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The Delaware Supreme Court Refines the Rules of Risk Management

Delaware's *Caremark* doctrine obligates corporate directors to implement and oversee effective risk management and compliance controls. While the obligation to monitor key areas of corporate risk ranks among the board's central duties, directors will traditionally not be held liable for an oversight failure unless there has been an "utter failure to attempt to assure a reasonable information and reporting system exists." The bar for liability in a failure-to-monitor case is high—but a ruling from the Delaware Supreme Court last week confirms that the risk of exposure is real. [\*Marchand v. Barnhill\*, No. 533, 2018 \(Del. June 19, 2019\)](#).

In 2015, Blue Bell Creameries distributed ice cream tainted with listeria. The contaminated food killed three people, and the company had to recall its products and suspend operations. To avoid insolvency, the company entered into a highly dilutive transaction. Plaintiffs then sued to recoup their investment losses.

The Court of Chancery dismissed the lawsuit, ruling that Blue Bell's existing compliance programs satisfied the *Caremark* standard. Reversing, the Supreme Court observed that, while Blue Bell had certain food safety programs in place and "nominally complied with FDA regulations," it "had no [board] committee overseeing food safety, no full board-level process to address food safety issues, and no protocol by which the board was expected to be advised of food safety reports and developments." This "dearth of any board-level effort at monitoring" the company's risk management supported an inference that the directors had breached their oversight obligations.

To "satisfy their duty of loyalty," the court held, "directors must make a good faith effort to implement an oversight system and then monitor it" themselves. Without more, the existence of management-level compliance programs is not enough for the directors to avoid *Caremark* exposure.

This decision highlights the risk boards face of fiduciary litigation when their corporations' compliance failures yield tragic results. [As we have repeatedly emphasized](#), the identification and management of key corporate risks is a core governance issue for contemporary boards. Directors should implement effective procedures to ensure that the board itself monitors key corporate risk factors, including in appropriate cases through board committees, and documents its monitoring efforts through minutes and other corporate records.

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