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MARCHAND v. BARNHILL’S IMPACT ON THE DUTY OF OVERSIGHT: NEW FACTORS TO ASSESS DIRECTORS’ LIABILITY FOR BREACHING THE DUTY OF OVERSIGHT

Abstract: In 2019, in Marchand v. Barnhill, the Delaware Supreme Court reversed the dismissal of a complaint alleging that the defendants, Blue Bell directors, breached their duty of oversight. In doing so, the court invoked two new factors—whether the corporation is monoline and whether it is heavily regulated—to consider when evaluating claims against directors for an oversight failure. These factors inform whether a court can identify an essential compliance concern, such that a court can infer the directors violated their obligation to act in good faith by consciously disregarding a known duty. This inference allows a court to find that a plaintiff alleged sufficient facts to state a claim for a breach of the duty of oversight. This Note examines the upper and lower boundaries of the monoline as well as heavily regulated factors established in Marchand via a derivative complaint against The Boeing Company’s directors. Ultimately, this Note isolates factors most important for a plaintiff to consider when evaluating the strength of their breach of the duty of oversight claim, including (1) whether the company makes only one product or has one product that is particularly significant to the company’s success and (2) whether one, primary, external regulator governs the company’s business.

INTRODUCTION

On March 25, 2019, Blue Bell Creameries USA, Inc. (Blue Bell) announced the return of its ice cream to grocery stores in Virginia. This news brought particular joy to my family of Texans who celebrated when Blue Bell’s ice cream originally came to Virginia and lamented when Blue Bell recalled its products after the outbreak of Listeria monocytogenes (Listeria) infections in 2015. This outbreak took three lives and caused at least ten infections.


2 See Zeke Hartner, Blue Bell Ice Cream Returns to Virginia After 3-Year Absence, WASH. TOP NEWS (Mar. 27, 2019), https://wtop.com/virginia/2019/03/blue-bell-ice-cream-returns-to-virginia-
Following the outbreak, the plaintiffs, Blue Bell shareholders, brought a derivative suit against the Blue Bell board of directors.\(^4\) Pursuant to *In re Caremark International Inc. Derivative Litigation*, which established the duty of oversight in a Delaware Chancery Court case in 1996, the plaintiffs alleged that the Blue Bell board of directors breached their duty of oversight by failing to make a good faith attempt to institute a monitoring system for the corporation.\(^5\) Historically, shareholder derivative suits did not survive the corporation’s motion to dismiss for failing to state a claim of a breach of a duty of oversight due to the significant decision-making deference afforded to the boards of corporations.\(^6\) Consequently, the court’s denial of Blue Bell’s board’s motion to dismiss disrupted corporate law with the first successful “Caremark claim.”\(^7\)


\(^{5}\) Id. at 57; see infra note 77–126 and accompanying text (explaining the development of the duty of oversight via *In re Caremark International Inc. Derivative Litigation* and its progeny). In 1996, in *In re Caremark International Inc. Derivative Litigation*, the Delaware Court of Chancery explained that the board is responsible for overseeing the company so long as the duty does not go so far as to require the board to establish a “system of espionage.” 698 A.2d 959, 969 (Del. Ch. 1996). Employees of Caremark International, Inc. (Caremark) had allegedly violated federal law by accepting referral payments in a health care context. Id. at 961–62.

\(^{6}\) See Marchand, 212 A.3d at 807 (alleging directors breached their fiduciary duties). See generally *In re Caremark*, 698 A.2d 959 (articulating the elements for assessing oversight liability for directors); Spivey et al., *supra* note 3 (describing the board’s oversight failures generally). A claim alleging a failure to fulfill a duty of oversight is frequently referred to as a “Caremark claim.” See *Marchand*, 212 A.3d at 807–08 (describing the failure to oversee Blue Bell’s food safety operations as a breach of duty under a Caremark claim); Stone v. Ritter, 911 A.2d 362, 364 (Del. 2006) (en banc) (describing the allegations in the derivative complaint, and referring to them as Caremark violations). This Note also refers to a claim alleging a breach of a duty of oversight as a “Caremark claim.” See, e.g., *Marchand*, 212 A.3d at 808, 820 (using the phrase “Caremark claim”); Mercer Bullard, *Caremark’s Irrelevance*, 10 BERKELEY BUS. L.J. 15, 33 (2013) (same); Todd Haugh, Caremark’s Behavioral Legacy, 90 TEMP. L. REV. 611, 618 (2018) (same); Ezra Wasserman Mitchell, Caremark’s Hidden Promise, 51 LOY. L.A. L. REV. 239, 242 (2018) (same); Joseph W. Swanson, *Yellow Flags Are Not Red Flags: Delaware Court of Chancery Rejects Caremark Claim in Reiter v. Fairbank*, 27 CLASS ACTIONS & DERIVATIVE SUITS 9, 9 (2017) (same).

\(^{7}\) Marchand, 212 A.3d at 820, 824 (explaining that alleging and proving a Caremark claim is challenging for plaintiffs, but finding that the plaintiff pled sufficient facts to deny the defendants’ motion to dismiss). See generally *In re Caremark*, 698 A.2d 959 (establishing the Caremark claim).
On June 20, 2019, in *Marchand v. Barnhill*, the Delaware Supreme Court denied the motion to dismiss a derivative action against Blue Bell directors for failing to fulfill their duty of oversight. Emphasizing that regulatory compliance was so essential for Blue Bell’s success, such that the board’s alleged failure to act when facing “red flags” concerning the product’s safety could rise to the level of an oversight failure, the court held that the derivative suit could survive a motion to dismiss. This Note discusses how *Marchand* altered corporate directors’ oversight responsibilities in certain industries by placing more emphasis on whether a business has a monoline structure and whether it has one primary regulator. Furthermore, this Note argues that the holding in *Marchand* will have significant implications for directors managing industries uniquely capable of causing irreparable harm. To illustrate the impact of this decision, this Note analyzes a derivative action against The Boeing Company (Boeing) to demonstrate how courts may apply *Marchand* in future claims for a breach of the duty of oversight.

On October 29, 2018, and March 10, 2019, two 737 MAX planes crashed and killed 346 people. Both incidents occurred because the planes’ automatic
safety systems forced the planes’ noses downward.14 By March 13, 2019, the United States grounded all Boeing 737 MAX jets.15 These accidents resulted in a multi-billion-dollar loss for Boeing—its first reported loss since 1997.16

On November 18, 2019, Kirby Family Partnership, an investor in Boeing, filed a derivative complaint on behalf of Boeing against its board of directors.17 The complaint alleged that the board ignored warning signs and failed to

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fulfill its oversight obligations following the first crash.18 The court since consolidated it with other derivative complaints against Boeing to create In re the Boeing Co. Derivative Litigation.19 This Note uses the Marchand decision to predict how the court will analyze the alleged failure to maintain oversight in In re the Boeing Co.20 This Note argues that the Marchand decision strengthens the plaintiffs’ position in In re the Boeing Co. and may result in the court denying the defendants’ motion to dismiss.21 Finally, this Note isolates important factors to evaluate when assessing the likelihood of a complaint’s dismissal, which can guide practitioners bringing derivative complaints and explain to corporate boards which elements of their business may make them vulnerable to derivative litigation post-Marchand.22

Part I of this Note describes the duties of care, loyalty, and good faith, which are the fiduciary duties that corporate directors must uphold.23 Part I further explains how the duty of good faith factors into the duties of care and loyalty as an element of liability for the breach of the duty of loyalty.24 Part I additionally explains the development of the duty of oversight as established in on behalf of retirement funds invested in Boeing, establishing In re the Boeing Co. Derivative Litigation. Kirby Fam. P’ship, 2020 WL 4504307, at *1.

18 Public Version of the Verified Stockholder Derivative Complaint, supra note 17, at 23.

19 Kirby Fam. P’ship, 2020 WL 4504307, at *1. The plaintiffs in In re the Boeing Co. Derivative Litigation filed a consolidated complaint (Boeing Complaint) on January 5, 2021. See generally Verified Amended Consolidated Complaint, In re the Boeing Co. Derivative Litig., No. 2019-0907 (Del. Ch. filed Jan. 5, 2021), 2021 WL 496766 (alleging that Boeing officers inadequately monitored Boeing 737 MAX’s safety). This Note relies on the Kirby Complaint and Boeing Complaint when analyzing the oversight failures attributed to the 737 MAX disaster. See generally Verified Amended Consolidated Complaint, supra, at 9 (alleging oversight failures after gaining more access to records); Public Version of the Verified Stockholder Derivative Complaint, supra note 17, at 9 (alleging oversight failures without extensive access to records). The Boeing Complaint outlines the interaction between Boeing and the Federal Aviation Administration (FAA) after a prolonged series of records requests. See Verified Amended Consolidated Complaint, supra, at 7 (describing Boeing’s efforts to reduce costs by asserting that the 737 MAX was similar to Boeing’s original 737 plane, thus reducing the FAA’s involvement and required pilot training); Rose Krebs, Chancery Pauses Boeing 737 Suits Amid Records Blitz, LAW360 (Jan. 21, 2020), https://www.law360.com/articles/1236044/chancery-pauses-boeing-737-suits-amid-records-bid-blitz [https://perma.cc/8WAZ-9TLM].

20 See infra notes 208–264 and accompanying text.

21 See generally Marchand v. Barnhill, 212 A.3d 805 (Del. 2019) (en banc) (introducing a new understanding of a Caremark claim for heavily regulated, monoline corporations, and imposing a more onerous oversight burden on directors of corporations within that category); Defendants’ Opening Brief in Support of Their Motion to Dismiss at 1–4, In re the Boeing Co., No. 2019-0907 (Del. Ch. filed Feb. 8, 2021), 2021 WL 530962 (seeking dismissal based on plaintiffs’ failure to successfully plead defendants’ failure to implement a monitoring process and ignorance of warning signs); Verified Amended Consolidated Complaint, supra note 19, at 9 (alleging a claim for breach of duty of oversight after the board supposedly ignored red flags of a compliance breakdown, and emphasizing the 737 MAX’s significance in Boeing’s business to establish criteria fulfilling the monoline descriptor in Marchand v. Barnhill).

22 See infra notes 265–274 and accompanying text.

23 See infra notes 31–55 and accompanying text.

24 See infra notes 56–76 and accompanying text.
In re Caremark.25 Finally, Part I explores how these fiduciary duties inform the
duty of oversight.26 Part II discusses Marchand as the first well-pled Caremark
claim, emphasizing how the monoline nature of Blue Bell’s business influ-
enced the court’s decision to deny the motion to dismiss.27 Part III examines
the upper and lower boundaries of the factors established in Marchand, namely
evaluating whether the corporation meets the monoline and whether it is heavi-
ly regulated criteria, meaning a “mission critical” compliance concern is iden-
tifiable.28 Part III also considers the implications of Marchand by applying these
factors to the facts alleged in In re the Boeing Co., predicting that the court will
likely deny a motion to dismiss for failure to state a claim for the breach of the
duty of oversight.29 Finally, Part III summarizes the key factors that potential
plaintiffs should consider in a breach of the duty of oversight claim.30

I. CORPORATE DIRECTORS’ FIDUCIARY DUTIES & THE DEVELOPMENT
OF THE DUTY OF OVERSIGHT

The duties of care and loyalty serve as the dominant sources of liability
for corporate directors.31 In the early 2000s, legal observers reacted to the Del-
aware courts’ rhetoric regarding good faith by asserting that the duty of good
faith should serve as an independent basis for director liability.32 Despite this

25 See infra notes 77–98 and accompanying text.
26 See infra notes 99–126 and accompanying text.
27 See infra notes 127–190 and accompanying text.
28 See infra notes 191–207 and accompanying text.
29 See infra notes 208–264 and accompanying text.
30 See infra notes 265–274 and accompanying text.
31 BRIAN J.M. QUINN, INTRODUCTION TO THE LAW OF CORPORATIONS 280 (6th ed. 2019) (defin-
ing the duty of care as obligating the director to use the care of a reasonably prudent director and the
scription of three fiduciary duties); Leo E. Strine, Jr. et al., Loyalty’s Core Demand: The Defining
Role of Good Faith in Corporation Law, 98 GEO. L.J. 629, 631 (2010) (identifying care and loyalty as
directors’ conventional fiduciary duties); Julian Velasco, How Many Fiduciary Duties Are There in
Corporate Law?, 83 S. CAL. L. REV. 1231, 1232–33 (2010) (suggesting that the two primary fiduciary
duties are care and loyalty).
32 See Melvin A. Eisenberg, The Duty of Good Faith in Corporate Law, 31 DEL. J. CORP. L. 1, 1
(2006) (highlighting the importance of fleshing out the nuances of the duty of good faith); Gold, supra
note 31, at 464 (explaining the evolution of fiduciary duties in corporate law). One scholar discusses
the idea of the duty of good faith as its own source of director liability rather than a subsidiary element
of the duty of loyalty. See Sale, supra note 31, at 482 (noting that Delaware cases discuss the duty of
advocacy, Delaware courts continued to rely on the duties of care and loyalty as the claims necessary to attach liability to corporate directors. For example, in 2006 in Stone v. Ritter, the Delaware Supreme Court explicitly described the duty of good faith as an elemental obligation within the duty of loyalty, not a cause of action on its own.

The duties of care and loyalty stem from corporate directors’ fiduciary obligations to the corporation for which they serve on the board. Those with a fiduciary responsibility must act in the beneficiary’s interest. The duty of care protects the beneficiary’s interest by requiring directors to make decisions on an informed basis and with the diligence that a person with the same training and skills would typically have in the relevant circumstances. Although this

33 See Mozal, supra note 31, at 160–61 (relying on Stone to explain that the Delaware Supreme Court addressed the question of whether good faith was an independent basis for liability, and noting that the threat of liability has not increased with the reliance on duties of care and loyalty).

34 911 A.2d 362, 369 (Del. 2006) (en banc) (describing good faith as a condition necessary for liability, such that “a failure to act in good faith is not conduct that results, ipso facto, in the direct imposition of fiduciary liability”); see In re Caremark Int’l Inc. Derivative Litig., 698 A.2d 959, 971 (Del. Ch. 1996) (describing a violation of good faith as a precondition for liability). In 2006, in Stone v. Ritter, the Delaware Supreme Court’s assertion that good faith is a perquisite for the duty of loyalty relied on a footnote in the 2003 Delaware Court of Chancery case Guttmann v. Huang, which explains that it is necessary to act in good faith to act loyally and it is impossible to behave in bad faith and still fulfill the duty of loyalty. Stone, 911 A.2d at 370 & nn. 30 & 34 (citing Guttmann v. Huang, 823 A.3d 492, 506 n.34 (Del. Ch. 2003)). Consequently, there is no use in separating the duty of good faith from the duty of loyalty. Guttmann, 823 A.2d at 506 n.34.


37 Goldberg, supra note 36, at 406; Velasco, supra note 35, at 69. The Delaware Supreme Court established the minimum conduct required to satisfy the directors’ duty to inform themselves in 1984 in Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984) (explaining that directors must stay apprised of all reasonably accessible material information), overruled on other grounds by Brehm v. Eisner, 746 A.2d 244 (Del. 2000). In Aronson, the court considered the directors’ approval of an employment agreement, which included $225,000 in loans without interest, with a director and stockholder. Id. at 808–09. The plaintiff, a stockholder of the company, alleged that such an agreement in no way benefited the corporation. Id. at 809.
standard of conduct requires the directors to act with ordinary care, the applicable standard of review for a care claim requires a plaintiff to allege that a director acted with gross negligence.\textsuperscript{38} Thus, if a director fulfills their obligations under the duty of care, they are not subject to liability on the basis of a care violation even if the decision resulted in an undesirable outcome for the stockholders.\textsuperscript{39} This deference to directors is a manifestation of the business judgment presumption, which reflects the position that the courts should not substitute their business judgment for the director’s business judgment.\textsuperscript{40} Stockholders may only overcome this presumption, which assumes that corporate directors “act[] on an informed basis, in good faith and in the honest belief that the action was taken in the best interests of the company,” by proving gross negligence for a care claim or asserting the directors’ conflict of interest.\textsuperscript{41}

The duty of loyalty requires directors to pursue the corporation’s interest, as opposed to the directors’ personal interests or a third-party’s interests.\textsuperscript{42}

\textsuperscript{38} Aronson, 473 A.2d at 812 (explaining that director conduct must rise to gross negligence to warrant liability due to the deference accorded to directors under the business judgment presumption); Velasco, supra note 35, at 68–69 (noting that liability for care claims is uncommon due to this standard of review). The applicable standard of review informs how the court considers lower court decisions and applies presumptions to alleged facts. Standard of Review, BLACK’S LAW DICTIONARY (11th ed. 2019). A presumption creates a lens through which the court examines facts, skewing the interpretation towards a specific result unless the opposing party defeats the presumption. Presumption, id. In the case of the business judgment presumption, the court defers to directors’ business judgment to protect the board’s ability to take risks for the corporation’s benefit and avoid substituting the court’s business judgment for that of the board’s. Sinclair Oil Corp. v. Levien, 280 A.2d 717, 720 (Del. 1971); Goldberg, supra note 36, at 412. Gross negligence entails the absence of “even slight diligence or care.” Gross Negligence, BLACK’S LAW DICTIONARY, supra. Gross negligence captures “willful and wanton misconduct” or, more relevant in the context of fiduciary duties, “a conscious, voluntary act or omission in reckless disregard of a legal duty.” Id. (emphasis omitted).

\textsuperscript{39} Goldberg, supra note 36, at 406 (noting that the standard for a duty of care claim is objective); see also A. GILCHRIST SPARKS, III, DELAWARE LAW FOR CORPORATE LAWYERS: RECENT DEVELOPMENTS 100 (1985) (explaining that the court will not look at the merits of the board’s decision, assuming that the board adhered to its fiduciary obligations in procedure and intent).

\textsuperscript{40} See, e.g., Sinclair Oil Corp. 280 A.2d at 720 (emphasizing how directors benefit from the business judgment presumption, such that a court “will not substitute its own notions of what is or is not sound business judgment.”); see Velasco, supra note 35, at 69–70 (suggesting that the business judgment presumption gives directors discretion to take risks). This presumption insulates directors and enables them to make risky decisions that benefit the corporation. See Goldberg, supra note 36, at 412; Velasco, supra note 35, at 63 (describing the policy interest in allowing corporate directors to make risky decisions to encourage profit maximization). Overall, the business judgment presumption operates in the directors’ favor when assessing liability. See SPARKS, supra note 39, at 102 (noting the business judgment presumption’s effects).

\textsuperscript{41} Aronson, 473 A.2d at 812; see Andrew S. Gold, The Fiduciary Duty of Loyalty, in THE OXFORD HANDBOOK OF FIDUCIARY LAW, supra note 35, at 385, 385 (explaining that most loyalty claims base liability in the directors’ self-dealing or conflicting duties).

\textsuperscript{42} Cede & Co. v. Technicolor, Inc., 634 A.2d 345, 361 (Del. 1993) (defining the duty of loyalty as directors’ fiduciary obligation to prioritize the corporation and stockholders’ interests ahead of the directors’ self-interest), modified decision on reargument, 636 A.2d 956 (Del. 1994) (explaining the reargument after return of remand without changing duty of loyalty definition); Gold, supra note 41, at 387; Velasco, supra note 35, at 66 (noting that the duty of loyalty requires directors to prioritize the
When directors’ interests are in conflict with the corporation’s, they must prioritize the corporation’s interests, abstain from self-dealing, and decline benefits unavailable to stockholders. If directors have a conflict of interest, the Delaware statute allows them to absolve their conflict by disclosing it to the disinterested board members or the stockholders. Disclosure can clear the transaction of director interest, making a loyalty violation claim against a director difficult. The business judgment presumption creates a high bar for plaintiffs to meet when asserting claims for breach of the duty of loyalty. Because loyalty claims are typically derivative causes of action, a complaint may only survive a pre-trial dismissal if it sufficiently alleges the director’s interest in the transaction or issue or their lack of independence from an interested party.
The proliferation of exculpation provisions in certificates of incorporation have forced plaintiffs to rely on the duties of loyalty and good faith to hold directors liable for breaches of fiduciary duties. Title 8, section 102(b)(7) of the Delaware Code provides the option to include an exculpation provision in a corporation’s certificate of incorporation to eliminate the possibility of money damages for a breach of the duty of care. These provisions protect disinterested and independent directors from care claims because plaintiffs cannot fulfill the requirements of a duty of care violation without alleging damages, and, therefore, they cannot survive a motion to dismiss for failure to state a claim.

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48 DEL. CODE ANN. tit. 8, § 102(b)(7) (allowing a corporation to include a provision in its certificate of incorporation that eliminates damages for breaching a fiduciary duty except for violations of the duty of loyalty or an act not in good faith); Mitchell, supra note 6, at 255 (commenting that exculpation provisions predominantly ended direct care claims); Rosenberg, supra note 32, at 507 (describing how exculpation provisions eliminate liability for a breach of the duty of care); Sale, supra note 31, at 462 (noting that care claims comprise only a small portion of derivative actions); Velasco, supra note 35, at 73 (explaining that exculpation provisions remove liability for care claims, functioning like a waiver).

49 DEL. CODE ANN. tit. 8, § 102(b)(7). The statute allows a corporation’s certificate of incorporation to include “[a] provision eliminating or limiting the personal liability of a director . . . for monetary damages for breach of fiduciary duty . . . .” Id. The language specifically prohibits exculpation for a director’s breach of the duty of loyalty or “for acts or omissions not in good faith or which involve intentional misconduct or knowing violation of law . . . .” Id. Therefore, the statute only eliminates money damages for a duty of care claim. Id. Exculpation provisions made successful duty of care claims essentially impossible by eliminating damages for duty of care violations; thus, plaintiffs cannot satisfy the elements for stating a claim because most allege damages in the form of money. Velasco, supra note 35, at 76. Plaintiffs, however, can still seek injunctive relief for a breach of duty of care. Id.

50 Elizabeth A. Nowicki, Director Inattention and Director Protection Under Delaware General Corporation Law Section 102(b)(7): A Proposal for Legislative Reform, 33 DEL. J. CORP. L. 695, 711
As a result of corporations’ adoption of exculpatory provisions, claims seeking monetary damages for a breach of the duty of care are no longer viable for plaintiffs.\(^5\) Instead, plaintiffs must rely on breaches of the duty of loyalty and the duty of good faith for recourse.\(^5\) Unlike the fiduciary duties of care and loyalty, the role of good faith remains nebulous.\(^5\) Part A of this Section explores how good faith operates as a condition for the duty of loyalty.\(^5\) Part B explains how the duty of oversight developed and describes its relationship to the fiduciary duties of care, loyalty, and good faith.\(^5\)

A. Violating the Duty of Good Faith as a Required Element to Establish Director Liability

Due to the improbability of successful care claims, the only way for plaintiffs to capture conduct traditionally within the duty of care is by alleging either a breach of the duty of loyalty or alleging that a director acted in bad faith.\(^5\) Commentators sought to convert care claims into non-exculpable good faith claims to avoid barred damages resulting from pervasive exculpation provisions.\(^5\)

Due to the elusive definition of good faith, it is helpful to understand good faith as excluding conduct exercised in bad faith.\(^5\) Bad faith conduct ne-
cessitates scienter, meaning that a director acted with intent.\(^59\) In 2006, in *In re the Walt Disney Co. Derivative Litigation*, the Delaware Supreme Court articulated the culpability required to establish bad faith conduct.\(^60\) In one example, the court described conduct where the director intentionally acted to advance interests other than the corporation’s.\(^61\) Despite this conduct’s similarity to a breach of the duty of loyalty, the court used this conduct as an example of a failure to act in good faith and emphasized a different part of the director’s misconduct—intent.\(^62\) The same emphasis applied where a director consciously disregarded a known duty, thus failing to act in good faith.\(^63\) Although this conduct aligns with a violation of the duty of care,\(^64\) the court’s analysis focused on the director’s intentional actions to demonstrate bad faith conduct,
which it considered more blameworthy. The court’s language suggested that the director did not negligently breach his fiduciary obligations but purposefully failed the corporation’s stockholders, which rose to the level of bad faith conduct.

Corporate directors’ fiduciary obligations create a baseline expectation that directors must act in the best interests of the stockholders, but the duty of good faith’s concern with intent operates to further impose a moral obligation on the directors. This moral obligation is context-dependent. For example, a director sincerely acting in what the director perceives as the stockholders’ best interest does not act in good faith when the stockholders’ best interest necessitates a violation of the law.

The Delaware Supreme Court most explicitly conveyed its understanding of the duty of good faith in Stone v. Ritter. According to the court, failing to act in good faith does not automatically result in fiduciary liability. The court cited a decision from the Delaware Chancery Court, which reiterated that good faith operates as a subordinate element of the traditional duty of loyalty. Alt-

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65 Disney II, 906 A.2d at 67 (describing bad faith to attribute greater emphasis on the state of mind of the director).
66 See id. (emphasizing the intentionality and culpability aspect of bad faith conduct).
67 Nowicki, supra note 59, at 447 (noting that the law obligates directors to manage the corporation’s business and affairs); see Sean J. Griffith, Good Faith Business Judgment: A Theory of Rhetoric in Corporate Law Jurisprudence, 55 DUKE L.J. 1, 4–5, 14 (2005) (describing good faith in relation to the duties of care and loyalty and interpreting the reference to good faith in section 102(b)(7) of the Delaware Code to consider intent); see also DEL. CODE ANN. tit. 8, § 102(b)(7) (West 2020) (allowing corporations to include exculpatory provisions that limit their liability for breaches of the duty of care).
68 See Disney II, 906 A.2d at 67 (identifying different examples involving good faith).
69 Eisenberg, supra note 32 at 31; see Griffith, supra note 32, at 29 (suggesting a definition of a violation of good faith as “egregious, subversive, or knowing behavior” (quoting Sale, supra note 31, at 488)).
70 911 A.2d 362, 369–70 (Del. 2006) (en banc).
71 See id. (addressing whether acting in bad faith can serve as its own basis for director liability, which the Delaware Court of Chancery in In re the Walt Disney Co. Derivative Litigation left explicitly open).
72 Stone, 911 A.2d at 369–70 (citing Guttman v. Huang, 823 A.2d 492, 506 n.34 (Del. Ch. 2003)). In Guttman v. Huang, a 2003 Delaware Chancery Court case, the plaintiff brought a derivative action on behalf of a technology corporation, NVIDIA Corporation. 823 A.3d at 493. The plaintiff argued that the NVIDIA directors breached their fiduciary duty by “failing to ensure that there was an adequate system of financial controls in place at the company,” which led to the issuance of materially misleading financial statements. Id. at 497. After explaining how difficult such Caremark claims are to prove, the court in Guttman proceeded to reject the plaintiff’s assertion that directors breached their duty of oversight. Id. at 505–08. The court explained that the basis of liability for failure of oversight depends on directors’ awareness that they were not fulfilling their jobs. Id. at 506 (explaining how a Caremark claim imposes a requirement to act with greater care coupled with a requirement to act in good faith, which predicates liability on a demonstration that directors consciously failed to exercise care); see also Emerald Partners v. Berlin, C.A. No. 9700, 2003 WL 21003437, at *39 n.133 (Del. Ch. Apr. 28, 2003) (sharing the view that the duty of loyalty subsumed the independent duty of good faith), aff’d, 840 A.2d 641 (Del. 2003).
hough this decision did not recognize the duty of good faith as its own basis of liability, the analysis enabled the same outcome of filling the gaps left by traditional notions of the duties of care and loyalty.\textsuperscript{73} Despite this potential, the rhetorical difference between good faith as an independent duty and good faith as a subsidiary element foreshadowed the courts’ hesitance to interpret care violations as a breach of good faith.\textsuperscript{74}

By keeping good faith claims within the duty of loyalty, the court left open the possibility that a care claim alleging facts so outrageous that the directors’ culpability rises to bad faith conduct can convert into a loyalty violation, even if the director did not engage in self-dealing or otherwise prioritize another’s interests over the corporation’s.\textsuperscript{75} Then in 1996, in \textit{In re Caremark International Inc. Derivative Litigation}, the Delaware Court of Chancery further defined how a care claim can convert into a loyalty claim by establishing that directors are responsible for overseeing the corporation.\textsuperscript{76}

\textbf{B. The Development of the Duty of Oversight}

With exculpation provisions essentially eliminating the ability to successfully bring care claims seeking monetary damages, plaintiffs sought other avenues of recourse, such as good faith claims.\textsuperscript{77} Alleging a breach of the duty of good faith allows plaintiffs to address directors who acted without conflicts of interests but with processes so inadequate that the conduct exceeded gross negligence and escalated to a breach of the duty of good faith.\textsuperscript{78} The legal hook for

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  \item \textsuperscript{73} See Stone, 911 A.2d at 369 (describing good faith as a necessary element to prove the duty of loyalty); Eisenberg, \textit{supra} note 32, at 5 (explaining how the duty of good faith can fill the space left open by the duties of care and loyalty).
  \item \textsuperscript{74} See Griffith, \textit{supra} note 32, at 18–19 (explaining that the plaintiff’s re-pled in \textit{In re the Walt Disney Co.} relied on an exculpable care claim because a loyalty claim was not available). According to Sean J. Griffith, in 2005, the Delaware Court of Chancery in \textit{In re the Walt Disney Co. Derivative Litigation} “rescue[d]” the plaintiffs’ revised complaint through good faith. \textit{Id.} at 19. In relying on the duty of good faith, the court discussed issues traditionally raised under the duty of care and the duty of loyalty, suggesting that facts related only to care claims would not have the same result. \textit{See id.} at 20 (“[T]hroughout the opinion he applied an analytic technique that essentially alternated between issues traditionally raised in analyses under the duty of loyalty, on the one hand, and the duty of care, on the other.”).
  \item \textsuperscript{75} Nowicki, \textit{supra} note 59, at 457.
  \item \textsuperscript{76} 698 A.2d 959, 970 (Del. Ch. 1996) (articulating the duty of oversight).
  \item \textsuperscript{77} QUINN, \textit{supra} note 31, at 411; \textit{see also} Emerald Partners v. Berlin, 787 A.2d 85, 92 (Del. 2001) (emphasizing that even when plaintiffs defeat the business judgment presumption by alleging a care violation amounting to gross negligence, the exculpation provision still affords directors protection); \textit{In re the Walt Disney Co. Derivative Litig. (Disney I)}, 907 A.2d 693, 754–55 (Del. Ch. 2005) (explaining the exculpation provisions’ impact, admitting the confusing jurisprudence surrounding good faith, and describing intentional disregard of a duty as a violation of good faith and a disloyal act), \textit{aff’d}, 906 A.2d 27 (Del. 2006)); Griffith, \textit{supra} note 32, at 13 (describing good faith as a limit to exculpatory powers).
  \item \textsuperscript{78} \textit{In re Caremark}, 698 A.2d at 969–70; QUINN, \textit{supra} note 31, at 411; \textit{see} Eisenberg, \textit{supra} note 32, at 5 (discussing how the duties of care and loyalty do not include all director misconduct).
\end{itemize}
a breach of the duty of good faith stems from the interpretation of good faith as a requirement of the duty of loyalty; thus, plaintiffs showing bad faith could demonstrate a breach of the duty of loyalty. 79 The duty of oversight became entangled with the duty of good faith in In re Caremark because the Delaware Court of Chancery used the rhetoric of good faith to establish minimum oversight responsibilities for directors. 80 Subsection 1 of this Section explores Graham v. Allis-Chalmers Manufacturing Co., a 1963 case, to provide the context precipitating the In re Caremark decision. 81 Subsection 2 showcases the difficulty of pleading a Caremark claim and discusses the status of oversight claims prior to the Marchand v. Barnhill, a 2019 decision. 82 Subsection 3 explains how acting in bad faith goes beyond breaching the duty of care to lay the foundation for Subsection 4, 83 which describes how a failure to act in good faith operates as a condition for establishing oversight liability and a breach of the duty of loyalty. 84

1. The Foundation for a Caremark Claim

In 1963, in Graham v. Allis-Chalmers Manufacturing Co., the Delaware Supreme Court provided the foundation from which the Delaware Court of Chancery later created the oversight duty in In re Caremark. 85 The court considered whether the directors knew or should have known about four employee’s conduct in violation of antitrust laws. 86 The plaintiffs, stockholders in the

79 See supra notes 56–76 and accompanying text (discussing good faith as required to fulfill the duty of loyalty).
80 698 A.2d at 970 (articulating the importance of the directors acting with “good faith judgment” to ensure the oversight system is adequate); see Marchand v. Barnhill, 212 A.3d 805, 820 (Del. 2019) (en banc) (explaining that a plaintiff must demonstrate that directors acted in bad faith to successfully bring a Caremark claim); Griffith, supra note 32, at 4 (describing good faith as an “amorphous principle”).
82 See infra notes 99–112 and accompanying text. See generally Marchand, 212 A.3d at 820–24 (denying a motion to dismiss for failure to state a claim of a breach of the duty of oversight).
83 See infra notes 113–118 and accompanying text.
84 See infra notes 113–126 and accompanying text.
85 See Graham, 188 A.2d at 130 (explaining that unless suspicion prompts them, directors do not have a duty to seek details to prevent wrongdoing); see also Stone v. Ritter, 911 A.2d 362, 367 (Del. 2006) (en banc) (noting that the concept of an oversight duty was first articulated in Graham v. Allis-Chalmers Manufacturing Co.); In re Caremark, 698 A.2d at 970–71 (holding that a corporation’s board must employ “a good faith effort” to oversee the corporation’s operations via a monitoring system designed to provide the board with “appropriation information . . . in a timely manner as a matter of ordinary operations”).
86 Graham, 188 A.2d at 127 (noting that the indicted employees were not directors). In 1963, in Graham v. Allis-Chalmers Manufacturing Co., the Delaware Supreme Court explained that these indictments charged the employees with conspiring to fix prices and manipulate bids. Id. at 128. When no evidence supported the contention that directors knew about the misconduct, the plaintiffs’
company, alleged that the directors’ lack of oversight prevented them from learning about and stopping the employees’ illicit activities. The court upheld the lower court ruling that the company’s directors were not liable on this basis. An important factor in the court’s decision was the absence of facts showing that the directors should have been so “on guard” that a need to prevent the antitrust violations was obvious. The relevance of these facts, or lack thereof, implies that directors can have a duty to prevent misconduct in certain circumstances.

The Graham decision did not provide specific criteria indicating when directors have sufficient notice that they should be “on guard” to prevent employee misconduct. The court instead offered insight into when the directors do not have an oversight duty. Noting that directors have the right to depend on employees until they suspect wrongdoing, the court explained that directors do not have a duty to implement a system designed to investigate the trustworthiness of its employees.

In 2006, in Stone v. Ritter, the Delaware Supreme Court outlined two interpretations of the Graham analysis. The first—a broad interpretation—is that absent any reason to suspect misconduct, directors do not have any duty to maintain reporting mechanisms to gather information concerning the corporation’s material acts altogether. The second, a narrower interpretation of Graham, is that directors are not subject to liability for assuming employees’ hon-

theory of the case shifted to assert that the directors’ misconduct was their failure to know and then prevent the employees’ activities.  

87 Id. at 127.

88 Id. at 131 (affirming the Delaware Court of Chancery’s decision).

89 See id. at 129 (holding that the plaintiffs did not show that the directors had notice of the unlawful activity). This reasoning extends to Marchand v. Barnhill, where the Delaware Supreme Court in 2019 held that “mission critical” regulatory requirements provide notice, such that the directors are on guard to act in an oversight capacity regarding that issue. 212 A.3d 805, 824 (Del. 2019) (en banc); see Graham, 188 A.2d at 129 (explaining that directors must first be on notice that regulatory compliance is a risk to their business).

90 See Graham, 188 A.2d at 129–30 (opting not to address what oversight duties directors will have when there are facts showing a cause for suspicion). In 1996, In re Caremark International Inc. Derivative Litigation, the Delaware Court of Chancery further developed the occasion where a director does have an affirmative duty. 698 A.2d at 970. Marchand further defines the scope of a Caremark claim by identifying criteria that provides enough notice to trigger directors’ attention to a potential source of risk. 212 A.3d at 824 (explaining that critical components of the corporation always provide enough notice that triggers oversight obligations).

91 See 188 A.2d at 130 (describing what directors do not have a duty to do).

92 Id. (explaining that directors do not have to be so “watchful” as to anticipate all misconduct).

93 Id. (“[A]bsent cause for suspicion there is no duty upon the directors to install and operate a corporate system of espionage to ferret out wrongdoing which they have no reason to suspect exists.”).

94 911 A.2d 362, 367–68 (Del. 2006) (en banc) (explaining how the court interpreted Graham in In re Caremark); see In re Caremark, 698 A.2d at 969 (analyzing Graham).

95 Stone, 911 A.2d at 367–68.
esty unless they have reason to suspect the reporting system’s integrity. This interpretation acts as an outer limit to the directors’ oversight responsibilities because it leaves open the possibility that the directors still have an obligation to establish a reporting system, but they do not have to be wary of their employees’ integrity without cause. Ultimately, the court chose the broader interpretation, which allowed the Chancery Court in In re Caremark to hold that directors have a duty to maintain an oversight system.


In 1996, in In re Caremark International Inc. Derivative Litigation, the Delaware Court of Chancery noted that although directors do not have to go so extreme as to have a “system of espionage,” the board is responsible for some level of oversight. Like the plaintiffs in Graham, the plaintiffs in Caremark alleged that the directors should have known about employees violating federal law. The plaintiffs argued that the directors violated a duty to monitor corporate function and therefore exposed the company to legal liability.

96 Id. In In re Caremark, the Delaware Court of Chancery explained why the Delaware Supreme Court's interpretation of Graham was too narrow. In re Caremark, 698 A.2d at 969; see also Graham, 188 A.2d at 130 (emphasizing the need for suspicion before an oversight duty arises). The court provided three reasons for rejecting this interpretation of Graham. In re Caremark, 698 A.2d at 970; see also Graham, 188 A.2d at 130; First, the court emphasized the corporate board’s importance in corporate law. In re Caremark, 698 A.2d at 970. Then, the court emphasized the need for pertinent and prompt information for the board to fulfill its management responsibilities under section 141(a) of the Delaware Code, which entitles directors to manage the corporation’s affairs. DEL. CODE ANN. tit. 8, § 141(a) (West 2020); In re Caremark, 698 A.3d at 970. Finally, the court observed the importance of reduced sentencing for companies when the organization makes a good faith effort to meet governance responsibilities. In re Caremark, 698 A.2d at 970. The court offered both explanations and then ultimately chose a broader approach. Id. at 969.

97 See Stone, 911 A.2d at 368 (viewing the decision in In re Caremark as an acknowledgement that directors are not subject to liability for assuming employees’ honesty, but noting they still have a duty to establish a monitoring system).

98 See id. (explaining the duty of oversight within a Caremark claim); see also In re Caremark, 698 A.2d at 970.

99 698 A.2d at 969–70; see Stone, 911 A.2d at 367 (analyzing In re Caremark to compare the Delaware Court of Chancery’s narrow interpretation of Graham to the Delaware Supreme Court’s broad interpretation).

100 Compare Graham, 188 A.2d at 129 (describing the plaintiffs’ assertion that directors have a duty to actively oversee the corporation, such that they should have known about the employees violating antitrust laws), with In re Caremark, 698 A.2d at 967 (describing the complaint’s allegations of the directors’ breach of their duty of oversight for unawareness of illegal referral payments). The Delaware Court of Chancery in In re Caremark considered the proposed settlement of the derivative action to determine whether it was fair and reasonable. 698 A.2d at 960, 966 (describing the settlement terms, such as the settlement to include the company’s assertion that employees will not conduct illegal referrals, board review of relevant regulations, and the creation of a committee dealing with ethics and compliance). The derivative action arose after employees allegedly violated federal law and
The court considered whether the board had an affirmative responsibility to oversee the corporation to ensure it operated lawfully.\textsuperscript{102} The court explained that interpreting \textit{Graham} to limit directors’ duty to when they have a reason for suspicion would be inconsistent with Delaware corporate law’s policy interests.\textsuperscript{103} Recalling directors’ responsibility to be reasonably informed in accordance with the duty of care, the court explained that the board must establish reporting mechanisms for the corporation.\textsuperscript{104} The court acknowledged that it is up to the board to exercise its business judgment in determining the extent of information directors must obtain to satisfy their oversight obligations.\textsuperscript{105} This duty required directors to make a good faith attempt to implement a monitoring system for the corporation.\textsuperscript{106} Moreover, the court determined that the directors’ duty continues beyond implementation because directors must monitor the adequacy of the established reporting process.\textsuperscript{107} Ultimately, the duty established by the court in \textit{In re Caremark} provided future plaintiffs with an additional avenue to hold directors liable for a corporation’s losses.\textsuperscript{108}

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\item[101] In re Caremark, 698 A.2d at 971.
\item[102] Id. Five derivative actions comprised the consolidated action in \textit{In re Caremark}. 698 A.2d at 964. Originally, the complaint alleged that the board’s failure to monitor the employees’ conduct and implement remedial measures constituted a violation of their duty of care. \textit{Id.} The complaint evolved through several amendments. \textit{Id.} (adding additional allegations regarding indictments and the significant cost of legal fees incurred by Caremark). The defendants, Caremark’s board of directors, sought to dismiss each iteration of the complaint for failing to show demand futility and stating an inadequate claim because the company’s certificate of incorporation exculpated directors’ liability for care claims. \textit{Id.} at 964–65.
\item[103] Id. at 969–70.
\item[104] Id. at 970.
\item[105] Compare Graham, 188 A.2d at 130 (explaining that directors do not have to “operate a corporate system of espionage to ferret out wrongdoing” without suspicion prompting them), with \textit{In re Caremark}, 698 A.2d at 970 (holding that directors have an obligation to make a good faith attempt to establish a reporting mechanism to ensure that they are informed of employee conduct).
\item[106] \textit{In re Caremark}, 698 A.2d at 970.
\item[107] Id.
\item[108] Id. (explaining that a failure to meet the oversight obligations described in \textit{In re Caremark} may “in theory” result in director liability); see Stone v. Ritter, 911 A.2d 362, 369 (Del. 2006) (en banc) (attempting to use the oversight liability established in \textit{In re Caremark} to hold directors liable). In \textit{In re Caremark}, the Delaware Court of Chancery evaluated the proposed settlement’s fairness and
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The Delaware Supreme Court in *Stone* acknowledged that acting in good faith is an integral part of fulfilling the oversight duty established in *In re Caremark*. The characterization of a *Caremark* claim as a breach of good faith and a condition for asserting a loyalty claim highlighted the analytical gymnastics the court used to convert a care claim into a non-exculpable loyalty claim. The duty of good faith invoked both a duty of care and a duty of loyalty analysis. The cases below seek to clarify this entanglement by showing how bad faith conduct relates to the duty of care and how establishing a violation of good faith invokes a breach of the duty of loyalty.

3. Defining Bad Faith Conduct Via the Duty of Care

In 2006, in *In re the Walt Disney Co. Derivative Litigation*, the Delaware Supreme Court relied on the duty of care to describe how to identify conduct not exercised in good faith. The plaintiffs had alleged that the board had violated the duties of care and good faith by approving both the original employment agreement, which hired Michael Ovitz as president, and the subsequent severance package valued at approximately $130 million. The court held that a failure to act in good faith is conduct beyond a duty of care violation. The court differentiated bad faith conduct from care violations protected by exculpation provisions by establishing that conduct not made in good faith is more blameworthy than a duty of care violation because it requires some level of intent. This analysis supports that some conduct even if arising from a duty of care analysis, can be so egregious as to render it a violation of the directors’ fi-
duciary responsibility to stockholders and thus the director should face liability.\(^{117}\) The duty to act in good faith is the vehicle to capture such liability.\(^ {118}\)

4. Bad Faith as a Condition for Oversight Liability

The example set in *In re the Walt Disney Co.*, where a director knowingly ignores their duties, most closely aligns with the test for a violation of the duty of oversight articulated in *In re Caremark*.\(^ {119}\) Failing to implement any reporting mechanism constitutes a knowing disregard of the directors’ required oversight responsibility—especially when choosing to disregard warning signs of non-compliance.\(^ {120}\) In *Stone v. Ritter*, the Delaware Supreme Court agreed with the classification of this conduct as an omission made in bad faith and reiterated that such a violation of the duty of good faith operates as a required element for oversight liability.\(^ {121}\)

The framework described in *Stone* restructured the dynamic of the duty of good faith by interpreting it as an element of the duty of loyalty rather than a different basis of liability altogether.\(^ {122}\) The court used the duty of good faith to construe a violation of the duty of oversight as a violation of the duty of loyalty.\(^ {123}\) If violating good faith is necessary to show a breach of the duty of oversight and that violation of good faith still serves as a subsidiary element of

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\(^ {117}\) See *Disney II*, 906 A.2d at 66 (describing bad faith as “more culpable,” suggesting that bad faith conduct is worse than a duty of care violation); Eisenberg, supra note 32, at 20 (describing the baseline definition of good faith); Nowicki, supra note 59, at 454 (explaining common understandings of good faith to include “honesty, lack of ill-intentions, fairness, full disclosure, and sincere attempts to honor an obligation”).

\(^ {118}\) *Disney II*, 906 A.2d at 66.

\(^ {119}\) See id. at 67 (describing bad faith conduct); *In re Caremark Int’l Inc. Derivative Litig.*, 698 A.2d 959, 969–70 (Del. Ch. 1996) (holding that directors are required to make a “a good faith attempt” to establish reporting mechanisms to ensure they are informed).

\(^ {120}\) See *In re Caremark*, 698 A.2d at 970 (interpreting the emphasis on suspicion in *Graham* as only one aspect of directors’ oversight responsibility); see also *Stone v. Ritter*, 911 A.2d 362, 370 (Del. 2006) (en banc) (defining “red flags” as facts demonstrating the board’s awareness of inadequate internal monitoring mechanisms (quoting *Stone v. Ritter*, C.A. No. 1570-N, 2006 WL 302558, at *2 (Del. Ch. Jan. 26, 2006), aff’d, 911 A.2d 362 (Del.)); *Graham v. Allis-Chalmers Mfg. Co.*, 188 A.2d 125, 129 (Del. 1963) (concluding there was no evidence to support the inference that directors knew of the employees’ illegal activities, but noting two reports from the Federal Trade Commission that employees had taken part in illegal antitrust activity previously); *In re Citigroup Inc. S’holder Derivative Litig.*, 964 A.2d 106, 111, 115 (Del. Ch. 2009) (holding that the plaintiffs’ reliance on the general health of the financial market as a warning sign was conclusory and an attempt to attach liability to directors for a decision that resulted poorly in hindsight).

\(^ {121}\) 911 A.3d at 369.

\(^ {122}\) Compare *Disney II*, 906 A.2d at 67 (describing a violation of the duty to act in good faith as fundamentally different from the duties of care and loyalty), with *Stone*, 911 A.3d at 369 (noting that the duty of good faith is an element capable of proving a breach of the duty of loyalty because “a failure to act in good faith requires conduct that is qualitatively different from, and more culpable than, the conduct giving rise to a violation of the fiduciary duty of care”).

\(^ {123}\) *Stone*, 911 A.3d at 369.
proving a breach of the duty of loyalty, then establishing oversight liability is a manifestation of conduct violating the duty of loyalty.\textsuperscript{124}

The court’s analysis in \textit{Stone} illustrated that the \textit{Caremark} claim is another avenue of proving a breach of the duty of loyalty without needing to show self-dealing.\textsuperscript{125} Although this framework set the legal foundation for using good faith as a vehicle to transform otherwise exculpable conduct as a care violation into a non-exculpable loyalty violation, \textit{Caremark} claims consistently failed until \textit{Marchand v. Barnhill}.\textsuperscript{126}

\textbf{II. \textit{Marchand v. Barnhill} Sharpened the Reality of Oversight Responsibilities}

On June 20, 2019, in \textit{Marchand v. Barnhill}, the Delaware Supreme Court held that Blue Bell’s directors breached a fiduciary duty by failing to fulfill their oversight responsibilities.\textsuperscript{127} In 2015, Blue Bell’s failure to contain the \textit{Listeria} outbreak in its plants led to \textit{Listeria}’s presence in products available to the public.\textsuperscript{128} Blue Bell recalled all products, closed production, and laid off

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\item \textsuperscript{124} Id.
\item \textsuperscript{125} Id.; Eisenberg, \textit{supra} note 32, at 72.
\item \textsuperscript{126} See \textit{In re Caremark Int’l Inc. Derivative Litig.}, 698 A.2d 959, 966 (Del. Ch. 1996) (describing a claim for a breach of the duty of oversight as one of the most difficult claims that a plaintiff can allege); \textit{QUINN}, \textit{supra} note 31 at 411 (noting how difficult it is to claim a breach of the duty of oversight under a \textit{Caremark} claim); see also Claudia A. Restrepo, Note, \textit{The Need for Increased Possibility of Director Liability: Refusal to Dismiss In re Wells Fargo & Co. Shareholder Derivative Litigation, a Step in the Right Direction}, 60 B.C. L. REV. 1689, 1693–94 (2019).
\item \textsuperscript{127} 212 A.3d 805, 824 (Del. 2019) (en banc) (holding that the plaintiff pled enough facts to support an inference that the board failed to establish a reasonable oversight system to manage the “most central consumer safety and legal compliance issue facing the company”). In 2019, in \textit{Marchand v. Barnhill}, the Delaware Supreme Court explained that the plaintiff, Jack L. Marchand II, was a stockholder suing defendant, John W. Barnhill, a director of Blue Bell, and other directors. Complaint at 4–5, \textit{Marchand}, 212 A.3d 805 (No. 2017-0586). Blue Bell, a Delaware corporation, was the nominal defendant. \textit{Id.} As nominal defendant, Blue Bell was a party to the suit because of its connection to the lawsuit, despite its lack of responsibility in the suit. \textit{Marchand}, 212 A.3d at 807 (identifying Blue Bell and directors as defendants); see \textit{Nominal Party, CORNELL L. SCH.\: LEGAL INFO. INST.}, https://www.law.cornell.edu/wex/nominal_party [https://perma.cc/VX6F-XFUS]. This Note focuses on the complaint’s allegation that the company’s directors breached the duty of oversight as established in \textit{In re Caremark International Inc. Derivative Litigation. Marchand, 212 A.3d at 807 (describing the \textit{Caremark} claim duty as a “duty of loyalty”). The complaint also alleged that Paul Kruse, the president and CEO, and Greg Bridges, a vice president, violated their duties of care and loyalty. \textit{Id.} All the defendants sought to dismiss the complaint for insufficiently pleading demand futility, which required the plaintiff to show that most of the board could not consider the demand to sue Kruse and Bridges without bias. \textit{Id.} at 807–08. The Delaware Court of Chancery granted the dismissal of the claims against Kruse and Bridges, holding that the plaintiff needed to show one more director’s bias to plead demand futility. \textit{Id.} at 808. The Chancery Court also dismissed the \textit{Caremark} claim, holding that the plaintiff sought to challenge the effectiveness of the oversight controls instead of meeting the \textit{Caremark} standard. \textit{Id.} The Delaware Supreme Court reversed the Chancery Court’s holdings. \textit{Id.}
\item \textsuperscript{128} \textit{Id.} at 807; see \textit{supra} note 2 and accompanying text (describing what the \textit{Listeria} outbreak entailed).
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employees. Tragically, three people died from the *Listeria* present in the company’s products.

The costs of the recall and the manufacturing shutdown ultimately created liquidity problems, which required a private equity investment that diluted stockholders’ share value and resulted in derivative litigation. The Delaware Supreme Court held that the plaintiff alleged sufficient facts to demonstrate a reasonable inference that Blue Bell’s board did not administer any monitoring system for the corporation’s compliance with food safety regulations, reversing the Chancery Court’s holding. This holding was the first instance in which the court did not dismiss the breach of a duty of oversight claim.

Signs of a potential food safety crisis began in 2009 when the U.S. Food and Drug Administration (FDA), Alabama Department of Health, and internal inspections conducted by Blue Bell reported several sources of contamination to management. Then, in 2013 and 2014, Blue Bell’s plant received positive

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131 *Marchand, 212 A.3d at 807*; Spivey et al., *supra* note 3.


133 *Marchand, 212 A.3d at 809*.

134 *Id.* at 811. In July 2009, a U.S. Food and Drug Administration (FDA) inspection of Blue Bell’s Texas facility uncovered condensation from pipes dripping into ice cream cartons and reported it to Kruse. *Id.* The FDA visited the Texas facility again in May 2010 and observed ten violations, including the same condensation drip. *Id.* Also, in March 2010, the Alabama Department of Health found improperly placed equipment and a damaged ceiling in the Alabama facility. *Id.* Another inspection in Alabama in July 2011 found additional health risks in the same location. *Id.* Finally, an inspection of the Oklahoma facility discovered inadequate controls against contamination. *Id.* Although this Note does not explore why the FDA did not intervene earlier to prevent the outbreak, it is noteworthy that the Food Safety Modernization Act (FSMA) had not been implemented at the time of the outbreak. Dianna Wray, *Blue Bell’s Listeria Problem Is a Sticky Mess*, DALL. OBSERVER (July 1, 2015), https://www.dallasobserver.com/news/blue-bells-listeria-problem-is-a-sticky-mess-7359432 [https://web.archive.org/web/20210516151634/https://www.dallasobserver.com/news/blue-bells-listeria-problem-is-a-sticky-mess-7359432] (observing that Congress passed the FSMA in 2010); see also 21 U.S.C. §§ 2201–2206 (entitling this subchapter as “Improving Capacity to Prevent Food Safety Problems”); *Food Safety Modernization Act (FSMA)*, FDA, https://www.fda.gov/food/guidance-regulation-food-and-dietary-supplements/food-safety-modernization-act-fsma [https://perma.cc/8UBZ-MJEV] (Jan. 4, 2021) (explaining the FSMA’s purpose to emphasize prevention of foodborne illness rather than reacting to such illnesses). The FDA introduced the FSMA to address the mostly preventable public health risk stemming from foodborne diseases, which impacts approximately forty-eight million people in the United States per year. *Food Safety Modernization Act (FSMA)*, *supra*. 
tests for *Listeria*. By February 2015, the *Listeria* problem extended to Blue Bell’s products. By March 2015, the *Listeria* infection reached consumers, causing illness in five people in Kansas and three in Texas. By the end of April, there were ten cases of the infection. After the complete recall, the FDA found significant food safety deficiencies in Blue Bell’s three manufacturing plants.

Section A of this Part explains the facts the plaintiff relied upon to sufficiently allege that the Blue Bell board breached its duty of oversight. Section B explores the importance the court in *Marchand* placed on the monoline nature of Blue Bell’s business and how this analysis informed subsequent court decisions regarding *Caremark* claims, such as the Delaware Court of Chancery’s 2019 decision in *In re Clovis Oncology, Inc. Derivative Litigation*.

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137 *Marchand*, 212 A.3d at 814; see *Listeria (Listeriosis)*, supra note 2 (explaining listeriosis infections). Pregnant women, people over sixty-five years old, and people with diminished immune systems are particularly vulnerable to a *Listeria* infection. *Listeria Infection*, supra note 2. There are a wide range of symptoms, varying from fever, nausea, chills, achiness, and diarrhea to symptoms resulting from the infection spreading to the nervous system, such as a headache, confusion, convulsions, a sense of imbalance, and a rigid neck. *Id.* The symptoms become more serious for the vulnerable groups. See *id.* (identifying symptoms for pregnant people and those with weaker immune systems). For example, pregnant women may suffer miscarriages, give birth prematurely, or experience a possibly lethal infection after the baby is born. *Id.*

138 *Multistate Outbreak of Listeriosis Linked to Blue Bell Creameries Products (Final Update)*, supra note 136.

139 *Marchand*, 212 A.3d at 814; see *Multistate Outbreak of Listeriosis Linked to Blue Bell Creameries Products (Final Update)*, supra note 136 (explaining the various investigations into the outbreak’s cause).

140 See infra notes 145–155 and accompanying text.

141 See infra notes 156–190 and accompanying text; see also *Marchand*, 212 A.3d at 809 (recognizing the first successfully alleged breach of duty of oversight); *In re Clovis Oncology, Inc. Derivative Litig.*, C.A. No. 2017-0222, 2019 WL 4850188, at *13 (Del. Ch. Oct. 1, 2019) (relying on *Marchand* to determine that the plaintiffs successfully stated a breach of duty of oversight claim).
A. Marchand v. Barnhill: Facts Supporting a Well-Pled Caremark Claim

Under a Caremark claim, a plaintiff alleging a breach of the duty of oversight has two options to demonstrate a board’s failure to meet its oversight responsibilities. First, a plaintiff can argue that the directors entirely failed to implement a monitoring system. Second, a plaintiff can assert that the board failed to observe an existing oversight system. Despite indications of a food safety problem, the Blue Bell board of directors remained unaware of the issue until after the first limited recall—two years after the first reported evidence of Listeria. In Marchand, the Delaware Supreme Court held that although Blue Bell had an internal sanitation compliance manual, both a failure to implement an oversight mechanism and a conscious disregard of warnings about the ensuing food safety problem satisfied Caremark because the claims met both options identified for plaintiffs to allege a failure to fulfill basic oversight responsibilities.

The board’s failure to institute the following oversight mechanisms made the directors susceptible to a Caremark claim: (1) a board committee managing food safety concerns, (2) a regular procedure requiring management to inform the board of food safety operations, (3) a systematic schedule by which the board examined food safety risks, and (4) a consistent discussion of food safety issues in board meeting minutes. These factors indicate the importance of board involvement in establishing and monitoring an oversight mechanism. An internal compliance manual is not enough when the board is not actively overseeing it.

Management’s knowledge and subsequent disregard of the food safety risks occurring in Blue Bell’s facilities extended to the board due to Paul

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142 In re Clovis, 2019 WL 4850188, at *13 (stating that the duty of oversight established in In re Caremark International Inc. Derivative Litigation provides two identifiable avenues for plaintiffs to plead a breach of the duty); see In re Caremark Int’l Inc. Derivative Litig., 698 A.2d 959, 969 (Del. Ch. 1996) (explaining that the board must in good faith implement a monitoring system, but noting it does not have to monitor it to the extent that the board must “ferret out wrongdoing”).

143 In re Clovis, 2019 WL 4850188, at *13.

144 Id. (describing the two options for pleading a Caremark claim).

145 Marchand, 212 A.3d at 812.

146 See id. at 822 (explaining the facts relevant to the court’s Caremark analysis). In 2018, in Marchand v. Barnhill, the Delaware Court of Chancery relied on the existence of a guidance manual prescribing procedures for sanitations to find that the board met the Caremark requirements for a monitoring system. C.A. No. 2017-0586, 2018 WL 4657159, at *17, *19 (Del. Ch. Sept. 27, 2018), rev’d, 212 A.3d 805 (Del. 2019). The Delaware Supreme Court rejected this analysis after noting that “routine regulatory requirements” are not generally “directed at the board.” Marchand, 212 A.3d at 823.

147 Marchand, 212 A.3d at 822.

148 Id. at 822–23 (emphasizing that compliance with FDA regulations at some level does not fulfill Caremark, which requires board level monitoring); Stone v. Ritter, 911 A.2d 362, 368 (Del. 2006) (en banc) (highlighting the board’s role in implementing internal controls).

149 Marchand, 212 A.3d at 823; QUINN, supra note 31 at 280.
Kruse’s position as chairman of the board and Blue Bell’s chief executive officer (CEO).\textsuperscript{150} The board’s meeting minutes showed no disclosure of reports, despite the fact that Kruse, in his capacity as CEO, had received reports of evidence from the FDA foreshadowing the upcoming \textit{Listeria} outbreak.\textsuperscript{151} Kruse’s role on the board and in management placed him in the unique position to correct the gap in the board’s oversight mechanisms because he was aware of the risks “intrinsically critical” to Blue Bell’s business but did not disclose them to the rest of the board.\textsuperscript{152} Despite the obvious importance of food safety to Blue Bell’s business as a food producer, however, the board did not have evidence that it regularly discussed food safety concerns.\textsuperscript{153}

The combination of these facts provided the court with sufficient evidence to demonstrate that Blue Bell’s board did not make a good faith effort to implement a reasonable monitoring and reporting process for the corporation’s “central compliance risks.”\textsuperscript{154} The critical importance of food safety to a corporation producing only ice cream, and the lack of a food safety monitoring system within Blue Bell, allowed the plaintiff to successfully plead a \textit{Caremark} claim.\textsuperscript{155}

\textbf{B. The Importance of the Industry Context and Inferring Intent}

In \textit{Marchand}, the Delaware Supreme Court emphasized the monoline nature of Blue Bell’s business model to infer the scienter required to breach a duty of good faith.\textsuperscript{156} Blue Bell’s business—the production of food—only has

\textsuperscript{150} \textit{Marchand}, 212 A.3d at 811. In his position as CEO, the FDA reported its results directly to Kruse. \textit{Id.}

\textsuperscript{151} \textit{Id.} at 811, 822 (noting that the FDA reported its results to Kruse, but noting that management had only disclosed favorable food safety information to the board despite the known reports illustrating the growing risk of contamination). The violations that the FDA reported to Kruse included reports of condensation falling into unfilled cartons, open containers of ingredients, and inadequate handwashing. \textit{Id.}

\textsuperscript{152} See \textit{id.} at 822 (demonstrating how the monoline nature of Blue Bell informed the \textit{Caremark} oversight expectation).

\textsuperscript{153} \textit{Id.} The essential nature of food safety was critical to the court’s analysis. See \textit{id.} at 824 (articulating that the bare minimum requirement of a \textit{Caremark} claim is ensuring that a monitoring system is in place to evaluate “central compliance risks” and that the board oversees such a system). If the board failed to monitor food safety, then any monitoring system in place was not reasonable. See \textit{id.} (suggesting a reasonable and adequate monitoring system requires oversight of critical compliance concerns).

\textsuperscript{154} \textit{Id.} at 824.

\textsuperscript{155} \textit{Id.} (noting that “[i]n Blue Bell’s case, food safety was essential and mission critical”).

\textsuperscript{156} See \textit{id.} at 809 (explaining that Blue Bell’s only product is ice cream, which makes food safety a critical compliance concern); \textit{Our Products}, BLUE BELL CREAMERIES, https://www.bluebell.com/our-products/ [https://perma.cc/KHB9-J84V] (listing Blue Bell’s products, which all have an ice cream base). Monoline describes those companies that focus on one product and become specialized in that specific service. Adam Hayes, \textit{Monoline}, INVESTOPEDIA, https://www.investopedia.com/terms/m/monoline.asp [https://perma.cc/UBB2-FZHP] (Feb. 10, 2021). In contrast, an example of a business that is not monoline is Procter & Gamble, which has a huge number of brands and various types of products. \textit{Brands}, PROCTER & GAMBLE, https://us.pg.com/brands/ [https://perma.cc/UB7G-982E].
one “central compliance” concern, the safety of its food.\textsuperscript{157} Blue Bell’s success, therefore, depended on consumers’ baseline confidence in the product’s safety.\textsuperscript{158} Emphasizing food safety as Blue Bell’s primary compliance concern, the court expanded upon \textit{In re Caremark International Inc. Derivative Litigation} by further defining what the board must do to assure they receive “appropriate” or “adequate” information.\textsuperscript{159} Where there is a central compliance concern, the board must receive reports on that issue to obtain the information required under \textit{In re Caremark}.\textsuperscript{160} After identifying the essential compliance requirements that Blue Bell’s board must monitor, the Delaware Supreme Court concluded that the complete absence of a food safety monitoring system sufficiently alleged a \textit{Caremark} claim.\textsuperscript{161}

As a result of food safety’s critical importance to Blue Bell’s business, the court could infer that maintaining food safety compliance was a known oversight duty for the board.\textsuperscript{162} The inference that the board knew of its duty allowed the court to conclude that the board did not make a good faith effort to uphold its duty.\textsuperscript{163} Inferring knowledge of the importance of food safety aided the court in finding the board’s conscious disregard of its responsibility.\textsuperscript{164} This analysis combined the duty of care with good faith by acknowledging that a reasonably prudent director would oversee a compliance issue, particularly where only one central compliance issue exists.\textsuperscript{165} Even though this inference of knowledge arguably would meet the difficult gross negligence standard for

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\textsuperscript{157} \textit{Marchand}, 212 A.3d at 809.

\textsuperscript{158} \textit{Id.}

\textsuperscript{159} \textit{Compare id.} at 824 (requiring the board to institute a “reasonable system of monitoring and reporting about the corporation’s central compliance risks”), \textit{with In re Caremark Int’l Inc. Derivative Litig.}, 698 A.2d 959, 970 (Del. Ch. 1996) (defining the duty of oversight as requiring directors to implement an oversight mechanism that reports “appropriate information”). Analyzing these cases together, the court in \textit{Marchand} identified “central compliance risks” as required for a successful \textit{Caremark} claim. \textit{Compare Marchand}, 212 A.3d at 824 (emphasizing essential compliance concerns), \textit{with In re Caremark}, 698 A.2d at 970 (requiring directors to oversee “appropriate information”).

\textsuperscript{160} \textit{In re Caremark}, 698 A.2d at 970 (explaining that directors have a responsibility to monitor certain information).

\textsuperscript{161} \textit{Marchand}, 212 A.3d at 824.

\textsuperscript{162} \textit{See id.} (describing food safety as “mission critical”); \textit{see also id.} at 822 (explaining that an inference that a board did not make any effort to remain informed of compliance concerns “intrinsically critical” to operations supports a conclusion that the board did not try in good faith pursuant to \textit{Caremark}).

\textsuperscript{163} \textit{Id.} at 824; \textit{see supra} notes 56–76 and accompanying texts (describing intentionality and the moral aspects of good faith).

\textsuperscript{164} \textit{Id.} at 824; \textit{see supra} notes 56–76 and accompanying texts (explaining the relationship between intentionality and good faith).

\textsuperscript{165} \textit{See Marchand}, 212 A.3d at 824 (explaining that the plaintiff met the pleading burden after relying on records from board meetings to support a fair inference that directors failed to implement a system to ascertain Blue Bell’s compliance with the most obvious safety issue for the company—food safety).
duty of care claims, the exculpation provisions prevent monetary liability for duty of care violations. 166 Thus, the court turned its focus to the board’s lack of good faith. 167

The court’s acknowledgment that In re Caremark required the board to exert a good faith effort to act in accordance with the duty of care importantly reclaimed the duty of care as a means for establishing liability. 168 Although the court could not attach liability for the failure to exercise due care, the failure to try to exercise care in good faith allowed the care claim to convert into a loyalty claim. 169 The court relied on the fact that Blue Bell made only one product—ice cream—and consequently had only one essential compliance concern—food safety—to marry the duty of care and the duty of loyalty to create a non-exculpable duty of oversight. 170 The good faith requirement made this marriage possible; without using the monoline business model to infer knowledge, the care claim could not transform into a successful Caremark claim. 171

Shortly after Marchand, in October 2019, in In re Clovis Oncology, Inc. Derivative Litigation, the Delaware Court of Chancery emphasized the importance of a company’s monoline services when it denied the corporation’s motion to dismiss a complaint alleging that the directors violated their oversight responsibilities. 172 The derivative cause of action in In re Clovis alleged that the directors breached their fiduciary obligations by failing to oversee the

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166 DEL. CODE ANN. tit. 8, § 102(b)(7) (West 2020); see Marchand, 212 A.3d at 809, 824 (concluding that the directors “consciously failed” their duty of oversight). In Marchand, the Delaware Supreme Court’s attribution of consciousness to the directors’ breach of a fiduciary duty reflects the conscious omission in the definition of gross negligence. Compare Marchand, 212 A.3d at 809 (determining that the directors consciously disregarded their oversight duties, which could theoretically meet the high bar of gross negligence for breach of care claims except for the elimination of damages resulting from an exculpation provision), with Gross Negligence, BLACK’S LAW DICTIONARY, supra note 38 (describing gross negligence as a “conscious . . . omission”), and supra note 38 and accompanying text (defining gross negligence).

167 Marchand, 212 A.3d at 824.

168 See id. (explaining that at a minimum, In re Caremark must require corporate directors to fulfill their duty of care with a good faith effort, otherwise the directors would violate their duty of loyalty).

169 See id.

170 See id. at 809, 813 (identifying food safety as Blue Bell’s critical compliance issue and describing directors’ lack of care to monitor it). The Delaware court highlighted that Blue Bell did not have three key components of an appropriate oversight mechanism: (1) a committee responsible for monitoring food, (2) a regular portion of board meetings dedicated to food safety, and (3) a procedure requiring compliance reports’ presentation to the board. Id. at 813. These failures have a shared quality with care claims: the board’s failure to inform itself. See id.; supra note 37 and accompanying text (noting the importance of acting on an informed basis when fulfilling the duty of care).

171 See Marchand, 212 A.3d at 809 (relying on Blue Bell’s monoline business structure to infer directors’ consciousness of their disregard of a duty).

clinical trial for the primary drug in development at Clovis Oncology, Inc. (Clovis). The court concluded that the plaintiffs, stockholders of Clovis, sufficiently pled facts showing that the directors were substantially likely to face liability for a breach of their oversight obligations. Like Blue Bell’s business in Marchand, Clovis’s business as a pharmaceutical company was monoline, and, as a result, the court emphasized that the central compliance concern for the company would be drug safety. The plaintiff demonstrated that Rociletinib (Roci), the drug at the clinical trial stage, was essential to the corporation’s success. Using the analysis articulated in Marchand, the court in In re Clovis inferred that the board knew the oversight responsibilities associated with drug safety, particularly in the context of a clinical trial, and consciously disregarded them. This disregard of a known duty constituted a breach of the duty of good faith, allowing the court to transform a care claim into a breach of loyalty under Caremark.

Unlike Blue Bell, which did not have a committee dedicated to food safety, Clovis had two subcommittees dedicated to compliance issues. Although the court in Marchand relied on the absence of an oversight committee as evidence of Blue Bell’s breach of its oversight duties, the court in In re Clovis noted that the defendants on the committees affirmatively knew the FDA standards required for drug approval and disregarded them. When the board

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173 Id. In 2019, in In re Clovis Oncology, Inc. Derivative Litigation, the Delaware Court of Chancery noted that Clovis Oncology, Inc. (Clovis) had only one drug in development that showed promise—Rociletinib (Roci). Id. Roci is a treatment for lung cancer. Id.
174 Id. According to the Delaware Supreme Court 1993 case Rales v. Blasband, when directors face a substantial likelihood of liability for a breach of the duty of loyalty, plaintiffs can successfully allege the futility of making demand on the board and thus can defeat the business judgment presumption. 634 A.2d 927, 936 (Del. 1993) (describing that a majority of directors must face a substantial likelihood of liability for the court to deem them interested, such that the plaintiff’s demand is futile); see supra note 47 and accompanying text (describing the Rales standard).
175 In re Clovis, 2019 WL 4850188, at *1.
176 Id. (finding that the plaintiffs sufficiently pleaded that Roci was critical to Clovis’s operation).
177 See id. (citing Marchand v. Barnhill, 212 A.3d 805, 809, 822 (Del. 2019) (en banc)) (noting Clovis’s dependence on Roci’s success, and then describing the board’s ignorance of warning signs as support for a well-pled Caremark claim).
178 Id. at *7 (describing the board’s failure to respond to warning signs as placing “hands on their ears to muffle the alarms” about the compliance failure).
179 Id. at *2 (highlighting the Nominating and Corporate Governance Committee and the Audit Committee as relevant to Clovis’s oversight system). The Nominating and Corporate Governance Committee’s responsibility was to advance and monitor Clovis’s compliance with regulatory requirements. Id. The Audit Committee reviewed Clovis’s earnings reports before releasing them to the public. Id.
180 Id. at *5 (“Indeed, each of the Board Defendants appreciated the FDA ‘could only make its decision . . . to approve Roci based on [] confirmed responses.’” (alteration in original) (quoting Supplemental Consolidated Verified Shareholder Derivative Complaint ¶¶ 99–100, id. (No. 2017-0222)). Despite the FDA requirements, Clovis calculated Roci’s success rate based partially on unconfirmed responses. Id. at *6. Confirmed responses require tumor shrinkage to not show in the first scan
learned that the clinical trial reported unconfirmed responses in defiance of the regulatory requirements, the board did nothing to correct the process. In light of these facts, the court in *In re Clovis* held that the board disregarded warning signs that Clovis violated the clinical trial protocol, and denied the board’s motion to dismiss.

The opinions in *Marchand* and *In re Clovis* clarified that boards have more onerous oversight responsibilities when the corporations they manage operate in an industry with regulatory requirements for their essential business operations. This emphasis enhanced the *In re Caremark* standard for alleging the breach of the duty of oversight because directors managing a corporation with a monoline business model have a heightened oversight obligation. The courts even differentiated the traditional *In re Caremark* standard from the standard applied in the monoline context, noting that even in a monoline industry, a *Caremark* claim does not require omniscience. By acknowledging that *In re Caremark* imposes different requirements for monoline corporations, the court expressed a willingness to make *Caremark* claims more feasible for plaintiffs, at least in circumstances similar to that of *Marchand* and *In re Clovis*.

In *Marchand* and *In re Clovis*, the courts considered two new factors when evaluating *Caremark* claims: (1) whether the corporation was monoline and (2) whether the corporation’s primary industry was heavily regulated. These two factors led the court to deny the motions to dismiss, opening the door to the possibility of Blue Bell and Clovis directors facing liability for

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181 *Id.* at *5* n.68. Unconfirmed responses, in contrast, do not require a second scan. *Id.*

182 *Id.* at *6.

183 *Id.* at *11* (denying the motion to dismiss because the complaint successfully alleged facts that Clovis’s board ignored warning signs that Clovis violated the clinical study requirements); see infra note 202 and accompanying text (explaining the Response Evaluation Criteria in Solid Tumors (RECIST) protocol).

184 *Id.* at *13* (remarking that the *Marchand* decision requires the board to “rigorously exercise[]” its oversight responsibility when external regulatory requirements govern the company’s essential operations).

185 *Id.*

186 See *Marchand v. Barnhill*, 212 A.3d 805, 824 (Del. 2019) (en banc) (concluding that the plaintiff successfully pled a *Caremark* claim because of Blue Bell’s monoline structure); see also *In re Clovis*, 2019 WL 4850188, at *10 (denying the defendants’ motion to dismiss because the court could infer that the directors knowingly breached their oversight duties due to the clear importance of Clovis’s adherence to the clinical trial protocols set out by the FDA).

187 See *Marchand*, 212 A.3d at 810, 824 (relying on Blue Bell’s monoline business and the significance of complying with FDA regulations as factors in finding a well-pled *Caremark* claim); *In re Clovis*, 2019 WL 4850188, at *1 (explaining the importance of the directors’ duty of oversight as “especially so when a monoline company operates in a highly regulated industry”).
their failure to oversee their respective corporations. Whether courts will continue to look for circumstances in which directors should have enhanced oversight responsibilities remains an open question. The court’s treatment of the plaintiffs’ allegations in In re the Boeing Co. Derivative Litigation will shed light on the upper and lower boundaries of the Marchand factors when a different regulator governs a more multifaceted corporation.

III. UNDERSTANDING THE BOUNDARIES OF MARCHAND V. BARNHILL THROUGH IN RE THE BOEING CO. DERIVATIVE LITIGATION

In 2019, in Marchand v. Barnhill, the Delaware Supreme Court explained that Blue Bell made only one product and had one primary regulator, the FDA. In 2019, in In re Clovis Oncology, Inc. Derivative Litigation, the Delaware Court of Chancery noted that Clovis produced multiple drugs, of which only one showed promise, and also faced the FDA as its primary regulator. Part A of this Section explores the differences between the companies at issue in Marchand and In re Clovis to highlight the boundaries of the monoline and heavily regulated factors that courts consider when plaintiffs bring a Caremark claim. Part B considers the plaintiffs’ allegations in In re the Boeing Co. Derivative Litigation as a case study for the application of Marchand and ult-

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188 Marchand, 212 A.3d at 820 (acknowledging the difficulty in pleading Caremark claims, and reversing the Delaware Court of Chancery’s dismissal of the plaintiff’s claim); In re Clovis, 2019 WL 4850188, at *10 (denying defendants’ motion to dismiss the Caremark claim).

189 See Marchand, 212 A.3d at 824 (noting that commentators wished the duty of oversight required more from directors). The significant challenges that plaintiffs historically have faced when alleging Caremark claims suggests that another expansion of oversight responsibility will not arrive soon. Haugh, supra note 6, at 613 (citing Stone v. Ritter, 911 A.2d 362, 372 (Del. 2006) (en banc)) (noting in Stone v. Ritter, the Delaware Supreme Court first explicitly “endorsed” the Caremark claim and recognized it as one of the most difficult claims available to plaintiffs); Mitchell, supra note 6, at 248–49 (describing the difficulty of succeeding on a Caremark claim, and then attributing it to Delaware courts’ concern with “distort[ing] the risk/reward calculus of corporate directors leading to a dearth of qualified candidates willing to serve”).

190 See generally Verified Amended Consolidated Complaint, supra note 19, at 9 (alleging that the board of directors at Boeing failed to diligently oversee the corporation, thus creating a Caremark claim). Notably, the court is only bound by the Delaware Supreme Court’s decision in Marchand, not the Court of Chancery’s decision in In re Clovis. See Vertical Stare Decisis, BLACK’S LAW DICTIONARY, supra note 38 (explaining that lower courts must follow decisions of higher courts in the same jurisdiction). Compare Marchand, 212 A.3d at 805 (noting that the plaintiff appealed to the Delaware Supreme Court), with In re Clovis, 2019 WL 480188, at *1 (confining the decision to narrow facts).

191 Marchand, 212 A.3d at 809; see also Inter-mktg. Grp. USA, Inc. v. Armstrong, No. 2017-0030, 2020 WL 756965, at *11, *15 (Del. Ch. Jan. 31, 2020) (relying upon the emphasis placed on food safety in Marchand as Blue Bell’s central compliance concern to find that the defendants faced a substantial likelihood of liability for violating their duty of oversight); In re LendingClub Corp. Derivative Litig., C.A. No. 12984, 2019 WL 5678578, at *9 n.59 (Del. Ch. Oct. 13, 2019) (summarizing Marchand, but finding it inapplicable to the plaintiffs claim against directors for violating their oversight duty because the defendants had an oversight mechanism in place).

192 2019 WL 4850188, at *1.

193 See infra notes 197–207 and accompanying text.
mately determines that the plaintiffs’ claim should survive a motion to dismiss.\footnote{See infra notes 208–264 and accompanying text.} Moreover, the analysis seeks to further parse the boundaries of the monoline and heavily regulated factors when courts consider a Caremark claim.\footnote{See infra notes 208–264 and accompanying text.} Finally, Part C identifies when a Caremark claim will fall within the boundaries of the monoline and heavily regulated factors of Marchand and that claim is more likely to survive a motion to dismiss.\footnote{See infra notes 265–274 and accompanying text.}

A. The Boundaries of Marchand v. Barnhill

At the very least, Marchand indicated that when a company produces one product governed by one regulator, the compliance concerns imposed by that regulator are mission critical, such that the board must at a minimum ensure it monitors that one compliance issue.\footnote{See Marchand v. Barnhill, 212 A.3d 805, 809, 810, 811, 822, 824 (Del. 2019) (en banc) (explaining that the board’s failure to attend to the critical compliance concern identified by the FDA allows for the inference that directors did not make a good faith effort to fulfill their duty of oversight). In 2019, in Marchand v. Barnhill, the food safety regulations imposed by the FDA allowed the Delaware Supreme Court to infer that the board knew of its duty to oversee food safety concerns. See id. at 810 (describing the FDA’s role in relation to Blue Bell’s business). Blue Bell’s production of only one product made the board’s requisite attention to the FDA compliance measures “obvious,” enhancing the court’s inference that the directors knew of their responsibility to oversee food safety. See id. at 810–11 (explaining how Blue Bell’s monoline structure made food safety of noticeable importance).} When the board failed to ensure that the product met the regulator’s requirements, the board breached its duty of oversight.\footnote{Id. at 822; see also Inter-marketing Group USA, Inc. v. Armstrong, No. 2017-0030, 2020 WL 756965, at *11 (Del. Ch. Jan. 31, 2020) (identifying “pipeline integrity and maintenance” as an essential compliance concern for Plains All American Pipeline, L.P. (Plains), which is a dominant pipeline operator in North America). In 2020, in Inter-marketing Group USA, Inc. v. Armstrong, the Delaware Court of Chancery explained that the plaintiff alleged that the directors of Plains violated their oversight duty by knowingly failing to monitor an essential compliance concern, the soundness of the pipelines. 2020 WL 756965, at *15. Plains was a partnership that “own[ed]” thousands of miles of pipelines.” Id. at *1. Consequently, the duty of good faith was contractual in nature rather than based on fiduciary responsibilities. Id. at *4. The court relied on Marchand, treating the contractual duty as if it were based in fiduciary principles. Id. at *15; see also Marchand, 212 A.3d at 816, 822 (providing a basis for the court in Inter-marketing Group).} Where a company produces more than one product, the application of the Marchand decision is less clear.\footnote{Compare Marchand, 212 A.3d at 810 (reversing the dismissal of the complaint because after establishing food safety as intrinsically important, the plaintiff pled sufficient facts to allow for the inference that the board failed to adequately observe any oversight or reporting system for food safety issues), with Inter-marketing Grp., 2020 WL 756965, at *11 (establishing pipeline structure as essential for Plains’s operations), and In re Clovis Oncology, Inc. Derivative Litig., No. 2017-0222, 2019 WL 4850188, at *1 (Del Ch. Oct. 1, 2019) (treating Clovis as a monoline company because Roci showed such promise that it was essential to Clovis’s function). The court in Inter-marketing Group identified pipeline structure as mission critical for Plains even though the corporation offered services beyond transportation via pipelines. 2020 WL 756965, at *11; see also What We Do, PLAINS ALL AM., https://}
that a corporation does not have to only produce one product for *Marchand* to apply.\(^{200}\) Although Clovis had multiple drugs in production, Roc\(\text{i}\) showed the most promise and was the subject of a clinical trial.\(^{201}\) Clovis’s dependence on Roc\(\text{i}\) as the only promising drug in its pipeline made compliance with the FDA during the clinical trial mission critical.\(^{202}\) In both *Marchand* and *In re Clovis*, the board attended to only one vital compliance concern.\(^{203}\)

The court’s determination that a company is monoline and heavily regulated informs what compliance concerns are mission critical for the board to oversee.\(^{204}\) When the *Marchand* factors lead the court to conclude that more than one mission critical compliance concern exists, the court is not likely to impose the

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\(^{200}\) *In re Clovis*, 2019 WL 4850188, at *1, *2 (describing Roc\(\text{i}\) as one drug among Clovis’s products). *But see Marchand*, 212 A.3d at 810 (emphasizing that Blue Bell made only one product). In August 2020, the Delaware Court of Chancery reiterated that *Marchand* could apply to more “complex” corporations in *Teamsters Local 443 Health Services & Insurance Plan v. Chou*. C.A. No. 2019-0816, 2020 WL 5028065, at *18 (Del. Ch. Aug. 24, 2020). In *Teamsters Local 443 Health Services & Insurance Plan*, the complexity stemmed from the company’s structure, including manufacturing, distribution, and packaging of drugs. *Id.* There, the court denied the defendants’ motion to dismiss despite the defendants’ increased complexity compared to Blue Bell and Clovis. *Id.* The court determined that the plaintiffs’ allegation that the defendants’ adherence to FDA regulations was the corporation’s primary regulatory concern was sufficient to defeat the motion to dismiss. *Id.*

\(^{201}\) *In re Clovis*, 2019 WL 4850188, at *2.

\(^{202}\) *Id.* at *1, *4–5 (describing Roc\(\text{i}\)’s success as contingent upon FDA approval, and noting that the directors were aware of the FDA’s requirement that confirmed responses, not unconfirmed responses, should form the results presented to the FDA for approval consideration). The clinical trial for Roc\(\text{i}\) utilized the RECIST protocol. *Id.* at *4 & n.63; *see also CTR. FOR INT’L BLOOD & MARROW TRANSPLANT RSCI., RETIRED FORMS MANUAL: RESPONSE EVALUATION CRITERIA IN SOLID TUMORS (RECIST) app. n (2009), https://www.cibmtr.org/DataManagement/TrainingReference/Manuals/DataManagement/Documents/appendix-n.pdf [https://perma.cc/26HB-RPS2] (describing criteria to measure the confirmation of a response). Confirming responses requires the performance of multiple assessments to help avoid overestimation of observed response rates. See generally NAT’L CANCER INST., CANCER THERAPY EVALUATION PROGRAM, RESPONSE EVALUATION CRITERIA IN SOLID TUMORS (RECIST) QUICK REFERENCE, http://ctep.cancer.gov/protocolDevelopment/docs/quickrcst.doc [https://perma.cc/6S6Q-259T].

\(^{203}\) *Compare Marchand*, 212 A.3d at 822, 824 (considering only food safety as “intrinsically critical” to Blue Bell’s business as an ice cream producer), *with In re Clovis*, 2019 WL 4850188, at *14 (explaining that the clinical trial for Roc\(\text{i}\) and its applicable regulations were an essential compliance concern for Clovis even as the company had other compliance concerns). The Delaware Court of Chancery emphasized the importance of a singular compliance concern in *Teamsters Local 443 Health Services & Insurance Plan*, even where the corporation might have other lines of business. *See* 2020 WL 5028065, at *18 (explaining how a dominant compliance concern can be sufficient even in a more complex corporation).

\(^{204}\) *Marchand*, 212 A.3d at 809, 810 (highlighting Blue Bell’s monoline structure and the FDA’s extensive regulatory requirements); *In re Clovis*, 2019 WL 4850188, at *1 (emphasizing that the directors’ duty to institute a monitoring system is particularly important in the context of a “monoline company operat[ing] in a highly regulated industry”).
more onerous oversight burden articulated in Marchand.205 There, the existence of a singular mission critical compliance concern allowed the Delaware Supreme Court to deem the oversight responsibility so obvious that the board knew of its duty to monitor it.206 Consequently, where more than one mission critical compliance concern exists, a knowledge inference becomes more attenuated.207

B. The In re the Boeing Co. Case Study

The stockholder derivative complaint, filed in Delaware in February 2021, In re the Boeing Co. Derivative Litigation alleged that Boeing’s board of directors (1) consciously failed to adequately oversee the 737 MAX airplane development and (2) failed to adjust their oversight activity after the first 737 MAX crash.208 The 737 MAX design uses engines placed higher and closer to the front of the plane, which is in contrast with older engine iterations that have engines further to the back of the aircraft.209 This repositioning resulted in a risk of engine stall, which Boeing attempted to remedy with the development of the Maneuvering Characteristics Augmentation System (MCAS).210 Boeing

205 In re Caremark Int’l Inc. Derivative Litig., 698 A.2d 959, 967 (Del. 1996) (highlighting that claims for a breach of the duty of oversight are potentially the hardest claims for a plaintiff to win in corporate law); South v. Baker, 62 A.3d 1, 25 (Del. Ch. 2012) (“Caremark claims are difficult to plead and harder to prove.”); In re Citigroup Inc. S’holder Derivative Litig., 964 A.2d 106, 125 (Del. Ch. 2009) (describing Caremark claims as difficult, and noting that the requirements to demonstrate bad faith are even more difficult than establishing gross negligence).

206 See Marchand, 212 A.3d at 821 (explaining that when the plaintiffs show that the board failed to monitor a mission critical concern, the court can infer that the board did not make a good faith effort to implement a monitoring system).

207 See id. 821–22 (noting the deference afforded to boards under a Caremark claim because plaintiffs failed to plead bad faith, but finding that the facts supported the inference that the board did not monitor an essential compliance issue, which allowed for the inference that the board made no good faith effort to implement a monitoring system).

208 See generally Verified Amended Consolidated Complaint, supra note 19, at 3–5 (providing facts alleging that the board abandoned its oversight responsibilities). There are minimal redactions in the consolidated complaint, which the plaintiffs filed in 2021, two years after the plaintiffs filed original complaints separately. Letter to Counsel at 5, In re the Boeing Co. Derivative Litig., C.A. No. 2019-0907 (Del. Ch. filed Feb. 1, 2021), 2021 WL 392851 (explaining that only employees who reported anonymously must remain redacted). See generally Public Version of the Verified Stockholder Derivative Complaint, supra note 17 (showing few redactions). The complaint provides enough facts to compare the allegations against Boeing with the allegations against Blue Bell and Clovis. Compare Public Version of the Verified Stockholder Derivative Complaint, supra note 17, at 23–28 (alleging both a lack of an existing oversight system and a failure to observe red flags about non-compliance), with Marchand, 212 A.3d at 809 (alleging that Blue Bell had no committee dedicated to overseeing food safety and ignored warning signs indicating Listeria), and In re Clovis, 2019 WL 4850188, at *1 (alleging that the Clovis board knew the clinical trial was not complying with reporting requirements and ignored such red flags). The defendants include Boeing’s board of directors, Boeing nominally, and Boeing officers. Verified Amended Consolidated Complaint, supra note 19, at 11, 16.

209 Verified Amended Consolidated Complaint, supra note 19, at 57–58; see also Public Version of the Verified Stockholder Derivative Complaint, supra note 17, at 3.

210 Verified Amended Consolidated Complaint, supra note 19, at 58. The new engine position upset the 737 MAX’s aerodynamic stability, creating the potential for an engine stall because of the
intended the software to automatically correct the aircraft by adjusting the position of the plane’s nose.\textsuperscript{211} The complaint alleged that Boeing’s oversight failures included absent safety monitoring in board meetings, a pattern of insufficient training manuals, implementation of the MCAS despite concerns, and inadequate pilot training with respect to intervening after the MCAS triggered.\textsuperscript{212} The board made these decisions despite more than two hundred incident reports about the sensors that triggered MCAS were reported to the Federal Aviation Administration (FAA).\textsuperscript{213} The complaint further alleged that the resulting interruption in airflow over the plane’s wings. Public Version of the Verified Stockholder Derivative Complaint, supra note 17, at 12. The Maneuvering Characteristics Augmentation System (MCAS) software usurped control from pilots, who could not manually correct for the issue as they would in prior models of the 737 plane. Verified Amended Consolidated Complaint, supra note 19, at 70.

\textsuperscript{211} Verified Amended Consolidated Complaint, supra note 19, at 58, 61.

\textsuperscript{212} Id. at 9, 26, 29, 43, 51, 56, 58–59. Testing the MCAS and training and informing pilots was important for the development of the 737 MAX for a myriad of reasons. See id. at 65 (noting that MCAS was not effectively described in the pilots’ foremost manual); see Public Version of the Verified Stockholder Derivative Complaint, supra note 17, at 14, 15 (explaining the significance of not informing pilots of MCAS, and noting Boeing’s awareness of the MCAS design flaws). For example, Boeing initially designed the MCAS to rely on two angles of attack (AOA) sensors, but the final iteration relied solely on one AOA sensor with a slower activation speed. Verified Amended Consolidated Complaint, supra note 19, at 6, 59; Public Version of the Verified Stockholder Derivative Complaint, supra note 17, at 15. The lower activation speed increased the likelihood that the MCAS would engage. Verified Amended Consolidated Complaint, supra note 19, at 60; Public Version of the Verified Stockholder Derivative Complaint, supra note 17, at 15. The warning system that indicated to the pilots that the MCAS became engaged did not reflect the use of only one AOA sensor; instead, the warning system reflected the earlier design, which had two AOA sensors. See Verified Amended Consolidated Complaint, supra note 19, at 67–68 (noting that the warning light failed because it was designed to rely on two AOA sensors, and capturing Southwest Airlines’ outrage that an operative warning system was offered only as an add-on). The warning would only show pilots when two AOA sensors disagreed. Id. Consequently, the MCAS standard reliance on only one AOA sensor would never trigger the warning. Id.; see also Dominic Gates, Long Before First 737 MAX Crash, Boeing Knew a Key Sensor Warning Light Wasn’t Working, but Told No One, SEATTLE TIMES, https://www.seattletimes.com/business/boeing-aerospace/long-before-first-737-max-crash-boeing-knew-a-key-sensor-warning-light-wasnt-working-but-told-no-one/ [https://perma.cc/2ZCD-XF4R] (May 5, 2019) (explaining the significance of the warning light problem). The predictable failure of the warning system, coupled with the automatic engagement of the MCAS software, made pilots’ unawareness of the changes to the MCAS especially problematic. See Verified Amended Consolidated Complaint, supra note 19, at 67–68, 81 (explaining the strangeness of “the plane automatically and repeatedly engaging an automated system while in manual flight mode” (emphasis added)); Public Version of the Verified Stockholder Derivative Complaint, supra note 17, at 13, 14 (noting that the software’s design took control away from the pilots, who could only disable MCAS if they knew of its existence). Regardless of whether there were one or two AOA sensors, the MCAS software did not appear in the 737 MAX’s Flight Crew Operations Manual. Verified Amended Consolidated Complaint, supra note 19, at 14.

\textsuperscript{213} Verified Amended Consolidated Complaint, supra note 19, at 60 (demonstrating the risk attributed to the sensors because of their frequent failure); see also Curt Devine & Drew Griffin, Boeing Relied on Single Sensor for 737 Max That Had Been Flagged 216 Times to FAA, CNN, https://www.cnn.com/2019/04/30/politics/boeing-sensor-737-max-faa/index.html [https://perma.cc/MR45-4XCW] (Apr. 30, 2019). This Note does not extensively address the role of the FAA’s oversight failures. Connor Raso, Boeing Crisis Illustrates Risk of Delegated Regulatory Authority, BROOKINGS INST. (Dec.
board failed to investigate and monitor the safety risks in the 737 MAX’s design after the first crash. Applying Marchand to these facts, the Delaware Court of Chancery is likely to deny a motion to dismiss because Boeing operates as a monoline corporation in an industry that has a single primary regulator imposing regulatory compliance standards. Subsection 1 of this Section evaluates whether the facts of In re the Boeing Co. satisfy the Marchand requirement for a heavily regulated industry. Subsection 2 presents two ways to apply the monoline requirement in Marchand to In re the Boeing Co., concluding that one interpretation would likely result in the court denying Boeing’s motion to dismiss. Finally, Subsection 3 completes the Caremark claim analysis after concluding that Boeing meets both the monoline and heavily regulated prongs of Marchand.

18, 2019), https://www.brookings.edu/research/boeing-crisis-illustrates-risks-of-delegated-regulatory-authority/[https://perma.cc/8GKK-KBSU] (noting that the FAA certified the plane as safe). Nonetheless, the FAA’s delegation of compliance responsibilities could support the allegation that the board knew of its oversight responsibilities and consciously disregarded them. See id. (explaining that a key aspect of FAA’s certification related to the delegation of safety certification responsibility to Boeing); see also Andy Pasztor & Andrew Tangel, Boeing Withheld Information on 737 Model, According to Safety Experts and Others, WALL ST. J., https://www.wsj.com/articles/boeing-withheld-information-on-737-model-according-to-safety-experts-and-others-1542082575 [https://perma.cc/7E63-7GYM] (Nov. 13, 2018) (reporting that Boeing withheld information about the MCAS from pilots, safety experts, and the FAA); supra note 63 and accompanying text (describing the role of the duty of good faith, and enhancing the argument that the board did not make a good faith effort to monitor safety risks). Alternatively, Boeing could use the FAA’s delegation of compliance controls to assign culpability to the FAA instead of Boeing. See Raso, supra (explaining that Congress authorized the FAA to delegate inspections to Boeing if the FAA monitored Boeing’s adherence to the inspection requirements).

214 Verified Amended Consolidated Complaint, supra note 19, at 4–5, 7–8, 31, 79 (noting that the board prioritized the company’s public relations before investigating whether the company had safety mechanisms in place). In 2020, the Delaware Chancery Court in Hughes v. Xiaoming Hu took issue with a board’s failure to address a critical compliance concern with urgency. C.A. No. 2019-0112, 2020 WL 1987029, at *14–15, *18 (Del. Ch. Apr. 27, 2020). There, the court denied the defendants’ motion to dismiss, citing the Audit Committee’s failure to meet to discuss the issue until two months after the disclosure of the compliance concern. Id. at *14. Compare id. (denying a motion to dismiss even though a relevant committee existed to oversee compliance with financial reporting), with Verified Amended Consolidated Complaint, supra note 19, at 29 (noting that no relevant oversight committee existed until after both 737 MAX crashes).

215 See Marchand v. Barnhill, 212 A.3d 805, 809 (Del. 2019) (en banc) (describing the significance of regulatory compliance to Blue Bell’s monoline business); In re Clovis Oncology, Inc. Derivative Litig., No. 2017-0222, 2019 WL 4850188, at *1 (Del Ch. Oct. 1, 2019) (emphasizing the importance of monoline operations and the extent of regulatory requirements in the relevant industry as important to determining whether a Caremark claim can survive a motion to dismiss).

216 See infra notes 219–231 and accompanying text.

217 See infra notes 232–254 and accompanying text.

218 See infra notes 255–264 and accompanying text.
1. Boeing Is Subject to an External Regulator in a Heavily Regulated Industry

Boeing easily satisfies the heavily regulated factor established in Marchand because of the requirements imposed by the FAA.\(^{219}\) Akin to how consumers relied on the base assumption that Blue Bell ice cream was safe to eat, airlines and passengers relied on the base assumption that the 737 MAX jets were safe to fly.\(^{220}\) Such assumptions about safety result from confidence that products will not reach the market without adhering to regulatory regimes certifying such safety.\(^{221}\) Boeing needed the FAA’s certification to sell the 737 MAX planes.\(^{222}\) Consequently, the FAA operated as a primary external regulator essential to Boeing’s success.\(^{223}\) The role of the FAA as Boeing’s primary regulator is also apparent in a settlement agreement between Boeing and the FAA in 2015, where Boeing agreed to adjust its oversight mechanisms to more effectively comply with the FAA.\(^{224}\) A twelve million dollar fine accompanied this settlement agreement, indicating the stakes associated with the FAA’s regulation and signaling Boeing’s knowledge of its inadequate oversight systems.\(^{225}\)

Boeing’s actions when dealing with the FAA during the 737 MAX development and production demonstrate knowledge of oversight obligations and an intentional failure to adhere to them.\(^{226}\) For example, by Boeing’s own admission, the company purposefully hid information regarding the potential for the MCAS to trigger while flying at lower speeds.\(^{227}\) Instead, Boeing characterized

\(^{219}\) Marchand, 212 A.3d at 810 (describing the FDA’s role in regulating Blue Bell); see also Raso, supra note 213 (describing Boeing’s FAA compliance requirements).

\(^{220}\) Compare Marchand, 212 A.3d at 809 (“Blue Bell can only thrive if its consumers enjoyed its products and were confident that its products were safe to eat.”), with Verified Amended Consolidated Complaint, supra note 19, at 24 (describing 737 MAX safety as integral to the product’s success).

\(^{221}\) See Marchand, 212 A.3d at 809 (explaining the relevance of compliance with the FDA as important to consumer confidence in the product); Aircraft, FED. AVIATION ADMIN., https://www.faa.gov/aircraft/ [https://perma.cc/989F-HAAA] (noting the purpose of the FAA’s certification process).

\(^{222}\) Raso, supra note 213 (discussing the FAA’s delegation of certification tasks to Boeing); see Aviation Safety (AVS), FED. AVIATION ADMIN., https://www.faa.gov/about/office_org/headquarters_offices/avs/ [https://perma.cc/P7K9-2ZDL] (explaining the FAA’s responsibility for certifying “all operational and maintenance enterprises in domestic civil aviation” and “safety oversight”).

\(^{223}\) Aircraft, supra note 221.


\(^{225}\) See id. The FAA imposed penalties under the 2015 agreement after asserting that the “company managers did not sufficiently prioritize compliance with FAA regulations.” Id.

\(^{226}\) Verified Amended Consolidated Complaint, supra note 19, at 6 (remarking on Boeing’s mischaracterization of how the MCAS operated in the 737 MAX planes).

\(^{227}\) Id. In January 2021, Boeing agreed to pay more than $2.5 billion dollars to settle the Department of Justice’s criminal charge of conspiracy to commit fraud against the FAA during the FAA’s evaluation of the 737 MAX aircrafts. Press Release, Dep’t of Just., Boeing Charged with 737 Max Fraud Conspiracy and Agrees to Pay Over $2.5 Billion (Jan. 7, 2021), https://www.justice.gov/opa/pr/boeing-charged-737-max-fraud-conspiracy-and-agrees-pay-over-25-billion [https://perma.cc/2SPF-
the MCAS as similar to an already-existing Boeing commercial plane, seeking expedited FAA approval. The fact that the FAA gave the certification, however, does not make the necessity of ensuring the corporation adhered to FAA regulatory requirements any less obvious. The 2015 settlement agreement, combined with the requisite FAA certification, offer strong evidence that complying with oversight obligations was essential to the success of the 737 MAX planes. Consequently, the court could infer that the directors knew of their oversight obligations.

2. Whether Boeing Meets the Monoline Prong of Marchand v. Barnhill

The court’s analysis regarding whether Boeing’s organization constitutes a monoline corporation will likely be a closer issue and pivotal to resolving whether the court will dismiss the complaint. The 737 MAX constituted almost 70% of Boeing’s backlogged orders worth more than $400 billion dollars. The commercial airplanes segment of Boeing depended on the 737

5A2G]. Significant evidence leading to a deferred prosecution agreement included Boeing’s admission to mislead and withhold information regarding the MCAS from the FAA. Id. A deferred prosecution agreement is when the prosecution charges a company with an offense, but if the subject of the prosecution complies with the agreement’s terms, then the prosecution agrees to drop the charges in the future. LOUIS M. BROWN ET AL., THE LEGAL AUDIT: CORPORATE INTERNAL INVESTIGATION § 2:25.50 (2020).

228 Verified Amended Consolidated Complaint, supra note 19, at 7.

229 See Marchand v. Barnhill, 212 A.3d 805, 811, 824 (Del. 2019) (en banc) (explaining that the FDA reported food safety concerns to Blue Bell, but not factoring the FDA’s awareness of the problem into the inference that directors breached their oversight duty). The Delaware Supreme Court in Marchand emphasized that complying with some regulations imposed by the regulator does not preclude successful pleadings of a Caremark claim. Id. at 823.

230 See Settlement Agreement Between the Federal Aviation Administration and the Boeing Company at 2, In re the Boeing Co. (Fed. Aviation Admin. Dec. 17, 2015) (affirming the importance of regulatory compliance); Aircraft, supra note 221 (explaining the FAA’s role in certifying airplane safety).

231 See Verified Amended Consolidated Complaint, supra note 19, at 57 (explaining Boeing’s reliance on the 737 MAX planes to complete just under 70% of $400 billion orders); see also Marchand, 212 A.3d at 822, 824 (describing food safety as so central that any oversight system made in good faith would monitor it as an essential compliance concern).

232 See General Information, BOEING, https://www.boeing.com/company/ [https://perma.cc/B5RF-3Z8M] (describing itself as an aerospace company providing different services, including “commercial and military aircraft, satellites, weapons, electronic, and defense systems, launch systems, advanced information and communication systems, and performance-based logistics and training”). Arguably, this description could mean that Boeing is monoline because it only provides aerospace products, or in the alternative, Boeing is arguably not monoline due to the differentiation of services. See id.; infra note 233 and accompanying text (explaining the four segments of Boeing).

233 Verified Amended Consolidated Complaint, supra note 19, at 57 (explaining that the 737 MAX comprised 4,000 of the 5,900 Boeing commercial planes ordered and awaiting production). Although Boeing’s organization has four lines of business (i.e., commercial airplanes, defense, space, and security, global services, and capital financing solutions), the court will likely still deem Boeing a monoline corporation because Boeing almost exclusively produces aerospace equipment, including
MAX’s success without question. The monoline nature of Blue Bell allowed the court in Marchand to conclude that compliance with the regulator was sufficiently mission critical to infer the board’s knowledge of its obligation to monitor it. There are two ways to apply the monoline analysis in Marchand to Boeing. The first interpretation assumes that whenever a segment of a corporation’s business itself is monoline, such that it focuses exclusively on one type of product, plaintiffs will more easily bring a Caremark claim against directors for failing to monitor compliance issues associated with that product. The second ignores the presence of multiple segments or products and instead considers whether a particular product Boeing offers is so essential to the business that compliance issues with respect to that product become mission critical for the corporation, regardless of its other lines of business. The Delaware courts’ previous hesitation to find sufficiently alleged Caremark claims can offer insight into which of these interpretations will most likely apply.

The first interpretation would transform the historically difficult Caremark claim because it could apply whenever one product or type of product constitutes a large percentage of a segment of a corporation’s business. Although this interpretation is credible based on the language of Marchand, it is commercial and military aircraft and other related services. See id. at 11; General Information, supra note 232.

Verified Amended Consolidated Complaint, supra note 19, at 56–57; see Public Version of the Verified Stockholder Derivative Complaint, supra note 17, at 11 (“[T]he 737 MAX series of aircraft is the primary profit-driver of Boeing’s Commercial Aircraft segment for the foreseeable future . . . .”); supra note 233 and accompanying text (explaining that when a company has one significant product, it supports an inference of the board’s knowledge).


See Marchand, 212 A.3d at 809 (describing Blue Bell as monoline).

See id. (relying on the role of one product within a corporation’s business to infer a critical compliance concern).

See Teamsters Loc. 443 Health Servs. & Ins. Plan v. Chou, C.A. No. 2019-0816, 2020 WL 5028065, at *18 (Del. Ch. Aug. 24, 2020) (denying the defendants’ motion to dismiss pursuant to Marchand despite the corporation’s increased complexity compared to Blue Bell and Clovis); In re Clovis, 2019 WL 4850188, at *1 (applying the monoline descriptor because one drug showed the most promise for the corporation even though the company was also developing other drugs).

See Haugh, supra note 6, at 613 (explaining the Delaware Supreme Court’s recognition of Caremark claims as one of the most difficult claims for an allegation of a breach of a fiduciary duty); Mitchell, supra note 6, at 248–49 (describing the challenges of asserting a Caremark claim).

See Marchand, 212 A.3d at 809 (inferring knowledge of a duty from Blue Bell’s monoline structure); Verified Amended Consolidated Complaint, supra note 19, at 56–57 (noting the significance of the 737 MAX for Boeing’s Commercial Aircraft segment and overall revenue).
unlikely. The court readily inferred intent in *Marchand* because Blue Bell’s singular product focus—ice cream—meant that food safety was so obvious that the board should have known to monitor it. Corporations often organize based on different product lines. For example, Boeing describes itself as an aerospace company providing different services, including planes for commercial and military purposes, satellites, and defense services. With this organization, each segment inherently becomes monoline. If these segments were sufficiently monoline to satisfy *Marchand*, then plaintiffs may successfully allege a *Caremark* claim wherever a corporation organizes itself by product lines.

The monoline descriptor in the second interpretation considers the significance of one product to the corporation generally, despite the corporation’s other segments. Although this interpretation makes pleading *Caremark* claims more difficult when suing multi-faceted corporations, limiting *Marchand* in this manner is more consistent with courts’ typical dismissal of *Caremark* claims.

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241 See *Marchand*, 212 A.3d at 809 (emphasizing the court’s identification of food safety as Blue Bell’s essential compliance concerns). Relying on the presence of essential compliance concerns rather than the fact that Blue Bell sells one type of product would allow the court in *Boeing* to interpret *Marchand* to allow a knowledge inference wherever a corporation has an essential compliance concern. *Id.* The *Boeing* Complaint specifically pleads that plane safety is “mission critical” to Boeing. Verified Amended Consolidated Complaint, *supra* note 19, at 24, 79–80.

242 *Marchand*, 212 A.3d at 809.


244 See *Inter-mktg. Grp. USA, Inc. v. Armstrong*, No. 2017-0030, 2020 WL 756965, at *15 (Del. Ch. Jan. 31, 2020) (demonstrating an interpretation of monoline that focuses on the importance of one product within a corporation by identifying pipeline integrity as an essential compliance concern despite a more complex corporate structure); *In re Clovis Oncology, Inc. Derivative Litig.*, No. 2017-0222, 2019 WL 4850188, at *1 (Del Ch. Oct. 1, 2019) (noting that the potential of one drug was enough to create an essential compliance concern despite the ongoing development of other drugs).

245 See *Marchand*, 212 A.3d at 809 (explaining that food safety was Blue Bell’s primary compliance concern because Blue Bell only produced a food product).

246 See *Marchand*, 212 A.3d at 809 (describing Blue Bell as monoline because it sells only one product—custard-based foods); *In re Clovis*, 2019 WL 4850188, at *1 (explaining that Roci is the drug that showed the most promise out of all Clovis products). *But see* Public Version of the Verified Stockholder Derivative Complaint, *supra* note 17, at 11 (describing the 737 MAX as critical to the success of Boeing’s commercial airlines segment, but not addressing its importance across Boeing more generally). After the benefit of records requests, the *Boeing* Complaint more effectively captured the importance of the 737 MAX to Boeing overall by explaining the significance of the commercial airplanes segment. See Verified Amended Consolidated Complaint, *supra* note 19, at 56–57 (emphasizing that “80% of [Boeing’s] annual net earnings” stemmed from commercial airplanes, and noting that the 737 MAX contributed to a huge percent of the commercial airplanes segment earnings); *see also* *Marchand*, 212 A.3d at 824 (acknowledging commentators’ desire to broaden a *Caremark* claim’s reach).
Due to the significance of the 737 MAX to Boeing, generally, a court applying the second interpretation will likely find that Boeing is monoline, despite the corporation’s other segments.\textsuperscript{249} Although ice cream was the basis of all of Blue Bell’s products in \textit{Marchand}, the 737 MAX comprised 4,000 of the 5,900 backlogged jetliner orders.\textsuperscript{250} Additionally, the application of \textit{Marchand} in \textit{In re Clovis} supports the interpretation of the monoline qualifier to not preclude corporations with other products in development.\textsuperscript{251} The lung cancer drug in \textit{In re Clovis} showed the most promise of all drugs in Clovis’s pipeline, and the ongoing clinical trial actively elevated the importance of compliance with FDA regulations for the product to move forward.\textsuperscript{252} Similarly, Boeing’s commercial airplanes division comprised approximately 80% of the company’s annual net earnings, such that the 737 MAX’s projected contribution of 70% of the backlogged orders within this division made the 737 MAX an extremely promising product for Boeing.\textsuperscript{253} The importance of the 737 MAX to Boeing coupled with the obvious necessity of complying with Boeing’s primary regulator—the FAA—suggest that the 737 MAX’s safety was so essential to Boeing’s overall success that the court should find that the board knew of its duty to oversee its safety compliance.\textsuperscript{254}

3. Conclusions After Determining That Boeing Meets Both \textit{Marchand} v. \textit{Barnhill} Prongs

Finding that Boeing satisfies the monoline requirement articulated in \textit{Marchand} would empower the court to acknowledge that the board not only

\textsuperscript{249} See Verified Amended Consolidated Complaint, supra note 19, at 56–57 (explaining the role of the Commercial Airplanes segment within Boeing’s business structure); see also \textit{Inter-mktg. Grp.}, 2020 WL 756965, at *15 (reasoning that pipeline integrity was an essential compliance concern).

\textsuperscript{250} \textit{Compare Marchand}, 212 A.3d at 809 (emphasizing that Blue Bell sold one type of product), with Verified Amended Consolidated Complaint, supra note 19, at 56–57 (noting that the 737 MAX orders increased to 5,000 after its launch, comprising the majority of Boeing aircraft orders).

\textsuperscript{251} \textit{In re Clovis}, 2019 WL 4850188, at *1 (noting the existence of other drugs in development at Clovis, but identifying Roci as the drug showing the most promise). The \textit{In re Clovis} opinion does not provide information regarding the position of other Clovis drugs within the drug development pipeline, but the court focused on Roci because it showed that the corporation’s success depended on it. \textit{Id.}; see also Pipeline Overview, CLOVIS ONCOLOGY, https://clovisoncology.com/pipeline/pipeline-overview/ [https://perma.cc/8H9S-CEGY] (listing multiple Clovis products).

\textsuperscript{252} \textit{In re Clovis}, 2019 WL 4850188, at *1, *12–13 (emphasizing the importance of directors’ oversight of “regulatory compliance risk” in addition to business risk, especially where the corporation operates in an industry with regulations governing “mission critical” operations” (quoting \textit{Marchand}, 212 A3d at 824)).

\textsuperscript{253} Verified Amended Consolidated Complaint, supra note 19, at 56–57; supra note 248 and accompanying text (explaining how a corporation with multiple segments can still satisfy the monoline requirement).

\textsuperscript{254} See Verified Amended Consolidated Complaint, supra note 19, at 56–57 (describing the importance of the 737 MAX to Boeing’s commercial aircraft line of business); \textit{Aviation Safety}, supra note 222 (articulating the FAA’s safety requirements).
must meet the oversight requirements established in *In re Caremark* but also must meet the more onerous burden of being aware of compliance risks. After meeting the monoline requirement, the plaintiffs in *In re the Boeing Co.* can more easily prove that the board failed to pay the special attention to safety compliance that the corporation’s monoline business requires. For example, the complaint detailed that the board’s records showed no evidence of an emergency meeting concerning the first crash, a substantive safety discussion, or a committee tasked with specific oversight concerns. The complaint further alleged that Boeing’s board created its first committee dedicated to overseeing the safe design, production, and maintenance of commercial aircraft after the two 737 MAX crashes.

When considering *In re the Boeing Co.* in the context of *Marchand* and *In re Clovis*, the Boeing board will likely have difficulty defending its alleged oversight failures. In *Marchand*, the FDA reports of food safety issues sufficiently constituted warning signs that the board should pay special attention to a compliance issue central to its products’ success. Similarly, in *In re Clovis*, the court concluded that the clinical trial’s reliance on unconfirmed responses, despite the FDA requirement to rely exclusively on confirmed responses, sufficiently demonstrated the board’s ignorance of red flags. Boeing not only had more than two hundred incident reports concerning the MCAS software, but it also had a plane crash in which 189 people died. It is difficult to imagine a

255 See *In re Clovis*, 2019 WL 4850188, at *13 (analyzing *Marchand* to mean directors’ good faith effort to institute a monitoring system must include being “sensit[ive]” to critical compliance concerns).

256 See Verified Amended Consolidated Complaint, *supra* note 19, at 50, 88 (alleging that Boeing’s board considered profitability of the 737 MAX only during development and after the first crash); see also *In re Clovis*, 2019 WL 4850188, at *12–13 (describing the more onerous oversight requirements corporations must follow after *Marchand*).


259 See Marchand v. Barnhill, 212 A.3d 805, 809 (Del. 2019) (en banc) (holding that directors knowingly disregarded a duty when the oversight responsibility entailed essential compliance requirements); *In re Clovis*, 2019 WL 4850188, at *1 (categorizing Clovis as similar to Blue Bell, such that the directors’ disregard of their oversight duty was conscious); Verified Amended Consolidated Complaint, *supra* note 19, at 56–57 (alleging that the 737 MAX is significant to Boeing’s success).

260 212 A.3d at 809 (explaining that management knew of “yellow and red flags about food safety”).

261 2019 WL 4850188, at *5 (acknowledging that Clovis’s board knew that the FDA would not accept unconfirmed responses).

262 Verified Amended Consolidated Complaint, *supra* note 19, at 43, 60; Public Version of the Verified Stockholder Derivative Complaint, *supra* note 17, at 2 (describing the first plane crash as “the biggest red flag an airline manufacturer can face”); *see Gates, supra* note 212 (revealing that Boeing knew a sensor warning light was not working); *supra* note 212 and accompanying text (describing the importance of the AOA sensors in relation to the MCAS and the safety of the 737 MAX).
more obvious red flag signaling a safety problem. Consequently, assuming that the court determines Boeing fits the monoline descriptor identified in Marchand, the court will likely find that the directors face substantial likelihood of liability for a breach of their oversight responsibility and deny the company’s motion to dismiss.

C. Assessing the Strength of a Caremark Claim Post-Marchand v. Barnhill

Two stages of analysis are important to assessing the likelihood of a Caremark claim’s success. The corporation must first meet the two threshold requirements established in Marchand: (1) a monoline business, that is (2) subject to a primary regulator in a heavily regulated industry. If the company fits within these parameters, the court can then infer that the board knew of its oversight obligations because such obligations are essential for the business to succeed. This inference then facilitates plaintiffs’ survival of a motion to dismiss where directors do not react to red flags indicating potential failure of

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264 Marchand, 212 A.3d at 809 (relying on Blue Bell’s monoline nature to find consciousness of the duty of oversight). In 1993, the Delaware Supreme Court in Rales v. Blasband explained that if a majority of the board faces substantial likelihood of liability for a breach of duty of fiduciary duty, including the duty of oversight, a plaintiff can defeat a motion to dismiss pursuant to the Delaware Court of Chancery Rule 23.1. DEL. CH. CT. R. 23.1; Rales v. Blasband, 634 A.2d 927, 936 (Del. 1993); see supra note 47 and accompanying text (explaining defendants’ ability to seek dismissal of the derivative action for the plaintiff’s failure to make a demand on the board).

265 See Marchand, 212 A.3d at 810, 824 (explaining that Blue Bell’s monoline business combined with the FDA’s presence as a regulator led to a well-pled Caremark claim); In re Clovis, 2019 WL 4850188, at *1 (noting that directors’ oversight responsibility is extremely relevant where a monoline business must comply with the industry’s regulators). See generally supra notes 156–190 and accompanying text (explaining the significance of a monoline business model and government regulators in Marchand); supra notes 197–207 and accompanying text (discussing the limits of Marchand).

266 See Marchand, 212 A.3d at 810, 824 (inferring intent because Blue Bell only produced ice cream and the FDA regulated Blue Bell). See generally supra notes 156–190 and accompanying text (emphasizing Blue Bell’s focus on one product and the external regulators overseeing its business).

267 See generally supra notes 156–190 and accompanying text (arguing that without Blue Bell’s monoline business structure and relationship with the FDA, the court in Marchand may have been less willing to infer the intent necessary to establish a breach of good faith).
regulatory compliance.\textsuperscript{268} As a result of this inference, the court can assume the board consciously acted with such disregard.\textsuperscript{269} After analyzing \textit{Marchand} as it applied in \textit{In re Clovis} and will likely apply in \textit{In re the Boeing Co.}, the following factors are critical in determining whether a claim has the criteria to allege a (1) monoline corporation, (2) in a heavily regulated industry, and (3) directors’ failure of oversight.\textsuperscript{270}

First, a corporation will likely meet the monoline parameters outlined in \textit{Marchand} if it produces one type of product.\textsuperscript{271} Additionally, where one product’s success is so critical for the corporation’s business model that the court can infer that the board knew meeting the product’s regulatory requirements was necessary for the business’s future, the corporation will likely meet monoline as described in \textit{Marchand}.\textsuperscript{272} Second, when one, primary, external regulator imposes those regulatory requirements, the court will likely find that the corporation is in a heavily regulated industry.\textsuperscript{273} Finally, assuming the corporation meets both the monoline and heavily regulated prongs, if the plaintiffs allege that the board ignored warning signs about the product’s failure to meet regulatory requirements, then the complaint will likely survive a motion to dismiss.\textsuperscript{274}

\section*{CONCLUSION}

Through emphasizing Blue Bell Creameries USA, Inc.’s (Blue Bell) monoline business model, the Delaware Supreme Court found a way to infer intent and find a breach of the directors’ duty to exercise oversight responsibilities in good faith. The good faith requirement was necessary for the \textit{Marchand v. Barnhill} 2019 decision despite the Delaware courts’ explicit treatment of good faith as a subsidiary element of the duty of loyalty. Good faith allowed the court to factor in egregiousness of conduct—conduct so obviously opposed to the stockholders’ interest that exculpation of directors can-

\textsuperscript{268} See \textit{Marchand}, 212 A.3d at 824 (identifying food safety as essential to Blue Bell’s business); \textit{see also id.} at 822 (suggesting that as long as the court can infer that a board made no effort to inform themselves of essential compliance concerns, the court can allow an allegation that a board did not act in good faith to survive a motion to dismiss); \textit{see supra} note 56–76 and accompanying text (describing good faith).

\textsuperscript{269} See \textit{Marchand}, 212 A.3d at 822 (explaining that a monoline business subject to an external regulator implies the board’s knowledge of the regulatory requirements, specifically that the board consciously disregarded warning signs about compliance failures).

\textsuperscript{270} See \textit{supra} notes 156–190 and accompanying text (establishing the requirements for a well-pled failure of oversight claim); \textit{supra} notes 219–264 and accompanying text (same).

\textsuperscript{271} See \textit{Marchand}, 212 A.3d at 809 (establishing Blue Bell as a monoline company because it makes one product).

\textsuperscript{272} See \textit{supra} notes 232–254 and accompanying text (discussing monoline as applied to Boeing).

\textsuperscript{273} See \textit{Marchand}, 212 A.3d at 810 (discussing the relevance of the FDA’s regulation of Blue Bell).

\textsuperscript{274} See \textit{id.} at 810, 824 (finding a well-pled \textit{Caremark} claim because Blue Bell is monoline and heavily regulated by the FDA).
not stand. The Delaware court in Marchand imputed this culpability by emphasizing Blue Bell’s monoline structure, concluding that the board implicitly knew the essential role food safety played in the corporation’s success. Both Marchand and In re Clovis Oncology, Inc. Derivative Litigation involved industries capable of causing irreparable harm if not properly regulated by the U.S. Food and Drug Administration. Whether a corporation is monoline and heavily regulated informs how a court identifies mission critical compliance concerns and can in turn infer the board’s conscious disregard of a known duty. The court’s willingness to provide more access to successful Caremark claims in these circumstances served to enforce directors’ duty of oversight more effectively without risking the protection of corporate innovation the business judgment presumption affords.

Blue Bell’s Listeria crisis resulted in fatalities that undoubtedly devastated families. Marchand cannot bring those individuals back, but these losses led to a change in Delaware courts’ understanding of directors’ fiduciary duty of oversight that will hopefully save lives in the future. Through Marchand, the Delaware Supreme Court recognized that some corporations should be more sensitive to overseeing their compliance obligations. The tragic death of 346 people in a six-month period made the importance of effective oversight of the safety of The Boeing Company’s aircraft clear. Texans can be proud of Blue Bell again because Marchand not only laid a foundation for the derivative action in In re the Boeing Co. Derivative Litigation to survive pre-trial dismissal, but it also identified factors essential to a strong Caremark claim. Where a corporation is monoline and subject to one primary external regulator, directors are on notice that their shareholders, and consumers more generally, rely on their oversight of essential compliance concerns.

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