



2015

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## Recommended Citation

Verity Winship, *Contracting Around Securities Litigation: Some Thoughts on the Scope of Litigation Bylaws*, 68 SMU L. Rev. 913 (2015)  
<https://scholar.smu.edu/smulr/vol68/iss3/27>

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# CONTRACTING AROUND SECURITIES LITIGATION: SOME THOUGHTS ON THE SCOPE OF LITIGATION BYLAWS

*Verity Winship\**

**S**HAREHOLDERS often sue the companies in which they hold shares. They pursue fiduciary duty violations under state law or claim rights under the federal securities laws. Shareholder litigation is an area, in other words, where state and federal law interact and sometimes overlap. Recent legal developments have opened a new arena in which state and federal regulation of shareholder claims collide. Beginning in 2013, Delaware courts approved (with limits) the use of corporate charter and bylaw provisions to set the rules for shareholder litigation.<sup>1</sup> The use of these litigation provisions triggered heated discussion. Issues about their use are embedded in broader debates over the value of shareholder litigation, the role of private enforcement, the comparative power of shareholders and directors, the role of Delaware in U.S. corporate law, and other longstanding, polarized, and possibly intractable fights.

This essay pulls on one thread in the tangle of issues that these litigation provisions raise. It highlights a feature of these emerging provisions: the gradual expansion of their claimed scope. Litigation bylaws and charter provisions emerged in the form of exclusive forum selection clauses, designating the state of incorporation for internal disputes governed by state law. They covered fiduciary duty claims, for instance. What started as a way to shape state-law litigation about corporate actors, however, has expanded to reach *all* litigation between those actors, including federal securities litigation.

Legislative fixes to date have not resolved these questions about scope. Delaware legislation passed in 2015 prohibits Delaware stock corporations from adopting bylaws or charter provisions that would shift fees in connection with “internal corporate claims.”<sup>2</sup> Whether internal claims include those based in federal securities law is open to debate. The statute

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\* Professor, University of Illinois College of Law. This symposium essay was prepared in honor of the late Professor Alan Bromberg’s work across fields in business law. I am grateful for comments from Amitai Aviram.

1. For analysis of this phenomenon and a proposed framework for evaluating these litigation provisions going forward, see Verity Winship, *Shareholder Litigation by Contract*, B.U. L. REV. (forthcoming 2016), available at <http://ssrn.com/abstract=2575668>.

2. Del. S. Bill 75, signed into law June 24, 2015, effective Aug. 1, 2015, available at <http://legis.delaware.gov/legislature.nsf/FSMMain?OpenFrameset&Frame=right&src=/LIS/lis148.nsf/home>.

is also limited in other respects: it addresses fee-shifting clauses in certain businesses, but leaves unaffected all other types of litigation provisions, their adoption by other business forms and their use outside of Delaware.

This essay outlines some reasons to be troubled by the expanding reach of litigation provisions. It then proposes several ways that courts could distinguish among these provisions based on their scope, with a preference for those that focus on the core category of state-law corporate governance.

## I. THE EMERGENCE — AND EXPANSION — OF LITIGATION PROVISIONS

This Part traces the emergence of the corporate bylaws and charter provisions that determine how and where shareholder litigation takes place.<sup>3</sup> Throughout, it tracks one key feature of these litigation provisions: the expanding territory that they claim within the vast and varied landscape of shareholder litigation.

### A. EXCLUSIVE FORUM SELECTION AND THE FOCUS ON STATE CORPORATE LAW

The first type of litigation provision to be adopted by companies and to be tested in court was the exclusive forum selection clause. These clauses, included in corporate charters or bylaws, designated a particular court (usually Delaware Chancery Court) as the only place that certain intra-corporate disputes could be resolved. They created a connection between the governing state law—usually the law of the state of incorporation—and where disputes concerning that law would be decided.

A particular litigation pattern triggered the development of these clauses. Plaintiffs' lawyers were challenging an increasing percentage of corporate deals, bringing suits in state courts that alleged breaches of state-law fiduciary duties. Some plaintiffs' firms filed suits covering the same class and same conduct in a non-Delaware forum, often the headquarters state.<sup>4</sup> The jurisdictional rules permitted this multi-forum filing; nothing mandated that parties bring these suits only in the state of incor-

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3. The terminology used to describe these provisions has not settled. This essay refers to them as "litigation provisions," but they are also called "litigation-regulating" provisions, or "Litigation Rights." See CORP. LAW COUNCIL, DELAWARE STATE BAR ASS'N, FEE-SHIFTING FAQs, available at <http://www.delawarelitigation.com/files/2015/03/COUNCIL-SECOND-PROPOSAL-FAQS-3-6-15-U0124511.docx>; INST. S'HOLDER SERV., U.S. SUMMARY PROXY VOTING GUIDELINES 23–24 (2014), available at <http://www.issgovernance.com/file/policy/2015ussummaryvotingguidelines.pdf>.

4. Negotiation among plaintiffs' attorneys about fee allocation may have driven this litigation. See, e.g., Randall S. Thomas & Robert B. Thompson, *A Theory of Representative Shareholder Suits and its Application to Multi-Jurisdictional Litigation*, 106 NW. U. L. REV. 1753, 1753 (2012) (describing "fee distribution litigation" as "multijurisdictional suits . . . filed by plaintiffs' law firms largely to obtain a slice of the total pool of plaintiffs' attorneys' fees that are paid in a global settlement").

poration.<sup>5</sup> Defendant corporations, however, were quite unhappy with defending in multiple jurisdictions and with the possibility that they would have to settle weaker cases in non-Delaware courts.

Commentators, attorneys and lawmakers floated several approaches to consolidate litigation.<sup>6</sup> In an influential footnote, Vice Chancellor Laster of the Delaware Chancery Court suggested a remedy: “[I]f boards of directors and stockholders believe that a particular forum would provide an efficient and value-promoting locus for dispute resolution, then corporations are free to respond with charter provisions selecting an exclusive forum for intra-entity disputes.”<sup>7</sup> Defendant corporations—and their lawyers and other advisors—took him up on the suggestion, and private ordering ultimately became the predominant approach to consolidating multijurisdictional deal litigation.

These forum selection clauses were tested in Delaware Chancery Court in *Boilermakers v. Chevron*.<sup>8</sup> The court there found an exclusive forum selection bylaw to be facially valid. According to the court, the bylaws formed part of a flexible, multi-part contract between shareholders and the corporation; shareholder corporate governance litigation was a proper subject for bylaws under the Delaware code; and, like forum selection clauses in other types of contracts, the bylaw was not prohibited by law.<sup>9</sup> The clauses were accordingly permissible in Delaware absent improper purpose or adoption. Since *Boilermakers*, most of the non-Delaware courts asked to enforce an exclusive forum selection bylaw or charter provision selecting Delaware courts have done so.<sup>10</sup>

Those are the origins of litigation provisions. The clauses solved what some stakeholders thought was a problem; they consolidated litigation while preserving court access. A key aspect of these clauses was their limited scope. The most commonly adopted intracorporate forum selection bylaws and charter provisions reach state-law corporate governance claims. Based on a study of intracorporate forum selection provisions, more than 90% used the following language:

Unless the Corporation consents in writing to the selection of an alternative forum, the Court of Chancery of the State of Delaware

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5. See Verity Winship, *Bargaining for Exclusive State Court Jurisdiction*, 1 STAN. J. COMPLEX LITIG. 51, 88 (2012) (noting that no rule limits these disputes to a particular forum and that stakeholders who want such a limitation must bargain for it, either through private contract or by convincing other government actors).

6. See *id.* at 55–62.

7. *In re Revlon, Inc., S’holders Litig.*, 990 A.2d 940, 960 (Del. Ch. 2010).

8. *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 939 (Del. Ch. 2013).

9. *Id.*

10. Compare *Galaviz v. Berg*, 763 F. Supp. 2d 1170, 1174 (N.D. Cal. 2011) (invalidating an exclusive forum bylaw selecting Delaware courts), with *Hemg Inc. v. Aspen Univ.*, No. 650457/13, 2013 WL 5958388, at \*2–3 (N.Y. Sup. Ct. Nov. 4, 2013) (enforcing an exclusive forum clause in corporate organizational documents); *Groen v. Safeway Inc.*, No. RG 14716641, 2014 WL 3405752, at \*2 (Cal. Super. Ct. May 14, 2014) (same); *Genoud v. Edgen Grp.*, No. 625,244 (19th Jud. Dist. Ct., East Baton Rouge, La., Jan. 17, 2014) (same); *Miller v. Beam Inc.*, No. 2014 CH 00932, at \*1 (Ill. Ch. Mar. 5, 2014) (same).

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 DGCL, 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 Article.<sup>11</sup>

Note that the covered suits are identified by their form: derivative suits brought on behalf of the corporation. Or they are identified by the source of law: fiduciary duty, the state corporate code or the internal affairs doctrine, which by definition covers claims about corporate governance covered by the law of the state of incorporation. The clauses did *not* reach other litigation among corporate actors. In particular, they made no claim to reach securities litigation by shareholders.<sup>12</sup>

In other words, the predominant practice in this area reached only state-law claims. Moreover, these clauses likely could not have reached all types of securities litigation even if lawyers and corporations had wanted to extend them. Contracting parties have a range of forum choices, and can contract into or out of personal jurisdiction (the reach of a court to a particular defendant based on that defendant's contacts with the forum state). However, these clauses cannot create the power in a court to hear a particular type of case (subject matter jurisdiction) where none previously existed.<sup>13</sup> Jurisdiction for claims under the 1934 Securities Exchange Act is exclusive in the federal courts.<sup>14</sup> State courts cannot hear these securities claims, and forum selection clause cannot change

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11. Netsuite, Inc., Amended and Restated Certificate of Incorporation, art. VI § 8 (Nov. 29, 2011), available at <http://sec.gov/Archives/edgar/data/1117106/000119312507255707/dex32.htm>; Joseph A. Grundfest, *The History and Evolution of Intra-Corporate Forum Selection Clauses: An Empirical Analysis*, 37 DEL. J. CORP. L. 333, 352, 380–81 (2012) (quoting this provision and noting that this version, which he drafted with lawyers from Wilson Sonsini, had become the dominant form with identical or nearly identical language used in 91.9% of all clauses identified at the time of his study).

12. Some of the language might arguably reach actions in federal court that include both derivative state law-claims and securities claims and could thus arguably qualify as "any action asserting a claim of breach of a fiduciary duty." See, e.g., Jessica M. Erickson, *Overlitigating Corporate Fraud: An Empirical Examination*, 97 IOWA L. REV. 49, 99 (2011). However, defendants in *Boilermakers* did not press that argument, focusing instead on the state-law and state-court aspects. See Defendants' Opening Brief at 30–31, *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934 (Del. Ch. 2013) (No. 7238-CS) (listing four categories covered by the clause: derivative suits, fiduciary duty, internal affairs and DGCL).

13. Patrick J. Borchers, *Forum Selection Agreements in the Federal Courts After Carnival Cruise: A Proposal for Congressional Reform*, 67 WASH. L. REV. 55, 88 (1992) ("It is quite clear that parties may not, by agreement, create subject matter jurisdiction in courts of limited subject matter jurisdiction.").

14. 15 U.S.C. § 78aa(b) (2012); 6 ALAN R. BROMBERG ET AL., *BROMBERG & LOWENFELS ON SECURITIES FRAUD* § 10:1 (2d ed. 2015) (noting exclusive federal court jurisdiction over 10b-5 and other '34 Act litigation).

that.<sup>15</sup>

## B. FEE-SHIFTING AND THE EXPANSION TO ALL SHAREHOLDER LITIGATION

What started as court approval of provisions that shape disputes over state-law governance claims has since expanded. The second test of a litigation provision was of a broadly worded fee-shifting provision in a case involving both antitrust claims and state-law fiduciary duty claims.<sup>16</sup> ATP Tour (the ATP) was a Delaware non-stock corporation that operated a men's tennis tour. In the course of reorganizing the tour, the board adopted several bylaws, including a fee-shifting bylaw:

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.<sup>17</sup>

Members sued the ATP to challenge certain changes to the tour, but lost on all claims.<sup>18</sup> The ATP then sought to recover fees from plaintiffs, pointing to the fee-shifting bylaw.<sup>19</sup> A Delaware federal court certified the question of the bylaw's validity to the Delaware Supreme Court.<sup>20</sup>

The Delaware Court's response was succinct: the bylaw was facially

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15. See, e.g., *Luce v. Edelstein*, No. 85 CIV. 4064, 1985 WL 2257, at \*2 (S.D.N.Y. Aug. 8, 1985) (enforcing an exclusive forum provision designating a state court for '33 Act claims, for which the state and federal courts had concurrent jurisdiction, while retaining the '34 Act claims because jurisdiction was exclusive in the federal courts); 6 BROMBERG ET AL., *supra* note 14, § 10:1 ("A forum selection clause in the parties' agreement specifying exclusive jurisdiction in a state court does not deprive a federal court of jurisdiction over 10b-5 and other 1934 Act claims which cannot be brought in state court.").

16. Complaint, at ¶ 11, *Deutscher Tennis Bund v. ATP Tour, Inc.*, 2007 WL 4425678 (D. Del. Mar. 28, 2007) (No. 07CV00178) ((Count IV (Sherman Act); Count VII (fiduciary duties); Count VIII (tortious interference with contractual and business interests)).

17. *Deutscher Tennis Bund v. ATP Tour Inc.*, 480 F. App'x 124, 126 (3d Cir. 2012) (quoting Article 23 of the Amended and Restated Bylaws of ATP Tour, Inc.).

18. *Deutscher Tennis Bund v. ATP Tour, Inc.*, 610 F.3d 820, 841 (3d Cir. 2010).

19. *Deutscher Tennis Bund v. ATP Tour, Inc.*, CIVA 07-178, 2009 WL 3367041, at \*1 (D. Del. Oct. 19, 2009), *vacated*, 480 F. App'x 124 (3d Cir. 2012).

20. *Deutscher Tennis Bund v. ATP Tour, Inc.*, CV 07-178, 2013 WL 4478033, at \*1 (D. Del. Aug. 20, 2013).

valid.<sup>21</sup> No law forbade its adoption.<sup>22</sup> Moreover, “[a] bylaw that allocates risk among parties in intra-corporate litigation would also appear to satisfy” the requirements in § 109(b) that a bylaw “relat[e] 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.”<sup>23</sup> Finally, deterring litigation was not by itself an improper purpose.<sup>24</sup> The Court noted that the opinion reached only facial validity; it did not judge whether the bylaw had been adopted “by the appropriate corporate procedures and for a proper corporate purpose”—both requirements for enforcing such a bylaw.<sup>25</sup>

Fee-shifting clauses adopted since *ATP Tour* have been broadly worded, reaching other shareholder litigation, including that based in the federal securities laws. Some reach all shareholder claims against the company<sup>26</sup> or “any claim or counterclaim . . . against the Company and/or any Director, Officer, Employee or Affiliate”<sup>27</sup> Others specifically define covered “internal matter[s]” to include both state corporate law claims and federal securities suits.<sup>28</sup> In addition to the language of these clauses, other evidence suggests that their intended reach was expansive. For instance, counsel for a corporation that had adopted a fee-shifting bylaw explicitly said that it had been prompted by a securities class action.<sup>29</sup>

In sum, a key development from *Boilermakers* to *ATP Tour* and from forum selection to fee-shifting was an expansion beyond the core competency of state corporate law to broad provisions reaching all sorts of shareholder litigation.

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

22. *Id.* at 557–58.

23. *Id.* at 558; DEL CODE ANN. tit. 8, §109(b) (2015).

24. 91 A.3d 554, 559.

25. *Id.*

26. Amended and Restated Memorandum and Articles of Association of Alibaba Group Holding Limited, § 173, available at <http://www.sec.gov/Archives/edgar/data/1577552/000119312514333674/d709111dex32.htm>.

27. See, e.g., The LGL Grp., Current Report (Form 8-K) (June 17, 2014) (covering “any claim or counterclaim . . . against the Company and/or any Director, Officer, Employee or Affiliate”).

28. Hemispherx Biopharma, Current Report (Form 8-K) (July 10, 2014) (defining covered “Internal Matter” as “(i) any derivative action or proceeding brought on behalf of or in the right of the Company, (ii) any action asserting a claim of breach of a fiduciary duty owed by any director, officer or other employee of the Company to the Company or the Company’s security holders, (iii) any action asserting a claim arising pursuant to any provision of the Delaware General Corporation Law, (iv) any action asserting a claim arising pursuant to any provision of the federal securities laws, and any regulation promulgated pursuant thereto, or (v) any action asserting a claim governed by what is known as the internal affairs doctrine”); see also Smart & Final Stores Registration Statement (2014) (applying a fee-shifting provision to “any current or prior stockholder or anyone on their behalf” who initiated “any action, suit or proceeding, whether civil, criminal, administrative or investigative or asserts any claim or counterclaim” against the corporation or its officers, directors, etc.).

29. Transcript of Scheduling Conference and Discussion Concerning Amendment of Bylaw at 23, *Kastis v. Hemispherx Biopharma*, No. 8657-CB (Del. Ch. Aug. 15, 2014) (“I think [plaintiffs] will find out [from discovery] that there’s securities litigation in the Eastern District of Pennsylvania which is really the central reason for adoption of the bylaw.”).

## II. LIMITING THE SCOPE OF LITIGATION PROVISIONS

This last section takes up two questions about limiting the scope of litigation provisions: *why* should they be limited, and *how* could courts implement this limit?

Why restrict the scope of these litigation provisions in corporate bylaws and charters to core state law claims? One underlying rationale for making these distinctions is based on the source and structure of the legal claims. I argue elsewhere that a key concern when addressing litigation bylaws and charter provisions should be preventing backdoor waiver of substantive law provisions.<sup>30</sup> For instance, if a charter or bylaws could not eliminate duty of loyalty obligations directly, they should not be able to do so indirectly by eliminating all enforcement of these duties.<sup>31</sup> Because substantive state corporate law is often enabling rather than mandatory, it lends itself to experimentation with litigation provisions.<sup>32</sup> Securities law is different, however, with many more mandatory substantive terms.<sup>33</sup> If the main concern is preventing waiver of mandatory provisions, litigation provisions should be similarly limited.<sup>34</sup>

Making these distinctions is also prudent for the adopting boards, as some existing legal advice suggests.<sup>35</sup> Uncertainty is inherent in adopting clauses with a broad scope. Shareholder reaction (and the reaction of the proxy advisory firms) is a concern regardless of the provision's scope, but reaching beyond state corporate governance raises at least two particular issues. First, the courts have not answered whether federal law preempts fee-shifting provisions and other litigation provisions. In *ATP Tour* itself, the federal court was faced with the question whether federal antitrust laws preempted the fee-shifting bylaw. Rather than answer, it certified questions about the bylaw's validity to the state court. It left the preemption question open. As some commentary suggests, preemption in this context, whether by antitrust or by the securities laws, is not subject to easy analysis.<sup>36</sup>

Second, the enforceability of litigation provisions is in flux, but litigation provisions limited to state-law corporate governance are more stable than more expansive versions. That is because litigation provisions can be paired with exclusive forum selection, as several examples (including the

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30. See Winship, *supra* note 1 (manuscript at 34–39).

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. See, e.g., Richard A. Rosen & Stephen P. Lamb, *Adopting and Enforcing Effective Forum Selection Provisions in Corporate Charters and Bylaws*, PAUL WEISS (Jan. 8, 2015), available at [http://www.paulweiss.com/media/2756381/fsc\\_article.pdf](http://www.paulweiss.com/media/2756381/fsc_article.pdf) (recommending that “[a]n effective, enforceable forum selection clause should be drafted to apply only to disputes arising out of the company’s governance and internal affairs, of the sort governed by the law of the state in which the company is incorporated”).

36. John C. Coffee, Jr., Testimony before SEC Investor Advisory Committee: “Fee-Shifting Bylaws: Can They Apply in Federal Court? – The Case for Preemption” (Oct. 9, 2014), available at [http://www.law.columbia.edu/null/download?&exclusive=filemgr.download&file\\_id=623364](http://www.law.columbia.edu/null/download?&exclusive=filemgr.download&file_id=623364).



bylaws adopted by the ATP) suggest.<sup>37</sup> The effect is that state-law corporate governance actions that fall within the scope of the exclusive forum clauses would be decided in Delaware courts, where the law about the validity of litigation provisions is (at least slightly) more developed. In contrast, a litigation provision that reaches securities litigation would not be within an exclusive forum clause and would not be restricted to the Delaware court.

Limiting the reach of litigation provisions at least along these lines<sup>38</sup> is also prudent for courts, particularly Delaware courts. In part, to do otherwise may invite action by the SEC. In the 1990s and again in 2012, the SEC rejected arbitration clauses in articles of incorporation included in registration statements.<sup>39</sup> Broadly worded litigation provisions could meet the same fate. The SEC's approach to arbitration provisions and Delaware's approach to litigation provisions sometimes seem to be running in parallel, without ever meeting. Expansive scope might force them to converge. Federal regulation or legislation is another possibility, particularly if Delaware courts enforce expansive provisions. Indeed, the drafters of the Delaware legislation acknowledged just this risk in urging the state legislature to act: to permit fee-shifting that would undermine fiduciary duties might make other regulators "feel compelled to step in."<sup>40</sup>

How could courts distinguish between (permissible and possibly desirable) provisions limited to state corporate law claims, on the one hand, and limits on federal securities law claims and other shareholder litigation, on the other? The first suggestion has to do with litigation bylaws in particular, and that is to continue down a path taken by *Boilermakers*.<sup>41</sup> The permissible role of bylaws is governed by §109(b) of the Delaware corporate code: 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."<sup>42</sup> In *Boilermakers*, Delaware Chancery Court found the exclusive forum bylaw valid in part because it "only regulate[d] suits brought by stockholders as stockholders in cases governed by the internal

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37. Winship, *supra* note 1 (manuscript at 20–21) (giving examples of bundled provisions).

38. The limit to state corporate governance is not necessarily the only basis for limiting these provisions. *Id.* (manuscript at 34–39) (suggesting other limits, especially on provisions that functionally waive substantive rights).

39. Miles Weiss et al., *Carlyle Drops Class-Action Lawsuit Ban as Opposition Mounts*, BLOOMBERG (Feb. 4, 2012), <http://www.bloomberg.com/news/2012-02-03/carlyle-drops-class-action-lawsuit-ban.html> (noting that the SEC refused to accelerate a registration statement that contained an arbitration clause and reporting that an SEC spokesperson said that "[w]e advised [Carlyle] that the staff was not prepared to clear the filing with the mandatory-arbitration provision included").

40. Explanation of Council Legislative Proposal, at 6, available at <http://www.dela.warelitigation.com/files/2015/03/COUNCIL-SECOND-PROPOSAL-EXPLANATORY-PAPER-3-6-15-U0124513.docx> at 6.

41. *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 939 (Del. Ch. 2013).

42. DEL. CODE ANN. tit. 8, § 109(b) (2015).

affairs doctrine” so “plainly relate[d]” to the “‘business of the corporation[s],’ the ‘conduct of [their] affairs,’ and regulate[d] the ‘rights or powers of [their] stockholders.’”<sup>43</sup> It fit because it clearly concerned state corporate internal affairs. Courts could extend this reasoning, considering this to be an outer limit rather than just a safe harbor.<sup>44</sup>

The bylaw in *ATP Tour* was more expansive than that in *Boilermakers*, as noted above. Because the underlying action involved antitrust claims as well as state law fiduciary duty claims, one could read the opinion to validate the use of fee-shifting clauses in the context of shareholders’ federal claims. Some grounds exist for distinguishing *ATP Tour*, however. The *ATP Tour* court described its holding precisely: “[F]ee-shifting provisions in a *non-stock* corporation’s bylaws can be valid and enforceable under Delaware law.”<sup>45</sup> Although the decision’s application to for-profit corporations has been widely assumed, the Delaware Supreme Court has not decided this issue, so these grounds might broadly distinguish it.<sup>46</sup> What was permissible in non-stock corporations could be impermissible in the context of stock corporations. This approach would not require the litigation bylaw to be struck down altogether. The court could instead preserve its valid aspects, construing it against a background limit on scope.<sup>47</sup>

*ATP Tour* may be further distinguished by its procedural posture. The Delaware court was responding to a certified question from a federal court, so could consider only the facial validity of the provision as a matter of law.<sup>48</sup> The court was disabled from making finer distinctions between, for instance, fees in the underlying action relating to federal antitrust claims versus those relating to fiduciary duty violations.<sup>49</sup>

Objections to bylaw provisions may simply provide a reason to locate litigation provisions in articles of incorporation instead. For provisions in corporate charters, courts could implement this limit on scope by refining their analysis of how bylaws and charters function as contracts. If corporate bylaws and charters are deemed components of an intracorporate contract, what is the scope of that contract? Are they contracts about the shareholder as a “holder of corporate stock and a constituent of the corporate entity” but not about the shareholder as a “purchaser or seller,” as

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43. 73 A.3d at 939.

44. See Lawrence A. Hamermesh & Norman M. Monhait, Fee-Shifting Bylaws: A Study in Federalism, available at <http://blogs.law.widener.edu/delcorp/2015/06/29/fee-shift-ing-bylaws-a-study-in-federalism/#sthash.WTx3qqji.DdHzNsXF.dpbs>.

45. *Id.* (emphasis added).

46. Henry duPont Ridgely, The Emerging Role of Bylaws in Corporate Governance, adapted from the Keynote Address at the SMU Corporate Counsel Symposium, at 19 (October 31, 2014) (making the point that *ATP Tour*’s application to for-profit companies is an open question), available at [http://www.delawarelitigation.com/files/2014/11/The\\_Emerging\\_Role\\_of\\_Bylaws\\_in\\_Corporate\\_Governance-copy.pdf](http://www.delawarelitigation.com/files/2014/11/The_Emerging_Role_of_Bylaws_in_Corporate_Governance-copy.pdf).

47. *Frantz Mfg. Co. v. EAC Indus.*, 501 A.2d 401, 407 (Del. 1985) (“[Bylaws] are presumed to be valid, and the courts will construe the bylaws in a manner consistent with the law rather than strike down the bylaws.”).

48. *Deutscher Tennis Bund v. ATP Tour, Inc.*, 2013 WL 4478033, at \*4.

49. Hamermesh & Monhait, *supra* note 44.

one commentator has suggested?<sup>50</sup> If so, contracting about federal securities litigation is beyond their scope. This view finds some support in a recent opinion by Vice Chancellor Laster, in which he categorized a 10b-5 claim under the federal securities law as “a personal claim akin to a tort claim for fraud,” which was “not a property right associated with shares.”<sup>51</sup>

Questions about the contractual scope could also be framed as the interpretation of § 102, which defines the contents of the certification of incorporation.<sup>52</sup> Corporations may include “[a]ny 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 . . . if such provisions are not contrary to the laws of this State.”<sup>53</sup> The “powers” would be powers related to the internal relations and corporate governance that are the traditional realm of state corporate law.

Determining the scope of the contract is not necessarily the end of the inquiry. Contractual terms sometimes reach extra-contractual (but related) claims. In other contractual settings, for instance, courts have interpreted when a fee-shifting or other litigation provision covers not only breach of contract, but related torts or statutory claims.<sup>54</sup> In these circumstances, courts generally focus on the intent of the contracting parties to determine the provision’s scope.<sup>55</sup> Intent is complicated in the context of corporate charters and bylaws. No one claims that shareholders have expressly agreed to negotiated terms. Instead, shareholders are deemed to consent because they are bound by a vote of the majority of shareholders, because they have agreed to a particular governance structure that allowed directors to introduce bylaws (“contractual terms”) unilaterally,<sup>56</sup>

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50. Ann Lipton, *Manufactured Consent: The Problem of Arbitration Clauses in Corporate Charters and Bylaws*, 104 GEO. L.J. (forthcoming 2015) (noting that “American law distinguishes between the contract that governs the transfer of a security between buyer and seller, and the ‘contract’ that forms the corporation and allocates power between its managers and shareholders”), available at <http://ssrn.com/abstract=2572014>; see also Barbara Black, *Eliminating Securities Class Actions Under the Radar*, 2009 COLUM. BUS. L. REV. 802, 838 n.172 (noting limits to the scope of provisions that govern shareholders’ ownership rights).

51. *In re Activision Blizzard Inc. Stockholder Litigation*, C.A. No. 8885-VCL (Del. Ch. May 21, 2015), slip op. at 50.

52. DEL. CODE ANN. tit. 8, § 102(b)(1) (2015).

53. *Id.*

54. PRACTICAL LAW COMMERCIAL, CHOICE OF LAW AND CHOICE OF FORUM: KEY ISSUES, Practical Law Practice Note 7-509-6876 (2015) (noting that parties to a contractual forum selection provision must “consider whether the clause conveys jurisdiction on the selected forum to adjudicate extra-contractual matters” and that parties “parties typically try to capture extra-contractual matters by including language in the choice of forum clause that expands its scope to include tort, fraud, statutory and equitable claims”).

55. 14D CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 3803.1 (4th ed. 2015) (“Courts are governed by the intent of the parties and tend to conclude that a contract-based clause will apply to torts that arise from the contractual relationship.”).

56. See, e.g., *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 940 (Del. Ch. 2013) (“[B]ylaws, together with the certificate of incorporation and the broader

or because they bought shares with the knowledge of a particular provision.<sup>57</sup> So what is their “intent” about the scope of the provision? Explicit language matters. But courts might also consider shareholder expectations when agreeing to the governance structure, and that expectation might reasonably be limited to the type of contracting over internal corporate governance that is the central subject of the intracorporate bargain.

In the context of fee-shifting provisions, recent Delaware legislation provides another possible way to limit the scope of litigation provisions. The statute eliminated certain categories of fee-shifting in Delaware for-profit stock companies.<sup>58</sup> As noted above, the legislation applies to “internal corporate claims.” Ambiguities in the statutory language have led to a debate about its scope. Is a claim of securities fraud an internal corporate claim? Some, including those involved in drafting the initial legislation, say that the statute does not apply to federal securities claims because the duties breached, especially under 10b-5, “do not arise from a director or officer’s duty to the corporation or its stockholders.”<sup>59</sup> Others say yes, pointing out that the statute fails to limit coverage to claims under Delaware law and uses phrases such as “including claims in the right of the corporation.”<sup>60</sup> At least when a fee-shifting provision is at issue, a court may have some room to read the new statutory provisions as prohibiting fee-shifting clauses that apply to certain federal securities actions.

The final way for a court to cabin these provisions would be to do so when it reviews how and why a particular provision was adopted. As the Delaware courts have suggested, the backstop for the court’s evaluation of these clauses is the “as-applied” test that looks to whether such provisions were adopted inequitably.<sup>61</sup> This solution is partial: reaching this stage of litigation may be costly, particularly in the context of fee-shifting, which may discourage plaintiffs from pursuing an initial challenge. But a court might consider prevention of federal securities litigation to be an

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DGCL, form part of a flexible contract between corporations and stockholders, in the sense that the certificate of incorporation may authorize the board to amend the bylaws’ terms and that stockholders who invest in such corporations assent to be bound by board-adopted bylaws when they buy stock in those corporations.”).

57. Lawrence A. Hamermesh, *Consent in Corporate Law*, 70 *BUS. LAW.* 161, 161–62 (2014).

58. Del. S. Bill 75.

59. Hamermesh & Monhait, *supra* note 44; *see also* John C. Coffee, Jr., What Happens Next?, *Bank & Corporate Governance Law Reporter*, available at <http://www.lawreporters.com/jun15b&c.pdf> (arguing that the Delaware legislation, “read strictly, permits fee-shifting bylaws that apply to federal securities, antitrust and fraud actions”).

60. Neil J. Cohen, Does Delaware Bill 75 Cover Fee Shifting in Securities Cases?, *Bank & Corporate Governance Law Reporter*, available at <http://www.lawreporters.com/jun15b&c.pdf>.

61. *Schnell v. Chris-Craft Indus., Inc.*, 285 A.2d 437, 439 (Del. 1971) (“[I]nequitable action does not become permissible simply because it is legally possible.”); *Winship*, *supra* note 1, (manuscript at 53) (pointing out that Delaware courts consider equitable evaluation an important shareholder protection).

inequitable purpose under this test, particularly given shareholder's expectations about the scope of the intracorporate contract.

### III. CONCLUSION

The emergence of litigation provisions has put pressure on the split between the federal and state domain over shareholder litigation. As broadly worded clauses are introduced and tested in court, they challenge and sometimes stretch assumptions about the proper subject matter for these intracorporate bargains. This essay proposes that courts distinguish among these litigation provisions based on whether they reach state corporate governance claims or other types of shareholder litigation, including securities litigation, with an eye to limiting these clauses to the core category of state-law corporate governance.