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FROM: PROFESSORBAINBRIDGE.COM

THE CASE FOR ALLOWING FEE SHIFTING BYLAWS AS A PRIVATELY ORDERED SOLUTION TO THE SHAREHOLDER LITIGATION EPIDEMIC

Stephen M. Bainbridge[†]

I had been planning on writing a law review article on fee shifting bylaws, but I suspect that events will overtake the inevitably lengthy publishing process. This seems to be one of those times when blog publishing is the most effective way of getting the ideas out there.

In 2006, the board of directors of ATP Tour, Inc. (ATP), a Delaware nonstock membership corporation[1] that operates a professional men's tennis tour, amended ATP's bylaws to provide in pertinent part that:

> 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

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[†] Stephen Bainbridge is the William D. Warren Distinguished Professor of Law at UCLA School of Law. Originals at www.professorbainbridge.com/professorbainbridgecom/2014/11/the-case-for-allowing-fee-shifting-bylaws-as-a-privately-ordered-solution-to-the-shareholder-litigat.html (Nov. 17, 2014) (vis. Sept. 4, 2015).

[1] The Delaware General Corporation Law (DGCL) defines a nonstock corporation as "any corporation organized under [the DGCL] that is not authorized to issue stock." Del. Code Ann., tit. 8, § 114(d)(4). A nonstock corporation can be either for-profit or nonprofit. *See id*. § 114(c)(3) (defining a "nonprofit nonstock corporation" as "a nonstock corporation that does not have membership interests"). Members of a for-profit nonstock corporation have a "membership interest," which is defined as "a member's share of the profits and losses of [the] corporation, or a member's right to receive distributions of [the] corporation's assets, or both." *Id*. § 114(d)(3). ATP is a nonprofit nonstock corporation. *See* Deutscher Tennis Bund v. ATP Tour Inc., 480 F. App'x 124, 125 (3d Cir. 2012) (explaining that "ATP is a not-for-profit Delaware membership corporation").

> 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.[2]

The Delaware Supreme Court upheld the bylaw as valid.

These fee shifting "bylaws impose a 'loser pays' rule that transfers a company's costs and expenses in shareholder litigation to the plaintiff shareholder if the plaintiff is unsuccessful."[3] At least 24 for profit Delaware business corporations have now adopted them. It is widely assumed that the legal basis for upholding such a bylaw in the context of a membership corporation will carry over to a stock corporation.

As a WSJ opinion column recently reminded us, however, the Delaware legislature may yet intervene:

> Weeks after the [Delaware Supreme Court's *ATP*] ruling, the Delaware legislature, cheered on and supported by the powerful state plaintiffs bar, attempted to pass a law "fixing" the Delaware Supreme Court's decision. Far from a fix, the bill would have outlawed a company's ability to use the fee-shifting tool to protect itself against frivolous litigation.
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> Loud protests from national, state and local business groups, as well as individual companies caused the legislature to rethink its approach. But the legislature hit only the pause button, asking the Delaware Bar's leadership to "study" the matter this fall before recommending to the legislature a revised provision to be considered early next year.[4]

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[2] ATP Tour, Inc. v. Deutscher Tennis Bund, 91 A.3d 554, 556 (Del. 2014) (quoting ATP Bylaw Article 23.2(a)).

[3] DavisPolf Briefing: Governance, The Latest on Fee-Shifting Bylaws (Oct. 23, 2014) [www.davispolk.com/briefing/corporategovernance/latest-fee-shifting-bylaws/].

[4] Lisa A. Richard, Delaware Flirts With Encouraging Shareholder Lawsuits, Wall St. J., Nov. 14, 2014 [www.wsj.com/articles/lisa-rickard-delaware-flirts-with-encouraging-shareholder-lawsuits-1416005328?tesla=y&mg=reno64-wsj].

The purpose of this essay is to explain the case for fee shifting bylaws and, accordingly, to argue that the Delaware legislature should not ban them legislatively.

WHY ARE FEE SHIFTING BY LAWS NEEDED?

In 2006-2007, there were three major reports studying the declining competitiveness of U.S. capital markets: the Bloomberg-Schumer Report,[5] the Paulson Committee Interim Report,[6] and the Chamber Report.[7] Taken together, and evaluated in light of subsequent developments, the evidence they gathered confirmed that the U.S. capital markets became less competitive vis-à-vis other markets in the last decade. By why?

In 2008, the Supreme Court handed down one of the most consequential securities cases to come before it in many years, *Stoneridge Investment Partners v. Scientific-Atlanta*.[8] What makes *Stoneridge* instructive for our purposes is not the specific legal issues or the holding, but rather the Supreme Court majority's explicit reliance on policy considerations and the content of those considerations:

> The practical consequences of an expansion [of Rule 10b-5 liability] . . . provide a further reason to reject petitioner's approach. In *Blue Chip*, the Court noted that extensive discovery and the potential for uncertainty and disruption in a lawsuit allow plaintiffs with weak claims to extort settlements from innocent companies. Adoption of petitioner's approach would expose a new class of defendants to these risks. As noted in *Central Bank*, contracting parties might find it necessary to protect against these threats, raising the costs of doing business. Overseas firms with no other exposure to our securities laws could be deterred from doing business here. This, in turn, may raise the cost of being a publicly traded company under our law and shift securities

[5] Michael R. Bloomberg & Charles E. Schumer, Sustaining New York's and the U.S.' Global Financial Services Leadership (2007) [hereinafter the Bloomberg-Schumer Report].

[6] Comm. on Capital Mkts. Reg., Interim Report of the Committee on Capital Markets Regulation (2006). The Committee on Capital markets regulation – or, as it is better known – the Paulson Committee subsequently issued a follow up report identifying thirteen competitive measures that the Committee tracks on a quarterly basis. Comm. on Capital Mkts. Regulation, The Competitive Position of the U.S. Public Equity Market (2007) [hereinafter the Paulson Committee Report].

[7] U.S. Chamber of Comm., Capital Markets, Corporate Governance, and the Future of the U.S. Economy (2006) [hereinafter the Chamber Report].

[8] Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc., 552 U.S. 148 (2008).

offerings away from domestic capital markets.[9]

Like all three of the capital market competiveness reports, the Supreme Court majority thus explicitly recognized the risk that our expansive securities anti-fraud legal regime poses to the competitiveness of our markets.

The point is not that we should live in a world of caveat emptor. An effective anti-fraud regime has obvious benefits. It serves to compensate defrauded investors. It deters fraud. It provides a bond making issuer disclosures more credible and thereby lowers the cost of capital. The question remains, however, whether the current U.S. anti-fraud regime imposes costs that may outweigh or, at least, reduce these benefits.

An affirmative answer to that question is suggested by a survey of global financial services executives, which found that the litigious nature of U.S. society and capital markets has a negative impact on the competitiveness of those markets.[10] The key problem appears to be the prevalence of private party securities fraud class actions, which do not exist in most other major capital market jurisdictions.

Between 1997 and 2005 there was a steady increase in both the number of securities class action filings and the average settlement value of those suits.[11] The total amount paid in securities class actions peaked in 2006 at over $10 billion, even excluding the massive $7 billion Enron settlement.[12] The vast majority of such settlement payments historically have been made either by issuers or their insurers, rather than by individual defendants.[13] As a result, the vast bulk of securities settlement payments come out of the corporate treasury, either directly or indirectly in the form of higher insurance premia. In either case, settlement payments reduce the value of the residual claim on the corporation's assets and earnings. In effect, the company's current shareholders pay the settlement, not the directors or officers who actually committed the alleged wrongdoing.

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[9] Id. at 163-64 (citations omitted).

[10] Bloomberg Schumer Report, supra note 1, at 73.

[11] See Paulson Committee Report, supra note 2, at 75. A mid-decade dip in filings was probably caused by the lack of volatility in U.S. stock markets during the period and the fading of the substantial litigation generated by the bursting of the dot-com bubble. Bloomberg-Schumer Report, supra note 1, at 74.

[12] Statement of the Financial Economists Roundtable on the International Competitiveness of U.S. Capital Markets, 19 J. Applied Corp. Fin. 54, 55 (2007) [hereinafter FER].

[13] Id.

The effect of securities class actions thus is a wealth transfer from the company's current shareholders to those who held the shares at the time of the alleged wrongdoing. In the case of a diversified investor, such transfers are likely to be a net wash, as the investor is unlikely to be systematically on one side of the transfer rather than the other. Because there are substantial transaction costs associated with such transfers, moreover, the diversified investor is likely to experience an overall loss of wealth as a result of the private securities class actions. Legal fees to plaintiff counsel typically take 25-35% of any monetary class action settlement, for example, and the corporation's defense costs are likely comparable in magnitude.[14]

The circularity inherent in the securities class action process reduces the effectiveness of private anti-fraud litigation as both a deterrent and means of compensation. As to deterrence, because it is the company and not the individual wrongdoers that pays in the vast majority of cases, the system fails to directly punish those individuals. As to compensation, the transaction costs associated with securities litigation ensure that investors are unlikely to recover the full amount of their claims. Indeed, there is evidence that investors recover only two to three percent of their economic losses through class actions.

The analysis to this point has implicitly assumed that all securities fraud class actions are meritorious. When one considers the potential for frivolous or nuisance litigation, the potential impact of litigation on the capital markets is compounded. To be sure, the Private Securities Litigation Reform Act of 1995 and the Securities Litigation Uniform Standards Act of 1998 heightened the pleading standards for securities fraud claims, allowed an automatic stay of discovery while a motion to dismiss is pending, created a uniform federal cause of action, and otherwise tried to reduce frivolous securities class action. While there is some empirical evidence that the PSLRA and SLUSA have reduced – but not eliminated – the number of frivolous suits, there is also evidence that they have had the unintended effect of reducing meritorious suits in which pre-filing indicia of fraud are more difficult to identify and plead with particularity as required by the new pleading standard.[15]

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[14] Id.

[15] Stephen J. Choi, The Evidence on Securities Class Actions, 57 Vand. L. Rev. 1465 (2004).

The accurate perception that exposure to the U.S. capital markets significantly increases an issuer's litigation risk has a measurable impact on the attractiveness of those markets. A study of domestic issuers found, for example, that issuers with prior experience with securities fraud class actions and those in standard industry classifications having a high incidence of such litigation tended to resort to offshore financing more often than other issuers.[16] As for foreign issuers, they are "deeply" concerned by the "cost of litigation" associated with securities class actions and "risk of huge enforcement actions."[17]

> When asked which aspect of the legal system most significantly affected the business environment, senior executives surveyed indicated that propensity toward legal action was the predominant problem. Worryingly for New York, the city fares far worse than London in this regard: 63 percent of respondents thought the UK (and by extension London) had a less litigious culture than the United States, while only 17 percent felt the US (and by extension New York) was a less litigious place than the United Kingdom (Exhibit 20). This is a dramatic result, and it is echoed even more strongly by the CEOs surveyed: 85 percent indicated that London was preferable, and not a single one chose New York. . . .
>
> . . . Only about 15 percent [of surveyed senior executives] felt that the US system was better than the UK's in terms of predictability and fairness, while over 40 percent favored the UK in both these regards. The CEOs interviewed also shared this sentiment, although they felt that London's advantage was particularly strong in terms of the predictability. Legal experts indicated that this is a major reason why many corporations now choose English law to govern their international commercial contracts.[18]

Because "the only way foreign companies can protect themselves" from litigation risk "is to move out of the United States altogether," "a lot of companies are doing" precisely that.[19]

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[16] Stephen J. Choi, Assessing the Cost of Regulatory Protections: Evidence on the Decision to Sell Securities Outside the United States (Yale Law & Economics Research Paper No. 253, March 21, 2001), available at SSRN: ssrn.com/abstract=267506.

[17] Howell E. Jackson, Summary of Research Findings on Extra-Territorial Application Of Federal Securities Law, 1743 PLI/Corp 1243, 1253 (May 20, 2009).

[18] Bloomberg-Schumer Report, supra note 1, at 75, 77.

[19] Jackson, supra note 13, at 1254.

The litigation risk problem is not limited to securities class actions. We see essentially identical concerns in areas such as state corporate law derivative litigation. In a seminal empirical study of derivative litigation, Professor Roberta Romano found that derivative litigation is relatively rare.[20] Of those cases that go to trial, shareholder-plaintiffs almost always lose. As is generally true of all litigation, however, most derivative suits settle. Only half of the settled derivative suits resulted in monetary recoveries, with an average recovery of about $6 million. In almost all cases, the legal fees collected by plaintiff counsel exceeded the monetary payments to shareholders. Romano further concluded that nonmonetary relief typically was inconsequential in nature.

Like securities class actions, derivative litigation mainly serves as a means of transferring wealth from investors to lawyers. At best, derivative suits take money out of the corporate treasury and return it to shareholders minus substantial legal fees. In many cases, moreover, little if any money is returned to the shareholders, but legal fees are almost always paid.

As for deterrence, there is no compelling evidence that derivative litigation deters a substantial amount of managerial shirking and self-dealing. To the contrary, there is evidence that derivative suits do not have significant effects on the stock price of the subject corporations, which suggests that investors do not believe derivative suits deter misconduct.[21] There is also substantial evidence that adoption of a charter amendment limiting director liability has no significant effect on the price of the adopting corporation's stock, which suggests that investors do not believe that duty of care liability has beneficial deterrent effects.[22]

CONCLUSION

There is a serious litigation crisis in American corporate law. As Lisa Rickard recently noted, "where shareholder litigation is reaching epidemic levels. Nowhere is this truer than in mergers and acquisitions.

[20] Roberta Romano, The Shareholder Suit: Litigation without Foundation?, 7 J. L. Econ. & Org. 55 (1991).

[21] See Daniel R. Fischel & Michael Bradley, The Role of Liability Rules and the Derivative Suit in Corporate Law: A Theoretical and Empirical Analysis, 71 Cornell L. Rev. 261 (1986).

[22] See, e.g., Michael Bradley & Cindy A. Schipani, The Relevance of the Duty of Care Standard in Corporate Governance, 75 Iowa L. Rev. 1 (1989); Roberta Romano, Corporate Governance in the Aftermath of the Insurance Crisis, 39 Emory L.J. 1155 (1990).

According to research* conducted by the U.S. Chamber Institute for Legal Reform, lawsuits were filed in more than 90% of all corporate mergers and acquisitions valued at $100 million since 2010." There simply is no possibility that fraud or breaches of fiduciary duty are present in 90% of M&A deals. Instead, we are faced with a world in which runaway frivolous litigation is having a major deleterious effect on U.S. capital markets.[23]

Fee shifting bylaws are an appropriate means of addressing the problem through private ordering. On the one hand, they likely will prove an effective deterrent to frivolous litigation:

> Fee-shifting bylaws, if widely adopted, would raise the risk associated with filing these lawsuits and could weed out the weakest ones, said Sean Griffith, a professor at Fordham University's law school.
>
> "This could be a gut check for plaintiffs' lawyers," Mr. Griffith said. "They would have to ask – for the first time, really – how good is my case?"[24]

It is, of course, a question that plaintiff lawyers should have been asking all along. The problem, of course, is that they never do.

On the other hand, bylaws are subject to shareholder amendment, so the most likely result will be a process of give and take between directors and shareholders that results in bylaws whose terms are broadly acceptable to the key constituencies (other than lawyers, of course).

Delaware should uphold these bylaws. But will it? That will be the subject of my next essay.

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* www.instituteforlegalreform.com/uploads/sites/1/M_and_A.pdf.

[23] The evidence seems clear that "that the system is broken, that shareholder suits are being filed regardless of the merits, and that shareholder plaintiffs are imposing a dead weight on society and an unwarranted burden on corporate America and the courts." Marc Wolinsky & Ben Schireson, Deal Litigation Run Amok, 47 Rev. Sec. & Comm. Reg. 1 (Jan. 8, 2014). The authors offer a number of solutions, including an endorsement of fee shifting bylaws.

[24] Liz Hoffman, Shareholder Suits May Prove Costly, Wall St. J., May 18, 2014 [www.wsj.com/articles/SB10001424052702304908304579565850165670972].

FROM: PROFESSORBAINBRIDGE.COM

DELAWARE'S DECISION

VIEWING FEE SHIFTING BYLAWS THROUGH A PUBLIC CHOICE LENS

Stephen M. Bainbridge[†]

In a recent WSJ column,[*] Lisa Rickard did a great job analyzing the decision Delaware's legislature will soon face with respect to fee shifting bylaws:

> Specifically, the controversy hinges on whether a company can adopt bylaws allowing it to claw back some of its legal costs if plaintiffs lawyers bring an abusive shareholder lawsuit and lose in court. . . .
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> The debate over fee shifting was ignited in May, after ATP Tour Inc., the Delaware-incorporated company that oversees men's professional tennis, tried to enforce a fee-shifting provision in its bylaws after it won a lawsuit brought by members challenging changes to the tour schedule and format. The Delaware Supreme Court ultimately determined that ATP was within its rights to adopt the provision under state law.
>
> Weeks after the court's ruling, the Delaware legislature, cheered on and supported by the powerful state plaintiffs bar, attempted to pass a law "fixing" the Delaware Supreme Court's decision. Far from a fix, the bill would have outlawed a company's ability to use the fee-shifting tool to protect itself against frivolous litigation.
>
> Loud protests from national, state and local business groups, as well as individual companies caused the legislature to rethink its approach.

[†] Stephen Bainbridge is the William D. Warren Distinguished Professor of Law at UCLA School of Law. Originals at www.professorbainbridge.com/professorbainbridgecom/2014/11/delawares-decision-viewing-fee-shifting-bylaws-through-a-public-choice-lens.html (Nov. 18, 2014) (vis. Sept. 4, 2015).

[*] www.wsj.com/articles/lisa-rickard-delaware-flirts-with-encouraging-shareholder-lawsuits-1416005328?tesla=y&mg=reno64-wsj.

> But the legislature hit only the pause button, asking the Delaware Bar's leadership to "study" the matter this fall before recommending to the legislature a revised provision to be considered early next year.

In an earlier post, I made the case that the Delaware legislature ought to authorize and validate fee shifting bylaws. But will it?

In this post, I view the problem through a public choice lens. As I see it, there are two questions: (1) What's in the state of Delaware's best interest? (2) What's in the best interest of the key interest group that would be affected by fee shifting bylaws? As we'll see, I think those questions have different answers. Predicting what Delaware will decide is thus quite difficult.

THE LEGISLATURE'S INCENTIVES TO PRESERVING DELAWARE'S DOMINANCE

Back in the nineteenth century state corporation laws gradually moved in the direction of increased liberality, making the incorporation process simpler on the one hand, while at the same time abandoning any effort to regulate the substantive conduct of corporations through the chartering process. In later years, this process became known as the "race to the bottom."[1] Corporate and social reformers believed that the states competed in granting corporate charters. After all, the more charters (certificates of incorporation) the state grants, the more franchise and other taxes it collects. According to this view, because it is corporate managers who decide on the state of incorporation, states compete by adopting statutes allowing corporate managers to exploit shareholders.

Many legal scholars reject the race to the bottom hypothesis.[2] According to a standard account, investors will not purchase, or at least not pay as

[1] See generally William L. Cary, Federalism and Corporate Law: Reflections Upon Delaware, 83 Yale L.J. 663 (1974) (classic statement of race to the bottom hypothesis); see also Lucian Ayre Bebchuk, Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law, 105 Harv. L. Rev. 1437 (1992).

[2] See Ralph K. Winter, Jr., State Law, Shareholder Protection, and the Theory of the Corporation, 6 J. Legal Stud. 251 (1977) (the seminal response to Cary); see also William J. Carney, The Political Economy of Competition for Corporate Charters, 26 J. Legal Stud. 303 (1997); Frank H. Easterbrook, Managers' Discretion and Investors' Welfare: Theories and Evidence, 9 Del. J. Corp. L. 540, 654-71 (1984); Daniel R. Fischel, The "Race to the Bottom" Revisited: Reflections on Recent Developments in Delaware's Corporation Law, 76 Nw. U. L. Rev. 913 (1982); Roberta Romano, The State Competition Debate in Corporate Law, 8 Cardozo L. Rev. 709 (1987); cf. Jonathan R. Macey and Geoffrey P. Miller, Toward an Interest Group Theory of Delaware Corporate Law, 65 Tex. L. Rev. 469 (1987) (public choice-based theory of state competition).

much for, securities of firms incorporated in states that cater too excessively to management. Lenders will not make loans to such firms without compensation for the risks posed by management's lack of accountability. As a result, those firms' cost of capital will rise, while their earnings will fall. Among other things, such firms thereby become more vulnerable to a hostile takeover and subsequent management purges. Corporate managers therefore have strong incentives to incorporate the business in a state offering rules preferred by investors. Competition for corporate charters thus should deter states from adopting excessively pro-management statutes. The empirical research appears to bear out this view of state competition, suggesting that efficient solutions to corporate law problems win out over time.[3]

Whether state competition is a race to the bottom or the top,[4] there is no question that Delaware is the runaway winner in this competition. More than half of the corporations listed for trading on the New York Stock Exchange and nearly 60% of the Fortune 500 corporations are in-

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[3] See Roberta Romano, The Genius of American Corporate Law (1993) (setting forth both an empirical analysis and theoretical arguments challenging race to the bottom hypothesis). As even many advocates of the race to the top hypothesis concede, however, state regulation of corporate takeovers appears to be an exception to the rule that efficient solutions tend to win out. See, e.g., Roberta Romano, Competition for Corporate Charters and the Lesson of Takeover Statutes, 61 Fordham L. Rev. 843 (1993); Ralph K. Winter, The "Race for the Top" Revisited: A Comment on Eisenberg, 89 Colum. L. Rev. 1526 (1989); see also Lucian Ayre Bebchuk and Allen Ferrell, Federalism and Corporate Law: The Race to Protect Managers from Takeovers, 99 Colum. L. Rev. 1168 (1999) (contending that the race to the bottom in takeover regulation may be a general phenomenon).

[4] The empirical data, however, imply a much less vigorous competition than either story claims. At most, it seems that states compete with Delaware to retain local incorporations. With few exceptions (perhaps Pennsylvania and Nevada), states generally are not competing with Delaware for out-of-state incorporations.

The empirical data only comes as a surprise, however, to those bemused by the popular caricature of the debate. Race to the top theorists like Ralph Winter or Roberta Romano never claimed that a Los Angeles-based lawyer sits down and thumbs through all 50 state statutes before deciding where to incorporate a client.

We all know that lawyers play a big role in the decision of where to incorporate. Lawyers are subject to the same bounded rationality constraints everybody else is, as well as the familiar incentives of agency cost economics. Under such conditions, lawyers naturally will adopt a decision-making heuristic; and, home state versus Delaware is far and away the most sensible heuristic.

So the market for corporate charters is better described as a leisurely walk than a race. But so what? Even though Delaware doesn't face as much competition as the caricature of the debate claims, there is still competition: When a firm is incorporated, the lawyer and client often decide between Delaware and the home state. And, of course, many firms periodically consider whether to change their domicile to Delaware via reincorporation.

corporated in Delaware. Proponents of the race to the bottom hypothesis argue that Delaware is dominant because its corporate law is more pro-management than that of other states. Those who reject the race to the bottom theory ascribe Delaware's dominance to a number of other factors: There is a considerable body of case law interpreting the Delaware corporate statute (DGCL), which allows legal questions to be answered with confidence. Delaware has a separate court, the Court of Chancery, devoted largely to corporate law cases. The Chancellors have great expertise in corporate law matters, making their court a highly sophisticated forum for resolving disputes. They also tend to render decisions quite quickly, facilitating transactions that are often time sensitive.[5]

Whether one thinks Delaware's dominance is because the state is winning the race to the top or the race to the bottom, there is no doubt that Delaware benefits significantly from its dominance. Delaware does get an astonishing percentage of state revenues from incorporation fees and franchise taxes. In some years, Delaware's annual revenues from these sources constitute up to 30% of the state's budget – an estimated equivalent of $3,000 for each household of four in the state. Given the importance of franchise taxes and other corporate fees to Delaware's budget it would be surprising if such competition did not suffice to keep Delaware on its toes. If Delaware isn't racing, it is at least fast walking.

The question thus becomes: How would banning fee shifting bylaws affect Delaware's competitive position. In my view, Delaware's competitive position would be adversely affected by doing so.

As I observed in an earlier post,[*] quoting Kevin LaCroix:

> . . . while the Delaware legislative initiative is on hold, at least one legislature has gone forward to provide for the awarding of fees against unsuccessful derivative lawsuit claimants. . . .
>
> . . . the "loser pays' model that the Oklahoma legislation adopts is extraordinary – It represents a significant departure from what is general known as the American Rule, under which each party typically bears its own cost. And unlike the fee-shifting bylaws being debated in Delaware –which would in any

[5] See generally Jill E. Fisch, The Peculiar Role of the Delaware Courts in the Competition for Corporate Charters, 68 U. Cin. L. Rev. 1061 (2000).

[*] www.professorbainbridge.com/professorbainbridgecom/2014/10/oklahoma-leads-on-fee-shifting-bylaws-will-delaware-and-mbca-follow.html.

> event require each company to decide whether it was going to adopt the bylaw (and might therefore be subject to shareholder scrutiny) – the Oklahoma legislation applies to any derivative action in the state, even if the company involved is not an Oklahoma corporation.
>
> If more states follow Oklahoma's lead, Delaware's need to remain at the forefront of corporate law may be enough to overcome the self-interested lobbying by lawyers (both defense and plaintiff) who hate loser pays.

John Coffee has similarly observed* that a ban by "Delaware might fuel an interjurisdictional competition, as other, more conservative states (think, Texas) might seek to lure companies to reincorporate there to exploit their tolerance for such provisions."

The effect of banning fee shifting bylaws on Delaware's dominance might only be marginal, but Delaware has kept its position at the top of the corporate law heap by responding to even marginal threats.

So what's in Delaware's best interest? If you're a Delaware taxpayer, the answer is clear: Endorse and validate fee shifting bylaws.

THE INTEREST GROUP THAT MATTERS

My late friend Larry Ribstein once observed that:

> Professors Jonathan Macey and Geoffrey Miller argue that lawyers may be the group that most influences Delaware corporate law. Delaware lawyers have all of the attributes of a politically powerful interest group: they are already organized into bar associations and maintain an advantage over other groups because they continually learn about the law as a consequence of their profession; they are centered in a single city (Wilmington), in a small state and, therefore, can communicate with each other at minimal costs; and they provide an important service for legislators in drafting legislation on complex commercial and corporate matters.
>
> Delaware lawyers, in essence, are the Delaware legislature, at least insofar as corporate law is concerned. Delaware has one of the three smallest legislatures in the country. Its legislative committees are virtually inactive. Most striking, however, is that few of Delaware's legislators are lawyers. Such legislators are likely to rely on lawyers to

* clsbluesky.law.columbia.edu/2014/10/14/fee-shifting-and-the-sec-does-it-still-believe-in-private-enforcement/.

> supply sophisticated commercial and business legislation. As a result, virtually all of Delaware corporate law is proposed by the Delaware bar, and the bar's proposals invariably pass through the legislature.[6]

The Macey and Miller article to which Ribstein refers exhaustively reviews the various interest groups that might influence the production of Delaware law and conclude that "the bar is the most important interest group within this equilibrium. Thus, the rules that Delaware supplies often can be viewed as attempts to maximize revenues to the bar, and more particularly to an elite cadre of Wilmington lawyers who practice corporate law in the state."[7] They further explain that:

> The Delaware bar is interested in maximizing one specific portion of the indirect costs of Delaware incorporation – fees to Delaware lawyers paid for work on behalf of Delaware corporations. These legal fees are functionally related to the number of charters in Delaware in the sense that the expected legal revenues will increase as the number of corporations chartered in the state increases. Accordingly, the bar would tend to favor low franchise fees, because keeping the fees low will tend to increase the number of Delaware corporations. But the bar could also benefit from legal rules that increase the amount of expected legal fees per corporation, even if such rules, by imposing additional costs on Delaware corporations, reduced the absolute number of firms chartered in the state. If the legal fees gained exceed the fees lost by deterring Delaware incorporation, the bar would prefer to adopt rules that did not serve the interests of the other interest groups within the state. In this respect, the bar's interests are opposed to the interests of all other groups.[8]

How then would fee shifting bylaws affect the income of Delaware lawyers? It seems fair to assume that there will be a net reduction in shareholder litigation as a result of fee shifting bylaws becoming widespread. As Kevin LaCroix observed,[*] quoting the Delaware Supreme Court's ATP Tour decision:

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[6] Larry E. Ribstein, Delaware, Lawyers, and Contractual Choice of Law, 19 Del. J. Corp. L. 999, 1009-10 (1994).

[7] Jonathan R. Macey, Toward an Interest-Group Theory of Delaware Corporate Law, 65 Tex. L. Rev. 469, 472 (1987).

[8] Id. at 503-04.

[*] www.dandodiary.com/2014/07/articles/corporate-governance/though-delaware-legislature-has-tabled-action-upcoming-judicial-review-of-fee-shifting-bylaws-seems-likely/.

> Fee shifting provisions "by their nature, deter litigation."

This would adversely affect not just plaintiff lawyers, but also defense lawyers. After all, fewer lawsuits mean less work for defense litigators too:

> The bar . . . does benefit from increasing the amount of litigation and accordingly would tend to favor litigation-increasing rules . . . . Delaware could stimulate litigation [by making] litigation cheaper by reducing the costs to the parties, especially plaintiffs who make the initial choice of forum.[9]

Both sides of the litigation bar thus have a strong interest in banning fee shifting bylaws. Such bylaws would raise plaintiff costs, deterring lawsuits, reducing fees for all litigators.

Widespread adoption of fee shifting bylaws could also adversely affect transactional lawyers. Litigation risk is a major driver in the level of advisory work. As Jonathan Macey observed, for example, Delaware case law has given corporate directors "significant incentives to cloak their decisions in a dense shroud of process and to take other steps that will generate high fees for lawyers, investment bankers, and other advisors (who, incidentally, are precisely the same people who advise companies to incorporate in Delaware in the first place)."[10] Fee shifting bylaws would reduce those incentives and thus decrease the demand for advisory work by lawyers.

All corporate lawyers – litigators and transactional – have a strong incentive to oppose fee shifting bylaws. Hence, it was no surprise that the Delaware legislature – dominated in this area by the Delaware bar – leaped to ban such bylaws. The business groups that favor fee shifting bylaws were able to delay that action. But the final decision remains pending.

Update: You should check out Brett McDonnell's comment below. Also consider the point being made by Usha Rodrigues[*]:

> Certainly litigators want litigation. But deal lawyers don't want it – at least, not this particular kind of litigation. Indeterminacy over doctrinal areas like good faith is good for transactional types as well as litigators, because it gives them more nuances and risks to have to explain at length to boards as they advise on various types of action. The type of

[9] Id. at 504.

[10] Jonathan Macey, Delaware: Home of the World's Most Expensive Raincoat, 33 Hofstra L. Rev. 1131, 1137 (2005).

[*] www.theconglomerate.org/2014/11/bainbridge-on-fee-shifting-bylaws.html.

fee-shifting bylaw we're discussing, in contrast, is bad for deal lawyers – at least, if you think, as Steve does, that

> There is a serious litigation crisis in American corporate law. As Lisa Rickard recently noted, "where shareholder litigation is reaching epidemic levels. Nowhere is this truer than in mergers and acquisitions. According to research* conducted by the U.S. Chamber Institute for Legal Reform, lawsuits were filed in more than 90% of all corporate mergers and acquisitions valued at $100 million since 2010." There simply is no possibility that fraud or breaches of fiduciary duty are present in 90% of M&A deals. Instead, we are faced with a world in which runaway frivolous litigation is having a major deleterious effect on U.S. capital markets.

If these suits amount to nothing more than a litigation tax on deals, then they discourage deals. And that's bad for deal lawyers.

CONCLUSION

The debate over fee shifting bylaws will come to a head in the Delaware legislature early in 2015. It is shaping up to be a fascinating test of whether the Delaware bar's grip on Delaware corporate law will be strong enough to overcome the incentives Delaware legislators have to remain the most attractive state of incorporation. Because endorsing fee shifting bylaws is the right answer from a policy perspective, those of us who do not have a dog in that specific fight can only hope that the latter position prevails. To end with a classic cliché, however, only time will tell.

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* www.instituteforlegalreform.com/uploads/sites/1/M_and_A.pdf.

FROM: THE FACULTY LOUNGE

ABOVE THE (PUBLIC HEALTH) LAW

HEALTHCARE WORKER DECEPTION & DISOBEDIENCE IN A TIME OF DISTRUST

Michelle N. Meyer[†]

> A physician shall . . . be honest in all professional interactions, and strive to report physicians . . . engaging in fraud or deception, to appropriate entities.
>
> – AMA Principles of Medical Ethics[1]

This is a troubling series of news reports about deception and defiance on the part of some healthcare workers (HCWs) in response to what they believe to be unscientific, unfair, and unconstitutional public health measures:

(1) Ebola Aide Doc: I'm Not Telling My Team To Tell The Truth[2]

> Gavin Macgregor-Skinner, an epidemiologist and Global Projects Manager for the Elizabeth R. Griffin Foundation, who has led teams of doctors to treat Ebola in West Africa, reported that he "can't tell them [his doctors] to tell the truth [to U.S. officials]" on Monday's "CNN Newsroom."

[†] Michelle Meyer is Assistant Professor of Bioethics and Director of Bioethics Policy in the Union Graduate College-Icahn School of Medicine at Mount Sinai Bioethics Program. Originals at www.thefacultylounge.org/2014/10/healthcare-worker-deception-defiance-in-a-time-of-distrust.html (Oct. 29, 2014; Addendum and updates (latest: 4 pm, 10/31) added below) (vis. June 1, 2015).

[1] www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/principles-medical-ethics.page?.

[2] www.breitbart.com/video/2014/10/27/ebola-aide-doc-im-not-telling-my-team-to-tell-the-truth/.

"At the moment these people are so valuable . . . I have to ensure they come back here, they get the rest needed. I can't tell them to tell the truth at the moment because we're seeing so much irrational behavior," he stated. "I've come back numerous times between the U.S. and West Africa. If I come back now and say 'I've been in contact with Ebola patients,' I'm going to be locked in my house for 21 days," Macgregor-Skinner said as his reason for not being truthful with officials, he added, "when I'm back here in the US, I am visiting US hospitals everyday helping them get prepared for Ebola. You take me out for three weeks, who's going to replace me and help now US hospitals get ready? Those gaps can't be filled."

He argued that teams of doctors and nurses could be trusted with the responsibility of monitoring themselves, stating, "When I bring my team back we are talking each day on video conferencing, FaceTime, Skype, text messaging, supporting each other. As soon as I feel sick I'm going to stay at home and call for help, but I'm not going to go to a Redskins game here in Washington D.C. That's irresponsible, but I need to get back to these hospitals and help them be prepared.

UPDATE: Here[3] is the CNN video of his remarks.

(2) Ebola Doctor 'Lied' About NYC Travels[4]

The city's first Ebola patient[5] initially lied to authorities about his travels around the city following his return from treating disease victims in Africa, law-enforcement sources said. Dr. Craig Spencer[6] at first told officials that he isolated himself in his Harlem apartment – and didn't admit he rode the subways, dined out and went bowling[7] until cops looked at his MetroCard the sources said. "He told the authorities that he self-quarantined. Detectives then reviewed his credit-card statement and MetroCard and found that he went over here, over there, up and down and all around," a source said. Spencer finally 'fessed up when a cop "got on the phone and had to relay questions to him through the Health Department," a source said. Officials then re-

[3] www.cnn.com/videos/bestoftv/2014/10/27/exp-macgregor-skinner-intv.cnn.
[4] nypost.com/2014/10/29/ebola-doctor-lied-about-his-nyc-travels-police/.
[5] nypost.com/2014/10/23/nyc-doctor-tests-positive-for-deadly-ebola-virus/.
[6] nypost.com/tag/craig-spencer/.
[7] nypost.com/2014/10/25/biohazard-scrubbing-begins-at-places-visited-by-ebola-doctor/.

traced Spencer's steps, which included dining at The Meatball Shop in Greenwich Village and bowling at The Gutter in Brooklyn.

UPDATE 11PM, 10/30: A spokesperson for the NYC healh department has now disputed[8] the above story, which cites anonymous police officer sources, in a statement provided to CNBC. The spokesperson said: "Dr. Spencer cooperated fully with the Health Department to establish a timeline of his movements in the days following his return to New York from Guinea, providing his MetroCard, credit cards and cellphone." . . . When CNBC asked again if Spencer had at first lied to authorities or otherwise mislead them about his movements in the city, Lewin replied: "Please refer to the statement I just sent. As this states, Dr. Spencer cooperated fully with the Health Department."

(3) Ebola nurse in Maine rejects home quarantine rules[9] [the WaPo headline better captures the gist: After fight with Chris Christie, nurse Kaci Hickox will defy Ebola quarantine in Maine[10]]

Kaci Hickox, the Ebola nurse who was forcibly held in an isolation tent in New Jersey for three days, says she will not obey instructions to remain at home in Maine for 21 days. "I don't plan on sticking to the guidelines," Hickox tells TODAY's Matt Lauer.[11] "I am not going to sit around and be bullied by politicians and forced to stay in my home when I am not a risk to the American public."

Maine health officials have said they expect her to agree to be quarantined at her home for a 21-day period. *The Bangor Daily News* reports.[12] But Hickox, who agreed to stay home for two days, tells TODAY she will pursue legal action if Maine forces her into continued isolation. "If the restrictions placed on me by the state of Maine are not lifted by Thursday morning, I will go to court to fight for my freedom," she says.

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[8] www.cnbc.com/2014/10/29/heres-why-states-dont-trust-voluntary-ebola-quarantines.html.

[9] www.usatoday.com/story/news/nation/2014/10/29/ebola-nurse-maine/18105327/.

[10] www.washingtonpost.com/news/morning-mix/wp/2014/10/29/after-fight-with-chris-christie-nurse-kaci-hickox-defies-ebola-quarantine-in-maine/.

[11] www.today.com/health/nurse-kaci-hickox-says-she-wont-obey-maines-ebola-quarantine-1D80251330.

[12] bangordailynews.com/2014/10/28/health/lawyer-for-fort-kent-nurse-says-she-wont-abide-by-quarantine/.

On the evolving Hickox situation, it's unclear whether – as Hickox herself has suggested – she is already under a mandatory home quarantine order, which she is threatening to defy by leaving her house on Thursday morning and (unless it's been lifted) suing, or whether – as her attorneys say – she is currently under no such quarantine order and is free to leave her house at any time (but is choosing to rest for a couple of days). In any case, Maine has clearly said that it is prepared to get a court order to enforce (or impose) a quarantine order.

More after the jump . . .

It isn't clear whether Hickox will wait for judicial resolution of her legal claim, which surely could be expedited, that home quarantine is unconstitutional before disobeying it. (If anything, statements both she and her lawyers have made suggest that she in fact does not intend to wait, and that she will leave quarantine on Thursday morning regardless of whether things have been resolved in her favor or not.) Even if you disagree with the merits of Maine's policy, it takes more to justify a refusal to let a fairly quick legal process play out, and to defiantly flaunt your Typhoid Mary[13] intentions through multiple media outlets to a country already struggling to keep its fear in check.

Nor is it clear what measures Hickox *is* willing to take to protect the public and her friends and family. Hickox has said that she will continue to take her temperature daily. But I've seen nothing from either her or her lawyers reassuring the public that she plans on adhering even to the relatively more relaxed precautions advised by the CDC.

UPDATE: Maine Governor LePage offered to allow[14] Hickox (and all others in the "some risk" category) to comply with a version of the more relaxed CDC guidelines, rather than home quarantine, but Hickox apparently declined that offer.

UPDATE 2: On 10/30, Maine filed a petition for a court order compelling Hickox to comply with CDC guidelines for asymptomatic people with her exposure level. The court granted[15] that petition, compelling Hickox to comply until such time as the court can consider a permanent order. A hearing on that question is reportedly[16] occuring now (the morning of Oct. 31).

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[13] en.wikipedia.org/wiki/Typhoid_Mary.

[14] www.maine.gov/tools/whatsnew/index.php?topic=Gov+News&id=630562&v=article2011.

[15] www.scribd.com/doc/245106293/Hickox-Temporary-Court-Order-10-30-14.

[16] www.wmtw.com/health/maines-ebola-protocols-mean-quarantine-for-nurse/29379150.

UPDATE 3 (4pm, 10/31): The court issued a new temporary order,[17] superseding the prior one discussed in the above update, finding that the state had met its burden, prior to a full hearing, of clear and convincing evidence that compelling Hickox to do three things – (a) comply with Direct Active Monitoring (public health authorities observe her once/day; a second check-in may be by phone); (b) coordinate her travel to ensure Direct Active Monitoring; and (c) immediately notify authorities if any symptom appears – are all "necessary" (Maine's statutory standard) to protect others from infection. However, the court also found, based on the current record before it, that the state had not met this burden as to the other measures it wanted Hickox to take. The court will issue a final order following a full hearing, to be held Nov. 4 and 5,[18] at which additional evidence and/or legal arguments may be heard.

The newly released CDC guidance[19] defines four tiers of risk, depending on an individual's exposure to Ebola: high, some, low, and no risk. CDC describes those returning to the U.S. from countries with widespread Ebola virus transmision who have had direct contact with a symptomatic Ebola patient while using appropriate personal protective equipment (PPE) – a category I assume includes Hickox – as "some risk." For "some risk" individuals who are asymptomatic, like Hickox, the CDC advises as follows:

- Direct active monitoring
- The public health authority, based on a specific assessment of the individual's situation, will determine whether additional restrictions are appropriate, including:
  - Controlled movement: exclusion from long-distance commercial conveyances (aircraft, ship, train, bus) or local public conveyances (e.g., bus, subway)
  - Exclusion from public places (e.g., shopping centers, movie theaters), and congregate gatherings
  - Exclusion from workplaces for the duration of a public health order, unless approved by the state or local health department (telework is permitted)
- Non-congregate public activities while maintaining a 3-foot distance from others may be permitted (e.g., jogging in a park)
- Other activities should be assessed as needs and circumstances change to determine whether these activities may be undertaken
- Any travel will be coordinated with public health authorities to ensure uninterrupted direct active monitoring
- Federal public health travel restrictions (Do Not Board) may be implemented based on an assessment of the particular circumstance
  - For travelers arriving in the United States, implementation of federal public health travel restrictions would occur after the traveler reaches the final destination of the itinerary

[17] www.scribd.com/doc/245121348/Hickox-New-Court-Order.
[18] courts.maine.gov/news_reference/high_profile/hickox/scheduling_order.pdf.
[19] www.cdc.gov/vhf/ebola/pdf/monitoring-and-movement.pdf.

It's unclear whether Hickox is having intimate contact with her boyfriend (a nursing student), but his Maine school reportedly precluded him from coming to campus for 21 days and he has said he will do the quarantine with Hickox (does this mean that he, too, will disobey it after a few days?).

FACTS *AND* VALUES, NOT "FACTS VERSUS FEAR"

I'm not here to defend governors who impose quarantines on relatively low-risk (or "some-risk," in CDC parlance) people without so much as consulting their own public health officials. But it's also increasingly hard to defend the argument, made by Macgregor-Skinner and others, that we can trust HCWs who have already risked their lives to "do the responsible thing," when some of them so defiantly, publicly, and blanketly insist that they, as individuals – rather than either the judicial or political process – get to decide what responsible public health conduct entails, because they know better. And it's hard to imagine that this very public defiance and deception won't irresponsibly undermine trust in HCWs and contribute to public fear and suspicion.

There has been entirely too much confident bumper sticker assertion of late that public health policy comes down to "fear versus facts." Yes, sound public policy (on just about anything, not just public health policy) depends on accurate facts, including scientific facts. We should not base policy on mere intuitions and good intentions when those intentions can be rigorously tested, much less on what is already known to be factually false. I trot out that reminder every[20] chance I get.[21] And yes, fear has played a troubling role in the history of public health[22] (and many other) policies, and that fear can have devastating costs, to both individuals and society.

But (a) the relevant science is not as clear-cut and certain as many officials have suggested (suggestions perhaps designed to quell fear which, when they prove false, probably end up causing more distrust and fear), and (b) to claim that the IL/NY/NJ and similar quarantines are necessarily

[20] articles.latimes.com/2013/sep/29/opinion/la-oe-chabris-nudge-20130929.
[21] papers.ssrn.com/sol3/papers.cfm?abstract_id=2215799.
[22] www.washingtonpost.com/national/health-science/ebola-a-growing-epidemic-of-fear-eerily-like-the-early-years-of-the-age-of-aids/2014/10/15/5781f1fe-5479-11e4-809b-8cc0a295c773_story.html.

"not grounded in science," as even one White House official has done[23] – sometimes in ways that seem designed to further politicize the debate about how we ought to respond to Ebola within our borders by tapping into stereotypes that only one side of the political spectrum ignores science[24] – is to ignore what one would have thought to be an obvious feature of law and public policy: they cannot be grounded in science (or other fact) *alone*, but inescapably involve value judgments, such as how to make trade-offs between costs and benefits and among groups of people.

Consider the common refrain that it's "impossible" (not just unlikely) to contract and therefore transmit Ebola after 21 days from exposure, that 21 days is "the virus's maximum incubation period."[25] This isn't so (one might even say that this isn't "grounded in science"). Here's[26] a recent article with background on where this number comes from (pretty good, but not perfect, data), which suggests that the tail of the distribution of onset of symptoms includes somewhere between 0.1-12% of Ebola patients who exhibit initial symptoms after 21 days. And here's a recent WHO report[27] concluding that the mean incubation period (which did not differ across countries or between HCWs and other patients) was 11.4 days (see Figure 3), with 5% of patients becoming symptomatic after 21 days from exposure. So, policies that focus on 21 days are rough justice: they are grounded in science but also reflect a decision to balance the costs of quarantine, controlled movement, and even self-monitoring with the low risk of transmission by not requiring these public health measures after 21 days. Much the same is true of claims that someone has to have a fever before he or she can infect others with Ebola.[28]

Our knowledge of this strain of Ebola, as it operates in our urban environment, is good, but imperfect. Based on that imperfect knowledge, the risk of returning HCWs transmitting Ebola to others is low, but not zero. As long as the risk is not zero, it requires a value judgment to decide what degree of individual liberty is reasonable to require returning HCWs tem-

[23] washington.cbslocal.com/2014/10/27/white-house-we-have-concerns-with-unintended-consequences-of-policies-not-grounded-in-science/.
[24] www.washingtonpost.com/news/wonkblog/wp/2014/10/28/liberals-deny-science-too/.
[25] www.washingtonpost.com/news/morning-mix/wp/2014/10/24/how-difficult-is-it-to-catch-ebola-on-the-subway/.
[26] currents.plos.org/outbreaks/article/on-the-quarantine-period-for-ebola-virus/.
[27] www.nejm.org/doi/full/10.1056/NEJMoa1411100.
[28] www.latimes.com/nation/la-na-1012-ebola-fever-20141012-story.html#page=1.

porarily to sacrifice in order to protect the public from that risk. Support for quarantines and other public health measures can certainly be rooted in scientific error or ignorance. But they can also be rooted in scientific disagreement around the edges and/or value-laden trade-offs with which others disagree. These kinds of value judgments are ones we entrust to our elected officials (God help us), to expert agencies, and sometimes to courts.

I don't personally happen to think that mandatory quarantine for returning HCWs in the "some risk" category is the optimal way to strike the balance between competing aims and values. And there have been some public health decisions in the past several weeks that can credibly be described as "not grounded in science" (such as when a teacher from Maine who had visited Dallas – but did not go to Texas Health Presbyterian Hospital, where Thomas Eric Duncan was treated and later died, and did not take either of the flights that his nurse, Amber Vinson, took before becoming symptomatic with Ebola – was placed on leave by her school district[29]). Some who support quarantines seem to want to reduce the risk of Ebola transmission to zero, and we generally – and, in my view, rightly – don't regulate with that idealistic aim in mind, even when the magnitude of the harm is very great; such aims usually reflect a failure to appreciate the costs of regulation.

I prefer the CDC guidelines which, notably, allow for an individualized assessment of the risk that an asymptomatic "some risk" individual poses to others and, presumably, of the burden to her of complying with the various options the CDC lists (such as abstaining from public transportion and public places, which not everyone can do as easily as others, at least not without state assistance). Some people have families to support and rent to pay; others are stay-at-home parents or have jobs that can be done via telecommuting. Some people depend on public transportation; others can drive themselves to work (where they would not come within three feet of others, etc.). Some activities that pose risks to others are optional (low-risk bowling and dining out; high-risk sex); others are not (work; child care). These policies necessarily involve cost-benefit tradeoffs, and where we can engage in individualized CBA, we should. I would be more sympathetic to Hickox, for example, if she explained why a home quarantine

[29] www.pressherald.com/2014/10/17/fearing-ebola-strong-elementary-teacher-on-leave-after-traveling-to-dallas/.

posed a substantial burden to her rather than flatly stating that it per se violates her "human rights" and if she at least acknowledged a responsibility and intention to abstain from optional and higher-risk activities that pose risk to others while rejecting more draconian quarantine conditions that prohibit necessary and/or extremely low risk activities.

But these are judgment calls, not (only) scientific claims, and neither I – nor Macgregor-Skinner, Craig Spencer, or Kaci Hickox – have the were appointed the "decider." Spencer and Hickox's actions (and NBC reporter Nancy Snyderman's[30] before them) appear self-serving, driven by something somewhere between a dislike of the personal inconvenience involved in home quarantines and a principled belief in individual liberty. Macgregor-Skinner's plans, at least, are designed to help west Africans (and, hence, the rest of the world) by making it easier for U.S. HCWs to volunteer their time and talents. There is certainly a long, if controversial, history of "beneficent deception"[31] in medicine, though usually the risks and expected benefits of such rare deception are imposed on a single patient, not traded off among different populations of people. And whether quarantines and other aggressive public health measures will reduce the supply of willing volunteers is an empirical question, as is the extent to which any such reduction would hamper the effort to defeat Ebola in west Africa, and knowledgeable people can and do disagree about the answers (here[32] are the provocative pro-quarantine thoughts about that from a medical school dean and former New York City Health Commissioner). Predicting such effects, and trading off some short-term risk to the U.S. public health against some short-term risk to west African public health and some longer-term risk to the U.S. public health, are policy calls, and complex ones at that.

There are ways of protesting laws and policies with which we disagree, and it is especially troubling to see members of a profession that so critically depends on trust so willing to undermine it by choosing methods of protest that involve deception and disobedience. Indeed, aside from differing values, I think the resistance to more "liberal" public health responses to Ebola is primarily rooted not in a disbelief or ignorance of science, but in a distrust of those who speak authoritatively about that science. Early,

[30] theweek.com/speedreads/444439/nbcs-dr-nancy-snyderman-apologizes-breaking-ebola-quarantine.
[31] en.wikipedia.org/wiki/Therapeutic_privilege.
[32] www.forbes.com/sites/matthewherper/2014/10/25/a-defense-of-the-ebola-quarantine/.

overconfident and absolutist pronouncements by CDC and other officials helped create that crippling distrust, politicians faced with reelection challenges responded to it, and now HCW deception and disobedience threaten to stoke it. We are caught in a distrust death spiral of our own collective making.

Healthcare workers who risk their lives by traveling to west Africa to fight Ebola at its source are heroes, and when they return, they deserve better than being stowed away in a tent and given little information about what officials have in mind for them. But neither this heroism nor HCWs' knowledge of Ebola facts license them to ignore or undermine public policies that are based on much more.

ADDENDUM: ON UNINTENDED CONSEQUENCES

To be clear, I fully support Hickox's right to go to court and challenge the quarantine order. On the one hand, I firmly believe that quarantine, in the right circumstances, is a legally legitimate and sometimes even morally obligatory public health tool. (It has been painful to watch CNN's Anderson Cooper as he repeatedly tries to process that quarantine could *ever* be a thing. He keeps characterizing quarantine as criminal, and asking his guests whether there are any other laws that convict and punish someone before they've done anything wrong. But quarantines are not (intentionally) punitive, and they do not necessarily rely at any stage on mens rea (if someone gives officials reasons to believe that they cannot be trusted to obey more relaxed public health measures, then they may be subject to heightened measures). Quarantine and other public health measures do, however, share with criminal law a reliance on something like probable cause: public health officials must have some reason to believe that an individual (or fairly well-defined group) has been exposed to an infectious agent (*quarantine* is, by definition, the isolation of asymptomatic but exposed, and thus potentially infectious, individuals; *isolation* refers to, erm, isolation of already-symptomatic and/or demonstrably infectious individuals). Once police have probable cause, there are all manner of things they can do to infringe the liberties of individuals despite the absence of proof of guilt – detain them, search them, and so on. So, too, here. Moving further afield, people who are reasonably believed to be a danger to themselves or others can be involuntarily confined. And of course we have laws – like

the FDA premarket approval process and the IRB system – that don't even make individualized assessments but assume that whole categories of products or action are per se risky and restrain people's liberty to market those products or engage in those activities until various processes designed to ensure public safety are complete.)

On the other hand, the devil is in the details, and there are lots of those devilish details to be worked out in our various federal and state quarantine policies, both in the immediate and the short term, with respect to Ebola, and in the longer-term, with respect to any number of infectious diseases that might visit our shores. Here's[33] a good overview of the law and politics of quarantine in recent years that highlights some of these open questions and how the task of answering them has become mired in politics (and here's[34] an earlier post by the same author). Would that politicians would find a way to overcome their security/civil libertarian deadlock and answer some of those questions. But if they won't, then the courts will have to start defining the outer edges of quarantine law as applied to a succession of cases. One lawsuit[35] challenges the absurd decision of a Connecticut public school to refuse to allow a healthy third-grader to attend school for 21 days following an October trip she and her family took to Nigeria – a country that was officially declared Ebola-free this summer – where she therefore interacted with precisely zero people with Ebola. A legal challenge to Hickox's quarantine could likewise usefully help define the contours of quarantine law.

What I *do* worry about is the possibility of lawlessness that Hickox and Macgregor-Skinner invited with their nationally televised comments on major media outlets. There are more and less responsible ways of challenging policies and more and less responsible ways of communicating one's plans to do so. Especially given the extent of public fear and distrust, there's no reason why Hickox, for instance, shouldn't avail herself of quick judicial resolution of her legal claim, and no reason why she couldn't have reassured the public that, in the meantime, she would adhere to the more relaxed CDC guidance and not, for instance, seek out close contact

[33] www.forbes.com/sites/scottgottlieb/2014/10/30/why-ebola-quarantines-will-grow-larger-and-more-troubling/.
[34] www.forbes.com/sites/scottgottlieb/2014/08/12/if-ebola-arrives-in-america-some-controversial-tools-could-be-used-to-stop-it/.
[35] abc7ny.com/371318/.

with others (she and her boyfriend broke quarantine this morning, which so far has been limited to a harmless bike ride along apparently rural back roads).

But shouldn't people sometimes disobey unjust and/or irrational laws? Sure; obviously, there's a whole history of civil disobedience that I don't address and I'm not arguing for an absolute rule against such tactics or even deception. I'm a consequentialist, not a deontologist. But I think it's fair to say that these should be last resorts and not engaged in casually or flippantly. Why?

For one thing, people have vastly different ideas about *which* laws and policies are irrational, unscientific, and/or unjust, so it's simply unworkable, as anything other than a rare exception, for each individual to make up her own mind about when she must obey the law. Although the governors who have imposed quarantines on returning HCWs (themselves a mixed political bag) have been mocked as part of a right-leaning "anti-science" "you can't be too safe" mindset, a moment's reflection reveals that right-wingers don't have the market cornered on pursuing "you can't be too safe" policies. Everyone loves the precautionary principle *sometimes*; they just differ on when. (On the left, consider fracking, GMOs, genetic engineering in general, nuclear power, and second-hand smoke, for instance.) To reiterate a central point of my post: regulations are based on both facts and values. The reason why different political parties exhibit risk-aversion in different contexts is because there's something other than "facts" doing the work. So there will always be someone whose conscience tells them that a law is unjust or unwise, and, rare exceptions aside, it's overall unworkable for each of us – or each political party – to relitigate these policy decisions. Elections have consequences, and so on.

Second, there will often be unintended or even perverse consequences, both of the short- and long-term variety, when people start flouting rules with which they disagree, and individuals making these decisions, who may be doing so with incomplete information and under psychological and time pressures, won't often be in a position to appreciate said consequences.

The White House invoked the specter of unintended consequences in arguing (apparently somewhat successfully) with Christie and Cuomo that draconian quarantine policies would affect the willingness and ability of much-needed medical volunteers to travel to west Africa. Let's stipulate this is true. It makes sense, then, for Dr. Macgregor-Skinner to advise his

team of doctors to lie to U.S. officials, right? Those who answer in the affirmative fail to sufficiently appreciate the extent to which many, many Americans (not just some right-wing fringe) distrust those, including some-risk HCWs, in charge of responding to the risk of Ebola in the U.S. (Check out the #KaciHickox[36] Twitter hashtag for a sampling.) Citizens who were already coming from a place of distrust and anger, given the CDC's slow start out of the gate, officials' overly confident and absolutist statement about Ebola knowledge and risk, and the Dallas experience, are only made even more distrustful and angry when HCWs publicly announce that they will flout the rules because they know better. Such citizens are likely to demand that their elected officials implement stricter, compulsory public health measures, since HCWs who flaunt their willingness to lie to officials and disobey laws have shown that they cannot be trusted to the honor system. The political process being what it is, especially right before an election, many of those elected officials will predictably respond by making a show of imposing those more aggressive public health measures. And that, by hypothesis, will undermine the effort to get volunteers to west Africa . . . which is exactly what Macgregor-Skinner says he's trying to avoid. Transparent, law-abiding methods of trying to change quarantine policies are unlikely to have

Longer term, I think it's harmful for the public to see doctors and nurses willing to lie about matters concerning health. A regular citizen who defies a quarantine order or lies to officials about his travel or exposure history doesn't have the same impact as a doctor or nurse doing the same thing. As Mark Hall has highlighted,[37] trust is a foundational principle of health care policy, so it's startling to see several HCWs so casually endorse behaviors, like deception and disobedience, that would undermine that trust.

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[36] twitter.com/search?q=%23KaciHickox&src=tyah.

[37] papers.ssrn.com/sol3/papers.cfm?abstract_id=306986.