

June 9, 2014

To Members of the Delaware General Assembly:

On behalf of the U.S. Chamber Institute for Legal Reform (ILR) – an affiliate of the U.S. Chamber of Commerce dedicated to making our nation’s overall civil legal system simpler, fairer and faster for all participants – I urge you to oppose SB 236.

Delaware’s legal system and its courts are respected nationally for their fairness and for their leadership on issues of corporate law. In fact, Delaware has been at the top of the Harris Interactive survey of state civil legal systems since 2002.

Notwithstanding the Delaware courts’ deep experience on these matters, SB 236 would overturn the Delaware Supreme Court’s unanimous ruling in the *ATP Tour* case – and it would do so on an extraordinarily expedited basis: the decision was issued barely one month ago on May 8, 2014. As you know, the Court held that a Delaware non-stock company may adopt a bylaw obligating the losing party in intra-corporate litigation to pay the fees and costs incurred by the prevailing party. The decision would also likely apply equally to stock companies.

Abusive intra-corporate litigation has become an extremely serious problem that imposes very substantial and wholly unjustified costs upon shareholders in Delaware companies. For example, in the merger and acquisition context:

- Just about every merger or acquisition involving a significant public company becomes a litigation target soon after the deal’s announcement – 94% of all deals valued at over \$100 million were targets of lawsuits; compared to 44% in 2007.¹ No one can seriously believe that *every one* of these transactions was legally flawed.
- Multiple lawsuits filed by different law firms challenge each deal, an average of five in 2013.² Lawsuits typically are filed in different States – 62% of the time in 2013.³ This multiplies the defense costs and increases the leverage to force settlements regardless of the merits.

¹ Cornerstone Research, *Shareholder Litigation Involving Mergers and Acquisitions: Review of 2013 M & A Litigation 1* (2014), available at <http://www.cornerstone.com/getattachment/73882c85-ea7b-4b3c-a75f-40830eab34b6/Shareholder-Litigation-Involving-Mergers-and-Acqui.aspx>.

² *Id.*

³ *Id.*

- The overwhelming majority of cases (more than 80%) settle, typically with a fig leaf of some additional, practically meaningless disclosure for shareholders accompanied by large fee awards for plaintiffs' counsel.⁴

Indeed, members of the Court of Chancery have commented on the abusive nature of some of these lawsuits.⁵

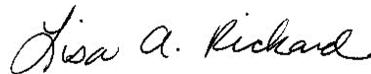
A company's shareholders suffer when one or both parties to a merger transaction are forced to expend millions of dollars defending suits in multiple courts and paying multiple attorneys' fee awards in connection with settlements necessary to eliminate legal uncertainty and allow the transaction. Those expenditures reduce the funds available to integrate the two companies effectively, expand the business, or create new products, imposing a "merger tax" that benefits lawyers and hurts shareholders.⁶

The Delaware Supreme Court's *ATP* decision gives corporations a way to protect their shareholders against these costs of abusive litigation. The possibility of fee shifting will deter the filing of abusive, duplicative lawsuits.

Why would the Legislature so quickly deprive shareholders of the opportunity to obtain that protection – overturning the decision of a Court that is widely respected as the leader in corporate law? Furthermore, why would it do so without providing an alternative deterrent to the abusive litigation that is a well-recognized problem?

We strongly urge you to reject SB 236 and refuse to overturn the Supreme Court's decision.

Sincerely,



Lisa A. Rickard

⁴ Steven Davidoff, *Corporate Takeover? In 2013, a Lawsuit Almost Always Followed*, N.Y. TIMES (Jan. 10, 2014), available at http://dealbook.nytimes.com/2014/01/10/corporate-takeover-in-2013-a-lawsuit-almost-always-followed/?_php=true&_type=blogs&_r=0.

⁵ *In re Transatlantic Holdings Inc. Shareholders Litigation*, C.A. No. 6574-CS, 2013 WL 1191738, at *3 (Del. Ch. Mar. 8, 2013); see also Leo E. Strine, Jr., Lawrence A. Hamermesh, Matthew C. Jennejohn, *Putting Stockholders First, not the First-Filed Complaint Rule 9-26* (Widener Law School Legal Studies Research Paper Series no. 13-25), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2200499&download=yes.

⁶ This phenomenon is discussed in ILR's report *The Trial Lawyers' New Merger Tax* (Oct. 2012), available at http://www.instituteforlegalreform.com/uploads/sites/1/M_and_A.pdf.