

## A Podcast Series in Collaboration With PLUS

### In the Boardroom with Resnick and Fuller

#### Episode 2

##### *Featuring Stephanie Resnick and John Fuller*

**PLUS:** Today in episode two, we focus on the potential legal liabilities that corporate officers and boards must consider in the wake of the U.S. Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*, which overturned *Roe v. Wade*, Stephanie and John will discuss how the seismic change in reproductive health law will impact company decisions on corporate culture and employee benefits as well as the risks for directors and officers, as they seek to adapt to a rapidly evolving state and federal legal landscape. Stephanie Resnick is a partner at Fox Rothschild, a national law firm, and is co-chair of the firm's Director and Officer's Liability and Corporate Governance Practice Group.

For 14 years, Stephanie has been ranked by *Chambers USA* as a leading litigator in Pennsylvania. She is known for taking the lead in high stakes, bet-the-company litigation and defending corporate boards and officers in complex and protracted litigation. Stephanie is a former managing partner of Fox's Philadelphia office and a past chair of its nationwide Litigation Department.

John Cornell Fuller is also a partner at Fox Rothschild and is the other co-chair of the firm's Director and Officer's Liability and Corporate Governance Practice Group. John has extensive experience defending directors and officers of public and private corporations in claims stemming from the discharge of their duties and management decisions.

Since 2015, Stephanie and John have been co-authoring articles on topics of interest to corporate boards and directors for a variety of publications, including *Corporate Compliance Insights*, *The Legal Intelligencer*, and the *Wiley Board Leadership Journal*. Now I'll turn it over to Stephanie and John,

**Fuller:** Thanks to everyone who's listening.

We're recording this broadcast ... this podcast ... as we've moved past the sort of initial phase of reactions to the *Dobbs* decision. When the opinion was leaked in the spring and then formally set forth in June, there was a lot of pressure on companies and their directors and officers to take a public position with respect to the decision and also to make, in many cases, commitments to employees about what the organization's culture and benefits would be moving forward. We want to look at three areas where we see, now that we are past that reaction phase, to areas of genuine legal exposure and potential liability at the board level. The first of those is a question of whether, and to what extent, *Dobbs* decision is going to have an effect on the corporate bottom line.

We start here because so often in the cases we handle as litigators, when you see a drop in share value or corporate earnings, that is classic fodder for plaintiffs to claim that there's been a decision, an error

made at the board level. So the way we're looking at, is a sort of two areas of potential effects on the bottom line.

And one is based on customer reaction. And, and the other is the issue of employee recruitment and retention.

**Resnick:** And John, I just want to say something with respect to customer reaction. We have seen broad-based, politically charged, social issue discussions within the corporate context in connection with beer manufacturers, fast food organizations, baking organizations and other manufacturers in various industries when a company takes a particular political view and the impact on whether that will alienate others who do not share that view and will ultimately result in a boycotting of company products. And if that company boycott affects the bottom line, are the directors and officers liable for that?

I would take the position that would be a very hard case to make. Do you share my thoughts?

**Fuller:** You know, I actually think, you know, one of the things we often see are, which is, can be a struggle for plaintiffs, but they might try to jump on here is when you can connect a singular announcement, a press release, and then a sharp change in revenue thereafter, which can be difficult on big issues.

But, I do think we'll see some attempts by plaintiffs to say, look, you need, you know, this, the opinion is handed handed down on June 24th. And in the week that followed, the company made an X statement and, they may try to say, look, the earnings in July and August were affected because there were these, you know, this news coverage.

And I think, it's still difficult, but I think we'll see attempts because there is a moment in time, and if you see a drop, they're going to try to say that it's related, so, well...

**Resnick:** Well, I definitely agree that there will be many attempts, but the question is ultimately, are they going to be liable for that?

I mean, I can see the argument that companies should not be engaged in political activity. Essentially, companies should be neutral and not take any particular position. And when a company does take a position, whether it's closely held company or even in, you know, situations, even a public company, there are ramifications from that because people will get mad at the message that that company is sending and then refuse to buy their product. So ultimately that will affect the bottom line and the stock price will drop. So, you know what happens in that context?

**Fuller:** I think that issue of the longer it goes, that it's going to be harder to make that connection.

And I think kind of comes to this other part of the employees' side of it, because I think there are companies who came out during this initial sort of reaction period and took strong positions and may see boycotts, or pushback in a very acute way. But a lot of companies didn't make very public statements, so, or ones that didn't register in the same way as some of the major companies that came out.

So, one of the other questions is, is employee recruitment going to be affected? And some people look at that as saying we won't know in the short term, but if this becomes an important employee benefit in certain states where access to abortion is no longer, is that going to affect your ability to recruit top people and retain them.

And so, you know, I don't know what your thoughts are on that. And the same idea of being able to connect it to the *Dobbs* decision.

**Resnick:** Well, I think that employee recruitment and retention is a huge issue, especially post-pandemic. Well, I guess we're still really in the pandemic, but, you know, the pandemic has really raised to the forefront a number of issues that deal with employee retention and recruitment.

And it has, for whatever reason, it has become more difficult to attract new employees and retain employees. And one of the benefits that a couple of companies are now starting to be vocal about are travel benefits for abortions and whether that will assist with employee retention and recruitment.

And ultimately that's a decision that the company is going to have to make, I think. But recognizing that all sorts of benefits, you know, have been presented to employees at this particular point, particularly in view of the pandemic. And if there is such a benefit, it needs to be very broad-based, and it needs to include both men and women in various health care matters that would cover this as well as other things. At least in, as I see it in the short term.

**Fuller:** Yeah, I agree. And that kind of brings us to this sort of second area we want to discuss, is changes in health care policies. I think, you know, I think it's probably going to end up being very industry-specific as we look at whether there's a long-term effect on recruitment and retention and maybe it's going to be specifically on a lot of companies who've moved from California and Silicon Valley and opening in places like Austin, Texas, where there's going to be sort of a culture clash. But I agree with you that the acute is probably not going to be the case. It's going to take some time. And we look at some of these benefits, and one of the pitfalls in terms of sort of hard legal liability that we were discussing before we got on is changing health care policies, right? There's part of this that is ERISA regulatory that people should be aware of that, you know, if you were a company that came out and made public statements about what you were going to offer to your employees moving forward, there's an issue.

There could be a potential issue if there's a space between what you offer and what the actual benefits you're giving your employees are. And that's, you know, sort of a flag for everyone listening to make sure that your health care plans and the plan summary documents, which explain the benefits to employees, are consistent with any messaging that's been put out there.

And one thing that some companies are running into is this realization that something like a travel reimbursement benefit is actually not considered a medical benefit. And so it's from the ERISA standpoint, not something that your health care claims administrator or whatever carrier you may be using. It's not a benefit that's going to come from that entity. And therefore you need to take special care in terms of the plan documents, but there are also two other issues if a company is looking at travel reimbursement. One is that because it's travel reimbursement, it's sort of another fringe benefit; it's not a purely medical benefit. And so one issue there is asking employees to identify, tell the company why

they're taking advantage of this benefit and having them disclose the medical reason likely runs afoul of HIPAA; is asking for protected health information. Stephanie, I think this goes to your point about needing to have broader base, not to say that this is a, you know, an abortion support mechanism or limited, I think as you said, to women only and that's just sort of from that issue, not asking employees for information. But the other thing companies should be concerned about and thinking about is that because a travel reimbursement benefit is not a medical benefit, if a company is subpoenaed for information regarding the usage of that travel reimbursement, they don't have the defense of saying that it's protected health information.

And, they need to be concerned about, they may be thinking about, what they're asking their employees to tell them, even if it's not health information, about their usage. And so, you know, Stephanie, I know if you have other thoughts on how companies should ...

**Resnick:** No, John, I don't mean to interrupt, but I do think that this is an issue.

I mean, for many reasons, companies want to be as broad as possible with their benefits and provide those hooks to enhance employee retention. And, you know, there are some pitfalls. There are privacy issues as you've described and you know, where we, I think should come down, is these benefits should be as broad as possible to substantiate, you know, many factors.

So, you know, someone who is traveling for an abortion does not have to indicate the reason for this travel expense. That in and of itself is somewhat problematic. So again, they have to be very, very carefully written and discussed with employees in terms of employee benefit plans and packages.

I'm curious to see how companies will address this issue, particularly in view of the new proposed legislation on aiding and abetting, which bring to the company an actual financial penalty in aiding and abetting in this, in that case would be an employee to get an abortion out of state.

What are your thoughts on that, John?

**Fuller:** I was almost going to say it's almost hard to answer this question. One of the most concerning areas is proposed legislation in places like Texas and other places where there would be liability with a private cause of action to seek that liability for aiding and abetting, as you stated that likely pull in scenarios where a company offers a benefit which would help someone move out of state, travel out of state to get an abortion. So that's concerning that that is the next wave of real liability.

On the sort of flip side, the Biden administration has said that they will do essentially everything in the power of the executive branch to use executive orders and expand federal protection.

But those ... there have been some initial executive orders. There's some ideas about things such as expanding the scope of protected health information and HIPAA to pull in things like travel benefits and avoid some of the issues we were discussing before. But I think someone thinking about relying on those federal expansions, those are going to be fraught with challenges at all levels and are likely not to be sort of actionable in the short term.

So I do agree with you that there's real concern about changing state law and that's where our focus should be for boards of directors and trying to keep up with what the restrictions are. I don't know if you have other thoughts?

**Resnick:** Well, I mean, my question is really, it puts a really onerous burden on a board member, because how does a board member stay on top of so many potential changes in state and federal law?

These restrictions that would create the liability are coming from those state and local laws. But as you know, it's very difficult to follow state and federal laws, and even commentators who report on the state and local and federal laws note many inconsistencies. So it really is, is it right to almost require a board member to be a lawyer, to sift through all of these laws and figure out, am I doing the right thing? Am I at risk here of aiding and abetting because I sit on the company board and the board wants to give expansive medical and other benefits to its employees to encourage recruitment and retention?

**Fuller:** No, and I absolutely agree. It's sort of a, it's a daunting task because I think if you're a board member, you're trying to keep one eye on maybe these ERISA ... trying to respond to shareholders on all the things we've talked about to the bottom line, make sure that you're retaining the right people and that you're, you know, aligned with your customer base, making sure that those representations match up with current plans and next year's plans and all those ERISA concerns.

And then all of that, could the carpet could come out from all of that, if there's a change in state law that would potentially, you know, essentially almost criminalize this? And, I don't know. I think our thought is the restrictions are going to come from state law. That needs to be the focus of efforts.

This is a situation where outside counsel is, if you're going to take action based on some combination of state law and federal law and understanding those, it's, this is not unprecedented territory, but it's new for, since the 1970s that we're back here with state law changes.

So ...

**Resnick:** I don't know if you've heard on the radio that one of the laws that were requested to be put in place on a state level was an exact law from the 1800s. And that to me is somewhat problematic, but more problematic is how do we, as officers and directors who have a fiduciary obligation to the company, deal with these laws that are really directed towards social issues and not towards economic issues and still maintain their fiduciary obligations and economic health of the company? So that I think is the biggest struggle and challenge that companies are facing. And I think companies have to be very careful here. To take one position or another will require a very deep legal analysis and advice from legal counsel to the boards so that the boards understand how they should react and what is for the good of the company in connection with these really challenging issues and issues that are somewhat conflicting, right?

**Fuller:** Mm-hmm

**Resnick:** Because you want to retain and recruit new employees. You want to offer the most expansive type of benefits generally. So it has to be done with great care

**Fuller:** Mm-hmm, and I absolutely agree. The only thing I'd add is, and unlike maybe some other situations where, you know, you can have someone come in and look at an issue and help you come up with a solution, this is changing constantly, right? And so what the solution you come up with today needs to be constantly looked at with a deep legal view. And sort of have someone that you can rely on as you move forward, because it is really changing landscape. We say that a lot, but this one ... this one is very volatile, genuinely.

So.

**Resnick:** Yeah, thank you everyone. We understand this is really a tough one, and we hope we could just have provided a bit of an overview on this ever-changing landscape. But there's more to come on this issue.

**PLUS Staff:** Well, thank you. Thank you to Stephanie and John for sharing their time and expertise. And thank you for listening to this PLUS podcast. You can find PLUS podcasts on the PLUS blog and the PLUS Connect app.

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