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CAREMARK CLAIMS: “MISSION CRITICAL” COMPLIANCE RISKS AND A BOARD’S DUTY TO MONITOR

In two recent cases the Delaware courts have allowed Caremark claims to proceed, raising the question whether the courts are lowering the high pleading bar to such cases. The authors discuss the cases, finding that extreme facts rather than lowering requirements are responsible for the decisions. Their takeaways include three central points that bear on whether a Caremark claim will survive a motion to dismiss; and they conclude that corporate boards should identify “mission critical” compliance risks and have — and use — mechanisms for monitoring those risks.

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Derivative claims based on directors’ oversight obligations – known as *Caremark* claims – present “possibly the most difficult theory in corporation law upon which a plaintiff might hope to win a judgment.”¹ Indeed, in the more than 20 years since *Caremark*, only a handful of cases have survived a motion to dismiss. Twice in the past year, however, in *Marchand v. Barnhill* and *In re Clovis Oncology, Inc. Derivative Litigation* (“*Clovis*”), Delaware courts have allowed *Caremark* claims to proceed past the pleading stage, raising the question of whether these decisions represent a trend towards lowering the bar.² Notably, in both cases, the plaintiffs relied heavily on board minutes and materials obtained through Section 220 “books-and-records” demands, which allowed them to make

particularized factual allegations regarding board oversight activity.³

Careful review of *Marchand* and *Clovis* indicates that the outcome of those cases merely reflects the extreme sets of facts on which they were based rather than an easing of the “onerous pleading burden” that plaintiffs bear when it comes to *Caremark* claims.⁴ Other recent decisions confirm that Delaware courts remain deferential to directors’ judgment in carrying out their oversight obligations and will find a breach of fiduciary duty adequately pleaded only in cases involving egregious, bad-faith conduct.⁵ Nonetheless, corporate

¹ *In re Caremark Int’l Inc. Derivative Litig.* (“*Caremark*”), 698 A.2d 959, 967 (Del. Ch. 1996).

² *Marchand v. Barnhill*, 212 A.3d 805 (Del. 2019); *In re Clovis Oncology, Inc. Derivative Litig.*, 2019 WL 4850188 (Del. Ch. Oct. 1, 2019).

³ 8 Del. C. § 220; *Marchand*, 212 A.3d at 822; *Clovis*, 2019 WL 4850188, at *9.

⁴ *Marchand*, 212 A.3d at 824.

⁵ See, e.g., *In re LendingClub Corp. Derivative Litig.*, 2019 WL 5678578, at *8-14 (Del. Ch. Oct. 31, 2019); *Rojas ex rel. J.C. Penney Co., Inc. v. Ellison*, 2019 WL 3408812, at *8-14 (Del. Ch. July 29, 2019).

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