

A Podcast Series in Collaboration With PLUS

In the Boardroom with Resnick and Fuller

Episode 3

Featuring Stephanie Resnick and John Fuller

PLUS: Welcome to this PLUS podcast, “In the Boardroom with Resnick and Fuller.” Before we get started, we'd like to remind everyone that the information and opinions expressed by our speakers today are their own and do not necessarily represent the views of their employers, or of PLUS. The contents of these materials may not be relied upon as legal advice.

Today in episode three, we discuss why boards and officers need to be particularly thoughtful about the topics of diversity, equity, and inclusion, or DEI. Stephanie and John will explain how DEI presents a truly unique set of legal concerns because companies can be faulted both for doing too little or for doing too much.

Citing trends in recent lawsuits, including one that led to a \$10 million jury verdict, they outline the legal risks from both angles. The conversation wraps up with some practical tips about best practices for minimizing risks in your DEI initiatives. Stephanie Resnick is a partner at Fox Rothschild, a national law firm, and is co-chair of the firm's Directors' and Officers' 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 Directors' and Officers' 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 [00:02:00] Corporate Compliance Insights, The Legal Intelligencer, and the Wiley Board Leadership Journal. I will now turn it over to John to get us started.

Fuller: Recording this podcast now more than two years past the protests in the summer of 2020, which called for, among many, many other things, companies to improve in the areas of diversity, equity, and inclusion. The trends we want to talk about today are both ones that we saw soon after the summer of 2020, but now a sort of new wave of concerns and potential liability for companies. We want to give some thoughts on how to navigate those. And, so even what we don't want to see is even the most well-

intentioned companies who want to implement DEI programs of being chilled from doing so because of the concern of doing both too little and both too much.

Now, Stephanie, I think you'll agree with me. You know, for a while we were seeing derivative actions and other actions brought by shareholders and companies when there had been announcements about new DEI initiatives, but then companies failed to follow through. Am I right in that?

Resnick: That's correct, John.

Yeah.

Fuller: And, we saw a lot of different ways that those came up. We saw them as breach of fiduciary duty claims. We saw them as claims under, you know, proxy solicitation violations under the Securities and Exchange Act. What there have generally been is an announcement about new goals, new priorities, and then a company sort of not being able to demonstrate to shareholders that they had met those expectations and there were a variety of, as I said, different types of claims, but all going after that sort of general announcement and failure to follow through. And we also saw a huge variety of remedies that they saw. Things from changing board structure and composition, demanding training regarding bias and inclusivity, requesting donations to organizations that promote underrepresented communities.

Resnick: And John, you know, we have always taken the position that all of those things are good. And in fact, we wrote an article about the importance of diversity on boards, both from an age perspective, a race perspective, a religious perspective, and other diverse areas. All of those things we have fully supported, you and I, in terms of our discussions of how to make a company better and what should occur with respect to a company's actions with respect to diversity and inclusion.

Fuller: Absolutely. And I think kind of a theme that's coming up in these podcasts that we've been doing is another thing that a lot of these early plaintiffs were doing is looking at the increasingly large body of writing and study of all the benefits of having a diverse board. All of the perspectives and how it has real impacts on the bottom line.

And, as we've said in other ones, you can start adding quantitative components to a plaintiff, to a damage, argument. It's always been fodder for litigation.

Resnick: Yeah. And the argument, you know, with respect to having a broad-based board of directors is that everyone comes to the board with their own experience and way to analyze an issue. We've talked frequently about the fact that in terms of financial checks, that has been a really important measure to institute because new board members who have fresh eyes on an institution, are oftentimes the ones that realize financial issues or those types of things. Apart from the general view that it's always better to have different views, you know, to at least be discussed before decision is made.

So, you know, it's interesting because other countries, not the United States, some of them have quotas on how many women should be on a board. I mean, there's a number of countries that actually have a quota for women, and the United States has not adopted that approach. And to the contrary, if you get into the area of employee management, you know, that is not a good idea to have quotas.

Yeah. So let's talk about some of the risks.

Fuller: Yeah. And it's interesting you talk about quotas and the employee side because that's, you know, what we've been talking about, those shareholder actions. I think a lot of people saw, but what we're seeing is this component of implementation and now that people, a lot of companies have announced programs and are working to implement them, we're now seeing a wave of potential pushback from that implementation phase.

And, you're absolutely right that it's in the employment center where there are structures that need to be considered and one of the ones that grabbed our attention and is interesting as a sort of construct to think about this potential area of liability is reverse discrimination lawsuits, and in particular one in North Carolina where a jury recently awarded \$10 million in punitive damages to a white male senior vice president who alleged that he and seven other white executives had been terminated in furtherance of the company's DEI program. Now I should say that the punitive damage award was subsequently reduced to a \$300,000, but it's a big jury verdict and should give everyone pause. And the plaintiff was ultimately awarded about \$4 million in both compensation and compensatory damages.

Resnick: And in this case, it's very important to highlight the need to effectuate or implement a DEI policy correctly. So in this case, it really was the implementation of that policy that caused harm to the company ultimately.

Fuller: Absolutely, and I think just to touch on the facts and how that played out here, is that, in response to the allegation from the plaintiff that had been fired, you know, because he was white, and in furtherance of this DEI policy to make room for essentially more diverse employees, the company responded that in fact, the vice president had been underperforming despite positive reviews throughout his career, saying that he really needed to be finding new opportunities and be exceptional in his role and that he was not. The company also pointed out from a legal standpoint that there had been no allegations by the plaintiff that he was ever discriminated against on the basis of race during the course of his employment was only, you know, as he alleged, the cause of his termination.

Now, plaintiff responded that that was all pretext, and the case went to trial, a seven-day trial. And what's very interesting in the sort of current context, at trial, the plaintiff traced the announcement, for instance, of a new DEI policy by the company. He then was able to look at when that DEI committee had met, decisions that they had made, things look like, you call them goals, they called them quotas about where the company wanted to be in terms of diversity. And then in the timeline, the actions and the determinations of certain individuals immediately after these meetings. And it was that timeline, that announcement, and that's something new, right? These, these are still the same employment laws that have been out there, but the fact that a plaintiff is now turning and looking at this very outset of statements about where the company is going and how they're gonna get there. To your point, the implementation is now a place that that has needs to be looked at. Yeah,

Resnick: And that was just the timing. I mean that in that case, we have to focus on the timing because the timing was very difficult to set aside. I mean, you have the DEI policy. You have the meeting with the committee, and then you have the termination of eight white senior executives.

And so that is not something that we recommend for companies. What we recommend is to have a broad-based DEI policy. We think it's absolutely imperative in these times and necessary. And if implemented correctly, it will bring strength to the organization. But if implemented in a faulty way, these are some of the risks that a company can encounter. You know, I think that any implementation of a DEI policy has to be very thoughtful, and hopefully you have a diverse board that is actually determining the DEI policy and the guideposts in that policy. We should stay away from quotas. There should be more general guideposts in terms of what the company wants to do, inspiration and in fact can ultimately

Fuller: Accomplish. Absolutely, and I think I said before, and we certainly don't want to be chilling anyone's implementation of these. We have not seen an onslaught, to be clear, of reverse discrimination type claims, but we want to be clear that they're out there and people are getting headlines. And to Stephanie's point, the thoughtfulness of the implementation is key. We were in a phase where boards were announcing really progressive and thoughtful plans, but now you need to follow up. There needs to be a dialogue with whoever, whether inside counsel or outside counsel, on things like the impact on employees and the inter-relation with employment laws.

So you need to have that dialogue, you know. The attorneys -- especially if you're working with the right attorneys -- should not be the ones saying, "No, no, no, we can't do this." You need to understand what you're trying to accomplish and what their concerns are under the law and work together to arrive at that.

Resnick: Yeah, and some of the best practices would be, as John just said, a coordination between counsel and either the board or the DEI committee or upper management that's dealing with DEI policies. You know, it's very important that the in-house lawyer or outside lawyer is aware of the policies that the company has promulgated and wants to move forward with.

So that's one of the ways that we think ultimately would be best. And another thing is that while a company may want to set specific targets for percentage of diverse employees, we suggest that there be no such percentage in a policy. Again, it should be a guidepost.

Fuller: Exactly. And I think that to people listening, who there was a big push for people to come out in the name of transparency, to identify where you are in terms of diversity as a company and set real goals and then report back on whether you had improved in real transparent terms.

And, and so we want to be clear that having goals like that is okay, and again, is a good way to drive diversity. The problem is on the legal side, quotas are illegal. You can't fill those spots specifically based on that criteria. So what, what's the difference? And it is very fact sensitive to try to find the difference between what a company may announce as a goal and what a challenging government agency or plaintiff may see as a quota.

And a lot of it's going to come down to, was there pressure to meet the goal? Was there compensation tied to meeting the goal? Were there punishments or other repercussions for not meeting the goal? Those are things that make it look like a quota and a requirement, as opposed to, Stephanie said, a guidepost and a meaningful and transparent guidepost.

So if you, if you're working with a company that has made those announcements, they're not per se, improper, and they can be a good driver. Just need to make sure that they remain as guideposts and that decisions aren't being made trying to hit those at all costs. You need to stay cognizant of the multitude of other things that go into employment decisions.

Resnick: And I think that if you follow the policy that diversity is good and ultimately helps a company, but implement those suggestions in those expectations in a manner that's thoughtful and careful, there won't be an issue because otherwise you're caught in the middle. It's like, do I do this, or don't I do this? But you can do this. Certainly, it's just a matter of doing it in a thoughtful manner.

Fuller: The third point we wanted to raise in terms of best practice and moving forward is there are a lot of headlines about these initiatives and there are a lot of different companies, a lot of different industries doing a lot, tackling these issues in a lot of different ways.

And so one of our recommendations is to look at your industry, look at similarly situated companies. See how they are not only, the level of expectation that they're setting, which we think should be as high as you can, but how they're implementing it, how quickly these things are being implemented because following what might be happening in Silicon Valley, and the announcements and all the pressures that they're going through, and what HR and legal counsel is doing with them to talk to them about implementation. You might not see the implementation, but thinking that you have to be at those standards and have to race to get there could have pitfalls. So think about what you can do. Make sure you're talking with your counsel and thinking about implementation because that's not what you're going to see. You're going to see headlines about announcements, not how they're getting there. So I don't know if you have anything else you want to ...

Resnick: Well, I think that's a really good point, John, and again, I think that there should be a continued push for diversity, equity, and inclusion policies, and they just need to be implemented in the right manner.

Fuller: I couldn't agree more.

PLUS Staff: Great. Thank you, Stephanie and John, and thank you all for listening to this PLUS podcast. If you should have an idea about a possible podcast episode, you can always submit those on the PLUS website using the content idea form.