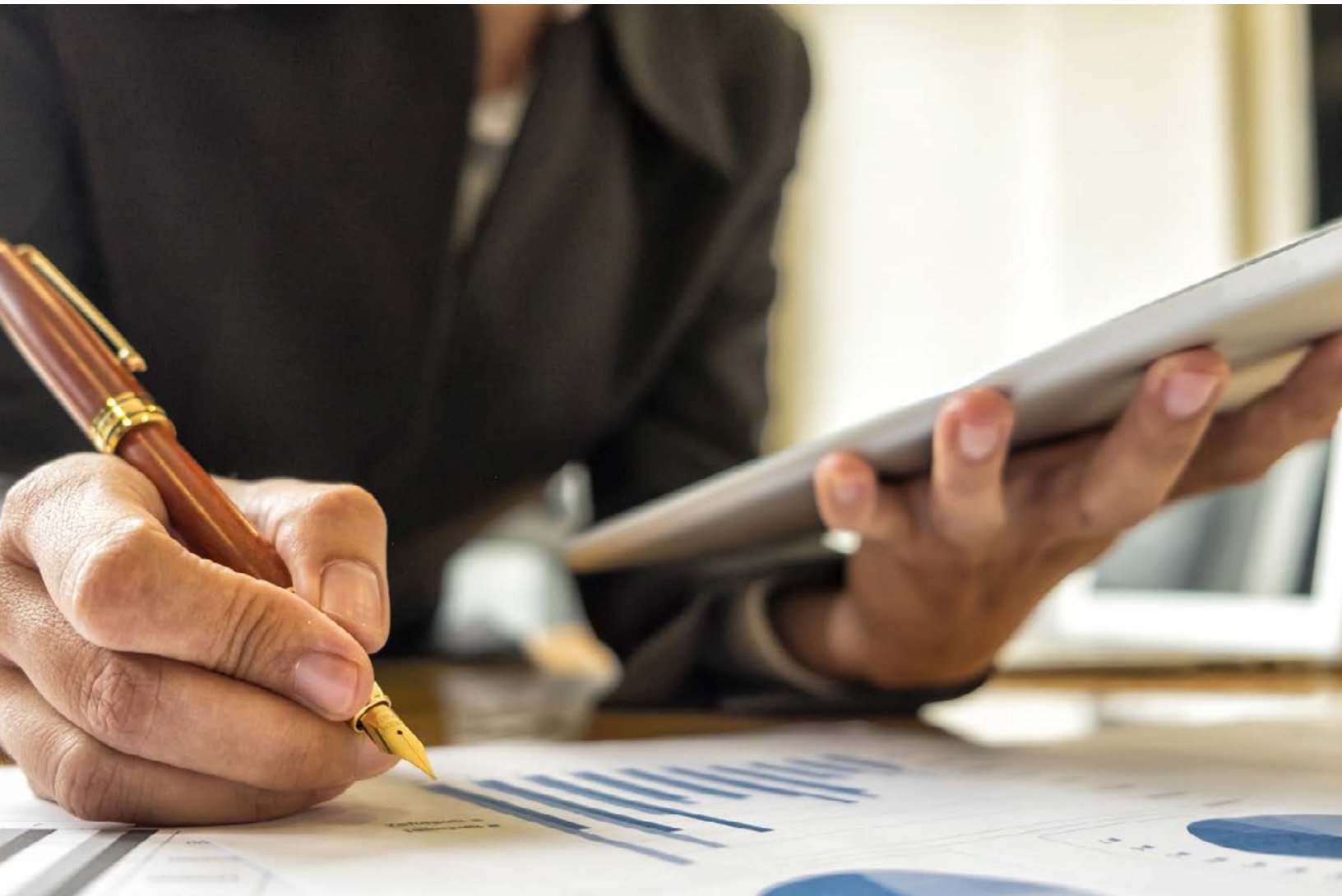


# PASSIVE INVESTORS AND THEIR ROLE IN ACTIVISM FOR 2018

By **Christopher P. Skroupa** Posted December 20, 2017



Originally published on [Forbes.com](https://www.forbes.com)

Ele Klein is a partner at Schulte Roth & Zabel, co-Chair of the firm's Global Shareholder Activism Group and a member of the firm's Executive Committee. Klein practices in the areas of shareholder activism, mergers and acquisitions, securities law and regulatory compliance. He represents activists, investment banks and companies in matters ranging from corporate governance and control to proxy contests and defensive strategies.

Since the early 1990s, Klein also has been well-known for his expertise in the development and implementation of alternative investment structures for private equity investments and, specifically, the structuring and negotiating of private investments in public equity, or PIPEs, and related products including registered direct offerings, convertible 144A offerings, reverse mergers, equity lines and SPACs. Klein works on numerous activist campaigns, regulatory and reporting matters and PIPE or PIPE-market-related transactions every year for some of the largest private investment groups and investment banks in the United States and abroad.

Recognized as a leading lawyer in rankings including "The Legal 500 United States," "New York Super Lawyers — New York Metro Top 100" and "Super Lawyers Business Edition," Klein has served as a moderator and speaker at numerous conferences and events addressing shareholder activism, regulatory and reporting issues, PIPEs, M&A deals, the capital markets and other topics of interest to the alternative investment industry.

**Christopher P. Skroupa:** Some of the more common defense strategies include either activist-centric or investor-centric defense, but what are some of the lesser common strategies that prove fruitful for activist investors?

*Ele Klein will be a moderator for the panel, Small Cap Versus Large Cap Companies: Activist Targets, and Why. He will also be a deliberator for the The Great Debate: Part III. These discussions will be held at the Shareholder Activism conference in New York City on Jan. 25, 2018.*

**Ele Klein:** As the flow of funds to passive investors has continued over the past few years, the influence, and accordingly the importance, of passive funds has ballooned. As both activists and the companies they look at have sought greater influence amongst passive funds, a "passive-centric" mindset has developed in the marketplace.

Recognizing the importance of the passive funds in deciding most proxy contests, many companies have adopted passive-centric mindsets where they seek to satisfy these index funds and ETFs to ensure that they cast their votes for management.

Some observers have noted that, unlike their more active and attentive peers, some, but by no means all, passive funds may be more interested in symbolic changes and offers rather than operational or other changes that require a deep understanding of the specific company and its issues.

**Skroupa:** How has the return of litigation as a defensive measure against activist campaigns affected your practice as a representative of activist investors? Can you cite specific examples?

**Klein:** Activism would be straightforward if parties acted rationally and pursuant to the interests of their principals. Unfortunately, in 2017, certain incumbents targeted by activists have become more emboldened to employ litigation as a tactic to fend off activist investors by, amongst other things, seeking to prevent votes from taking place. After Keith Meister's Corvex Management LP sought to call a special meeting of Energen Corp. and elect new directors, Energen sued Corvex in Alabama state court.

Energen managed to get an injunction against Corvex calling a special meeting, effectively preventing a stockholder vote on the matters Corvex had proposed. Litigation has also been used at the other end of the spectrum in attempts by incumbents to invalidate elections that they lost and to prevent activist nominees from taking office. In one of the lawsuits brought by Immunomedics, Inc. against venBio Select Advisor LLC, Immunomedics attempted to prevent venBio's nominees, who had clearly won the stockholder vote, from taking office following the annual meeting on the basis of claims that had already been rejected by a federal court.

In that lawsuit, the Delaware Chancery Court entered a status quo order seating venBio's nominees and the parties eventually settled and agreed that venBio's nominees were elected. Nonetheless, these examples serve to show the lengths that companies go to in order to prevent stockholders from having their voices heard.

**Skroupa:** Are there any defensive strategies that were new or changed in 2017? If so, what are they and/or how did they change?

**Klein:** From an approach perspective, but not necessarily a statistical perspective, companies have become less willing to settle with activists to avoid protracted proxy fights in 2017. Emboldened by more aggressive defensive strategies, some companies have rejected activist overtures out of hand, refusing to reach agreements about board seats or, in some cases, refusing to even engage with activists. Companies have become more willing to spend massive amounts of capital

to fend off activists, with some estimating that Procter & Gamble spent over \$100 million in its proxy fight with Trian Partners.

One unfortunate defensive strategy that re-emerged in 2017 is the personal attack. Despite views from institutional investors and proxy advisory firms that both activists and companies should take the high road and seek to engage constructively, certain proxy fights have devolved into name calling and other attacks.

In the most notable example of this in 2017, the CEO of Arconic Inc., which was the subject of a proxy fight brought by Elliott Management, was forced to step down from his role after sending a threatening letter to an Elliott principal. As these personal attacks have often backfired as they did at Arconic, one can be hopeful that this strategy won't significantly reemerge in 2018.

**Skroupa:** In the ever-changing dynamic of activism, how will campaign strategy unfold in 2018?

**Klein:** We can expect to hear more from passive investors in the year ahead. Recognizing the increasing influence of passive funds, some market participants and commentators have begun to draw more attention to the responsibilities of passive funds. While passive funds have traditionally remained opaque on matters related to activists, they have begun to engage and speak more openly about activism.

Activist investors will also become more passive-centric, with the necessity of the passive funds' votes to winning proxy contests helping drive activist decisions on how many directors to nominate, who those nominees should be, and what their message should be.

---

## ABOUT SKYTOP STRATEGIES

As the corporate landscape evolves around global, social, environmental and economic change, **Skytop Strategies** works to facilitate discussion around corporate strategy with C-suite leaders, institutional investors, boards of directors, stakeholders, and authoritative NGO/government agencies. Skytop Strategies convenes companies through **live conferences** designed to empower success and longevity within their respective industries and around the global marketplace. We provide a platform for market-moving dialogue by connecting decision makers through actionable exchange, revolutionizing the way 21st century companies create value. Our programs form an arena for experienced professionals to navigate large-scale concepts and implement sustainable, ethical and productive practices. Topics cover shareholder activism, ESG and sustainability, governance and risk, gender equality, and much more. Skytop Strategies also produces **high-quality content** – interviews, newsletters, feature-length articles, etc. in the form of video, online, print and more – to expand the dialog and support the concepts.

### Publishing inquiries:

KALEB SMITH  
*Associate Editor*  
[ksmith@skytopstrategies.com](mailto:ksmith@skytopstrategies.com)

### Media and Marketing inquiries:

PHILLIP LOFASO  
*Chief Marketing Officer*  
[plofaso@skytopstrategies.com](mailto:plofaso@skytopstrategies.com)

### Speaker inquiries:

MAURA MURPHY  
*Managing Director, Program Development*  
[mmurphy@skytopstrategies.com](mailto:mmurphy@skytopstrategies.com)

### Sponsorship inquiries:

CHRISTOPHER SKROUPA  
*CEO & Founder*  
[cskroupa@skytopstrategies.com](mailto:cskroupa@skytopstrategies.com)