Episode Title: Environmental, Social, and Governance (ESG) Standards -- A Conversation with the Honorable Leo E. Strine, Jr.

Episode Number: 20240223
Publication Date: February 23, 2024

All Things Chemical® is a podcast produced by Bergeson & Campbell, P.C., a Washington, D.C., law firm focusing on chemical law, business, and litigation matters.

This podcast transcript has been lightly edited for accuracy. It is an approximation of the podcast audio, and the audio recording remains the definitive record.

Let us know about any topics you would like to hear about in future episodes at podcast@lawbc.com.

A full recording of the podcast is available at https://www.lawbc.com/environmental-social-and-governance-esg-standards-a-conversation-with-the-honorable-leo-e-strine-jr/.

Lynn L. Bergeson (LLB): Hello, and welcome to *All Things Chemical*, a podcast produced by Bergeson & Campbell, P.C. (B&C®), a Washington, D.C., law firm focusing on chemical law, business, and litigation matters. I'm Lynn Bergeson.

This week, I had the distinct pleasure of visiting with former Chief Justice of the Delaware Supreme Court, the Honorable Leo E. Strine, Jr., now Of Counsel at Wachtell, Lipton, Rosen & Katz. Judge Strine and I discussed the intense focus on environmental, social, and governance, so-called ESG, standards and the pressures on corporate directors and managers occasioned by the *Caremark* decision and its progeny, among other developments. These initiatives have particular relevance to businesses many of our clients and listeners manage, as they often involve environmentally sensitive chemical products and manufacturing operations. We discussed Judge Strine's thoughts on implementing ESG programs by building upon existing corporate compliance programs and how best to allocate compliance responsibilities between corporate boards and senior management. Now, here is my conversation with Judge Strine.

Judge Strine, thank you so much for being with us today. I have been looking forward to speaking with you for many months now.

Leo E. Strine, Jr. (LES): It's great to be with you, Lynn.

LLB: I think our listening audience knows that you are a leading authority, a global authority, on corporate governance; the former Chief Justice of the Delaware Supreme Court; now a practicing attorney focusing on corporate law; a thought leader on corporate governance issues; and the author of countless scholarly publications and law review articles on corporate law and governance.

A topic addressed in a recent law review article that you co-authored is the subject of our conversation today. It caught my eye, and I'm just very, very excited to talk about it. The article is titled "*Caremark* and ESG, Perfect Together: A Practical Approach to

Implementing an Integrated, Efficient, and Effective *Caremark* and EESG Strategy." It was published last year in the *Iowa Law Review*. The central thesis, as I read the law review article, is EESG is best understood as an extension of the board's duty to implement and monitor a compliance program under *Caremark*. I'm going to stop there because I've crammed a lot into an introductory statement. Two questions for you, Judge. What is EESG, as many of our listeners are more familiar with ESG? And what is the holding in the landmark *Caremark* decision?

LES: You're right, Lynn. A double-ESG, which is easier to say maybe than EESG, is sort of my creation. Because ESG, as many people know, it stands for environment, social, and governance. It's a string of initials used, I think initially, by a UN [United Nations] study to describe a corporation's obligations, essentially to be a good citizen. It actually followed up on the movement that used to be called corporate social responsibility. The reason why I go with double-ESG is I was told to beware the workers. And I was told aptly, well, they're buried in the S, which is an interesting way to think about it. And I have a passionate belief that you cannot be a good corporate citizen if you're not good to the stakeholders who are most responsible for capitalism's success: the employees, and that they shouldn't be buried in the S, they should be up front. And I also have a passionate belief that we don't make progress on environmental responsibility if we ignore the concerns about economic security that come with transitions in how corporations address the environment, and that it's particularly important at this time with climate change. So that's where the extra E came in. I don't know that it's caught on, but it has had some impact in causing corporations and institutional investors to give a little bit more focus to workers.

LLB: Let me comment just on that for a minute, because many of our listeners are very, very familiar with chemical substances and the regulation of chemicals in the workplace under the Toxic Substances Control Act (TSCA). Interestingly, when TSCA was amended in 2016, employees were identified as a potentially sensitive subpopulation, so the emphasis in our community of chemical stakeholders is very focused on employees. Your statement, the E in employee might be buried in the S, is very apropos for our cohort here.

LES: Lynn, it's interesting. I mean there are studies, for example, in Germany where there's worker codetermination, and so workers actually have a segment of the board. And there are communities where companies in the industries with a high degree of environmental emissions, where employees lived in those communities and were suffering from that environmental harm in terms of their personal health, but yet, along with the company, weren't really anxious to do anything to transition because their greater concern, honestly, Lynn, was to continue to have a job.

LLB: Right. Right.

LES: One of the tensions we have -- and I think we are at this moment -- I always cringe when I hear some of my friends, I call them, I would call them the pour-over coffee left, which are the people -- well, it's, "Peet's and Starbucks is not fancy enough." You have to go and get some single-origin pour-over thing through a filter in this little cup -- that when they talk about climate, it often seems to personalize the people who work in producing energy as if they're somehow uniquely responsible.

LLB: Yes, or disproportionately.

LES: Right. When most of us, frankly -- I like to be -- like, I forgot to pack right today, and I went for a run this morning, but it was a little brisk since I didn't actually bring long pants or a thing. I like to be warm in the winter and cool in the summer. I have a hybrid, but I still use gasoline, right? When we talk about these things and we don't realize that we're *all* responsible for them, we tend not to make progress. Recognizing that in many of these industries, the workers themselves are often the most exposed, as members of the community, because they live in that community. This is a long standing, and the climate thing puts it on a global scale. But I don't think that these things, as you know and your listeners know, these things are not new to this dynamic. They've actually been central for some time, and it might be good for us to actually learn something from the lessons of the past rather than repeat them.

LLB: Couldn't agree more. Maybe we can circle back to the *Caremark* decision. I know this is a hugely important decision in the corporate world of board governance, but there's a unique relevance to the decision in the context of ESG or double-ESG and the law review article that you authored. What is the holding, and why is it relevant to this conversation?

LES: The basic holding in *Caremark*, and it was decided by a mentor, a late mentor of mine, whom I still miss, Chancellor William T. Allen. A basic holding reflects the bottom line, first obligation of corporations under Delaware law, which is not to make profits. It's actually to conduct only lawful business by lawful means. We've given corporations great flexibility to go into different business lines, do things like that, but there is this bottom line, as I put it in an opinion that I wrote when I was on the Court of Chancery, "Delaware does not charter lawbreakers."

So in *Caremark*, what Chancellor Allen did was to recognize that one of the duties of a board of directors -- and it's one of the reasons we have independent directors -- is to make sure that there are compliance systems in place that are designed to make sure that the company complies with that basic obligation. And that's things like, to your listeners, to environmental responsibility, or to the harm that your products -- if you make things that go in people's bodies -- like I'm looking at plastic products. I've got a bottle of water. I think it ensures me that it's recyclable. But the reality is, we now know that what we drink from things that have plastics in it, some of it goes in our body -- that we're honoring whatever society's expectations are for lawful conduct, and that that's the central obligation of the board of directors. And so that's associated with the *Caremark* duty of the board: to make sure that the company is honoring its obligations to society.

LLB: And as I read the decision, it's both having a reporting functionality that can report up and identify issues along the lines that you described and also a monitoring functionality. So once those systems are in place, there is an appropriate infrastructure to make sure that you can report out on information being reported to a board or senior executives in a company. At least that's my --

LES: Correct. And as you know, Lynn, you've worked with companies for a long time. The whole goal here is let's identify potential problems or harm at the earliest possible --

LLB: Exactly.

LES: -- moment, and let's try to act on it. Obviously, people use the term "red flags." I actually tend to say yellow.

LLB: And green and the red? Right.

LES: Right. To have those systems in place, although we all hate those. I don't know if you've ever had those consultant charts where they give you green, like it's a traffic thing. But the point is potential issues to identify them and then act upon them. So there is that obligation to have a system in place, but it's also the obligation of the board to ensure that when there's information that suggests there might be a deficiency, that there's appropriate follow-up and that you're acting on them.

You mentioned appropriately disclosure. One of the things that's always been a requirement of fiduciaries -- when you have other people's money -- is that you provide fair disclosure. The interaction of state corporate law and with public companies, the SEC [U.S. Securities and Exchange Commission] requirements when you have annual meeting proxies, when you have your annual report, there are requirements that you identify material risk factors and other sorts of things. This interacts with that disclosure, because if you know things which are potentially violations of law, which could be material to society and to investors in particular, you have an obligation to disclose them. There's actually been a fair amount of litigation around things like -- you think about tobacco, you think about other situations -- lead gasoline -- where industries allegedly knew about potential societal harm and didn't disclose. That's actually been a factor in allowing litigation to be brought against them, even though it was seemingly years after the conduct. Because if the public doesn't know about it, Lynn, there's no ability to actually bring the suit. These things tend to come together in better companies in thinking systemically about what I say is making money the right way.

LLB: These topics, Judge, are of endless interest to many of us here at the firm because we take product stewardship issues very, very, very seriously, simply because many of the issues that our clients are forced to address relate to their ability to identify, monitor, and prevent the consequences of either their manufacturing operations or untoward consequences of the presence of contaminants or byproducts, or the actual core ingredient in a product that they manufacture and distribute to others. I'm hoping that people will read your law review article, because there's just an excellent summary of some of the origins of EESG and why you have the double-E focus, is explained well in your article.

Maybe you can give a little background, or take some snippets from your law review article, on what the origins of EESG are and what some of the drivers are. It is a huge focus today, but as you correctly noted a moment ago, corporate social responsibility is by no means new, but there seems to be much more intense focus on it now, and newer and more demonstrably efficient ways of ensuring that we have ESG programs in place and achieve corporate social responsibility in a way that seems to be evolving and even more demanding on fiduciaries of corporations. Maybe you can just give a little background, as you did in your law review article.

LES: Yes, actually, as you know, Lynn, the dynamics have moved fairly briskly, even since the article came out, and in a way that is dismaying, and that is emblematic of the larger kind of erosion in civil discourse in our society. What I focused on in the article, and what I believe to be uncontroversial, is that whether it's a Republican or a Democrat, independent, anybody, there's not a partisan divide about the following proposition, which is that companies ought to -- I call it again, "make money the right way." Which is they should make money based on the quality and innovation of their products and services, not on externalizing costs to their workers, to taxpayers, the communities of operations, or their consumers. What does that mean? Basically, don't subject your workers to unsafe conditions in order to squeeze out extra profits. Don't pay them a sub-living wage where they have to use government resources in order to provide for themselves. Don't fail to pay your taxes in your community or pollute the communities you're involved in. Make sure your consumers get good value and that their lives are better off because they use the products and services.

A good example is the opioid crisis, right? There's no partisan divide that it was not useful to our society for pharmaceutical companies and pharmacy chains to make profits by, frankly, being complicit in selling opioids for improper purposes to people who were addicted, and for hundreds of thousands of people to lose their lives, for paramedics and police officers to spend their time reviving the same person, to have communities degraded, to have taxpayer coffers have to be gone into to create programs to overcome this. Nobody supports that.

On the environmental side, in one of my other articles, Lynn, I say, people talk about climate. Climate has become caught up in the culture wars as a matter of primitive identity. If you look at polls of people who hunt and fish, who are more likely to identify as Republican than the average American, they overwhelmingly want companies to be environmentally responsible and to not pollute the stream or the air. And that makes sense, right? If you hunt or you fish, you like to be outdoors. You want to take your kid, and when she catches her first trout, you might actually want her to be able to eat it, when you go hunting. If you look at polls across the board, as should workers be treated with respect by companies? There's not a partisan divide. Should companies pay their fair share of taxes?

If one of the ways -- if you conceive of good corporate citizenship the way I am, and double-ESG that way, it's really "Are we making money through quality innovation while respectfully treating all those stakeholders and all elements of society that we affect with respect?" If you think about it that way, it's less of a partisan divide. Where the culture wars are coming in is when you speak out about things where the public is divided: reproductive rights, gun things, things like that that companies don't necessarily control. That's when you start to lose the consensus, because you're talking about companies speaking on issues where there *is* no societal consensus. What I tried to do in the article, and to be practical for those people like you and others and people inside companies who are trying to figure out "How do we go forward in a responsible way?" is to say that focusing on your respectful treatment of stakeholders and making sure you're doing the right thing. There's no partisan divide about that.

Where it comes together with the law, Lynn -- and this is why I say that *Caremark* and good corporate citizenship come together -- is where does the company -- where the company rubs up against a stakeholder group or society, the law tends to rub up against the company. For example, if you make products and there's a certain inherent danger in making the product, you're going to run up against OSHA [U.S. Occupational Safety and Health Administration], right? -- to make sure that your workers are safe. All companies have HR [human resources] issues like Title VII, MeToo, other sorts of things, obligation to pay the minimum wage. You're going to run up against legal requirements in those areas. If you have emissions, you're going to run up against EPA [the U.S. Environmental Protection Agency]. If you put things in people's bodies -- you're a pharmaceutical company, you're a food company -- you're going to run up against the FDA [U.S. Food and Drug Administration]. Right?

LLB: Absolutely.

LES: If you think about corporate citizenship, which is when we rub up against people, do we do it with respect, and are their lives better, and do we respect them? That meets up with the law, because the law tends to constrain you in those areas where you could harm someone.

We all know this. Most people actually try to do the right thing. If you've raised children, or if you're like me, you are a perpetual adolescent, you know that there's a three-letter word that's really important where somebody may not agree with you. But if you show them the "Aretha," the respect of using it and explaining it, you tend to get more adherence, which is W-H-Y. Why are we doing something? If you look at things like environmental responsibility, or the obligation you have to your consumers, or the safety obligations to your workers -- if you look at it through the lens of doing things the right way, making money the right way, you're explaining to the people in your organization. You're creating a culture about the why, why it is the right thing to do. But then you always get that group of people -- right, Lynn? -- where "Okay, that's the right thing to do. Do I *have* to do it?"

LLB: Right. There is that component to deal with.

LES: That's where the law comes in. These things enforce each other, which is -- there's evidence that compliance programs that are infused with values are more effective, because the people involved in them understand why what they're doing is important and has value to someone else. But then the law comes in, because there are people who just -- frankly, they're not going to do something unless they have to. And you can point out that we *have* to and that the law requires us to do this.

I talk a fair amount about this. I am sensitive that people do not have unlimited time. It's difficult to run a complex organization. People are busy. If you do related functions in an inefficient, uncoordinated way, you tend to not do them well. You work at cross purposes, and you're more likely to miss something. One of the things I'm trying to point out to people is if you integrate, you shouldn't be doing your E for environment for purposes of ESG separately for your E in terms of legal responsibility. And usually, Lynn, where the law regulates you most tightly as a business, the law is not -- I'm sorry, but most laws make sense. They tend to more tightly regulate companies where there's the potential that the company could create the most harm. I mean, we're talking today at a period where Boeing is again in the news.

LLB: Yes, for all the wrong reasons.

LES: Yes, and they went through this. But you know, they had a case a few years ago, a *Caremark* case about the same aircraft. They didn't have a specific board committee focused on the industry and on aircraft safety. They had all their compliance through audit. They had a very difficult record of not acting on yellow and red flags, and they ended up paying a fairly massive amount of money, and even more, the company -- when you get a *Caremark* suit, as I put it in the article, you've almost always already lost, Lynn, because the *Caremark* suit usually comes after the regulatory inquiries. You're talking about shutdowns, grounded planes. How does that affect your business? You also may have to make your customers whole. You could suffer regulatory fines, and you can suffer when it comes to consumer harm, obviously you can suffer a loss of confidence and your consumers going elsewhere.

Part of the focus of the article really is it's hard enough to be a good business and treat all your stakeholders with respect. But if you do that, that's an awfully important thing. And maybe we haven't thought hard enough about the board's role in that process, and making sure that you have industry-specific approaches that make sense. Too many companies -- and I just said this, but it bears repeating -- too many companies still have almost all their compliance in the audit committee. The audit committee has a very difficult job, usually around financial reporting. Risks are diverse, and the fact that somebody knows about

GAAP [generally accepted accounting procedures] reporting doesn't mean that they know anything about PFAS [per- and polyfluoroalkyl substances] or about chemical emissions or other sorts of things. There's also a very difficult time management issue with the audit committee. Core industry risk that's different from financial risk, and issues that are common in all companies like HR, often don't get as much attention as they should, because companies haven't set up their board structures to spread the load and make sure that the risk management structure of the company actually fits the specific industry that the company is functioning in.

LLB: -- which will necessarily vary all over the map, right? If you're a manufacturer, for example, of a PFAS material or a component into a firefighting foam, it would seem to me that the portfolio of board directors needs to be necessarily attuned to all of the implications of that. The finance portfolio needs to appreciate that the cost and the risk associated with the products that you're manufacturing could be quite substantial. But your article goes into some of the complexities here, but also the common sense-ness of it all, that depending upon the type of material that you're producing or the business in which you are engaged necessarily needs to reflect the risks, the responsibilities of the cohorts that might be most directly impacted adversely by your product, and integrating those sensitivities into the existing compliance structure is, if I read your article correctly, kind of your core message. You don't need redundancy, and in fact redundancy might be not working to your advantage.

Maybe you can spend a little time talking about how exactly companies might be utilizing best practices in this regard, because it's a tough area for a lot of our clients to be mindful and respectful of double-ESG principles, but also manage their business in a way that addresses the potential risks of their products in a way that is commensurate with the structures they have evolved and the responsibilities they have to all of their shareholders and writ large shareholders, meaning the communities, the employees, the regulatory entities, all of which have a role in the management of that company.

LES: No, I don't want to understate the challenge, but I think the solution I have is one that involves business people taking advantage of what they're best capable of, which is thinking in a businesslike way about the business itself, and stop treating this like a game. Too much of what's happened, Lynn, is you've got some good faith legal obligations, but they went kind of a Christmas tree effect. You had first Sarbanes-Oxley and then Dodd-Frank. I don't criticize the basic financial reporting aspects of it, but you ended up things with nominating and corporate governance mandates for committee. Okay, that's probably not that central.

What you see is companies just throwing their ESG or their sustainability into nominating corporate governance, and they get a PR [public relations] firm to put out some report. The report is not verified with the same rigor that the annual report or the proxy statement is. The people putting out the environmental part aren't integrated with the people doing the real hard work of environmental compliance with the company. Same thing with HR, so there's a disconnect. It takes up time. It tends to be rote. One of the problems with legal mandates is they're on the checklist. We're lawyers. We know that they're on the checklist; they have to be done. There's not on the checklist "Make sure you have a fundamentally sound business strategy. Make sure that that fundamentally sound business strategy does not involve harming any of your stakeholders." That's not actually a legal mandate, but that happens to be the most fundamentally important one.

LLB: And the standard to which entities are going to be held, certainly in the court of public opinion, right?

LES: Yes. My practical view for this for most companies, audit has enough to do. Audit folks are often your best directors, but they have a control freak tendency. I mean, they do. It's not -- their propensity for monitoring financial controls also extends to their desire to control everything. They often overestimate their ability to do things. They do have audit, will have to sign off on the overall compliance plan. But no, it shouldn't be the soup to nuts compliance for most companies. You should have a strong audit committee. It should have a relationship to the overall thing. And it might in many companies also be the place you house cyber. HR, again, consistent with my double-ESG. Every company has workforce issues. Instead of having a comp committee that just obsesses over the C-suite compensation and the board, have them actually be a workforce committee. Have them set executive and board compensation in the context of an overall workforce plan.

And have them be the committee to which the HR staff, the risk management on the HR side, Lynn, the Title VII, the MeToo stuff, where frankly, a lot of boards have been caught out, because there's not a regular time and attention with a board committee is -- I'll pause here. It's really important. Things don't get discussed at the full board meeting unless they're regularly discussed at committee and shape for the full board. And the other thing is the committee process is the way that there's more informal discussions with other members of management than the CEO with a subset of the board. Those relationships build over time, and when there's not a regular opportunity to discuss them, conversations that are important don't happen. HR, instead of just having this committee focus on comp for the few, have it focus on the many.

And have a third committee, which is really your central industry-specific committee. If you're a pharma company, it should be populated -- I always use this example, Doctor Fauci. Whether people agree with him or disagree with him, there was an amazing public servant, in my view, who took on tough issues like AIDS and COVID. I would think if you're a farmer or a food company, you might want him on your key compliance ESG committee that deals with your central industry risk about our products. Are our products safe for the people that are putting them in their bodies?

He couldn't serve on the compliance committee, probably, of a lot of pharma and food companies. Why? Because he would probably say, "I was busy doing all this public health stuff, not really focused on GAAP accounting. You want to put me on audit, and I'm supposed to certify myself as a financial expert? I'm not comfortable doing that." But we don't have any problem having a former accountant at a top accounting firm or the former CFO of a public company -- we have no problem with them dealing with pharma or environmental risk? That's the mismatch is we're not thinking about this, and if you're in a particular industry, you should have an industry-specific committee. Your board members should have industry-relevant experience, and all your risk management structures at the management level that deal with material risk should be married up with a reporting relationship to a board committee.

There are companies that are hugely complex, but most companies are in an industry space. It's good for us as a society. Most of the companies, their products are not just financial products. They're actually real, tangible services or products that -- and chemicals is obviously a huge one. Our society -- I'm from Delaware. When I went to school, when I was growing up, people tended to ask each other, "Where's your parent work? Is it DuPont, Hercules, or ICI?" That's the way it was. We had more Ph.D.s per capita in New Castle County, Delaware, than any other place in the United States. I'll never deny that chemicals have made our lives better off. And they do. I mean, nonstick pans. I'm the cook in the household. Who doesn't like not having to scrape the egg off the pan? But we've also come to learn that things that are useful, they can be very useful in the short term, but they can have deleterious consequences if you don't balance that.

I would not be a good compliance, probably, director on a chemical company, because it wouldn't have been my best grade in school, Lynn, to be honest. Some of the science might be beyond me. It doesn't mean I couldn't necessarily be a board member. But wouldn't we want some board members who have relevant experience, who speak the language, who are able to interact with the people who are full time doing the risk management, have a good sense of values, and have the company be able to benefit from their expertise? I think we've done a poor job in the United States, actually, organizing boards in a businesslike way. And it's because people who are business people, this is what they're good at.

What I'm really urging them to do is think like you would if you were trying to do it right in this industry, and then where you ask people like me and you, Lynn, is to figure out how within the law can we organize our committee structure so that we're doing what is right within the law? The reality is that the law gives you a good amount of flexibility, and you can actually do it. And because you're not doing stupid things, which is hiring some PR firm to do an optical report on sustainability, where that's separate from all the hard work that's really going on. If you're doing it in an integrated way and for example, you've got a workforce Committee of the board, and that's the one that's going to produce the workforce part of your public sustainability, good corporate citizenship report, then you've got the real people in the company working on it, doing it. They're also the people going to be producing the real data for compliance reports to federal agencies and state agencies. And you're not going to do things twice, and the same thing with the environment, and the same thing with your finance, and your cyber.

It actually is the way a business -- you would think that a business would do it. It's less the way that you would think that you would do it if it was just a corporate governance checklist. And that's been the problem is that people have commoditized corporate governance. They come in, and they just basically do the same old, same old. You don't get credit for investors, by the way, Lynn, because when it happens -- the fact that, "We did this, and this is how you do it," they're not going to give you credit when there's a meltdown. And if you look at companies getting targeted for activism, when boards -- after the fact, when it doesn't look like it makes sense because it *doesn't* make sense -- that's when activists have been able to replace members of the board. That's frankly when companies have paid big regulatory fines. And it's also when you look bad to your stakeholders.

LLB: Right. Those are the instances where corporate governance has not worked, because either the wrong people or the wrong systems were in place and didn't anticipate, address, and remedy problems before they happened. I'm having a hard time disagreeing with anything you're saying because you're singing my song here. In our neck of the woods, in the agrochemical, specialty, biocidal, and industrial chemical communities in which I work, the need for subject matter expertise is *so* critically important. The people who are running the show and providing the governance at the board level need to be fully aware of the consequences, good or bad: the advantages, and efficacy, and potential consequences of the products that they are releasing into the environment and into workplaces. Because not being able to pick the product that you are responsible for managing out of a lineup is not a good thing.

Which leads me to the question that I wanted to ask, and I think you've already answered it, which is, what are some of the common corporate missteps in implementing double-ESG?

And one question I wanted to ask there is that I sense in the more recent past, some pushback, some erosion on the value of ESG (or double-ESG), either wrongly throwing it into a camp of being too woke or just not important, or it's just a lot of fancy hoo-ha and corporate greenwashing. I think that is absolutely incorrect, but to the extent that that sentiment is out there and in some corridors might even be growing, what's the rejoinder to that? That not only to me, is implementing double-ESG critically important. It's even *more* important, particularly in the businesses that I service.

LES: No, I agree, I think that the rejoinder is -- let's just say you're in a part of the country where -- I don't like the misuse of the venerable term out of the labor and civil rights movement, woke, which I think -- somebody reminded me actually was in Matthew, the gospel, which some of the anti-woke types might want to remember, is the "woke capitalism" thing is an invention of the right. It's not a term of the left. But the reality is corporations have -- some of them have gotten out front, right? Corporate leaders are not elected to be political. Most corporations have employee bases and customer bases that are as diverse as the American people. It's not surprising that to the extent corporations have spoken out on issues where the public is divided, Lynn, there's been controversy.

Also, corporations giving in the political process. Frankly, there's an overwhelming bipartisan view that corporations should stop doing that. But my point, I think, yours is to say, don't confuse that debate about whether corporations should get involved in politics or political issues, with there being some societal divide that no one thinks it's okay -- the opioid crisis is okay -- and no one thinks better of the corporations who were involved in that. No one. Same thing if you saw -- interestingly -- the GM strike. Not everybody was sort of pro-union, but you saw an awful lot of Republican elected officials actually go out and be with the workers.

No one is going to defend a company if there's something at a plant and 20 workers get hurt. West Virginia is a pretty conservative state. I don't think it went so well for Massey Energy at the end there, when you had miners die. If you look at something in the news now -- PFAS -- if you look at the state governments bringing suit, they're not all Democratic states. In fact, the PFAS problem is highly concentrated in states that have predominantly Republican legislatures. Conceived of the way that we're talking about it -- which is, are you making money the right way, and are you honoring your obligations to your stakeholders? -- I think it would be very dangerous for businesses to say, "We don't have to do that because of these culture wars." I think it's almost category error. It's actually quite dangerous for you as a business.

I think there are some useful reminders, and I've written another article about is there a non-ideological, nonpartisan way for corporations to look at it? I think there is, which is there are some things you can learn about whether we should stay within our lane, whether we should actually make clear to our employees that we're not an orthodoxy, that we welcome all people of good faith, as long as you treat each other with respect. We value diversity in all its respects, which includes diversity of viewpoint, and that's a basic right of Americans. As long as you're coming together productively and collegially, that you're welcome here. That's the same for our customers. We don't want to tell you what to think, but we do have values as a company, and we show our values in how we treat our employees, how we treat our customers, how we treat our communities. That's what we're going to focus on. That's pretty hard. But if we do that well, we're actually making an immense contribution to society and also to our investors, because if we're making money the right way, we're not likely to suffer regulatory harm. We're likely to be sustainably profitable, because it means that the products and services that we're selling are actually quite useful to people, and that's likely to endure, as opposed to us trying to make money on the margins by shorting our workers or, frankly, putting out products that are not as safe to our communities and to our consumers as they should be. That tends to get caught out after time, right?

LLB: Oh absolutely.

LES: But I do think it's a different -- and as a person, I admit that I'm a person of the left. I was never scared by President Reagan out of using the *liberal* term. I'm still a liberal. I never was not a kind of Roosevelt, MLK liberal, but I gotta say, the people on the left have contributed a little bit to this debate, because there's been a tendency to want corporations to be on your side at times. Then if corporations were not on your side, you criticized them. The only consistency, when the right and left do that, is that, "Well, Strine likes the corporations that say what he thinks. The person on the right likes the corporations who say what they think." That's not a consistent principle.

What I think we need to do is focus on a consistent principle, which is that really for-profit companies, you're not actually who ought to decide political issues. That ought to be the American public, the living, breathing people. But you should be good corporate citizens by serving all community members with respect, being places where all community members can come and work and thrive together and listen to each other. I have a -- you may have heard me say this, Lynn -- but I have a view about -- people say, and again, this is more associated with the left – "Bring your whole self to work." Have you heard that?

LLB: Yes I have, yes.

LES: Okay. The question you have is can everybody bring their whole self to work? Imagine a company where everybody was Christian, and they brought their whole self to work. What does history suggest about that? It doesn't suggest it would go well. But if you look at --

LLB: Quite the opposite.

LES: Right. If you think about fights within Christianity, I have a very different view. I believe that the workplace is basically like Thanksgiving dinner, that you have Thanksgiving dinner rules, which is everybody -- you talk about what you *should* talk about. We all have a crazy uncle. You might even -- I might be the crazy uncle, right? You don't talk about the things -- you remember you love your crazy uncle. You see the humanity, but you try to talk about how good the cornbread stuffing is, the football game, how great it is to see your cousins. When you're at work, that's not the place to solve humanity's most divisive issues. At work? The most passionate arguments you should have, Lynn, is about solving work problems, right?

LLB: Right. We're just helping each other out to have a safe and --

LES: Yes, but if you're going to argue, it should be "Lynn, we've got this difficult issue of PFAS, and how do we deal with this? We've got to resolve this thing, because we're selling -- frankly, we were selling to municipal airports. We were mandated to do it. Now we've got to figure out the liability. Let's get into it. That's what we're at work about."

It's not to resolve the fact that one of us is a Republican and the other is a Democrat. That's not what we do at work, as long as we treat each other with respect. By the way, by working on common projects, by seeing each other's humanity, talking about our kids -- "How was your Thanksgiving with the family?" -- we actually build the kind of --

LLB: --community --

LES: -- basis for discussion that actually helps society as a whole. That can -- the workplace -- can really help, because it's allowing people of different backgrounds to see their common identity, but it's not the place to actually resolve all those differences. When business leaders forget that, that's a real problem.

I would also say there's a great philosopher, Elizabeth Anderson, from the University of Michigan, who echoed some work of the *good* Adolf, a famous guy in corporate governance named Adolf Berle, who was one of Roosevelt's Brain Trust-ers, who's very famous for the so-called separation of ownership and control. Berle, earlier, and Elizabeth Anderson, more recently, made a point that we should all be mindful of, which is for most of us, we spend more of our waking hours under the roof of our employer than we do with our families. Most people in society may not have the flexibility of career choices that people like you and I have had, Lynn, right?

LLB: Right.

LES: In their community, there may only be three or four major employers. We don't want them to go to a totalitarian regime of right or left when they go to work. They shouldn't have to go to work and be in some sort of village of Henry Ford's making -- or *anybody's* making. They should be able to go, be respectfully treated, and believe what they believe, and as long as they're good to the customers and good to each other, they go home. It shouldn't be an orthodoxy. There's a real risk that if we start pushing blue and red companies, that we're going to really impinge on the freedom of people, because it *does* impinge on people's freedom for them to be in an environment where they don't feel welcome to be themselves because there's a kind of orthodoxy, whereas if you do it in the way that I'm suggesting, where you think about our values is not in what we believe, except to the extent that we believe we treat everybody with good faith and respect, and that that's the community we are, and that we value each other's differences. We're not trying to resolve all of them.

Then you start to create more common ground. And honestly, you're also, frankly, getting on with the business of being a business in a more effective way. I don't want to minimize how hard it is. I think the chemical industry -- and because I've been so close to it, just locationally. It's just a good example -- there's so much societal utility that's obviously come from chemical-based products. But we're also correspondingly -- who knew, right? I think we're all embarrassed by our plastic usage.

I don't think any of us would have thought 20 years ago of how deleterious the extensive use of plastics would be in the environment. And as someone who -- for example, I *do* fish and I *do* love being outdoors. When you see the evidence of what it's done to the fish population, for example, and when you see what comes in on the beaches, even of some of our loveliest, more pristine parts of the United States, your human behavior comes back to you. But we've got to be really careful about kind of demonizing anyone in particular.

Now I *will* say there's a caveat there. Industries which have had internal research banks where they wouldn't be surprised about plastics, Lynn? That does hurt the credibility of the business community. There have been too many of these situations. Lead gasoline is one that was associated with several big companies. Tobacco. The impact of fossil fuels on climate change, where it's fairly hard to deny that internally, industry understood that the harm of its products was enormous, not being borne by its stockholders, and not being disclosed to the public.

LLB: Right. A willful indifference.

LES: And even worse, as you probably know, some of the best research on the impact of fossil fuels and climate was actually done internally in the fossil fuel industry. There was vigorous debate internally. Then the fossil fuel industry originally was going to push to lead the transition and then changed to climate suppression. You can read the same files -- the same companies' files -- and it changes over time. That's where it gets difficult to defend; it gets impossible to defend. Where it's also important for people to realize who study corporate governance is that, honestly, these companies and their stockholders *hav*e gotten away with making money, and they actually haven't borne the cost, and the residual cost has really been borne by the environment and by, harmed --

LLB: -- consumers.

LES: -- peoples. Exactly. For example, people are underestimating -- there's tangible evidence that climate change is reducing life expectancy in many parts of the world. I mean, these are actual human lives. It's not I think; fossil fuels have a deleterious effect on air quality. There's also been the distributional issue of the developed world, which has been responsible for using most of these products and creating demand for them, not necessarily bearing the same -- not bearing anything *close* to the proportionate harm. For industries that are really important, like the chemical industries, is that balance between innovation, doing something useful, but doing it in a responsible way, is really more at the forefront than virtually any other segment of the economy, just because it so tangibly affects people's bodies and quality of life.

LLB: Right. Let me -- if I may -- ask you one final question, because it's a question that has come up a fair bit, and it's one that I struggle with sorting out in my head and communicating to clients. We've talked a lot about PFAS. We know it's an emerging risk for many, many, many, many, many companies, in large part because many of our manufacturers are unaware of the fact that there may be a PFAS component in their widget, right?

LES: Right.

LLB: The ubiquity of PFAS in the environment has caused responsible parties to become newly aware of their role in the PFAS conundrum. The lack of scientific information on most species of PFAS has -- to use your word -- demonized this enormous class of chemicals. The universe of -- depending upon the legal definition of what *is* a PFAS --can include tens of thousands of substances. This -- unsurprisingly, Judge, has caused corporate entities to be just extraordinarily cautious and to some extent overly risk averse, and forgo commercializing new technologies that may be rooted in a PFAS, even though those technologies are demonstrably safer, better, greener, faster, more efficient, more efficacious, whatever the adjective, than incumbent technologies that are non-PFAS-based. My question to you is how do you sort those issues out at the board level? Because often these decisions do go to the board, as to whether to embrace a technology that is fundamentally rooted in a PFAS, which is demonstrably better, safer than incumbent technology, but because it is part of that PFAS lexicon, it seems to be dead on arrival, almost. What are your thoughts on that?

LES: One of them is, this is where candor going forward on an industry-wide basis, and why it's really -- the disclosure, common disclosure requirements for everybody in the industry is really important, helps everyone. Being as candid as you just describe the choice, putting out there the information, saying that there's nothing risk free, that this is a lawful product.

"Here's why we think it is actually the best balance of utility and safety." That's what using your business judgment is. As long as that's what's in your research and you're actually owning it, you're not smoking your own effluent, right? Because that's a real problem that we have -- is that people are not really candid -- because if you're being candid, I think you can make that choice.

But here's another thing that the industry could do. I'm very proud. My senior senator is the Chair of the Environment and Public Works Committee, and he's been a committed environmentalist since he was in his 20s. That goes back a ways. He's always believed in the connection between environmental progress and economic development. He's worked very hard in the Senate on things like climate change, infrastructure, and he's focused on PFAS. There are people coming to the U.S. Senate, to the Congress who want immunity, right? Some of them have sympathetic claims. Their argument is, "We made products that government actually required." Or "We used PFAS because we were required."

LLB: We had to, right.

LES: Here's where the industry can come together. Okay. How about, as an industry, the industry come up with some solutions around public funding for remediation that's really adequate? If, for example, we want to have immunity -- we don't want to do this sort of private litigation, but there is a harm. Are we going to not just ask for immunity, but we're going to say to, frankly, members of Congress, because there are members of Congress who want to give immunity, but they don't want to do the public funding.

Shouldn't there be a form of a user fee? Shouldn't we essentially -- my understanding is there is one, but it's not nearly big enough -- is if we're going to exempt everybody, and say "This was all a social problem," are we going to socialize the solution? I hate to use the word -- it's like we can't even use the word "socialize" because then it'll be seen as communist.

I strongly -- I would prefer us to give some immediate aid to Ukraine, having agreed with Ronald Reagan on opposing Russian aggression. But I would say on this issue, there's a mismatch. The business community, though, and industry groups can have an effect on it, which is the industry actually trying to have it each way -- which is "Just let us off the hook. We're not going to have any responsibility to support the funding. We are not actually putting on the table even something that you can put it out of our product."

The reality is -- what is the scope of the products that involve PFAS that are out there, Lynn? It's got to be enormous, right?

LLB: It's huge, and growing.

LES: There ought to be a way to tax the externality that is, frankly, not catastrophic for consumers or the industry, but that provides real remediation. And what you end up with is this insoluble problem, because we're going to try to make the local wastewater facility the locus for remediation. That's not going to work so well. And they didn't know about this, and they're not set up to refine the PFAS out of the water.

What's interesting to me is there seems to be a bipartisan consensus that this is a real problem. When you see state governments that are controlled by Republicans suing, when you see members of Congress who are Republicans and members of Congress who are

Democrats, all complaining about PFAS, then why not figure out a constructive way forward?

My point about the industry is, if you want immunity, but you agree that there is a real harm and a real problem, then you cannot just ask for immunity and refuse to solve the bigger picture problem. That's one of the difficulties we're having as a society now -- is that things that should not be partisan are becoming partisan. This is a science problem. No one wanted PFAS to cause harm. The thing about climate change and PFAS is there's no rational ideological reason why a person of the left or right wants PFAS to cause harm or fossil fuels to create climate change. They just happen to be dangerous. We ought to have a rational way of dealing with it.

What I'm saying for folks in the business this year is straightforward questions. I think the company should make the safest product. It should explain why. But in its larger efforts within the industry, it should look at the mirror and be honest. I could -- if the audience was looking in the mirror and looking at me, they would see somebody who looks a little bit like a raccoon propped up vertical. But if I told you that I my bangs were looking good, that would be a clear lie, because I don't have any bangs. If I told you I took a shower, put on a suit, that would be truthful. The industry being truthful and saying, "This is who we are, warts and all. We're trying to do better." If they come to the table and support a proportionate approach to funding PFAS remediation, then they're probably more likely to get reasonable --

LLB: Buy-in. Yes.

LES: -- protections against lawsuits. But when you only come and just basically say, "Let us off the hook," and leave the public holding the bag. And when we know that there actually is real public health harm from this, whether it was intentional or not, but we know it's real, and we know, unfortunately, that it doesn't easily -- it just doesn't go away. The only way it's going to go away is to actually do something that treats it as it comes back in, and that that's massively expensive. Oddly, it also -- let's be honest about the location of some industries. Many of these industries move to places with lesser environmental and worker protections --

LLB: Restriction, right?

LES: Some of the harm, therefore, is more centered in communities where there are fewer resources to deal with it. This is one where I think many conservative economists would say price the externality -- that because there's such an enormous flow of products that use PFAS, or that are related to products that used to use PFAS -- that it would be relatively easy to come up with a sound economic proposal if the industry helped promote a nonpartisan response. Those are difficult these days, but there are people, for example, the hydrofluorocarbon phaseout was really forged by Chairman Carper, working with the business community, Environmental Defense Fund, and working with Senators Kennedy and Thune, as I recall, and passed during the Trump Administration. It's not easy to do, but when people are committed and when industry itself is willing to come to the table, things are more achievable.

LLB: I totally agree, and given the partisan nature of our Congress these days, the likelihood of a political fix is absent. A very strong push by the commercial community is highly unlikely.

LES: Well, because people don't feel -- unfortunately, it's an atmosphere where there's not a lot of trust.

LLB: Right.

LES: Interest groups -- the last thing you want to do if you're an environmentalist is come to the table, take a risk, have it not pay off, and then have undermined yourself with your own community and look weak. I think where the business community really comes in is -- are they willing to have the back of people who make a change, and are they willing to actually do their share and try to bring together both parties? That's a difficult thing, but they have a lot of influence, they have a lot of jobs, and if they step up, they really can have a positive impact.

LLB: Absolutely. And somebody, some cohort, some group needs to step up, because last year was an extraordinary year for all things PFAS. This year will be no different, and even more intense. The problem is not getting resolved. It's getting worse.

LES: Yes. It's difficult. I'm a judge -- I was a judge for many years. I'm a lawyer. You're a lawyer. I'm no fan of endless litigation to solve issues. You look at the asbestos issue. We still have asbestos --

LLB: **--** litigation.

LES: It's pretty amazing. I think it would be much better for us to have a non-litigation solution. But --

LLB: Completely agree.

LES: It has to be a solution, and it can't -- if wishes were horses, we'd each own a Kentucky Derby winner. I think having -- I can't get behind an idea that you're just going to give away immunity to certain industries without a proportionate solution.

LLB: No.

LES: It also is kind of maddening, because this is one where objectively, there's an across-the-board, bipartisan consensus that there's a real problem. It's not an ideological issue. It's a real issue. And it's one where industry and leadership -- so I think on two levels to get to your question is running a business, I think you make the right product, make sure it's safe. But if it's the safer option, it's the more useful product.

Then make your case. Be credible about it and proceed. In the American system, you get a lot of credit for that, particularly in Delaware. But realize that your own company -- make sure your participation in industry group sectors and in the political process is consistent with your value system, and that you're part of the solution, and that you're not talking out one side of your mouth as an individual company and then supporting an industry group that's actually impeding a rational solution. Rather, use your membership to insist that it actually forge something that brings a resolution to it. I think that's lost a lot.

LLB: Great response.

LES: A lot of industries, a lot of companies participate in industry groups. They feel like they have to, but they don't necessarily use their voices. Or, even worse, perhaps they secretly support the industry group, and then their own corporate statements are not actually accurately reflecting their commitments. That creates a credibility gap.

LLB: Judge Strine, I want to thank you for joining us today. Your expertise in this area, the clarity of your thinking, your article I urge all of our listeners to read. With your permission -- and I can sort this out later -- I'd love to post it with the posting of the podcast, because your *Iowa Law Review* article just brings out so many important issues regarding double-ESG corporate governance and how to address some of the more practical challenges that I know our clients address routinely. This is the best article I've read on how to sort these issues out and move forward, and do as you suggest, be good corporate citizens and make the world a better place.

LES: Thank you, Lynn. It's an honor to be with you and your audience.

LLB: Thank you for being here.

LES: Take care.

LLB: You, too. My thanks again to Judge Strine for speaking with me today about EESG, *Caremark*, and navigating the evolving duty owed by corporate entities and senior managers to the public, their employees, communities, and the environment.

All Things Chemical is produced by Jackson Bierfeldt of Bierfeldt Audio LLC.