

Service

Corporate

Validity of Fee-Shifting Bylaw Provisions for Stock Companies Remains Uncertain

Early speculation that the Delaware Supreme Court's decision in *ATP Tour, Inc. v. Deutscher Tennis Bund* would result in an onslaught of proposals to adopt fee-shifting bylaw provisions was quickly tempered by newly proposed amendments to the Delaware General Corporation Law. Within weeks of the ruling, the Delaware State Bar Association approved an amendment that would prohibit Delaware stock corporations from adopting fee shifting provisions in their charters or bylaws.

The *ATP Tour* case involved a provision of a Delaware non-stock corporation's bylaw that shifts responsibility for attorney's fees and costs to the unsuccessful plaintiff. The court held that the bylaw was permissible under Delaware law, leading some to suggest that stock companies could adopt similar provisions and expect similar results if challenged.

However, in its decision, the court cautioned that even if the bylaw was valid on its face, it might not be enforced if it was "adopted or used for an inequitable purpose." Although the court did not delineate what might constitute inequitable conduct, it stated that the "intent to deter litigation, however, is not invariably an improper purpose."

Some commentators interpret the decision as a signal that the time for stock corporations to utilize fee shifting bylaws to protect against frivolous lawsuits has arrived. Final analysis will have to wait until the Delaware General Assembly decides whether to adopt the proposed amendment, which is expected by the end of the month.

What This Means to You

Any public company board that is considering the adoption or use of new or amended bylaws should take note of the standards announced in this decision regardless of whether the bylaws include a fee shifting provision. For now, it appears that the legality of fee shifting provisions for Delaware corporations is in the hands of the legislature.