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"Bad" v. "Bad-Faith" Oversight: Navigating the Risks of Potential Oversight Liability Following *Marchand v. Barnhill*

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In June 2019, the Delaware Supreme Court issued a decision that signaled a potential departure from the court's existing thinking on oversight liability for boards of directors. The court in *Marchand v. Barnhill*[1] held that a plaintiff's claims against directors for their alleged failure to oversee operations at an ice cream manufacturer, leading to a listeria outbreak and three deaths, could go forward. So-called *Caremark* claims are named for the Court of Chancery's 1996 decision that held that directors could be liable for the breach of the duty of loyalty if they "consciously disregarded" their fiduciary duties and utterly failed to implement a functioning oversight system.[2] However, since the *Caremark* decision, few oversight claims have proceeded past the motion to dismiss stage. In the wake of *Marchand*, practitioners wondered whether Delaware courts would more frequently allow *Caremark* cases to proceed into discovery.

Since *Marchand*, decisions by Delaware courts on *Caremark* claims have largely been a mixed bag. Although the Court of Chancery has since issued a few decisions denying motions to dismiss *Caremark* claims on demand futility grounds—thereby permitting such claims to go forward—*Marchand* has not led to a wide-scale shift in jurisprudence on oversight issues. Rather, the decisions of Delaware courts in this arena have been heavily fact-driven and context-specific, due in part to an increasing number of these cases being litigated with the corresponding decline in mergers and acquisition litigation.

In this article, we explore *Marchand* and the cases that followed. In doing so, we seek to identify key factors that distinguish complaints that survive from ones that do not, and offer insight to guide companies and their directors attempting to navigate this area of the law. As Vice Chancellor Sam Glasscock III aptly noted in the recent *Moneygram* case, "bad oversight is not bad-faith oversight," with only the latter triggering liability under *Caremark*.[3] This article seeks to explore that critical line between "bad-faith oversight" and mere "bad oversight."

Marchand v. Barnhill

In 2015, Blue Bell Creameries, one of the largest ice cream manufacturers in the U.S., suffered a listeria outbreak, causing a recall of its product, a shutdown of all of its plants, significant layoffs, and the deaths of three people.[4] This crisis caused losses to stockholders, as the company was forced to accept a dilutive private equity investment.[5]

A stockholder brought a derivative suit against two executives and the company's directors for alleged breaches of fiduciary duties arising from these events.[6] The plaintiff alleged that executives knowingly disregarded contamination risks and failed to oversee food-making operations.[7] Focusing on the first of the two *Caremark* "prongs,"[8] the plaintiff alleged that the board failed to implement an effective monitoring and reporting system. The defendants moved to dismiss the complaint for failure to plead demand futility.[9]

The Court of Chancery granted the defendants' motions to dismiss, holding that the plaintiff did not plead sufficient facts to show that the board "utterly failed" to implement a reporting and compliance system.[10] The court observed that "despite the far-reaching regulatory schemes that governed Blue Bell's operations at the time of the listeria contamination, the Complaint contains no allegations that Blue Bell failed to implement the monitoring and reporting systems required [by law]."[11] The court also observed that Blue Bell had a sanitation manual with operating and reporting procedures, engaged a third-party laboratory and food safety auditor to test for the presence of dangerous contaminants at its facilities, and that management "provided regular reports regarding operations" to the board.[12] The court further noted that the plaintiff had failed to cite a case "for the proposition that a board of directors must create a committee to monitor and manage every aspect of

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risk the corporation might face."[13] The court explained that the plaintiff was not challenging the *existence* of monitoring and reporting controls, but rather their *effectiveness*, which was "not a valid theory" under *Caremark*.[14]

The Delaware Supreme Court reversed. The court began by focusing on the standard for asserting "bad faith" under *Caremark*, summarizing that, "[i]n short, to satisfy their duty of loyalty, directors must make a good faith effort to implement an oversight system and then monitor it."[15] The court focused "on the key issue of whether the plaintiff has pled facts from which we can infer that Blue Bell's Board made no effort to put in place a Board-level compliance system."[16] The court determined that the complaint supported a reasonable inference that no system of board-level compliance monitoring and reporting existed.[17]

In so holding, the Delaware Supreme Court found important that, although the company was a "monoline company" that has food as its only product, there was no supervisory structure in place to oversee food safety and compliance.[18] Specifically, there was no committee seeing to food safety, no board-level process to address safety issues, and no protocol by which the board would be apprised of safety reports and developments (including that there was no regular discussion of food safety issues or schedule on which to discuss such issues).[19] Because the company operated in a "heavily regulated industry," and was bound by FDA requirements and state regulations, these protocols were important.[20]

The Delaware Supreme Court also noted that management had been alerted to "yellow and red flags" that were never raised to the board, including that regulators had identified safety issues at processing facilities. Specifically, in the years preceding the listeria outbreak, the FDA as well as state regulators had found numerous compliance failures at various facilities, including condensation, equipment left out, and rooms in disrepair.[21] The company had also received positive listeria tests in 2013 and 2014.[22] Although management was alerted to these issues, the board was only alerted to the listeria outbreak after a recall had been initiated, and even then left the company's response to management.[23] The court observed that these issues "might have been rectified had any reasonable reporting system that required management to relay food safety information to the board on an ongoing basis been in place."[24] As a result of these failures, the court concluded that the complaint alleged sufficient facts to create a reasonable inference that "the directors consciously failed 'to attempt to assure a reasonable information and reporting system exist[ed].'"[25]

The court rejected the defendants' arguments that, by law, the company had to meet certain regulatory requirements, that it had in place manuals for employees for food safety, and that management received the results of government inspections.[26] The court explained that "the fact that Blue Bell nominally complied with FDA regulations does not imply that the Board implemented a system to monitor food safety at the board level."[27] The court also rejected the argument that management alerted the board to "operational issues," noting that if that were the standard, *Caremark* would be irrelevant.[28] Rather, the board must put in place a system to be alerted to issues, particularly those that are "essential and mission critical."[29]

The court offered insight regarding its expectations. Specifically, although the court believed it was appropriate for boards of directors to have leeway to design product-specific and industry-specific approaches to oversight of operations, they must make a good-faith effort to ensure that issues are monitored and reported.

The *Marchand* case left practitioners and in-house counsel with a few guideposts to shape their oversight practices. The case made clear that Delaware courts will focus on the nature of the business and industry of the company, and thus companies must tailor their oversight mechanisms to the company's business to address industry-specific or company-specific risk. The case also suggested that directors will be expected to engage in "regular discussion" of key issues to the business (in that case, issues pertaining to food safety), and thus a committee dedicated to the particular areas of risk (such as a safety committee) may be appropriate.

Cases Following *Marchand* Indicate That Delaware Courts Will Undertake a Fact-Specific Inquiry

Although practitioners initially questioned whether *Marchand* signaled a new plaintiff-friendly shift in jurisprudence on oversight

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liability, the cases that followed have not necessarily evidenced a significant departure from previous *Caremark* case law. As discussed below, the cases suggest that the inquiry remains highly contextual.

In the first post-*Marchand* oversight liability case, *Rojas v. Ellison* (“*J.C. Penney*”),[30] the Court of Chancery dismissed *Caremark* claims, highlighting the board’s existing reporting and monitoring system. There, a stockholder of J.C. Penney asserted a derivative claim against the company’s board of directors for allegedly failing to ensure that the company was complying with the terms of a settlement regarding price comparison advertising practices.[31] The settlement had resulted from the company’s practice of engaging in false “reference pricing” by augmenting the stated “original price” of an advertised sale item.[32] The settlement, pursuant to which J.C. Penney agreed to pay up to $50 million for the benefit of a state-wide class of California consumers, required the company to implement and/or continue improvements to its price comparison policies, including reporting and monitoring systems.[33] Nevertheless, the following year, the company faced two more lawsuits regarding reference pricing of online products.[34]

The Court of Chancery dismissed the plaintiff’s claims, reasoning that J.C. Penney had a reporting system in place before the first settlement and continued to utilize oversight procedures thereafter.[35] Moreover, the board had discussed the settlement before and after it was entered into, and the audit committee’s charter required it to oversee the company’s compliance with laws and regulations and discuss with management any litigation that raised “material issues” regarding the company’s compliance with law or regulation.[36] The court further emphasized the board’s remedial efforts, including that the company had created a new position, Director of Pricing Compliance, and hired two new compliance specialists, to ensure compliance with pricing laws.[37] The court placed significance on the use of the word “utterly” in the context of holding directors personally liable for oversight failures under *Caremark*, noting that “our Supreme Court appears to have been quite deliberate in its use of the adverb ‘utterly’- a ‘linguistically extreme formulation’- to set the bar high when articulating the first way to hold directors personally liable for a failure of oversight under Caremark.”[38] Thus, the *J.C. Penney* decision reassured directors and their counsel that reporting systems and remedial efforts need not be perfect.

Shortly thereafter, in the *Clovis Oncology* case,[39] the Court of Chancery once again upheld claims against directors for failure to oversee operations. As in *Marchand*, the complaint alleged a failure of oversight with respect to the company’s “mission critical” operations—in this instance, drug development.

There, stockholders of the company had brought a derivative claim for breach of fiduciary duty against members of the company’s board of directors, alleging that the directors failed to monitor clinical trial protocols and reporting to the market of results related to Clovis’ most promising cancer drug.[40] Specifically, although the clinical trial incorporated objective response rate (ORR) as a success-defining metric, the company reported to the market an ORR that was based on unconfirmed results, which the board allegedly knew would be meaningless for FDA approval.[41] The actual ORR (required for FDA approval) was much lower than what was reported to the market, and when actual ORR was ultimately disclosed, the drug studies were terminated and the company’s stock price declined.[42] The board was also allegedly aware of additional clinical trial violations and side effects, but did not temper its disclosure to the market accordingly.[43]

The court found that the plaintiffs stated a claim based on allegations that the board failed to oversee “mission critical” operations and related disclosures. While the board was “laser-focused” on the clinical trial, the board consciously disregarded “red flags,” including that the trial protocol required confirmed responses for FDA approval and that management was publicly reporting data using unconfirmed responses.[44] The court also pointed out that the board was comprised of experts and the criteria requiring confirmed results was “well-known” within the pharmaceutical industry.[45] The court determined that the plaintiffs “have well-pled that the Board ignored red flags that the Company was violating - perhaps consciously violating - the [trial protocol] and then misleading the market” about its progress.[46]

Echoing the *Marchand* court, the Court of Chancery emphasized

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that "when a company operated in an environment where externally imposed regulations govern its mission critical operations, the board's oversight function must be more rigorously exercised."[47] The court found that the board "ignored multiple warning signs that management was inaccurately reporting [the drug's] efficacy."[48] Importantly, the court inferred from board decks (that had been produced to the plaintiffs pursuant to a Section 220 demand) that the directors were aware of such "warning signs," signaling to directors and practitioners that board decks may be construed in deference to plaintiffs, even if there is also exculpatory information included in such materials (here, the court rejected the defendants' arguments that certain information in the decks showed that the defendants were properly exercising their oversight duties).

In contrast, the Court of Chancery dismissed similar claims in *Wajda v. Patel*[49] on the grounds that the board had closely monitored drug trials. In another case involving efforts to get approval of a drug candidate, the plaintiff alleged that the company failed to disclose that the titration scheme proposed to the FDA (and subsequently rejected) differed from that used in the phase 3 trial of the drug.[50] The court dismissed the *Caremark* claim on grounds that the complaint did not allege that the directors had failed to implement systems or monitor them, but rather made clear that the directors closely monitored the status of the new drug candidate and no red flags were put before them.[51] The court again emphasized that *Caremark* does not require a "perfect" reporting system.[52]

Like *Marchand*, *Clovis* intimated that high expectations will be placed on directors when it comes to the monitoring of highly regulated operations, particularly of "mission critical" products and where directors have experience in that business sector. However, this required oversight does not need to be perfect, as evidenced by *Wajda* and *J.C. Penney*.

Subsequent cases have suggested that courts may be more willing to dismiss claims where boards of directors had reporting and monitoring systems in place (even if imperfect) and/or took remedial actions to address issues raised to the board. For example, in the case of *In re Lendingclub*,[53] the Court of Chancery dismissed *Caremark* claims arising from the company's sale of loans to an investor that did not meet the investor's requirements, failure of two board members to disclose personal investments, and a subsidiary's failure to conduct a valuation in compliance with GAAP. Critical to the court's holding was the fact that the board took swift remedial action upon learning of the alleged wrongdoing. To address the loans' sale, for example, the board formed a subcommittee of the audit committee to investigate, terminated the managers involved, and split the chairman and CEO roles.[54] The board also disclosed the personal investments as related-party transactions.[55] Likewise, when the board learned of the issue with the subsidiary's valuations, the company stated that it would reimburse the limited partners who were adversely impacted by improper adjustments, engage an independent valuation firm, and establish a majority independent governing board for affected funds.[56] The court also observed that the board had effective controls in place, including an audit committee that met monthly.[57] In sum, the court determined that "[t]he complaint does not contain a single fact that would demonstrate bad faith on the part of the demand board members, who were lauded for self-reporting, investigating, and remediating the wrongdoing at the heart of this matter."[58]

In line with pre-*Marchand* cases, Delaware courts have also continued to dismiss cases where, despite having a functioning oversight system, the board was unaware of alleged wrongdoing. For example, in *Owens v. Mayleben*, the Court of Chancery dismissed claims arising from a press release that allegedly mischaracterized conclusions the FDA had made following a drug development meeting where the directors did not know the press release was false.[59] Likewise, in *In re GoPro*, the Court of Chancery dismissed a complaint alleging that the company should have changed its revenue guidance in view of roadblocks in the release of a new product, where the board was regularly advised by management that the company was on track to meet its projections.[60] And in *TrueCar*, the court dismissed claims against members of the company's board for failure to inform themselves of certain changes with the company's affinity partner that could have negative impacts on the company's revenues, reasoning that references in board materials to a "fragile" relationship with the partner and the partner's underperformance were not

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sufficient to notify the board of the potentially negative impacts.[61]

Certain cases since *Marchand* also suggest that Delaware courts may be more likely to allow a complaint to survive dismissal where critical safety concerns are implicated, as they were in *Marchand*. For example, in *Inter-marketing*,[62] the Court of Chancery declined to dismiss a complaint against a partnership's directors arising from a large oil spill caused by corrosion, which resulted in environmental damage, costly cleanup, lost revenue, a stock price decline, and a federal securities lawsuit.[63] The partnership had been found guilty of eight misdemeanors and one felony: that it knowingly discharged oil or reasonably should have known that its actions would discharge oil.[64] The plaintiff, a unitholder of the partnership, brought a claim against the board members for breaching their fiduciary duties by failing to implement or properly oversee a pipeline integrity reporting system.[65] Drawing parallels to *Marchand*, the plaintiff noted that the "primary operational emphasis" of the partnership was pipeline integrity and maintenance.[66] The plaintiff alleged that the partnership made no good-faith effort to implement a board-level pipeline integrity reporting system.[67]

Relying heavily on *Marchand* and testimony provided by the partnership's CEO in the criminal action (which was cited heavily in the plaintiff's complaint),[68] the court agreed with the plaintiff and declined to dismiss the action. Although there was an audit committee that was required by its charter to monitor legal and regulatory requirements, including pipeline oversight, evidence suggested the committee never engaged in any direct oversight. For example, in his testimony in the criminal action, the CEO did not mention the partnership's audit committee, and testified that no subcommittee existed to discuss the integrity management process and the board did not discuss pipeline integrity policy or procedure.[69] Moreover, while the defendants argued that the board reviewed activity-level reports, the CEO's testimony reflected that those reports did not include any substantive information regarding pipeline integrity.[70] Rejecting the defendants' attempt to rely on the audit committee's charter, the court noted that the charter "says nothing about what [the audit committee] actually did," and the evidence cited in the complaint suggested that it did nothing to oversee pipeline integrity.[71]

More recently, the Court of Chancery in *Chou*[72] upheld a claim relating to harm flowing from the contamination of cancer drugs. There, the plaintiffs alleged that ABC's pharmacy business, which produced pre-filled syringes to doctors and hospitals, had operated as a "criminal enterprise," selling syringes without prescriptions, filling syringes in unsterile environments, improperly using "overfill" to fill extra syringes that resulted in contamination, and pocketing the excess revenue.[73] The court upheld the plaintiffs' *Caremark* claims, identifying the pharmacy as a "monoline manufacturer" and citing the failure to ensure the safety of its one product as a "mission critical compliance risk."[74] There were numerous red flags that were raised to, and ignored by, the board, including an internal investigation report that signaled that the pharmacy business was operating outside of the company's compliance controls and a *qui tam* complaint filed by a former officer that raised concerns regarding the pre-filled syringe program.[75] The court rejected the defendants' arguments that the *Caremark* claims should be dismissed because the pharmacy was a small part of ABC's overall business, explaining that the "concept of mission critical" was still in play.[76] The court explained that even though the pharmacy business represented a small portion of the company's overall revenue, compliance with FDA regulations is and was a primary regulatory concern for the company and its pharmacy business.[77]

In addition to focusing on safety issues and highly regulated businesses, Delaware courts have permitted claims to survive a motion to dismiss where oversight lapses are particularly egregious. For example, in *Hughes*,[78] the Court of Chancery denied a motion to dismiss where the plaintiff had alleged significant and repeated financial misreporting. Specifically, the company publicly announced the existence of material weaknesses in its financial reporting and oversight system in March 2014, and three years later, again disclosed that its precedent three years of financial statements needed to be restated.[79] The court there focused on the fact that the board had failed to honor its pledge to remediate weaknesses in financial reporting, and the audit committee only met briefly (for less than an hour) once a

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year, even after a material weakness had been identified.[80]

In focusing on oversight of "mission critical" operations, Delaware courts have been careful to distinguish between actions that are merely imprudent and actions that are taken in bad faith. *Metlife*[81] is illustrative of this distinction. That case involved claims that Metlife's Pension Risk Transfer Business (PRTB) used outdated and inadequate procedures for locating annuity recipients, which resulted in regulatory actions and securities litigation. Specifically, the PRTB had historically given notice to annuitants of entitlements to benefits by sending two letters to their last known address when the annuitants turned 65 and 70.[82] If the annuitants did not respond, they would be presumed dead and ineligible for benefits.[83] The plaintiff alleged that the "two-letter" method was inadequate, and that the provider should have verified presumed deaths by reviewing a computerized list of deceased American employees maintained by the U.S. Social Security Administration (the "Death Master File").[84] The plaintiff alleged that another of Metlife's businesses used the Death Master File as a reference to allow it to *stop* making payments, which ultimately resulted in that business agreeing to a settlement requiring it to use a "Thorough Search" method to identify beneficiaries.[85] The plaintiff further argued that the board acted in bad faith by failing to ensure that the PRTB likewise used the Thorough Search method, which the plaintiff claimed the board knew was necessary in light of the settlement.[86]

The Court of Chancery rejected the plaintiff's arguments, explaining that the failure to do what may be "prudent" is not sufficient to imply bad faith.[87] The court noted that the plaintiff "wisely" focused on the second prong of *Caremark*, as it was "clear from the complaint that MetLife had an extensive network of internal controls."[88] Focusing on the "red flags" identified by the plaintiff, the court noted that the other business's settlement did not give any indication that there were deficiencies in the PRTB.[89] The court noted that, although it may have been "prudent" for the PRTB to use the Death Master File, "the failure to recognize that use of the [Death Master File] in one way in one line of business made it wise to use it differently in another . . . even if those failures imply unwise or imprudent management, does not thereby also imply bad faith."[90] The court also noted that there were insufficient allegations in the complaint to infer that the board knew of the other business's settlement or its subsequent use of the Thorough Search method.[91] With respect to the second alleged "red flag," the court rejected the plaintiff's argument that the board acted in bad faith in response to an audit report that identified weaknesses in retirement letter mailings, because the board in fact addressed the issues raised therein (even if the plaintiff contended they did not do so fast enough).[92] The court observed that "[a] failure to undertake immediate remediation of a reported defect, even where immediate action would be wise, is not evidence of bad faith unless it implies a need to act so clear that to ignore it implies a conscious disregard of duty."[93]

In the most recent case from the Delaware courts addressing *Caremark* claims, the Court of Chancery put it aptly: "bad oversight is not bad-faith oversight."[94] The case, *Richardson v. Clark* ("*Moneygram*"), involved allegations that the directors of a money transfer service failed to exercise adequate oversight over the company's compliance with anti-money-laundering laws pursuant to the terms of a Deferred Prosecution Agreement (DPA) the company entered into in 2012 to avoid prosecution.[95] Pursuant to the DPA, the board took remedial action, including creating a compliance committee, which met regularly and considered the company's progress under the DPA, but was ultimately unsuccessful in meeting the requirements of the DPA, resulting in additional charges and ultimately the payment of $125 million.[96]

The court dismissed the plaintiff's claims. Although the plaintiff tried to focus on purported "red flags" ignored by the board, including the existence of the DPA, the court observed that the complaint "makes clear that each of these compliance issues was brought before, and addressed by, the Board," which had caused the company to spend nearly $250 million on remedial measures.[97] The plaintiff also alleged that the board failed to implement a systematic effort to prevent agent fraud, and instead used ineffectual *ad hoc* efforts with insufficient skill and speed.[98] The court explained that the ineffective efforts of the board did not implicate "bad faith," but rather simply showed that the board did a "poor job applying its discretion to act."[99] The court indicated that although the defendants could be described as demonstrating a "lack of vigor" or being "wistless," that did not rise to the level of bad faith

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necessary to sustain a complaint under *Caremark*.[100]

Observations on Overall Recent Trends

Although recent cases suggest a highly fact-specific inquiry, a few trends have emerged, which provide guidance as to the likelihood of having to litigate a *Caremark* case past the motion to dismiss.

First, it is clear that dismissal of oversight claims is less likely where the underlying problem relates to "mission critical" operations of the company.[101] Courts have placed significant emphasis on the nature of the business and industry in which the company operates, and the extent to which the underlying problem arises from the fundamental purpose of the business or is highly regulated. Where companies operate in highly regulated areas, they will be expected to have information and reporting systems that are tailored to the company's area of operations and designed to ensure compliance with those regulations. Likewise, in "monoline" businesses, directors will be expected to closely monitor the company's sole product.

Second, although not always the case, courts have generally been less inclined to dismiss cases involving critical safety issues (as opposed to, for example, mere financial issues).[102] The majority of cases since *Marchand* where the court has upheld *Caremark* claims have implicated significant safety issues.[103]

Third, courts have been more willing to dismiss complaints where it is clear that the board took *some* action to remedy the issue, even if imperfect or delayed, as opposed to cases where the board appeared to take no action.[104] Indeed, courts have been more forgiving of even "imperfect" reporting systems, as long as they were actively monitored and tailored to the risks at issue.[105] Courts have explained that, because the *Caremark* standard requires that the board "utterly fail" to implement a reporting system, bad oversight does not equate to the required bad faith.[106] Documents produced in response to Section 220 demands can play a critical role in this analysis, although courts have suggested that they may interpret such documents in the light most favorable to plaintiffs.

Guidance for Directors and Their Counsel

In light of *Marchand* and its progeny, proactive directors may wish to consider and undertake certain precautions in order to decrease the likelihood of oversight claims being litigated against them.

- Having in place internal controls and a reporting system that is tailored to the company's business and industry-specific risk, and ensures that issues are raised to the board and remediated, is critical to fulfilling directors' fiduciary duties. When issues are raised, directors must investigate and ensure that "red flags" are followed up on. Directors should not rely upon management alone to establish such procedures and investigate any issues raised.
- Directors should establish and actively monitor board-level oversight committees and procedures. Delaware courts are generally more forgiving of boards that maintain an active and engaged audit committee that meets frequently and carefully evaluates compliance issues. However, boards should also consider whether to establish other board-level committees to perform critical oversight responsibilities, particularly depending on the size of the company and the breadth of oversight issues faced by the board.
- Boards and their counsel should be thoughtful about what to include in board minutes and presentations, as plaintiffs are encouraged by Delaware courts to seek out and rely on such materials in their complaints, and courts will, on a motion to dismiss, often construe such materials in a plaintiff's favor where there are competing inferences that can be drawn. On the issue of board minutes, directors should review draft minutes carefully and ensure that any discussion of oversight issues, particularly on key safety, regulatory, and "mission critical" products or areas of business, is adequately captured in such minutes.
- Given Delaware courts' recent focus on industry and business-specific compliance concerns, it may behoove directors to identify "mission critical" operations or critical products, and tailor oversight systems to make sure that issues pertaining to those operations or products are closely monitored and reported to the board. Directors should be especially aware of regulations governing those critical operations and put procedures in place to ensure compliance with those regulations. Directors should take efforts to ensure that there is a regular cadence of

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reporting to the board on these key issues, as well as oversight and compliance generally, and not necessarily rely upon management to present on or flag issues when they deem appropriate. It may be a good idea for boards to revisit the company's compliance efforts and particular risk profile at least annually and, as noted above, to formally document those discussions through board minutes.

- Directors of companies in industries where safety may be a concern are well-advised to take extra care in ensuring compliance and prompt reporting. Delaware courts have looked favorably upon the establishment of board committees dedicated to safety.

Endnotes

1 212 A.3d 805 (Del. 2019).
2 *In re Caremark Int'l Inc. Deriv. Litig.*, 698 A.2d 959, 971 (Del. Ch. 1996).
3 *Richardson v. Clark et al.*, 2020 WL 7861335, at *9 (Del. Ch. Dec. 31, 2020).
4 *Id.* at 807.
5 *Id.* at 807.
6 *Marchand v. Barnhill*, 2018 WL 4657159, at *2 (Del. Ch. Sept. 27, 2018).
7 *Id.*
8 A plaintiff asserting a *Caremark* claim can succeed under two theories, or "prongs": by showing that the board "utterly failed" to implement an effective compliance and reporting system; or, alternatively, by showing that, despite the existence of a monitoring and reporting system, the board "consciously fail[ed] to monitor or oversee its operations thus disabling themselves from being informed of risks or problems requiring their attention." *Marchand*, 212 A.3d at 821.
9 *Marchand*, 2018 WL 4657159, at *2.
10 *Id.* at *18.
11 *Id.* at *11.
12 *Id.* at *17.
13 *Id.* at *18.
14 *Id.*
15 *Marchand*, 212 A.3d at 821.
16 *Id.*
17 *Id.*
18 *Id.* at 809 ("As a monoline company that makes a single product – ice cream – Blue Bell can only thrive if its consumers enjoyed its products and were confident that its products were safe to eat. That is, one of Blue Bell's central compliance issues is food safety. Despite this fact, the complaint alleges that Blue Bell's Board had no committee overseeing food safety, no full board-level process to address food safety issues, and no protocol by which the board was expected to be advised of food safety reports and developments.").
19 *Id.* at 822.
20 *Id.* at 810.
21 *Id.* at 811.
22 *Id.* at 812.
23 *Id.* at 813-14.
24 *Id.* at 822.
25 *Id.* at 809 (quoting *In re Caremark Int'l Inc. Deriv. Litig.*, 698 A.2d 959, 971 (Del. Ch. 1996)).
26 *Id.* at 823.
27 *Id.*
28 *Id.* at 824.
29 *Id.*
30 2019 WL 3408812 (Del. Ch. July 29, 2019).

31 *Id.* at *1.
32 *Id.* at *2.
33 *Id.* at *3-4.
34 *Id.* at *4-5.
35 *Id.* at *9.
36 *Id.* at *9.
37 *Id.* at *6.
38 *Id.*
39 *In re Clovis Oncology, Inc. Deriv. Litig.*, 2019 WL 4850188 (Del. Ch. Oct. 1, 2019).
40 *Id.* at *1.
41 *Id.* at *6.
42 *Id.* at *8.
43 *Id.*
44 *Id.* at *13.
45 *Id.* at *14.
46 *Id.* at *10.
47 *Id.* at *13.
48 *Id.* at *1.
49 C.A. No. 2019-0122-JTL (Del. Ch. July 30, 2020).
50 *Id.* at *4.
51 *Id.* at *8-9.
52 *Id.* at *9.
53 *In re Lendingclub Corp. Deriv. Litig.*, 2019 WL 5678578 (Del. Ch. Oct. 31, 2019).
54 *Id.* at *2-3.
55 *Id.* at *3.
56 *Id.* at *3, 14.
57 *Id.* at *10.
58 *Id.* at *2.
59 *Owens on Behalf of Esperion Therapeutics, Inc. v. Mayleben*, 2020 WL 748023, at *9 (Del. Ch. Feb. 13, 2020).
60 *In re GoPro, Inc.*, 2020 WL 2036602, at *13 (Del. Ch. Apr. 28, 2020).
61 *In re TrueCar, Inc. Stockholder Derivative Litigation*, 2020 WL 5816761, at *19-20 (Del. Ch. Sept. 30, 2020).
62 2020 WL 756965 (Del. Ch. Jan. 31, 2020).
63 *Id.* at *1.
64 *Id.* at *3.
65 *Id.* at *1.
66 *Id.* at *11.
67 *Id.*
68 The court also rejected the company's argument that the claims should be dismissed because the plaintiff relied on criminal trial testimony and never sought inspection of books and records pursuant to Section 220 of the Delaware General Corporation Law, observing that the plaintiff made use of a "fully developed criminal trial record" and that was enough to survive a motion to dismiss. *Id.* at *15.
69 *Id.* at *3, 12.
70 *Id.* at *14.
71 *Id.* at *13.
72 *Teamsters Local 443 Health Services & Insurance Plan v. Chou*, 2020 WL 5028065 (Del. Ch. Aug. 24, 2020).
73 *Id.* at *1-2.
74 *Id.* at *18.
75 *Id.* at *20-24.
76 *Id.* at *18.
77 *Id.*
78 *Hughes v. Xiaoming Hu*, 2020 WL 1987029 (Del. Ch Apr. 27, 2020).
79 *Id.* at *1.

Continued on page 11...

Endnotes *(continued)*

80 *Id.* at *16.
81 *In re Metlife Inc. Deriv. Litig.*, 2020 WL 4746635 (Del. Ch. Aug. 17, 2020).
82 *Id.* at *1.
83 *Id.*
84 *Id.*
85 *Id.* at *6.
86 *Id.*
87 *Id.* at *15.
88 *Id.* at *13.
89 *Id.* at *15.
90 *Id.*
91 *Id.*
92 *Id.* at *17.
93 *Id.* at *18.
94 *Richardson v. Clark et al.*, 2020 WL 7861335 (Del. Ch. Dec. 31, 2020).
95 *Id.* at *1.
96 *Id.* at *1, 5, 6.
97 *Id.* at *9.
98 *Id.*
99 *Id.*
100 *Id.* at *2.
101 *See, e.g.*, *Marchand*, 212 A.3d 805 (motion to dismiss denied where allegations related to failures to oversee safety of company's sole product that caused multiple deaths); *Clovis*, 2019 WL 4850188 (motion to dismiss denied where allegations related to failures to oversee safety/efficacy of company's "most promising" drug); *Inter-Marketing,* 2020 WL 756965 (motion to dismiss denied where allegations related to failures to oversee safety of oil pipeline); *Chou*, 2020 WL 5028065 (motion to dismiss denied where allegations related to failures to oversee safety/efficacy of cancer drug).
102 *Compare Marchand*, 212 A.3d 805 (upholding claims arising from listeria outbreak that led to three deaths) *and Chou*, 2020 WL 5028065 (upholding claims arising from contaminated cancer drugs) *with GoPro*, 2020 WL 2036602 (dismissing claims relating to allegedly inaccurate financials) *and LendingClub*, 2019 WL 5678578 (dismissing claims arising from improper loan and related party transactions).
103 *See, e.g.*, *Chou*, 2020 WL 5028065 (upholding claims arising from contaminated cancer drugs); *Inter-Marketing,* 2020 WL 756965 (motion to dismiss denied where allegations related to failures to oversee safety of oil pipeline); *Clovis*, 2019 WL 4850188 (motion to dismiss denied where allegations related to failures to oversee safety of company's "most promising" drug); *but see Hughes*, 2020 WL 1987029 (denying motion to dismiss where claims relate to egregious failures in financial reporting).
104 *Compare LendingClub*, 2019 WL 5678578, *MetLife*, 2020 WL 4746635, and *Moneygram*, 2020 WL 7861335, *with Chou*, 2020 WL 5028065, *and Hughes*, 2020 WL 1987029.
105 *Compare, e.g., J.C. Penney*, 2019 WL 3408812, *Wajda*, C.A. No. 2019-0122-JTL, *and Metlife*, 2020 WL 4746635, with *Hughes*, 2020 WL 1987029.
106 *See J.C. Penney*, 2019 WL 3408812, at *6.

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