

PROPOSED AMENDMENT TO DELAWARE GENERAL CORPORATION LAW WOULD PRECLUDE FEE-SHIFTING IN CHARTERS AND BYLAWS OF STOCK CORPORATIONS

The Proposal

On May 22, 2014, the Corporation Law Section of the Delaware State Bar Association (the “DSBA”) was provided with a proposed amendment to the Delaware General Corporation Law (the “DGCL”). The proposed amendment, if enacted into law, would eliminate the ability of Delaware stock corporations to adopt provisions imposing liability on stockholders, including bylaws or charter provisions that would impose fee-shifting liability. Following adoption of this proposal, the holding of *ATP Tour, Inc. v. Deutscher Tennis Bund*, which upheld the facial validity of a fee-shifting bylaw, would apply only to nonstock corporations. See *Morris Nichols Update, Supreme Court Upholds Facial Validity of Fee-Shifting Bylaw Adopted by Nonstock Corporation* (May 9, 2014). If the amendment is approved by the Corporation Law Section and the Executive Committee of the DSBA, the amendment will be considered by the Delaware General Assembly during its current session. The effective date for the proposed amendment would be August 1, 2014.

Limited Liability Concerns

The notice to the Corporation Law Section that accompanied the proposed amendment notes that the *ATP* decision raises a number of significant issues with respect to stockholder litigation, and describes the *ATP* decision as a “straightforward statutory analysis rather than a policy pronouncement with respect to the desirability of fee-shifting bylaws.” However,

the notice goes on to describe a broad implication of *ATP*: because the decision held that the adoption of a bylaw provision that exposed stockholders to personal liability was facially valid, it created the possibility that a wide variety of provisions imposing personal liability on stockholders might also be facially valid. The notice stated “this extension of the contract theory of corporate constitutional documents to permit monetary liability may have unforeseen consequences on capital formation, even if subject to equitable constraints.” In light of these concerns, the proposed amendment does not simply address fee-shifting bylaws, but also precludes virtually all charter or bylaw provisions that would impose liability on stockholders.

Nonstock Corporations Excluded

The proposed new amendment does not apply to nonstock corporations. The drafters of the amendment did not believe the same capital formation concerns were implicated by permitting the imposition of liability through the charters and bylaws of nonstock corporations. In addition, they recognized that many such entities have carefully negotiated provisions that might be impacted if the prohibition included in the new legislation applied to nonstock corporations and did not want to disturb settled expectations.