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Securities

Amalgamated Bank Joins in Opposition To Fee-Shifting Bylaws, Asks Del. for Action

Amalgamated Bank has become the latest investor to urge the Delaware Legislature to bar stock corporations from adopting bylaws that shift litigation expenses to the losing party.

In a Feb. 11 letter, the bank told Delaware Gov. Jack Markell (D) and the state's legislative leaders that abrogating the "American rule"—in which each party in a litigation bears its own costs—would be a "serious blow to shareholder rights."

"We believe that there is an urgent need for legislation to avoid upsetting the delicate balance that exists between the rights of investors and the companies in which they invest their money," states the letter, signed by Amalgamated Bank President and Chief Executive Officer Keith Mestrich.

In a related release, Mestrich argued that fee-shifting bylaws can deter valid claims from being brought to court because the financial risks of losing are too high. "We're therefore urging immediate legislative action to keep the courthouse door open to investors and ensure that those who provide capital to the markets have access to recourse when misconduct occurs," he said in the release.

'ATP' Ruling. Fee-shifting bylaws became particularly controversial after *ATP Tour Inc. v. Deutscher Tennis Bund*, a May 2014 decision in which the Delaware Supreme Court concluded that fee-shifting provisions in the bylaws of Delaware non-stock corporations can be valid and enforceable (12 CARE 529, 5/16/14).

In the wake of ATP, as of January 39 U.S. companies have adopted fee-shifting bylaws, according to research by Claudia H. Allen, a partner and co-chair of the Corporate Governance practice at Katten Muchin Rosenman LLP (13 CARE 147, 1/16/15).

Many investor groups and pension funds have written to Delaware representatives asking that the scope of ATP be narrowed or limited (12 CARE 1689, 12/12/14).

The Delaware General Assembly is expected to act in May or June to possibly restrict the use of such bylaws, and there is an ongoing case in the Delaware Chancery Court challenging an enacted fee-shifting bylaw (22 DER EE-4, 2/3/15).

Lead Plaintiff. Amalgamated's LongView Funds served as lead plaintiff in many key securities cases.

For example, the funds were lead plaintiff in a case settled by Freeport-McMoRan for \$137.5 million involving alleged conflicts of interest that caused the company to overpay to acquire two oil and gas companies in 2013. Commenters have suggested that the case could start a new trend in shareholder derivative actions.

In its letter, Amalgamated countered the argument by some business representatives—including the U.S. Chamber of Commerce—that fees awarded from private securities actions provide little benefit to shareholders. The bank noted that judges in class actions make findings as to whether settlements are fair to the class and that attorneys' fees are reasonable. The bank also noted that both Delaware and federal civil procedure rules include sanctions for frivolous litigation.

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The bank's letter is available at <https://www.amalgamatedbank.com/sites/default/files/Amalgamated%20Bank%202011%202015%20Ltr%20to%20Gov%20Markell%20Sen%20Blevins%20Rep%20Schwarzkopf.pdf>.

The release is available at <https://www.amalgamatedbank.com/article/2015-02-12/amalgamated-bank-urges-delaware-governor-markell-and-legislative-leaders-defend>.