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## The Fifteenth Annual Albert A. DeStefano Lecture On Corporate, Securities, & Financial Law At The Fordham Corporate Law Center

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## LECTURE

### THE FIFTEENTH ANNUAL ALBERT A. DESTEFANO LECTURE ON CORPORATE, SECURITIES, & FINANCIAL LAW AT THE FORDHAM CORPORATE LAW CENTER<sup>†</sup>

#### FEE-SHIFTING IN SHAREHOLDER LITIGATION

##### WELCOME AND INTRODUCTORY REMARKS

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##### PANEL

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<sup>†</sup> The lecture was held at Fordham University School of Law on March 26, 2015. It has been edited to remove minor cadences of speech that appear awkward in writing and to provide sources and references to other explanatory material in respect to certain statements made by the speakers.

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**WELCOME AND INTRODUCTORY REMARKS**

SEAN GRIFFITH: Well, I am just going to start us, because we have so much to discuss in so little time. I want to welcome everyone to the Fifteenth Annual Albert A. DeStefano Lecture on Corporate, Securities, and Financial Law, where half of the time we do a lecture and half of the time we do a panel presentation. I am just delighted to have the distinguished panelists that we have tonight. We have so many of us that I am not going to go through the introduction of each of my fellow panelists individually, but I will let you know that all that information appears in the program, and that we have many distinguished jurists and policymakers, in one way or another, to talk about an important issue in corporate law that is happening in Delaware.

What I want to do is set it up with a little bit of the backstory. Then, I want to get out of the way, and let these guys explain and duke it out. Here is the backstory. On May 8, 2014, the Delaware Supreme Court announced a surprise decision in a litigation involving the American Tennis Professional Federation versus Deutscher Tennis Bund (“ATP”).<sup>1</sup> It was a certified question to the Delaware Supreme Court. The question was: can this fee-shifting provision that this private, non-stock corporation has adopted in its bylaws be enforced to shift the cost of intraorganizational litigation to the plaintiffs? The answer was yes because bylaws are a contract, which we will talk about on the panel.

The ink was not dry on the opinion before a number of prominent corporate law firms had sent memos to their clients and friends recommending that they consider adopting fee-shifting bylaws in the context of big public corporations. A number of companies started to go down that road. We are pausing to ask why that happened. The answer is that intracorporate litigation has turned into something of an epidemic in Delaware, especially with regard to M&A litigation.

I will give you a couple of statistics for mergers and acquisitions: 98% of deals attract lawsuits, 70% of those lawsuits settle, 94% of those settlements are for non-pecuniary relief where there is no relief to the plaintiff class, and 80% of those settlements are disclosure-only settlements, the type of settlement where the only relief is additional supplemental disclosures in the proxy statement or other disclosure documents. The other 14% of those settlements were for additional amendments to the merger agreement, like the reduction of a

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1. ATP Tour, Inc. v. Deutscher Tennis Bund, 91 A.3d 554 (Del. 2014).

termination fee. There is non-pecuniary relief to the plaintiff class, but every single one of them results in pecuniary relief to the lawyers involved, on both defense and plaintiff side. So, 98% of deals seems like more deals than something is wrong with and that seems a little bit crazy.

Corporations are thinking they are going to adopt a fee-shifting bylaw to solve this problem, and lo and behold, *ATP* gives them permission to do so. Delaware corporations are thinking about moving to the English rule, which is the loser pays rule, of course, with regard to fees. Fees are shifted to the losing party in litigation. Within two weeks of that, the Delaware Corporate Law Council, a group that we are going to hear about more today because we have three distinguished members of that Council on our panel, recommended a rule change to the Delaware General Corporation Law that would have banned fee-shifting bylaws.<sup>2</sup>

*ATP* comes out stating that fee-shifting bylaws are okay and the Delaware Council, which recommends changes to the Delaware statute, comes out and says, “No, we are going to adopt a rule that says fee-shifting is not okay.” Their proposed ban on fee-shifting was introduced to the Delaware Senate on June 3, 2014, with the idea that it was going to become effective on August 1, 2014. The wording of that provision stated that you cannot adopt a provision that will shift the cost of intracorporate litigation to the shareholder plaintiffs.

Now, I am going to make another aside here. There is a little bit of irony to that wording because shareholder plaintiffs pay a cost of intracorporate litigation currently. As I said, the statistics are that 70% of these cases settle. When the case is settled, the fees on both sides are paid by the corporation. The effective rule in Delaware presently is that the shareholders pay attorneys’ fees on both sides. I refer to that as the “Delaware Rule.” We also have the English Rule and the American Rule. The English Rule is that the loser pays. The American Rule is that each side bears their own costs. The Delaware Rule is that the corporation pays. The irony of the Council’s proposal last summer was that we could not shift fees onto shareholder plaintiffs. In between the time that that provision was going to be enacted and the time that it was proposed, the corporate lobby became busy, and a bunch of letters were issued from the U.S. Chamber of Commerce to various Delaware

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2. S.B. 236, 147th Gen. Assemb., Reg. Sess. (Del. 2014).

representatives. The proposal was put on hold for a period of continued examination.<sup>3</sup> That period of continued examination ended two weeks ago, about ten months after the original *ATP* ruling. The Delaware Corporate Law Council has come out with its new suggestion on what to do about fee-shifting bylaws.<sup>4</sup> There are two important aspects of the current proposal on the table. One is to ban fee-shifting and not allow the costs in intracorporate litigation to be hoisted upon shareholder plaintiffs. That is pretty much the same provision that we had last time. The second important aspect is to expressly allow forum selection bylaws, which is interesting.

There is only one more thing I have to say, and then I want to turn it over to our Council members to speak first. What I would say is, and I cannot resist this, there was a ten-month period of continued examination. I will just point out, having looked at it myself, that there is a dense literature on the effects of fee-shifting bylaws on litigation. There are many serious econometric studies by very well respected academic authors on what are the effects of fee-shifting on settlement practices, on filing practices, on litigation practices. There is dense literature. None of this is cited by the Corporate Council in any of the documents it released. It released the proposed statement.<sup>5</sup> Then it released an explanation of how it reached its conclusion, as well as frequently asked questions.<sup>6</sup> None of that literature that exists has been cited.

KURT HEYMAN: Would you feel better if we cited your article?<sup>7</sup>

SEAN GRIFFITH: I would, yes. Here is the point. As Kurt points out, it is deflating to academics who hope to have some effect on public policy. When I say serious academic authors, I do not include myself of course. The question is: what was going on behind those closed doors? A ten-month period of continued examination, and the relevant literature does not appear, and it looks like there is some kind of bargain being struck between plaintiff's lawyers who get rid of fee-shifting, and

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3. S.J. Res. 12, 147th Gen. Assemb., Reg. Sess. (Del. 2014).

4. S.B. 75, 148th Gen. Assemb., Reg. Sess. (Del. 2015).

5. *Id.*

6. See DEL. CORP. L. COUNCIL, EXPLANATION OF COUNCIL LEGISLATIVE PROPOSAL (2015), <http://www.corporatedefensedisputes.com/files/2015/03/COUNCIL-SECOND-PROPOSAL-EXPLANATORY-PAPER-3-6-15-U0124513.pdf> [<http://perma.cc/JLA3-GL5Y>].

7. Sean J. Griffith, *Fixing Corporate Benefit: How to Fix Shareholder Litigation by Shifting the Doctrine on Fees*, 56 B.C. L. Rev. 1 (2015).

defense lawyers who get to recognize forum selection bylaws. I do not know, of course, because I sit in an ivory tower. I have no idea what is going on, but we are going to hear it tonight.

The first set of panelists that will speak are the folks from the Council. That, of course, is Norm, Kurt, and Rick. These guys come to the Council from different perspectives I should add. Norm's career is mostly as a plaintiff's lawyer. Rick is mainly a transactional guy working on what would be the defense side in this case. And Kurt is a defense-side litigator. One of the other things I would say about the Corporate Council is that it is a secretive organization, kind of like the Masons. I do not know how much they are going to be able to tell us tonight about what they do, but I would ask each of them to relay their individual perspectives on what goes on, what they think about the issues, and how much they are able to share about how they arrived at their conclusion. Let me ask Norm to speak first.

**PANEL**

NORMAN MONHAIT: We used to revel in our obscurity. Here and there over time, there have been issues in which proposals that came from the Council would attract significant public attention. That infrequently happens. The last one, at least according to people who are older than I am, and that is an increasingly small subset these days, was more than twenty years ago. We are in a position where we have to, at least for starters, issue an SEC type of disclaimer. The views that any one of us is going to express this evening are those of each of us individually. There are three of us here and we do not necessarily speak for our twenty other colleagues on the Council.

Let me begin with this observation. If this panel had been convened a year ago today to talk about shareholder litigation and what might be done to address the statistics that Professor Griffith mentioned, I do not think anyone on the panel would have suggested the adoption of fee-shifting bylaws, for what is really more significant than fee-shifting bylaws are fee-shifting charter provisions. I do not think that a year ago today there was a thoughtful commentator in the corporate arena who was advocating that as a solution to what Sean identifies as a problem.

The decision in *ATP*, as Sean characterized, was a surprise. One might say it was an earthquake in the corporate world. Folks are quick to ignore its context. They are quick to ignore its substantive context. It comes from a situation in an anti-trust case involving a non-stock corporation that is effectively a very large business. Each member of that business is itself a large business. Each member of that business, one presumes, was effectively represented in whatever negotiations or discussions led to that particular tennis federation joining the ATP. It is a very different kind of entity.

This decision comes down, and as Sean noted, there was this immediate response to it. It really shifted the ground in corporate litigation. We have articulated, and it was recommended reading, among other things, in the paper we put out, where we go into what the significant deterrence fee-shifting represents to stockholder litigation. I will not rehearse all of that. I simply want to say that in the United States, both on the federal level and the state level, we significantly depend on private enforcement of statutory corporate law, fiduciary corporate law, and federal securities law. What is significant about fee-shifting, as distinguished from every other mechanism that may be suggested to address shareholder litigation, is that it precludes a method



of private enforcement that has really been the only method for enforcing both statutory and fiduciary law for years.

What we have sought to do since this decision came down is to restore the status quo. That is what we believe our proposal last spring did. That is what we believe our current proposal does. With that, I will turn it over to Kurt.

SEAN GRIFFITH: Kurt, can I ask you to go next?

KURT HEYMAN: I just wanted to add that in addition to being a litigator in Wilmington, I have been an adjunct professor at this fine institution. I teach here every Thursday and I came straight from class. I see a few of my students here—they took my threat to fail them seriously if they did not show.

Sean, thanks for putting this panel together. I want to take issue first with Professor Griffith's idea that there is this Delaware Rule. I know that is his thesis, and he has written an article on it. There is the English Rule where the loser pays, the American Rule where each side pays its own fees, absent some extreme circumstances, and the Delaware Rule where the corporation always pays. He is saying that the corporation always pays because they wind up paying for the shareholders' counsel as well. Sean, that only happens if the case settles or the plaintiffs win. I understand that you are saying, statistically, that is what happens. Although, in cases that are actually litigated, where the defendant wins, the plaintiffs get nothing. That is how contingency litigation works.

MARK LEBOVITCH: Kurt, if I could actually pile on to that since I am the contingency lawyer here. I took the "other guy's" case to trial twice. We were up against Wachtell Lipton and eight other law firms. Forget the other fee-shifting, we could never have brought the case. I am pretty sure that what we, on the defendant's side, lost in that case out of our own pockets is more than twenty or thirty disclosure-only settlement fees. I am not proud to say that, but anyone who thinks we are not taking a risk is not counting what happens when you actually do take risks and lose after two trials.

FREDERICK ALEXANDER: I want to just say that after that case, believe it or not, Mark took another tough case.

MARK LEBOVITCH: I did.

FREDERICK ALEXANDER: What was your recovery there?

MARK LEBOVITCH: My recovery was nothing. We did not get a good ruling for the pill. We tried to attack the pill. I said, "I must be stupid. I keep trying to attack the pill, but in the end, if you cannot get

paid and if you are going to lose, people will stop tackling these things.” And now, pills in Delaware are now basically immune from challenge.

KURT HEYMAN: There is also another problem with the Delaware Rule concept, which is, at least they used to teach me in law school, that shareholders own the corporation and if the corporation is paying for it, then derivatively that is the shareholders’ money. Maybe it is that the shareholders pay no matter what happens. Maybe that is the rule. I do not know.

The other thing I wanted to say, and people come at this from different perspectives, but I had a very strong view that *ATP* was wrongly decided based on clear and established Delaware precedent of the last seventy years. Let me read the syllogism from the *ATP* case. It says, “Delaware follows the American Rule, under which parties to litigation generally must pay their own attorneys’ fees and costs. But it is settled that the contracting parties may agree to modify the American Rule and obligate the losing party to pay the prevailing party’s fees.”<sup>8</sup> The kicker is that “[b]ecause 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. Therefore, a fee-shifting bylaw would not be prohibited under Delaware common law.”<sup>9</sup>

That is the paragraph that has caused all this consternation. There is a jump there. You may not see it, but there is a jump there. They say, “Because corporate bylaws are contracts among a corporation’s shareholders.”<sup>10</sup> As a very junior associate, I did research that Rick probably sent me to the library to do back when I was at his firm, and I said, “This is just wrong.” In fact, I went back and looked, and if you look, there is caselaw, which I am oversimplifying a little, from the 1930s and on, that talks about bylaws and certificates being in the nature of contracts or akin to contracts. What they are really talking about is: for the purpose of how you interpret them, you apply the same canons of construction to bylaws and certificates that you do to contracts. So all those great Latin phrases, *expressio unius* and the others, you apply them to certificates and bylaws too.

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8. *ATP Tour, Inc. v. Deutscher Tennis Bund*, 91 A.3d 554, 558 (Del. 2014).

9. *Id.*

10. *Id.*

We then get to two decisions, in particular, in the early 1990s, the *Centaur Partners* case<sup>11</sup> and the *STAAR Surgical* case,<sup>12</sup> which come out and take a leap to say that bylaws and certificates are contracts. Now it is from that, frankly, lazy or sloppy language that we then get to this problem here. There is a lot of literature about why bylaws and certificates are not really contracts. They are not bilateral, they are usually not negotiated, there is no consideration, and they can be changed unilaterally by the board as long as the certificate permits it. This is not a contract in the sense that anybody really understands it.

The final thing I just wanted to add is the “Kurt Heyman test” to determine whether something is or is not a contract, which is, can they make you do it in a chicken suit? For instance, if I have a contract with you to show up at my daughter’s party wearing a chicken suit, we have a contract for you to do that. If you do not show up in a chicken suit, you breached that contract. Can DuPont make its shareholders show up to shareholders’ meetings in chicken suits? I think that is a very fundamental question. I do not believe any court in America would force a stockholder to show up in a chicken suit, no matter what the bylaws or certificates say. If they cannot do that, then it should be understood as rules governing the conduct of the corporation and not as a contract. With that, I will stop.

SEAN GRIFFITH: I want to get Rick’s perspective, but I cannot resist asking a question about that. What the Council did does not help us on your contract/not-a-contract, chicken suit/not-a-chicken-suit test, right? The Council says, “Fee-shifting invalid, forum selection valid.” Why is one more of a contract than the other one?

KURT HEYMAN: That is a good question. I actually think that my way of looking at it is the only way that reconciles those two. If they are really contracts, you would expect to see all kinds of funky provisions in certificates and bylaws. The fact is, until last year, at least in public companies, we never saw fee-shifting provisions. Nobody ever thought that those were legal until *ATP* came out. I am trying to stick to the idea that they are not contracts, so you do not have provisions like that. But, the forum selection clause is usually in contracts. Although, I view that as a Delaware regulatory matter. Delaware needs to be able to regulate

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11. *Centaur Partners, IV v. Nat’l Intergroup, Inc.*, 582 A.2d 923 (Del. 1990).

12. *STAAR Surgical Co. v. Waggoner*, 588 A.2d 1130 (Del. 1991).

its corporations, and it is not a contractual issue at all, it is part of the regulatory scheme of the corporate law. That is how I would reconcile it.

MARK LEBOVITCH: In short, just to add on to that, maybe one way to reconcile it is to say that bylaws, together with the charter, are more like a contract if you view the bylaws as the Robert's Rules of Order tagalong to the corporate contract. So, the charter itself is a contract.

KURT HEYMAN: So then you can force them to wear a chicken suit in a charter?

MARK LEBOVITCH: I do not think that you can. The bylaws are where the process comes from. The way the forum selection bylaws came about was to steamroll the idea of whether bylaws are contracts. Under Delaware's corporate law, courts, whether it is bylaws or otherwise, have some authority over internal affairs, including, to some extent, how to call a meeting, how many people attend the meeting, and maybe where a lawsuit gets filed, although I have some problems with that.

KURT HEYMAN: You are not in favor of forum selection clauses, are you?

MARK LEBOVITCH: I am not against the policy, but the way we got there with a Wachtell Lipton article that just took for granted that bylaws are contracts and that you can do forum selection, leading to the *Chevron* opinion,<sup>13</sup> which held this as perfectly fine without citing Delaware precedent that says shareholders cannot use bylaws to regulate substance. All of a sudden, directors can pick forum. I will tell you, as a policy matter, forum is not taking away your right to sue. It is telling you where to sue. The problem is the *Chevron* opinion opened the door to arbitration, which does take away your ability to vindicate your rights. That was predictable and people were talking about arbitration after *Chevron*. But, no one talked about fee-shifting. In light of *Chevron*, it is actually very hard to say that *ATP* was inconceivable. But it is substantive and that is the distinction I would draw.

SEAN GRIFFITH: I want to come back to that question, but I want to get Rick's perspective on what happened in the Council chamber.

FREDERICK ALEXANDER: I want to talk a little bit, not about fee-shifting, but about the Council, and what we do, and how we arrive at where we arrive. Just note that it is often the case that when people

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13. *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934 (Del. Ch. 2013).

see results of a decision-making process, they immediately go to motive. They do not analyze whether this was a good outcome or a good policy. They say, "Well, what was the selfish motive of the decision maker?" We get that a lot on the Council. Whatever you do, you cannot win. For many, many years, the criticism of the Delaware General Corporation Law, and the decisions that the legislature made based on the recommendation of the Council was, "Oh, this is so management-favorable," and I am sure you have heard in your corporate law class about "the race to the bottom." You are just going to go all the way and do whatever the directors and management want.

More recently, we have sometimes been criticized from the other side. For instance, when we expanded our statute to expressly permit proxy access and proxy reimbursement, people thought, "Why are you doing that? You must just be trying to curry favor with stockholder advocates." Now, with this last fee-shifting, what everyone says is, "Oh, well the Delaware lawyers are getting together, plaintiffs and defendants, because they want more litigation, so that must be why they are doing it." It is interesting, but those cannot all be right. We cannot have all those completely different motivations. What I would suggest is, in a way there is a very selfish motivation behind what the Council does, but it is not to favor plaintiffs, management, or defendants. It is to keep charters in Delaware. I will just admit that. Delaware likes to be the place where companies incorporate. It is good for our state. A lot of us think it is good for the country because we think we have come up with a pretty good system. But the only way to do that is to have a balanced system. If you have a system that just favors management, Chris is going to tell everybody, "Vote out of Delaware. That is not where you want to be. It is hurting stockholders."

On the other hand, if you went in the other direction, and just gave stockholders everything, then management would say, "Well, we are not going to do our IPOs there." You have to have a system that works for both parties. I am not going to say we are successful, but I would say that if you came inside and were a fly on the wall at the Council meetings, you would not see people with secret handshakes saying, "How do we get litigation here, how do we keep management happy?" We would be saying, "Everyone is attacking us, everyone is threatening to leave. The federal government is threatening to come in and regulate corporations. What can we do to have the right balance?" I think that is what we did here.

I will just talk a little bit about fee-shifting specifically. It is in the paper, as Norm said, and everybody has a slightly different perspective. What was highest in my mind was that fee-shifting had a real risk of eliminating the only real regulator on the director/management and stockholder relationship. There is nobody in this country that is looking at the, literally, trillions of dollars that are being managed. There is no regulator. For instance, somebody says, “Well 98% of the deals are sued on.” Well, you know what, in 100% of public company deals you have to file an S4, a proxy statement, or some document like that with the SEC. It spends thirty days there. They ask you all kinds of ridiculous questions. Every deal in some way is looked at. This litigation is the regulator and our concern was that fee-shifting would eliminate that form of regulation, and that somebody else would have to jump in, and that somebody would not be as efficient. I could spend a lot of time talking about why I think the system is certainly imperfect. There are lots of improvements that could be made, but it may be better than the alternatives. That is where we came from.

SEAN GRIFFITH: Not to be argumentative, but there is a regulator of the disclosure process, which is the SEC. If 98% of litigation results in 70% of the settlements, and 80% of those are disclosure-only settlements, there is a regulator for that and it is the SEC regulating the proxy. You have heard that before, so I will not go into that again. I want to get the perspectives of some folks from outside the Council on how the Council did, and what the Council should have done, and if it is good, bad, or if it is about right. Let me go to Andy first.

ANDREW PINCUS: I am not going to talk about whether bylaws are contracts or not. What I am going to talk about is a problem in Delaware in M&A litigation. I am sorry, but any system where 95% or 100% of the deals are sued is a sick system, where there are 70% settlements that do not have any monetary benefits and where you have plaintiffs who appear as plaintiffs in suit after suit. Most notably, Reuters did a story a few months ago.<sup>14</sup> The plaintiff did forty suits and zero money was returned to shareholders in all those suits. These are the symptoms of a sick system.

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14. Tom Hals, *Special Report: TV Stock Picker Leads Onslaught of Class Action Suits*, REUTERS (Feb 18, 2015, 10:18 AM), <http://www.reuters.com/article/2015/02/18/lawsuit-classaction-plaintiffs-idUSL1N0VS13820150218> [<http://perma.cc/B5LM-4NB9>].

It seemed to me that after *ATP* was decided, the reason there was a reaction was that people were looking for ways to protect their innocent shareholders who did end up paying both sides of the fence here from those costs in cases that are settled. There was not any other device out there. There were two problems. There was a problem of the same deal being challenged in litigation in multiple states, which led to a very unpleasant and unseemly process in litigation, where a whole bunch of lawyers who had brought claims had to separately be paid in order for them to go away. That really multiplied the cost of litigation, and I think the forum selection clause will largely provide a way to deal with that problem.

What the forum selection clause does not provide is a way to deal with the problem of suits being brought that clearly do not have merit, and how to create a system of incentives so that people have incentives to file the good cases, not incentives to file the bad cases. Now, unless you think 95% of deals are problematic, the incentives do not seem to be right. It seemed to me that the reason why I was disappointed with the Council's decision is the Council's proposal takes away an instrument for dealing with that. Maybe, for a good reason, but it does nothing to provide an alternative way to deal with this very serious problem.

It seems to me, you cannot take this away, and say "We are not going to do anything." I think the reason for that, and I think it is really this fundamental problem with the Council report, is it was the English Rule or nothing. The whole analysis of fee-shifting is the English Rule has all these bad characteristics, therefore, we cannot do anything. Well, that is a false choice, because in the real world of U.S. litigation, while the English Rule has not been adopted in very many circumstances, there is a lot of fee-shifting. Rule 11 in the federal courts has a fee-shifting standard.<sup>15</sup> There is a statute called the Equal Access to Justice Act in the federal system for suits against the federal government that has yet a different standard.<sup>16</sup>

KURT HEYMAN: Delaware has Rule 11 too.<sup>17</sup>

ANDREW PINCUS: I understand, but obviously it is not doing the trick because we still have 95% of the deals being sued on. So, obviously, we need something more. In the patent litigation system,

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15. FED. R. CIV. P. 11.

16. 5 U.S.C. § 504 (2012).

17. DEL. CH. CT. R. 11; DEL. SUPER. CT. R. CIV. P. 11.

where there is a similar problem of abuse of infringement litigation, Congress is looking. There is an existing fee-shifting statute for patent litigation<sup>18</sup> that has a standard that the Supreme Court just clarified that permits fee-shifting only in the unusual case.<sup>19</sup> The House of Representatives last year, which does not have super majorities for anything, had 325 votes, including two-thirds of the Democrats, voting for a new fee-shifting standard for patent infringement litigation because of the abuse that they found there that is different.<sup>20</sup> It is not an automatic, the “loser pays rule.” It is a rule where the loser pays if the loser’s claim was not substantially justified and there are no other reasons why fee-shifting is bad. It is a quite different standard, but there is zero discussion of any of those alternatives in the report.

There is also zero discussion of other techniques that could be used. In the federal securities law reform, there was a prohibition on bounty payments to plaintiffs, for “pet plaintiffs” that some lawyers have on reserve in order to bring cases.<sup>21</sup> There were limits on the number of cases that one plaintiff could file on the theory that that is a way that abusive lawsuits often are filed. There would be other possible techniques to give the judges of the Court of Chancery, who really are great experts in this area, perhaps more power to shift fees in appropriate cases.

I think what was terribly disappointing about the report is none of those things were discussed. It was portrayed as this all or nothing choice. All was rejected, and so, nothing. To me, the report’s discussions about the evils of fee-shifting relate entirely to an English Rule. They do not have anything to do with more moderated fee-shifting rules. I think that is a real disappointment. I think that is why you saw some unhappiness when the report came out, because the answer basically is, “Too bad, companies that are victimized and shareholders that are victimized by these abusive lawsuits, we are not going to do anything to help you.”

NORMAN MONHAIT: I just have one question for you. I am curious about your reference to the patent statute. I do not know how much you have looked at the decisional law there. Do you see the

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18. 35 U.S.C. § 285 (2012).

19. *See Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 134 S. Ct. 1749 (2014).

20. H.R. REP. NO. 113-279 (2013).

21. 15 U.S.C. § 78u-4(a)(2)(A)(vi) (2012).



application of that statute being materially different from a Rule 11 analysis?

ANDREW PINCUS: The existing patent law? Section 285 as it currently exists?

NORMAN MONHAIT: Yeah.

ANDREW PINCUS: No, I do not. That is why Congress is changing it. It is very similar to a situation where you have Rule 11 plus abusive litigation. There are two problems with the existing patent law. For about a decade and a half, the Federal Circuit had a standard that required basically both objective and subjective unreasonableness, so you have to prove that the case was brought in bad faith. For somebody who had just lost the case, who invested a lot of money in trying to prove both of those things, that was very hard to do, and there was almost no fee-shifting. The Supreme Court last year overturned that requirement of both subjective and objective unreasonableness.<sup>22</sup> We do not know how it is going to play out, but Congress is not waiting for that. As I said, taking the substantially justified tests, the Equal Access to Justice Act, which has a very well-developed body of caselaw, and saying, “You know what, we have got a big problem of abusive litigation, and skewed incentives in patent litigation. So, we are going to insert this changed fee-shifting rule as a way to change the incentives.”

FREDERICK ALEXANDER: I am not a patent litigator. I am just not sure that it is a fair comparison because patent litigation can involve a person who owns a patent. It is not representative litigation. The problem with corporate litigation that we are talking about, in general, is it is generally representative litigation. When you have fee-shifting, what you are doing is shifting the fees from all the stockholders to one of the stockholders. It is not as easy to fix the problem. I would say that if you look at the report, I do not think it is quite fair to say that we say that there is nothing else. First of all, we spent time thinking about whether there were other alternatives. It is very difficult to draft something that was effective.

In the report, we make a few points. First of all, we invigorate the forum selection, which should help with the settlement abuse. And they are related problems, because with forum selection, it is harder to have settlement abuse. With settlement abuse, you are less likely to attract the “98 percenters.”

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22. See *Octane Fitness*, 134 S. Ct. at 1755-58.

ANDREW PINCUS: Just to respond to that, the most recent cornerstone numbers actually bear out the fact that even though the number of multi-state deals challenged as multiple lawsuits are down, the same percentage of deals are being challenged.<sup>23</sup> So it is not like that solves the problem.

FREDERICK ALEXANDER: Things take time.

MARK LEBOVITCH: What makes that an epidemic?

ANDREW PINCUS: 94%.

MARK LEBOVITCH: We can all stipulate that that is stupid. It is really stupid that 94% of deals get litigation. But why is it an epidemic?

ANDREW PINCUS: Because somebody's bearing the cost of that.

MARK LEBOVITCH: What is the cost to society?

ANDREW PINCUS: The cost to all of those companies that have to deal with the litigation and have to pay settlements.

MARK LEBOVITCH: What is the cost? What is the actual cost? Why is the Republic going to come to its knees over 94% of deals becoming the subject of litigation?

ANDREW PINCUS: It is not going to come to its knees.

MARK LEBOVITCH: Some percentage gets dismissed, right?

ANDREW PINCUS: Very small, 7% according to the numbers. Some additional number of cases get voluntarily dismissed.

MARK LEBOVITCH: What do they settle for? There is no pecuniary benefit for shareholders. I am the last person who will ever defend the disclosure-only part. We can stipulate that. I have never done it. I hope never to even present, and probably never will present to the court, a disclosure-only settlement. Let us identify our epidemic so that we can cure it. What is the cost of the disclosure-only settlement?

ANDREW PINCUS: Those costs are the legal fees that get paid to defense lawyers.

MARK LEBOVITCH: How much is it?

ANDREW PINCUS: I have no idea.

MARK LEBOVITCH: What about \$300,000 or \$400,000?

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23. OLGA KOUMRIAN, CORNERSTONE RESEARCH, SETTLEMENTS OF SHAREHOLDER LITIGATION INVOLVING MERGERS AND ACQUISITIONS: REVIEW OF 2014 M&A LITIGATION (2015), <http://www.cornerstone.com/GetAttachment/897c61ef-bfde-46e6-a2b8-5f94906c6ee2/Shareholder-Litigation-Involving-Acquisitions-2014-Review.pdf> [<http://perma.cc/WL8Y-VGHB>].

ANDREW PINCUS: I think it is probably more than that. If the plaintiff's lawyers are getting \$500,000, my guess is that the defense lawyers are getting at least that.

KURT HEYMAN: I wish.

MARK LEOVITCH: If the fees for the plaintiff's lawyers come down, my suspicion is that plaintiff's lawyers are getting about \$150,000 to \$200,000 now. The defense is getting about, let us just say \$500,000. So, \$750,000 for every one of the disclosure-only settlements. Do you know how many there are in any given year?

ANDREW PINCUS: I do not know.

MARK LEOVITCH: Let us just identify why society is falling apart. One loyalty case is going to do more damage to society. One good loyalty breach on these multi-billion dollar mergers is going to do far more damage to society than all of these frivolous cases, and I will say it, they are frivolous. I am not defending that.

ANDREW PINCUS: So, then why can we not see if there is a way to fix the system for that?

KURT HEYMAN: Why did you not trust the Delaware courts to deal with that?

ANDREW PINCUS: Because I think they clearly need additional tools. The problem has gone on in Delaware and in other places. Rule 11 is the tool that does not work in the federal courts.

MARK LEOVITCH: Why not?

ANDREW PINCUS: Because the whole question here is not about setting up things that lawyers will use later. The litigation system is a system of incentives.

MARK LEOVITCH: It is to stop the lawsuit.

ANDREW PINCUS: It is not to stop the lawsuit. If I wanted to stop the lawsuits, I would be arguing your English Rule. I do not think it is to stop the lawsuits. We just heard Delaware wants to be the most attractive place for people to incorporate. Delaware tries to do everything it can to have a fair and balanced law. If the law today is allowing for frivolous cases, and the current tools are not enough, is it a good idea that one person files forty lawsuits? Good, bad, or we do not care?

MARK LEOVITCH: In response to the one person who files forty of those suits and gets nothing. And, I do not represent that person. Four lawsuits that I want to mention. Pfizer Pharmaceuticals, that was in New York, and in Delaware. Tyson Foods set precedent, got money.

News Corp., set precedent, got money. Pre-court just settled. We will see if it gets approved.

ANDREW PINCUS: Four seems different than forty.

MARK LEBOVITCH: Maybe it is.

ANDREW PINCUS: Four that get something versus forty that get nothing?

MARK LEBOVITCH: Here is the thing. The fee-shifting concept is not about solving the problem.

ANDREW PINCUS: I am on something else.

MARK LEBOVITCH: Delaware has the tools. They have the tools.

ANDREW PINCUS: They do not have the tools. There is not a tool that says you are out of bounds on some number of lawsuits, or it is a question for the Court of Chancery to look at whether a representative suit should go forward if somebody has a record of forty and zero return. What is wrong with that?

MARK LEBOVITCH: I would raise that on a lead plaintiff fight.

ANDREW PINCUS: But they are the only plaintiffs.

KURT HEYMAN: I used Rule 11 to get a plaintiff sanctioned and barred from litigating in Delaware in a consumer class action.<sup>24</sup> It was filed in the Court of Chancery, before someone who is now our chief justice. To say that Delaware does not have tools—it was a truly frivolous lawsuit and there were outright lies in the complaint—the problem is, you need a truly frivolous lawsuit and if you have one you can do something about it, but there is nothing.

SEAN GRIFFITH: I am very sympathetic to this debate, and I like this debate. There are two issues on the table here. One is could or should the Council have done more than just say no fee-shifting forum selection? This is one of Andy's points. The other point is if you add up fee-shifting plus forum selection, what it means is we are going to let the judiciary solve this problem. There is an argument right now between you guys about whether the judiciary is going to solve the problem. I think the point is made, and we should at least recognize the point that they have not solved it yet. Delaware judges customarily approve \$500,000 or \$1.5 million disclosure-only settlements, in other words, fees on disclosure-only settlements. The question is: is the judiciary going to do something different now? The statistics show, as you all know, that the average fee on a disclosure case is between \$500,000 and \$1 million.

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24. *See Beck v. Atlantic Coast PLC*, 868 A.2d 840 (Del. Ch. 2005).

AUDIENCE MEMBER: That is an outdated number.

SEAN GRIFFITH: It is an outdated number, but it is from 2012. There is the average disclosure-only fee.

AUDIENCE MEMBER: What is the real number?

MARK LEBOVITCH: Let us just say that is the real number.

SEAN GRIFFITH: The question is: are they going to do it differently now? They still have *Sauer-Danfoss*.<sup>25</sup> *Sauer-Danfoss* says you get half a million bucks for one meaningful disclosure. What is the tool? Is the tool simply that they now know that the Council has put it on us, so now I can do something? The jurisprudential tools that they have still say half a million bucks for one meaningful disclosure. It still says that in *Sauer-Danfoss*.

MARK LEBOVITCH: There are a couple of changes that the statistics do not keep up with. I understand that people are still filing lawsuits. I watch it every day and so does Rick. I think the number of suits have been coming down. I think that law firms that are self-respecting have been more selective. It is not just me, I have talked to the other law firms that get money for shareholders, and I would say that the four or five law firms that actually get money for shareholders have never seen a three-month period where we filed less. Now, that is not because we are deterred because we are not getting disclosure-only fees. We are just selective. There has not been a whole lot.

I think that the fees have come down. If you are going to litigate against Rick, and Kurt, and Sullivan & Cromwell, and Cravath, you actually cannot possibly win if you are only aiming for a \$500,000 fee because you are not going to work hard enough to beat them, because of how good these lawyers are. And Andy, too. I do not want to cut you out. So you have to be willing to actually swing for farther fences than even \$500,000. But the fees are down, so they cannot even make sense of filing a lawsuit for a \$50,000 return, so it is down. The number of lawsuits is coming down, and you know what? The judges, in the last six to nine months in good cases—for example, a \$750 million breach of the duty of loyalty settles with a \$280 million recovery. Again, one breach of loyalty causes more damage to society than all of the bad litigation combined. But the point being, the judges are dismissing the weak lawsuits. They are being harder on cases that are not getting

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25. *In re Sauer-Danfoss Inc. S'holders Litig.*, 65 A.3d 1116 (Del. Ch. 2011).

money, and if you have a good suit they are like, “Look, we are not going to discourage you. You are doing a good thing.”

SEAN GRIFFITH: I want to get to Chris, because I have a question for Chris. The question I want to ask is, look, we have a number of perspectives on the table that are, “Well, the Council could have done more.” Let us flip it and ask the question of whether the Council had to do anything at all. Because there is someone sitting at the table who has not spoken yet who could have solved this problem, and, in fact, who was on his way to solving the problem. Institutional Shareholder Services Inc. (“ISS”), the most important proxy advisory firm, in its latest proxy voting guidelines, referred to the unilateral adoption of fee-shifting bylaws as the governance failure, right?<sup>26</sup> That was potentially going to relate to a unilateral adoption. No shareholder approval, which is all these are, and adoption of fee-shifting bylaws was going to qualify as the governance failure. Now, what is a governance failure? A governance failure means we tell our institutional clients to vote against the whole board or at least those members that we can identify as having been in on the decision. Now, this is a powerful tool. I can prove it, because there was another governance provision called the anti-golden leash bylaw. Wachtell Lipton is good at innovating these sorts of nefarious devices.

KURT HEYMAN: Didn’t you start your career there?

SEAN GRIFFITH: I did. I also have unclean hands. The idea is that hedge funds are going to compensate their director nominees for serving on the boards of companies that they are attacking. That is the golden leash. But Wachtell comes up with the idea, “Look, that is a bad idea. Here is what we are going to do. You all adopt a bylaw that says directors cannot receive outside compensation.” That is the anti-golden leash bylaw. Wachtell comes out with this in a memo<sup>27</sup> and thirty-eight companies adopt it. ISS refers to it as a governance failure and recommends voting against all the directors on Provident Bank’s board

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26. INSTITUTIONAL S’HOLDER SERVS., UNITED STATES SUMMARY PROXY VOTING GUIDELINES: 2015 BENCHMARK POLICY RECOMMENDATIONS (2015), [http://www.issgovernance.com/file/policy/1\\_2015-us-summary-voting-guidelines-updated.pdf](http://www.issgovernance.com/file/policy/1_2015-us-summary-voting-guidelines-updated.pdf) [<http://perma.cc/PL4K-R8T7>].

27. Martin Lipton et al., *Wachtell Proposes Bylaw to Ward Off Threat of Conflicted Directors*, CLS BLUE SKY BLOG (May 10, 2013), <http://clsbluesky.law.columbia.edu/2013/05/10/wachtell-proposes-bylaw-to-ward-off-threat-of-conflicted-directors/> [<http://perma.cc/NHD7-2564>].

who are involved in adopting the anti-golden leash bylaw.<sup>28</sup> And guess what? The actual withhold votes were incredibly high in that election. Shortly thereafter, the thirty-eight companies all repealed the Wachtell Lipton anti-golden leash bylaw.

I was talking to a very influential person in Delaware that will remain nameless. He said to me, “Look, we do not have to do anything. You know who is going to solve the fee-shifting problem? It is going to be ISS because they are going to treat it as a governance failure and then firms are going to decide to let the market decide.”

One thing that we are going to see in the wake of what I think the Council has done is all those kinds of weird provisions, the chicken suit provisions that Kurt was talking about before, are going to be in bylaws now, including arbitration bylaws, including minimum percentage ownership to sue bylaws. People are going to be adopting weird, wacky stuff in their bylaws. So, the question is: what are we going to do about it? Are we going to have a Council meeting a year from now about the minimum threshold ownership requirement bylaw? Is that how we are going to do it iteratively to knock these things out? Or is there a place for someone else in the market to solve the problem? And I leave that to Chris.

CHRIS CERNICH: You have done a good job summarizing it, but you have left out a lot of the really interesting points. So, let me just take a second, because it will be instructive on the golden leash bylaws. We did not actually recommend withholds because they adopted a golden leash bylaw. We recommended withholds because they did it unilaterally, and, once you have got that, it is a significant infringement on shareholder rights. If they had put it to a vote, and a few companies did—Wynn Resorts did—if they put it to a shareholder vote, we will make a recommendation on the bylaw, but if shareholders approve it, it is done. Our view is that is how the governance should work. It is not like you put it to a shareholder vote, it gets approved and we continue to recommend against the directors. It was not the bylaw, it was the

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28. Berl Nadler, *ISS Advises Against By-Law Restricting Shareholder Compensation of Board Nominees*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Dec. 27, 2013), <http://corpgov.law.harvard.edu/2013/12/27/iss-advises-against-by-law-restricting-shareholder-compensation-of-board-nominees/> [<http://perma.cc/U8US-WX6A>].

unilateral aspect that was the issue for us, which is one of the reasons why I do not think that is a solution to any of the fee-shifting.

The other thing that you have to look at is what has happened, and we are going to go a little bit further afield because this is the SEC, not Delaware, but look at what has happened with proxy access. The SEC put its rules out a few years ago. It got struck down in the courts and then there were a few proposals from shareholders over the subsequent years. There were a lot of them, but a lot of them is maybe twenty in a year. It is not like there were thousands of them a year. Shareholders were still trying to figure out what they wanted to do and which ones they would support until this year, when all of a sudden, companies, and I think you start with Whole Foods, started adopting something that shareholders really have a problem with. Initially, I think it was going to be like 8%, or maybe it was 10% holding, so that they could get a no action letter to get the shareholder proposal at three and three removed.

All of a sudden, shareholders are radicalized. They are our clients. It kind of does not matter what we say. In fact, we may get lynched if we do not recommend the same way they are going to vote on it. We will still do our analysis and we will still make our recommendation, but we are not the power on these things. One thing we do really well is research and highlight. So when you come back to the golden leash with Provident Financial, we had very few clients who held shares. I do not know what percentage it was, but I did look at it at one point and it was something like 10% to 11%. Not every client is going to vote the way we recommend, but let us just say they did. There were 35% of shares at that meeting that voted against the directors, and the previous year it had done the standard 2% to 5%. It was not us telling clients what to do, and them following lock-step. It was us shining a light on it.

We shone a light—well, we did not need to, the media did—on Whole Foods. We will continue to shine a light on it and the same thing with fee-shifting. It is not because the fee-shifting bylaw itself is what we object to, it is unilateral adoption. So what happens when they put it to a vote is what you really get down to. You get Balkanization. If you think it is bad already, it is going to get a lot worse when absolutely every CEO and general counsel out there comes up with what they think is a good idea.

That is actually the concern that we have. Whether we think fee-shifting is a good idea or not is a little bit less important than creating a coherent system. You asked a question early on that was something along the lines of, “Should the Council have done anything? Should Delaware have done anything with it? Will someone else do it?” You



might want to consider whether it is an abrogation of Delaware's responsibility and the attorney's responsibility to not take it up.

I do not have any problem with the proposal that has come out. From my perspective, as probably the only non-lawyer in the room, it seems reasonably fair. There may be some other angles that you want to shift on it, but if you look at Mark's question of, "Is there a problem here from an investor perspective?" It is not that 95%, or 98%, or some number approaching 100% of mergers, get sued, it is that over the past decade that has resulted in about \$615 million in plaintiff's attorneys' fees. During the same period, security class action settlements have reached \$83 billion. We actually looked up the facts for that because we have a research note going out to clients on it. From an investor perspective, I am going to make up the numbers, let us just say of that of the \$615 million, there were \$500 million from either frivolous, ankle-biter, or bottom-feeder suits—the lawsuits that are truly a waste of shareholder resources. As a shareholder, are you really willing to try to recover that \$500 million to put the \$83 billion at risk? That number includes things like \$7.5 billion at Enron.

With Enron, it is really hard to say that nobody would have brought that suit. But then you start applying, and here is the Balkanization part, the logic of who is a loser in the loser pay bylaws. The formulations that I have seen are things like you have to prevail on substantial merits or you get substantially all the damages that you are seeking. So we look at every security class action in the past decade through the end of 2014 that was greater than \$1 billion. I think it is twelve of them. I looked to see if any of those twelve passed those two tests. Not one of them passed both of those tests. Not even Enron passed. One of the twelve did pass on one of the two tests, but you start calling these things loser pays, which is actually a far more satisfying name for it. I understand you guys need to be professional, but I call them loser pays. It is emotionally satisfying to say, "Yeah, we are going to stick it to the people who are actually abusing the system." But the question of who is the loser is not nearly as easy as it should be.

So, back to what you were saying earlier, actually, I do not know what Delaware should come out with on this. You guys are all smart, and you generally come up with really interesting formulations, and it is a lot better than the Balkanization that results when we recommend withholds against boards for unilaterally adopting something, and everything else breaks out. Maybe there is a better way than just saying there is no fee-shifting allowed. But frankly, not allowing fee-shifting is

a lot better than putting at risk about \$83 billion over the past decade, and whatever becomes of the future.

I am not worried about somebody not filing on the next Enron. I am worried about people not filing things that are closer to the marks. Mark may not have won those cases he was mentioning before, but there were several others that he and others have filed that were meritorious and won, there were damages and recoveries, and they were close to the line as well. That is the part that, as a shareholder, you worry about.

There is one other thing I want to add quickly that you worry about as a shareholder. It is not the cost of meritless litigation, in terms of attorneys' fees, but it is that those class actions become a form of insurance for boards of directors. Sometimes that is entirely appropriate and sometimes it is not. I do not even know the relevant percentage. I just know that I run into occasions, like an Indiana corporation a couple years ago with a controlling shareholder, another strategic, that decided it wanted to buy the first corporation so it ran the price down. It is an insurance company and it ran the market price down by substantially increasing the reserves. You can do that; it is an accounting judgment on how much you need to reserve. What it signals for the market is that you really miscalculated your liabilities, you are going to have a lot more losses in the future, and the future is not as rosy. Once the price ran down that far, they made an offer above market and they tried to push this through with a tender offer. By the way, on the board itself, the majority of the seats were either employees of the controller or affiliates of the controller. The word, and I never actually talked to the person who did this, but the word out there, which from an investor you begin to worry about, is that the board then started to seek out some plaintiff's attorney who would file a class action that they could quickly settle, and then you are immune. That is what you worry about as an investor. You really do not worry about the \$615 million. You worry about when there is real wrong out there and you cannot get at it, whether it is through what I just described or it is because the system is not going to challenge things that are anywhere close to the line.

NORMAN MONHAIT: A few observations. First of all, this express concern about excessive shareholder litigation is not needed. I have been doing this stuff since 1979, and you would have heard the same tune in 1979 and continuously since. So, this is not a problem that arises because of too much merger litigation. Although, I will say there is too much litigation.

Secondly, merger litigation represents a subset of shareholder litigation. It is not an insignificant subset, but it is a subset. There are

lots of cases, involving small companies, old companies, or non-public companies where litigation is an important tool for shareholders to call managers to account. In many of those situations, those are managers who are not pursuing the shareholders' interests effectively, and litigation is the only tool available to the shareholders to remedy that.

Third point, you will see, and this goes to the multi-forum issue mentioned, that one of the problems that developed with the proliferation of litigation around the country, primarily in merger cases, although you do see it in others, is that other courts, non-Delaware courts, were often favored as the fora for presenting settlement. Why? Because I think the judges in other jurisdictions are prepared to grant much higher fees for the same results than Delaware judges. I have seen fee applications in settlements in other states that are in amounts that no one in Delaware would even think about requesting. And they are granted or something close to them. There is an intersection between what we have done in the forum selection and what we have done in fee-shifting. What we are trying to say is corporations can challenge litigation in Delaware and we think our judges do have the tools. To take a look at our paper, we have laid out about six of them. It is not just Rule 11, there is a whole bunch of them, including class certification.

Take a look at where a lot of plaintiffs come from. Take a look at the notices on the Internet every time. Think about arguments that may be made about whether those people are appropriate. Another one that did not even get mentioned in the papers, it is typical at the start in most cases that the plaintiff will make an application for expedition to prosecute a motion for preliminary injunction and that goes to the whole disclosure issue. Our courts have been looking at them much more critically and granting them less often. And a lot of cases die right at the start because they do not get going. If you do look at the data, you will see that our courts are increasingly rejecting settlements where they do not deem the disclosures to be of sufficient merit, or, as an audience member pointed out before, granting very small fees.

So, Andy said it right. The problem is: how do you create a system of incentives? To incentivize the shareholders' lawyers to bring the good cases and not bring the cases that do not merit litigation. That takes some time, but if the message comes from the Court of Chancery, and I am confident that it will, that if you bring cases that do not have merit what you are going to get is an investment of time and expense without any return, over time it will create the incentive system that Andy advocates.

SEAN GRIFFITH: So, let me go to Rick, and then Andy, and then finally, wrap up.

FREDERICK ALEXANDER: I think I just want to follow on and say something that responds to what Andy said, and also to something Professor Griffith said, and maybe even a little bit of what Chris said. If you look at the Council's report, in addition to the discussion of what the courts can do, there is an illusion to the fact that companies may be able to adopt other sorts of bylaws to regulate this behavior. I think the typical one that you think about is when you have to have some substantial amount of stock ownership to bring a claim. So this is trying to cut off the forty claims from somebody.

I think that should help, but assuming this legislation gets through, I think we will see some developments there. I do not think that is going to present us with the issue of the Council having to come back next year and comment on it because, remember, fee-shifting is unique. Fee-shifting is unique in that it is self-enforcing. Any other bylaw, you can challenge, and if you are wrong, then you say, "Oh, that 3% to bring a lawsuit, that is no good," and you challenge it and are wrong, you wasted a little time, but you do not have to pay the company's fees. Fee-shifting has an *in terrorem* effect where you just cannot challenge it. This is something where I would say there can be development from the company side and the court can look at it, or ISS can look at it, and decide whether it is reasonable. I think, as we are with proxy access, we may well get to an equilibrium that works well.

ANDREW PINCUS: I think the demonstrated problem here is M&A litigation. I do not think anybody thinks that the Enron kind of cases are cases that are going to be affected by these bylaws or that the SEC is going to let them be affected by these bylaws. So, I think that is a little bit of a red herring in the world here.

I think for a lot of the companies that are concerned about this, something that focused on M&A type litigation would be fine because one of the unique things about M&A litigation is the pressure to settle before the deal closes. That is one of the great leverage points that any plaintiff has. "Let us get this cloud eliminated." That is why there are so many settlements. I do think that M&A litigation is a particular problem, and I think, although I have not been involved in this as long as Norm, I do know something about the numbers, and the numbers on M&A litigation are shocking. In 2008, it was 35% of the deals. Ten years ago, more than half of the settlements resulted in cash and only 10% were disclosure only. There has been a sea of change in the reality of M&A

litigation and that is because there is abuse. I think it is an area where tools are needed. We can have a lot of debates about the tools.

Speaking for myself, I think this is an odd problem to address with bylaws. I think it would be very weird for Company A to say, “You know what? If you brought five challenges to mergers and acquisitions in the past three years, you cannot file a challenge to one that we are engaged in,” while the company across the street has ten and the company three doors down has none. It seems to me that this is something that Delaware should examine. Maybe not with a bazooka, but there is a strong argument that some additional controls are needed to deal with these targeted abuses. And again, I just think, given all the expertise of the Council, it was a real missed opportunity to not evaluate some of these other tools and to really focus on the all or nothing switch here.

SEAN GRIFFITH: So let me give a final word to Mark.

MARK LEBOVITCH: I do not think the Council was looking to have to make this decision. On May 8th last year, the world changed with an opinion that nobody saw coming. A federal circuit court and a federal district judge sent it to Delaware because, if you read their opinions, they took for granted Delaware law, and the Delaware Supreme Court was going to invalidate the bylaw issued in *ATP*. So, it was a shocker.

To the point about securities litigation that Andy makes, a few blocks north of here at another school, there is Professor Jack Coffee who does not agree. He criticizes the Council for not expressly including federal securities claims in its definition of fee-shifting bylaws that are not allowed.<sup>29</sup> He is concerned that companies are going to try to game it and say, “Well, a fee-shifting bylaw that includes a federal securities claim may be allowed.” I understand the political reasons why the Council would not want to touch federal law, but Coffee is raising a concern and some companies are going to press that.

That gets to Rick’s point about experimenting with bylaws. I think that what opened with *Chevron* is this idea that you can just use a bylaw, impose it on your shareholders, and change their rights. I think that if I

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29. See John C. Coffee, *Fee-Shifting Bylaw and Charter Provisions: Can They Apply in Federal Court—The Case for Preemption 5-7* (Columbia L. Sch. Ctr. for L. & Econ. Stud., Working Paper No. 498, 2014), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2508973](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2508973) [<http://perma.cc/6VX3-VGGA>].

have any concern about the Council's resolution it is to say that we are getting rid of fee-shifting bylaws, and not really getting into the self-interested nature of what boards are doing. I think what is going to happen is that boards are going to find ways, other than fee-shifting, to try to eliminate litigation. Maybe the answer is you can still litigate and challenge that file because there is no fee-shifting provision. But I advise hedge funds, who are activists and who are worried that bylaws are going to be used to target proxy fights. Like the golden leash, the hypocrisy is that a controlling shareholder can control directors all they want, but heaven forbid an activist have some consulting fee for a director. I think that the bylaws are a dangerous weapon to give to directors and you have to treat it as a self-interested transaction and validate it before the abuse gets much worse.

The last thing, the real abuse in all this litigation, as much as we hate paying plaintiff's lawyers \$200,000 to \$300,000, is the release. The release of the defendant who did not face a plaintiff who actually looked at the situation. That is what you have to worry about. I think that we will see how that plays out. The litigation is important.

SEAN GRIFFITH: Please join me in thanking our distinguished group.