 257 (“Other recent cases have also reaffirmed the general rule that, *absent statute or enforceable contract*, litigants pay their own attorneys’ fees.” (emphasis added)); *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 717–18 (1967) (“The rule here has long been that attorney’s fees are not ordinarily recoverable *in the absence of a statute or enforceable contract* providing therefor. . . . Limited exceptions to the American rule have, of course, developed.” (emphasis added)); *see also* Bungard, *supra* note 45, at 33 (“[T]he United States Supreme Court has been quite clear on the fee-shifting issue since 1796. In the 1796 case, *Arcambel v. Wiseman*, the Court ruled that it would not create a general rule independent of any statute permitting the award of attorneys’ fees to the prevailing party, holding: ‘The general practice of the United States is in opposition [sic] to it; and even if that practice were not strictly correct in principle, it is entitled to the respect of the court, till it is changed, or modified, by statute.’” (quoting *Arcambel v. Wiseman*, 3 U.S. (3 Dall.) 306 (1796))).

⁴⁸ *See generally* Vargo, *supra* note 43, at 1578–90.

⁴⁹ *Id.* at 1587–88 (“Statutory provisions for shifting attorney’s fees are not really exceptions to the American Rule, but a part of it.”).

⁵⁰ *See Alyeska Pipeline*, 421 U.S. at 257 (noting the exception of an “enforceable contract” to the American rule); *ATP Tour, Inc. v. Deutscher Tennis Bund*, 91 A.3d 554, 558 (Del. 2014) (“[I]t is settled that contracting parties may agree to modify the American Rule and obligate the losing party to pay the prevailing party’s fees.”).

⁵¹ Vargo, *supra* note 43, at 1578 (footnotes omitted).

⁵² *ATP Tour*, 91 A.3d at 558 (“[C]orporate bylaws are ‘contracts among a corporation’s shareholders’”); *Airgas, Inc. v. Air Prods. & Chems., Inc.*, 8 A.3d 1182, 1188 (Del. 2010) (“Corporate charters and bylaws are contracts among a corporation’s shareholders; therefore, our rules of contract interpretation apply.”); *Centaur Partners, IV v. Nat’l Intergroup, Inc.*, 582 A.2d 923, 928 (Del. 1990) (“Corporate charters and bylaws are contracts among the shareholders of a corporation and the general rules of contract interpretation are held to apply.”).

American Rule.⁵³ “There are over 200 federal statutes and almost 2000 state statutes that provide for shifting of attorney’s fees”;⁵⁴ however, out of all these statutes, the vast majority of them are one-way fee-shifting.⁵⁵ In fact, only two states have actually chosen to implement two-way fee-shifting rules—Alaska and Texas. In Alaska, Rule 82 of the Alaska Court Rules of Civil Procedure provides that “the prevailing party in a civil case shall be awarded attorney’s fees calculated under this rule.”⁵⁶ Meanwhile, in Texas, Rule 91a.7 of the Texas Rules of Civil Procedure dictates that, if a party moves to dismiss a cause of action on the grounds that it is meritless, “the court must award the prevailing party on the motion all costs and reasonable and necessary attorney fees incurred with respect to the challenged cause of action in the trial court.”⁵⁷ Rules such as those in Alaska and Texas cut against the grain of using the standard American Rule and instead reflect the other main approach of attorney fee allocation—the English Rule.

2. The English Rule

Under the English Rule, the losing party pays the winning party’s reasonable attorneys’ fees.⁵⁸ This rule is generally used by most of the Western World,⁵⁹ although as previously mentioned, Alaska and Texas have also explicitly adopted this rule under the statutes and rules of procedure exception.⁶⁰ Under the modern practice in England,

the solicitor representing the winning party [regardless of whether it is the plaintiff or defendant] prepares a bill of costs, detailing each item of taxable expense. If the losing party agrees, it pays the bill; parties, however, rarely agree. When disputed, the parties present

⁵³ See *Alyeska Pipeline*, 421 U.S. at 257 (noting the exception of a “statute” to the American Rule); Eisenberg & Miller, *supra* note 45, at 329 (“Variations on the American and English rules exist, including a California statute requiring a party to pay its adversary’s fees if the party loses in litigation under a contract that specifies that the party is to receive fees from its adversary if it prevails.”).

⁵⁴ Vargo, *supra* note 43, at 1588 (footnotes omitted); see also SUSANNE DI PIETRO ET AL., ALASKA JUDICIAL COUNCIL, ALASKA’S ENGLISH RULE: ATTORNEY’S FEE SHIFTING IN CIVIL CASES 14–15 (1995), <http://www.ajc.state.ak.us/reports/atyfee.pdf> [https://perma.cc/F45K-YPSP].

⁵⁵ See DI PIETRO ET AL., *supra* note 54, at 14–15.

⁵⁶ ALASKA R. CIV. P. 82(a).

⁵⁷ TEX. R. CIV. P. 91a.7.

⁵⁸ Eisenberg & Miller, *supra* note 45, at 329; Bungard, *supra* note 45, at 7 (“The English Rule . . . provides that the losing party is responsible for the winning party’s legal fees.”).

⁵⁹ Eisenberg & Miller, *supra* note 45, at 329; Bungard, *supra* note 45, at 34 (“In most civil law countries the codes specifically require courts to impose costs, inclusive of attorneys’ fees, on the defeated party.”).

⁶⁰ Eisenberg & Miller, *supra* note 45, at 329; Bungard, *supra* note 45, at 34.

their itemized expenses to a taxing master who decides the appropriate amounts after a hearing.⁶¹

The creation of the English Rule originated centuries ago, where “[a]t common law, fee awards were based solely on statute.”⁶² In fact, “[t]he law concerning attorney fee shifting as it developed in England was a creature of statute.”⁶³ Over the course of hundreds of years, English statutes have slowly shifted the ability to recover attorneys’ fees from only successful *plaintiffs*, to now successful *litigants*.⁶⁴ “Absent enabling legislation, the English Rule would mirror the American Rule where the ‘loser’ is not responsible for the attorney’s fees of the ‘winner.’”⁶⁵ Today, Delaware’s enactment of DGCL Section 102(f) and amendment of Section 109(b) solidifies the use of the American Rule with respect to shareholder derivative suits, which, although perfectly justifiable under the statutes and rules of procedure exception, fails to account for the longstanding contracts exception that Delaware courts have consistently recognized.⁶⁶

II. LEGISLATIVE HISTORY OF DGCL SECTIONS 102(f) AND 109(b)

A. *Delaware Fee-Shifting Prior to ATP Tour*

Prior to *ATP Tour, Inc. v. Deutscher Tennis Bund*, although the Delaware Supreme Court had never addressed whether a fee-shifting provision found in a Delaware corporation’s articles of incorporation or bylaws was valid or legal,⁶⁷ it had

⁶¹ Vargo, *supra* note 43, at 1571 (footnotes omitted).

⁶² *Id.* at 1570.

⁶³ *Id.* at 1571.

⁶⁴ *Id.* at 1570–71. It took centuries for plaintiffs and defendants to become equal in the allocation of attorneys’ fees:

In 1278, the Statutes of Gloucester allowed only the victorious plaintiff to recover attorney’s fees in specified actions. Not until two centuries later could a defendant recover attorney’s fees, and then only in isolated instances. By 1607, a defendant could recover fees on the same basis as a winning plaintiff. In 1875, the Rules of Court gave English courts the discretion to determine the amounts that could be awarded to a prevailing litigant.

Id. (footnotes omitted).

⁶⁵ *Id.* at 1571 (footnotes omitted).

⁶⁶ See cases cited *supra* note 52.

⁶⁷ *ATP Tour, Inc. v. Deutscher Tennis Bund*, 91 A.3d 554, 557 (Del. 2014) (providing that the district court’s reasoning for remanding the case regarding bylaw fee-shifting provisions to the Delaware Supreme Court was due to the “novel question of Delaware law that should be addressed in the first instance by [the Delaware Supreme] Court”).

addressed, numerous times,⁶⁸ Delaware's standard policy of following the default American Rule and, consequently, the generally recognized contracts exception to the rule.⁶⁹ Yet, even with Delaware's adherence to the American Rule and its contracts exception, there were only a "modest number of public companies [that had] adopted various forms of fee-shifting prior to *ATP*."⁷⁰

On May 8, 2014, the Delaware Supreme Court issued its opinion in *ATP Tour*, effectively ruling that fee-shifting provisions in company bylaws are valid.⁷¹ *ATP Tour, Inc. (ATP)* is a nonstock, "membership corporation"⁷² incorporated in Delaware that "operates a global professional men's tennis tour."⁷³ The members of the corporation include professional tennis players as well as various entities that operate and organize professional tennis tournaments.⁷⁴ *Deutscher Tennis Bund (Deutscher)*, the original plaintiff in the case, was one of those entities.⁷⁵

In the early 1990s, after joining ATP, *Deutscher* entered into an agreement with ATP whereby both parties "agreed to be bound by ATP's Bylaws, as amended from time to time."⁷⁶ In 2006, ATP's seven-member board of directors ratified the amendment that was at issue (Article 23.3(a)), a bylaw which essentially provided, *inter alia*, that if any member of the corporation brings suit against the corporation or against the ATP board, and the court rules against the members, all of the members that participated in the suit will be jointly and severally

⁶⁸ *Id.* at 558 ("Delaware follows the American Rule, under which parties to litigation generally must pay their own attorneys' fees and costs."); *Sternberg v. Nanticoke Mem'l Hosp., Inc.*, 62 A.3d 1212, 1220 (Del. 2013) ("Under the American Rule and Delaware law, litigants are normally responsible for paying their own litigation costs."); *Goodrich v. E.F. Hutton Grp. Inc.*, 681 A.2d 1039, 1041 (Del. 1996) ("The standards for awarding attorney's fees in litigation by the [Delaware] Court of Chancery are well established. The starting principle is a recognition of the so-called 'American Rule.'" (internal citations omitted)).

⁶⁹ *Sternberg*, 62 A.3d at 1220 ("Under the American Rule and Delaware law, litigants are normally responsible for paying their own litigation costs. An exception to this rule is found in contract litigation that involves a fee shifting provision.").

⁷⁰ Claudia H. Allen, *Fee-Shifting Bylaws: Where Are We Now?*, BLOOMBERG BNA (Feb. 2, 2015), <http://www.bna.com/feeshifting-bylaws-n17179922685/> [<https://perma.cc/4QSC-7RJ2>].

⁷¹ *ATP Tour*, 91 A.3d at 558.

⁷² *Membership Corporation*, BALLENTINE'S LAW DICTIONARY (3d ed. 2010) ("A distinct kind of corporation authorized under the statutes of most jurisdictions, existing for purposes other than profit, often for charitable, fraternal, social, or religious purposes, in which the participants acquire the status of members rather than stockholders."). As such, a "membership corporation" is technically not a "stock corporation" or "publicly traded corporation," but for purposes of this note, this distinction is irrelevant.

⁷³ *ATP Tour*, 91 A.3d at 555.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* at 556.

liable for the board's attorneys' fees, costs, and litigation expenses.⁷⁷ This bylaw, utilizing the contracts exception to the American Rule, shifted the liability of attorneys' fees from the traditionally used American Rule, to the "loser pays" English Rule.

The controversy in *ATP Tour* began in 2007—one year after the addition of the fee-shifting provision to ATP's bylaws—when ATP decided to downgrade the professional tennis tournament that Deutscher owned and operated from the highest tier to the second highest tier, while simultaneously changing the season in which the tournament was played from spring to summer.⁷⁸ Taking offense to these changes, Deutscher brought suit against "ATP and six of its board members in the United States District Court for the District of Delaware, alleging both federal antitrust claims and Delaware fiduciary duty claims."⁷⁹ After the district court ruled in favor of ATP, ATP moved to recover its attorneys' fees, costs, and expenses, pursuant to Article 23.3(a) of its bylaws.⁸⁰

The district court, however, denied the motion, citing various policy concerns as well as federal preemption issues with respect to federal antitrust law.⁸¹ On appeal, the United States Court of Appeals for the Third Circuit held "the District Court should have decided whether Article 23.3(a) was enforceable as a matter of Delaware law before reaching the federal preemption question,"⁸² and remanded the case back to

⁷⁷ *Id.* The bylaw at issue here, Article 23.3(a), states:

In the event that (i) any [current or prior member or Owner or anyone on their behalf ("Claiming Party")] initiates or asserts any [claim or counterclaim ("Claim")] or joins, offers substantial assistance to or has a direct financial interest in any Claim against the League or any member or Owner (including any Claim purportedly filed on behalf of the League or any member), and (ii) the Claiming Party (or the third party that received substantial assistance from the Claiming Party or in whose Claim the Claiming Party had a direct financial interest) does not obtain a judgment on the merits that substantially achieves, in substance and amount, the full remedy sought, then each Claiming Party shall be obligated jointly and severally to reimburse the League and any such member or Owners for all fees, costs and expenses of every kind and description (including, but not limited to, all reasonable attorneys' fees and other litigation expenses) (collectively, "Litigation Costs") that the parties may incur in connection with such Claim.

Id. (alterations in original).

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.* (citing to *Bund v. ATP Tour, Inc.*, 2009 WL 3367041, at *3 (D. Del. Oct. 19, 2009) ("Furthermore, allowing antitrust defendants to collect attorneys fees in this case would be contrary both to longstanding Third Circuit precedent and to the policies underlying federal antitrust laws.")).

⁸² *Id.* at 556–57 (citing to *Deutscher Tennis Bund v. ATP Tour, Inc.*, 480 Fed. App'x 124, 127–28 (3d Cir. 2012)).

the district court.⁸³ “On remand, the District Court reasoned that the question of Article 23.3(a)’s enforceability was a novel question of Delaware law that should be addressed in the first instance by [the Delaware Supreme] Court.”⁸⁴ Thereafter, four questions of law were certified for the Delaware Supreme Court to answer, the first of which directly addressed whether a *nonstock* corporation may legally enact a fee-shifting provision in its bylaws allocating attorneys’ fees, costs, and expenses to the losing party.⁸⁵

The Delaware Supreme Court, after analyzing the first certified question, held that “[f]ee-shifting bylaws are permissible under Delaware Law.”⁸⁶ The court first established the legality of the bylaw in question by evaluating the necessary requirements in order for a bylaw to be considered valid.⁸⁷ After finding that the nature of fee-shifting bylaws in general are valid,⁸⁸ especially since “no principle of common law prohibits directors from enacting fee-shifting bylaws,”⁸⁹ the court considered the potential implications that may arise from Delaware’s traditional use of the American Rule with respect to the allocation of attorneys’ fees.⁹⁰ In response to that inquiry, the court noted:

⁸³ *Id.*

⁸⁴ *Id.* at 557.

⁸⁵ *Id.* (emphasis added). Out of the four questions certified to the Delaware Supreme Court, the first question is the most pertinent to the issue this note addresses. It provided:

May the Board of a Delaware non-stock 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”?

Id.

⁸⁶ *Id.* at 557–58.

⁸⁷ *Id.* (“Under Delaware law, a corporation’s bylaws are ‘presumed to be valid, and the courts will construe the bylaws in a manner consistent with the law rather than strike down the bylaws.’ To be facially valid, a bylaw must be authorized by the Delaware General Corporation Law (DGCL), consistent with the corporation’s certificate of incorporation, and its enactment must not be otherwise prohibited.” (footnotes omitted)).

⁸⁸ *Id.* at 558 (“A fee-shifting bylaw, like the one described in the first certified question, is facially valid. Neither the DGCL nor any other Delaware statute forbids the enactment of fee-shifting bylaws. 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 rights or powers or the rights or powers of its stockholders, directors, officers or employees.’”).

⁸⁹ *Id.*

⁹⁰ *Id.* at 554, 558.

[Although] Delaware follows the American Rule . . . 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. Because corporate bylaws are "contracts among a corporation's shareholders," a fee-shifting provision contained in a nonstock corporation's validly-enacted bylaw would fall within the contractual exception to the American Rule.⁹¹

Ultimately, the Delaware Supreme Court held that due to the valid nature of fee-shifting bylaws generally, and due to the fact that a corporation's bylaws are "contracts among a corporation's shareholders,"⁹² a fee-shifting provision, *in a nonstock corporation's bylaws*, falls within the contracts exception to the American Rule, and therefore is legally valid.⁹³ The Delaware State Legislature, appearing to take offense to this ruling, moved quickly to "correct" the issue that the Delaware Supreme Court had just seemingly created.⁹⁴

B. *Fee-Shifting Post-ATP Tour: The Reaction of the Delaware Legislature*

Generally, whenever the Delaware Legislature modifies the DGCL, there is a good chance that the Section of Corporation Law of the Delaware State Bar Association (hereinafter Delaware Corporation Law Council) was behind it.⁹⁵ True to form, it came as no surprise when, less than a month after the *ATP Tour* opinion was issued, the Delaware Legislature (in particular, the Delaware State Senate) debated whether to ratify an addition and amendment to the DGCL that was proposed by the Delaware Corporation Law Council, and subsequently the Delaware State Bar Association.⁹⁶ After careful deliberations surrounding the

⁹¹ *Id.* (emphasis added) (footnotes omitted) (citing *Sternberg v. Nanticoke Mem'l Hosp., Inc.*, 62 A.3d 1212, 1218 (Del. 2013)).

⁹² *Id.* (quoting *Airgas, Inc. v. Air Prods. & Chems., Inc.*, 8 A.3d 1182, 1188 (Del. 2010)).

⁹³ Note that the particular facts of *ATP Tour* and the narrow language used by the court dictate that its holding applies to nonstock corporation bylaws only. *Id.* at 555.

⁹⁴ Lisa A. Rickard, *Delaware Flirts with Encouraging Shareholder Lawsuits*, WALL ST. J. (Nov. 14, 2014), <http://www.wsj.com/articles/lisa-rickard-delaware-flirts-with-encouraging-shareholder-lawsuits-1416005328> [<https://perma.cc/78CT-CRVT>] ("Weeks after the court's ruling, the Delaware legislature, cheered on and supported by the powerful state plaintiffs bar, attempted to pass a law 'fixing' the Delaware Supreme Court's decision. Far from a fix, the bill would have outlawed a company's ability to use the fee-shifting tool to protect itself against frivolous litigation.").

⁹⁵ Ed Batts, *In an Abrupt Reversal, Delaware Says "Ummm . . . Wait!" to Fee Shifting Bylaws*, DLA PIPER (May 27, 2014), <https://www.dlapiper.com/en/us/insights/publications/2014/05/in-an-abrupt-reversal/> [<https://perma.cc/B2XW-MMCF>] ("Changes to the Delaware General Corporation Law (DGCL) are normally a rather rubber-stamp affair—the Delaware State Bar Association recommends a change and the Delaware legislature dutifully tends to follow the advice of its experts . . .").

⁹⁶ See Rickard, *supra* note 94.

initial proposal—Senate Bill No. 236—followed by a postponement of the issue until the following term, the Delaware Legislature ultimately adopted Senate Bill No. 75, which addressed the *ATP Tour* decision.⁹⁷

1. Senate Bill No. 236

Just days after the Delaware Supreme Court's decision in *ATP Tour*, the Delaware Corporation Law Council took action. Fearing that the court's decision—which only applied to nonstock companies—could easily be applied to publicly traded companies as well, the Delaware Corporation Law Council began “circulat[ing] among practitioners a draft of an amendment that would specifically limit stock corporations' use of fee-shifting bylaws.”⁹⁸ According to Norman Monhait, the Chair of the Delaware Corporation Law Council at the time the amendment was proposed,⁹⁹ the reason behind such an amendment was simple: “The significant liability risk created by such a provision could drastically reduce the ability of stockholders to bring even meritorious claims.”¹⁰⁰ After receiving approval by both the Delaware Corporation Law Council and the Delaware State Bar Association, the amendment was sent to the Delaware State Senate.¹⁰¹ The State Senate quickly approved the proposed addition and amendments to the DGCL, which were encompassed in Senate Bill No. 236 (S.B. 236). Dealing only with the issue raised in *ATP Tour*, S.B. 236 provided for the amendment of DGCL Sections 102(b)(6) and 114, as well the formation of an entire new section—Section 331.¹⁰²

As one of S.B. 236's major additions to the DGCL, Section 331 addressed the monetary liability of stockholders, stating, “Notwithstanding any other provision of this chapter, neither the certificate of incorporation nor the bylaws of any corporation

⁹⁷ See DEL. STATE BAR ASS'N, *supra* note 3, at 1 (noting that “[t]he proposed legislation arises from the Delaware Supreme Court's . . . decision in *ATP Tour Inc. v. Deutscher Tennis Bund*”).

⁹⁸ Karlee Weinmann, *Del. Attys Push to Shield Stock Cos. from Fee-Shifting Ruling*, LAW360 (May 22, 2014), <http://www.law360.com/articles/540901/del-attys-push-to-shield-stock-cos-from-fee-shifting-ruling> [<https://perma.cc/J2QZ-8U7A>].

⁹⁹ See *About the Section of Corporation Law*, DEL. STATE BAR ASS'N, <https://www.dsba.org/sections-committees/sections-of-the-bar/corporation-law/> [<https://perma.cc/MK8B-VRNE>] (listing Norman Monhait as the “Immediate Past Chair”); see also Weinmann, *supra* note 98.

¹⁰⁰ Weinmann, *supra* note 98 (quoting Norman Monhait, head of the Corporate Law Section of the Delaware Bar).

¹⁰¹ Karlee Weinmann, *Fee-Shifting Ban Heads to Del. Capitol*, LAW360 (May 29, 2014), <http://www.law360.com/articles/542550/fee-shifting-ban-heads-to-del-capitol> [<https://perma.cc/R99S-XT8C>].

¹⁰² S.B. 236, 147th Gen. Assemb. (Del. 2014).

may impose monetary liability, or responsibility for any debts of the corporation, on any stockholder of the corporation, except to the extent permitted by Sections 102(b)(6) and 202 of this title.”¹⁰³ As follows, S.B. 236 mainly amended Section 102(b)(6), which provided the following (addition underlined):

(b) In addition to the matters required to be set forth in the certificate of incorporation by subsection (a) of this section, the certificate of incorporation may also contain any or all of the following matters: (6) A provision imposing personal liability for the debts of the corporation on its stockholders based solely on their stock ownership, to a specified extent and upon specified conditions; otherwise, the stockholders of a corporation shall not be personally liable for the payment of the corporation's debts except as they may be liable by reason of their own conduct or acts.¹⁰⁴

Reading Section 331 in conjunction with Section 102(b)(6) provides that, in the certificate of incorporation and the bylaws of a stock corporation, the only provision imposing monetary liability on a shareholder can be one that is “based solely on [the shareholder's] stock ownership,”¹⁰⁵ and not one that is based on “any debts of the corporation”¹⁰⁶ (e.g., attorneys' fees incurred by directors or officers in the process of litigation).¹⁰⁷ Therefore, under proposed Sections 102(b)(6) and 331, fee-shifting provisions in the articles of incorporation or bylaws of a stock corporation that impose liability on shareholders for the attorneys' fees incurred by directors or officers during the course of shareholder derivative actions would be invalid.¹⁰⁸ Not only did these additions to the DGCL address the Delaware Corporation Law Council's concerns that the ruling from *ATP Tour* would “spill-over” and apply to stock corporations as well,¹⁰⁹ but they also avoided explicitly overruling *ATP Tour*, because that decision technically only applied to nonstock corporations.

However, just as S.B. 236 had enthusiastic supporters in the form of the Delaware Corporation Law Council, it also had its opponents. Delaware corporations such as Dole Food Company, Inc. as well as public interest groups such as the U.S. Chamber Institute for Legal Reform (ILR) vehemently

¹⁰³ *Id.*

¹⁰⁴ *Id.* (emphasis added).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* (“Under new Section 331 and Section 102(b)(6) as amended, a provision of the certificate of incorporation or bylaws that would purport to require a holder of stock in a stock corporation to pay expenses incurred by the corporation, its directors, officers, employees, agents or controlling stockholders in connection with litigation initiated or claims prosecuted by the stockholder would be facially invalid.”).

¹⁰⁹ See Weinmann, *supra* note 98.

opposed the new legislation.¹¹⁰ The ILR expressed its staunch opposition to S.B. 236 in a letter to Senator Bryan Townsend,¹¹¹ the primary sponsor of S.B. 236,¹¹² and in a letter sent to the Members of the Delaware General Assembly.¹¹³ The letter to Senator Townsend requested that he “consider deferring consideration of S.B. 236 in order to allow [for] a more robust discussion on the broader issues raised by this legislation.”¹¹⁴ The letter to the Members of the General Assembly was more forceful, urging them to reject S.B. 236 in its entirety based on the Delaware Supreme Court’s decision in *ATP Tour*, the expedited nature of the legislation, and the fact that S.B. 236 will virtually condemn shareholders to “wholly unjustified costs.”¹¹⁵

To the surprise of some commentators, Senator Townsend and the Delaware Assembly heeded the ILR’s warnings and decided to postpone hearings on S.B. 236 until the fall term.¹¹⁶ Although the Delaware State Senate approved S.B.

¹¹⁰ See Letter from C. Michael Carter, Dole Food Co., to the Honorable Bryan Townsend, Del. State Senator (June 9, 2014), <https://www.documentcloud.org/documents/1184980-dole-letter-to-townsend.html> [<https://perma.cc/TS4W-NK5N>] (stating that S.B. 236 “is anti-business and will only serve to encourage the appraisal arbitrage lawsuits that have become so commonplace against companies in Delaware”); see Letter from Lisa A. Rickard, President, U.S. Chamber Inst. for Legal Reform, to Norman Monhait, Chairman, Section of Corp. Law, Del. State Bar Ass’n (Apr. 8, 2015), http://www.institutelegalreform.com/uploads/sites/1/de-bar-letter-4_8_2015.pdf [<https://perma.cc/RD5G-TPE4>] [hereinafter Rickard, April 4 Letter] (“The U.S. Chamber of Commerce (the ‘Chamber’) is the world’s largest business federation, representing the interests of more than three million companies of every size, sector, and region. ILR is an affiliate of the Chamber dedicated to making our nation’s overall civil legal system simpler, faster, and fair for all participants.”).

¹¹¹ See Letter from Andrew Wynne, Dir., State Legislative Affairs, U.S. Chamber Inst. for Legal Reform, to the Honorable Bryan Townsend, Del. State Senator (June 5, 2014), <https://assets.documentcloud.org/documents/1184979/chamber-letter-to-townsend.pdf>.

¹¹² S.B. 236, 147th Gen. Assemb. (Del. 2014).

¹¹³ See Letter from Lisa A. Rickard, President, U.S. Chamber Inst. for Legal Reform, to Members of the Del. Gen. Assembly (June 9, 2014), <https://assets.documentcloud.org/documents/1184978/chamber-letter-to-lawmakers.pdf> [hereinafter Rickard, June 9 Letter].

¹¹⁴ See Wynne, *supra* note 111.

¹¹⁵ See Rickard, June 9 Letter, *supra* note 113 (“Notwithstanding the Delaware courts’ deep experience on these matters, SB 236 would overturn the Delaware Supreme Court’s unanimous ruling in the *ATP Tour* case—and it would do so on an extraordinarily expedited basis Abusive intra-corporate litigation has become an extremely serious problem that imposes very substantial and wholly unjustified costs upon shareholders in Delaware companies.”).

¹¹⁶ Alison Frankel, *Big Pension Funds Mobilize Against Delaware Fee-Shifting Clauses*, REUTERS (Nov. 26, 2014), <http://blogs.reuters.com/alison-frankel/2014/11/26/big-pension-funds-mobilize-against-delaware-fee-shifting-clauses/> [<https://perma.cc/Q8W5-STZQ>] (“Typically, according to my Reuters colleague Tom Hals, when the state bar backs a proposed law, Delaware legislators pass it. But not this time. Delaware lawmakers tabled the proposed law just a few days after the Chamber sent its letters.”); see also Jonathon Starkey, *Chamber Forces Delay on Fee-Shifting Legislation*, DEL. ONLINE (June 10, 2014), <http://www.delawareonline.com/story/firststatepolitics/2014/06/10/fee-shifting-bill/10280791/> [<https://perma.cc/3MBH-A2UQ>] [hereinafter Starkey, *Chamber Forces Delay on Fee-Shifting*]; Jonathan Starkey, *Fee-Shifting Bylaw Bill Tabled Until*

236, instead of pushing it through to the Delaware House of Representatives for review, the Senate adopted a resolution “asking the corporate section of the state Bar Association to ‘continue examination’ of measures that would address fee-shifting.”¹¹⁷ Senator Townsend expressed his opinion that “Delaware truly respects the views of the business community,” and noted that he is “happy to encourage discussions about ways we can limit frivolous litigation.”¹¹⁸

In the intervening time between the tabling of S.B. 236 in June of 2014 and the Delaware State Senate reopening the discussion in 2015, contrary to the initial concerns of the Delaware State Bar Association, the number of Delaware public corporations that adopted fee-shifting bylaws remained modest: “Since *ATP*, and despite claims that large numbers of public companies would adopt fee-shifting bylaws, only 39 domestic corporations, out of the approximately 5,000 public companies traded on U.S. stock exchanges have acted.”¹¹⁹

As some commentators have noted, however, publicly traded companies incorporated in Delaware might have been hesitant to begin implementing fee-shifting provisions in their bylaws or articles of incorporation right after the *ATP Tour* decision.¹²⁰ “That such a small number of companies had done so doubtless[ly] reflected concern by corporate directors over opposition from shareholder activists.”¹²¹ In other words, companies might have believed that once discussions regarding S.B. 236 were reopened in 2015, the Delaware Legislature would heed the advice of the Delaware Corporation Law Council—who plays a large role in DGCL amendments¹²² and who quickly criticized the *ATP Tour* decision—and enact legislation that prohibits fee-shifting provisions.¹²³ Due to this

2015, DEL. ONLINE (June 19, 2014), <http://www.delawareonline.com/story/money/business/2014/06/19/delaware-general-assembly-tables-legal-fee-shifting-bylaw-bill/10946611/> [https://perma.cc/ZAT2-M8Y4] [hereinafter Starkey, *Fee-Shifting Bylaw Tabled*].

¹¹⁷ Starkey, *Fee-Shifting Bylaw Tabled*, *supra* note 116; *see also* S.J. Res. 12, 147th Gen. Assemb. (Del. 2014).

¹¹⁸ Starkey, *Chamber Forces Delay on Fee-Shifting*, *supra* note 116.

¹¹⁹ Allen, *supra* note 70 (footnotes omitted).

¹²⁰ Frankel, *supra* note 116 (“So far, big U.S. corporations have been reluctant to adopt fee-shifting clauses.”).

¹²¹ Bainbridge, *supra* note 34, at 6.

¹²² Batts, *supra* note 95; *see supra* note 116 and accompanying text; *see also* Frankel, *supra* note 116.

¹²³ *See* Bainbridge, *supra* note 34, at 6 (“The legal uncertainty created by the Delaware legislature’s effort to overturn the *ATP* decision also loomed as a potential deterrent, as many observers expected that the legislature would ultimately opt to ban fee-shifting.”). In an interview with Lee Rudy, of Kessler Topaz Meltzer & Check, Angela Frankel reported that Rudy told her that “corporations may be waiting to see what the Delaware legislature says about fee-shifting, or may be reluctant to adopt provisions until they are endorsed by Chancery Court.” Frankel, *supra* note 116.

likelihood, logic dictates that a company would wait until the Delaware Legislature had a chance to address S.B. 236 again in 2015 before going through the tedious process¹²⁴ of amending its bylaws to incorporate a fee-shifting provision, just to have it ruled invalid by the Legislature and be forced to remove the provision or be subject to litigation.¹²⁵

2. Senate Bill No. 75

When the Delaware Legislature reconvened in 2015, all eyes were on the Delaware State Bar Association to see whether they would propose any new amendments to the DGCL similar to those proposed in S.B. 236. That question was answered affirmatively in March when the Delaware State Bar Association issued their proposed amendments to the DGCL (S.B. 75).¹²⁶ Along with these amendments, the Delaware State Bar Association issued an explanation regarding the reasoning behind their decision.¹²⁷

Whereas S.B. 236 did not explicitly provide for the prohibition of fee-shifting provisions, S.B. 75 struck right to the core of the issue presented by *ATP Tour*. S.B. 75, *inter alia*, contained amendments to Sections 102 and 109(b) of the DGCL that dealt directly with fee-shifting provisions. The proposed amendment to Section 102, found in the newly added subsection (f), provided: “The certificate of incorporation may not contain 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, as defined in § 115 of this title.”¹²⁸ Likewise, the proposed amendment to Section 109(b) extended the prohibition of fee-shifting provisions from the articles of incorporation to the bylaws of a publicly traded company, providing: “The bylaws may not contain any provision that would impose liability on a stockholder for the attorneys’ fees or expenses of the corporation

¹²⁴ Henry duPont Ridgely, Essay, *The Emerging Role of Bylaws in Corporate Governance*, 68 SMU L. REV. 317, 320 (2015) (“For public companies, a shareholder vote to approve a bylaw requires proxy access. . . . Yet for the corporation and shareholders alike, the proxy process can be complex and involve the U.S. Securities and Exchange Commission (“SEC”).”).

¹²⁵ See Frankel, *supra* note 116 (“If Delaware lawmakers or judges say explicitly that fee-shifting is legal for companies with public shareholders, Rudy said, ‘you’ll see a flood of these bylaws.’”).

¹²⁶ See Jeff C. Dodd & James Edward Maloney, *Proposed Delaware Legislation Would Prohibit Fee-Shifting Provisions for Stock Corporations*, ANDREWS KURTH (Mar. 12, 2015), <https://www.andrewskurth.com/insights-1196.html> [<https://perma.cc/9YKY-NDRL>].

¹²⁷ *Id.*; see DEL. STATE BAR ASS’N, *supra* note 3; *infra* Part III.

¹²⁸ S.B. 75, 148th Gen. Assemb. (Del. 2015).

or any other party in connection with an internal corporate claim, as defined in § 115 of this title.”¹²⁹ Also under S.B. 75, “internal corporate claims” would be defined under the newly added Section 115 as “claims, including claims in the right of the corporation, (i) that are based upon a violation of a duty by a current or former director or officer or stockholder in such capacity, or (ii) as to which this title confers jurisdiction upon the Court of Chancery.”¹³⁰

Read together, S.B. 75’s new amendments to Sections 102(f) and 109(b) provide that a publicly traded company may not include a provision in its bylaws or certificate of incorporation that would shift the liability of the corporation’s attorneys’ fees onto a plaintiff-stockholder in the event such stockholder was the losing party in a shareholder derivative suit. Essentially, Sections 102(f) and 109(b) solidify the use of the American Rule (that shareholder derivative suit litigants pay their own attorneys’ fees regardless of the outcome) and prohibit a publicly held corporation from adopting any bylaw or charter provision that establishes the use of the English Rule (that unsuccessful litigants pay their own attorneys’ fees as well as the attorneys’ fees of the successful litigant).

On April 29, 2015, S.B. 75 was assigned to the Senate Judiciary Committee and proceeded quickly through the Delaware Legislature.¹³¹ Approximately one month later, after S.B. 75 was approved by the Delaware State Senate and pushed through for review by the Delaware House of Representatives, the House Judiciary Committee heard unopposed testimony in which Norman Monhait explained “that the ban would simply maintain the status quo by statutorily prohibiting corporations from adopting such bylaws.”¹³² Thereafter, the House of Representatives moved extraordinarily fast, approving S.B. 75 by a unanimous vote within a matter of days.¹³³ On June 24,

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Senate Bill 75: 148th General Assembly (2015–2016)*, *supra* note 25 (Actions History).

¹³² H. Judiciary Comm. Meeting Minutes (Del. June 3, 2015), [http://phoenix.state.de.us/LIS/lis148.nsf/6d7bc5d1188131fa85257e0a0055604b/e0a816faaba21d6585257e4a006400ce/\\$FILE/6.3.15%20House%20Judiciary%20Committee%20Meeting%20Minutes.pdf](http://phoenix.state.de.us/LIS/lis148.nsf/6d7bc5d1188131fa85257e0a0055604b/e0a816faaba21d6585257e4a006400ce/$FILE/6.3.15%20House%20Judiciary%20Committee%20Meeting%20Minutes.pdf) [<https://perma.cc/2YK5-7TKK>]; *see* S.B. 75, 148th Gen. Assemb. (Del. 2015) (stating in the synopsis that the addition to Section 109(b) and the amendment to Section 102(f) “[do] not disturb [the *ATP Tour*] ruling in relation to nonstock corporations”).

¹³³ *Senate Bill 75: 148th General Assembly (2015–2016)*, *supra* note 25 (The Actions History states that S.B. 75 was assigned to the Judiciary Committee in the Senate for review on April 29, 2015. It was reported out of the judiciary committee on May 6, and sent to the Senate for review. On May 12, the Delaware State Senate passed S.B. 75 with a vote of “16 YES 5 NO.” On June 11, after S.B. 75 had been assigned and reported out of the Judiciary Committee in the House of Representatives, the House of

2015, Governor Jack Markell signed into law S.B. 75, which took effect on August 1, 2015,¹³⁴ formally amending Delaware General Corporation Law Sections 102(f) and 109(b).¹³⁵

Adjoined to S.B. 75 was a Synopsis of the Delaware Legislature's reasoning behind the adoption of each proposed amendment, which stated that the amendments to Sections 102(f) and 109(b) invalidating fee-shifting provisions would "preserve the efficacy of the enforcement of fiduciary duties in stock corporations."¹³⁶

Despite the seemingly smooth and expedited nature of S.B. 75, it did not go unopposed. As with S.B. 236, as soon as the Delaware State Bar Association issued their proposed amendments to Sections 102(f) and 109(b), the ILR issued a press release in which they stated their opposition on the grounds that the amendments did not adequately protect against the "well-documented, longstanding problem of abusive merger-and-acquisition litigation in Delaware."¹³⁷ The ILR issued at least two more press releases during the life span of S.B. 75, one after the Delaware State Senate's vote approving S.B. 75¹³⁸ and another after the Governor of Delaware signed S.B. 75 into law,¹³⁹ both condemning the Delaware Legislature's approval of the amendments.¹⁴⁰ Moreover, Lisa Rickard, the President of the ILR, sent a letter to Norman Monhait characterizing S.B. 75 as a proposal that "would eliminate an important mechanism that corporations have turned to in order to protect innocent shareholders against the significant costs of abusive litigation without providing an adequate replacement

Representatives passed the legislation with a vote of "40 YES 0 NO." On June 24, the Governor of Delaware signed S.B. 75 into law.).

¹³⁴ See S.B. 75.

¹³⁵ DEL. CODE ANN. tit. 8, §§ 102(f), 109(b) (2017).

¹³⁶ S.B. 75 ("New subsection (f) is not intended, however, to prevent the application of such provisions pursuant to a stockholders agreement or other writing signed by the stockholder against whom the provision is to be enforced.").

¹³⁷ *U.S. Chamber Comments on Introduction of Anti-"Fee Shifting" Legislation in Delaware*, U.S. CHAMBER INST. FOR LEGAL REFORM (Apr. 30, 2015), <http://www.instituteforlegalreform.com/resource/us-chamber-comments-on-introduction-of-anti-fee-shifting-legislation-in-delaware> [<https://perma.cc/GSM2-MXJV>].

¹³⁸ *U.S. Chamber Comments on Delaware State Senate Vote on "Fee Shifting" Bill*, U.S. CHAMBER INST. FOR LEGAL REFORM (May 12, 2015), <http://www.instituteforlegalreform.com/resource/us-chamber-comments-on-delaware-state-senate-vote-on-fee-shifting-bill> [<https://perma.cc/EQS6-C26V>].

¹³⁹ *U.S. Chamber Disappointed in Enactment of Delaware's Anti-"Fee Shifting" Law*, U.S. CHAMBER INST. FOR LEGAL REFORM (June 25, 2015), <http://www.instituteforlegalreform.com/resource/us-chamber-disappointed-in-enactment-of-delawares-anti-fee-shifting-law> [<https://perma.cc/BBF6-9QXL>].

¹⁴⁰ See generally *U.S. Chamber Comments On Delaware State Senate Vote on "Fee Shifting" Bill*, *supra* note 138; *U.S. Chamber Disappointed in Enactment of Delaware's Anti-"Fee Shifting" Law*, *supra* note 139.

tool.”¹⁴¹ Despite this opposition, the Delaware Legislature still decided to enact Sections 102(f) and 109(b), and today Delaware corporations are left with the repercussions of that decision.

III. RAMIFICATIONS OF DGCL SECTIONS 102(f) AND 109(b)

The decision to enact DGCL Sections 102(f) and 109(b) solidifies the use of the American Rule, but contradicts the long-standing contracts exception that has specifically been accepted by the Supreme Court and the Delaware Supreme Court.¹⁴² Whereas having a fee-shifting provision in a corporation's bylaws or certificate of incorporation can deter frivolous litigation, Sections 102(f) and 109(b) incentivize frivolous shareholder litigation, increase the already epidemic levels of shareholder litigation stemming from corporate mergers, and promote disinterest in board of director and officer positions. Most importantly, Sections 102(f) and 109(b) actually harm shareholders, a sentiment that was echoed by Lisa Rickard,¹⁴³ and is contrary to what the Delaware Corporation Law Council contended.

A. *DCGL Section 102(f) and Section 109(b)'s Contradiction to the Contracts Exception*

As a policy consideration, it is necessary to point out that the enactment of these statutes solidified the use of the American Rule in regard to shareholder derivative actions against a publicly traded company. Although this use of the American Rule is nothing out of the ordinary, most jurisdictions, including Delaware,¹⁴⁴ have at least recognized the contracts exception to the American Rule, which allows contracting parties to set their own procedures with respect to the allocation of attorneys' fees and opt-out of the American Rule in favor of some form of the English Rule.¹⁴⁵ Furthermore, as the Delaware

¹⁴¹ Rickard, April 4 Letter, *supra* note 110.

¹⁴² See *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 257 (1975) (noting the exception of an “enforceable contract” to the American rule); *ATP Tour, Inc. v. Deutscher Tennis Bund*, 91 A.3d 554, 558 (Del. 2014) (“[I]t is settled that contracting parties may agree to modify the American Rule and obligate the losing party to pay the prevailing party's fees.”); *Airgas, Inc. v. Air Prods. & Chems., Inc.*, 8 A.3d 1182, 1188 (Del. 2010) (“Corporate charters and bylaws are contracts among a corporation's shareholders; therefore, our rules of contract interpretation apply.”); *Centaur Partners, IV v. Nat'l Intergroup, Inc.*, 582 A.2d 923, 928 (Del. 1990) (“Corporate charters and by-laws are contracts among the shareholders of a corporation and the general rules of contract interpretation are held to apply.”).

¹⁴³ Rickard, April 4 Letter, *supra* note 110.

¹⁴⁴ See, e.g., cases cited *supra* note 142 and accompanying text.

¹⁴⁵ See *supra* Section I.A.

Supreme Court has explicitly held, “Corporate bylaws are ‘contracts among a corporation’s shareholders.’”¹⁴⁶ With the enactment of Sections 102(f) and 109(b), however, the Delaware Legislature has put a restriction on a publicly traded corporation’s ability to invoke the contracts exception to the American Rule, even if shareholders themselves wish to incorporate a fee-shifting provision into the company’s bylaws or certificate of incorporation.

Although the statutes and rules of procedure exception to the American Rule allows states to establish their own fee-shifting regimes—which theoretically can include legislatively solidifying the use of the American Rule—“[t]he major purpose of state fee-shifting legislation is to compensate the prevailing plaintiff, promote public interest litigation, punish or deter the losing party for misconduct, or prevent abuse of the judicial system.”¹⁴⁷ The Delaware Legislature, however, has not adopted a fee-shifting “strategy” that could promote meritorious litigation while deterring frivolous litigation. Instead, Sections 102(f) and 109(b) simply codify the use of the American Rule and prevent publicly traded companies, including their shareholders, from utilizing the contracts exception to the American Rule. Although at first glance this decision seems to protect shareholders, it in fact hurts interested shareholders along with the officers and board of directors of a corporation.

B. *Incentivizing Frivolous Shareholder Derivative Suits*

DGCL Sections 102(f) and 109(b)’s codification of the use of the American Rule in regard to shareholder derivative suits has a high potential to lead to and incentivize frivolous shareholder litigation.¹⁴⁸ “A simple economic analysis of the two general approaches to fee-shifting demonstrates that, assuming all parties act rationally, American Rule plaintiffs are more likely to file suits that are frivolous or have a low probability of victory than English Rule plaintiffs,”¹⁴⁹ because American Rule plaintiffs face a far smaller penalty for losing. Generally, under the American Rule in non-shareholder derivative suits, plaintiffs

¹⁴⁶ *ATP Tour*, 91 A.3d at 558 (quoting *Airgas, Inc.*, 8 A.3d at 1188); *Centaur Partners, IV*, 582 A.2d at 928 (“Corporate charters and by-laws are contracts among the shareholders of a corporation and the general rules of contract interpretation are held to apply.”).

¹⁴⁷ Vargo, *supra* note 43, at 1588.

¹⁴⁸ See Eisenberg & Miller, *supra* note 45, at 335 (“The English rule holds the potential, as its proponents argue, to deter frivolous or nonmeritorious lawsuits since a defendant facing such a lawsuit has an incentive to vigorously litigate the case, knowing that it will almost certainly win and its adversary will pay its fees.”).

¹⁴⁹ Bungard, *supra* note 45, at 37.

will only be liable for their own attorneys' fees, regardless of whether they win or lose.¹⁵⁰ In shareholder derivative actions, however, the plaintiff-shareholders are rarely liable for their attorneys' fees even if they win,¹⁵¹ as opposed to the defendant-officers and directors who will be liable for their own attorneys' fees even if they successfully defend the suit.¹⁵² Instead, in shareholder derivative suits, the plaintiff-shareholder brings suit on behalf of the corporation; therefore, any recovery obtained by the plaintiff goes back into the corporation, and not the plaintiff's pocket.¹⁵³ Subsequently, "[b]ecause very few shareholders would pay, out of their own pockets, the attorney's fee for a suit that is brought on the corporation's behalf . . . very few derivative actions would be brought if the law did not allow the plaintiff's attorney to be compensated by a contingent fee payable out of the corporate recovery."¹⁵⁴ This "contingent fee" is generally derived out of a "common fund" whereby the recovery received by the corporation through successful litigation goes into a fund before it is put back into the corporation, and the plaintiff-attorney receives a percentage of said fund.¹⁵⁵ Therefore, the plaintiff-shareholders themselves do not pay any out-of-pocket attorneys' fees.

Because plaintiff-shareholders in derivative litigation are not paying their attorneys' fees out-of-pocket, under the American Rule, and now under Sections 102(f) and 109(b), there is more incentive to bring frivolous claims,¹⁵⁶ particularly "strike suits"—shareholder derivative suits that are brought without any merit and act as a nuisance for the corporation, forcing the defendant-board of directors to weigh the pros and cons of litigating, and ultimately determine whether to settle rather than expend time, money, and resources on litigation.¹⁵⁷

¹⁵⁰ *American Rule*, *supra* note 26.

¹⁵¹ George S. Geis, *Shareholder Derivative Litigation and the Preclusion Problem*, 100 VA. L. REV. 261, 291 (2014) ("[Shareholder derivative litigation] can be self-funding because plaintiffs do not need to foot their legal bill for successful outcomes.").

¹⁵² *Id.* at 291–92 ("Even if a corporation fights a claim to the bitter end and prevails on the merits, it will still be stuck writing checks for its legal fees (or higher insurance premiums).").

¹⁵³ See Erickson, *supra* note 31; *supra* note 31 and accompanying text.

¹⁵⁴ MELVIN ARON EISENBERG & JAMES D. COX, BUSINESS ORGANIZATIONS: CASES AND MATERIALS 1121 (11th ed. 2014).

¹⁵⁵ See *Ams. Mining Corp. v. Theriault*, 51 A.3d 1213, 1253 (Del. 2012) ("The common fund doctrine is a well-established basis for awarding attorneys' fees in the Court of Chancery.").

¹⁵⁶ Geis, *supra* note 151, at 290 ("If the corporation (or its insurer) foots the bill, either directly or via contingency fee arrangements, this introduces a significant risk that entrepreneurial lawyers will drum up hollow cases to generate buy-off settlements." (footnote omitted)).

¹⁵⁷ *Strike Suit*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("A suit (esp[ecially] a derivative action), often based on no valid claim, brought either for nuisance value or as leverage to obtain a favorable or inflated settlement."); see also KOJI F. FUKUMURA &

An added problem is that in order to bring a shareholder derivative suit, a shareholder need not be the holder of a certain percentage of stock.¹⁵⁸ Theoretically, a person could choose a corporation, buy one share of stock in the corporation, wait until the board of directors or officers makes a business decision,¹⁵⁹ hire an attorney, and then bring a strike suit against the corporation in order to receive a quick payout.¹⁶⁰ Similarly, DGCL Sections 102(f) and 109(b) pave the way for misconduct by attorneys themselves, opening the door for an attorney to search for potentially questionable officer or director conduct in a corporation, find one person who owned at least one share of stock in that corporation at the time of the questionable conduct, and then bring a strike suit in order to receive a quick payout.¹⁶¹ Mergers and acquisitions decisions are particularly susceptible to this type of attorney misconduct: over 80% of cases settle¹⁶² simply because a board of directors does not have the time, money, or availability to deal with the hassle of litigation while trying to conduct a merger. Although procedural safeguards exist in the form of standing requirements—e.g., the plaintiff in a shareholder derivative suit must have had ownership of the company's stock at the time of the alleged misconduct¹⁶³—the intrinsically meritless

PETER M. ADAMS, AM. BAR ASS'N, UPDATE ON CORPORATE GOVERNANCE LITIGATION: M&A AND PROXY STRIKE SUITS (2013) ("Given the large stakes and often compressed timeline, M&A class actions place defendant-companies on the horns of a dilemma. Should they quickly settle the lawsuit(s), usually by agreeing to provide certain—typically immaterial—supplemental disclosures, and pay a relatively modest award of attorneys' fees to plaintiffs' counsel? Or should they vigorously defend the lawsuit(s), risking a possible injunction, delay (or even derailment) of the merger transaction, and a larger payment of fees to plaintiffs' counsel?").

¹⁵⁸ See Erickson, *supra* note 31, at 100 ("A shareholder can bring a derivative suit if he owns only a single share of stock, and many derivative plaintiffs own little more than this single share" (footnote omitted)).

¹⁵⁹ Note that the business decision itself need not be illegal or even questionable, for the very nature of a strike suit is that it is meritless. See *Strike Suit*, *supra* note 157.

¹⁶⁰ Geis, *supra* note 151, at 290 ("The legal framework—which allows any lawyer who can recruit a single shareholder to self-select as a firm protector and precludes quick dismissals—is simply too tempting.").

¹⁶¹ See *id.* (noting that attorneys often play the role of "watch-dog" and will "take the reins" in a shareholder derivative suit while "working through nominal plaintiff-shareholders").

¹⁶² See Rickard, June 9 Letter, *supra* note 113.

¹⁶³ DEL. CODE ANN. tit. 8, § 327 (2017) ("In any derivative suit instituted by a stockholder of a corporation, it shall be averred in the complaint that the plaintiff was a stockholder of the corporation at the time of the transaction of which such stockholder complains or that such stockholder's stock thereafter devolved upon such stockholder by operation of law."); see also Joseph M. McLaughlin, *Standing in Shareholder Derivative Litigation*, N.Y.L.J. (Oct. 10, 2013), <http://www.newyorklawjournal.com/id=1202622850417/Standing-in-Shareholder-Derivative-Litigation?mcode=0&curindex=0&curpage=ALL> [<https://perma.cc/69B9-2GNK>] ("By statute, Delaware law imposes a 'contemporaneous ownership' requirement, which provides that a derivative plaintiff does not have standing

nature of a strike suit eliminates the need for the plaintiff to be a shareholder at the time *actual* misconduct occurs,¹⁶⁴ thus opening the door for a person to purchase a single share of stock, wait until a business decision is made (even a valid or legal one), and then bring suit.

C. *Increased Mergers and Acquisitions Litigation*

The new additions to the DGCL also incentivize shareholders to challenge mergers and acquisitions litigation in an effort to achieve high payouts. In 2015, the world of Mergers and Acquisitions saw record-breaking numbers.¹⁶⁵ In 2015, almost \$2.3 trillion worth of deals were made, as compared to the year 2014 where roughly \$1.4 trillion worth of deals were made.¹⁶⁶ More so, as the ILR argued in their letters to the Delaware Legislature and Delaware State Bar Association, litigation stemming from these merger and acquisition deals was at an all-time high.¹⁶⁷

Just about every merger or acquisition involving a significant public company becomes a litigation target soon after the deal's announcement—94% of all deals valued at over \$100 million [in the year 2013] were targets of lawsuits; compared to 44% in 2007. No one can seriously believe that *every one* of these transactions was legally flawed.¹⁶⁸

Although these numbers subsided slightly for the years 2014 and 2015, they remained astronomical. In 2014, 93% of all deals valued at over \$100 million were challenged through shareholder litigation, with only one of those challenges actually proceeding to trial.¹⁶⁹ Even more troubling was the fact that 96% of all deals valued at over \$1 billion were challenged, with each deal receiving roughly six lawsuits filed against it.¹⁷⁰

In 2015 and for the first half of 2016, however, the numbers continued to decrease. In 2015 and the first half of 2016,

to bring a derivative suit unless it was a shareholder or member at the time of the transaction of which the plaintiff complains.”).

¹⁶⁴ See *Strike Suit*, *supra* note 157.

¹⁶⁵ See Maureen Farrell, *2015 Becomes the Biggest M&A Year Ever*, WALL ST. J. (Dec. 3, 2015), <http://www.wsj.com/articles/2015-becomes-the-biggest-m-a-year-ever-1449187101> [<http://perma.cc/8AXF-BZTF>] (“A slew of smaller takeovers announced Wednesday officially made 2015 the biggest year ever for mergers and acquisitions.”).

¹⁶⁶ PAUL, WEISS, RIFKIND, WHARTON & GARRISON, LLP, M&A AT A GLANCE—2015 YEAR-END ROUNDUP (2016), https://www.paulweiss.com/media/3316690/maag_2015_year-end_roundup.pdf [<https://perma.cc/8MNQ-LTHH>].

¹⁶⁷ See Rickard, June 9 Letter, *supra* note 113.

¹⁶⁸ See *id.* (footnote omitted).

¹⁶⁹ KOUMRIAN, *supra* note 35, at 1.

¹⁷⁰ *Id.* at 2.

84% and 64%, respectively, of all deals valued over at \$100 million were challenged through shareholder litigation.¹⁷¹ Reports indicate, however, that this decrease could have resulted from the Delaware Court of Chancery's 2016 decision in *In re Trulia, Inc. Stockholder Litigation*.¹⁷² In *Trulia*,¹⁷³ the Chancery Court effectively held that Delaware courts will begin to decline "disclosure-only" settlements¹⁷⁴ if it is found that said disclosures are not "material."¹⁷⁵ For a disclosure to be considered material, there must be "a substantial likelihood that it 'significantly' alter[s] the 'total mix' of information made available."¹⁷⁶ As such, the fact that Delaware courts were beginning to decline disclosure-only settlements—which are prevalent in shareholder derivative suits—could very well be a contributing factor as to why, during the year 2015 and for the first half of 2016, "[l]awsuits were less likely to be filed in the Delaware Court of Chancery than in previous years."¹⁷⁷

The *Trulia* decision has a two-fold effect. First, other state courts are not obligated to follow the *Trulia* decision, so "disclosure-only" settlements are still available in states besides Delaware.¹⁷⁸ As such, shareholders (or more likely, plaintiff-attorneys) who are looking to leverage a quick settlement through the common disclosure-only framework, and subsequently collect attorneys' fees through the common fund method discussed *supra*,

¹⁷¹ RAVI SINHA, CORNERSTONE RESEARCH, SHAREHOLDER LITIGATION INVOLVING ACQUISITIONS OF PUBLIC COMPANIES: REVIEW OF 2015 AND 1H 2016 M&A LITIGATION 2 (2014), <https://www.cornerstone.com/Publications/Reports/Shareholder-Litigation-Involving-Acquisitions-2016> [https://perma.cc/7KUV-6CE4].

¹⁷² See *id.*; see also Edward B. Micheletti & Keenan D. Lynch, *Key Developments in Delaware Corporation Law in 2016*, SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP (Jan. 30, 2017), <https://www.skadden.com/insights/key-developments-delaware-corporation-law-2016> ("The [*Trulia*] decision sparked three observable trends in 2016: lower rates of deal litigation generally, a declining share of such litigation in the Delaware Court of Chancery relative to other states and courts, and decreased fee opportunities for plaintiffs' lawyers. Although the long-term implications are not yet fully clear, we anticipate that these trends will continue in 2017.").

¹⁷³ Although a complete analysis of *In re Trulia* is outside the scope of this note, it will briefly be discussed in order to counter the hypothetical argument that, since M&A litigation rates are down, the new amendments to the DGCL have not incentivized frivolous shareholder litigation. Moreover, although *In re Trulia* dealt with a shareholder class action lawsuit and not a shareholder derivative lawsuit, this analysis will assume that the principles and holding of *In re Trulia* apply to derivative suits as well.

¹⁷⁴ For a discussion on "disclosure-only" settlements, see *supra* Section I.A.

¹⁷⁵ *In re Trulia*, 129 A.3d at 887.

¹⁷⁶ *Id.* at 899 (alteration in original) (quoting *Arnold v. Soc'y for Sav. Bancorp.*, 650 A.2d 1270, 1277 (Del. 1994)).

¹⁷⁷ See SINHA, *supra* note 171, at 1.

¹⁷⁸ Daniel W. Halston & Alexandra C. Boudreau, *After In re Trulia: Increased Scrutiny for the Give and the Get in Disclosure Settlements*, WILMERHALE (Feb. 29, 2016), <https://www.wilmerhale.com/pages/publicationsandnewsdetail.aspx?NewsPubId=17179880878> [https://perma.cc/3VNE-QZD5] ("With disclosure-only settlements facing a hostile reception in Delaware, plaintiffs may pursue deal litigation in other states.").

can still file suit in a state other than Delaware.¹⁷⁹ Second, since disclosure-only settlements are still available in other states, if a shareholder of a Delaware corporation brings a derivative suit against the corporation outside the state of Delaware, those disclosure-only settlements can still result in large attorneys' fees; but now, since the Delaware corporation cannot have a fee-shifting provision in its bylaws or certificate of incorporation due to DGCL Sections 102(f) and 109(b), the standard American Rule applies and the company's board of directors and officers will be liable for their own attorneys' fees while the plaintiff-shareholders will not be paying their legal fees out of their own pockets.

Although Delaware corporations can now enact an exclusive forum-selection clause pursuant to the newly promulgated DGCL Section 115 in order to prevent plaintiff-shareholders from bringing derivative suits outside the state of Delaware,¹⁸⁰ such a clause will not have a significant impact on plaintiff-attorney misconduct or the collection of legal fees.¹⁸¹ Even if shareholders are forced to bring derivative suits in Delaware, the court in *Trulia* specifically stated that the heightened materiality standard that applies to the review of disclosure-only settlements does not apply to the review of mootness¹⁸² fee awards.¹⁸³ Instead, to determine whether a mootness fee award is reasonable, the court will analyze the

¹⁷⁹ Meredith E. Kotler & Vanessa C. Richardson, *Update About Disclosure-Only Settlements in M&A Litigation*, CLEARY M&A & CORP. GOVERNANCE WATCH (Aug. 23, 2016), <http://www.clearymawatch.com/2016/08/update-about-disclosure-only-settlements-in-ma-litigation/> [<https://perma.cc/ES6J-3CNT>] (noting the recent decline in M&A litigation filed in Delaware and "predict[ing] this trend will continue, and plaintiffs instead may attempt to file these suits in other forums that may be more willing to accept disclosure only settlements").

¹⁸⁰ See *In re Trulia, Inc. Stockholder Litig.*, 129 A.3d 884, 899 (Del. 2016) (The court acknowledged the potential for plaintiffs to "sue fiduciaries of Delaware corporations in other jurisdictions in the hope of finding a forum more hospitable" to disclosure-only settlements, however, Delaware corporations can proactively prevent this because "[i]t is within the power of a Delaware corporation to enact a forum selection bylaw to address this concern.").

¹⁸¹ For further implications of DGCL Section 115, see discussion *infra* Section IV.A.

¹⁸² Taking into account the prevalence of disclosure-only settlements, if defendant-directors voluntarily make the disclosures that the plaintiffs are seeking, thus making the plaintiffs' claims moot, under the mootness doctrine the case is dismissed. *In re Trulia*, 129 A.3d. at 896–97 (discussing the fact that when the defendants voluntarily make the supplemental disclosures that the plaintiffs were seeking, the plaintiffs' claims become moot); *Mootness Doctrine*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("The principle that American courts will not decide moot cases—that is, cases in which there is no longer any actual controversy.").

¹⁸³ *In re Trulia*, 129 A.3d at 898, n.46 ("[A]n award of fees in the mootness fee scenario may be appropriate for supplemental disclosures of less significance than would be necessary to sustain approval of a settlement.").

voluntary disclosures made by the defendants and decide whether the disclosures provided “some benefit to stockholders, whether or not material to the vote.”¹⁸⁴ Afterwards, the plaintiff-attorney will petition the court to collect a fee for the work that was performed on the lawsuit.¹⁸⁵ As such, plaintiff-attorneys still have an incentive to recruit shareholders to bring strike suits against a Delaware corporation in the hope that the defendant-directors will make voluntary disclosures. Once the directors make the voluntary disclosures, an attorney need only show that the disclosures had some benefit to the corporation, and they will get paid for their “work.” Because public companies cannot defend themselves by implementing fee-shifting provisions, plaintiff-attorneys for potential strike suit litigants will still see this as a quick way to receive a fairly substantial payout for a minimal amount of work performed.

D. *Decreased Shareholder Protection*

Delaware’s enactment of its new legislation will also lead to a decrease in shareholder protection. The Delaware State Bar Association, as one of the explanations for proposing the amendments to the DGCL, reasoned that shareholder derivative litigation is essentially the only form of control over a board of directors breaching their fiduciary duty; therefore, shareholder litigation is essential in order to protect shareholders.¹⁸⁶ As such, by solidifying the use of the American Rule through the banning of fee-shifting provisions, shareholder litigation is preserved.¹⁸⁷ At first glance this may seem true, and shareholders may rejoice at the promulgation of DGCL Sections 102(f) and 109(b). Contrary to this belief and the Delaware State Bar Association’s contention, however, the solidification of the American Rule fails to protect shareholders. Instead, it will result in harm to

¹⁸⁴ *In re Xoom Corp. Stockholder Litig.*, No. 11263-VCG, 2016 Del. Ch. LEXIS 117, at *9 (Del. Ch. Aug. 4, 2016) (stating that “[i]n other words, a helpful disclosure may support a fee award in this [mootness] context”); *see also* Jack B. Jacobs et al., ‘Mootness Fees’ in *Deal Litigation: An Argument for a Different Approach*, BLOOMBERG L., Mar. 28, 2017, http://www.sidley.com/~media/publications/bloomberg-bna-corporate-counsel-weekly_mootness-fees-final.pdf (“Delaware courts have facilitated, if not encouraged, such [mootness] fee applications by applying a standard more lenient than that applied in the context of a disclosure-only settlement fee application: the disclosure need only be ‘helpful’ to class members.”).

¹⁸⁵ *In re Xoom Corp. Stockholder Litig.*, 2016 Del. Ch. LEXIS 117, at *8–9 (“The theory under which a mootness fee is awarded is a subspecies of the common-benefit doctrine, which recognizes that, where a litigation provides a benefit to a class or group, costs necessary to the generation of that benefit should also be shared by the group or its successor.”).

¹⁸⁶ *See* DEL. STATE BAR ASS’N, *supra*, note 3, at 6.

¹⁸⁷ *See id.*

shareholders due to incentivized frivolous shareholder litigation, which will drain corporate resources.

To conceptualize this problem, consider the following. In bringing a shareholder derivative action, there is no formal requirement as to how many shares of stock a shareholder must own. Therefore, one person could buy a single share of stock of Corporation A, bring a strike suit against A's board of directors and officers, and then settle for a fairly large amount. Under the American Rule, the plaintiff-shareholder need only worry about his own attorneys' fees (which will be paid out as a percentage from the amount reached in settlement or litigation), so not only will the suit waste the time and money of the board of directors and officers who are liable for their own attorneys' fees, but it will also waste the resources of the corporation, indirectly harming other shareholders of Corporation A. This problem applies to litigation challenging mergers as well:

A company's shareholders suffer when one or both parties to a merger transaction are forced to expend millions of dollars defending suits in multiple courts and paying multiple attorneys' fee awards in connection with settlements necessary to eliminate legal uncertainty and allow the transaction. Those expenditures reduce the funds available to integrate the two companies effectively, expand the business, or create new products, imposing a "merger tax" that benefits lawyers and hurts shareholders.¹⁸⁸

Consequently, long-term investors in a company that want to see it grow and prosper become easy targets for less interested shareholders, outsiders, and attorneys who only care about receiving a quick payout. As Professor Stephen Bainbridge has said:

In sum, shareholder litigation mainly serves as a means of transferring wealth from investors to lawyers. At best, such suits take money out of the firm's residual value—at the expense of current shareholders—and return it to former shareholders, minus substantial legal fees. In many cases, moreover, no money is returned to the shareholders or the corporate entity, but legal fees are almost always paid.¹⁸⁹

¹⁸⁸ Rickard, June 9 Letter, *supra* note 113, at 2.

¹⁸⁹ Bainbridge, *supra* note 34, at 11–12 (footnotes omitted).

Essentially, while DGCL Sections 102(f) and 109(b) may seem like strong protective measures, in actuality these amendments indirectly harm shareholders and funnel resources directly from the corporation into the pockets of plaintiff-attorneys.

E. Decreased Incentive to Become a Board Member

The new additions to the DGCL also decrease incentive to sit on a board of directors or become an officer of a Delaware corporation. Generally, unlike the plaintiff-shareholder's attorney, who gets paid out of a recovery fund, the attorneys for the defendant-board of directors and officers are paid out-of-pocket by the defendant-board members and officers they represent¹⁹⁰ (subject to Director and Officer Insurance discussed *infra*). Under the American Rule, defendant-board members must always pay this fee—whether or not they win. Therefore, the American Rule strikes an imbalance in the allocation of attorneys' fees in regard to shareholder derivative suits in favor of the shareholders to the detriment of the board of directors and officers. This can naturally lead to a decreased incentive in becoming a board member or officer due to the knowledge that board members and officers will remain liable for their own attorneys' fees every time a shareholder brings an unmeritorious lawsuit against them just to leverage a settlement, which could happen more frequently as a result of the DGCL amendments.

Generally speaking, the board of directors and officers of a corporation are shielded from personally paying the attorneys' fees, costs, and expenses associated with a shareholder derivative suit by Director and Officer Insurance (hereinafter D&O Insurance).¹⁹¹ "D&O insurance policies offer liability cover for company managers to protect them from claims which may arise from the decisions and actions taken within the scope of their regular duties."¹⁹² However, now that Delaware corporations can no longer implement fee-shifting provisions in their bylaws or certificates of incorporation in regard to shareholder derivative suits, no matter what, win or lose, the board of directors and officers of a corporation are going to be responsible for their own

¹⁹⁰ ALLIANZ GLOB. CORP. & SPECIALTY, INTRODUCTION TO D&O INSURANCE 6 (2010), <http://www.agcs.allianz.com/assets/PDFs/risk%20insights/AGCS-DO-infopaper.pdf> [<https://perma.cc/36KL-CHSB>] ("D&O polic[ies] will pay for defense costs and financial losses.").

¹⁹¹ *Id.*

¹⁹² *Id.* at 4.

attorneys' fees, which in turn will create liability for D&O Insurance providers.

Now, D&O Insurance providers will be "on the hook" for the attorneys' fees, costs, and expenses of their board member and officer clients every time a shareholder brings a derivative action. This has two potential consequences: (1) increased rates among D&O Insurance providers, requiring board members and officers of Delaware corporations to pay more in order to stay adequately insured;¹⁹³ or (2) no change in rates, but decreased coverage provided to boards of directors and officers of Delaware corporations, which in turn will require the board and officers to personally pay to make up for what the insurance does not cover. In either event, because a board member may be liable for potentially huge sums of money in every derivative suit brought against the board, the incentive to become a board member will decrease.

IV. SOLUTIONS TO IMPLICATIONS

A. *Relationship Between DGCL Sections 102(f) and 109(b) and Section 115*

The Delaware Legislature, perhaps in an attempt to put power back into the hands of the corporation and mitigate the implications posed by DGCL Sections 102(f) and 109(b), also enacted DGCL Section 115.¹⁹⁴ "The newly enacted . . . [DGCL § 115] allow[s] Delaware corporations to include a Delaware choice of law provision in their certificates of incorporation and bylaws. However, a Delaware corporation cannot designate a state other than Delaware as the exclusive forum for an internal corporate claim."¹⁹⁵ Although Sections 102(f) and 109(b) take power away from publicly traded companies by limiting what they can put in their articles of incorporation and bylaws, Section 115 does, in fact, give power back to corporations by allowing them to designate where shareholder derivative suits must be brought. Section 115, however, fails to mitigate the implications of Sections 102(f) and 109(b) in the form of frivolous shareholder derivative suits.

Section 115 allows a publicly traded corporation to implement a forum-selection clause in its bylaws or certificate of incorporation that prohibits shareholders from bringing

¹⁹³ See Geis, *supra* note 151, at 290–92; *supra* note 151 and accompanying text.

¹⁹⁴ See S.B. 75, 148th Gen. Assemb. (Del. 2015).

¹⁹⁵ Boeckman & Graffeo, *supra* note 6.

derivative suits in any jurisdiction except Delaware.¹⁹⁶ At first glance, this appears to potentially limit frivolous shareholder litigation because an exclusive forum-selection clause will force out-of-state shareholders to travel to Delaware in order to bring a shareholder derivative suit; however, this reasoning is flawed. In fact, in shareholder derivative suits, it is the plaintiff-shareholders' attorney who primarily controls all aspects of the litigation, not the shareholders themselves.¹⁹⁷ Theoretically, in order to circumvent a forum-selection clause, out-of-state shareholders can simply reach out to Delaware attorneys in order to bring shareholder derivative suits on their behalf. Since plaintiff-shareholder attorneys have limited interaction with the shareholders bringing a derivative suit to begin with,¹⁹⁸ the added burden put on out-of-state shareholders that seek to bring a frivolous shareholder derivative action is minimal. Therefore, DGCL Section 115 fails to mitigate the implications, outlined *supra*, posed by Sections 102(f) and 109(b).

B. *Proposed DGCL Amendments*

Although the Delaware Legislature's amendments to the DGCL providing for strict use of the American Rule are a mistake, it does not necessarily follow that amending the DGCL to provide for the strict use of the English Rule is correct. While the American Rule inspires frivolous litigation, the English Rule may deter meritorious litigation.¹⁹⁹ In fact, the deterrence of meritorious litigation was one of the Delaware State Bar Association's main concerns in proposing Sections 102(f) and 109(b).²⁰⁰ It is important to note, however, that no perfect solution exists to the problems surrounding both the American Rule and the English Rule—there will always be negative implications with each. Nevertheless, at least with respect to shareholder derivative litigation, these implications can be limited by combining both the American Rule and the English Rule.

¹⁹⁶ DEL. CODE ANN. tit. 8, § 115 (2017).

¹⁹⁷ Macey & Miller, *supra* note 38, at 3 (“[P]laintiffs’ . . . derivative attorneys function essentially as entrepreneurs who bear a substantial amount of the litigation risk and exercise nearly plenary control over all important decisions in the lawsuit.”).

¹⁹⁸ *Id.* (Plaintiffs’ derivative attorneys “are subject to only minimal monitoring by their ostensible ‘clients,’ who are either dispersed and disorganized (in the case of class action litigation) or under the control of hostile forces (in the case of derivative litigation).”).

¹⁹⁹ Eisenberg & Miller, *supra* note 45, at 334 (noting that numerous proposals for a move toward the English Rule have been shot down “by those who argue 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’”).

²⁰⁰ See DEL. STATE BAR ASS’N, *supra* note 3, at 3.

Currently, DGCL Section 102(f) states: “The certificate of incorporation may not contain 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, as defined in § 115 of this title.”²⁰¹ DGCL Section 109(b) reads: “The bylaws may not contain 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, as defined in § 115 of this title.”²⁰² When read carefully, one notices that Sections 102(f) and 109(b) only prohibit one-way fee-shifting provisions that would impose liability on the “losing” plaintiff-shareholders for the “winning” defendant-board of directors or officers attorneys’ fees, costs, and expenses.²⁰³

In order to effectively address the implications of Sections 102(f) and 109(b), the Delaware Legislature should amend both sections. These amendments should change both Sections 102(f) and 109(b) to permit fee-shifting provisions in the articles of incorporation and bylaws of publicly traded Delaware corporations, provided that (1) said fee-shifting provision is a “two-way” fee-shifting provision; and (2) the losing party will not be required to pay more than 50% of the winning party’s attorneys’ fees, expenses, and costs.²⁰⁴

A redraft of DGCL Section 102(f) could read as follows (amendments and additions underlined, redactions stricken):

The certificate of incorporation may ~~not~~ contain ~~any~~ a provision that would impose liability on ~~a stockholder~~ an unsuccessful litigant regardless of whether said litigant is a stockholder, the corporation, or any other party, for no more than 50% of the attorneys’ fees, costs, and expenses of the corporation ~~successful litigant, regardless of whether said litigant is a stockholder, the corporation,~~ or any other party, in connection with an internal corporate claim, as defined in § 115 of this title.

Similarly, a redraft of DGCL Section 109(b) could read as follows (amendments and additions underlined, redactions stricken):

The bylaws may ~~not~~ contain ~~any~~ a provision that would impose liability on ~~a stockholder~~ an unsuccessful litigant regardless of whether said litigant is a stockholder, the corporation, or any other party, for no more than 50% of the attorneys’ fees, costs, and

²⁰¹ DEL. CODE ANN. tit. 8, § 102(f) (2017).

²⁰² *Id.* § 109(b).

²⁰³ *Id.* §§ 102(f), 109(b).

²⁰⁴ For an example of a rule that imposes percentage limits on attorneys’ fees, see ALASKA R. CIV. P. 82(b).

expenses of the corporation successful litigant, regardless of whether said litigant is a stockholder, the corporation, or any other party, in connection with an internal corporate claim, as defined in § 115 of this title.

These proposed amendments would permit a Delaware publicly traded corporation to implement fee-shifting provisions, provided that said provisions are two-way fee-shifting provisions. Therefore, instead of prohibiting a corporation from implementing a one-way fee-shifting provision that only establishes liability upon shareholders if they lose, under the proposed amendments, a corporation will be permitted to adopt a fee-shifting provision, but only if such provision is the true English Rule in the sense that it establishes a “loser pays” rule, regardless of whether that “loser” is the plaintiff-shareholders or the defendant-board of directors or officers.

Furthermore, under the proposed amendments, if a corporation wishes to implement a fee-shifting provision, such provision must provide that, if the plaintiff-shareholders win, the defendant-board members or officers cannot be liable for more than 50% of the shareholders’ attorneys’ fees, costs, and expenses. Likewise, if the defendant-board members win, then the plaintiff-shareholders cannot be liable for more than 50% of the board members’ attorneys’ fees, costs, and expenses. Consequently, these amendments to the DGCL will give some autonomy back to Delaware corporations, allowing them to choose between either (1) not implementing a fee-shifting provision at all and adopting the standard American Rule; or (2) implementing a fee-shifting provision, but with the risk of also potentially being liable for up to 50% of the opposing side’s attorneys’ fees, costs, and expenses.²⁰⁵

As it currently stands, when plaintiff-shareholders succeed in a shareholder derivative suit, generally their attorneys’ fees are paid out of the corporate recovery or by the corporation itself.²⁰⁶ With these proposed amendments, however, if a two-way fee-shifting provision were implemented in a corporation’s

²⁰⁵ It is important to note that the proposed amendments will give a corporation the ability to enact a two-way fee-shifting provision with liability capped at a *maximum* of 50%. As such, corporations will maintain the right to cap the liability amount at a percentage below 50%.

²⁰⁶ Jill E. Fisch et al., *Confronting the Peppercorn Settlement in Merger Litigation: An Empirical Analysis and a Proposal for Reform*, 93 TEX. L. REV. 557, 600 (2015) (noting that in disclosure-only settlements Delaware Courts require the plaintiff’s attorneys’ fees to be paid by the defendant corporation); Sean J. Griffith, *Correcting Corporate Benefit: How to Fix Shareholder Litigation by Shifting the Doctrine on Fees*, 56 B.C. L. REV. 1, 2 (2015) (“The application of this [corporate benefit] doctrine has led to the result that in shareholder litigation, the corporate defendant always pays fees and expenses for both sides.” (emphasis omitted)).

bylaws or certificate of incorporation, in such a situation only a maximum of 50% of the plaintiff-shareholders' attorneys' fees could be paid out of the corporate recovery or by the corporation. This approach expends fewer resources of the corporation, which benefits the shareholders, due to the fact that, with these amendments, at most, 50% of the plaintiff-shareholders' attorneys' fees will be paid directly by the defendant-board of directors or officers. As such, only 50% of the attorneys' fees would be paid out of the corporate recovery, as opposed to 100% had the corporation chosen not to implement a fee-shifting provision.

C. *Counter Arguments*

The two main concerns that prompted the Delaware State Bar Association's proposal to the Delaware Legislature, encompassed in S.B. 75, was that "open-ended" use of fee-shifting provisions "w[ould] curtail the development of the common law of corporations" and would lead to less shareholder litigation, and "[t]he absence of stockholder litigation would eliminate the only extant regulation of substantive corporate law."²⁰⁷ This note's proposed amendments to DGCL Sections 102(f) and 109(b), however, address those concerns; under the proposed solution, a corporation will not have full reign to establish whatever type of fee-shifting provision it so desires. If a corporation wants to implement a fee-shifting provision, it must be a two-way fee-shifting provision that has a monetary limit of 50% of the attorneys' fees, costs, and expenses.

Moreover, the Delaware State Bar Association argues that "[t]he fact that stockholder litigation can be detrimental as well as beneficial should not result in virtually precluding it, as fee-shifting provisions would."²⁰⁸ Under the proposed amendments, however, a two-way fee-shifting provision would not preclude stockholder litigation—it would force corporations to choose between either not implementing a fee-shifting provision at all, or implementing a fee-shifting provision that puts both the corporation's board of directors and officers on the same playing field as the shareholders. Although there have been concerns that the English Rule deters meritorious litigation, those same kind of concerns apply to the use of the American Rule and its incentivizing of frivolous litigation. While both rules undisputedly have negative consequences, it should be up to the corporation—whether that be the board of

²⁰⁷ See DEL. STATE BAR ASS'N, *supra* note 3, at 4, 6.

²⁰⁸ See *id.* at 7.

directors, shareholders, or both—to decide which rule to implement. Completely removing this choice from the corporation and creating a forced adoption of the American Rule is not the answer to the potential problems posed by the English Rule.

CONCLUSION

Although when drafting DGCL Sections 102(f) and 109(b) the Delaware Legislature had good intentions of trying to protect shareholders, it did so at the significant expense of the corporation, its board of directors and officers, and, ironically, even the shareholders it set out to protect. In some situations, it might be critical to choose between protecting shareholders or protecting directors and officers, however here is not such an occasion. The possibility exists to protect both shareholders and directors and officers equally, while also achieving the goals of the Delaware State Bar Association.²⁰⁹ Therefore, a balancing approach should be used in the drafting of fee-shifting clauses, and not a blanket prohibition as the Delaware Legislature has done. Giving autonomy to Delaware corporations to decide whether to incorporate a fee-shifting provision into the bylaws or certificate of incorporation, while also providing two conditions to that provision—the requirement that the provision provide for two-way fee-shifting and a 50% cap on attorneys' fees—strikes the perfect balance between protecting shareholders and preventing frivolous shareholder litigation.

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²⁰⁹ See *id.* at 4–6.

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