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Boardroom Perspectives: Oversight of Material Litigation in Four Practical Steps

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Introduction

Public companies in the United States are subject to litigation in various areas, including: shareholder litigation; government investigations and enforcement actions; environmental litigation and intellectual property disputes. While certain litigation may be frivolous or merely routine, other claims may be costly and potentially damaging to the company's bottom line, reputation, or both. It is important that boards be equipped to manage and mitigate risks associated with litigation deemed material to the company. The following tips are designed to give boards a framework from which to approach litigation oversight.

Exercise the Duty of Care

Providing ongoing oversight of material litigation is part of a director's general duty of care. In the litigation context, effective oversight involves:

1. Getting involved in the right cases and the right potential claims
2. Receiving regular reports from management
3. Asking the right questions to hold management accountable
4. Keeping abreast of the company's liability insurance policies

1. Get Involved in the Right Cases

While public company directors need not be briefed on every claim or potential claim facing the company, management should consider involving the board in the important cases — and early on. Board involvement will depend upon various factors, including whether the adverse party is a competitor or customer, or former senior employee or executive; the amount of damages sought; the subject matter of the litigation; and the level of publicity a case has generated or is expected to generate.

2. Receive Regular Reports from Management

In order to be adequately prepared to give strategic advice, approve a settlement or take other necessary action, it is important for boards to stay adequately informed about the material litigation facing the company. Litigation reports to the board are typically prepared by the company's general counsel or outside counsel, and include, as appropriate:

- A general status update
- A discussion of strategy
- An assessment of risk
- Budget information
- Insurance coverage
- Next steps

Reports preferably have the appropriate level of detail to inform the board without being unduly burdensome. In addition, reports are ideally provided in the context of the attorney-client privilege to protect the company. Minutes serve to reflect the discussion and create the record of director oversight.

3. Ask the Right Questions

Staying on top of material litigation involves frequent and open communication among management and directors. The board's job is to ask the right questions to hold management accountable. For example, directors might ask:

- What are the goals/objectives of the litigation?
- What is the impact of the litigation on company resources?
- Will the litigation require reliance on expert testimony?
- Does the litigation subject the company to adverse publicity, and if so, what steps does the company plan to take to address this issue?
- Does the litigation require a critical evaluation of one of the company's business processes?
- What is the company's tolerance for risk, and to what extent should the company consider more adversarial or cooperative strategies?
- Is settlement advisable, and what is the timing to broach settlement?

4. Keep Abreast of the Company's Liability Insurance Policies

Comprehensive liability insurance policies help reduce the exposure to litigation risks, damages and expenses, but can vary widely in coverage, exclusions and limitations. To use liability insurance policies effectively in litigation risk management, directors may wish to review the policies the company maintains for itself and its directors and officers. For example, directors could:

- Confirm that systems are in place to provide for timely notification to insurers of all claims, including potential claims
- Verify that applications for new and renewal insurance policies are properly vetted (to ensure that misstatements or omissions in an application do not serve as a basis for rescission or denial of coverage); and
- Understand coverage exclusions in director and officer insurance policies which, if invoked, could result in the denial of coverage for individual directors and officers

By following these steps in appropriate cases, board members can provide oversight to help management teams protect their companies from potentially damaging material litigation. 



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