



H.S. Grace & Company, Inc.

## **Using Corporate Governance Expert Testimony**

The spotlight is once again focused on corporate governance issues as a result of the current economic crisis. Courts are scrutinizing past board and management actions in the numerous securities fraud, breach of fiduciary duty, ERISA, fraud and other actions that have been filed in the aftermath of the stock market decline in 2008 and 2009. H.S. Grace & Company, Inc.'s (HSG) team of senior management level executives and board members offers a wide range of actual, real-life experience in governance issues and business practice and process issues in a variety of industries. We have set out below a brief summary of how we believe a thorough analysis of corporate governance and management practice issues can be helpful to the trier of fact in these cases in understanding how business decisions are and should be made.

### **Corporate Governance Practices are at Issue in a Variety of Causes of Action**

Roles, responsibilities, practices, and processes of both the board and management are at issue in a variety of causes of action. For example, breach of fiduciary duty actions against directors asserting that directors have failed to properly exercise their oversight or decision-making functions or have acted in bad faith or in their own self interest obviously require an understanding of how boards and management function and of the standard business practices and processes of corporate governance which may be applicable. Similarly, securities violations claims may require an understanding of the roles and responsibilities of directors and individual corporate officers to determine whether fraudulent intent is present or whether a due diligence defense is available. And even common law fraud claims involving complex business decisions may implicate corporate governance and management practice issues in explaining how and why decisions were made and what structures were in place to insure good decision-making to address issues of fraudulent intent and misrepresentation.

In these types of actions courts and juries are increasingly asked to assess and evaluate complicated business decision-making and oversight decisions. But executive compensation issues, provisions in mergers and acquisition agreements, financial and other strategic decision-making issues, director oversight responsibilities, and disclosures in financial statements or SEC filings, to name a few, are not exactly everyday stuff within the common experience of most courts and jurors.

To avoid having these cases tried by hindsight, it is important that the trier of fact understand both the context in which business decisions are made and good corporate governance and management practices and processes for making decisions. Business mores and governance practices evolve over time. What steps should be taken, procedures followed, and information considered in making these and similar decisions and what individual officer and director roles and responsibilities should be in the process are complicated issues important to the fact finder. Testimony explaining both the context in which the board or management acted and customary business practices, standards of conduct and procedures for boards or management can, therefore, be helpful to the court or the jury in deciding the case.

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*H.S. Grace & Company, Inc. is a team of senior executives who diagnose and resolve critical corporate problems in business governance, operations, finance and control. With more than 1,000 years of experience, our goal is to help companies enhance shareholder value, protect reputation and their long-term ability to succeed, avoid and manage litigation, and navigate major changes such as mergers and acquisitions or bankruptcies. We often serve as consulting and testifying experts, identifying and analyzing critical business issues.*

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