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Caremark Developments—And the Imperative of Regular Risk Review

Every day, the litigation environment reinforces the imperative for boards of directors to regularly review key enterprise risks. [In a recently filed complaint](#), stockholders of NiSource, Inc, a natural gas supplier, sued to hold the company’s directors liable for breach of fiduciary duty arising out of a tragic 2018 pipeline accident that caused one fatality, multiple injuries, and mass evacuations. Alleging that the NiSource board disregarded “numerous red flags evidencing violations of gas pipeline safety laws that occurred over a number of years,” the stockholder plaintiff charged the directors with “bad faith oversight failures [that] are not protected under Delaware law.”

Whether the lawsuit ripens into fiduciary liability will turn on whether NiSource can persuade a court that it had in place control and monitoring functions commensurate with the scope and scale of the potential risk. Delaware’s courts have [recently sustained against a motion to dismiss multiple](#) “oversight” claims of this kind—often called *Caremark* claims, for the 1996 case where the theory of liability was first recognized—and such claims now regularly follow whenever a company has bad news. Once a *Caremark* claim survives a pleadings motion, it becomes a vehicle for extensive discovery and takes on substantial settlement value, even if not ultimately meritorious.

This risk cannot be contained entirely. Corporate trauma can happen, even to the best-run companies, and the courts should be expected to permit multiple avenues of litigation attack when it does. The best approach is for boards to undertake at least a quarterly review of corporate operations and developments affecting enterprise-level risk. As important, directors should create a clear written record of their review and their vigilant response to [any compliance risks](#) that may emerge. [As we have previously explained](#), boards that take care to institute and document such regular reviews will be in accord with best practices for corporate risk management. And they will have a powerful answer, available at the pleading stage, if ever charged with neglecting their oversight duties.

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