

Delaware Legislature Urged to Address Fee-Shifting Bylaws

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Amalgamated Bank's LongView Funds has [written](#) to several Delaware representatives, including the state governor, urging immediate legislative action to clarify that the "American rule," in which each side in litigation bears its own costs, is applicable for stock corporations notwithstanding the decision in the ATP Tour case last year, which we previously discussed [here](#).

Noting that they were the lead plaintiff in the Enron case, as one example, Amalgamated states that most securities cases settle after significant discovery has taken place, which requires substantial legal expense. Traditionally, exceptions to the "American rule" that have been made by other legislative branches of government have in fact generally favored plaintiffs, such as in employment discrimination cases.

Amalgamated Bank's actions follows similar letters sent from over 30 pension funds and other investors beginning in late November and into this year, arguing that some have wrongly characterized the fee-shifting bylaw, as provided for in the ATP Tour case, as protection against "frivolous" or "abusive" litigation. The same group also sent letters to ISS and Glass Lewis in January, urging them to make stronger statements against board adoption of fee-shifting bylaws. The proxy advisory firms' current policies examine a number of factors when boards unilaterally adopt bylaw or charter amendments without shareholder approval in a manner that the firms believe diminishes shareholders' rights. The letters urge the advisory firms to make clear that there is never a situation in which fee-shifting bylaws would not warrant recommending against director elections.

At the end of January, according to a [list](#) posted on the Council of Institutional Investor's website,¹³ Russell 3000 companies, 28 non-Russell 3000 companies and 17 limited partnerships have adopted fee-shifting bylaws.

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

Ning Chiu

+1 212 450 4908

ning.chiu@davispolk.com

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