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11 February 2015

The Honorable Jack Markell
Office of the Governor
150 Martin Luther King Jr. Blvd. South, 2nd Floor
Dover, Delaware 19901

The Honorable Patricia M. Blevins
President Pro Tempore
State Senate
Legislative Hall Office
411 Legislative Avenue
Dover, Delaware 19901

The Honorable Peter C. Schwarzkopf
Speaker
House of Representatives
Legislative Hall Office
411 Legislative Avenue
Dover, Delaware 19901

Dear Governor Markell, Senator Blevins, and Representative Schwarzkopf:

I write on behalf of Amalgamated Bank's LongView Funds to urge you to press for immediate legislative action on legislation to clarify that Delaware stock corporations will continue to follow the "American rule" that each side in litigation generally bears its own costs. As explained below, abrogating this rule will be a serious blow to shareholder rights.

The issue arose last year in the case of *ATP Tour v. Deutscher Tennis Bund.* In that case, the Delaware Supreme Court upheld the by-law of a non-stock corporation, under which a shareholder of the company who sued the company and did not prevail could be forced to pay the company's attorneys' fees and expenses. The Court held that this by-law was not barred by Delaware law and was allowed under an exception to the "American rule" under which litigation fees and costs may be shifted to the losing side if there is a fee-shifting statute or (as in the *ATP Tour* case) a contractual agreement between the company and its members. This was an extremely broad expansion of contractual fee shifting between parties, given that the shareholders have no ability to refuse consent. Note also that the Supreme Court added that such a bylaw might be unlawful in certain situations if enforcement would be inequitable.

Whatever the merits of that decision as to non-stock corporations, we do not believe that it should be extended to stock corporations, particularly as to litigation in which investors seek to protect their rights under federal and state securities and corporate laws. Such a result would be

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inequitable, contrary to sound public policy and inconsistent with two centuries of legal tradition in this country. The current uncertainty as to the law in this area requires legislative action.

The issue was considered by the legislature last year, but no action was taken before the session expired. 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.

By way of background, Amalgamated Bank was founded in 1923 and offers a variety of services to institutional investor clients, and for over 20 years, our LongView Funds have offered a variety of products to pension funds seeking a diversified investment portfolio. We currently have over $13 billion under management and hold shares in over 3,000 companies, a number of whom are incorporated in Delaware.

The LongView Funds have a long history of promoting shareholder rights and bringing meritorious cases that result in significant benefits for shareholders. In 1995 Congress enacted legislation to reform federal securities laws to discourage the filing of frivolous securities lawsuits. To that end, Congress required that trial judges who hear these cases must name as lead plaintiff one or more shareholders with a substantial stake in the company.

In furtherance of this policy, the LongView Funds, along with other institutional investors, have stepped forward and served as lead plaintiffs in a number of cases that have produced significant gains for shareholders. Some of these cases include recovering $7.2 billion for Enron investors in the wake of egregious accounting fraud, securing a $139 million settlement with News Corporation resolving breach of fiduciary duty allegations in the wake of the *News of The World* hacking scandal, and more recently, a $137.5 million settlement with Freeport-McMorAn resolving allegations of gross overpayment for acquisitions with which the founder and Chair, as well as other board members, had rampant conflicts of interest.

As you know, most securities cases are settled prior to trial, but in our experience, settlements usually occur only after significant discovery has taken place, a process that gives both sides an opportunity to learn the pertinent facts and thus gauge the chances of prevailing at trial. This discovery requires substantial legal expenses. A bylaw abrogating the "American rule" in these cases could easily deter valid cases from being brought, much less settled on terms favorable to shareholders. Suppose that a shareholder's counsel believes that there is a 70% chance of winning at trial. That is the same thing as a 30% chance that the shareholder will lose and have to pay the company's legal fees and expenses, no matter how exorbitant. The same would hold true in a shareholder derivative case.

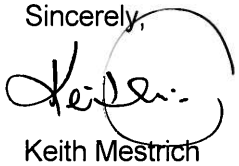
Over the years, exceptions to the "American rule" that will have a broad effect on the public have generally been made by the legislative branch of government, not the courts, and these exceptions generally favor vindication of important rights being asserted by plaintiffs in areas such as employment discrimination, environmental protection, antitrust, freedom of information and similar statutes. The theory was to encourage individual plaintiffs to act as "private attorney generals" by pursuing claims that help advance these and other important public policies. Few statutes allow recovery of legal fees by defendants.

The same logic applies here. Whatever rationale may warrant use of a "loser pay" provision in a private agreement that was negotiated at arm's length, the same rationale cannot be extended to stock corporations. Neither the Securities and Exchange Commission, nor the U.S. Department of Justice, nor state attorneys general have the resources to pursue all claims involving injuries to shareholders. Private securities litigation – which Congress reformed only after a full debate – fills an important gap and should not be discouraged.

As for the concern that fees are being awarded for lawsuits that provide little or minimal benefit to shareholders, it is important to note that these cases are generally brought as class actions, a process that requires a judge to make a finding that any settlement is fair to the class and that any fees paid to the plaintiff's counsel are reasonable. Furthermore, both the Federal and Delaware civil procedure rules include provisions for sanctions for frivolous litigation.

The "American rule" has thus served an important purpose in American jurisprudence by keeping open the courthouse door to many citizens. We urge you to seek legislative re-affirmation of this rule as it applies to stock corporations and their shareholders.

Sincerely,



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