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Private Ordering Solutions for excessive shareholder litigation: The Impact of *Boilermakers*, *ATP Tour* and *Sciabacucchi*

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INTRODUCTION

Over time, M&A litigation become a major issue in corporate law matters. A few decades ago, shareholders used to challenge a minor percentage of corporate deals, whereas deal litigation is nowadays almost inevitable.[1] The logic behind deal litigation stands upon the plaintiff's attorneys' "starvation" for fee awards. The process generally starts as soon as a deal in announced, with the investors challenging the transaction to the court. The plaintiff will try to settle likely allege claims that the officers had failed to disclose all the information about the deals, among many other claims. Plaintiffs will therefore require that supplemental information be disclosed. In case the court certifies that such additional information provides a "material benefit" to the corporation, the plaintiff's attorney is awarded a fee as a consequence of having contributed to the supplemental information. Initially, litigation focused on state-law allegations, complaining that directors failed to satisfy their obligations. Then, as a result of Delaware's conservative approach to the awarding of fees, litigations was brought in multiple forums, leaving defendants to protect themselves in different jurisdictions. Courts have gradually tried to address the issue, but private ordering solutions turned up to be the most powerful tool. Private ordering consists in modelling corporate governance by entitling corporate parties to resolve corporate issue by themselves. This can happen through amendments to the corporate charter or to the bylaws. Among the several types of private ordering solutions, I will deal with the two board-adopted provisions which raised most concerns across Delaware's legislation and the media as well, namely fee shifting provisions and exclusive forum provisions. In particular, I distinguish between a state forum provision and a federal forum provision. The former defines the exclusive state, or states, in which litigation under certain claims is to be resolved. The latter defines federal district courts as the exclusive forum for resolution of litigation under federal securities claims. Fee-shifting provisions, instead, require the losing party to a litigation to bear all the fees associated with the litigation, including attorneys' fees. I analyze the impact of three major cases, which provided the standards for the validity of such provisions: *Boilermakers, ATP Tour,* and *Sciabacucchi.* In Part I, I introduce the historical background of M&A litigation, focusing on the reasons for this dramatic increase. I also deal with the rise of private ordering solutions, and I provide a detailed understanding of Exclusive Forum Provisions and Fee-

[1] *See* Higgins, K., Kinsella, P. and Welsh, P., 2019. *A Fresh Look at Exclusive Forum Provisions*. The Harvard Law School Forum on Corporate Governance. Available at: <https://corpgov.law.harvard.edu/2019/05/28/a-fresh-look-at-exclusive-forum-provisions/>.

Shifting Provisions specific to the cases at issue. I further gather various opinions on private ordering provisions among scholars and commentators, whose debate has been active for the past two decades.

Part II focuses on the decision in *ATP* by the Delaware Court of Chancery. I analyze the ruling made by the court and also discuss the potential implications of the decision. I further analyze the impact of the provisions and of the amendments made in 2015 to the Delaware General Corporation Law, which definitely banned corporations form adopting fee shifting provisions as a response to intra-corporate claims. I present evidence of an already-in-existence rule which purports to deal with fee shifting provisions, namely Delaware Rule 11. However, the last subsection of the provision rules that it is not applicable to claims seeking disclosures. Rule 11 therefore would not apply to most of the litigation i am dealing with in this paper.

In Part III, I focus on the standard of judicial review provided by *Boilermakers* and *Sciabacucchi*. I present several pros and cons of exclusive forum provisions and I rely upon many scholars' opinions to analyze the approaches taken by the courts in upholding the validity and enforceability of such provisions. In the first subsection, I deal with the 2015 amendments of the DGCL which explicitly authorize exclusive forum provisions in a Delaware corporation's certificate of incorporation or bylaws for internal corporate claims. The amendments also impose Delaware as a mandatory forum for litigation. With regard to State Forum provisions, I analyze both the pros and cons that have been gradually come up as a result of recent litigation. I further present a plausible resolutive provision which, in the mind of some scholars, may "pick up the slack" of both fee-shifting and exclusive forum provisions concerning state-law claims. In the second subsection, I deal with a relatively new kind of exclusive forum provisions, namely Federal Forum Provisions, which have come up as a consequence of shareholders filing securities claims in state courts. The standard of judicial review for the validity and enforceability of such provisions has just been provided by the Delaware Supreme Court in *Salzberg, et al. v. Sciabacucchi,* in 2020.

I. THE HISTORICAL BACKGROUND

A. The Dramatic Increase in M&A Litigation

In principle, corporate deals should be everything but objectionable.[2] Yet, starting at the beginning of the 21st century, plaintiffs have challenged almost every merger.[3] Deal litigation has become so common that some started calling it "a feeding frenzy."[4] Back in 2005, shareholders challenged only about 50% of deals in court: by 2010, shareholders had increased such amount by almost 40% claiming that such mergers be unfair.[5] According to Cornerstone Research, in 2013, 94 % of M&A deals were challenged by shareholders, and every deal averaged more than five lawsuits. Moreover, 62% of deal litigation was multi-jurisdictional, and 75 percent of the overall lawsuits was resolved before the closure of the deal.[6]

Reporters for the New York Times defined M&A litigation as "a big issue these days, because once you've announced a deal, you are likely to get sued. Really."[7]

What's more, the settlement in the transaction case is generally of little value to investors. The most common types of settlements are money, amendments to terms of the deal, supplemental disclosures or even all of them.[8] Litigation may settle before the deal closes,[9]

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[2] *See* U.S. Department of Justice and the Federal Trade Commission, "Horizontal Merger Guidelines," § 10 (Aug. 19, 2010) (stating that "mergers have the potential to "generate significant efficiencies" and "enhance the merged firm's ability and incentive to compete,").

[3] *See* Cornerstone Research, 2014. *Shareholder Litigation Involving Mergers and Acquisitions*: *Review of 2013 M&A Litigation.* Available at: <https://www.cornerstone.com/CMSPages/GetFile.aspx?guid=73882c85ea7b4b3ca75f40830eab34b6>.

[4] *See* Solomon, S. D, 2013. *Debating the Merits of the Boom in Merger Lawsuits.* New York Times Deal Book. Available at: <http://dealbook.nytimes.com/2013/03/08/debating-the-merits-of-the-boom-in- merger-lawsuits/?r=2>. *See also* Sumpter, P., 2013. *Adjusting Attorneys' Fee Awards: The Delaware Court of Chancery's Answer to Incentivizing Meritorious Disclosure-Only Settlements.* University of Pennsylvania Journal of Business Law, Vol. 15. Available at: <https://ssrn.com/abstract=2560846>.

[5] *See Cain, M. D., Solomon, S. D., 2015. Takeover Litigation in 2014.* (stating that for "four year in a row over 90% of transactions experienced a lawsuit"); *See also* Cain, M. D., Solomon, S. D., 2014. *Takeover Litigation in 2013*. Ohio State Public Law Working Paper No. 236. Available at: <https://ssrn.com/abstract=2377001>. (explaining that in 2013 almost every merger except 2 was subject to litigation).

[6] Koumrian, O. and Daines, R., 2013. *Shareholder Litigation Involving Mergers and Acquisitions: February 2013 Update*. The Harvard Law School Forum on Corporate Governance.

[7] *See* Solomon, S. D, 2013. *Debating the Merits of the Boom in Merger Lawsuits.* New York Times Deal Book. *See also* Thomas, R. S., 2013. *What Should We Do About Multijurisdictional Litigation in M&A Deals?*. The Harvard Law School Forum on Corporate Governance.; *See also* Cheffins, B. R., Armour, J. and Black, B. S., 2012. *Delaware Corporate Litigation and the Fragmentation of the Plaintiffs' Bar.* Columbia Business Law Review, Northwestern Law & Econ Research Paper No. 12-04, ECGI - Law Working Paper, Oxford Legal Studies Research Paper No. 21/2012. *See also* Coffee, Jr., J. C., 2014. *Loser Pays': Who Will Be the Biggest Loser?*. New York Law Journal.

[8] *See* Fisch, J., Griffith, S. and Davidoff Solomon, S., 2015. *Confronting the Peppercorn Settlement in Merger Litigation: An Empirical Analysis and a Proposal for Reform*. Penn Law: Legal Scholarship Repository, 93 Tex.

and usually companies settle the deal by agreeing to make additional disclosures about the terms of the deal.[10] On the other hand, plaintiffs' attorneys are awarded fees as a premium for having contributed to the production of a corporate benefit.[11]

Supplemental disclosures sometimes produce meaningful information, for instance they may reveal that managers are conflicted with respect to the transaction.[12] But most of these supplemental disclosures do not provide any benefit to investors. Professors Fisch, Griffith, and Solomon noted that "if the disclosure does not affect the shareholder vote, it is difficult to see how shareholders benefit from it."[13] They go on complaining that "[t]he benefit produced by disclosure-only settlements is anything but substantial. Indeed, it would be closer to the truth to say that it is imaginary."[14] Then what is it that shareholder gain if they do not get money or meaningful disclosure?[15] Plaintiffs can make a settlement attractive to directors by little changes to the deal, requesting superficial fees,[16] and agreeing to release some liability.[17] This way defendants are prompted to settle the case in "silence", aware of the fact

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L. Rev. 557.; *See also* Cain, M. D., Solomon, S. D., 2015. *A Great Game: The Dynamics of State Competition and Litigation.* Iowa Law Review, Vol. 100 No. 165.

[9] *See* Cornerstone Research, 2014. *Shareholder Litigation Involving Mergers and Acquisitions*: *Review of 2013 M&A Litigation.* (stating that "As in prior years, litigation for the majority of deals was resolved before the deal was closed. Of the 2013 deals resolved before the deal closed, 88 percent were settled, 9 percent were withdrawn by plaintiffs, and 3 percent dismissed by courts."); *See also* Fisch, J., Griffith, S. and Davidoff Solomon, S., 2015. *Confronting the Peppercorn Settlement in Merger Litigation: An Empirical Analysis and a Proposal for Reform*, *supra note_* (Noting that "Empirical studies confirm that nearly 70% of merger claims settle while the rest are dismissed.").

[10] *See* Cornerstone Research, 2014, *supra note_* ("Settlements for additional disclosures, or additional disclosures plus other terms, remained prevalent. Nearly 92 percent of settlements reached in 2013 included such deal terms.").

[11] According to Delaware law, the court may award a fee to the plaintiff's attorney, which is paid by the other party, based on a lawsuit that provides non-monetary relief to the plaintiff, as long as the relief constitutes the benefit of the company and its shareholders. *See Sugarland Indus., Inc. v. Thomas*, 420 A.2d 142, 147 (Del. 1980). *See also Solomon v. Pathe Commc'ns Corp.*, No. CIV. A. 12563, 1995 WL 250374, (Del. Ch. Apr. 21, 1995)

[12] *See Tandycrafts, Inc. v. Initio Partners*, 562 A.2d 1162, 1165 (Del. 1989)

[13] *See* Fisch, J., Griffith, S. and Davidoff Solomon, S., 2015. *Confronting the Peppercorn Settlement in Merger Litigation: An Empirical Analysis and a Proposal for Reform*. Penn Law: Legal Scholarship Repository, 93 Tex. L. Rev. 557.

[14] Id.

[15] Shareholder litigation may be worthwhile for several reasons. *See* Sumpter, P., 2013. *Adjusting Attorneys' Fee Awards: The Delaware Court of Chancery's Answer to Incentivizing Meritorious Disclosure-Only Settlements.* University of Pennsylvania Journal of Business Law, Vol. 15.; *See also* Griffith, S. J., Lahav, A. D., 2012. *The Market for Preclusion in Merger Litigation*. Vanderbilt Law Review, Fordham Law Legal Studies Research Paper No. 2155809.

[16] Before 2014, fees for disclosure-only settlements ranged from $600,000 to about $1.8 million. *See* Cain, M. D., Solomon, S. D., 2015. *Takeover Litigation in 2014*.; *See also* Cain, M. D., Solomon, S. D., 2014. *Takeover Litigation in 2013*. Ohio State Public Law Working Paper No. 236.; (Fees for 2014 saw the mean attorneys' fee going from $489,000 in 2013 to $531,000 in 2014.)

[17] *See* Sumpter, P., 2013. *Adjusting Attorneys' Fee Awards: The Delaware Court of Chancery's Answer to Incentivizing Meritorious Disclosure-Only Settlements.* University of Pennsylvania Journal of Business Law, Vol. 15. (explaining that defendants would likely settle deals "since they can obtain a broad release of all potential deal-related claims").

that usually insurance covers the bill for attorneys' fees.[18] Both Plaintiffs and defendants subsequently present the settlement to the court, which "will have to raise objections on its own, something that it is unlikely to do."[19]

The roller coaster of M&A litigation[20] does not end here. Delaware courts are renowned for their expertise in corporate law, and the Delaware Court of Chancery is also known to award conservative fee awards.[21] Such conservative behavior is exactly what drove merger litigation outside of Delaware, causing plaintiffs' lawyers to fly out of the state's jurisdiction and go "forum shopping" to file and settle their cases elsewhere in which the judges accepted settlements with lower levels of scrutiny.[22] Plaintiffs' attorneys therefore started bringing litigation in several jurisdictions.[23] Merger claims can be brought either in the state of incorporation, in the headquarters state, or in federal court. According to the internal affairs doctrine, the law governing the company's charter also governs wherever the dispute is litigated, except for federal securities claims.[24] But when a company's headquarters state

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[18] *See* Clark, D., 2013. *Why Merger Cases Settle*. BoardMember.com.; *See also* Griffith, S. J., 2014. *Correcting Corporate Benefit: How to Fix Shareholder Litigation by Shifting the Doctrine on Fees.* Boston College Law Review, Vol. 56, No. 1, Fordham Law Legal Studies Research Paper No. 2496395.; *See also* Tatum, A., 2013. *Securing D&O For Attorney's Fees in Securities Cases.* Law360.

[19] *See* Fisch, J., Griffith, S. and Davidoff Solomon, S., 2015. *Confronting the Peppercorn Settlement in Merger Litigation: An Empirical Analysis and a Proposal for Reform*, supra note_ (recognizing that a court's struggle to review and approve disclosure-only settlements in deal litigation because "the settlement hearing is likely to be non-adversarial in nature"); *See also* Griffith, S. J., 2014. *Correcting Corporate Benefit: How to Fix Shareholder Litigation by Shifting the Doctrine on Fees, supra note_* ; *See also* Leslie, C. R., 2002. *A Market-Based Approach to Coupon Settlements in Antitrust and Consumer Class Action Litigation.* 49 University of California Los Angeles Law Review 991. ("Despite their authority to reject settlements and the inherent problems of coupon-based settlements in class action litigation, courts routinely approve such settlements. This is not surprising given that for many class action settlements, court approval is a mere formality. For a variety of systemic and case-specific reasons, courts are loathe to reject proposed settlements in class action litigation.").

[20] *See* Matera, P., Sbarbaro, F. M., 2020. *From Trulia to Akorn: A Ride on the Roller Coaster of M&A Litigation*. 44 (2-3) Delaware Journal of Corporate Law, 61-112.

[21] *See* Micheletti, E. B. and Parker, J., 2012. *Multi-Jurisdictional Litigation: Who Caused This Problem, and Can It Be Fixed?*. Delaware Journal of Corporate Law, Vol. 37, No. 1.

[22] *See* Armour, J., Black, B. S., Cheffins, B. R., 2012. *Is Delaware Losing Its Cases?*. 9 Journal of Empirical Legal Studies, Northwestern Law & Econ Research Paper No. 10-03, Oxford Legal Studies Research Paper No. 36/2010, U of Texas Law, Law and Econ Research Paper No. 174, European Corporate Governance Institute, Law Working Paper No. 151/2010, 5th Annual Conference on Empirical Legal Studies Paper, University of Cambridge Faculty of Law Research Paper No. 11/08. (suggesting that courts in outside Delaware will scrutinize settlements and will grant fee awards less carefully). *See also* Armour, J., Black, B. S., Cheffins, B. R., 2012. *Delaware's Balancing Act.* 87 Indiana Law Journal, University of Cambridge Faculty of Law Research Paper No. 37/2011, European Corporate Governance Institute, Law Working Paper No. 167/2010, Northwestern Law & Econ Research Paper No. 10-04, Oxford Legal Studies Research Paper No. 64/2010.

[23] The defendant in a transaction lawsuit is always a corporate entity. Shareholders usually sue the state where the company is registered and where the company's headquarters are located. Not only in Delaware, but other states often raise the same transaction challenges. *See Hertz Corp. v. Friend*, 130 S. Ct. 1181, 1188, 1193 (2010).

[24] The internal affairs of a corporation include "fiduciary duties owed to a corporation by its officers and directors . . . and . . . matters peculiar to the relationships among of between the corporation and its officers, directors and shareholders . . ." *See Edgar v. MITE Corp*., 457 U.S. 624, 645 (1982); *See also* Tung, F., 2006. *Before Competition: Origins of the Internal Affairs Doctrine*. Emory Law and Economics Research Paper No.

differs from its state of incorporation, litigation can be brought in more jurisdictions, up to three. Both parties' attorneys soon started focusing on obtaining the highest fees possible for themselves because in exchange for keeping cases out of the state where the companies were incorporated, the courts granted higher fees. Some courts, trying to deal with the issue, started awarding fees to the attorney who filed first, therefore granting him a larger "piece of the pie" at settlement.[25]

Over time, Delaware judges have started addressing deal-litigation issues: for instance, Delaware courts abandoned the first-application approach to appointing lead plaintiff.[26]

With regards to the non-adversarial process of the settlement, courts have also responded with a sort of "anti-peppercorn" mechanism. Delaware courts have begun scrutinizing settlements more closely, rejecting them in case the supplemental disclosures provided did not bring any significant change to the total mix of information. *Trulia* first provided the standard for judging the importance of supplementary disclosures. There, Chancellor Bouchard announced that the Delaware Court of Chancery would commit to avoid granting disclosure settlements. He ruled that:

> "Practitioners should expect that the Court will continue to be increasingly vigilant in applying its independent judgment to its case-by-case assessment of the reasonableness of the 'give' and the 'get' of such settlements"[27]

Moreover, the *Trulia* standard is now accompanied by the *Walgreen* standard, which imposes the "plainly material" requirement on supplemental disclosures across the federal judiciary as well.[28]

06-04. *See also* Ursaner, S., 2010. *Keeping "Fiduciary Outs" out of Shareholder-Proposed Bylaws: An Analysis of CA, Inc. v. AFSCME*. New York University Journal of Law & Business, Vol. 6, p. 479.

[25] *See* Strine, L., Hamermesh, L. A., Jennejohn, M., 2013. *Putting Stockholders First, Not the First-Filed Complaint*. Business Lawyer, Vol. 69, 2013, Harvard John M. Olin Center for Law, Economics, and Business Discussion Paper No. 740, Widener Law School Legal Studies Research Paper No. 13-25. (stating that courts are "often motivated by a desire to secure a role in litigation that will justify a share in potential fee awards . . . plaintiffs' lawyers often bring parallel actions against the same defendant in multiple jurisdictions hoping to become the lead plaintiff's attorney.").

[26] *See Hirt v. U.S. Timberlands Service Co.*, No. Civ. A. 19575, 2002 WL 1558342 (Del. Ch. July 3, 2002); Webber, D. H., 2013. *Private Policing of Mergers and Acquisitions: An Empirical Assessment of Institutional Lead Plaintiffs in Transactional Class and Derivative Actions*. Delaware Journal of Corporate Law, Vol. 38, No. 3, 2014, 7th Annual Conference on Empirical Legal Studies Paper.

[27] *Id.*

[28] *See In re Walgreen Co. Stockholder Litigation*, No. 15-3799 (7th Circ. Aug. 10, 2016). The two parties agreed to settle, and Walgreens accepted to issue additional disclosures in exchange for limited release claims. The settlement authorized the class lawyer to demand compensation of USD 370,000 in attorney's fees without

It is easy to see how Delaware courts have, since the beginning of the 21st century, gradually conducted more incisive inquiries to address and repress M&A overlitigation, by either increasing the scrutiny on disclosure-only settlements or, in general, developing specific responses to specific threats. However, there is disagreement among the critics on whether some of these responses (or sometimes initiatives taken by the courts themselves) should, or should not, be justified on the grounds that were simply responses to M&A overlitigation.

B. The Rise of Private Ordering Solutions

Corporate governance mechanisms have gradually and steadily evolved over the past 40 years.[29] The term "New Governance", as some scholar defines it, refers to the way of shaping corporate law by granting corporate participants "freedom" in the use of private ordering to tailor governance terms to specific issues, instead of relying on regulatory reform.[30]

The new governance allows boards and shareholders to innovate and respond to governance changes quicker that through the implementation of formal regulation. The rise of private ordering solutions has been "bi-dimensional": as shareholders have attempted at elevating their role in corporate decision-making, directors have counter-attacked by adopting constraining mechanisms that would limit shareholders' influence.

These governance innovations typically are provisions in an issuer's charter and/or bylaws. In most states, directors and shareholders can amend corporate bylaws unilaterally.[31] The

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Walgreens objection. The Federal Court considered that the supplementary disclosure "may have mattered to a reasonable investor" and therefore approved the settlement agreement. The Seventh Circuit overturned and sent back for retrial, and concluded that " the value of the disclosures in this case appears to have been nil."

[29] *See* Ocasio, W., Joseph, J., 2005. *Cultural Adaptation and Institutional Change: The Evolution of Vocabularies of Corporate Governance, 1972-2003*. 33 Poetics 163, 166.; *See also* Cheffins, B. R., Wright, M., 2013. *The History of Corporate Governance*. The Oxford Handbook Of Corporate Governance 46, Oxford University Press.

[30] *See* Fisch, J. E., 2016. *The New Governance and the Challenge of Litigation Bylaws*. Brooklyn Law Review, Vol. 81, P. 1637, University of Pennsylvania, Institute for Law & Economic Research Paper No. 16-1.; *See also* Smith, D. G., Wright, M. G., Hintze, M. K., 2011. *Private Ordering with Shareholder Bylaws*. Fordham Law Review, Vol. 80, p. 125.

[31] In Delaware, the charter must grant the board the power to amend the bylaws. *See* DEL. CODE ANN. tit. 8, § 109 (2015). *See also* Brown, J. R., 2015. *The Future Direction of Delaware Law (Including a Brief Exegesis on Fee Shifting Bylaws)*. Denver University Law Review, Vol. 92, No. 49, University of Denver Legal Studies Research Paper No. 15-17. In addition, the regulations do not restrict the power of the board of directors to amend the articles of association passed by shareholders. *See also Gen. DataComm Indus., Inc. v. Wis. Inv. Bd.*, 731 A.2d 818, 821 n.2, 822 (Del. Ch. 1999) (In Delaware, "the corporation statutes allow the board of directors to amend the by-laws if the certificate or articles of incorporation so provide and place no express limits on the application of such director amendment authority to stockholder-adopted bylaws.").

consequence is that the board can make governance changes without shareholder approval. However, board-adopted bylaws are subject to a different type of analysis compared to shareholder power to adopt governance provisions. In many cases, the courts seems to have refrained from providing guidance on the permissible scope of shareholder power under the new governance, therefore providing a "critical dearth of precedence" on the matter.[32]

On the other hand, the analysis of board-adopted bylaws concerns a 2-step case-law approach. The first step addresses the validity of the bylaw according to the board's statutory power.[33] The second step concerns the enforceability of the provision. The courts have specifically observed that a facially permissible action may not grant the enforceability of it, for instance if the bylaw is deployed for an improper purpose.[34] Corporate statutes impose that a bylaw not-conflict with the corporate statute or the company's charter, everything else the content of bylaws is open ended.[35]

Historically speaking, companies' charters and bylaws generally did not include any provisions to address intra-corporate litigation. The internal affairs doctrine used to work its path towards ensuring that the law of the incorporation state applied to intra-corporate disputes; moreover, litigation was mostly filed in the state of incorporation.[36] However, with the advent of merger litigation crisis, the need for potential solutions emerged.[37] Private-ordering solutions can be implemented without any legislative, judicial, or regulatory action. A corporation requires at most a vote of the shareholders to amend the bylaws or the charter. However, if the corporation's certificate of incorporation allows the board to adopt bylaws without shareholder approval, then directors are free to amend them.[38]

The kind of bylaws most frequently implemented are 3: exclusive forum bylaws, fee-shifting bylaws, and arbitration bylaws. Exclusive forum bylaws address multi-forum litigation,

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[32] *See* Fisch, J. E., 2000. *The Peculiar Role of the Delaware Courts in the Competition for Corporate Charters*. *See also* Hamermesh, L. A., 1998. *Corporate Democracy and Stockholder-Adopted By-Laws: Taking Back the Street?*. Tulane Law Review, Vol. 73, p. 409.

[33] *See ATP Tour, Inc. v. Deutscher Tennis Bund*, 91 A.3d 554, 557 (Del. 2014).

[34] *Id.* ("Bylaws that may otherwise be facially valid will not be enforced if adopted or used for an inequitable purpose.")

[35] *See* DEL. CODE ANN. tit. 8, § 109(b) (2015) ("The bylaws may contain any provision, not inconsistent with law or with the certificate of incorporation, relating to the business of the corporation, the conduct of its affairs, and its rights or powers or the rights or powers of its stockholders, directors, officers or employees."); N.Y. BUS. CORP. LAW § 601(b) (McKinney 2015); MODEL BUS. CORP. ACT § 2.06(b) (2007)

[36] Winship, V., 2015. *Shareholder Litigation by Contract*. 96 Boston University Law Review 485, University of Illinois College of Law Legal Studies Research Paper No. 15-14..

[37] *See* Griffith, S. J., 2014. *Correcting Corporate Benefit: How to Fix Shareholder Litigation by Shifting the Doctrine on Fees.* Boston College Law Review, Vol. 56, No. 1, Fordham Law Legal Studies Research Paper No. 2496395.

[38] Delaware legislation retains the power to "adopt, amend or repeal" bylaws to the corporation's shareholders. *See* 8 *Del. C.* § 109(a). However, the certificate of incorporation may grant the board the power to do so unilaterally.

therefore lawsuits filed in multiple jurisdictions. They respond to the threat by designating one or more permissible forums for litigation in advance. Vice-Chancellor Laster first referred to exclusive forum bylaws in In re Revlon Inc. Shareholders Litigation.[39] Following Revlon, a number of issuers adopted exclusive forum provisions, and they were almost always deployed by the board.[40]

Shareholders reacted negatively to these adoptions. Among the issuers, there were those who repealed the bylaws right away and those who tried to defend them in court.[41] Two issuers in particular, Chevron and FedEx, defended the bylaws in litigation.[42] In Boilermakers v. Chevron, then-Chancellor Strine ruled that the board's power to adopt bylaws was coherent with that endorsed by section 109 of the DGCL, therefore validated the bylaw.[43]

Since Boilermakers, exclusive forum provisions have spread dramatically. As of August 2014, 746 U.S. public companies had adopted them.[44] More than 90% used the following language in drafting the provision:

> "Unless the Corporation consents in writing to the selection of an alternative forum, the sole and exclusive forum for (a) any derivative action or proceeding brought on behalf of the Corporation, (b) any action asserting a claim of breach of a fiduciary duty owed by any director, officer, employee or agent of the Corporation to the Corporation or the Corporation's stockholders, (c) any action asserting a claim arising pursuant to any provision of the General Corporation Law of the State of Delaware, the Certificate of Incorporation or these Bylaws, or (d) any action asserting a claim governed by the internal affairs doctrine shall be a state or federal court located within the State of Delaware, in all cases subject to the court having personal jurisdiction over the indispensable parties named as defendants therein. Any person or entity purchasing or otherwise acquiring any

[39] *See In re Revlon, Inc. S'holders Litig.*, 990 A.2d 940, 960 (Del. Ch. 2010).
[40] *See* Romano, R., Sanga, S., 2015. *The Private Ordering Solution to Multiforum Shareholder Litigation*. European Corporate Governance Institute, Law Working Paper No. 295/2015, Yale Law & Economics Research Paper No. 524.
[41] *Id.*
[42] *See Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 937 (Del. Ch. 2013).
[43] *Id.* (explaining that "boards of Delaware corporations have the flexibility to respond to changing dynamics in ways that are authorized by our statutory law").
[44] *Id.*

> interest in shares of capital stock of the Corporation shall be deemed to have notice of and consented to the provisions of this Bylaw."[45]

The provisions do not cover securities litigation lawsuits. Indeed, they cover only state-law claims. [46] Most importantly, these clauses cannot create the power in a court to hear a particular type of case where there is no legal precedent, like federal claims.[47] For instance, claims under the 1934 Securities Exchange Act are subject to federal jurisdiction only.[48] State courts cannot hear these securities claims, and forum selection clauses cannot do anything about it.[49]

The Securities Act of 1933 rules that federal claims can be brought in either state or federal courts.[50] It also prevents those claims form being shifted to federal court form state court.[51] In 1995, the PLSRA emerged as a response to "perceived abuses of the class-action vehicle in litigation involving nationally traded securities".[52] However, this caused plaintiffs to bring class actions under state law, avoiding federal forums.[53] Companies therefore started amending their charters and bylaws. They started adopting provisions designating federal courts as the exclusive forum for litigation concerning federal securities claims. The adoption of the provision occurred before the companies filed their registration statements with the SEC. The federal-forum bylaw rules that federal courts be the exclusive forum for the resolution of claims under the 1933 Act. Generally, the bylaw provides:

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[45] *See Netsuite, Inc*., Amended and Restated Certificate of Incorporation, art. VI § 8 (Nov. 29, 2011).; *See also* Grundfest, J. A., 2012. *The History and Evolution of Intra-Corporate Forum Selection Clauses: An Empirical Analysis*. Delaware Journal of Corporate Law, Vol. 37, No. 2, 2012, Rock Center for Corporate Governance at Stanford University Working Paper No. 116, Stanford Law and Economics Olin Working Paper No. 427.

[46] They may reach actions in federal court that include both derivative state law-claims and securities claims and could thus qualify as "any action asserting a claim of breach of a fiduciary duty." *See* Erickson, J., 2011. *Overlitigating Corporate Fraud: An Empirical Analysis*. Iowa Law Review, Vol. 97. *See also* Defendants' Opening Brief, *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934 (Del. Ch. 2013) (No. 7238-CS)

[47] *See* Borchers, P. J., 1992. *Forum Selection Agreements in the Federal Courts After Carnival Cruise: A Proposal for Congressional Reform.* Washington Law Review, Vol. 65, p. 55.

[48] *See* 15 U.S.C. § 78aa(b).

[49] *See Luce v. Edelstein*, No. 85 CIV. 4064, 1985 WL 2257, (S.D.N.Y. Aug. 8, 1985).

[50] *See Cyan*, 138 S. Ct; see 15 U.S.C. § 77v(a); ("The district courts of the United States and the United States courts of any Territory shall have jurisdiction of offenses and violations under this subchapter" . . . "concurrent with State and Territorial courts, except as provided in section 77p of this title with respect to covered class actions, of all suits in equity and actions at law brought to enforce any liability or duty created by this subchapter.").

[51] *See* 15 U.S.C. § 77v(a) ("Except as provided in section 77p(c) of this title, no case arising under this subchapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States."); *See also Cyan*, 138 S. Ct. (contending that SLUSA "did nothing to strip state courts of their longstanding jurisdiction to adjudicate class actions alleging only 1933 Act violations. Neither did SLUSA authorize removing such suits from state to federal court.").

[52] *See Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 81 (2006).

[53] *Id.*

> "Unless the corporation consents in writing to the selection of an alternative forum, the federal district courts of the United States of America shall, to the fullest extent permitted by law, be the sole and exclusive forum for the resolution of any complaint asserting a cause of action arising under the Securities Act of 1933, as amended. Any person or entity purchasing or otherwise acquiring or holding any interest in shares of capital stock of the corporation shall be deemed to have notice of and consented to the provisions of this Section 8.14."[54]

In *Sciabacucchi*, Delaware's Court of Chancery ruled that FFP are not valid according to Delaware law.[55] The court reasoned that the "constitutive documents of a Delaware corporation cannot bind a plaintiff to a particular forum when the claim does not involve rights or relationships that were established by or under Delaware's corporate law."[56] Given that FFP address that same exact matter, the court ruled that the federal-forum provisions are "ineffective and invalid."[57] The Supreme Court, however, disagreed and, later on, upheld the facial validity of the provisions based on the section 102(b)(1)[58] and based on the fact that they do not violate the laws of the State of Delaware.[59] Companies engaging in IPOs are therefore allowed to implement a FFP in their own bylaws or charter, along with a forum selection provision covering state-law claims, as stated by the Delaware Court of Chancery.[60]
A third, more controversial type of litigation bylaw requires a shareholder that is unsuccessful in litigation to bear the defendants' attorneys' fees. These so-called "fee-shifting" bylaws are

[54] *See* App. to Opening Br. at A84, A100.
[55] *See Sciabacucchi v. Salzberg*, No. 2017-0931-JTL, 2018 WL 6719718 (Del. Ch. Dec. 19, 2018).
[56] *See Opinion*, 2018 WL 6719718
[57] *Id.*
[58] *See* 8 Del. C. § 102. ("(b) In addition to the matters required to be set forth in the certificate of incorporation by subsection (a) of this section, the certificate of incorporation may also contain any or all of the following matters: (1) Any provision for the management of the business and for the conduct of the affairs of the corporation, and any provision creating, defining, limiting and regulating the powers of the corporation, the directors, and the stockholders, or any class of the stockholders, or the governing body, members, or any class or group of members of a nonstock corporation; if such provisions are not contrary to the laws of this State. Any provision which is required or permitted by any section of this chapter to be stated in the bylaws may instead be stated in the certificate of incorporation . . .")
[59] DGCL grants broad freedom to enforce terms for the organization, finance, and governance of the corporation. *See also Sterling v. Mayflower Hotel Corp*, 93 A.2d 107 (Del. 1952). (Stating that according to Section 102(b)(1), "the stockholders of a Delaware corporation may by contract embody in the charter a provision departing from the rules of the common law, provided that it does not transgress a statutory enactment or a public policy settled by the common law or implicit in the General Corporation Law itself.")
[60] *See Boilermakers Local 154 Retirement Fund v. Chevron Corp.*, No. 7220-CS (Del. Ch. June 25, 2013)

in stark contrast to the traditional American rule,[61] and impose the burden on shareholders seeking to bring class actions and derivative suits. In 2014, the Delaware Supreme Court upheld the facial validity of fee-shifting provisions in ATP.[62] Relying heavily on the contractual nature of the bylaws,[63] the ATP court explained that fee-shifting bylaws are not forbidden by case-law or by the Delaware statute. Moreover, the court reasoned that the bylaw properly related to the business of the corporation under section 109.[64] The court did not consider the issue of enforcement[65], but ruled that the enforceability of the bylaw did not preempt its facial validity.[66] Commentators have interpreted ATP as encouraging corporations to adopt similar bylaws.[67] In fact, after ATP, several companies did.[68] Fee shifting bylaws targeted a broad range of actors and required them to bear all the costs of the litigation if they did not "substantially achieve in substance and amount the full remedy sought."[69] Many institutional investors, concerned about the potential upshot of ATP ruling, and fearing that the bylaws would "foreclose[e] stockholders' access to courts" and "effectively make corporate directors and officers unaccountable for serious wrongdoing", wrote letters to the Chair of Delaware's Bar association's section of corporate law, to Delaware's Governor, and many others.[70] Reaction to the decision in ATP came quickly.

In 2015, the Delaware legislature amended the Delaware corporation statute with the intent of addressing litigation bylaws.[71] The amendments authorize Delaware corporations to make use of exclusive forum provisions, through either a charter amendment or bylaw provision, for

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[61] *See* Griffith, S. J., 2014. *Correcting Corporate Benefit: How to Fix Shareholder Litigation by Shifting the Doctrine on Fees.* Boston College Law Review, Vol. 56, No. 1, Fordham Law Legal Studies Research Paper No. 2496395. (noting that Delaware law has departed from the American rule).

[62] *See ATP Tour, Inc. v. Deutscher Tennis Bund*, 91 A.3d 554, 555 (Del. 2014).

[63] *Id*. (describing corporate bylaws as "contracts among a corporation's shareholders" (quoting Airgas, Inc. v. Air Prods. & Chems., Inc., 8 A.3d 1182, 1188 (Del. 2010)).

[64] *Id.*

[65] *Id.*

[66] *See ATP*, 91 A.3d.

[67] *See* Rospert, A. J., Ritzert, T.M., 2014. *Limiting Shareholder Suits in Mergers & Acquisitions: Potential Corporate Governance Solutions*. The Deal Byline. ("The Delaware Supreme Court's recent opinion in ATP Tour, Inc. v. Deutscher Tennis Bund, though issued in the context of a fee-shifting provision adopted by a non-stock corporation, suggests that this may be a viable approach for public companies seeking to curb merger objection litigation.").

[68] *See* Council of Institutional Investors, 2014. *Litigation Bylaws.* (listing 42 companies that adopted fee- shifting bylaws as of November 2014); *See also* Brown Jr., J. R., 2014. *Fee Shifting Bylaws and the Reaction of Institutional Investors (Part 1).* TheRacetotheBottom.org. Notably, only companies with small capitalization have adopted fee-shifting bylaws. *See also* Allen, C. H., 2015. *Fee-Shifting Bylaws: Where Are They Now?*. Bloomberg BNA.

[69] *See* Coffee Jr., J., 2014. *"Loser Pays": Who Will Be The Biggest Loser?*. The Columbia Law School Blue Sky Blog.

[70] *See* Letter to the Honorable Jack Markell, 2014. Office of the Governor from Institutional Investors, Re Fee Shifting Bylaws.

[71] *See* Synopsis, *Senate Bill No. 75*, Legis.Delaware.Gov.; *See also* LaCroix, K.M., 2015. *Del. Bans 'Loser Pays' Bylaws—What Questions Remain?.* LAW360. (describing legislative adoption of Senate Bill 75).

the litigation of internal corporate claims.[72] Moreover, Senate Bill 75 prohibits exclusive forum provision that do not include a Delaware court as a forum and forbids the adoption of a fee-shifting bylaw that purports to impose liability upon a stockholder in intra corporate litigation.[73]

As of now, Delaware's constraints on private ordering may represent a well-balanced approach that provides the state's corporations a tool for dealing with abusive litigation. However, there still is an active debate among scholars on whether Delaware's openness to private ordering solutions justifies reducing litigation within the state and whether such reduction affects Delaware as the leading state in corporate law making.

II. FEE-SHIFTING PROVISIONS

A. ATP Tour, Inc., et al. v. Deutscher Tennis Bund, et al.

In 2007, ATP Tour's Board changed its tour schedule and format. According to its so-called "Brave New Plan", Hamburg Tennis Tournament was first moved from the spring season to the summer season and then downgraded from the highest tier of tournaments to the second highest tier.[74] On March 28th, 2007, Deutscher Tennis Bund ("DTB") filed an action against ATP Tour, Inc. and its directors alleging antitrust claims for violation of the Sherman Act and state law claims for breach of fiduciary duty and tortious interference. They sought damages and an injunction to restore the original structure of the tour. ATP and its board members prevailed at trial on every claim. What is more, ATP filed a post-trial motion, pursuant to Federal Rule of Civil Procedure 54(d), seeking attorneys' fees, costs and expenses arising from the litigation[75]. The request amounted to $17,865,504.51 for attorneys' fees and other costs. In doing so, ATP cited one of its bylaws, Article 23.3, which had been approved and adopted by the ATP Tour Board in 2006. The provision provided that:

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[72] The statute defines internal corporate claims as "claims, including claims in the right of the corporation, (i) that are based upon a violation of a duty by a current or former director or officer or stockholder in such capacity, or (ii) as to which this title confers jurisdiction upon the Court of Chancery." *See* Del. Code Ann. tit. 8, § 115 (2016).

[73] *See* Del. Code Ann. tit. 8, §§ 102(f), 109(b); S. 75, 148th Gen. Assemb. (Del. 2015)

[74] *See ATP Tour, Inc. v. Deutscher Tennis Bund*, 91 A.3d.

[75] *See* Fed.R.Civ.P.54(d)

> "(a) In the event that (i) any [current or prior member or Owner or anyone on their behalf ("Claiming Party")] initiates or asserts any [claim or counterclaim ("Claim")] or joins, offers substantial assistance to or has a direct financial interest in any Claim against the League or any member or Owner (including any Claim purportedly filed on behalf of the League or any member), and (ii) the Claiming Party (or the third party that received substantial assistance from the Claiming Party or in whose Claim the Claiming Party had a direct financial interest) does not obtain a judgment on the merits that substantially achieves, in substance and amount, the full remedy sought, then each Claiming Party shall be obligated jointly and severally to reimburse the League and any such member or owners for all fees, costs and expenses of every kind and description (including, but not limited to, all reasonable attorneys' fees and other litigation expenses) (collectively, "Litigation Costs") that the parties may incur in connection with such Claim." [76]

The District Court, however, denied ATP's motion because it was contrary to the policy of Federal Antitrust Laws, and denied the enactment of the bylaw.[77] The District Court ruled that "federal law preempts the enforcement of fee-shifting agreements when antitrust claims are involved."[78] The federal court reasoned that before addressing the enforceability under federal law, the state court should have addressed whether the bylaw was valid and enforceable under Delaware State Law.[79] Later on, the Delaware Supreme Court upheld the validity and enforceability of the fee-shifting bylaws. In so doing, the Court addressed the contractual principle of charters and bylaws: a fee shifting provision contained in a non-stock corporation bylaw could be considered as a contractual exception to the long-standing American Rule, and therefore not prohibited under Delaware common law.[80] The enforceability of the specific ATP bylaw depended on the purpose for which it was adopted:

[76] *See ATP Tour, Inc. v. Deutscher Tennis Bund*, 91 A.3d 554 (Del. 2014) (quoting ATP Bylaw Article 23.2(a)).
[77] *Id.*
[78] *Id.* (3d Cir.2012)
[79] *Id.* (Supreme Court 2014)
[80] *Id.*

the court emphasized the fact that facially valid bylaws may have not been enforced "if adopted for an inequitable purpose."[81]

Within one year from ATP decision, about forty corporations adopted fee-shifting provisions, mostly in their bylaws.[82] However, the provision proved to be short-lived: in June 2015, the Delaware legislature banned fee-shifting bylaws. In particular, the legislature amended Sections 102 and 109 of the DCGL. The bill was introduced as Senate Bill 75 (S.B.75), and it is purported to "preserve the efficacy of the enforcement of fiduciary duty in stock corporations."[83] The new DCGL § 102(f) thus states: "The certificate of incorporation may not contain any 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 internal corporate claim, as defined in § 115 of this title."[84] Similarly, the amended section 109(b) now states: "The bylaws may contain any provision, not inconsistent with law or with the certificate of incorporation, relating to the business of the corporation, the conduct of its affairs, and its rights or powers or the rights or powers of its stockholders, directors, officers or employees. The bylaws may not contain any 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 internal corporate claim, as defined in § 115 of this title."[85]

ATP provision covered a broad range of lawsuits and litigants: with regards to the latter, it included the plaintiff shareholder, the attorneys and anybody offering "substantial assistance" to the plaintiff. The U.S Chamber of Commerce Institute for Legal Reforms supported the decision, reasoning that those arrangements were a "useful tool for fighting frivolous litigation."[86] However, such provisions seemed to be extremely severe in addressing overlitigation: they deterred shareholder litigation *per se*, preventing both good and bad claims from ever being brought to the court. In doing so, they proved to discourage the fundamental public policy of shareholders litigation. Shareholder' interest in filing litigation refers to the intent of monitoring the corporate directors and charge them in case of wrongdoing. Limiting shareholders access to courts by incentivizing corporations to adopt fee

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[81] *Id*. ("Legally permissible bylaws adopted for an improper purpose are unenforceable in equity.");

[82] *See* Lebovitch, M., Van Kwawegen, J., 2015. *Of Babies and Bathwater: Deterring Frivolous Stockholder Suits Without Closing the Courthouse Doors to Legitimate Claims*. Delaware Journal of Corporate Law, Vol. 40. (stating that "within days of the ATP opinion, prominent corporate law firms issued client alerts suggesting that boards of public stockholder corporations consider adopting similar bylaws")

[83] *See S. 75*, 2015. 148th Gen. Assemb. (amending Del. Code Ann. tit. 8, §§ 102, 109)

[84] *See* Del. Code Ann. tit. 8, § 102(f).

[85] *See* Del. Code Ann. tit. 8 § 109(b) & 115 (stating that corporate claims are "claims, including claims in the right of the corporation, (i) that are based upon a violation of a duty by a current or former director or officer or stockholder in such capacity, or (ii) as to which this title confers jurisdiction upon the Court of Chancery.")

[86] *See* Dammann, J., 2020. *Fee-Shifting Bylaws: An Empirical Analysis*.

shifting provisions would have "relegated [the courts] to the sidelines".[87] Plaintiff-shareholders facing such provisions would have had to achieve a complete victory in order not to bear the litigation and corporation's expenses: this, in turn, would have further lowered the incentives for shareholders to bring claims, given that the kinds of judgments falling within the boundaries set by the provision (i.e., that "substantially achieve [] the full remedy sought") are really rare.[88] This reflected the one-sided behavior of the provisions, meaning that the plaintiff had the obligation to reimburse the costs if he lost, but the defendant was not required to reimburse the plaintiff of its litigation costs if the opposite happened. Moreover, the provision did not cover what would happen in case the plaintiff achieved a complete victory.[89] In line with this reasoning, some scholars have associated the ATP case with the Delaware Supreme Court's commitment to the "Delaware way" of shaping corporate law, granting corporate boards an extensive legal authority over the management of the company.[90] On this matter, the Delaware General Corporate Law (DCGL) provides that "business and affairs shall be managed by or under the direction of a board of directors", whom legal authority is delegated by the shareholders.[91] Furthermore, Delaware courts strongly support the notion that bylaws can regulate anything "relating to the business of the corporation, the conduct of its affairs, and its rights or powers or the rights or powers of its stockholders, directors, officers, or employees."[92] Besides, Delaware prevents the abuse of the board's power by granting shareholders three core rights: the right to vote, sell and sue.[93] In fact, as held by Delaware Supreme Court in the case, the corporate board of ATP Tour, Inc. was legally entitled to adopt bylaws of that kind and no sort of Delaware law prohibited that. However, the adoption and enforcement of those bylaws had to be equitable under the circumstances.[94] Again, ATP provision deterred shareholder litigation indiscriminately, most likely preventing both good and bad cases from being brought to the court. Still, the ATP

[87] *See* Kaufman, M. J., Wunderlich, J. M., 2015. *Paving the Delaware Way: Equitable Limits on Bylaws after ATP*. Washington University Law Review, Vol. 93, No. 2.; *See also Letter to the Honorable Jack Markell*, 2014. Office of the Governor from Institutional Investors, Re Fee Shifting Bylaws.
[88] *Id.*
[89] *See* Choi, A. H., 2018. *Fee-Shifting and Shareholder Litigation*. 104:1 Virginia Law Review 59, Virginia Law and Economics Research Paper No. 2016-15.
[90] *Id.*; *See also* Strine, L., 2005. *The Delaware Way: How We Do Corporate Law and Some of the New Challenges We (and Europe) Face*. Delaware Journal of Corporate Law, Vol. 30, No. 3.
[91] *See* Del. Code Ann. tit. 8 § 141(a).
[92] *See* Del. Code Ann. tit. 8 §§ 109(b), 141(a).
[93] *See* Del. Code Ann. tit. 8, § 211(b); § 242(b)(2); § 251(c); § 271; § 327.
[94] *See ATP Tour, Inc. v. Deutscher Tennis Bund*, 91 A.3d 554, 557-560 (Del. 2014). ("Neither the DGCL nor any other Delaware statute forbids the enactment of fee- shifting bylaws" . . . "fee-shifting bylaw would not be prohibited under Delaware common law.". . ."whether the specific fee-shifting bylaw is enforceable depends on the manner in which it was adopted and the circumstances under which it was invoked. Bylaws that may otherwise be facially valid will not be enforced if adopted or used for an inequitable purpose.")

Board retained the legal power to amend the bylaw without the shareholder approval. The clause was expressly stated in the charter when a shareholder bought in.[95] Consequently, whenever an amendment to the bylaws is made, and the company's charter allows that, shareholders are bound under such terms.[96] This sort of "corporation-as-contract" reasoning coincided with that used by the Delaware Supreme Court in upholding fee-shifting bylaws as facially valid.[97] Against this reasoning, one could argue that, according to contract law, "the modification of a contract requires mutual agreement of the parties as well as some form of consideration"[98] Yet, in *ATP*, shareholders did not get to agree to the amendment of the bylaws nor got any consideration by the board in doing it.[99]

No matter the involvement, the bylaws were eventually (and quickly) abolished. These amendments prohibit any corporation from having a provision, either in the charter or in the bylaws, that purport to shift the litigation expenses of a defendant onto the plaintiff when he brings a claim based on corporate law matter.[100] Delaware Corporate law thus follows again the traditional American Rule. The ban, however, does not cover the case in which a fee-shifting bylaw is enforced against federal securities law claims.[101] Professor John Coffee predicted that federal securities law would have eventually preempted such bylaws.[102] For instance, the Congress had previously worried about shareholder overlitigation and it had taken some steps to limit litigation by amending federal law.[103] No doubt Delaware had nothing to be afraid for what concerned a hypothetical Supreme Court intervention, especially on the grounds that *ATP* was biased in favor of the company's board.[104]

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[95] The statute allows corporations to give directors equal power to amend the bylaws as shareholders. *See* Del. Code Ann. tit. 8 § 109(a); *See also* Griffith, S. J., 2014. *Correcting Corporate Benefit: How to Fix Shareholder Litigation by Shifting the Doctrine on Fees.* Boston College Law Review, Vol. 56, No. 1, Fordham Law Legal Studies Research Paper No. 2496395.

[96] *See* 8 Del. C. § 109(b)

[97] *See ATP Tour, Inc. v. Deutscher Tennis Bund*, 91 A.3d.

[98] *See* Lebovitch, M., Van Kwawegen, J., 2015. *Of Babies and Bathwater: Deterring Frivolous Stockholder Suits Without Closing the Courthouse Doors to Legitimate Claims*. Delaware Journal of Corporate Law, Vol. 40.

[99] *Id.*

[100] *See* Del. S. Bill 75, signed into law June 24, 2015, effective Aug. 1, 2015.

[101] *See* Brown, J. R., 2015. *The Future Direction of Delaware Law (Including a Brief Exegesis on Fee Shifting Bylaws)*. Denver University Law Review, Vol. 92, No. 49, University of Denver Legal Studies Research Paper No. 15-17.; *See also* Brown, J. R., 2015. *Staying in the Delaware Corporate Governance Lane: Fee Shifting Bylaws and a Legislative Reaffirmation of the Rules of the Road*. 54 Bank and Corporate Governance Law Reporter 4 (2015), University of Denver Legal Studies Research Paper No. 15-23.

[102] *See Coffee Jr., J., 2015. Delaware Throws a Curveball. The Columbia Law School Blue Sky Blog.* (analyzing the preemption issue)

[103] *See Private Securities Litigation Reform Act (PLSRA)* of 1995, Pub. L. No. 104-67, 109 Stat. 737; *Securities Litigation Uniform Standards Act (SLUSA)* of 1998, Pub. L. No. 105-353, 112 Stat. 3227 (codified at 15 U.S.C. § 78bb).

[104] *See* Fisch, J. E., 2015. *Federal Securities Fraud Litigation as a Lawmaking Partnership*. Washington University Law Review, Vol. 93, Pg. 453, 2015, University of Pennsylvania, Institute for Law & Economics

Some scholars have defined the *ATP* approach as "unusual", since it represented a departure from Delaware's traditional approach to corporate law, one that enabled courts to deal with litigation provisions the same way they had delt with other governance changes."[105] Made it simple, both Delaware legislature and Delaware courts had previously approached corporate governance innovation by leaving the market to self-adjust to firm's governance changes. According to many, the legislative amendments, which clearly contrasted with Delaware's "enabling" behavior, might have marked the "permanent departure from Delaware's traditional approach to corporate law."[106] The enabling approach had seemed to result in efficient, firm-specific tailoring that allowed companies to adapt to governance changes quicker than under formal regulation. Perhaps, when deciding to actively intervene to make changes to the governance structure, Delaware gradually made use of judicial resolution rather than legislation.[107] One common justification for the departure from its historical approach is that the Delaware legislature was influenced by the Delaware plaintiffs' bar.[108] According to many, Delaware's bar is one of the most influential body in the state and it plays a huge role in the development of corporate legislation.[109] Professor Larry Ribstein has defined Delaware lawyers as *being* the Delaware legislature.[110] Sometimes, the interests of Delaware's bar and the state government are aligned: the former aims at maximizing Delaware incorporations, since the greater the number of Delaware incorporations, the

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Research Paper No. 16-28.; *See also* Fisch, J. E., 2016. *The New Governance and the Challenge of Litigation Bylaws*. Brooklyn Law Review, Vol. 81, P. 1637, University of Pennsylvania, Institute for Law & Economic Research Paper No. 16-1. ("The Supreme Court articulated similar concerns and repeatedly restricted the scope of shareholder litigation rights.")

[105] *Id.*

[106] *Id.*

[107] *See* Dammann, J., 2020. *Fee-Shifting Bylaws: An Empirical Analysis*. ("Although Delaware courts approved director authority to adopt a poison pill, the courts both provided parameters regarding the basis for the decision to adopt a pill and the circumstances under which a board might be barred from continuing to use a pill to thwart a takeover attempt. Similarly, the courts imposed limits on the permissible structure of a pill, invalidating, for example, pills that limited the authority of future boards.")

[108] *See* Bats, E., Reed, J. L., Piper, D. L. A., 2015. *Delaware (Again) Proposes Sledgehammering Fee- Shifting Bylaws*. The Harvard Law School Forum on Corporate Governance, HLS Forum on Corporate Governance and Financial Regulation.; *See also* Choi, A. H., 2018. *Fee-Shifting and Shareholder Litigation*. 104:1 Virginia Law Review 59, Virginia Law and Economics Research Paper No. 2016-15.; *See also* Lebovitch, M., Van Kwawegen, J., 2015. *Of Babies and Bathwater: Deterring Frivolous Stockholder Suits Without Closing the Courthouse Doors to Legitimate Claims*. Delaware Journal of Corporate Law, Vol. 40. (arguing that fee-shifting terms may "eliminate all stockholder litigation, irrespective of merit").

[109] *See* Hamermesh, L. A., 2006. *The Policy Foundations of Delaware Corporate Law.* Columbia Law Review, Vol. 106, No. 7.

[110] *See* Ribstein, L. E., 1994. *Delaware, Lawyers, and Contractual Choice of Law.* 19 DELaware Journal of Corporate Law 999, 1009-10. ("Delaware lawyers have all of the attributes of a politically powerful interest group: they are already organized into bar associations and maintain an advantage over other groups because they continually learn about the law as a consequence of their profession; they are centered in a single city, in a small state and, therefore, can communicate with each other at minimal costs; and they provide an important service for legislators in drafting legislation on complex commercial and corporate matters.")

greater the volume of legal work needed. Delaware State also aims at incorporating in Delaware as many firms as possible in order to maximize franchise and other tax revenues. For instance, the litigation-deterrent effect of ATP's fee-shifting bylaw threatened both Delaware incorporation system and Delaware layers' fees. Thus, both Delaware's bar and legislature might be better with the enactment of the Bill. On the other hand, S.B. 75 has significantly incentivized other states to compete with Delaware and attract new incorporations by legalizing fee-shifting bylaws otherwise prohibited in Delaware. For instance, Oklahoma's state law allows companies to enact fee-shifting provisions even in unsuccessful derivative litigation.[111] Potentially, S.B 75 might have undermined Delaware's dominance in corporate-law-making.[112] In the light of subsequent litigation after S.B 75, some scholars have tried to assess an equitable solution to the litigation crisis which would not discourage good and bad claims altogether, possibly preserving meritorious ones and permitting shareholders to pursue action. For instance, a fee-shifting provisions which transfers a reasonable amount of fees and that imposes the remuneration burden on both parties to the litigation, not simply to the plaintiff's side. This way the provision would appear as symmetric and would therefore pose the threat of covering the litigation expenses to both the plaintiff and the defendant. The main issue with that solution concerns assessing the amount of fees to be shifted as well as assessing whether the litigation is frivolous or meritorious. Definitely both shareholders and directors do not retain the neutrality required to make such decisions, and they would necessarily try to protect their pockets from getting lighter. Therefore, the court would appear to be the most neutral arbiter in assessing the two conditions.[113] One other option would be to empower the shareholders with the ability to counteract amendments to the bylaws made by the board with a mandatory shareholder voting or anything which may prevent such move. In fact, Section 109 of the DGCL specifically states that "The power to adopt, amend, or repeal bylaws of a stock/nonstock corporation shall always be in the stockholders/members entitled to vote; . . . "[114] However, reuniting shareholders into a single meeting and subject them to a vote for a proposal of that kind is both expensive and problematic. What is more, in corporations where ownership is

[111] *See* OKLA. STAT. tit. 18, § 1162 (2015).
[112] *See* Fisch, Jill E, *supra note*.
[113] *See* Kaufman, M. J., Wunderlich, J. M., 2015. *Paving the Delaware Way: Equitable Limits on Bylaws after ATP*. Washington University Law Review, Vol. 93, No. 2.
[114] *See* Del. Code Ann. tit. 8, § 109(a)

concentrated among few investors, a shareholder voting process may not fairly reflect the opinion of every attendant.[115]

It turns out that Delaware Rule of Civil Procedure 11 provides for a neutral 2-way fee shifting provision.[116] Among other assertions, Rule 11 specifically provides that:

> "By representing to the Court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, -- (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law; (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief."[117]

The rule targets both plaintiffs and defendants indiscriminately, imposing plaintiffs the duty to bring meritorious litigation and charging defendants with the obligation to avoid asserting frivolous motions. Furthermore, the rule allows the court to apply sanctions to both parties unilaterally, in the event that " . . . the Court determines that subdivision (b) has been violated."[118] Sanctions to be applied are assessed "reasonably" so as to avoid the repetition of

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[115] *See* Choi, A. H., 2018. *Fee-Shifting and Shareholder Litigation*. 104:1 Virginia Law Review 59, Virginia Law and Economics Research Paper No. 2016-15. (stating that "subjecting a fee-shifting bylaw to shareholder approval may provide too little protection when the ownership is dispersed or give power to the wrong party when the ownership is concentrated.")

[116] *See* Rule 11 - *Signing of pleadings, motions, and other papers: Representations to Court, sanctions*, Del. R. Civ. P. Super. Ct. 11

[117] *Id.*, Representations to Court.

[118] *Id.* (c) *Sanctions*. (ruling that "If, after notice and a reasonable opportunity to respond, the Court determines that subdivision (b) has been violated, the Court may, subject to the conditions stated below, impose an

the behavior, and they may have a both pecuniary and non-pecuniary nature, also depending on the party to be charged with violation of subsection (b).[119] However, even Delaware's Rule 11 presents a major flaw. The provision expressly provides that "Subdivisions (a) through (c) . . . do not apply to disclosures and discovery requests, responses, objections, and motions that are subject to the provisions of Rules 26 through 37"[120], which deal with discovery and sanctions to waived discovery, respectively.[121] By failing to sanction litigation parties in the event that claims concern discoveries or disclosures, the rule becomes inapplicable to most merger litigation. As previously presented, the most common form of claims brought by plaintiffs in M&A litigation seeks supplemental disclosures on the part of directors, and the disclosures can be petitioned in both federal and state-law litigation. Ultimately then, Delaware's Rule 11 cannot work as a solution to fee-shifting provisions, and for now it seems like no existing bylaw is capable of rearranging the distribution of fees among corporate parties in M&A litigation.

III. EXCLUSIVE FORUM PROVISIONS

A. Boilermakers Local 154 Ret. Fund v. Chevron Corp.

On September 29, 2010, Chevron's directors deployed a forum selection bylaw which states:

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appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.")

[119] *Id.* (c)(2) *Nature of Sanctions: Limitations*. (providing that "a sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated . . . the sanction may consist of, or include, directives of a non-monetary nature, an order to pay a penalty into Court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation . . . (A) Monetary sanctions may not be awarded against a represented party for a violation of subdivision (b)(2). (B) Monetary sanctions may not be awarded on the Court's initiative unless the Court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.")

[120] *Id.* (d) *Inapplicability to Discovery*.

[121] *See* Rule 26 - *General provisions governing discovery*. Del. R. Civ. P. Super. Ct. 26; *See also* Rule 37 - *Failure to make discovery: Sanctions*, Del. R. Civ. P. Super. Ct. 37

> "Unless the Corporation consents in writing to the selection of an alternative forum, the Court of Chancery of the State of Delaware shall be the sole and exclusive forum for (i) any derivative action or proceeding brought on behalf of the Corporation, (ii) any action asserting a claim of breach of a fiduciary duty owed by any director, officer or other employee of the Corporation to the Corporation or the Corporation's stockholders, (iii) any action asserting a claim arising pursuant to any provision of the Delaware General Corporation Law, or (iv) any action asserting a claim governed by the internal affairs doctrine. Any person or entity purchasing or otherwise acquiring any interest in shares of capital stock of the Corporation shall be deemed to have notice of and consented to the provisions of this [bylaw]"[122]

Chevron's charter empowered its board of directors to adopt bylaws under 8 Del. C. § 109(a).[123] The plaintiff was a stockholder and sued the board for deploying the forum selection bylaw. The plaintiff claimed that the bylaw was statutorily invalid since it was beyond the board's authority under the Delaware General Corporation Law ("DGCL"). The plaintiff also alleged that the bylaw was invalid and unenforceable because the board acted unilaterally in adopting the provision[124]. The plaintiff also claimed that the board breached its fiduciary duties in adopting the bylaw. The defendant filed a motion for judgment on the counts relating to the statutory and contractual validity of the bylaw. The court first considered the issue of whether the bylaws were valid under the domestic law of the state where the company was incorporated and found that the bylaw was valid under Delaware's statutory law.[125] The court went on explaining that the forum selection bylaw met the requirements of the DCGL, that it related to the "business of the corporation," the "conduct of its affairs," and regulated the "rights or powers of its stockholders." Also, the court ruled that the forum selection bylaw was not inconsistent with the law, and therefore ruled that it was not facially invalid.[126]. Relying upon the Supreme Court's acknowledgment of bylaws as

[122] *See Chevron* Compl. ¶ 21.
[123] *See* 8 Del. C. § 109(a) ("a corporation may, in its certificate of incorporation, confer the power to adopt, amend or repeal bylaws upon the directors . . .").
[124] *See The Bremen v. Zapata Off-Shore Co*., 407 U.S. 1 (1972).
[125] *See* 8 Del. C. § 109(b) (explaining that the bylaws of a corporation "may contain any provision, not inconsistent with law or with the certificate of incorporation, relating to the business of the corporation, the conduct of its affairs, and its rights or powers or the rights or powers of its stockholders, directors, officers or employees."
[126] *Id.*

"part of a binding broader contract among the directors, officers, and stockholders formed within the statutory framework of the DGCL", the court further found that the bylaw was valid and enforceable.[127] The reasoning followed the DGCL's recognition of power to the directors to adopt and amend the bylaws of a company unilaterally, through the certificate of incorporation. Specifically, Chevron's certificate of incorporation authorizes the board to amend the bylaws. Therefore, when "participating" in the company, directors knew:

> "(i) that . . . the certificates of incorporation gave the boards the power to adopt and amend bylaws unilaterally; (ii) that . . . bylaws regulate the business of the corporation, the conduct of its affairs, and the rights or powers of its stockholders; and (iii) that board-adopted bylaws are binding on the stockholders."[128]

In other words, stockholders ought to have known that, when they bought Chevron's stock, the board had the power to adopt bylaws as permitted by 8 Del. C. § 109.

The court therefore granted the defendants' motion for judgment on the pleadings on all counts. In 2015, however, the Delaware legislature amended the DGCL, adding Section 115, and ruled Delaware corporation may include, in either their charters or bylaws, a forum-selection provision. Such bylaw applies to "internal corporate claims," and includes claims "based upon a violation of a duty by a current or former director or officer or stockholder in such capacity," or any claim which is "confer[red] jurisdiction upon the Court of Chancery" under the DGCL. Exclusive forum terms are allowed to designate "any or all of the courts in this State," but they cannot "prohibit bringing such claims in the courts" of Delaware.[129]

Boilermakers is the first Delaware decision covering the validity of a forum selection provision in a document of a Delaware corporation.[130] Before that, Delaware did not formally mention whether forum clause could be adopted. Scholars also debated on whether such provisions would be valid.[131] After Boilermakers, forum provisions became very popular

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[127] *Id.*

[128] *See Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 937 (Del. Ch. 2013). Mentioning Del. Code Ann. tit. 8, § 109(a)(b) *supra note.*

[129] *See* Del. Code Ann. tit. 8, § 251(c)

[130] *See* Grundfest, J. A., 2012. *The History and Evolution of Intra-Corporate Forum Selection Clauses: An Empirical Analysis*. Delaware Journal of Corporate Law, Vol. 37, No. 2, 2012, Rock Center for Corporate Governance at Stanford University Working Paper No. 116, Stanford Law and Economics Olin Working Paper No. 427.

[131] *See* Allen, C. H., 2012. *Study of Delaware Forum Selection in Charters and Bylaws*. (discussing the chances that bylaw provisions would be challenged as invalid).

across other states as a protection tool against multi-forum litigation.[132] Many Delaware corporations began provisions in their charters and bylaws which provided that any shareholder who enters the company after the term was added shall be "deemed" to have "consented" to the enforcement of the term if that shareholder filed an action in a different court.[133] Hershkoff and Kahan argue that this corporate practice strategy was designed by the Delaware judiciary to counter the abuses in representative litigation.[134]

Generally, most of the courts that have considered the enforceability of bylaw forum-term have followed Boilermakers' standard. There exist, however, at least a case so far in which the enforceability of a forum-term has been denied. For instance, in Galaviz v. Berg,[135] the federal court of California held that a forum-term unilaterally adopted by the board mid-stream was unenforceable. According to the court, the provision lacked "of mutual consent" on the choice of the forum.[136]

The real debate among commentators concerns the contractual approach undertaken by the courts when addressing challenges to the exclusive forum provisions. Many mandate that corporate forum terms significantly differ from ordinary contract: a common belief is that the state's role as a party to the company's charter is not in line with the powers conferred to it when ruling on such bylaws in litigation.[137] The foundation of the reasoning stands upon the concept of corporation as expressed by the Delaware Supreme Court.[138] Scholars argue that even though the state is a notional party to the contract, it possesses a broad and unusual role in the contractual regime of charters, bylaws and state law. The state retains indeed the power to regulate the contents of charters and bylaws, to revise them and add terms, and to alter the

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[132] *See* McClendon, T. T., 2012. *The Power of a Suggestion: The Use of Forum Selection Clauses by Delaware Corporations*. 69 Wash. & Lee Law Review 2067.; *See also* Van Gorder, M., 2014. *Boilermakers v. Chevron: Are Board Adopted Arbitration Bylaws Valid under the Delaware General Corporation Law?*. 39 Delaware Journal of Corporate Law, 443 & 444.

[133] *See Rockwell Automation Inc*., 2016. By-laws of Rockwell Automation, Inc. (Form 8-K, Ex. 3.1). ("If any action the subject matter of which is within the scope of the preceding sentence is filed in a court other than a court located within the State of Delaware in the name of any shareowner, such shareowner will be deemed to have consented to (I) the personal jurisdiction of the state and federal courts located within the State of Delaware in connection with any action brought in any such court to enforce the preceding sentence and (II) having service of process made upon such shareowner in any such action by service upon such shareowner's counsel in the Foreign Action as agent for such shareowner.")

[134] *See* Hershkoff, H., Kahan, M., 2017. *Forum-Selection Provisions in Corporate 'Contracts'*. NYU Law and Economics Research Paper No. 17-28.

[135] *See Galaviz v. Berg*, 763 F. Supp. 2d 1170 (N.D. Cal. 2011) (Corporation cannot dismiss action for lack of venue based on forum-term in bylaw).

[136] *Id.*

[137] *See* Hershkoff, H., Kahan, M., 2017. *Forum-Selection Provisions in Corporate 'Contracts'*. New York University Law and Economics Research Paper No. 17-28.

[138] *See STARR Surgical Co. v. Waggoner*, 588 A.2d 1130, 1136 (1991) (explaining that is a "contract between the State and the corporation, and the corporation and its shareholders."). *See also Wylain, Inc. v. TRE Corp*., 412 A.2d 338, 344 (Del. Ch. 1979).

content of such documents ex post without conflicting with the contract clause. Therefore, the powers conferred to the state as a contractual party to the corporation are not typical of parties to ordinary contracts. For instance, according to Delaware law, state's corporate law merely grants private parties to choose to incorporate under any terms they want. The statement, however, is believed to be partially fallacious.[139]

Sticking to the contractual nature of bylaws and charters, Hershkoff and Kahan further contend that the rationale used in Boilermakers in justifying the bylaws as a contract does not follow a coherent logic. [140] They reason that when investors buy shares, they do so as aware of the fact that corporate governance rules (including laws concerning the way they may be amanded) can be changed by legislation. Therefore, the authority of the legislator to adopt binding corporate laws is presupposed in the deal that the shareholders sign when buying stock in the corporation. According to the logic of Boilermakers, therefore, a Delaware statute giving exclusive jurisdiction over internal corporate claims should be treated in the same way as a contract for the purposes of assessing the terms of the forum. However, they mandate, there are "limits to the state's power to regulate judicial access and the logic according to which shareholders' knowledge that the state can change the law is equivalent to contractual consent would certainly not justify an exclusive court selection provision imposed by law."[141] This reasoning applies to when a company adopt forum-selection bylaws mid-stream, thus after the company has already sold shares. The type of shareholder consent they stick-to is therefore that for rules to change the terms in the bylaws or the charter, provided that such rules were promulgated before the issuance of the shares. It would seem like shareholders are left with nothing in their hands when it comes to counteracting forum-selection bylaws. However, Chancellor Strine himself suggested that "stockholders retain the right to modify the corporation's bylaws"[142]. In publicly-traded corporations, shareholders opposing exclusive forum bylaws may request, under Rule 14a-8, a that the board repeal the bylaw.[143] Otherwise, shareholders could withhold voting support from directors' candidates

[139] *See* Hershkoff, H., Kahan, M., 2017. *Forum-Selection Provisions in Corporate 'Contracts'*. New York University Law and Economics Research Paper No. 17-28.

[140] *See Boilermakers*, 73 A.3d at 939-940 (explaining that the contractual nature of the bylaw "is, by design, flexible and subject to change in the manner that the DGCL spells out and that investors know about when they purchase stock in a Delaware corporation . . . Thus, when investors bought stock, they knew: (i) that the certificates of incorporation gave the boards the power to adopt and amend bylaws unilaterally; (ii) that bylaws regulate the business of the corporation, the conduct of its affairs, and the rights or powers of its stockholders; (iii) that board-adopted bylaws are binding on the stockholders.")

[141] *Id.*

[142] *Id.*.

[143] *See* 17 C.F.R. § 240.14a-8. 2017.

who adopt or fail to repeal an objectionable provision.[144] Proxy advisory firms have enhanced this routine thanks to their major influence over a corporation's shareholders. They have exploited the so-called "golden leash" bylaws to prevent directors from acting unfairly to the corporation's owners.[145] Fiduciary duties may be another powerful tool: in fact, they limit the ability of the board to amend bylaws.[146] Fiduciary duties thus may classify as a sort of protection constraints on the amendments to the bylaws which that go against shareholders' interests and along directors' ones. Bylaws may indeed not necessarily survive the enforcement clause even though they may be held as facially valid: for instance, a board may breach its fiduciary duty either by adopting such provision or by "failing to waive it".[147] It goes without saying that may the shareholders fail to take the necessary steps required to address the issue in case they have the opportunity to do it, they can potentially be viewed has having consented to the board's action. A variety of commentators has argued that Delaware law should grant shareholders broader power in amending corporate governance bylaws.[148] Chief Justice Strine observed that courts should not interfere with the private ordering of a company's contractual parties. Indeed, private ordering reflects Delaware's enabling approach to corporate law and such approach has allowed issuers to draft governance terms that have turned out to be beneficial.[149] Furthermore, Private ordering grants company's participants the ability to quickly identify optimal governance structures and tailor their governance so that it reflects characteristics specific to the company.[150] It is no secret that

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[144] *See* Choi, S. J. and Fisch, J. E., Kahan, M., 2009. *Director Elections and the Role of Proxy Advisors.* Southern California Law Review, Vol. 82, Pg. 649, University of Pennsylvania, Institute for Law & Economics Research Paper No. 08-18.

[145] *See* Weil, 2014. *Alert SEC Disclosure and Corporate Governance*. ("issue negative vote recommendations against directors if the board amends the bylaws or charter without shareholder approval in a manner that materially diminishes shareholder rights or otherwise impedes shareholder ability to exercise their rights").

[146] *See Boilermakers*, 73 A.3d at 954 ("the real-world application of a forum selection bylaw can be challenged as an inequitable breach of fiduciary duty").

[147] *See Schnell*, 285 A.2d at 439 (Del. 1971); *See also Blasius Indus., Inc. v. Atlas Corp*., 1988. 564 A.2d 651, 663; *See also* 80 Del. Laws, c. 40, § 5; *See also*
Hershkoff, H., Kahan, M., 2017. *Forum-Selection Provisions in Corporate 'Contracts'.* New York University Law and Economics Research Paper No. 17-28.

[148] Lucian Bebchuk proposed that shareholder have the authority to "initiate and adopt any rules-of-the-game decisions." *See* Bebchuk, L. A., 2005. *The Case for Increasing Shareholder Power.* Harvard Law Review, Vol. 118, No. 3, pp. 833-914, Harvard Law and Economics Discussion Paper No. 500. (proposing to "empower shareholders in public corporations by facilitating their ability to contract."); Gordon Smith, Matthew Wright and Marcus Kai Hintze have proposed that shareholder bylaw power be "coextensive with board power." *See also* Smith, D. G., Wright, M. G., Hintze, M. K., 2011. *Private Ordering with Shareholder Bylaws*. Fordham Law Review, Vol. 80, p. 125.; Brett McDonnell proposes increased shareholder power. *See also* McDonnell, B. H., 2008. *Bylaw Reforms for Delaware's Corporation Law.* Deleware Journal of Corporate Law, Vol. 33, No. 3, Minnesota Legal Studies Research Paper No. 08-24.

[149] *See* Baysinger, B., Butler, H., 1985. *Race for the Bottom v. Climb to the Top: The ALI Project and Uniformity in Corporate Law*. 10 Journal of Corporate Law 431, 446-449.

[150] See Gallagher, D., 2014. *Commissioner Gallagher discusses Federal Preemption of State Corporate Governance*. The Columbia Law School Blue Sky Blog.

board holds far greater control over governance terms compared to shareholders. This may cause the board, acting alone, to fail to set fair governance structures.[151] However, sections 109 and 141(a) already pose some tension, and Delaware courts may always decide to amend them.[152] Delaware courts are renowned for approaching corporate law incrementally and for reconsidering their legal precedence based on new market developments.[153] However, notwithstanding the courts' recent substantial shift in their approach to merger litigation[154], It may not be in their power to make sure that their previous standards will be applied consistently to all M&A litigation, and, most importantly, Delaware courts' jurisdiction is limited to the borders of the state. Notably, Delaware courts cannot account for the willingness of foreign courts to follow their lead in refusing disclosure-only settlements or upholding the validity of private ordering solutions.[155]

The real issue with exclusive forum provisions, as Griffith notes, lies in their *optionality.*[156] Such provisions can indeed be applied at the will of corporate defendants. There is no express regulation which provides that defendants are required to invoke exclusive forum provisions in corporate litigation in case such terms are present in the charter or bylaws of the company. In fact, there is one rule of this kind which, in *most* cases, ensured that the *Trulia* standard was brought to the court. Notably, ABA Model Rule 3.3(a)(2) provides that:

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[151] *See* Barzuza, M., 2016. *Do Heterogeneous Firms Select their Right "Size" of Corporate Governance Arrangements?*. The Harvard Law School Forum on Corporate Governance.

[152] *See* 8 Del. C. 1953, § 109 ("(a) The original or other bylaws of a corporation may be adopted, amended or repealed by the incorporators, by the initial directors of a corporation other than a nonstock corporation or initial members of the governing body of a nonstock corporation if they were named in the certificate of incorporation, or, before a corporation other than a nonstock corporation has received any payment for any of its stock, by its board of directors. After a corporation other than a nonstock corporation has received any payment for any of its stock, the power to adopt, amend or repeal bylaws shall be in the stockholders entitled to vote. In the case of a nonstock corporation, the power to adopt, amend or repeal bylaws shall be in its members entitled to vote"); *See also* 8 Del. C. 1953, § 141(a) (stating that "The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors, except as may be otherwise provided in this chapter or in its certificate of incorporation. If any such provision is made in the certificate of incorporation, the powers and duties conferred or imposed upon the board of directors by this chapter shall be exercised or performed to such extent and by such person or persons as shall be provided in the certificate of incorporation.")

[153] *See* Fisch, J. E., 2000. *The Peculiar Role of the Delaware Courts in the Competition for Corporate Charters*.

[154] *See Corwin v. KKR Fin. Holdings LLC*, 2015. 125 A.3d 304 (Del. 2015); *See also In re Trulia*, 2016. Inc. Stockholder Litig., 129 A.3d 884.

[155] *See* Bomba, A. P., S. de Wied, W., Epstein, S., Fleischer Jr., A., Golden, P.S., Greenwald, D.J., Richter, P., Schwenkel, R. C., Simmons, P. L., Weinstein, G., 2016. *Delaware's Effort to Reduce Wasteful M&A Litigation — Should Companies Adopt Delaware Forum Selection Bylaws After Trulia?*. Fried Frank M&A Briefing. (stating that "if other jurisdictions do not follow Delaware's lead in rejecting disclosure-only settlements, then a company may prefer not to force litigation to Delaware where, if litigation is brought, a quick disclosure-only settlement with a broad release of claims against the company and its directors will generally not be available.")

[156] *See* Griffith, S. J., 2016. *Private Ordering Post-Trulia: Why No Pay Provisions Can Fix the Deal Tax and Forum Selection Provisions Can't*. The Corporate Contract in Changing Times, Steven Davidoff Solomon and Randall S. Thomas, eds., Fordham Law Legal Studies Research Paper No. 2855950.

> "A lawyer shall not knowingly: . . . (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; . . ."[157]

Therefore, even though settling parties may have been incentivized to "hide" the standard from the courts, perhaps they had the obligation to raise it, given that *Trulia* is clearly "adverse" to the disclosure settlements in vigor at that time. But as Griffith explains, that does not mean that attorneys have always disclosed the standard.[158] The aftermath was the obligation clause never "entering the equation" and courts left to approve settlements completely unconscious of the standard to be applied.[159] Back to Exclusive forum provisions, the question therefore becomes whether corporate defendant are willing to enforce such bylaws to bring litigation back to Delaware. The optionality of such terms renders their enforcement a mere threat to be used against plaintiffs when responding to the filing of the litigation. In other words, the flexibility of exclusive forum provisions in enforcing them, assuming they are included in a company's charter or bylaws, makes the board capable of choosing whether to invoke them or not based on the willingness to settle by the plaintiffs. That is the case of a litigation in which corporate defendants choose to settle in a non-Delaware jurisdiction, instead of deploying exclusive forum provisions to bring the case back to Delaware. Contrary to standards like *Trulia,* the "omission", or the negligence in failing to present the exclusive forum provision to the court is perfectly acceptable according to the terms of the provision. Those terms expressly emphasize the self-enforcing nature of the bylaws, leaving the decision of whether to enforce them exclusively in the hand of the issuers. Solomon, in his book, provides that:

> ". . . a company may wish to wait to adopt Delaware selection bylaws until it becomes clearer whether other jurisdictions will continue to

[157] *See* American Bar Association.
[158] *See* Griffith, S. J., *supra note.* (stating that he was "aware of at least eight disclosure settlements involving Delaware-incorporated companies that have been presented in non-delaware courts for approval since Trulia was decided." They were *Suprina v. Berkowtiz*, No. 1-14-CV-272358 (Ca. Super. Ct. Feb. 29, 2016); *Saggar v. Woodward*, No. CIV-532534 (Ca. Super. Ct. Apr. 4, 2016); *Allan v. Micrel, Inc.*, No. 1-15-CV-280762 (Ca. Super. Ct. May 20, 2016); *In re Pharmacyclics, Inc. Shareholder Litigation*, No. 2015-1-CV-278055 (Ca. Super. Ct. Jul. 20, 2016); *Vergiev v. Aguero et al*. (*In re: Metalico Stockholders' Litigation*), UNN-L-2276-15, Superior Court of New Jersey, Union County (June 6, 2016); *Garcia v. Remy International, Inc.*, Civ. No. 1:15-cv-01385-TWP-TAB, (S.D. Indiana, hearing scheduled Nov. 2, 2016); *Dean Drulias v. 1st Century Bancshares, Inc., et al.*, 16-CV-294673, (Ca. Super. Ct. Nov. 18, 2016).
[159] *Id.*

> approve disclosure-only settlements; or may wish to adopt the bylaws now and then eliminate them if it becomes clear that other jurisdictions will continue to approve disclosure-only settlements. Further, a company may wish to adopt the bylaws and then waive them in the context of an approved transaction when the company would prefer the certainty of a quick resolution over the prospect of lengthier litigation for vindication on the merits."[160]

Griffith justifies the flexible nature of exclusive forum bylaws on the grounds that they were drafted by boards with the intent of avoiding breach of fiduciary duties on their side, which in turn would have deemed the bylaws as invalid. The notional and practical leeway of freedom to apply or waive the provision therefore represents a sort of protection against hypothetical judicial invalidation dictated by a breach of fiduciary duties on the part of directors.[161] Still, boards are left with the enormous power to choose their preferred jurisdiction to either settle the claims or re-direct them, and this makes exclusive forum provisions both biased and inefficient. One plausible solution would be to render the provisions mandatory instead of optional, namely ruling that exclusive forum terms be enforced at all times in every litigation, provided that the company's charter or bylaws include the provision. This would prevent directors from deliberately choosing whether or not to enforce the bylaw.[162] However, this would not apply to claims brought under the Securities At 1933, in which case the federal districts court would have the priority of jurisdiction over Delaware's state courts. Since claims brought under rule 14a-9 can easily replace those alleging breach of fiduciary duties

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[160] *See* Solomon, S. D., *The Corporate Contract in Changing Times*, eds. 2019. University of Chicago Press. *See also* Bomba, A. P., S. de Wied, W., Epstein, S., Fleischer Jr., A., Golden, P.S., Greenwald, D.J., Richter, P., Schwenkel, R. C., Simmons, P. L., Weinstein, G., 2016. *Delaware's Effort to Reduce Wasteful M&A Litigation — Should Companies Adopt Delaware Forum Selection Bylaws After Trulia?*. Fried Frank M&A Briefing.

[161] *See* Ursaner, S., 2010. *Keeping "Fiduciary Outs" out of Shareholder-Proposed Bylaws: An Analysis of CA, Inc. v. AFSCME*. New York University Journal of Law & Business, Vol. 6, p. 479. (Defining waver and discretion terms of the provisions as "fiduciary out" to protect them from invalidation by the courts); *See also* Grundfest, J. A., Savelle, K., 2013. *The Brouhaha Over Intra-Corporate Forum Selection Provisions: A Legal, Economic, and Political Analysis*. Business Lawyer, Vol. 68 Issue 2, p. 325-410, Rock Center for Corporate Governance Working Paper No. 125, Stanford Law and Economics Olin Working Paper No. 439.

[162] *See* Griffith, S. J., 2016. *Private Ordering Post-Trulia: Why No Pay Provisions Can Fix the Deal Tax and Forum Selection Provisions Can't*. The Corporate Contract in Changing Times, Steven Davidoff Solomon and Randall S. Thomas, eds., Fordham Law Legal Studies Research Paper No. 2855950. (stating that "Assuming some form of pre-commitment strategy would be enforceable in this context, a simple solution to the problem might be to strip the optionality from Exclusive Forum provisions, making them Exclusive Forum mandates. Companies would pre-commit to asserting Delaware forum wherever appropriate. To make the commitment binding, waiver could be prohibited, and a shareholder vote requirement could be added to discourage ex post repeal. A narrow fiduciary out, allowing for waiver if enforcement would amount to a breach of the target board's fiduciary duty, could also be crafted if necessary.")

(i.e. disclosure claims), the amended provision would simply not affect disclosure settlements at a federal level.[163] Griffith further suggests that the most efficient way to repress the issue is to address its roots, namely the incentives that make both corporate parties behave unfairly. On one hand, plaintiffs' attorneys filing litigation outside Delaware seeking compensation at all "costs". On the other hand, defendants' attorneys advising their clients to accept settlements and pay the counterpart, so as to minimize the risk that the board may have missed something during the acquisition or merger's process. The common denominator is money, which perpetually reproduces the M&A litigation cycle. Therefore, any commitment made before the process not to pay fees and costs may repress the habit. Companies currently distribute fees according to the corporate benefit doctrine, therefore on the grounds that "(1) the stockholder presents a claim to the corporation such that, at the time the claim was presented, a suit based on the actions underlying the claim would have survived a motion to dismiss and (2) a material corporate benefit results."[164] The doctrine applies to both derivative suits and class actions, and specifically in case the suits result in a non-monetary relief.

To counteract this process, some scholars propose no-pay provisions, specifically designed to limit the incentives for corporate parties to settle and therefore pay the counterpart's fees and costs in specific types of litigation.[165] Such provisions could either address all litigation or be tailored to the specific "needs" of corporate parties. More precisely, based on the specific fraudulent behavior of litigants: for instance, no-pay provisions could prevent fees from being paid in class actions only, or in disclosure settlements only.[166] As opposed to the corporate benefit doctrine, which purports to incentivize shareholders to bring claims in which they might gain some monetary benefit, the no pay provision would make shareholders commit not to pay to bring claims for a certain kind of litigation where they would not be any better off.[167]

Bayliss and Mixon offer an hypothetical draft of a provision of this kind:

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[163] *Id.*

[164] *See* Griffith, S. J., 2014. *Correcting Corporate Benefit: How to Fix Shareholder Litigation by Shifting the Doctrine on Fees.* Boston College Law Review, Vol. 56, No. 1, Fordham Law Legal Studies Research Paper No. 2496395.

[165] *See* Griffith, S. J., 2016. *Private Ordering Post-Trulia: Why No Pay Provisions Can Fix the Deal Tax and Forum Selection Provisions Can't.* The Corporate Contract in Changing Times, Steven Davidoff Solomon and Randall S. Thomas, eds., Fordham Law Legal Studies Research Paper No. 2855950.; *See also* Bayliss, A. T., Mixon, M., 2015. *"No Pay" Provisions: The Forgotten Middle Ground in the Fee-Shifting Battle*. The Harvard Law School Forum on Corporate Law.

[166] *Id.* (stating that "No Pay provisions could be crafted to preclude fees for shareholder litigation generally. Alternatively, No Pay provisions could be narrowed to preclude fees only for class action shareholder litigation. Or, even more narrowly, No Pay provisions could be written to preclude fees only for disclosure settlements.")

[167] *Id.*

> "To the fullest extent permitted by law, in the event that any [Claiming Party] initiates or asserts any [Representative Claim] or joins, offers substantial assistance to, or has a direct financial interest in any [Representative Claim] against any [Company Parties], then, regardless of whether the [Representative Claim] is successful in whole or in part, neither the [Claiming Party] nor the [Claiming Party's] attorneys shall be entitled to recover any [Litigation Costs] from the corporation on account of the [Representative Claim], unless (a) [the Court] determines that the corporation litigated [in bad faith], (b) [the Court] determines that the [Representative Claim] was derivative or (c) the [Bylaws] or [Certificate of Incorporation] or other contract provides the [Claiming Party] a right to advancement or indemnification from the corporation on account of the [Representative Claim]."[168]

Each party, not litigating in bad faith, therefore commits to bear its own litigation costs, including fees, unless the court concludes otherwise. In terms of validity and enforceability, no pay provisions would fall within the constraints imposed by the amendments made in 2015 to the DGCL, which ban fee-shifting provisions and limits the use of exclusive forum provisions.[169] A no-pay term has been previously deployed in litigation, but the court reasoned that the bylaw did not rule out all the possible outcomes in which shareholders sought compensations for wrongdoing by the board.[170] However, no pay terms would also shield corporations against federal securities litigation: no matter whether the settlement is reached at a state or federal level, Griffin holds that these provisions should validly suppress the corporate benefit doctrine in both state court and federal court, therefore proving to be the most effective and expansive solution to the many loopholes of M&A litigation.[171]

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[168] *See* Bayliss, A. T., Mixon, M., 2015. *"No Pay" Provisions: The Forgotten Middle Ground in the Fee-Shifting Battle*. The Harvard Law School Forum on Corporate Law.
[169] *See* Delaware General Corporation Law §§ 102(f) & 109(b)
[170] *See Katz v. Commonwealth REIT*, 2014. No. 24-C-13-001299, slip op. (holding that "the Plaintiffs find the expense involved in proving their remedy is not worth the associated costs does not constitute the elimination of the right to pursue that remedy so as to render the bylaw invalid.")
[171] *See* Griffith, S. J., 2014. *Correcting Corporate Benefit: How to Fix Shareholder Litigation by Shifting the Doctrine on Fees.* Boston College Law Review, Vol. 56, No. 1, Fordham Law Legal Studies Research Paper No. 2496395. (stating that "No Pay provisions solve the collective action problem created by corporate defendants' inconsistent preferences over time. As long as corporations adopt No Pay provisions on a clear day,

B. Salzberg, et al. v. Sciabacucchi

In 2017, the companies Roku, Stitch and Blue Apron launched their Initial Public Offerings. Before filing their registration statements to the SEC, each company included a federal-forum provision its certificate of incorporation mandating that federal courts be the exclusive fora for resolution of litigation claims brought under the Securities Act 1933. Appellee Sciabacucchi bought shares of common stock of each company, some of which during their IPOs and others sometime later on. On December 29 of the same year, Sciabacucchi filed a federal securities class action against the companies' directors seeking a judgement for the invalidation of federal-forum provisions by the Delaware state court. In reaching the final decision, the court relied upon its decision in Boilermakers and ATP Tour, as well as the "first principles" of Delaware law and federal case law. Eventually, the court invalidated federal forum provisions.[172]

In recent years, corporations have adopted forum-selection provisions in an effort to gain an upper hand over the plaintiffs' bar in securities litigation. However, after the court's decision in *Salzberg*, any effort to modify the rules seemed to be "running afoul of state or federal interests".[173] Within a few months later, 58 companies launching their IPO contained federal forum provisions in their company's documents. Among those, 38 adopted the provision in their charters (65.5%), while twenty (34.5%) included the term in the bylaws.[174] Clearly, the proliferation of state-court federal litigation was a major concern for Delaware companies. Such concern premises on the fact that, apart from the logical increase in expenses and complexity of cases, the increase in state-court class actions and parallel proceedings brings along many risks. These include inconsistent rulings by unfamiliar judges, as one federal court explained.[175] The aftermath is an increase in settlement value which generates negative externalities for the judicial system and market as a whole.[176] Just to mention some numbers, in 2018, among the companies which were faced with claims pursuant to the Federal Securities Act 1933, almost 27% saw claims filed exclusively in federal court, compared to

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when they are not subject to deal litigation, they have no incentive to defect from the collective interest in fighting nuisance litigation.")

[172] *See Opinion*, 2018 WL 6719718 (stating that FFP are "ineffective and invalid")
[173] *See* Listwa, D., Polivka, B., 2019. *First Principles for Forum Provisions.* Cardozo Law Review.
[174] *See* Grundfest, J. A., 2019. *Federal Forum Provisions: Historical Development and Future Evolution.*
[175] *See Baker v. Dynamic Ledger Solutions, Inc.*, 2018. Case No. 17-cv-06850-RS, 2018 WL 4740197. (stating that ""remanding creates the risk that parallel state and federal proceedings could produce inconsistent conclusions regarding key questions of fact and law.")
[176] *See* Huang, P. H., 2006. *The Unexpected Value of Litigation: A Real Options Perspective*. Stanford Law Review, Vol. 58, p. 1267, Princeton Law and Public Affairs Working Paper No. 06-006.

an historical 91.67% in 2010. According to further data, in 2019 state-court federal-securities litigation activity dominated with 73% of new cases being brought exclusively in state court or in state and federal court.

Plaintiffs are incentivized to file claims in state courts when alleging claims pursuant to section 11.[177] According to Grundfest, state courts apply pleading standards which are "more plaintiff-friendly than applied in federal court."[178] Federal courts, on the other hand, restrict the identity of shareholders and their plaintiffs pursuant to federal law.[179] These constraints negatively impact the plaintiff counsel.[180] As previously mentioned, this process results in litigation to be brought *inefficiently* in multiple jurisdictions.

Sciabacucchi, in a sense, proved to support these developments, by effectively eliminating the possibility of using federal forum provisions for most companies.

However, just a few years after the decision, in 2020, the Delaware Supreme court reviewed the Court of Chancery's ruling in Sciabacucchi and validated FFPs relying on the content of section 102(b)(1). As a facial matter, the court concluded that "they do not violate the principles of horizontal sovereignty".[181] Therefore, the Delaware court of Chancery's decision was reversed.

In addressing FFP's facial validity, the Delaware Supreme court relied upon the words used by the General Assembly in writing Section 102 of the DGCL, which covers matters concerning the company's charter.[182] The court reasoned that the provisions "easily" fall within the range of categories outlined in section 102.[183] What is more, the court recognized that the amendments made in 2015 on section 115 did not affect at all the way section 102

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[177] *See* 15 U.S.C. § 77k.)

[178] *Id.*

[179] *See* 15 U.S.C. § 77z-1(a)(3)(B)(2018).

[180] *See* Aggarwal, D., Choi, A. H., Eldar, O., 2020. *Federal Forum Provisions and the Internal Affairs Doctrine.* 10 Harvard Business Law Review 383, University of Michigan Law & Economics Research Paper No. 19-009, University of Michigan Public Law Research Paper No. 646, Duke Law School Public Law & Legal Theory Series No. 2019-58. (stating that "there is a possibility that actions under section 11 in state court will be filed by opportunistic lawyers representing plaintiffs with minimal economic losses, just to extract nominal settlements from deep-pocket defendants who want the case to go away.")

[181] *See Sciabacucchi v. Salzberg*, Del. 2018. No. 2017-0931-JTL, 2018 WL 6719718

[182] *See* 8 Del. C. § 102(b)(1) (stating that "In addition to the matters required to be set forth in the certificate of incorporation by subsection (a) of this section, the certificate of incorporation may also contain any or all of the following matters: (1) Any provision for the management of the business and for the conduct of the affairs of the corporation, and any provision creating, defining, limiting and regulating the powers of the corporation, the directors, and the stockholders, or any class of the stockholders, or the governing body, members, or any class or group of members of a nonstock corporation; if such provisions are not contrary to the laws of this State. Any provision which is required or permitted by any section of this chapter to be stated in the bylaws may instead be stated in the certificate of incorporation . . .")

[183] *See* Sciabacucchi v. Salzberg, Del. 2018. No. 2017-0931-JTL, 2018 WL 6719718.

classified FFPs as facially valid. In fact, the court noted, "section 115 supports the view that FFP are valid."[184]

It is not easy to draw conclusions about the analysis and the ruling performed by the Delaware Supreme Court after such a short amount of time, also because the effect of such decision has not yet made a clear impact on later litigation. However, it is possible to gather concerns about the ruling in *Sciabacucchi* and therefore address whether such concerns, logically, either agree or disagree with the following overruling. At first sight, it seems like a common belief among scholars is that the logic of the first principles and the internal affairs applied in *Sciabacucchi* by the court is flawed. *Sciabacucchi*'s reasoning lies on the ground that the DGCL applies to intra-corporate matters happening outside of Delaware's boundaries. *Sciabacucchi* indeed enforces the internal affairs doctrine to constrain the DGCL's extraterritorial application:

> "Delaware's authority as the creator of the corporation does not extend to its creation's external relationships, particularly when the laws of other sovereigns govern those relationships. Other states exercise territorial jurisdiction over a Delaware corporation's external interactions. A Delaware corporation that operates in other states must abide by the labor, environmental, health and welfare, and securities law regimes that apply in those jurisdictions. When litigation arises out of those relationships, the DGCL cannot provide the necessary authority to regulate the claims."[185]

Made it simple, the logic implies that except for the case in which a "first principles" analysis is generated which imposes a new internal affairs constraint, the DGCL can be applied to rule on extraterritorial matters concerning Delaware corporations. According to Grundfest, this logic "ignores a substantial body of United States and Delaware Supreme Court precedent that already precludes extra-territorial application of the DGCL." He also contends that it "undermines the logic that is foundational to *Sciabacucchi*'s first principles analysis",

[184] The 2015 amendments purported "to codify Boilermakers and to preclude a charter or bylaw provision from excluding Delaware as a forum for internal corporate claims." *See* 8 Del. C. § 115(f) (stating that section 115 is "not intended to authorize a provision that purports to foreclose suit in a federal court based on federal jurisdiction"). FFPs instead "transfer" federal securities claims to federal court.

[185] *See Sciabacucchi*, 2018 WL 6719718.

proving that the internal affairs constraint suggested by the court is "unnecessary and problematic."[186] Unnecessary because the Delaware Supreme Court had previously explained that "[t]here is, of course, a presumption that a law is not intended to apply outside the territorial jurisdiction of the State in which it is enacted."[187] Problematic because, the scholar highlights, if the new internal affairs constraint were to limit Delaware law in a novel manner, then it would have to do it in a more restrictive way than previously set, which it did not. Actually, the court in *Sciabacucchi* never mentioned deficiencies in the existing constraints regarding the applicability of state law to territories outside of Delaware, neither It attempted at clarifying why the newly proposed constraints of the doctrine would be reasonable in approaching the issue.

Listwa and Polivka justify the court's behavior in "failing to articulate the source of its territorial principle.[188] They argue that the identification of the origin of choice-of law rules and the constraints on legislative jurisdiction have been a major issue for courts over the past 20 years at least. Given that both state legislatures and Congress provide a very limited counseling for choice-of-law issues, courts are left with a narrow guidance on where to look for making decisions and they must therefore rely on something else. For this reason, the area covering choice of law gets subject to significant influence by scholars, "sometimes leading to abrupt and dramatic theoretical realignments."[189] Sticking to the analysis carried out by the court regarding the validity of FFPs, Listwa and Polivka further suggest that comity, rather than territoriality, should have been the landmark of the "first principles" analysis offered by the Court of Chancery. Grounding on the decision in *Galaviz v. Berg*,[190] the two authors approach the issue from a different perspective: rather than looking at the question as a "prisoner's dilemma", in which state courts battle for the supremacy of their governing law, jurisdictions ought to "negotiate" under comity principles. Each jurisdiction is interested in protecting its body of law by retaining the power and ability to make independent judgments on the enforcement of forum-selection clauses. At the same time, states would be better off

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[186] *See* Grundfest, J. A., 2019. *The Limits of Delaware Corporate Law: Internal Affairs, Federal Forum Provisions, and Sciabacucchi*. Rock Center for Corporate Governance at Stanford University Working Paper No. 241.

[187] *See Singer v. Magnavox Co.*, Del. 1977. 380 A.2d 969, 981, overruled by *Weinberger v. UOP, Inc*., Del. 1983. 457 A.2d 701.

[188] *See* Listwa, D., Polivka, B., 2019. *First Principles for Forum Provisions.* Cardozo Law Review.

[189] *Id.*

[190] The Federal Court of the Northern District of California refused to enforce the unilateral choice-of-court clause as a matter of federal law, arguing that the terms under which the board of directors enforced the clause cast doubt on whether the clause was actually adopted in the interests of shareholders. *See* 763 F. Supp. 2d 1170 (N.D. Cal. 2011).

by having a uniform legislation covering the matter. Comity, therefore, proves to be an ideal solution for states to find a compromise to balance their interests.[191]

One last critique emerging from commentators is that the court in Sciabacucchi surprisingly fails to respect "internal affairs" precedents. Cases like Edgar, VantagePoint, which clearly represent a legal precedent for Internal affairs[192], were not mentioned. In fact, the court in Sciabacuccchi creates a new version of internal affairs from scratch. The court noted that it is "the rights, powers, or preferences of the shares, language in the corporation's charter or bylaws, a provision in the DGCL, or the equitable relationships that flow from the internal structure of the corporation" that must be used to assess whether a provision is internal.[193] The court also concluded that: (a) any claim brought under the 1933 Act is external to the corporation; (b) the plaintiffs is the purchaser of a security (which need not necessarily be a share, but anything considered as a security according to the Act); (c) the defendants may be anybody which the 1933 Act identifies as such (not necessarily the board); (d) the cause of action is the purchase of the security itself; (e) the event that raises the claim does so exactly before the shareholder becomes such, therefore before the corporate contract constraint can be enforced; (f) the necessary condition to assert such a claim does not include being a continuing shareholder, instead the plaintiffs is allowed to bring suit even if he has sold stock and he is not a shareholder anymore; (g) legal and equitable rights of shareholders in the corporate contract under state law do not apply to federal claims.[194]

Sciabacucchi adds a series of new constraints to the Supreme Court's definition of internal affairs but they do not relate to whether any matter is "peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders."[195] The internal affairs' definition commonly adopted by Delaware and the Supreme Court significantly differs from that of Sciabacucchi. According to the former, Internal affairs remain an internal matter even though they are regulated by federal law. Internal affairs, sticking to the Supreme Court, do not concern whether a matter falls within one state's law or another, nor whether that matter isn't federal. Suggesting that a federal claim is not internal, Sciabacucchi showed

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[191] *Id.*

[192] *See Edgar v. MITE Corp.*, 1982. 457 U.S. 624 (Supreme Court defined internal affairs as "matters peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders"); *See also VantagePoint Venture Partners 1996 v. Examen, Inc*., Del. 2005 - 871 A.2d 1108 (Delaware Supreme Court explained that the "internal affairs doctrine applies to those matters that pertain to the relationships among or between the corporation and its officers, directors, and shareholders.")

[193] *See Sciabacucchi*, 2018 WL 6719718

[194] *Id.*

[195] *See Salzberg v. Sciabacucchi*, Del. 2020. 227 A.3d 102, 125-26, 131.

to have "misapprehended both the plain text of the Supreme Courts' definitions, and the rationale for those definitions."[196]

Later on, however, the Delaware Supreme Court defined the doctrine as a mere choice-of-law principle instead of a limit on the scope of the corporate contract that state corporate law creates.[197] Thus, the Supreme Court concluded that although matters arising under federal securities law do not affect the doctrine, they lie within the extreme scope of regulation of a corporation's charter.[198] Before the ruling in *Salzberg*, this "Outer Band"[199], which stands in between internal corporate affairs and external matters—represented dark matter to US corporate law.

There are many ways to interpret *Salzberg'* s final decision. One is to use a pragmatic approach, therefore justifying the court on the fact that Delaware was responding to the needs of the state's corporate constituency. In fact, the FFPs represented a powerful state-law solution to a federal issue arose a few years earlier.[200] One hypothesis is that the state's supreme court did not allow its state regulation to interfere, especially when there is plenty of other states awaiting to steal incorporations from Delaware by being more flexible with regulations.

From a theoretical perspective, *Salzberg* represents the Delaware Supreme Court's common adoption of the "nexus of contracts" theory of corporations.[201] Under such principles, the internal affairs doctrine does not interfere with the scope and content of the corporate contract, and merely represents the rule according to which the parties to a contract choose the law governing their company. Besides, the "concession theory" used by the Delaware Court of Chancery in Sciabacucchi collides with that of the Delaware Supreme Court. According to concession theory, the internal affairs doctrine expresses a state's sovereignty instead of a state's private independence. The internal principles define the regulatory boundaries of a company's charter and thus the limits of state law in creating the charter.

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[196] *See* Grundfest, J. A., 2019. *The Limits of Delaware Corporate Law: Internal Affairs, Federal Forum Provisions, and Sciabacucchi*. Rock Center for Corporate Governance at Stanford University Working Paper No. 241.

[197] *See* Sciabacucchi v. Salzberg, Del. 2018. WL 6719718 (Laster, V.C.).

[198] *Id.*

[199] *See* Manesh, M., 2021. *The Corporate Contract and the Internal Affairs Doctrine.* 71 American University Law Review.

[200] *See Cyan, Inc. v. Beaver Cty. Emps. Ret. Fund*, 2018. 138 S. Ct. 1061.

[201] The so-called contractarian theory reflects a modern approach to the aggregate theory of the corporation. It focuses on the parties stipulating the company's charter. *See* Chaffee, E. C., 2015. *Collaboration Theory: A Theory of the Charitable Tax Exempt Nonprofit Corporation*. University of California Davis Law Review, Vol. 49, No. 5, University of Toledo Legal Studies Research Paper No. 2015-20.; *See also* Padfield, S. J., 2014. *Rehabilitating Concession Theory.* Oklahoma Law Review, University of Akron Legal Studies Research Paper No. 12-13.

Finally, these contrasting approaches pose a more fundamental question regarding the intrinsic nature of a company: is it the state that creates the corporate entity and submit it to the public dimensions? Or is the corporation a mere aggregation of individuals seeking private ordering?

Definitely, the two definitions bring to two distinct practical consequences if adopted by two different courts, even within the same State.

CONCLUSION

In recent years, companies have increasingly enforced provisions in their charter or bylaws in the face of the challenges brought by stockholder plaintiffs in M&A deals. The most common forms of private ordering solutions used are exclusive forum provisions, fee shifting provisions, and arbitrations provisions. Although fee-shifting provisions are no longer valid under Delaware law,[202] exclusive forum provisions still represent a powerful tool to deter frivolous litigation. In particular, *Boilermakers* standard applies to "any derivative action or proceeding brought on behalf of the Corporation, any action asserting a claim of breach of a fiduciary duty owed by any director, officer or other employee of the Corporation to the Corporation or the Corporation's stockholders, any action asserting a claim arising pursuant to any provision of the Delaware General Corporation Law, or any action asserting a claim governed by the internal affairs doctrine."[203] However, scholars contend that *Boilermakers* may not necessarily allow courts to polish the behavior of directors and shareholders, therefore No-Pay provisions might prove to "pick up the slack" of both fee-shifting and exclusive state-forum Provisions.

Sciabacucchi, on the other hand, applies to claims arising under the Securities Act of 1933, and requires that the federal district courts be the exclusive forum for resolution of such claims. As for now, the decision of the Delaware Supreme Court holds and is commonly accepted across commentators.

[202] *See Del. S. Bill 75*, signed into law June 24, 2015, effective Aug. 1, 2015,
[203] *See Chevron* Compl. ¶ 21.

All three decisions represent milestones of Delaware corporate law: they have contributed to the enormous bulk of rules with an additional package of legal standards that now govern Delaware corporations and that companies in Delaware consider when going public or later on in the process. Whatever the degree of protection against M&A litigation, such provisions are still at the center of many discussions on private ordering solutions. Scholars actively debate on whether private ordering results in efficient tailoring and whether it represents a better solution than *ex-ante* and *ex-post* legislative regulation. Some defend the enabling approach of Delaware legislature, some side with the traditional division of powers between shareholders and directors. Anyway, Delaware proves again to be the point of departure for many U.S corporate law matters.

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