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Disney Sues Florida Officials for Allegedly Unconstitutional Retaliatory Legislation

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Walt Disney Parks and Resorts U.S., Inc. ("Disney"), the owner and operator of the Walt Disney World Resort in Florida, has sued Florida's Governor and other officials for allegedly launching "a targeted campaign of government retaliation" in response to Disney's opposition to Florida's so-called "Don't Say Gay" law. The Complaint in *Walt Disney Parks and Resorts U.S., Inc. v. DeSantis et al.*, highlights one of the most hotly debated topics in the era of competing ESG and anti-ESG sentiments: to what extent should corporations take public positions on political and social issues that might not directly relate to the companies' core business operations? Corporate boards of directors should be attuned to and exercise appropriate oversight over these questions, as well as the related issue of corporate political contributions.

Background

Disney has been operating in Florida since 1967 under a local governing jurisdiction called the Reedy Creek Improvement District (the "RCID"). Disney is one of Florida's largest taxpayers and employers. During the first half of 2022, the RCID held public hearings and approved a comprehensive development plan for the District.

In March 2022, Florida's Legislature passed the Parental Rights in Education Act, which imposes restrictions on public schools' discussions of sexual orientation or gender identity and prohibits adoption of procedures that prevent parents from learning about students' disclosures of gender identity or sexual orientation. During the legislative process, the then-CEO of Disney's parent, The Walt Disney Company ("WDC"), called Florida Governor Ronald DeSantis to express concern about the legislation. The Governor allegedly recounted thinking that "'it was a mistake for Disney to get involved'" and telling WDC's then-CEO "'You shouldn't get involved[;] it's not going to work out well for you.'"

After the Governor signed the bill, WDC publicly stated that the legislation "'never should have been signed into law.'" The next day, the Governor allegedly said that he thought WDC's statement "had 'crossed the line'" and that he would "'make sure we're fighting back.'"

Allegedly at the Governor's behest, the Legislature first voted to dissolve the RCID and then voted to give near-complete control of it to the Governor. The Florida representative who had introduced the dissolution bill was quoted as telling the House State Affairs Committee: "'You kick the hornet's nest, things come up. And I will say this: You got me on one thing, this bill does target one company. It targets the Walt Disney Company.'"

In January 2023, Disney and RCID gave public notice that they would enter into development contracts under the previously approved comprehensive development plan. Disney planned to invest more than $17 billion and to create 13,000 new jobs over the next decade. The RCID approved the contracts after two rounds of notices and hearings.

The next month, the Governor signed a new law that allowed him to select the RCID's members, who previously had been elected by landowners within the District. The Governor then replaced the RCID board with his own appointees, allegedly announcing that the new board would "stop Disney from 'trying to inject woke ideology' into children." And on April 26, 2023, the new board declared that Disney's previously approved contracts were "'void and unenforceable.'" Disney sued that same day.

The Complaint

Disney's Complaint alleges four principal constitutional violations to challenge what it calls "a concerted campaign of retaliation because the Company expressed an opinion with which the government disagreed":

- The Contracts Clause, which prohibits a state from passing any "Law impairing the Obligation of Contracts." Disney alleges that the Legislature's and the new board's actions violated the Contracts Clause by "purport[ing] to rescind Disney's rights and protections under contracts and to relieve [the board] of any obligation to comply with its obligations under the Contracts or to pay damages for any breaches." Disney further alleges that the impairment was not reasonable or necessary to serve an important public purpose.

- The Takings Clause, which prohibits taking private property for public use without providing just compensation. Disney alleges that Florida's actions deprived it of valuable contractual rights in specific property without payment of just compensation.
- The Due Process Clause, which allegedly prohibits "'arbitrary and irrational' legislative act[s] affecting a person's state-created rights." This substantive due-process claim alleges that Florida's actions abrogated Disney's contractual rights "without any rational basis and only for impermissible reasons."
- The First Amendment, which prohibits governmental action that abridges the freedom of speech. Disney alleges that Florida's "retaliatory interference" with its contracts "has chilled and continues to chill Disney's protected speech" and that the "unconstitutional chilling effect is particularly offensive due to the clear retaliatory and punitive intent that motivated the Governor's and the Legislature's actions."

Implications

The *Disney* suit will likely be viewed by ESG adherents and supporters of purportedly "liberal" agendas as a brave challenge to "anti-woke" "conservative" politicians who seek to retaliate against corporations that take positions with which they disagree. A victory, particularly on First Amendment grounds, could make other politicians think harder about retaliating against corporations or other actors for taking supposedly controversial political or social stances.

The lawsuit also will likely be viewed by anti-ESG adherents and supporters of purportedly "conservative" agendas as a courageous stance against corporations that supposedly have overstepped their bounds by injecting their own beliefs into what purportedly should be apolitical business operations. If the litigation is viewed from that perspective, the defendants will likely claim a political triumph regardless of whether they ultimately obtain a legal one. Under this view, governmental retaliation can be a no-lose political gambit to please politicians' proverbial "base" even if a legal victory is not attainable.

But regardless of how one construes this particular lawsuit, it vividly illustrates the dilemmas that companies face when deciding whether and how to speak out about controversial social topics that arguably do not relate directly to their core business operations. Corporations' internal constituencies generally are not uniform; nor are the public arenas in which the companies operate. Taking a position – or not taking a position – is likely to leave at least some stakeholders dissatisfied.

Moreover, any supposed line between what does and does not "directly" relate to a company's business operations can become fuzzy because companies themselves have internal constituents whose welfare and goodwill might be considered essential to business operations. For example, a company's own employees might want – or not want – their employer to take a position on a significant social issue (such as LGBTQ rights, abortion rights, etc.) that might personally affect many of them, and they might be offended if their employer does – or does not – speak out on a particular side of that issue.

The debate about whether to speak out also implicates the related debate about corporations' political contributions. Political contributions themselves can be considered a form of speech under current Supreme Court precedent, so even if a company chooses not to make express public statements about controversial issues, it might nevertheless be deemed to have implicitly "spoken" about them if it makes political contributions that favor a particular side of those issues or that are inconsistent with the company's public professions about its own positions and values.

These thorny questions call for nuanced oversight at the board level, and perhaps even from shareholders in some circumstances. Boards of directors ultimately need to be involved with corporate policy, including how the company presents itself to the public and the values it professes to represent. These types of decisions generally are too fundamental to be left solely to senior management. Indeed, some commentators (such as former Delaware Chief Justice Leo Strine, Jr.) have advocated that corporations should not take public positions on external public-policy issues unless the full board approves – and that they should not make political contributions unless a supermajority of shareholders approves a political-spending plan consistent with the company's stated values. We will see how the *Disney* case plays out and how corporations continue to grapple with difficult issues about political and social speech and political contributions.

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