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Tectonic Forces to Watch in Corporate Litigation

Corporate litigation in Delaware continues to reflect the judicial trend toward honoring the decisions of informed stockholders and independent directors, thus shielding those decisions from costly after-the-fact legal attack. While the boundaries of stockholder ratification and director independence continue to be refined on a case-by-case basis, the broader conceptual trend—to give the last word on corporate action to independent directors and the stockholders who elect them—has taken firm root. Novel issues now rumbling under and through the judicial system implicate a different set of relationships—not between stockholders and directors, but between corporations and society at large. To meet these challenges, directors should assess new risks and opportunities from multiple perspectives—operations, strategy, corporate governance, litigation, finance, tax and compensation policy, and investor relations.

Climate. The economic and social consequences of climate change are at the top of the news in this new year. Litigation is sure to follow and boards of directors should act promptly to prepare. Indeed, dozens of climate-related suits are already pending, many brought by municipalities seeking funds to pay for structural responses to climate change, many brought by class-action lawyers trained in tobacco and asbestos litigation. Some will be dismissed but many will survive. Increasing calls from influential investors (notably including BlackRock) for more robust disclosure of climate risk, and more corporate action to address it, will attract additional plaintiffs and litigation. So too will the intense focus on climate (and sustained attack on the social role of corporations) that can be confidently predicted for the 2020 political season. As we have previously noted, few companies are immune from climate-related exposure—but the appropriate governance structure to address that exposure will vary widely among industries and firms. As well as evaluating operational risks related to the environment, directors must also consider climate-related disclosure, governance, and compensation policies. Continuous and substantial litigation related to these matters is inevitable throughout the economy; the time to prepare for it is now.

Caremark. Much of this litigation is likely to come in the form of *Caremark* claims—that is, lawsuits alleging that directors failed to implement adequate risk controls or to address a risk once identified. Last year, Delaware allowed two lawsuits alleging *Caremark* claims to proceed in circumstances that surprised some observers. Notwithstanding those decisions, we continue to emphasize that there is no need for undue concern regarding directors' personal liability under

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Caremark—as it should, *Caremark* liability remains exceedingly rare. And *Caremark* is a manifestly unsuitable vehicle to redress expenses related to climate risks (or other so-called "externalities") that corporations impose on society because, under *Caremark*, the company does not compensate others but instead recovers funds itself. Nevertheless, *Caremark* remains the obvious cause of action for plaintiffs seeking to complain about board inaction in the face of climate-related exposure, or in response to high-profile corporate trauma, and for that reason we expect to see a steady uptick in *Caremark* filings. But boards have ample means to anticipate and thereby minimize the risk of *Caremark* exposure through appropriate prophylactic corporate governance, as we have recently emphasized.

D&O Insurance. The past months have witnessed unusual volatility in the insurance markets that protect directors and officers from liability. On the claims side, stung by the settlement value conferred upon debatable class and derivative complaints that survived motions to dismiss, some carriers have shown unusual resistance to resolving claims before trial, giving rise to increased coverage litigation. On the underwriting side, again reflecting their concern that too many lawsuits survive the motion-to-dismiss filter, some insurers are raising rates and deductibles for D&O coverage; others are exiting the market. These developments reflect carriers' broader concern with "social inflation"—their belief that the tort system is increasingly looking to deep-pocketed corporations to pay for society's ills (including costs connected to climate change). To be clear, D&O coverage is still broadly available, and along with indemnification and exculpation, provides secure protection to directors in nearly every circumstance. But the growing pressures of new litigation frontiers, including climate-related litigation, *Caremark*, and other representative lawsuits that survive the pleadings stage, are tightening the coverage market in ways not seen in years.

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Climate-related claims, the *Caremark* doctrine, and the insurance market are evolving, interrelated elements of the corporate litigation ecosystem that must be kept in balance in a changing social environment. Prudent boards will attend to each, convening interdisciplinary teams with the common purpose of mitigating risk, avoiding externalities, and promoting long-term corporate health and value.

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