

## ***Fearless Fund Settles: Settlement Will Shape Law on Race-Based Grantmaking in Eleventh Circuit While Leaving Issue Unresolved Nationally***

Over the last year, we have monitored a lawsuit in Georgia that alleged a hedge fund (“Fearless Fund”) violated 42 U.S.C. § 1981—the federal prohibition on racial discrimination in contracting—by operating a grant contest that awarded \$20,000 grants to select small business owners, all of whom, by the contest’s express rules, had to be Black women. That case, *American Alliance for Equal Rights v. Fearless Fund Management, LLC*, settled yesterday.

While the joint stipulation of dismissal expressly stated that the parties had settled the matter, it did not disclose the terms of their settlement—leaving unclear at this time how, if at all, Fearless Fund will be required to alter the terms and conditions of its grantmaking going forward. The settlement of the *Fearless* case has at least two key implications with respect to the emerging law relating to race-based grantmaking in the U.S. First, the Eleventh Circuit’s June 3, 2024 opinion holding that Fearless Fund likely violated § 1981 is now the settled and binding law of the states comprising the Eleventh Circuit Court of Appeals—Alabama, Florida, and Georgia. Second, the law of race-based grantmaking outside of the Eleventh Circuit will remain uncertain, at least until other appellate courts have ruled on the various *Fearless*-like cases now percolating through the nation’s courts.

### **I. Settlement Entrenches Panel’s Ruling as Law of the Eleventh Circuit**

As we covered in our [June 5, 2024 client alert](#), a divided three-judge panel of the United States Court of Appeals for the Eleventh Circuit recently [ruled](#) that Fearless Fund likely could not offer grants exclusively to Black women. Specifically, the majority held that:

- The grants at issue were contracts—and so fell within the ambit of § 1981—because they were supported by sufficient consideration, namely that in entering the contest, applicants had to agree to indemnify Fearless Fund, arbitrate any disputes with it, and had to give it permission to use their ideas, names, images, and likenesses for promotional purposes;
- Fearless Fund had no valid affirmative action-based defense to its conduct;
- The First Amendment did not protect Fearless Fund’s conduct because “the First Amendment does not protect the very act of discriminating on the basis of race”; and
- The plaintiff—a membership organization—could bring a lawsuit against Fearless Fund while identifying its members by pseudonyms rather than by their actual names.

In light of yesterday’s settlement, the rulings of the Eleventh Circuit panel regarding the permissibility of race-based contracting are now more firmly established as the law of the Eleventh Circuit.

Importantly for our philanthropic clients, the ruling leaves open the question of whether grants that are gifts and not contracts escape § 1981 scrutiny.

### **II. Settlement Leaves the Law of Race-Based Grantmaking Unresolved Outside of the Eleventh Circuit**

The *Fearless* settlement also means that, for the states and territories outside the Eleventh Circuit, the court’s ruling in *Fearless* has not been confirmed as “law of the land” nationally by the Supreme Court.

Importantly, *Fearless* is not the nation's only case on race-based grantmaking. For instance, similar cases have already reached the United States Courts of Appeal for the Fifth, Sixth, and Ninth Circuits, although final opinions have not yet been issued by those Circuits. We will continue to follow these cases, any one of which could eventually make its way to the Supreme Court.

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*Fearless* was just one of the dozens of cases filed across the country since 2023 regarding the appropriate role of race-conscious remedial efforts to address the nation's deep-rooted racial inequalities. As these issues play out in the courts, we will continue to offer updates on their decisions and related guidance to grantmakers and other clients pursuing DEI-related goals.

**This alert is for general informational purposes only and should not be construed as specific legal advice. If you would like more information about this alert, please contact one of the following attorneys or call your regular Patterson contact.**

**Employment Law**

[Lisa E. Cleary](#)

212.336.2159

[lecleary@pbwt.com](mailto:lecleary@pbwt.com)

[Jacqueline L. Bonneau](#)

212.336.2564

[jbonneau@pbwt.com](mailto:jbonneau@pbwt.com)

[Peter Vogel](#)

212.335.2595

[pvogel@pbwt.com](mailto:pvogel@pbwt.com)

**Tax-Exempt Organizations**

[Laura E. Butzel](#)

212.336.2970

[lebutzel@pbwt.com](mailto:lebutzel@pbwt.com)

[Susan Vignola](#)

212.336.2256

[svignola@pbwt.com](mailto:svignola@pbwt.com)

To subscribe to any of our publications, call us at 212.336.2000, email [mktg@pbwt.com](mailto:mktg@pbwt.com) or sign up on our website, <https://www.pbwt.com/subscribe/>.

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**Patterson Belknap Webb & Tyler LLP**

1133 Avenue of the Americas

New York, NY 10036-6710

212.336.2000

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