THE CLAP BACK

BLACK INNOVATION ALLIANCE

HOW AFFIRMATIVE SHOULD YOUR ACTIONS BE?

Risk Tolerance & Risk Mitigation in the Wake of AAER V. Fearless Fund

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AAER V. FEARLESS FUND

A summary of the case and its implications for leaders who provide certain or all their programming, grants, or other resources exclusively to Black or Latinx founders.

RISK ASSESSMENT

Guidance for determining the scope of your organization's risk of facing a lawsuit related to the organization's offerings or even its existence, as well as notes regarding typical costs of litigation.

RISK MANAGEMENT

Instruction on determining risk tolerance, steps an organization can take to mitigate litigation and reputational risk, based on rick tolerance.

AAER V. FEARLESS FUND

On August 2, 2023, American Alliance for Equal Rights ("AAER") filed suit against Fearless Fund in the United States District Court for the Northern District of Georgia. AAER describes itself as a nationwide membership organization dedicated to challenging distinctions and preferences made on the basis of race and ethnicity. It was founded by conservative activist **Edward Blum**, the man driving the effort to end affirmative action.

Specifically, AAER sued FEARLESS FUND MANAGEMENT, LLC; FEARLESS FUND II, GP, LLC; FEARLESS FUND II, LP; and FEARLESS FOUNDATION, INC. **Fearless Fund** is an early-stage venture capital firm based in Atlanta that focuses on funding women founders of color.

The law at issue is Section 1981 of the Civil Rights Act (42 U.S.C. §1981). AAER says, with Section 1981, Congress provided a guarantee of racial neutrality in private contracting, and Section 1981 "protects the equal right of all persons … to make and enforce contracts without respect to race." Domino's Pizza, Inc. v. McDonald, 546 U.S. 470, 474 (2006).

AAER's Argument is that Fearless Fund is discriminating against non-Black individuals in violation of Section 1981 by having a $20,000 grant program only for Black women who are small business owners. AAER has non-black women who meet all criteria other than being black.

The implications of this case are significant, and part of a snowball of cases. It follows decisions on June 29, 2023, in Students for Fair Admissions, Inc. ("SFFA") v. President and Fellows of Harvard College and SFFA v. University of North Carolina in which the U.S. Supreme Court ruled that Harvard and the University of North Carolina violated Title VI of the Civil rights Act and the Equal Protection Clause of the Fourteenth Amendment of the U.S. constitution by impermissibly considering race when making undergraduate admissions decisions. While "impermissibly" makes clear that using race in some manner is permissible, conservative judges are likely to be hesitant to find such permissible uses.

Conservatives are strategically leveraging the court to secure conservative rulings. For example, on June 19, 2023, in the United States District Court for the Eastern District of Tennessee, the court in Ultima Services Corp. v. United States Department of Agriculture enjoined the Small Business Administration from applying a "rebuttable presumption of social disadvantage" to individuals of certain minority groups (with social disadvantage being an eligibility requirement, one benefit is the ability to bid on contract set asides).

The decision in the Fearless Fund case will be key, as the Northern District of Georgia is a relatively balanced court. Next, Judge Thomas W. Thrash Jr., a Bill Clinton appointee, must decide whether Fearless Fund can continue making grants while the lawsuit is pending.

The final decision in the Fearless Fund case could have broad implications for various types of organizations, including nonprofits, impact investors, and others attempting to remedy past discrimination, close the racial wealth gap, or pursue diversity, equity, and inclusion goals.

RISK ASSESSMENT

Assessing your organization's risk is always a wise decision, but especially in this moment. For those dedicated to closing the racial wealth gap, the concept of race often influences everything from an organization's name to its culture.

To the extent that a huge part of your organization's purpose for existing could be used against you, it's important to understand precisely how that might happen. Risk assessment exercised properly is an act of strength and wisdom, not weakness or fear.

In assessing your risk, it is paramount to understand that you can be sued. Opponents of equality are not "respecters of persons" and do not sympathize or empathize with you or the good you do. In fact, in their eyes, the good you do likely does them harm.

A great starting point for risk assessment as it relates to a potential discrimination (or reverse discrimination) claim is to review your programming.

1. What programming is public facing (advertised on your website or social media, applauded by media outlets, etc.)?
2. What are your eligibility requirements?
3. What types of benefits or opportunities do you offer?
4. What can non-participants participate in, compete for, or attend? Under what circumstances and pursuant to what eligibility requirements?
5. How are the organization and its members described (on the website, in printed materials, on social media)?

These questions are a starting point for identifying exposure. However, it's important to understand that everywhere that race is mentioned, represents a place of interest. And everywhere that race serves as a factor in qualifying or disqualifying a party for an offer, is a place of exposure.

Assessing your exposure is key because defending your organization in a lawsuit can be expensive, ranging anywhere from $200-$1,200 per hour in legal fees (depending on where you reside and the experience and specialization of the attorney you select). If you're in a jurisdiction that leans liberal you could win the case early on a motion for summary judgment, or to dismiss (e.g., for lack of **standing** or the right to sue), with litigation being over in a matter of months. If your case goes to trial, you could be litigating the case for a year or longer.

RISK MANAGEMENT

After you complete the risk assessment process, you need a plan to manage or mitigate risk. Start by asking yourself these questions.

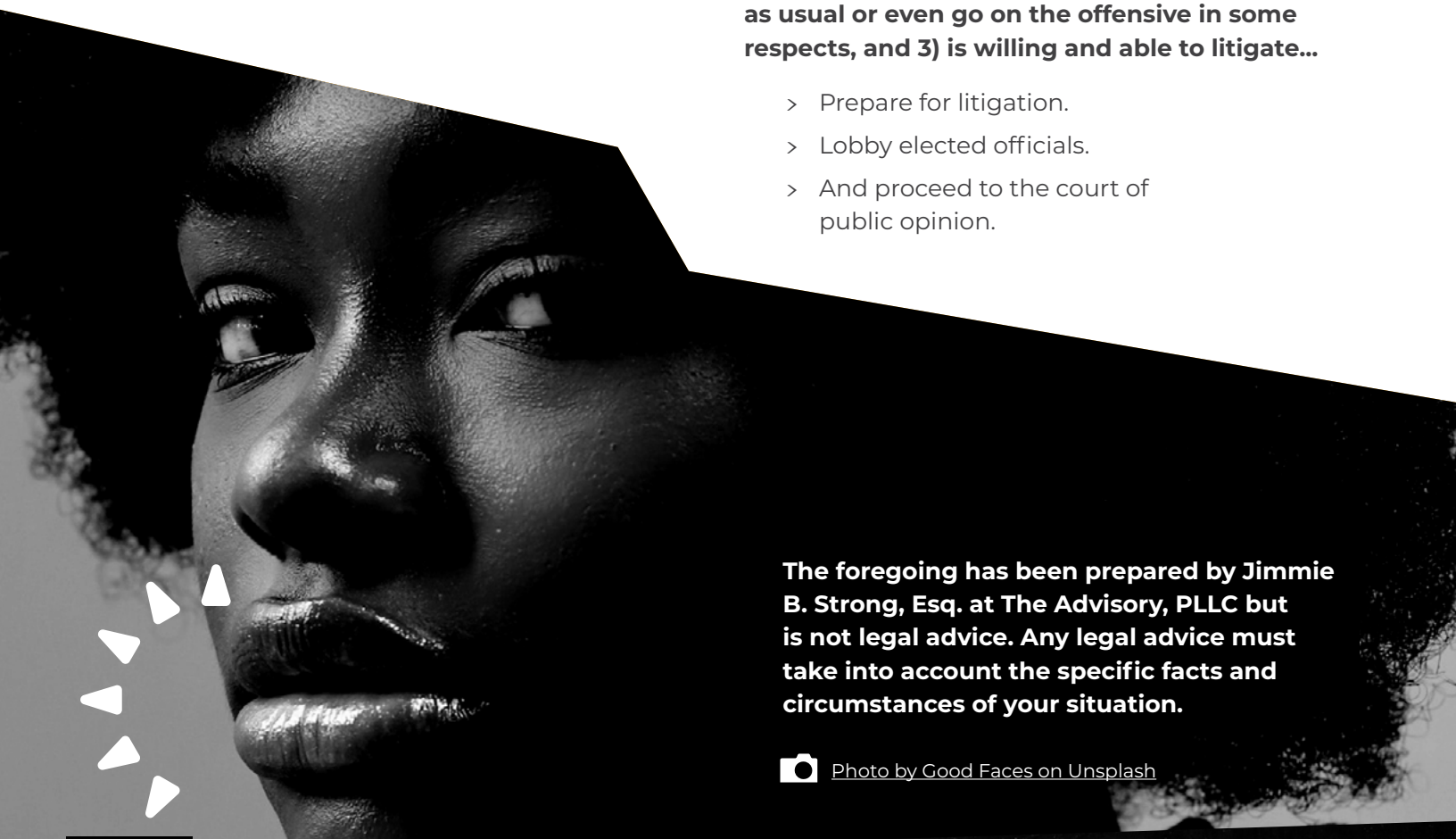
1. What are you going to do if you get sued (attorney in place or on speed dial, budget allocated, relationships with key allies established, records organized, etc.)?
2. Can you afford to litigate at all?
3. How long can you afford to litigate?
4. What strain does litigation put on the organization?
5. What offerings will likely have to cease during litigation, and what offerings will replace them?

If you feel that litigation would serve as the death knell to your organization, undergoing extensive risk mitigation might be advisable and could involve:

1. Making public-facing programs that increase exposure, private.
2. Establishing social media guidelines and controls.
3. Monitor and/or minimize media coverage on your organization.
4. Ensure all key stakeholders understand your risk assessment and the primary factors for the organization's low risk tolerance.

Conversely, if your organization: 1) has a high-risk tolerance, 2) plans to continue its business as usual or even go on the offensive in some respects, and 3) is willing and able to litigate...

- Prepare for litigation.
- Lobby elected officials.
- And proceed to the court of public opinion.



The foregoing has been prepared by Jimmie B. Strong, Esq. at The Advisory, PLLC but is not legal advice. Any legal advice must take into account the specific facts and circumstances of your situation.

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