

Summer 2014



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Delaware Court of Chancery Finds Two-Tier Poison Pill Reasonable; Declines to Enjoin Sotheby's Annual Meeting

In *Third Point LLC v. Ruprecht*, the Delaware Court of Chancery held, in the context of a suit for preliminary injunction, that plaintiffs would be unlikely to demonstrate that the Sotheby's board breached its fiduciary duties by adopting a two-tiered stockholder rights plan (a so-called "poison pill") which provided that passive institutional investors could acquire a greater percentage of the company than other investors, and then later refusing to waive the application of the lower threshold as to Third Point. In so holding, the court found that the possibility of "creeping control" and "negative control" by stockholders posed objectively reasonable and legally cognizable threats to Sotheby's. The court, therefore, declined to enjoin Sotheby's from holding its annual meeting. Sotheby's and Third Point have since announced the settlement of this litigation; thus, there will be no appeal. For more, click [here](#).

Delaware Supreme Court Finds Fee-Shifting Bylaws Permissible

In *ATP Tour, Inc. v. Deutscher Tennis Bund*, the Delaware Supreme Court upheld a fee-shifting bylaw put in place by the directors of a non-stock corporation that required a member plaintiff to bear the costs of intra-corporate litigation if the member was not successful on the merits or did not achieve "in substance and amount, the full remedy sought." This holding followed from the premise that bylaws are a contract between the corporation and its owners and that fee-shifting is a well-settled contractual device for allocating risk. The court noted, however, that the adoption and application of such a fee-shifting bylaw must comply with a board's fiduciary duties. If the board so complies, such bylaws are facially permissible and enforceable, even for the purpose of deterring litigation. Although the *ATP Tour* decision addressed a fee-shifting bylaw in the context of a non-stock corporation, the holding may be read to apply to all Delaware corporations. For our memo on this decision, click [here](#).

Whether a fee-shifting bylaw is appropriate for a particular corporation will depend on a number of factors specific to such corporation, and care should be taken in connection with the board's adoption of such a bylaw. First, the court

in *ATP Tour* was careful to note that such a bylaw may be facially valid but, nevertheless, invalid if adopted or used for an inequitable purpose. Second, the reaction of stockholders, proxy advisory firms and other interested parties to this type of bylaw is not yet fully known, and we are aware of only a handful of Delaware stock corporations that have adopted such provisions. Finally, in June 2014, legislation was introduced in the Delaware General Assembly that would have limited the holding in *ATP Tour* to non-stock corporations. Under that proposed legislation, neither the certificate of incorporation nor the bylaws of a Delaware stock corporation would have been permitted to include a fee-shifting provision of the kind addressed in *ATP Tour*. That legislation, originally fast-tracked for passage in June, was delayed due in part to heavy lobbying efforts by various interests. Reports indicate that new legislation may be introduced in 2015. For the version of the legislation that was introduced in June, click [here](#).

Other Notable Developments

In *Chen v. Howard-Anderson*, stockholder plaintiffs alleged that the directors and officers of the company breached their fiduciary duties in connection with a merger by making decisions during the sales process that fell outside the range of reasonableness. On a post-merger motion for summary judgment, applying enhanced scrutiny as the standard of review, the Delaware Court of Chancery granted the motion for summary judgment with respect to the directors of the company because, although the record supported an inference that certain decisions fell outside the range of reasonableness, the stockholder plaintiffs failed to develop sufficient evidence to support an inference that the directors acted with an improper motive and breached their duty of loyalty. The directors, therefore, “demonstrated that they exclusively breached their duty of care,” if any breach had occurred, and were insulated from liability because the company had an exculpatory provision in its charter authorized by Section 102(b)(7) of the Delaware General Corporation Law. The court, however, denied the motion for summary judgment with respect to the officers of the company because such an exculpatory provision can only exculpate directors. For the full opinion, click [here](#).

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M&A Markets

The following issues of M&A at a Glance, our monthly newsletter on trends in the M&A marketplace and the structural and legal issues that arise in M&A transactions, were published this quarter. Each issue can be accessed by clicking on the date of each publication below.

➤ [April 2014](#)

➤ [May 2014](#)

➤ [June 2014](#)

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