

Possible Delaware Legislation on Fee-Shifting and Exclusive Forum Provisions

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As is the practice from time to time, the Corporation Law Section of the Delaware State Bar Association has proposed amendments to the Delaware General Corporation Law (the DGCL) for the Delaware Legislature to pass.

The proposed legislation prohibits a company's certificate of incorporation and bylaws from containing a fee-shifting provision, or in other words, a 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 intracorporate claim." 30 companies have adopted these provisions and 6 companies have gone public with them.

The synopsis indicates that the DGCL amendment is not intended to disturb the ruling in ATP Tours related to nonstick corporations, or prevent the application of these types of provisions pursuant to a stockholders' agreement. We have previously discussed fee-shifting provisions [here](#) and [here](#).

In addition, a new section on forum selection provisions would allow charters or bylaws to require that any or all intracorporate claims be brought solely and exclusively in any or all of the courts in Delaware (but only in Delaware). We discussed the prior cases that upheld exclusive forum provisions [here](#).

This [Delaware Corporate and Commercial Litigation blog](#) contains the text of the proposed legislation, a shared memo describing the policy analysis, FAQs on possible questions to the proposed bill as well as commentary on the likely next steps. The author speculates that due to the controversial nature of the proposed legislation, there is expected to be more discussion than in the past and it is possible the final outcome will not be known until the last day of the session on June 30.

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.

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