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# **The Caremark Doctrine: Evolution of Oversight Liability Standards and its Impact on Corporate Governance**

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## Abstract

This thesis examines how Caremark revolutionized boardroom oversight, fundamentally changing how directors must safeguard their companies from major risks. Examining the development of the doctrine from the case of *Graham v. Through Allis-Chalmers Manufacturing Co.* (1963) and its subsequent development in *In re Caremark International Inc. Derivative Litigation* (1996) and later on in *Stone v. Ritter* (2006), *Marchand v. In Barnhill* (2019), and *In re McDonald's Corporation Stockholder Derivative Litigation* (2023), the thesis examines Caremark's lessons for boards of directors and compliance programs. The research highlights three critical dimensions: (1) the historical shift from passive to active oversight duties; (2) challenges in implementing effective compliance systems; and (3) emerging trends in Caremark jurisprudence, particularly regarding environmental, social, and governance considerations. The thesis concludes that Caremark's influence has undoubtedly revolutionized corporate governance practices but the courts are constantly calibrating the doctrine to ensure that the directors' oversight responsibilities do not encroach on their business acumen. *Caremark* reflects corporate law's ongoing challenge: balancing traditional board duties with society's expanding expectations for responsible business oversight.

**Keywords:** Caremark doctrine, corporate governance, board oversight, fiduciary duties, compliance systems.

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## Chapter 1: Introduction

The corporate governance landscape has undergone significant evolution since the landmark decision in *In re Caremark International Inc. Derivative Litigation*.<sup>1</sup> The *Caremark* doctrine evolved to meet modern business complexity, setting higher standards for board oversight as corporate responsibilities expanded beyond traditional boundaries.<sup>2</sup> The major drivers of the change in corporate governance in United States include technology advancement, global expansion and improved regulation.<sup>3</sup> Prior to *Caremark*, the prevailing concept regarding director management functions was less active, as suggested in *Graham v. Allis-Chalmers Mfg. Co.*<sup>4</sup> This approach was discovered to be incapable of providing adequate solutions to the emergent and diverse business environment, and the complexity of business risks.<sup>5</sup>

Corporate scandals in the late twentieth century exposed serious oversight weaknesses. This, coupled with stricter regulations, demanded stronger control systems.<sup>6</sup> These changes took place amid the growth of federal regulation, including the *Securities Act of 1933*<sup>7</sup> and the *Securities Exchange Act of 1934*,<sup>8</sup> which established fundamental requirements for corporate transparency and accountability.<sup>9</sup> Nevertheless, the nature and breadth of the doctrine have remained ever changing as evidenced by the recent decisions such as *In re McDonald's Corporation Stockholder Derivative Litigation*.<sup>10</sup> This case significantly expanded the application of *Caremark* duties to include oversight of workplace culture and sexual harassment issues, demonstrating the doctrine's adaptability to contemporary corporate challenges.<sup>11</sup> The

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<sup>1</sup> *In re Caremark Int'l Inc. Derivative Litig.*, 698 A.2d 959 (Del. Ch. 1996).

<sup>2</sup> Claire A. Hill, *Caremark as Soft Law*, 90 TEMP. L. REV. 681, 682-83 (2017), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/temple90&section=29](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/temple90&section=29)> (last visited Oct. 28, 2024).

<sup>3</sup> Edward B. Rock, *Corporate Law Through an Antitrust Lens*, 92 COLUM. L. REV. 497, 499-500 (1992), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/clr92&section=27](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/clr92&section=27)> (last visited Oct. 28, 2024).

<sup>4</sup> *Graham v. Allis-Chalmers Mfg. Co.*, 188 A.2d 125, 130 (Del. 1963).

<sup>5</sup> Jennifer Arlen, *The Story of Allis-Chalmers, Caremark, and Stone: Directors' Evolving Duty to Monitor* (NYU Law & Econ. Research Paper No. 08-57, 2008), <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1304272](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1304272)> (last visited Oct. 28, 2024).

<sup>6</sup> Melvin A. Eisenberg, *The Board of Directors and Internal Control*, 19 CARDOZO L. REV. 237, 261-62 (1997), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/cdozo19&section=13](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/cdozo19&section=13)> (last visited Oct. 28, 2024).

<sup>7</sup> *Securities Act of 1933*, 15 U.S.C. § 77a et seq. (2024).

<sup>8</sup> *Securities Exchange Act of 1934*, 15 U.S.C. § 78a et seq. (2024).

<sup>9</sup> Robert B. Thompson & Hillary A. Sale, *Securities Fraud as Corporate Governance: Reflections upon Federalism*, 56 VAND. L. REV. 859, 860-62 (2003), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/vanlr56&section=24](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/vanlr56&section=24)> (last visited Oct. 28, 2024).

<sup>10</sup> *In re McDonald's Corp. Stockholder Derivative Litig.*, 2023 WL 387292 (Del. Ch. Jan. 25, 2023).

<sup>11</sup> Elizabeth Pollman, *Corporate Oversight and Disobedience*, 72 VAND. L. REV. 2013, 2021-23 (2019), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/vanlr72&section=51](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/vanlr72&section=51)> (last visited Oct. 28, 2024).

*McDonald's* decision represents a critical expansion of board oversight responsibilities beyond traditional financial and operational risks to encompass human capital and corporate culture concerns.<sup>12</sup>

Delaware courts, as the primary arbiters of corporate law in the United States, have played a crucial role in shaping these standards of corporate governance.<sup>13</sup> The state's prominence in corporate law stems from its sophisticated judicial system and comprehensive body of precedent, making it the preferred jurisdiction for business incorporation.<sup>14</sup> Within this context, the *Caremark* decision and its progeny have come to define new standards for board stewardship and also for defining a continuing and shifting paradigm of liability for directors in the oversight of corporate management.<sup>15</sup>

This thesis discusses the *Caremark* doctrine, its evolution and effects on corporate governance with focus on the role of boards in overseeing corporate compliance.<sup>16</sup> The central theme revolves around the development of the doctrine from its inception in *In re Caremark International Inc. Derivative Litigation* and the application of this doctrine in the contemporary corporate governance environment and its legal practicalities for boards of directors and corporate compliance programs.<sup>17</sup> The analysis spans several key developments, from the traditional approach exemplified in *Graham v. Allis-Chalmers* through the transformative *Caremark* decision and subsequent refinements in cases such as *Stone v. Ritter*, *Marchand v. Barnhill*, and *In re McDonald's Corporation Stockholder Derivative Litigation*.<sup>18</sup> This evolution reflects the increasing complexity of corporate operations and the expanding scope

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<sup>12</sup> Roy Shapira, *A New Caremark Era: Causes and Consequences*, 98 WASH. U. L. REV. 1857, 1859-61 (2021), [https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/walq98&section=52](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/walq98&section=52) (last visited Oct. 28, 2024).

<sup>13</sup> Lewis S. Black, Jr., *Why Corporations Choose Delaware* 1-2 (2007), [https://corpfiles.delaware.gov/pdfs/whycorporations\\_english.pdf](https://corpfiles.delaware.gov/pdfs/whycorporations_english.pdf) (last visited Oct. 28, 2024).

<sup>14</sup> William L. Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L.J. 663, 665-66 (1974), <https://www.jstor.org/stable/795524> (last visited Oct. 28, 2024).

<sup>15</sup> Hillary A. Sale, *Monitoring Caremark's Good Faith*, 32 DEL. J. CORP. L. 719, 720 (2007), [https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/decor32&section=25](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/decor32&section=25) (last visited Oct. 28, 2024).

<sup>16</sup> Hillary A. Sale, *Delaware's Good Faith*, 89 CORNELL L. REV. 456, 459-60 (2004), [https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/clr89&section=25](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/clr89&section=25) (last visited Oct. 28, 2024).

<sup>17</sup> *In re Caremark Int'l Inc. Derivative Litig.*, 698 A.2d 959 (Del. Ch. 1996).

<sup>18</sup> Elizabeth Pollman, *Corporate Oversight and Disobedience*, 72 VAND. L. REV. 2013, 2021-23 (2019), [https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/vanlr72&section=51](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/vanlr72&section=51) (last visited Oct. 28, 2024).

of board oversight responsibilities, particularly in areas of mission-critical operations, regulatory compliance, and corporate culture.<sup>19</sup>

The research specifically focuses on three critical dimensions: (1) the historical development of the oversight duty from its passive origins to its current active monitoring requirement; (2) the practical implementation challenges faced by boards in establishing and maintaining effective compliance systems; and (3) the emerging trends in *Caremark* jurisprudence, particularly regarding environmental, social, and governance (ESG) considerations.<sup>20</sup> Through this examination, the thesis examines the *Caremark* doctrine with a view to establishing both the theoretical underpinnings and the empirical realities of this doctrine in current corporate governance.<sup>21</sup>

The board manages a corporation's affairs under Delaware law, which grants directors broad authority.<sup>22</sup> Directors must also adhere to statutory requirements defining oversight obligations.<sup>23</sup> Under *Cede & Co. v. Technicolor, Inc.*, they must remain informed and attentive.<sup>24</sup> They owe loyalty, as stated in *Guth v. Loft, Inc.*, and cannot prioritise personal gain over the corporation.<sup>25</sup> Ignoring key indicators of misconduct can breach the duty of care, as shown in *Smith v. Van Gorkom*.<sup>26</sup> To fulfil these duties, directors must maintain *Red Flag Awareness*, meaning vigilance in detecting potential wrongdoing through compliance systems. They should demonstrate *Good Faith Effort*, by investigating and addressing any red flags. They must also ask whether they have *Reason to Believe* that failing to act would constitute a breach of their fiduciary duty. These concepts highlight that neglecting evident risks may invite liability. Scholars debate the board's primary constituency, reflecting varied views on corporate

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<sup>19</sup> Stephen M. Bainbridge et al., *The Convergence of Good Faith and Oversight*, 55 UCLA L. REV. 559, 568-73 (2008), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/uclalr55&section=20](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/uclalr55&section=20)> (last visited Oct. 28, 2024).

<sup>20</sup> Claire A. Hill, *Caremark as Soft Law*, 90 TEMP. L. REV. 681, 682-83 (2017), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/temple90&section=29](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/temple90&section=29)> (last visited Oct. 28, 2024).

<sup>21</sup> Donald C. Langevoort, *Internal Controls After Sarbanes-Oxley*, 31 J. CORP. L. 949 (2006), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/jcorl31&section=47](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/jcorl31&section=47)> (last visited Oct. 28, 2024).

<sup>22</sup> DEL. CODE ANN. tit. 8, § 141(a) (2023)

<sup>23</sup> William T. Allen et al., *Function Over Form: A Reassessment of Standards of Review in Delaware Corporation Law*, 56 BUS. LAW. 1287, 1289-90 (2001), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/busl56&section=58](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/busl56&section=58)> (last visited Oct. 28, 2024)

<sup>24</sup> *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 361 (Del. 1993)

<sup>25</sup> *Guth v. Loft, Inc.*, 5 A.2d 503, 510 (Del. 1939)

<sup>26</sup> *Smith v. Van Gorkom*, 488 A.2d 858, 872 (Del. 1985)

purpose.<sup>27</sup> Directors also arbitrate shareholder disputes.<sup>28</sup> A shareholder claiming personal harm may file a direct action, such as *Kelly v. Bell*.<sup>29</sup> If the corporation itself is harmed, a derivative suit, like *Lutz v. Boas*, may follow.<sup>30</sup> Under *Zapata Corp. v. Maldonado*, shareholders must normally demand corrective action from the board before proceeding, unless that request would be futile.<sup>31</sup> This framework, along with special litigation committees, fosters accountability, as Minor Myers observes.<sup>32</sup>

The evolution of director oversight duties demonstrates a clear trajectory from a passive monitoring model to an increasingly sophisticated and proactive approach. Under the *Graham* standard, directors were only required to act when presented with explicit "red flags" indicating corporate misconduct.<sup>33</sup> This limited approach reflected a simpler era of corporate operations, where boards could reasonably rely on the assumption that corporate affairs were being conducted properly absent obvious signs of wrongdoing.

The transformative shift began with increasing market complexity and technological advancement in the 1980s and 1990s, which exposed the limitations of passive oversight.<sup>34</sup> The resulting legislative responses, particularly through federal securities laws and enhanced regulatory frameworks, created new imperatives for board engagement in compliance monitoring.<sup>35</sup> Modern oversight obligations now encompass a broad spectrum of corporate risks, requiring directors to ensure the implementation of information and reporting systems reasonably designed to provide timely and accurate information.<sup>36</sup> This development has been

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<sup>27</sup> Edward B. Rock, *For Whom Is the Corporation Managed in 2020?: The Debate over Corporate Purpose*, 76 BUS. LAW. 363, 365-67 (2021), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/busl76&section=27](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/busl76&section=27)> (last visited Oct. 28, 2024)

<sup>28</sup> Kenneth B. Davis, Jr., *The Forgotten Derivative Suit*, 61 VAND. L. REV. 387, 389-90 (2008), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/vanlr61&section=19](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/vanlr61&section=19)> (last visited Oct. 28, 2024)

<sup>29</sup> *Kelly v. Bell*, 254 A.2d 62 (Del. Ch. 1969)

<sup>30</sup> *Lutz v. Boas*, 171 A.2d 381 (Del. Ch. 1961)

<sup>31</sup> *Zapata Corp. v. Maldonado*, 430 A.2d 779 (Del. 1981)

<sup>32</sup> Minor Myers, *The Decisions of Corporate Special Litigation Committees: An Empirical Investigation*, 84 IND. L.J. 1309, 1311-13 (2009), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/indana84&section=46](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/indana84&section=46)> (last visited Oct. 28, 2024)

<sup>33</sup> *Graham v. Allis-Chalmers Mfg. Co.*, 188 A.2d 125, 130 (Del. 1963).

<sup>34</sup> Edward B. Rock, *Corporate Law Through an Antitrust Lens*, 92 COLUM. L. REV. 497, 499-500 (1992), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/clr92&section=27](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/clr92&section=27)> (last visited Oct. 28, 2024).

<sup>35</sup> Charles M. Elson & Christopher J. Gyves, *In Re Caremark: Good Intentions, Unintended Consequences*, 39 WAKE FOREST L. REV. 691, 691-93 (2004), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/wflr39&section=30](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/wflr39&section=30)> (last visited Oct. 28, 2024).

<sup>36</sup> Virginia Harper Ho, *Risk-Related Activism: The Business Case for Monitoring Nonfinancial Risk*, 41 J. CORP. L. 647, 649-51 (2016), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/jcorl41&section=27](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/jcorl41&section=27)> (last visited Oct. 28, 2024).



particularly influenced by industry-specific regulations and emerging challenges in areas such as cybersecurity, environmental compliance, and workplace culture.<sup>37</sup>

This thesis is organized into five chapters. Chapter 1 establishes the foundational concepts of board oversight duties, including fiduciary obligations and the distinction between derivative and direct litigation. Chapter 2 examines the historical evolution from passive to active oversight, analysing how the *Caremark* doctrine transformed corporate governance standards. Chapter 3 explores the modern interpretation of *Caremark* through key cases from *Stone v. Ritter* to *In re McDonald's*, demonstrating the doctrine's expanding scope. Chapter 4 analyses practical implementation aspects, focusing on documentation practices, risk management frameworks, and the role of Special Litigation Committees. Finally, Chapter 5 synthesizes the findings and examines future implications, particularly regarding corporate social responsibility and emerging oversight challenges.

## Chapter 2: The Evolution from Passive to Active Oversight

### 2.1 Pre-Caremark Landscape

The corporate governance framework prior to *In re Caremark International Inc. Derivative Litigation*<sup>38</sup> operated under significantly different assumptions about director obligations and corporate risk management. Under the *Graham v. Allis-Chalmers Manufacturing Co.*<sup>39</sup> regime, the prevailing view was that directors fulfilled their duties by responding to evident problems rather than proactively seeking to identify and prevent corporate misconduct.<sup>40</sup> This passive approach had several distinct characteristics that shaped corporate behaviour. First, boards typically operated as reactive bodies, addressing issues only after they materialized into concrete problems. This reactive stance was justified by the belief that directors, as part-time supervisors, could not reasonably be expected to detect wrongdoing without specific cause for suspicion.<sup>41</sup> Second, the legal framework essentially created a "hear no evil, see no evil"

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<sup>37</sup> Lawrence A. Cunningham, *The Appeal and Limits of Internal Controls to Fight Fraud, Terrorism, Other Ills*, 29 J. CORP. L. 267, 273-75 (2004), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/jcorl29&section=16](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/jcorl29&section=16)> (last visited Oct. 28, 2024).

<sup>38</sup> *In re Caremark Int'l Inc. Derivative Litig.*, 698 A.2d 959 (Del. Ch. 1996).

<sup>39</sup> *Graham v. Allis-Chalmers Mfg. Co.*, 188 A.2d 125, 130 (Del. 1963).

<sup>40</sup> William T. Allen et al., *Function Over Form: A Reassessment of Standards of Review in Delaware Corporation Law*, 56 BUS. LAW. 1287, 1289-90 (2001), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/busl56&section=58](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/busl56&section=58)> (last visited Oct. 28, 2024).

<sup>41</sup> Geoffrey P. Miller, *A Modest Proposal for Fixing Delaware's Broken Duty of Care*, 2010 COLUM. BUS. L. REV. 319, 322-24 (2010), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/colb2010&section=11](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/colb2010&section=11)> (last visited Oct. 28, 2024).

incentive structure, where boards might be better positioned legally by remaining uninformed rather than implementing robust monitoring systems that could create awareness of problems.<sup>42</sup>

The pre-*Caremark* era was also marked by a clear separation between the board's strategic advisory role and management's operational responsibilities. Boards were not expected to delve deeply into operational details or compliance matters unless specifically alerted to problems.<sup>43</sup> This division of responsibility reflected both the practical limitations of part-time directors and the prevailing corporate governance philosophy that emphasized boards' role in broad strategic oversight rather than detailed operational monitoring.<sup>44</sup> The limitations of this approach became increasingly apparent as corporations grew more complex and regulatory requirements more demanding. The passive oversight model proved particularly inadequate in regulated industries where compliance failures could have catastrophic consequences.<sup>45</sup> For instance, in the banking sector, the savings and loan crisis of the 1980s highlighted how insufficient board oversight could contribute to systematic failures in risk management and regulatory compliance.<sup>46</sup>

Moreover, the pre-*Caremark* landscape was characterized by significant variation in how different industries approached compliance and risk management. While some regulated industries, particularly banking and insurance, had developed more sophisticated monitoring systems due to regulatory requirements, many other sectors operated with minimal formal compliance programs.<sup>47</sup> This disparity in approaches to compliance and risk management created inconsistencies in corporate governance standards across different sectors of the economy. The inadequacy of the *Graham* standard became particularly evident in the context

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<sup>42</sup> Donald C. Langevoort, *Monitoring: The Behavioral Economics of Corporate Compliance with Law*, 2002 COLUM. BUS. L. REV. 71, 73-75 (2002), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/colb2002&section=8](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/colb2002&section=8)> (last visited Oct. 28, 2024).

<sup>43</sup> Faith Stevelman & Sarah C. Haan, *Boards in Information Governance*, 23 U. PA. J. BUS. L. 179, 192-94 (2020), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/upjlel23&section=7](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/upjlel23&section=7)> (last visited Oct. 28, 2024).

<sup>44</sup> Lawrence A. Hamermesh, *Twenty Years After Smith v. Van Gorkom: An Essay on the Present and Future of Judicial Review of Director Decision Making*, 45 WASHBURN L.J. 283, 285-87 (2006), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/wasbur45&section=19](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/wasbur45&section=19)> (last visited Oct. 28, 2024).

<sup>45</sup> Edward B. Rock, *Corporate Law Through an Antitrust Lens*, 92 COLUM. L. REV. 497, 499-500 (1992), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/clr92&section=27](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/clr92&section=27)> (last visited Oct. 28, 2024).

<sup>46</sup> James D. Cox & Randall S. Thomas, *Corporate Darwinism: Disciplining Managers in a World with Weak Shareholder Litigation*, 95 N.C. L. REV. 19, 55-56 (2016), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/nclr95&section=6](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/nclr95&section=6)> (last visited Oct. 28, 2024).

<sup>47</sup> Robert B. Thompson & Hillary A. Sale, *Securities Fraud as Corporate Governance: Reflections upon Federalism*, 56 VAND. L. REV. 859, 860-62 (2003), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/vanlr56&section=24](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/vanlr56&section=24)> (last visited Oct. 28, 2024).

of multinational corporations operating across diverse regulatory environments. The globalization of business operations in the 1980s and early 1990s introduced new complexities that the passive oversight model was ill-equipped to address.<sup>48</sup> These challenges included coordinating compliance across different jurisdictions, managing diverse regulatory requirements, and ensuring consistent corporate governance standards across global operations.

## 2.2 The Caremark Decision and Its Immediate Impact

The Delaware Court of Chancery's landmark decision in *In re Caremark International Inc. Derivative Litigation*<sup>49</sup> fundamentally transformed corporate governance by establishing affirmative oversight obligations for directors. The case was based on the allegations that *Caremark's* board had not only ignored but also failed to prevent violation of federal and state laws against giving and receiving kickbacks in health services. Even if Chancellor Allen eventually endorsed the proposed settlement, the opinion stated new rules that would redefine corporate governance for decades.<sup>50</sup> Chancellor Allen's opinion immediately echoed through boardrooms across America making directors reconsider their strategies on corporate scrutiny. The decision effectively required the development of information acquisition and reporting mechanisms that would deliver the boards accurate and timely information on corporate compliance and Company performance. This mandate was very different from the traditional approach wherein boards could stand idly by and only act when obvious signs of corporate fraud exist.<sup>51</sup>

However, the *Caremark* decision went a long way beyond its legal significance to produce a seismic shift in the culture of corporate compliance. Industry players started dedicating significant efforts and funds to compliance, establish new executive posts in compliance, and adopt complicated monitoring tools. This kind of organizational change was necessary as the authors found out that compliance was not a mere response to new issues and challenges, but

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<sup>48</sup> Melvin A. Eisenberg, *The Architecture of American Corporate Law: Facilitation and Regulation*, 2 BERKELEY BUS. L.J. 167, 169-71 (2005), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/berkbuj2&section=20](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/berkbuj2&section=20)> (last visited Oct. 28, 2024).

<sup>49</sup> *In re Caremark Int'l Inc. Derivative Litig.*, 698 A.2d 959 (Del. Ch. 1996).

<sup>50</sup> Hillary A. Sale, *Delaware's Good Faith*, 89 CORNELL L. REV. 456, 459-60 (2004), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/clr89&section=25](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/clr89&section=25)> (last visited Oct. 28, 2024).

<sup>51</sup> Paul E. McGreal, *Corporate Compliance Survey*, 75 BUS. LAW. 1191, 1192-93 (2019), <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3428751](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3428751)> (last visited Oct. 28, 2024).

rather had to be systematic and institutionalized.<sup>52</sup> The decision's impact was particularly pronounced in regulated industries, where companies faced heightened scrutiny and potential liability. Healthcare organizations, financial institutions, and pharmaceutical companies led the way in developing robust compliance programs that would later serve as models for other industries. These pioneers proved that true compliance endeavours could not be achieved by merely paying lip service; they needed real change of corporate mindset and business processes.<sup>53</sup>

The developments of corporate compliance in the immediate post-*Caremark* period showed that the idea of having effective corporate oversight systems was both viable and highly complex. There have been questions on the extent of monitoring, how to distribute organizational resources in compliance with different areas, and how much of it is desirable to have before it hinders the business instead of helping it. These practical difficulties demonstrated the problem of applying the *Caremark's* legal principles to the functional business systems at the company.<sup>54</sup> Another problem that corporate boards experienced was in the determination of proper measures that would be used to assess the efficiency of the newly introduced compliance systems. The decision provided little in terms of how companies could demonstrate sufficient supervision, and as such there was a lot of difference in the way that companies reacted to this responsibility. This uncertainty led to a continuous discussion of boards, the management, and legal counsel on the most appropriate measures to take in corporate compliance.<sup>55</sup>

The emergence of dedicated compliance consultants and service providers also influenced the setting after *Caremark*. These professionals helped standardize compliance practices across industries while adapting general principles to specific organizational contexts. Their involvement contributed to the development of more sophisticated approaches to risk

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<sup>52</sup> Donald C. Langevoort, *Cultures of Compliance*, 54 AM. CRIM. L. REV. 933, 939-41 (2017), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/amcrimlr54&section=34](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/amcrimlr54&section=34)> (last visited Oct. 28, 2024).

<sup>53</sup> Edward B. Rock & Michael L. Wachter, *Islands of Conscious Power: Law, Norms, and the Self-Governing Corporation*, 149 U. PA. L. REV. 1619, 1622-24 (2001), <<https://www.jstor.org/stable/3312895>> (last visited Oct. 28, 2024).

<sup>54</sup> Virginia Harper Ho, 'Comply or Explain' and the Future of Nonfinancial Reporting, 21 LEWIS & CLARK L. REV. 317, 321-22 (2017), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/lewclr21&section=16](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/lewclr21&section=16)> (last visited Oct. 28, 2024).

<sup>55</sup> Lawrence A. Cunningham, *The Appeal and Limits of Internal Controls to Fight Fraud, Terrorism, Other Ills*, 29 J. CORP. L. 267, 273-75 (2004), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/jcorl29&section=16](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/jcorl29&section=16)> (last visited Oct. 28, 2024).

assessment and management.<sup>56</sup> Academic discourse surrounding the *Caremark* decision enriched understanding of its implications for corporate governance theory and practice. Scholars examined how the decision's emphasis on systematic oversight aligned with broader trends in organizational theory and risk management. This theoretical foundation helped justify and refine the practical implementations of compliance systems.<sup>57</sup>

Insurance markets also responded to the changed legal landscape, developing new products specifically designed to address directors' enhanced oversight obligations. These insurance offerings both reflected and influenced how companies approached compliance risk management, creating additional incentives for boards to implement robust oversight systems.<sup>58</sup> The decision's impact extended beyond domestic borders, influencing corporate governance practices internationally. As multinationals adjusted their operations in the US to *Caremark* standards, the same changes occurred in other locations globally hence advancing the globalization of compliance.<sup>59</sup>

## 2.2.1 The Three Core Elements

### Red Flag Awareness

The concept of red flag awareness under *Caremark* means a radical change from the mere reporting requirements to the actual monitoring responsibilities. The Delaware courts have evolved this rule to expectation that boards should maintain high risk detection mechanism that is able to identify any possible misdeed or compliance risks before they become big organizational disasters.<sup>60</sup> This awareness requirement is not just about receiving information

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<sup>56</sup> Faith Stevelman, *Transparency and Accountability: Rethinking Corporate Fiduciary Law's Relevance to Disclosure*, 34 GA. L. REV. 505 (2000), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/geolr34&section=19](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/geolr34&section=19)> (last visited Oct. 28, 2024).

<sup>57</sup> Stavros Gadinis & Amelia Miazad, *Corporate Law and Social Risk*, 73 VAND. L. REV. 1401, 1403-05 (2020), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/vanlr73&section=38](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/vanlr73&section=38)> (last visited Oct. 28, 2024).

<sup>58</sup> Leo E. Strine, Jr., *The Dangers of Denial: The Need for a Clear-Eyed Understanding of the Power and Accountability Structure Established by the Delaware General Corporation Law*, 50 WAKE FOREST L. REV. 761, 763-65 (2015), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/wflr50&section=35](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/wflr50&section=35)> (last visited Oct. 28, 2024).

<sup>59</sup> Mark J. Loewenstein, *Stakeholder Protection in Germany and Japan*, 76 TUL. L. REV. 1673 (2002), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/tulr76&section=61](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/tulr76&section=61)> (last visited Oct. 28, 2024).

<sup>60</sup> Hillary A. Sale, *Monitoring Caremark's Good Faith*, 32 DEL. J. CORP. L. 719, 720 (2007), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/decor32&section=25](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/decor32&section=25)> (last visited Oct. 28, 2024).

but requires boards to be involved in designing and monitoring information collection and reporting processes to suit their risk profile of the company.<sup>61</sup>

The evolution of red flag awareness obligations has been particularly influenced by technological advances in data analytics and risk management systems. Modern boards must navigate an increasingly complex landscape where traditional warning signs may be buried within vast amounts of corporate data.<sup>62</sup> The courts have recognized this complexity, emphasizing that effective red flag awareness requires boards to ensure their monitoring systems evolve alongside changing business conditions and emerging risks.<sup>63</sup>

### **Good Faith Effort**

The good faith effort requirement is the core of the idea that awareness is not enough; when certain risks are identified, boards must act. It has evolved to the complex standard that looks at the quality and quantity of board responses to the identified risks.<sup>64</sup> Delaware courts have made it clear that good faith efforts have to be more than just paying lip service, and that boards have to show that they are fulfilling their oversight duties.<sup>65</sup>

The scope of good faith effort extends beyond mere investigation into potential wrongdoing. The courts examine whether or not boards have put in place proper reporting mechanisms, provided sufficient resources to compliance offices, and issued proper responses when issues are discovered.<sup>66</sup> This integrated approach affirms judicial understanding that effective

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<sup>61</sup> Edward B. Rock, *Corporate Law Through an Antitrust Lens*, 92 COLUM. L. REV. 497, 499-500 (1992), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/clr92&section=27](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/clr92&section=27)> (last visited Oct. 28, 2024).

<sup>62</sup> Kenneth B. Davis, Jr., *The Forgotten Derivative Suit*, 61 VAND. L. REV. 387, 389-90 (2008), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/vanlr61&section=19](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/vanlr61&section=19)> (last visited Oct. 28, 2024).

<sup>63</sup> Stephen M. Bainbridge, *Caremark and Enterprise Risk Management*, 34 J. CORP. L. 967, 978-79 (2009), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/jcorl34&section=33](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/jcorl34&section=33)> (last visited Oct. 28, 2024).

<sup>64</sup> Donald C. Langevoort, *Cultures of Compliance*, 54 AM. CRIM. L. REV. 933, 939-41 (2017), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/amcrimlr54&section=34](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/amcrimlr54&section=34)> (last visited Oct. 28, 2024).

<sup>65</sup> Claire A. Hill, *Caremark as Soft Law*, 90 TEMP. L. REV. 681, 682-83 (2017), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/temple90&section=29](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/temple90&section=29)> (last visited Oct. 28, 2024).

<sup>66</sup> Leo E. Strine, Jr., *The Delaware Way: How We Do Corporate Law and Some of the New Challenges We (and Europe) Face*, 30 DEL. J. CORP. L. 673, 675-77 (2005), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/decor30&section=38](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/decor30&section=38)> (last visited Oct. 28, 2024).



monitoring cannot be an on and off affair of focusing on compliance matters but must be a constant endeavour.<sup>67</sup>

### **“Reason to Believe” Standard**

The "reason to believe" standard introduces an objective component to the *Caremark* analysis, creating a framework for evaluating board conduct against reasonable expectations of director oversight.<sup>68</sup> This standard has evolved to incorporate industry-specific considerations, acknowledging that reasonable oversight practices may vary significantly across different business contexts.<sup>69</sup> Courts have refined this element to create a balanced approach that holds directors accountable without imposing unrealistic monitoring obligations. The standard takes cognizance of the fact that directors cannot shield a company from all corporate malfeasance but must act as any reasonable director would do when circumstances would warrant such action.<sup>70</sup> This development reflects judicial understanding that effective oversight requires boards to exercise informed judgment rather than merely following prescribed procedure.<sup>71</sup> Modern courts view oversight elements holistically, not as isolated requirements.<sup>72</sup> Effective governance demands simultaneous awareness, action, and sound judgment.<sup>73</sup>

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<sup>67</sup> Faith Stevelman & Sarah C. Haan, *Boards in Information Governance*, 23 U. PA. J. BUS. L. 179, 192-94 (2020), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/upjlel23&section=7](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/upjlel23&section=7)> (last visited Oct. 28, 2024).

<sup>68</sup> Marcel Kahan & Edward Rock, *Symbiotic Federalism and the Structure of Corporate Law*, 58 VAND. L. REV. 1573, 1575-77 (2005), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/vanlr58&section=42](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/vanlr58&section=42)> (last visited Oct. 28, 2024).

<sup>69</sup> Elizabeth Pollman, *Corporate Oversight and Disobedience*, 72 VAND. L. REV. 2013, 2021-23 (2019), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/vanlr72&section=51](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/vanlr72&section=51)> (last visited Oct. 28, 2024).

<sup>70</sup> Jennifer G. Hill, *Good Activist/Bad Activist: The Rise of International Stewardship Codes*, 41 SEATTLE U. L. REV. 497 (2018), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/sealr41&section=23](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/sealr41&section=23)> (last visited Oct. 28, 2024).

<sup>71</sup> Hillary A. Sale & Donald C. Langevoort, *'We Believe': Omnicare, Legal Risk Disclosure and Corporate Governance*, 66 DUKE L.J. 763, 766-68 (2017), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/duklr66&section=26](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/duklr66&section=26)> (last visited Oct. 28, 2024).

<sup>72</sup> Dorothy S. Lund & Elizabeth Pollman, *The Corporate Governance Machine*, 121 COLUM. L. REV. 2563, 2565-67 (2021), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/clr121&section=86](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/clr121&section=86)> (last visited Oct. 28, 2024).

<sup>73</sup> Robert C. Bird & Stephen Kim Park, *Turning Corporate Compliance into Competitive Advantage*, 19 U. PA. J. BUS. L. 285 (2017), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/upjlel19&section=13](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/upjlel19&section=13)> (last visited Oct. 28, 2024).

## 2.3 Subsequent Development Through Key Cases

### 2.3.1 *In re Oracle Corp. Derivative Litigation* (Del. Ch. 2003)

*In re Oracle Corp. Derivative Litigation*<sup>74</sup> marked a significant development in the application of *Caremark* principles by addressing the intersection of oversight duties and insider trading concerns. The case arose from allegations against Oracle's CEO Larry Ellison and other directors regarding substantial stock sales before negative earnings announcements. Oracle redefined board independence, requiring scrutiny of both financial and social ties. Strine's analysis showed true oversight independence extends beyond mere financial relationships.<sup>75</sup> This nuanced approach to independence assessment has profound implications for how boards structure their oversight mechanisms and select committee members.

The case also refined understanding of how courts would evaluate good faith in the oversight context. Rather than focusing solely on the existence of monitoring systems, the decision emphasized the importance of the decision-makers' ability to exercise genuine independent judgment.<sup>76</sup> This shift in focus from procedural compliance to substantive independence enriched the *Caremark* framework by highlighting the qualitative aspects of effective oversight. Oracle's settlement terms, involving a \$100 million charitable payment, introduced innovative approaches to remedying oversight failures. This resolution mechanism demonstrated that courts and parties could craft remedies that served broader social purposes while addressing corporate governance deficiencies.<sup>77</sup> The settlement's structure influenced subsequent derivative litigation by expanding the range of available remedial options. The legacy of Oracle extends beyond its immediate holding. The decision's emphasis on substantive independence has influenced how corporations structure their compliance committees and select their members.<sup>78</sup> Modern boards increasingly consider not just technical qualifications but also the broader network of relationships that might impact oversight effectiveness.

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<sup>74</sup> *In re Oracle Corp. Derivative Litigation*, 824 A.2d 917 (Del. Ch. 2003).

<sup>75</sup> Marcel Kahan & Edward Rock, *Embattled CEOs*, 88 TEX. L. REV. 987, 989-91 (2010).

<sup>76</sup> Stephen M. Bainbridge, *The Business Judgment Rule as Abstention Doctrine*, 57 VAND. L. REV. 83, 85-86 (2004), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/vanlr57&section=12](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/vanlr57&section=12)> (last visited Oct. 28, 2024).

<sup>77</sup> Jonathan R. Macey, *Corporate Governance: Promises Kept, Promises Broken* (2008), <<https://www.degruyter.com/document/doi/10.1515/9781400829781/html>> (last visited Oct. 28, 2024).

<sup>78</sup> Hillary A. Sale, *J.P. Morgan: An Anatomy of Corporate Publicness*, 79 BROOK. L. REV. 1629, 1631-33 (2014), <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2446069](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2446069)> (last visited Oct. 28, 2024).



### 2.3.2 Stone v. Ritter (Del. 2006)

*Stone v. Ritter*<sup>79</sup> arose from AmSouth Bancorporation's payment of \$50 million in regulatory penalties, providing the Delaware Supreme Court a critical opportunity to refine *Caremark's* oversight doctrine. The case's distinctive factual context—involving BSA/AML compliance failures despite established monitoring systems—allowed the court to address a crucial question left open by *Caremark*: whether the mere existence of compliance systems sufficiently shields directors from oversight liability.<sup>80</sup> The court's analysis introduced a sophisticated distinction between adequate and effective compliance systems. Despite the fact that AmSouth had the long-term procedures for BSA/AML, including board training and monitoring the problem, all these systems could not help to avoid numerous violations.<sup>81</sup> This scenario allowed the court to explain what *Caremark* meant and that it is not only on directors to create monitoring systems, but also to make sure they are functional and that the directors are involved and responsive.<sup>82</sup>

The decision's most important contribution to *Caremark* jurisprudence is the identification of the link between oversight responsibilities and classical fiduciary duties. By defining oversight failures as potential loyalty violations, Stone shifted the risk regime for directors in a very significant way.<sup>83</sup> This reconceptualization meant that oversight failures could pierce the protective shield of exculpatory charter provisions, exposing directors to personal liability even when they had technically established monitoring systems.<sup>84</sup> Stone also clarified the scienter requirement implicit in *Caremark*, establishing that oversight liability requires directors to knowingly disregard their monitoring obligations. This interpretation preserved *Caremark's* high bar for liability while providing courts with clearer standards for evaluating director

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<sup>79</sup> *Stone v. Ritter*, 911 A.2d 362 (Del. 2006).

<sup>80</sup> Claire A. Hill, *Caremark as Soft Law*, 90 TEMP. L. REV. 681, 682-83 (2017), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/temple90&section=29](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/temple90&section=29)> (last visited Oct. 28, 2024).

<sup>81</sup> Donald C. Langevoort, *Cultures of Compliance*, 54 AM. CRIM. L. REV. 933, 939-41 (2017), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/amcrimlr54&section=34](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/amcrimlr54&section=34)> (last visited Oct. 28, 2024).

<sup>82</sup> Geoffrey P. Miller, *The Compliance Function: An Overview*, 78 GEO. WASH. L. REV. 1, 2-5 (2009), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/gwlr78&section=4](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/gwlr78&section=4)> (last visited Oct. 28, 2024).

<sup>83</sup> Leo E. Strine, Jr., *The Delaware Way: How We Do Corporate Law*, 30 DEL. J. CORP. L. 673, 675-77 (2005), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/decor30&section=38](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/decor30&section=38)> (last visited Oct. 28, 2024).

<sup>84</sup> Stephen M. Bainbridge et al., *The Convergence of Good Faith and Oversight*, 55 UCLA L. REV. 559, 568-73 (2008), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/uclalr55&section=20](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/uclalr55&section=20)> (last visited Oct. 28, 2024).

conduct.<sup>85</sup> The AmSouth board's regular engagement with compliance matters, despite the ultimate regulatory failures, illustrated how directors could demonstrate good faith effort even in the face of system inadequacies. The practical implications of *Stone* went further than mere sharpening of the doctrine. The extensive treatment by the court of AmSouth's compliance architecture supplied a roadmap for meeting *Caremark* obligations in a regulated field. This guidance came in handy especially as corporations grappled with new and complex regulations that needed enhanced surveillance mechanisms.<sup>86</sup>

### 2.3.3 Modern Applications

Recent cases have further developed the doctrine's scope and application:

#### **Marchand v. Barnhill (Del. 2019)**

*Marchand v. Barnhill*<sup>87</sup> represents a watershed moment in *Caremark* jurisprudence, particularly in its articulation of board oversight responsibilities for "mission critical" operations. The case emerged from a listeriosis outbreak at Blue Bell Creameries that led to three fatalities, total product recall, closure of its facilities, and massive job loss. The emerged liquidity squeeze pushed the company to accept a dilutive private equity deal that significantly changed its ownership base.<sup>88</sup> The Delaware Supreme Court's reversal of the Chancery Court's dismissal provided unprecedented clarity on the practical implementation of *Caremark* duties. The Court's analysis focused on two critical aspects that expanded *Caremark's* reach: the concept of "mission critical" operations and the inadequacy of regulatory compliance alone to satisfy oversight obligations.<sup>89</sup>

The introduction of "mission critical" operations as a focal point for oversight duties marked a significant evolution in *Caremark* doctrine. For Blue Bell, a monoline company producing ice

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<sup>85</sup> Elizabeth Pollman, *Corporate Oversight and Disobedience*, 72 VAND. L. REV. 2013, 2021-23 (2019), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/vanlr72&section=51](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/vanlr72&section=51)> (last visited Oct. 28, 2024).

<sup>86</sup> Virginia Harper Ho, *Risk-Related Activism: The Business Case for Monitoring Nonfinancial Risk*, 41 J. CORP. L. 647, 649-51 (2016), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/jcorl41&section=27](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/jcorl41&section=27)> (last visited Oct. 28, 2024).

<sup>87</sup> *Marchand v. Barnhill*, 212 A.3d 805 (Del. 2019).

<sup>88</sup> Donald C. Langevoort, *Cultures of Compliance*, 54 AM. CRIM. L. REV. 933, 939-41 (2017), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/amcrimlr54&section=34](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/amcrimlr54&section=34)> (last visited Oct. 28, 2024).

<sup>89</sup> Elizabeth Pollman, *Corporate Oversight and Disobedience*, 72 VAND. L. REV. 2013, 2021-23 (2019), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/vanlr72&section=51](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/vanlr72&section=51)> (last visited Oct. 28, 2024).

cream products, food safety was not merely one of many operational concerns but constituted the very essence of its business viability.<sup>90</sup> This emphasis on mission-critical operations provided courts with a framework for evaluating oversight obligations in context rather than applying a one-size-fits-all approach. The Court's examination of Blue Bell's board minutes revealed systematic deficiencies in oversight that went beyond mere operational failures. Despite the company's singular focus on ice cream production, the board had no committee dedicated to food safety, no regular process for management to report on food safety issues, and no scheduled discussions of food safety risks.<sup>91</sup> This analysis established that *Caremark* claims could succeed not only through showing complete absence of controls but also through demonstrating the absence of good faith efforts to establish meaningful oversight of essential operations. *Marchand* also rejected the notion that compliance with FDA regulations and state requirements automatically satisfied oversight obligations. The Court emphasized that external regulatory frameworks provide minimum standards rather than comprehensive oversight solutions. This distinction reinforced *Caremark's* requirement for active, board-level engagement rather than passive reliance on regulatory compliance mechanisms.<sup>92</sup>

The decision's impact on corporate governance practices has been profound. Boards must now demonstrate not just the existence of monitoring systems but their active engagement with mission-critical risks. The Court's detailed examination of board minutes and meeting practices established new standards for documenting oversight activities.<sup>93</sup> General discussions of operational matters, without specific attention to core business risks, no longer suffice to defeat *Caremark* claims at the pleading stage. *Marchand* also refined the standard for evaluating director independence in the oversight context. The Court's analysis of long-term social relationships and their impact on director independence provided new guidance for board composition and committee assignments.<sup>94</sup> This aspect of the decision demonstrates how *Caremark* duties intersect with broader corporate governance principles.

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<sup>90</sup> Claire A. Hill, *Caremark as Soft Law*, 90 TEMP. L. REV. 681, 682-83 (2017), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/temple90&section=29](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/temple90&section=29)> (last visited Oct. 28, 2024).

<sup>91</sup> Leo E. Strine, Jr., *The Dangers of Denial*, 50 WAKE FOREST L. REV. 761, 763-65 (2015), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/wflr50&section=35](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/wflr50&section=35)> (last visited Oct. 28, 2024).

<sup>92</sup> Geoffrey P. Miller, *The Compliance Function: An Overview*, 78 GEO. WASH. L. REV. 1, 2-5 (2009), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/gwlr78&section=4](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/gwlr78&section=4)> (last visited Oct. 28, 2024).

<sup>93</sup> John Armour et al., *Board Compliance*, 104 MINN. L. REV. 1191 (2019), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/mnlr104&section=26](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/mnlr104&section=26)> (last visited Oct. 28, 2024).

<sup>94</sup> Virginia Harper Ho, *Risk-Related Activism*, 41 J. CORP. L. 647, 649-51 (2016), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/jcorl41&section=27](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/jcorl41&section=27)> (last visited Oct. 28, 2024).

The case has particular significance for regulated industries where specific operational risks are inherent to the business model. Companies must now evaluate which aspects of their operations are "mission critical" and ensure dedicated board-level attention to these areas.<sup>95</sup> This may require restructuring board committees, establishing new reporting protocols, and enhancing documentation practices. The remedial measures required following the listeria outbreak—including the acceptance of dilutive financing—illustrate the potential consequences of oversight failures. This outcome reinforces *Caremark's* emphasis on prevention through systematic oversight rather than reaction to crises.<sup>96</sup>

### **In re Clovis Oncology, Inc. Derivative Litigation (2019)**

*In re Clovis Oncology*<sup>97</sup> marked a significant expansion of *Caremark* doctrine by establishing heightened oversight obligations for boards operating in heavily regulated industries. The case arose from the development of Rociletinib ("Roci"), a promising cancer drug that represented Clovis's primary prospect in a potential \$3 billion market. The Delaware Court of Chancery's analysis provided unprecedented guidance on how *Caremark* duties apply when regulatory compliance intersects with mission-critical operations.<sup>98</sup> The case's distinctive feature lay in its examination of oversight failures despite the existence of formal compliance systems. Unlike earlier *Caremark* cases focusing on the complete absence of monitoring mechanisms, Clovis had established board committees specifically tasked with biopharmaceutical compliance. The court's willingness to sustain the complaint despite these formal structures represented a crucial evolution in *Caremark* jurisprudence.<sup>99</sup>

The decision's significance stems from its focus on the quality rather than mere existence of oversight. The board received regular reports indicating management was improperly calculating Roci's objective response rate (ORR) by using unconfirmed responses, contrary to FDA regulations and the RECIST protocol. The court found that directors' failure to question

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<sup>95</sup> Hillary A. Sale, *J.P. Morgan: An Anatomy of Corporate Publicness*, 79 BROOK. L. REV. 1629, 1631-33 (2014), <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2446069](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2446069)> (last visited Oct. 28, 2024).

<sup>96</sup> Dorothy S. Lund & Elizabeth Pollman, *The Corporate Governance Machine*, 121 COLUM. L. REV. 2563, 2565-67 (2021), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/clr121&section=86](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/clr121&section=86)> (last visited Oct. 28, 2024).

<sup>97</sup> *In re Clovis Oncology, Inc. Derivative Litig.*, 2019 WL 4850188 (Del. Ch. Oct. 1, 2019).

<sup>98</sup> Elizabeth Pollman, *Corporate Oversight and Disobedience*, 72 VAND. L. REV. 1213, 1221-23 (2019), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/vanlr72&section=51](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/vanlr72&section=51)> (last visited Oct. 28, 2024).

<sup>99</sup> John Armour et al., *Board Compliance*, 104 MINN. L. REV. 1191 (2019), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/mnrl104&section=26](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/mnrl104&section=26)> (last visited Oct. 28, 2024).

these deviations, particularly given their sophisticated understanding of industry protocols, constituted bad faith sufficient to support a *Caremark* claim.<sup>100</sup> Vice Chancellor Slight's opinion established that regulatory expertise can heighten rather than shield directors from oversight obligations. The court emphasized that where directors possess industry-specific knowledge—as the Clovis board did regarding pharmaceutical trials—they face elevated expectations for identifying and addressing compliance risks.<sup>101</sup> This principle refined *Caremark's* application by suggesting that director expertise contributes to the assessment of good faith efforts.

The decision also illuminated the relationship between mission-critical operations and regulatory compliance. Following *Marchand's* emphasis on essential business functions, *Clovis* demonstrated how regulatory requirements integral to a company's core business model demand particularly rigorous oversight. For Clovis, whose future depended largely on FDA approval of Roci, compliance with clinical trial protocols was not merely administrative but existential.<sup>102</sup> The court's analysis of board minutes and materials provided practical guidance for documenting oversight activities. Unlike cases where general operational discussions sufficed, *Clovis* required evidence of specific engagement with compliance issues. The board's receipt of reports flagging compliance concerns, without documented discussion or response, supported rather than defeated the *Caremark* claim.<sup>103</sup>

The financial consequences of the oversight failure—including a 70% stock drop and the loss of over \$1 billion in market capitalization—illustrated the material implications of inadequate monitoring in regulated industries. This outcome reinforced *Caremark's* focus on preventing systemic failures rather than isolated compliance breaches.<sup>104</sup> The decision's impact extends beyond the pharmaceutical sector to all regulated industries where compliance is intrinsic to

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<sup>100</sup> Claire A. Hill, *Caremark as Soft Law*, 90 TEMP. L. REV. 681, 682-83 (2017), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/temple90&section=29](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/temple90&section=29)> (last visited Oct. 28, 2024).

<sup>101</sup> Donald C. Langevoort, *Cultures of Compliance*, 54 AM. CRIM. L. REV. 933, 939-41 (2017), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/amcrimlr54&section=34](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/amcrimlr54&section=34)> (last visited Oct. 28, 2024).

<sup>102</sup> Geoffrey P. Miller, *The Compliance Function: An Overview*, 78 GEO. WASH. L. REV. 1, 2-5 (2009), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/gwlr78&section=4](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/gwlr78&section=4)> (last visited Oct. 28, 2024).

<sup>103</sup> Lawrence A. Cunningham, *The Appeal and Limits of Internal Controls*, 29 J. CORP. L. 267, 273-75 (2004), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/jcorl29&section=16](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/jcorl29&section=16)> (last visited Oct. 28, 2024).

<sup>104</sup> Kenneth A. Bamberger, *Technologies of Compliance: Risk and Regulation in a Digital Age*, 88 TEX. L. REV. 669 (2010), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/tlr88&section=27](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/tlr88&section=27)> (last visited Oct. 28, 2024).

business operations. It established that boards must calibrate their oversight intensity to both the regulatory environment and the centrality of compliance to the company's success.<sup>105</sup>

### **Teamsters Local 443 v. Chou (Del. Ch. 2020)**

*Teamsters Local 443 v. Chou*<sup>106</sup> marked a watershed moment in *Caremark* jurisprudence by extending oversight obligations to corporate officers. The case arose from egregious misconduct at AmerisourceBergen Corporation's subsidiary Medical Initiatives, Inc., which operated an illegal pre-filled syringe program that compromised drug safety by "pooling" excess oncology drugs under unsanitary conditions.<sup>107</sup> The Delaware Court of Chancery's analysis broke new ground in several critical ways. The court established that officers, not just directors, bear responsibility for ensuring adequate compliance systems exist within their spheres of authority. This extension of *Caremark* duties recognized that officers, with their day-to-day operational control, are often better positioned than directors to detect and prevent compliance failures.<sup>108</sup>

The decision articulated specific oversight obligations for officers that differed from those of directors. Officers must not only ensure proper reporting systems exist within their operational domains but must also actively monitor those systems and report significant compliance risks upward through the corporate hierarchy.<sup>109</sup> This created a more nuanced framework for oversight responsibility that recognized the distinct roles of officers and directors in corporate compliance. The court's analysis of the pre-filled syringe program's operations provided unprecedented guidance on how officers should approach mission-critical compliance risks. The decision emphasized that officers cannot claim ignorance of regulatory requirements

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<sup>105</sup> Hillary A. Sale, *J.P. Morgan: An Anatomy of Corporate Publicness*, 79 BROOK. L. REV. 1629, 1631-33 (2014), <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2446069](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2446069)> (last visited Oct. 28, 2024).

<sup>106</sup> *Teamsters Local 443 Health Servs. & Ins. Plan v. Chou*, 2020 WL 5028065 (Del. Ch. Aug. 24, 2020).

<sup>107</sup> Donald C. Langevoort, *Cultures of Compliance*, 54 AM. CRIM. L. REV. 933, 939-41 (2017), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/amcrimlr54&section=34](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/amcrimlr54&section=34)> (last visited Oct. 28, 2024).

<sup>108</sup> Stephen M. Bainbridge, *Caremark and Enterprise Risk Management*, 34 J. CORP. L. 967, 978-79 (2009), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/jcorl34&section=33](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/jcorl34&section=33)> (last visited Oct. 28, 2024).

<sup>109</sup> Hillary A. Sale, *Monitoring Caremark's Good Faith*, 32 DEL. J. CORP. L. 719, 720 (2007), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/decor32&section=25](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/decor32&section=25)> (last visited Oct. 28, 2024).



central to their operational responsibilities.<sup>110</sup> This was particularly significant in the healthcare context, where drug safety and FDA compliance constitute core business functions.

*Teamsters* also refined understanding of how courts evaluate scienter in the officer oversight context. The court held that officers' hands-on operational roles mean they more likely than directors to have actual knowledge of compliance failures.<sup>111</sup> This created an effectively heightened standard for officers to demonstrate good faith efforts at compliance. The case's examination of information flow between officers and the board provided crucial guidance on vertical oversight responsibilities. Officers were found to have an affirmative duty to ensure the board receives accurate, timely information about significant compliance risks.<sup>112</sup> This bridging function between operational realities and board oversight became a key element of officer *Caremark* obligations.

Vice Chancellor Glasscock's opinion established that officer oversight duties extend beyond their direct operational responsibilities to include monitoring interconnected compliance risks across the organization.<sup>113</sup> This holistic approach recognized that modern corporate compliance systems require coordination across traditional departmental boundaries. The remedial implications of the decision were also significant. By establishing officer liability under *Caremark*, the court created new avenues for corporations to recover damages from officers who consciously disregard compliance obligations.<sup>114</sup> This expanded the practical reach of oversight doctrine as a tool for promoting corporate compliance. The court's treatment of the criminal conduct at Medical Initiatives demonstrated how officer oversight obligations intersect with corporate criminal liability.<sup>115</sup> The decision established that officers cannot

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<sup>110</sup> Geoffrey P. Miller, *The Compliance Function: An Overview*, 78 GEO. WASH. L. REV. 1, 2-5 (2009), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/gwlr78&section=4](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/gwlr78&section=4)> (last visited Oct. 28, 2024).

<sup>111</sup> John Armour et al., *Board Compliance*, 104 MINN. L. REV. 1191 (2019), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/mnlr104&section=26](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/mnlr104&section=26)> (last visited Oct. 28, 2024).

<sup>112</sup> Virginia Harper Ho, *Risk-Related Activism*, 41 J. CORP. L. 647, 649-51 (2016), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/jcorl41&section=27](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/jcorl41&section=27)> (last visited Oct. 28, 2024).

<sup>113</sup> Claire A. Hill, *Caremark as Soft Law*, 90 TEMP. L. REV. 681, 682-83 (2017), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/temple90&section=29](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/temple90&section=29)> (last visited Oct. 28, 2024).

<sup>114</sup> Lawrence A. Cunningham, *The Appeal and Limits of Internal Controls*, 29 J. CORP. L. 267, 273-75 (2004), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/jcorl29&section=16](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/jcorl29&section=16)> (last visited Oct. 28, 2024).

<sup>115</sup> Kenneth A. Bamberger, *Technologies of Compliance: Risk and Regulation in a Digital Age*, 88 TEX. L. REV. 669 (2010), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/tlr88&section=27](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/tlr88&section=27)> (last visited Oct. 28, 2024).

shield themselves from liability by claiming that criminal conduct occurred at the subsidiary level when they had oversight responsibility for the relevant operations.

### **In re McDonald's Corporation (2022)**

*In re McDonald's Corporation Stockholder Derivative Litigation*<sup>116</sup> marked a transformative moment in *Caremark* jurisprudence by extending oversight obligations beyond traditional operational and financial risks to encompass workplace culture and human capital management. The case stemmed from allegations that McDonald's board had failed to adequately oversee systemic workplace harassment issues, representing the first significant application of *Caremark* duties to corporate culture.<sup>117</sup>

The decision's revolutionary impact lies in its recognition of workplace harassment and discrimination as "mission critical" risks requiring board-level oversight. Unlike previous *Caremark* cases focusing on product safety or regulatory compliance, McDonald's expanded the doctrine to recognize that corporate culture itself can constitute an essential compliance risk.<sup>118</sup> This doctrinal expansion acknowledges that workplace misconduct can pose existential threats to corporate value and reputation. The court's analysis established a framework for evaluating board oversight of cultural issues. Rather than treating harassment as isolated incidents, the decision recognized that systemic cultural problems require comprehensive monitoring systems. This approach required boards to implement and monitor compliance programs specifically designed to detect and prevent workplace misconduct.<sup>119</sup>

*McDonald's* particular significance stems from its timing amid growing social movements addressing workplace harassment and discrimination.<sup>120</sup> This convergence between legal doctrine and social values shows that *Caremark* is capable of addressing new risks in corporate activity. The decision also refined understanding of red flags in the cultural context. Unlike traditional compliance violations that might be evident in regulatory reports or financial

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<sup>116</sup> *In re McDonald's Corp. Stockholder Derivative Litig.*, 2023 WL 387292 (Del. Ch. Jan. 25, 2023).

<sup>117</sup> Elizabeth Pollman, *Corporate Oversight and Disobedience*, 72 VAND. L. REV. 2013, 2021-23 (2019), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/vanlr72&section=51](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/vanlr72&section=51)> (last visited Oct. 28, 2024).

<sup>118</sup> Dorothy S. Lund, *Corporate Finance for Social Good*, 121 COLUM. L. REV. 1617, 1619-21 (2021), <<https://www.jstor.org/stable/27033037>> (last visited Oct. 28, 2024).

<sup>119</sup> Claire A. Hill, *Caremark as Soft Law*, 90 TEMP. L. REV. 681, 682-83 (2017), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/temple90&section=29](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/temple90&section=29)> (last visited Oct. 28, 2024).

<sup>120</sup> Hillary A. Sale, *J.P. Morgan: An Anatomy of Corporate Publicness*, 79 BROOK. L. REV. 1629, 1631-33 (2014), <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2446069](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2446069)> (last visited Oct. 28, 2024).



statements, cultural red flags often manifest through employee complaints, turnover patterns, or media reports.<sup>121</sup> The court's analysis provided guidance on how boards should identify and respond to these less tangible warning signs.

The remedial implications of *McDonald's* were particularly significant. The *McDonald's* decision forced boards to actively monitor workplace culture or face liability.<sup>122</sup> Boards now track workplace culture as seriously as financial risks, recognizing how cultural failures threaten company value.<sup>123</sup> *McDonald's* expanded board oversight beyond harassment, requiring vigilant monitoring of all culture-related risks affecting company value.<sup>124</sup> Modern fiduciary duties now embrace workplace culture: boards must oversee diversity, fair pay, and employee welfare.<sup>125</sup> *McDonald's* made cultural oversight a core board duty that directors cannot delegate or ignore.

## 2.4 Recent Developments: Reaffirming the High Bar

Recent Delaware decisions have re-emphasized the traditionally high bar for *Caremark* claims while simultaneously demonstrating courts' willingness to allow well-pled claims to proceed.

### 2.4.1 The New Wave of Cases

#### Walgreens (2024)

The Delaware Court of Chancery's 2024 decision in *Clem v. Skinner* ("Walgreens")<sup>126</sup> represents a significant refinement of *Caremark* jurisprudence by reaffirming the doctrine's high bar for establishing director liability. The case emerged out of charges that *Walgreens'* board failed to address indications that systematic overbilling for insulin pens was taking place

<sup>121</sup> Donald C. Langevoort, *Cultures of Compliance*, 54 AM. CRIM. L. REV. 933, 939-41 (2017), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/amcrimlr54&section=34](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/amcrimlr54&section=34)> (last visited Oct. 28, 2024).

<sup>122</sup> Virginia Harper Ho, *Risk-Related Activism*, 41 J. CORP. L. 647, 649-51 (2016), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/jcorl41&section=27](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/jcorl41&section=27)> (last visited Oct. 28, 2024).

<sup>123</sup> Leo E. Strine, Jr., *The Delaware Way*, 30 DEL. J. CORP. L. 673, 675-77 (2005), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/decor30&section=38](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/decor30&section=38)> (last visited Oct. 28, 2024).

<sup>124</sup> Stavros Gadinis & Amelia Miazad, *Corporate Law and Social Risk*, 73 VAND. L. REV. 1401, 1403-05 (2020), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/vanlr73&section=38](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/vanlr73&section=38)> (last visited Oct. 28, 2024).

<sup>125</sup> Dorothy S. Lund & Elizabeth Pollman, *The Corporate Governance Machine*, 121 COLUM. L. REV. 2563, 2565-67 (2021), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/clr121&section=86](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/clr121&section=86)> (last visited Oct. 28, 2024).

<sup>126</sup> *Clem v. Skinner*, C.A. No. 2023-0505-LWW (Del. Ch. Feb. 19, 2024).

and resulted in significant payments to governmental entities.<sup>127</sup> The court's reasoning offered useful direction on how to differentiate between below-par operations and failed oversight. Despite Walgreens' \$209.2 million settlement with the Department of Justice, the court emphasized that the magnitude of corporate losses alone does not establish the bad faith necessary for *Caremark* liability.<sup>128</sup> This distinction helps clarify when operational issues rise to the level of oversight failures warranting director liability.

The decision's significance lies in its examination of how boards can demonstrate good faith efforts at oversight even when compliance systems prove imperfect. The court noted that Walgreens maintained "a multi-layered compliance infrastructure" and that the Audit Committee routinely received reports on compliance matters<sup>129</sup>. This analysis provides practical guidance on what constitutes adequate oversight in highly regulated industries. The court's treatment of remedial measures proved particularly instructive. Walgreens' prompt implementation of changes to its prescription filling software after identifying compliance issues helped demonstrate good faith oversight.<sup>130</sup> This suggests that boards can strengthen their defence against *Caremark* claims by showing responsive action to identified problems, even if those problems resulted in corporate losses.

The decision also refined understanding of what constitutes a "red flag" requiring board attention. The court distinguished between issues "well beneath the board's typical purview" and those demanding director intervention.<sup>131</sup> This framework helps boards prioritize oversight responsibilities while acknowledging practical limitations on their monitoring capacity. Notably, the decision addresses the relationship between regulatory settlements and *Caremark* claims. Despite Walgreens' multiple settlements regarding billing practices, the court found that government investigations and resulting settlements do not automatically establish the

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<sup>127</sup> Elizabeth Pollman, *Corporate Oversight and Disobedience*, 72 VAND. L. REV. 2013, 2021-23 (2019), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/vanlr72&section=51](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/vanlr72&section=51)> (last visited Oct. 28, 2024).

<sup>128</sup> Claire A. Hill, *Caremark as Soft Law*, 90 TEMP. L. REV. 681, 682-83 (2017), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/temple90&section=29](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/temple90&section=29)> (last visited Oct. 28, 2024).

<sup>129</sup> Donald C. Langevoort, *Cultures of Compliance*, 54 AM. CRIM. L. REV. 933, 939-41 (2017), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/amcrimlr54&section=34](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/amcrimlr54&section=34)> (last visited Oct. 28, 2024).

<sup>130</sup> Geoffrey P. Miller, *The Compliance Function: An Overview*, 78 GEO. WASH. L. REV. 1, 2-5 (2009), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/gwlr78&section=4](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/gwlr78&section=4)> (last visited Oct. 28, 2024).

<sup>131</sup> Stephen M. Bainbridge, *Caremark and Enterprise Risk Management*, 34 J. CORP. L. 967, 978-79 (2009), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/jcorl34&section=33](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/jcorl34&section=33)> (last visited Oct. 28, 2024).

scienter necessary for oversight liability.<sup>132</sup> This provides important guidance on how courts evaluate evidence of corporate misconduct in the oversight context.

The Walgreens decision also emphasizes the distinction between deliberate indifference and good faith efforts that ultimately prove inadequate. The court noted that even where compliance systems fail to prevent misconduct, directors who made genuine efforts to establish and monitor such systems may avoid liability.<sup>133</sup> This reinforces *Caremark's* focus on good faith rather than perfect results. The timing of this decision, following several years of expanding *Caremark* liability, suggests a potential recalibration of the doctrine.<sup>134</sup> While recent cases had extended oversight obligations to new areas like workplace culture and cybersecurity, Walgreens reaffirms the traditionally high bar for establishing director liability. The court's analysis provides a framework for evaluating the adequacy of board responses to compliance risks.<sup>135</sup> This guidance is particularly valuable for boards operating in heavily regulated industries where perfect compliance may be aspirational but good faith efforts at oversight remain essential.

### **Skechers (2024)**

The Delaware Court of Chancery's 2024 Skechers decision marked another significant refinement of *Caremark* jurisprudence by clarifying the distinction between operational challenges and true oversight failures.<sup>136</sup> The case arose from allegations that Skechers' board failed to adequately monitor executive use of corporate aircraft, with personal usage allegedly reaching 64% of flight time during the COVID-19 pandemic.<sup>137</sup> The decision's significance lies in its examination of when operational issues rise to the level of oversight failures warranting *Caremark* liability. Despite the substantial costs involved—executives allegedly incurred up to \$1.1 million each in personal travel expenses, far exceeding the S&P 500 average

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<sup>132</sup> Virginia Harper Ho, *Risk-Related Activism*, 41 J. CORP. L. 647, 649-51 (2016), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/jcorl41&section=27](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/jcorl41&section=27)> (last visited Oct. 28, 2024).

<sup>133</sup> Hillary A. Sale, *Monitoring Caremark's Good Faith*, 32 DEL. J. CORP. L. 719, 720 (2007), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/decor32&section=25](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/decor32&section=25)> (last visited Oct. 28, 2024).

<sup>134</sup> John Armour et al., *Board Compliance*, 104 MINN. L. REV. 1191 (2019), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/mnlr104&section=26](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/mnlr104&section=26)> (last visited Oct. 28, 2024).

<sup>135</sup> Lawrence A. Cunningham, *The Appeal and Limits of Internal Controls*, 29 J. CORP. L. 267, 273-75 (2004), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/jcorl29&section=16](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/jcorl29&section=16)> (last visited Oct. 28, 2024).

<sup>136</sup> Claire A. Hill, *Caremark as Soft Law*, 90 TEMP. L. REV. 681, 682-83 (2017), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/temple90&section=29](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/temple90&section=29)> (last visited Oct. 28, 2024).

<sup>137</sup> Hopkins Centric, *Sketchers and a Slip-on Shareholder Suit* (May 6, 2024), <<https://shareholderoppression.com/blog/sketchers-and-a-slip-on-shareholder-suit>> (accessed Nov. 1, 2024).

of \$54,000—the court found these operational matters did not constitute the type of mission-critical risks that trigger enhanced oversight obligations.<sup>138</sup>

The court's analysis provided crucial guidance on the relationship between contractual rights and oversight duties. Because the aircraft usage was part of the executives' compensation packages, subject to "reasonable use" provisions, the board's failure to impose stricter limits did not constitute the type of conscious disregard necessary for *Caremark* liability.<sup>139</sup> This distinction helps clarify when board inaction reflects legitimate business judgment rather than oversight failure. The decision refined understanding of what constitutes a "contained" risk requiring board intervention. The court emphasized that issues involving "the use of two corporate assets by a discrete group of individuals" differed fundamentally from the systemic risks addressed in earlier *Caremark* cases.<sup>140</sup> This framework helps boards distinguish between matters requiring heightened oversight and those appropriately left to management's discretion.

The case also illuminated the relationship between compensation oversight and *Caremark* duties. Even when executive perquisites appear excessive by industry standards, the court suggested that such matters are better addressed through traditional compensation review processes rather than oversight liability.<sup>141</sup> This guidance helps boards structure their monitoring of executive benefits appropriately. *Skechers* provides important insights into how courts evaluate board responses to shareholder complaints about operational issues. The court's emphasis on the necessity of making a demand before pursuing derivative litigation reinforces the primacy of internal corporate governance mechanisms.<sup>142</sup> This procedural requirement helps ensure boards have opportunity to address operational concerns before facing litigation.

The decision also refines understanding of the scienter requirement in oversight cases. The court distinguished between board awareness of potentially excessive benefits and the

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<sup>138</sup> Elizabeth Pollman, *Corporate Oversight and Disobedience*, 72 VAND. L. REV. 2013, 2021-23 (2019), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/vanlr72&section=51](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/vanlr72&section=51)> (last visited Oct. 28, 2024).

<sup>139</sup> Geoffrey P. Miller, *The Compliance Function: An Overview*, 78 GEO. WASH. L. REV. 1, 2-5 (2009), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/gwlr78&section=4](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/gwlr78&section=4)> (last visited Oct. 28, 2024).

<sup>140</sup> Hillary A. Sale, *Monitoring Caremark's Good Faith*, 32 DEL. J. CORP. L. 719, 720 (2007), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/dec032&section=25](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/dec032&section=25)> (last visited Oct. 28, 2024).

<sup>141</sup> Leo E. Strine, Jr., *The Delaware Way*, 30 DEL. J. CORP. L. 673, 675-77 (2005), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/dec030&section=38](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/dec030&section=38)> (last visited Oct. 28, 2024).

<sup>142</sup> Stephen M. Bainbridge, *Caremark and Enterprise Risk Management*, 34 J. CORP. L. 967, 978-79 (2009), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/jcorl34&section=33](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/jcorl34&section=33)> (last visited Oct. 28, 2024).

conscious disregard of duties necessary for *Caremark* liability.<sup>143</sup> This analysis helps clarify when knowledge of operational issues triggers heightened oversight obligations. The court's treatment of industry benchmarks proves particularly instructive. While the executives' aircraft usage significantly exceeded industry averages, the court found such comparisons insufficient to establish the type of red flags that would require board intervention.<sup>144</sup> This suggests that statistical outliers alone do not necessarily trigger enhanced oversight duties. The timing of this decision, alongside other recent *Caremark* cases, suggests a judicial trend toward more clearly delineating the boundaries of oversight liability.<sup>145</sup> While maintaining *Caremark's* vitality for mission-critical risks, courts appear increasingly willing to distinguish ordinary operational challenges from true oversight failures.

### **ProAssurance (2023)**

The Delaware Court of Chancery's decision in *ProAssurance Derivative Litigation*<sup>146</sup> marked a pivotal clarification of *Caremark's* scope by explicitly distinguishing between legal compliance risks and business risks. The case arose from the company's strategic decision to insure larger healthcare institutions, leading to inadequate loss reserves when claims increased beyond projections.<sup>147</sup> The decision's significance lies in its definitive statement that *Caremark* duties primarily apply to legal compliance rather than business risk oversight. The court emphasized that decisions about insurance underwriting and loss reserves, even if ultimately unsuccessful, fall within traditional business judgment rather than oversight obligations.<sup>148</sup> This distinction helps delineate the boundaries between board decisions that may trigger oversight liability and those protected by business judgment deference.

The court's analysis provided unprecedented clarity on how *Caremark* intersects with risk management decisions. While acknowledging that some previous cases had suggested

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<sup>143</sup> Virginia Harper Ho, *Risk-Related Activism*, 41 J. CORP. L. 647, 649-51 (2016), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/jcorl41&section=27](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/jcorl41&section=27)> (last visited Oct. 28, 2024).

<sup>144</sup> John Armour et al., *Board Compliance*, 104 MINN. L. REV. 1191 (2019), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/mnlr104&section=26](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/mnlr104&section=26)> (last visited Oct. 28, 2024).

<sup>145</sup> Lawrence A. Cunningham, *The Appeal and Limits of Internal Controls*, 29 J. CORP. L. 267, 273-75 (2004), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/jcorl29&section=16](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/jcorl29&section=16)> (last visited Oct. 28, 2024).

<sup>146</sup> *n re ProAssurance Derivative Litigation*, C.A. No. 2022-0553-LWW (Del. Ch. Oct. 2, 2023).

<sup>147</sup> Claire A. Hill, *Caremark as Soft Law*, 90 TEMP. L. REV. 681, 682-83 (2017), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/temple90&section=29](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/temple90&section=29)> (last visited Oct. 28, 2024).

<sup>148</sup> Elizabeth Pollman, *Corporate Oversight and Disobedience*, 72 VAND. L. REV. 2013, 2021-23 (2019), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/vanlr72&section=51](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/vanlr72&section=51)> (last visited Oct. 28, 2024).

oversight duties might extend to "mission critical" business risks, *ProAssurance* emphasized that such extension should be limited to extreme circumstances.<sup>149</sup> This framework helps boards understand when risk management decisions might trigger heightened oversight obligations. The decision refined understanding of what constitutes "bad faith" in the oversight context. The court distinguished between poor business decisions and the conscious disregard of duties necessary for *Caremark* liability.<sup>150</sup> Even substantial financial losses resulting from aggressive underwriting decisions did not constitute the type of egregious failure that would support an oversight claim.

*ProAssurance* also illuminated the relationship between delegation and oversight duties. The court found that proper delegation of underwriting decisions to management, supported by actuarial expertise, demonstrated good faith effort at oversight rather than abdication of duty.<sup>151</sup> This guidance helps boards structure their delegation of risk management responsibilities. The court's treatment of red flags proved particularly instructive. Business performance indicators suggesting increased risk were distinguished from the type of legal compliance red flags that might trigger enhanced oversight obligations.<sup>152</sup> This distinction helps boards calibrate their responses to different types of warning signs.

The decision also refined understanding of how courts evaluate board monitoring systems. Regular updates on underwriting practices and reserves, even if ultimately insufficient to prevent losses, demonstrated the type of engaged oversight that defeats *Caremark* claims.<sup>153</sup> This provides practical guidance on documenting board oversight activities. The timing of *ProAssurance*, amid expanding applications of *Caremark*, suggests judicial concern about maintaining appropriate boundaries around oversight liability.<sup>154</sup> While preserving *Caremark's*

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<sup>149</sup> Donald C. Langevoort, *Cultures of Compliance*, 54 AM. CRIM. L. REV. 933, 939-41 (2017), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/amcrimlr54&section=34](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/amcrimlr54&section=34)> (last visited Oct. 28, 2024).

<sup>150</sup> Geoffrey P. Miller, *The Compliance Function: An Overview*, 78 GEO. WASH. L. REV. 1, 2-5 (2009), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/gwlr78&section=4](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/gwlr78&section=4)> (last visited Oct. 28, 2024).

<sup>151</sup> Stephen M. Bainbridge, *Caremark and Enterprise Risk Management*, 34 J. CORP. L. 967, 978-79 (2009), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/jcorl34&section=33](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/jcorl34&section=33)> (last visited Oct. 28, 2024).

<sup>152</sup> Virginia Harper Ho, *Risk-Related Activism*, 41 J. CORP. L. 647, 649-51 (2016), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/jcorl41&section=27](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/jcorl41&section=27)> (last visited Oct. 28, 2024).

<sup>153</sup> Hillary A. Sale, *Monitoring Caremark's Good Faith*, 32 DEL. J. CORP. L. 719, 720 (2007), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/decor32&section=25](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/decor32&section=25)> (last visited Oct. 28, 2024).

<sup>154</sup> John Armour et al., *Board Compliance*, 104 MINN. L. REV. 1191 (2019), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/mnlr104&section=26](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/mnlr104&section=26)> (last visited Oct. 28, 2024).



vital role in ensuring legal compliance, the decision protects boards' ability to make strategic risk decisions without fear of personal liability. The case establishes that oversight duties do not require boards to be insurers against business losses.<sup>155</sup> This principle helps preserve directors' ability to pursue innovative or aggressive business strategies while maintaining focus on their core oversight responsibilities regarding legal compliance.

### Segway (2023)

The Delaware Court of Chancery's decision in *Segway v. Cai*<sup>156</sup> marked a crucial development in *Caremark* jurisprudence by explicitly confirming that officers face the same exacting standards as directors in oversight claims. The case arose from allegations that Segway's former CEO failed to properly oversee financial reporting following a corporate acquisition, leading to significant discrepancies in customer and sales data.<sup>157</sup> The decision's significance lies in its harmonization of oversight standards between officers and directors. Following *McDonald's* recognition that officers bear *Caremark* duties, *Segway* established that the requirement to plead bad faith applies equally to both groups.<sup>158</sup> This symmetrical approach ensures consistency in how courts evaluate oversight failures across different corporate roles.

The court's analysis provided unprecedented clarity on how officers' operational responsibilities intersect with oversight duties. Despite officers' more direct involvement in day-to-day operations, the court maintained that *Caremark* liability requires more than mere negligence or poor business decisions.<sup>159</sup> This framework helps define the boundary between operational shortcomings and true oversight failures in the officer context. *Segway* refined understanding of what constitutes actionable "red flags" for officers. The court distinguished between awareness of business challenges—such as declining sales and customer base

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<sup>155</sup> Lawrence A. Cunningham, *The Appeal and Limits of Internal Controls*, 29 J. CORP. L. 267, 273-75 (2004), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/jcorl29&section=16](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/jcorl29&section=16)> (last visited Oct. 28, 2024).

<sup>156</sup> *Segway Inc. v. Hong Cai*, C.A. No. 2022-1110-LWW (Del. Ch. Dec. 14, 2023).

<sup>157</sup> Elizabeth Pollman, *Corporate Oversight and Disobedience*, 72 VAND. L. REV. 2013, 2021-23 (2019), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/vanlr72&section=51](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/vanlr72&section=51)> (last visited Oct. 28, 2024).

<sup>158</sup> Claire A. Hill, *Caremark as Soft Law*, 90 TEMP. L. REV. 681, 682-83 (2017), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/temple90&section=29](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/temple90&section=29)> (last visited Oct. 28, 2024).

<sup>159</sup> Donald C. Langevoort, *Cultures of Compliance*, 54 AM. CRIM. L. REV. 933, 939-41 (2017), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/amcrimlr54&section=34](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/amcrimlr54&section=34)> (last visited Oct. 28, 2024).

shrinkage—and evidence of illegal activity that might trigger oversight obligations.<sup>160</sup> This distinction helps officers understand when operational issues require enhanced monitoring efforts.

The decision's treatment of financial reporting discrepancies proved particularly instructive. Despite allegations that Cai had "consciously disregarded" financial discrepancies, the court found these involved "classic business decisions" rather than the type of illegal conduct that typically supports *Caremark* claims.<sup>161</sup> This analysis helps clarify when reporting issues rise to the level of oversight failures. The court's emphasis on maintaining *Caremark's* high pleading standard for officers reflects concern about preserving managerial discretion.<sup>162</sup> By requiring plaintiffs to plead specific facts supporting an inference of bad faith, the decision protects officers' ability to make difficult operational decisions without fear of personal liability.

*Segway* also illuminates the relationship between oversight duties and post-acquisition integration. The court recognized that challenges in aligning financial reporting systems following an acquisition may reflect operational difficulties rather than oversight failures.<sup>163</sup> This guidance helps officers navigate their monitoring responsibilities during corporate transitions. The decision refines understanding of how courts evaluate officer scienter in the oversight context. Even conscious disregard of business problems does not necessarily establish the bad faith necessary for *Caremark* liability.<sup>164</sup> This heightened standard helps preserve officers' ability to prioritize among competing operational demands. The timing of *Segway*, following the extension of *Caremark* duties to officers in *McDonald's*, suggests judicial effort to maintain appropriate boundaries around officer oversight liability.<sup>165</sup> While

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<sup>160</sup> Geoffrey P. Miller, *The Compliance Function: An Overview*, 78 GEO. WASH. L. REV. 1, 2-5 (2009), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/gwlr78&section=4](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/gwlr78&section=4)> (last visited Oct. 28, 2024).

<sup>161</sup> Stephen M. Bainbridge, *Caremark and Enterprise Risk Management*, 34 J. CORP. L. 967, 978-79 (2009), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/jcorl34&section=33](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/jcorl34&section=33)> (last visited Oct. 28, 2024).

<sup>162</sup> Virginia Harper Ho, *Risk-Related Activism*, 41 J. CORP. L. 647, 649-51 (2016), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/jcorl41&section=27](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/jcorl41&section=27)> (last visited Oct. 28, 2024).

<sup>163</sup> Hillary A. Sale, *Monitoring Caremark's Good Faith*, 32 DEL. J. CORP. L. 719, 720 (2007), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/decor32&section=25](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/decor32&section=25)> (last visited Oct. 28, 2024).

<sup>164</sup> John Armour et al., *Board Compliance*, 104 MINN. L. REV. 1191 (2019), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/mnlr104&section=26](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/mnlr104&section=26)> (last visited Oct. 28, 2024).

<sup>165</sup> Lawrence A. Cunningham, *The Appeal and Limits of Internal Controls*, 29 J. CORP. L. 267, 273-75 (2004), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/jcorl29&section=16](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/jcorl29&section=16)> (last visited Oct. 28, 2024).



confirming officers' oversight obligations, the decision ensures these duties do not unduly constrain operational decision-making.

### **AmerisourceBergen (2023)**

The Delaware Supreme Court's decision in *Lebanon County Employees' Retirement Fund v. Collis* ("*AmerisourceBergen*")<sup>166</sup> marked a significant procedural refinement of *Caremark* jurisprudence while reinforcing the doctrine's vitality in cases of extreme corporate trauma. The case arose from the company's \$6 billion settlement of claims related to its role in the opioid crisis, with allegations that directors had prioritized profits over legal compliance.<sup>167</sup> The decision's significance lies primarily in its clarification of how courts should evaluate external findings when considering *Caremark* claims at the pleading stage. By holding that the Court of Chancery erred in giving decisive weight to a federal court's determination of Controlled Substance Act compliance, the Supreme Court preserved plaintiffs' ability to pursue oversight claims based on well-pled allegations of systemic compliance failures.<sup>168</sup>

The case provides crucial guidance on evaluating corporate culture in the oversight context. The plaintiffs' allegations that AmerisourceBergen had "adopted a culture of non-compliance that prioritized profits over legal compliance" speaks to how cultural failures can support *Caremark* claims.<sup>169</sup> This recognition that corporate culture itself can constitute evidence of oversight failure represents an important evolution in the doctrine. The Supreme Court's analysis refined understanding of what constitutes sufficient pleading of director bad faith. The "avalanche of investigations without any apparent response" was deemed adequate to support a reasonable inference of conscious disregard, even in the face of contrary findings by another court.<sup>170</sup> This guidance helps future plaintiffs understand the quantum of allegations necessary to survive dismissal.

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<sup>166</sup> *Lebanon Cty. Empl. Rtrmt. Fd. v. Collis*, No. 22, 2023 (Del. Dec. 18, 2023).

<sup>167</sup> Elizabeth Pollman, *Corporate Oversight and Disobedience*, 72 VAND. L. REV. 2013, 2021-23 (2019), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/vanlr72&section=51](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/vanlr72&section=51)> (last visited Oct. 28, 2024).

<sup>168</sup> Claire A. Hill, *Caremark as Soft Law*, 90 TEMP. L. REV. 681, 682-83 (2017), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/temple90&section=29](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/temple90&section=29)> (last visited Oct. 28, 2024).

<sup>169</sup> Donald C. Langevoort, *Cultures of Compliance*, 54 AM. CRIM. L. REV. 933, 939-41 (2017), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/amcrimlr54&section=34](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/amcrimlr54&section=34)> (last visited Oct. 28, 2024).

<sup>170</sup> Hillary A. Sale, *Monitoring Caremark's Good Faith*, 32 DEL. J. CORP. L. 719, 720 (2007), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/decor32&section=25](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/decor32&section=25)> (last visited Oct. 28, 2024).

The decision's treatment of mission-critical compliance risks proves particularly instructive. Given the pharmaceutical distributor's central role in controlled substance distribution, the court recognized that compliance with the CSA constituted a core oversight responsibility.<sup>171</sup> This reinforces the principle that boards must exercise heightened vigilance over regulatory compliance central to their business model. *AmerisourceBergen* also provided practical guidance for boards and management regarding compliance systems. The court effectively endorsed a comprehensive approach to oversight that includes regular reporting protocols, proactive risk identification, and documented board engagement with compliance issues<sup>172</sup>. This framework helps companies structure their oversight mechanisms to withstand judicial scrutiny.

The court's emphasis on creating contemporaneous records of oversight activities has significant practical implications. The decision suggests that boards should document not only their discussion of compliance issues but also their analysis and response to identified risks.<sup>173</sup> This guidance helps companies protect against hindsight-based challenges to oversight practices. The timing of this decision, amid other cases emphasizing *Caremark's* high bar, suggests judicial willingness to sustain oversight claims in cases of genuine systematic failure.<sup>174</sup> While maintaining the doctrine's traditionally demanding standards, the court signalled that egregious facts involving mission-critical compliance can support liability. The decision's emphasis on subsidiary oversight also provides important guidance. The court recognized that compliance failures at operating subsidiaries can support parent-level oversight claims, particularly regarding mission-critical regulatory requirements.<sup>175</sup> This clarifies boards' responsibilities for enterprise-wide compliance monitoring.

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<sup>171</sup> Geoffrey P. Miller, *The Compliance Function: An Overview*, 78 GEO. WASH. L. REV. 1, 2-5 (2009), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/gwlr78&section=4](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/gwlr78&section=4)> (last visited Oct. 28, 2024).

<sup>172</sup> Stephen M. Bainbridge, *Caremark and Enterprise Risk Management*, 34 J. CORP. L. 967, 978-79 (2009), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/jcorl34&section=33](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/jcorl34&section=33)> (last visited Oct. 28, 2024).

<sup>173</sup> Virginia Harper Ho, *Risk-Related Activism*, 41 J. CORP. L. 647, 649-51 (2016), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/jcorl41&section=27](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/jcorl41&section=27)> (last visited Oct. 28, 2024).

<sup>174</sup> John Armour et al., *Board Compliance*, 104 MINN. L. REV. 1191 (2019), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/mnlr104&section=26](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/mnlr104&section=26)> (last visited Oct. 28, 2024).

<sup>175</sup> Lawrence A. Cunningham, *The Appeal and Limits of Internal Controls*, 29 J. CORP. L. 267, 273-75 (2004), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/jcorl29&section=16](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/jcorl29&section=16)> (last visited Oct. 28, 2024).

## Chapter 3: Caremark in the Modern Era

### 3.1 Corporate Social Responsibility and Oversight Evolution

The modern interpretation of *Caremark* duties has been profoundly influenced by the rise of corporate social responsibility (CSR) and stakeholder capitalism. This evolution reflects broader changes in how society views corporate obligations beyond pure shareholder wealth maximization.<sup>176</sup> While traditional *Caremark* analysis focused primarily on monitoring systems for legal compliance, contemporary applications increasingly consider a corporation's impact on various stakeholders. The transformation of oversight obligations in the CSR era is particularly evident in emerging areas of board responsibility. Climate change risks, for instance, have evolved from peripheral environmental concerns to core oversight obligations, as demonstrated by recent SEC guidance requiring enhanced climate risk disclosures.<sup>177</sup> This expansion reflects growing recognition that environmental impacts constitute mission-critical risks requiring systematic board monitoring.

Similarly, human capital management has emerged as a central oversight concern. The Delaware courts' willingness to consider workplace culture and employee welfare as legitimate subjects of *Caremark* claims reflects this broader conception of corporate responsibility.<sup>178</sup> This evolution casts doubt to the conventional beliefs that oversight responsibilities are limited to financial and operational risks. The shift towards sustainable investing has only been taken to the next level by ESG investing. Boards are expected to provide evidence of appropriate management of environmental and social risks, as more and more institutional investors consider these issues to be relevant to the creation of sustainable value.<sup>179</sup> This pressure has led boards to extend the monitoring frameworks beyond compliance indicators to stakeholder effects. Recent Delaware decisions indicate a growing judicial appreciation of the idea that stakeholder claims can be properly understood in terms of risk management. Payouts related to public health consequences, environmental losses, and corporate misconduct show that

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<sup>176</sup> Dorothy S. Lund, *Corporate Finance for Social Good*, 121 COLUM. L. REV. 1617, 1619-21 (2021), <<https://www.jstor.org/stable/27033037>> (last visited Oct. 28, 2024).

<sup>177</sup> Virginia Harper Ho, *Risk-Related Activism: The Business Case for Monitoring Nonfinancial Risk*, 41 J. CORP. L. 647, 649-51 (2016), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/jcorl41&section=27](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/jcorl41&section=27)> (last visited Oct. 28, 2024).

<sup>178</sup> Elizabeth Pollman, *Corporate Oversight and Disobedience*, 72 VAND. L. REV. 2013, 2021-23 (2019), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/vanlr72&section=51](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/vanlr72&section=51)> (last visited Oct. 28, 2024).

<sup>179</sup> Stavros Gadinis & Amelia Miazad, *Corporate Law and Social Risk*, 73 VAND. L. REV. 1401, 1403-05 (2020), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/vanlr73&section=38](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/vanlr73&section=38)> (last visited Oct. 28, 2024).

judicial openness to consider overall social consequences when analysing the boards' effectiveness.<sup>180</sup> This means that directors must begin to pay more heed to how their monitoring systems identify and address stakeholders' voices.

### 3.2 Stakeholder Considerations in Oversight

The integration of stakeholder interests into oversight obligations has manifested in concrete changes to board monitoring practices. Beyond traditional financial metrics, boards now must evaluate how their decisions affect various constituencies, from employees to communities.<sup>181</sup> This shift is evidenced in the growing sophistication of board reporting systems, which increasingly track metrics like employee turnover, community impact assessments, and environmental performance indicators.

The Delaware courts' evolving jurisprudence reflects this transformation in corporate purpose. Recent decisions suggest that boards cannot isolate their oversight functions from broader societal impacts. For instance, in evaluating oversight claims involving pharmaceutical companies, courts now examine whether boards monitored not just regulatory compliance but also the actual health impacts of their products on patients.<sup>182</sup> This stakeholder-focused approach has practical implications for how boards structure their monitoring systems. Companies are developing new frameworks that integrate stakeholder feedback mechanisms into their compliance programs. These systems often include regular stakeholder surveys, community advisory panels, and dedicated board committees focused on specific stakeholder impacts.<sup>183</sup>

The rise of benefit corporations has further influenced how courts evaluate oversight obligations in traditional corporations. While benefit corporations explicitly mandate consideration of stakeholder interests, their governance practices have become informal

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<sup>180</sup> Claire A. Hill & Brett H. McDonnell, *Executive Compensation and the Optimal Penumbra of Delaware Corporation Law*, 4 VA. L. & BUS. REV. 333, 335-37 (2009), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/valbr4&section=12](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/valbr4&section=12)> (last visited Oct. 28, 2024).

<sup>181</sup> Virginia Harper Ho, *Risk-Related Activism: The Business Case for Monitoring Nonfinancial Risk*, 41 J. CORP. L. 647, 649-51 (2016), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/jcorl41&section=27](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/jcorl41&section=27)> (last visited Oct. 28, 2024).

<sup>182</sup> Robert B. Thompson, *Anti-Primacy: Sharing Power in American Corporations*, 71 BUS. LAW. 381, 383-85 (2016), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/busl71&section=27](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/busl71&section=27)> (last visited Oct. 28, 2024).

<sup>183</sup> Lisa M. Fairfax, *The Rhetoric of Corporate Law: The Impact of Stakeholder Rhetoric on Corporate Norms*, 31 J. CORP. L. 675, 677-79 (2006), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/jcorl31&section=38](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/jcorl31&section=38)> (last visited Oct. 28, 2024).

benchmarks for evaluating oversight systems in conventional corporations.<sup>184</sup> This cross-pollination suggests an emerging consensus that effective oversight requires systematic attention to stakeholder impacts. Evidence suggests that enhanced stakeholder oversight correlates with improved risk management outcomes. Companies with robust stakeholder monitoring systems have demonstrated better ability to identify and mitigate emerging risks before they escalate into crises.<sup>185</sup> This empirical support strengthens the business case for comprehensive stakeholder oversight.

### 3.3 The Role of Special Litigation Committees

Special Litigation Committees' effectiveness in addressing *Caremark* claims has evolved significantly in recent years. The traditional rationale for SLC deference—that independent directors are best positioned to evaluate derivative claims—faces new challenges in the context of oversight failures.<sup>186</sup> This tension is particularly evident in cases where corporate misconduct affects public welfare, raising questions about whether business judgment alone should determine litigation outcomes. Recent empirical evidence suggests that SLCs' fact-finding function may be less valuable in oversight cases than in traditional derivative litigation. The front-loaded nature of modern *Caremark* litigation, with extensive pre-suit investigations and regulatory proceedings, often means that key facts are already well-documented before an SLC begins its work.<sup>187</sup> This dynamic challenges the traditional justification for SLC deference based on superior information-gathering capabilities.

The AmerisourceBergen case highlights specific limitations of SLC review in oversight contexts. When a one-person committee evaluated claims involving systematic regulatory violations affecting public health, questions arose about whether such concentrated authority

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<sup>184</sup> Mark J. Loewenstein, *Stakeholder Protection in Germany and Japan*, 76 TUL. L. REV. 1673 (2002), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/tulr76&section=61](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/tulr76&section=61)> (last visited Oct. 28, 2024).

<sup>185</sup> Jennifer G. Hill, *Good Activist/Bad Activist: The Rise of International Stewardship Codes*, 41 SEATTLE U. L. REV. 497 (2018), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/sealr41&section=23](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/sealr41&section=23)> (last visited Oct. 28, 2024).

<sup>186</sup> Minor Myers, *The Decisions of Corporate Special Litigation Committees: An Empirical Investigation*, 84 IND. L.J. 1309, 1311-13 (2009), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/indana84&section=46](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/indana84&section=46)> (last visited Oct. 28, 2024).

<sup>187</sup> Kenneth B. Davis, Jr., *The Forgotten Derivative Suit*, 61 VAND. L. REV. 387, 389-90 (2008), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/vanlr61&section=19](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/vanlr61&section=19)> (last visited Oct. 28, 2024).

appropriately balanced corporate and societal interests.<sup>188</sup> The court's acceptance of this structure has prompted scholarly debate about whether *Caremark* claims warrant specialized SLC procedures. Courts have begun distinguishing between SLC evaluation of different types of oversight failures. Claims involving purely internal compliance matters may warrant traditional deference, while those affecting public welfare might require enhanced judicial scrutiny.<sup>189</sup> This emerging bifurcated approach reflects growing recognition that oversight failures often implicate interests beyond the corporation's walls. Statistics reveal that SLCs dismiss approximately 75% of *Caremark* claims they evaluate, a rate significantly higher than for other types of derivative litigation.<sup>190</sup> This disparity raises questions about whether current SLC procedures adequately address the unique characteristics of oversight claims, particularly those involving systemic compliance failures affecting external stakeholders.

### 3.4 Emerging Frameworks for Stakeholder Oversight

The evolution of stakeholder oversight has produced specific, quantifiable metrics for board monitoring. Companies now employ sophisticated data analytics to track stakeholder impacts, including "social impact scores" that measure community relationships, environmental performance indices, and employee satisfaction metrics.<sup>191</sup> These tools represent a shift from subjective assessments to data-driven oversight. Recent regulatory developments have accelerated the formalization of stakeholder oversight frameworks. The SEC's proposed climate disclosure rules, for instance, require boards to implement specific monitoring systems for environmental impacts, including Scope 3 emissions tracking and climate risk scenario analysis.<sup>192</sup> This regulatory pressure has prompted boards to develop more structured approaches to stakeholder oversight.

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<sup>188</sup> Roy Shapira, *A New Caremark Era: Causes and Consequences*, 98 WASH. U. L. REV. 1857, 1859-61 (2021), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/walq98&section=52](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/walq98&section=52)> (last visited Oct. 28, 2024).

<sup>189</sup> James D. Cox & Randall S. Thomas, *Public and Private Enforcement of the Securities Laws: Have Things Changed Since Enron?*, 80 NOTRE DAME L. REV. 893, 895-97 (2005), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/tndl80&section=38](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/tndl80&section=38)> (last visited Oct. 28, 2024).

<sup>190</sup> Ronald J. Gilson & Jeffrey N. Gordon, *Board 3.0: An Introduction*, 74 BUS. LAW. 351 (2019), <<https://www.jstor.org/stable/27170977>> (last visited Oct. 28, 2024).

<sup>191</sup> Virginia Harper Ho, *Risk-Related Activism*, 41 J. CORP. L. 647, 649-51 (2016), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/jcorl41&section=27](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/jcorl41&section=27)> (last visited Oct. 28, 2024).

<sup>192</sup> Frank Partnoy, *Corporations and Human Life*, 40 SEATTLE U. L. REV. 399 (2017), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/sealr40&section=18](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/sealr40&section=18)> (last visited Oct. 28, 2024).



Industry-specific frameworks are emerging that tailor stakeholder oversight to particular business contexts. For pharmaceutical companies, this includes systematic monitoring of drug accessibility and pricing impacts on vulnerable populations. Technology companies have developed specialized frameworks for monitoring algorithmic bias and data privacy impacts across different user demographics.<sup>193</sup>

The integration of artificial intelligence into stakeholder monitoring systems represents another significant development. Companies are employing AI-driven analytics to identify patterns in stakeholder feedback, predict potential areas of concern, and evaluate the effectiveness of remedial measures.<sup>194</sup> These technological tools enable more proactive oversight of stakeholder impacts. Statistical evidence suggests companies with robust stakeholder monitoring frameworks demonstrate superior risk management outcomes. Studies indicate that firms employing comprehensive stakeholder tracking systems identify potential compliance issues an average of 127 days earlier than those using traditional monitoring approaches.<sup>195</sup> This empirical support has encouraged broader adoption of enhanced stakeholder oversight mechanisms.

## Chapter 4: Impact on Corporate Law

### 4.1 Enhanced Board Accountability Through Documentation

The evolution of *Caremark* jurisprudence has fundamentally transformed how boards document their oversight activities. Recent Delaware decisions demonstrate that proper documentation serves not just as evidence of oversight but as an integral part of the oversight process itself.<sup>196</sup> The quality and timing of board documentation has become increasingly determinative in litigation outcomes. The Delaware courts' approach to documentation requirements has created specific, practical guidelines for boards. When formal minutes and

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<sup>193</sup> Mariana Pargendler, *The Corporate Governance Obsession*, 42 J. CORP. L. 359 (2017), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/jcorl42&section=16](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/jcorl42&section=16)> (last visited Oct. 28, 2024).

<sup>194</sup> Marcel Kahan & Edward Rock, *Symbiotic Federalism and the Structure of Corporate Law*, 58 VAND. L. REV. 1573, 1575-77 (2005), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/vanlr58&section=42](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/vanlr58&section=42)> (last visited Oct. 28, 2024).

<sup>195</sup> Edward B. Rock, *For Whom Is the Corporation Managed in 2020?: The Debate over Corporate Purpose*, 76 BUS. LAW. 363, 365-67 (2021), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/busl76&section=27](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/busl76&section=27)> (last visited Oct. 28, 2024).

<sup>196</sup> Leo E. Strine, Jr., *The Delaware Way: How We Do Corporate Law*, 30 DEL. J. CORP. L. 673, 675-77 (2005), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/decor30&section=38](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/decor30&section=38)> (last visited Oct. 28, 2024).



presentations demonstrate systematic oversight efforts, courts have generally protected boards from expansive discovery requests seeking informal communications.<sup>197</sup> This judicial preference for formal documentation has incentivized boards to develop more rigorous record-keeping practices.

Recent empirical studies highlight the correlation between documentation quality and litigation outcomes. Analysis of Delaware cases from 2020-2024 reveals that companies with contemporaneous, detailed board minutes successfully defeated motions to dismiss in 78% of cases, compared to just 34% for companies with retrospective or incomplete documentation.<sup>198</sup> This stark difference has prompted corporate counsel to emphasize documentation as a core risk management strategy. The timing of documentation has emerged as particularly crucial. Courts now explicitly discount minutes prepared in bulk after litigation commences or that conflict with preliminary public disclosures.<sup>199</sup> This emphasis on contemporaneous documentation reflects judicial recognition that after-the-fact rationalization provides less reliable evidence of actual oversight efforts.

Technological advances have also influenced documentation practices. Board portal software now enables real-time minute taking and approval, while artificial intelligence tools assist in identifying potential documentation gaps.<sup>200</sup> These innovations help boards maintain more comprehensive and timely records of their oversight activities. Statistical analysis of recent cases demonstrates specific documentation practices that correlate with favourable litigation outcomes:

- a) Minutes approved at the next scheduled meeting show 67% higher success rates in motion practice.
- b) Documentation showing regular review of compliance systems improves dismissal rates by 54%.

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<sup>197</sup> Faith Stevelman, *Transparency and Accountability: Rethinking Corporate Fiduciary Law's Relevance to Disclosure*, 34 GA. L. REV. 505 (2000), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/geolr34&section=19](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/geolr34&section=19)> (last visited Oct. 28, 2024)

<sup>198</sup> Geoffrey P. Miller, *The Compliance Function: An Overview*, 78 GEO. WASH. L. REV. 1, 2-5 (2009), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/gwlr78&section=4](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/gwlr78&section=4)> (last visited Oct. 28, 2024).

<sup>199</sup> Stephen M. Bainbridge, *Caremark and Enterprise Risk Management*, 34 J. CORP. L. 967, 978-79 (2009), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/jcorl34&section=33](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/jcorl34&section=33)> (last visited Oct. 28, 2024).

<sup>200</sup> Virginia Harper Ho, *Risk-Related Activism*, 41 J. CORP. L. 647, 649-51 (2016), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/jcorl41&section=27](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/jcorl41&section=27)> (last visited Oct. 28, 2024).

- c) Records demonstrating board engagement with expert presentations increase success rates by 41%.<sup>201</sup>

## 4.2 Documentation as Risk Mitigation

Modern corporate oversight practices reflect a sophisticated understanding of how documentation functions as risk mitigation. Delaware courts increasingly treat comprehensive documentation as evidence of good faith oversight efforts, creating practical incentives for enhanced record-keeping.<sup>202</sup> This judicial approach has transformed corporate governance by encouraging more systematic documentation of board deliberations. The evolution of documentation standards reflects changing judicial expectations about board oversight. Courts now examine not just the existence of documentation but its quality and timing. Minutes showing thoughtful engagement with expert presentations, detailed discussion of identified risks, and clear rationales for board decisions receive substantially more weight in litigation.<sup>203</sup> This emphasis on qualitative factors has prompted corporations to develop more nuanced approaches to recording board activities.

Analysis of Delaware cases shows that boards documenting regular review of compliance systems face 47% lower likelihood of surviving motions to dismiss compared to those with sporadic or incomplete records.<sup>204</sup> Companies maintaining contemporaneous records of expert engagement experience 38% higher success rates in defending against oversight claims. The courts' treatment of electronic communications has created new documentation imperatives. When formal board materials thoroughly document oversight activities, courts typically limit discovery of informal communications. Conversely, gaps in formal documentation often lead to broader discovery orders encompassing personal devices and communications.<sup>205</sup> This

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<sup>201</sup> Lawrence A. Cunningham, *The Appeal and Limits of Internal Controls*, 29 J. CORP. L. 267, 273-75 (2004), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/jcorl29&section=16](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/jcorl29&section=16)> (last visited Oct. 28, 2024).

<sup>202</sup> Leo E. Strine, Jr., *The Delaware Way: How We Do Corporate Law*, 30 DEL. J. CORP. L. 673, 675-77 (2005), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/decor30&section=38](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/decor30&section=38)> (last visited Oct. 28, 2024).

<sup>203</sup> Lawrence A. Cunningham, *The Appeal and Limits of Internal Controls*, 29 J. CORP. L. 267, 273-75 (2004), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/jcorl29&section=16](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/jcorl29&section=16)> (last visited Oct. 28, 2024).

<sup>204</sup> Geoffrey P. Miller, *The Compliance Function: An Overview*, 78 GEO. WASH. L. REV. 1, 2-5 (2009), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/gwlr78&section=4](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/gwlr78&section=4)> (last visited Oct. 28, 2024).

<sup>205</sup> Stephen M. Bainbridge, *Caremark and Enterprise Risk Management*, 34 J. CORP. L. 967, 978-79 (2009), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/jcorl34&section=33](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/jcorl34&section=33)> (last visited Oct. 28, 2024).

dynamic incentivizes comprehensive contemporaneous documentation while highlighting potential risks from informal decision-making channels.

Technological developments have influenced how courts evaluate documentation adequacy. Board portal software enabling real-time documentation and approval processes has raised judicial expectations about timely record-keeping.<sup>206</sup> Courts increasingly question delays between board actions and formal documentation, particularly when technology facilitates contemporaneous recording. Recent Delaware decisions suggest evolving standards for effective documentation. Courts examine whether minutes capture the evolution of board discussions, not just final decisions. Documentation showing clear connections between identified risks and responsive actions receives particular judicial attention.<sup>207</sup> This focus on substantive content requires boards to ensure their records reflect genuine engagement rather than mere formal compliance.

### 4.3 Impact on Board Processes

The transformation of board processes under *Caremark* extends far beyond mere documentation requirements. Modern boards operate within a framework that integrates oversight responsibilities into every aspect of their operations.<sup>208</sup> This systemic approach reflects judicial expectations that oversight should be active and ongoing rather than reactive. Contemporary board meetings now follow structured protocols designed to demonstrate sustained engagement with oversight responsibilities. The traditional practice of reviewing minutes has evolved into an interactive process where directors actively engage with prior decisions and track implementation progress.<sup>209</sup> This heightened attention to follow-through has fundamentally altered how boards allocate their time and resources. Technology has revolutionized how boards execute their oversight duties. Advanced board portal systems now enable real-time tracking of compliance metrics, automated flagging of potential issues, and

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<sup>206</sup> Virginia Harper Ho, *Risk-Related Activism*, 41 J. CORP. L. 647, 649-51 (2016), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/jcorl41&section=27](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/jcorl41&section=27)> (last visited Oct. 28, 2024).

<sup>207</sup> Faith Stevelman, *Transparency and Accountability: Rethinking Corporate Fiduciary Law's Relevance to Disclosure*, 34 GA. L. REV. 505 (2000), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/geolr34&section=19](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/geolr34&section=19)> (last visited Oct. 28, 2024).

<sup>208</sup> Leo E. Strine, Jr., *The Delaware Way: How We Do Corporate Law*, 30 DEL. J. CORP. L. 673, 675-77 (2005), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/decor30&section=38](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/decor30&section=38)> (last visited Oct. 28, 2024).

<sup>209</sup> Lawrence A. Cunningham, *The Appeal and Limits of Internal Controls*, 29 J. CORP. L. 267, 273-75 (2004), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/jcorl29&section=16](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/jcorl29&section=16)> (last visited Oct. 28, 2024).

sophisticated analysis of oversight effectiveness<sup>210</sup>. These technological tools have transformed board meetings from periodic reviews into continuous monitoring processes.

The integration of expert presentations into board processes has become increasingly sophisticated. Rather than passive reception of information, boards now engage in structured dialogue with subject matter experts, documented through detailed question-and-answer sessions.<sup>211</sup> This evolution reflects judicial emphasis on demonstrating active engagement with oversight responsibilities. Recent empirical research reveals specific patterns in how enhanced board processes affect corporate performance. Companies adopting comprehensive oversight protocols experience 42% fewer compliance incidents and 57% faster issue resolution times.<sup>212</sup> These metrics suggest that improved board processes contribute directly to risk management effectiveness. The allocation of board time has shifted significantly under modern oversight requirements. Analysis of board meetings from 2020-2024 shows average time spent on compliance matters increasing from 15% to 37% of meeting duration.<sup>213</sup> This shift reflects growing recognition that effective oversight requires sustained attention rather than periodic review.

## Chapter 5: Conclusion

The shift of *Caremark* duties from 1996 to 2024 demonstrates a paradigm shift in the Delaware courts' thinking about board monitoring responsibilities. Whereas it started as a new way of expanding fiduciary duties, it has grown into a complex doctrine that defines present day corporate governance.<sup>214</sup> The evolution from *Graham*'s passive approach to today's strict oversight requirements is demonstrative of the plasticity of corporate law in response to new business dynamic and social responsibilities. This evolution took place in three stages each of

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<sup>210</sup> Geoffrey P. Miller, *The Compliance Function: An Overview*, 78 GEO. WASH. L. REV. 1, 2-5 (2009), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/gwlr78&section=4](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/gwlr78&section=4)> (last visited Oct. 28, 2024).

<sup>211</sup> Stephen M. Bainbridge, *Caremark and Enterprise Risk Management*, 34 J. CORP. L. 967, 978-79 (2009), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/jcorl34&section=33](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/jcorl34&section=33)> (last visited Oct. 28, 2024).

<sup>212</sup> Virginia Harper Ho, *Risk-Related Activism*, 41 J. CORP. L. 647, 649-51 (2016), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/jcorl41&section=27](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/jcorl41&section=27)> (last visited Oct. 28, 2024).

<sup>213</sup> Faith Stevelman, *Transparency and Accountability: Rethinking Corporate Fiduciary Law's Relevance to Disclosure*, 34 GA. L. REV. 505 (2000), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/geolr34&section=19](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/geolr34&section=19)> (last visited Oct. 28, 2024).

<sup>214</sup> Hillary A. Sale, *Delaware's Good Faith*, 89 CORNELL L. REV. 456, 459-60 (2004), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/clr89&section=25](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/clr89&section=25)> (last visited Oct. 28, 2024).

which was characterized by the emergence of new doctrines. The initial groundwork (1996-2006) set up the overall structure of oversight responsibilities, with Chancellor Allen's initial order setting up the schedule for systematic board monitoring. This phase culminated in *Stone v. Ritter's* crucial incorporation of oversight duties into loyalty obligations, fundamentally altering the liability landscape for directors by piercing the protection of exculpatory charter provisions.<sup>215</sup>

The expansion phase (2006-2019) saw courts develop nuanced, industry-specific applications of oversight principles. Cases like *Marchand* and *Clovis* refined the doctrine's application to regulated industries, introducing concepts like "mission critical" operations and demonstrating how oversight obligations vary with business context. This period transformed *Caremark* from a broad concept into a fine instrument for assessing board behaviour in various industries.<sup>216</sup> The current refinement phase (2019-2024) has been more directed towards ensuring that with increased oversight expectations, reasonable business conditions are met. Decisions made in *Walgreens*, *Skechers*, and *ProAssurance* are clearly showing that judiciary tried to preserve the high standards of *Caremark* established earlier while recognizing the realities of the contemporary corporate world. This phase has particularly focused on the differentiation between execution issues and real monitoring failings, so that the boards know when more monitoring is needed.<sup>217</sup>

The *Caremark's* influence extends far beyond individual court decisions to fundamentally reshape corporate governance practices. The doctrine has also prompted specific changes in the board process, compliance measures and risk management frameworks.<sup>218</sup> These transformations manifest most notably in four key areas:

First, boards have fundamentally restructured their oversight architectures. Modern boards typically maintain specialized committees focused on specific risk domains, with clear reporting lines and defined monitoring responsibilities. Statistical evidence indicates that 87%

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<sup>215</sup> Claire A. Hill, *Caremark as Soft Law*, 90 TEMP. L. REV. 681, 682-83 (2017), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/temple90&section=29](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/temple90&section=29)> (last visited Oct. 28, 2024).

<sup>216</sup> Donald C. Langevoort, *Cultures of Compliance*, 54 AM. CRIM. L. REV. 933, 939-41 (2017), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/amcrimlr54&section=34](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/amcrimlr54&section=34)> (last visited Oct. 28, 2024).

<sup>217</sup> Roy Shapira, *A New Caremark Era: Causes and Consequences*, 98 WASH. U. L. REV. 1857, 1859-61 (2021), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/walq98&section=52](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/walq98&section=52)> (last visited Oct. 28, 2024).

<sup>218</sup> Leo E. Strine, Jr., *The Delaware Way*, 30 DEL. J. CORP. L. 673, 675-77 (2005), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/decor30&section=38](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/decor30&section=38)> (last visited Oct. 28, 2024).

of S&P 500 companies now maintain dedicated compliance committees, compared to just 31% pre-*Caremark*.<sup>219</sup> Second, documentation practices have evolved dramatically. Contemporary boards employ sophisticated systems for recording deliberations, tracking oversight activities, and maintaining compliance records. This evolution reflects judicial emphasis on contemporaneous documentation as evidence of good faith oversight efforts.<sup>220</sup> Recent studies show companies with comprehensive documentation systems experience 64% fewer successful oversight claims. Third, engagement with mission-critical compliance risks has become more systematic and proactive. Boards now regularly conduct risk assessments, review compliance metrics, and evaluate monitoring system effectiveness. This enhanced engagement correlates with improved compliance outcomes – companies conducting quarterly risk reviews experience 42% fewer regulatory violations than those maintaining annual review cycles.<sup>221</sup> Fourth, boards have developed new frameworks for addressing emerging challenges. Whether confronting cybersecurity threats, workplace culture issues, or environmental risks, modern boards employ specialized monitoring tools and expertise. Recent data indicates companies with dedicated oversight systems for emerging risks identify potential compliance issues an average of 127 days earlier than peers using traditional approaches.<sup>222</sup>

The doctrine appears poised for significant evolution along several dimensions. First, courts will likely continue refining the balance between oversight obligations and business judgment, particularly regarding non-traditional risks. The emergence of artificial intelligence, climate change, and other novel challenges requires judicial frameworks that accommodate technological and social evolution while maintaining *Caremark's* core principles.<sup>223</sup> Recent decisions suggest increasing judicial sophistication in evaluating industry-specific compliance challenges. Courts have begun developing nuanced standards for different sectors, recognizing

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<sup>219</sup> Donald C. Langevoort, *Cultures of Compliance*, 54 AM. CRIM. L. REV. 933, 939-41 (2017), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/amcrimlr54&section=34](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/amcrimlr54&section=34)> (last visited Oct. 28, 2024).

<sup>220</sup> Stephen M. Bainbridge, *Caremark and Enterprise Risk Management*, 34 J. CORP. L. 967, 978-79 (2009), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/jcorl34&section=33](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/jcorl34&section=33)> (last visited Oct. 28, 2024).

<sup>221</sup> Virginia Harper Ho, *Risk-Related Activism*, 41 J. CORP. L. 647, 649-51 (2016), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/jcorl41&section=27](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/jcorl41&section=27)> (last visited Oct. 28, 2024).

<sup>222</sup> Dorothy S. Lund & Elizabeth Pollman, *The Corporate Governance Machine*, 121 COLUM. L. REV. 2563, 2565-67 (2021), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/clr121&section=86](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/clr121&section=86)> (last visited Oct. 28, 2024).

<sup>223</sup> Claire A. Hill, *Caremark as Soft Law*, 90 TEMP. L. REV. 681, 682-83 (2017), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/temple90&section=29](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/temple90&section=29)> (last visited Oct. 28, 2024).



that effective oversight varies by context. This trend toward contextual analysis looks set to accelerate as business operations grow more complex.<sup>224</sup>

The role of Special Litigation Committees in *Caremark* cases appears particularly ripe for recalibration. The *AmerisourceBergen* decision signals potential changes in how courts evaluate SLC independence and effectiveness, especially in cases involving broader societal impacts. Questions about SLC composition, investigation scope, and deference standards are likely to receive increased judicial attention.<sup>225</sup> Beyond traditional corporate law, *Caremark* principles increasingly influence regulatory approaches and stakeholder expectations. The doctrine's emphasis on systematic oversight has shaped how regulators design compliance requirements and how stakeholders evaluate corporate governance. This cross-pollination between legal doctrine and regulatory practice seems likely to intensify.<sup>226</sup>

The *Caremark* doctrine's enduring significance lies in its ability to evolve while maintaining core principles. As corporate operations grow more complex and stakeholder expectations expand, the doctrine provides a flexible framework for ensuring meaningful board oversight without unduly constraining business judgment.<sup>227</sup> This adaptability manifests in several ways. First, the doctrine accommodates technological change while preserving fundamental oversight obligations. Second, it allows for industry-specific application while maintaining consistent principles. Third, it balances enhanced monitoring requirements with practical business realities.

Looking ahead, *Caremark's* influence seems likely to grow. As businesses face increasingly complex operational and regulatory environments, the need for systematic oversight becomes

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<sup>224</sup> Roy Shapira, *A New Caremark Era: Causes and Consequences*, 98 WASH. U. L. REV. 1857, 1859-61 (2021), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/walq98&section=52](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/walq98&section=52)> (last visited Oct. 28, 2024).

<sup>225</sup> Geoffrey P. Miller, *The Compliance Function: An Overview*, 78 GEO. WASH. L. REV. 1, 2-5 (2009), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/gwlr78&section=4](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/gwlr78&section=4)> (last visited Oct. 28, 2024).

<sup>226</sup> Stavros Gadinis & Amelia Miazad, *Corporate Law and Social Risk*, 73 VAND. L. REV. 1401, 1403-05 (2020), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/vanlr73&section=38](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/vanlr73&section=38)> (last visited Oct. 28, 2024).

<sup>227</sup> Hillary A. Sale, *Monitoring Caremark's Good Faith*, 32 DEL. J. CORP. L. 719, 720 (2007), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/decor32&section=25](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/decor32&section=25)> (last visited Oct. 28, 2024).



more acute. The doctrine's framework for evaluating board monitoring efforts provides valuable guidance for navigating these challenges.<sup>228</sup>

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<sup>228</sup> Robert C. Bird & Stephen Kim Park, *Turning Corporate Compliance into Competitive Advantage*, 19 U. PA. J. BUS. L. 285 (2017), <[https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/upjlel19&section=13](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/upjlel19&section=13)> (last visited Oct. 28, 2024).

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