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Skadden Discusses Court Decision Striking Down Women on Boards Law

By Virginia Milstead May 20, 2022

Comment

On May 13, 2022, a judge of the Los Angeles County Superior Court ruled in *Crest v. Padilla*, Case No. 19STCV27561, that California’s statute requiring California-based public companies to have one to three women on their boards of directors (S.B. 826), depending on their board size, violated the equal protection clause of the state constitution. Although the decision, which following a bench trial, does not specifically address the related requirement in S.B. 826 that companies disclose board member information to the secretary of state, the court’s decision enjoins enforcement of the entire law.

After determining that the taxpayer plaintiffs could challenge the law even though the defendant California secretary of state had not enforced it against any corporation, the court first concluded that the law “affects two or more ‘similarly situated’ groups in an unequal manner.” The law created “essentially a quota system for private corporate boards” that requires corporations to “take gender into account to comply with S.B. 826.” However, the “general board selection process ... does not differentiate between men and women” and is competitive and difficult for any prospective board member. Because “men and women are similarly situated for purposes of S.B. 826’s gender-based quota,” the court concluded the law was “presumptively unconstitutional.” The burden therefore fell on the defendant to prove that the law satisfied strict scrutiny — that it was (i) supported by a compelling state interest, (ii) necessary and (iii) narrowly tailored to accomplish its goals.

The court rejected the defendant’s argument that S.B. 826 furthered a compelling state interest because it would increase gender diversity on boards, thereby boosting “the economy, improving work opportunities for women, protecting taxpayers, public employees and retirees” and “improving corporate governance.” The defendant offered insufficient evidence quantifying these benefits or proving any causal link between those benefits and the gender diversification of boards, the court determined. The expert evidence the defendant submitted did “not sufficiently address discrimination [and/or] causality nor utilize the most sophisticated, econometric methodologies and current statistical analysis available.” Rather, the court said, the defendant relied on “testimony of stereotypical virtues of women such as ‘consensus builders’ and ‘less risky behavior in investments.’” The court was “unpersuaded by this offer of stereotypes for a justification of S.B. 826.”

The court also rejected the defendant’s argument that S.B. 826 furthered a compelling state interest because it “was passed to eliminate and remedy discrimination in the director selection process for publicly held corporate boards in California.” To show that a law remedies past discrimination, the defendant must point to “purposeful or intentional, unlawful discrimination by the entity employing the suspect classification,” not general discrimination in a particular region or industry. However, the text of S.B. 826 did “not reference discrimination nor remedying discrimination” as a reason for its enactment; instead, the text and legislative history spoke about achieving gender equity or parity. The defendant also did not point to any “specific, purposeful, intentional, and unlawful discrimination to be remedied.” Instead, it cited “only statistics about the number of women on corporate boards as compared to men, not any specific discrimination.” Witnesses attributed the numerical differences between men and women to “reasons other than actual discrimination, including the lack of open board seats, women’s networking issues, board propensity to select persons that they already know, and [boards’] preference for choosing CEOs to fill open board positions.”

Finally, the court concluded that, even if remedying past discrimination were a compelling state interest, the law was not narrowly tailored because the defendant “failed to show the Legislature considered gender-neutral alternatives ... or that gender-neutral alternatives were not available.” The Legislature did not consider amending existing anti-discrimination laws or enacting new anti-discrimination laws pertinent to the board selection process. Nor did it limit the law in scope and duration to that which was necessary to remediate past discrimination. In any event, for a law that remedies past discrimination to use a suspect classification, the “remedy must be designed as nearly as possible to restore the victims of specific, purposeful, or intentional, unlawful

discrimination to the position they would have occupied in the absence of the discrimination.” However, “having a ‘critical mass’ of women on boards is unrelated to remedying any injury that an actual victim of discrimination may have suffered.”

This decision follows the decision of another judge in the Los Angeles County Superior Court in April 2022, which struck down a similar law requiring companies to include at least one member of an “underrepresented community” on their boards. That court likewise concluded that the law violated the equal protection clause in California’s constitution. It is too soon to tell whether California’s secretary of state will appeal either decision.

This post comes to us from Skadden, Arps, Slate, Meagher & Flom LLP. It is based on the firm’s memorandum, “California Trial Court Strikes Down Women on Boards Law,” dated May 17, 2022.