

Caremark Claims Following Disasters: Why Plaintiffs Should Sue the Board When It Causes a Disaster

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*Fire disasters have become an inevitability for California residents. After a fire disaster, the public is primarily concerned with compensating the victims. However, securities fraud class actions brought by shareholders of the responsible utilities companies also accompany fire disasters. This Note argues that, instead of securities class actions, derivative claims under the Caremark jurisprudence may better serve corporate litigants following fire disasters. Historically, surviving the initial motion to dismiss under the Caremark standard has been a challenging hurdle for plaintiffs. However, under *Marchand v. Barnhill* and *In re Clovis Oncology Derivative Litigation*, “mission critical” risks of life and limb, or the presence of red flag warnings of the risk, are more likely to survive the initial motion to dismiss. Corporate claims following fire disasters are better suited as Caremark claims because fire disaster risk is a risk of life and limb in a highly regulated industry; derivative claims create the possibility that distribution of damages will prevent future harms; and the procedural hurdles of the demand requirement under *United Food v. Zuckerberg* are unlikely to pose an issue for plaintiffs bringing Caremark claims.*

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INTRODUCTION

Wildfire risk and inevitable fire disasters have become an integral part of living in California. In 2017, forty-four people lost their lives in the Wine Country Fires, which destroyed thousands of structures, resulting in billions of dollars of insured losses and exposed millions of people to smoke.¹ In 2018, Pacific Gas and Electric Co. (“PG&E”) pled guilty to negligently killing eighty-four of the eighty-five victims of the U.S.’s fifth deadliest wildfire, the Camp Fire.² Then, in 2020, California experienced a fire season that came with five of the largest wildfires ever recorded in its history.³ During the 2020 California fire season, thirty-three people died.⁴ The 2020 season “famously turned San Francisco daylight skies into an apocalyptic orange twilight for several days.”⁵ Now most recently, the Los Angeles community was devastated by the Eaton and Palisades fires, the two worst fires in Los Angeles history.⁶ The damages due to the Los Angeles fires are not yet fully known, but the death toll reached twenty-nine people, with preliminary assessments indicating more than 9,400 structures were destroyed.⁷ Additionally, somewhat unique to the Los Angeles fires, as opposed to other California fires, the Eaton and Palisades fires primarily burned residential structures, displacing thousands.⁸

1. Clifford F. Mass & David Ovens, *The Northern California Wildfires of 8–9 October 2017: The Role of a Major Downslope Wind Event*, 100 BULL. AM. METEOROLOGICAL SOC’Y 235, 235 (2019) (“[T]he fires were the most destructive in California history: destroying roughly 9,000 structures; damaging 21,000 buildings and resulting in over \$10 billion (U.S. dollars) of insured lossesForty-four people lost their lives several hundred were hospitalized, and millions of people were exposed to smoke from the fires.”).

2. Hope Miller, *These Are the Victims of the Camp Fire*, KCRA (June 17, 2020, at 20:12 PT), <https://www.kcra.com/article/these-are-the-victims-of-camp-fire/32885128>; see also Dr. Jeff Masters & Bob Henson, *Camp Fire Toll Stabilizes at 86 Deaths; Only 25 Missing Now*, WEATHER UNDERGROUND (Dec. 3, 2018, at 10:49 ET), <https://www.wunderground.com/cat6/Camp-Fire-Toll-Stabilizes-88-Deaths-Only-25-Missing-Now> (“[T]he Camp Fire will end up as the fifth deadliest wildfire in U.S. history, and 12th deadliest in world history.”).

3. Marc Carreras-Sospedra, Shupeng Zhu, Michael MacKinnon, William Lassman, Jeffrey D. Mirocha, Michele Barbato & Donald Dabdub, *Air Quality and Health Impacts of the 2020 Wildfires in California*, 20 FIRE ECOLOGY, Jan. 19, 2024, at 1–2 (“[L]argest area burned due to wildfires . . . in recorded history”).

4. *Id.* at 2 (“More than 1.7 million hectares burned in 8648 incidents, and 33 people perished as a direct result of the fires.”).

5. *Id.*

6. Minyvonne Burke & Liz Kreutz, *What We Know About the Victims Killed in the California Wildfires*, NBC NEWS (Feb. 12, 2025, at 14:33 PT), <https://www.nbcnews.com/news/us-news/california-wildfires-what-we-know-victims-killed-rcna188240>; Ian James, *How Climate Change Worsened the Most Destructive Wildfires in L.A. History*, L.A. TIMES (Jan. 16, 2025, at 11:51 PT), <https://www.latimes.com/environment/story/2025-01-16/climate-change-california-fires> (“[The Eaton and Palisades fires are] the most destructive fires in L.A. history [and] scientists say one significant ingredient is human-caused climate change.”).

7. Sean Greene, Sandhya Kambhampati, Colleen Shalby & Noah Haggerty, *Mapping the Damage From the Eaton and Palisades Fires*, L.A. TIMES (Jan. 27, 2025, at 21:03 PT), <https://www.latimes.com/california/story/2025-01-16/mapping-los-angeles-damage-from-the-eaton-and-palisades-fires-altadena-pasadena> (“According to preliminary assessments, the Eaton fire destroyed more than 9,400 structures in an area of nearly 22 square miles. An additional 6,800 buildings were lost to the Palisades fire, which burned 36.5 square miles of the Santa Monica Mountains.”).

8. *Id.*

The devastation of these events cannot be overstated, and they are only increasing in frequency as the negative impacts of climate change continue to worsen.⁹ Following fire disasters, the paramount issue for the public is compensation for the victims. In many cases, fire disasters are also followed by securities fraud class actions brought by shareholders of the utilities companies under Section 10(b) of the Securities Exchange Act (“Rule 10b-5”).¹⁰ This Note will argue that derivative claims for breach of the duty to monitor under the *In re Caremark International Inc. Derivative Litigation* jurisprudence are better suited for the wildfire disaster context than securities fraud lawsuits.¹¹ It focuses on wildfire disasters because of their current publicity and relevance to California residents; however, other climate-related disasters likely have similar analogs in the corporate disaster litigation context.

Section I provides background on securities fraud claims brought under Rule 10b-5 and *Caremark*, highlighting the difficulties facing shareholder-plaintiffs bringing claims following disasters. Section II presents two cases in which the Delaware Court of Chancery (“Chancery Court”) dealt with the “failure to monitor” standard and explains how that standard may be broader than ever before. Then it examines two cases following the establishment of the broader failure to monitor standard in the event-driven litigation context. Section III argues that corporate claims following fire disasters are more compelling as *Caremark* claims than securities fraud claims because fire risk is a “mission critical” risk, especially one of life and limb, and public utilities are “highly regulated” industries. Further, Section III explains how derivative lawsuits’ compensation structure may allow companies to prevent future harms and how the procedural hurdles under the *Caremark* standard’s procedural hurdles may be a better fit for fire-disasters.

I. CORPORATE CLAIMS FOLLOWING DISASTERS

A. 10B-5 SECURITY FRAUD CLAIMS FOLLOWING DISASTERS

When disasters happen and a utility company is sued for its alleged involvement in the destruction, the share price of the utility company drops.¹²

9. Jon E. Keeley & Alexandra D. Syphard, *Large California Wildfires: 2020 Fires in Historical Context*, 17 FIRE ECOLOGY, Aug. 25, 2021, at 1, 2 (“[T]he pace of these events has greatly accelerated.”); Jon E. Keeley & Alexandra D. Syphard, *Twenty-First Century California, USA, Wildfires: Fuel-Dominated vs. Wind-Dominated Fires*, 15 FIRE ECOLOGY, July 18, 2019, at 1, 2.

10. Kevin M. LaCroix, *First, Wildfires. Then What? Securities Litigation, Of Course*, D&O DIARY (Nov. 18, 2018), <https://www.dandodiary.com/2018/11/articles/securities-litigation/first-wildfires-securities-litigation-course/> (“[Wildfires] may also include securities lawsuits by utility company investors who claim they were misled about the company’s fire safety readiness and potential liability exposure.”); 17 C.F.R. § 240.10b-5 (2025).

11. 698 A.2d 959, 970 (Del. Ch. 1996).

12. See, e.g., Kevin M. LaCroix, *Electric Utility Linked to Maui Wildfires Hit With Securities Suit*, D&O DIARY (Aug. 27, 2023), <https://www.dandodiary.com/2023/08/articles/securities-litigation/electric-utility-linked-to-maui-wildfires-hit-with-securities-suit/> (“Maui County filed a lawsuit against the utility, alleging that

When the share price drops, shareholders of the utility company are likely to become plaintiffs in a securities fraud class action brought under Rule 10b-5 for misstatements made by the company about the risk of the disaster.¹³ Rule 10b-5 makes it “unlawful . . . to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading”¹⁴ Although not in the text of the statute, there is an implied right of private action under Rule 10b-5 that has been upheld by courts.¹⁵ To bring a private securities fraud claim under Rule 10b-5, plaintiffs must show: (1) the defendant made a material misstatement, (2) the plaintiffs relied on that misstatement, (3) the defendant acted with the required state of mind (*scienter*), and (4) a causal relationship exists between the misstatement and the loss experienced by plaintiffs.¹⁶ A misstatement is material if there is a substantial likelihood that the reasonable investor would deem the information to “alter the ‘total mix’” of information available.¹⁷

Under the fraud-on-the-market theory, plaintiffs may establish reliance on misstatements or omissions¹⁸ even if the specific shareholder-plaintiffs did not trade on the basis of the misstatement.¹⁹ The fraud-on-the-market theory relies

its power lines caused the wildfire. With the adverse publicity, the utility’s share price has slumped. Now, a plaintiff shareholder has filed a securities lawsuit against the company.”)

13. See, e.g., *id.*; *In re BP p.l.c. Sec. Litig.*, 852 F. Supp. 2d 767, 778 (S.D. Tex. 2012) (alleging “thirty-five specific misstatements and omissions, all centered on BP’s process safety efforts”); *In re PG&E Corp. Sec. Litig.*, 806 F. Supp. 3d 962, 1002 (N.D. Cal. 2025) (“The Securities Act Plaintiffs generally allege that PG&E’s registration statements and prospectuses (the “Offering Documents”) concealed wildfire risks that materialized in the 2017 North Bay Fires and 2018 Camp Fire.”).

14. 17 C.F.R. § 240.10b-5(b) (2025).

15. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 737 (1975) (“When we deal with private actions under Rule 10b-5, we deal with a judicial oak which has grown from little more than a legislative acorn.”).

16. STEPHEN J. CHOI & ADAM C. PRITCHARD, *SECURITIES REGULATION* 278 (6th ed. 2024).

17. *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 450 (1976) (“[T]here must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the ‘total mix’ of information made available.”).

18. *But see* *Macquarie Infrastructure Corp. v. Moab Partners, L.P.*, 144 S. Ct. 885, 892 (2024) (“Pure omissions are not actionable under Rule 10b-5(b).”); Blaise Chow & William A. Accordino, Jr., *Liability for Pure Omissions Following the US Supreme Court’s Decision in Macquarie Infrastructure*, KENNEDY’S (July 15, 2024), <https://kennedyslaw.com/en/thought-leadership/article/2024/liability-for-pure-omissions-following-the-us-supreme-court-s-decision-in-macquarie-infrastructure> (“The Court held that ‘pure omissions,’ including violations of Item 303 of Regulations S-K, are alone not actionable as misstatements under Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5(b) promulgated thereunder.”).

19. See, e.g., *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 813 (2011) (“[T]he investor purchased the stock at a distorted price, and thereby presumptively relied on the misrepresentation reflected in that price.”); see also Merritt B. Fox & Joshua Mitts, *Event-Driven Suits and the Rethinking of Securities Litigation*, 78 BUS. LAW. 1, 7 (2023) (“The principal target of the typical fraud-on-the-market class action is an issuer whose shares trade publicly in an efficient secondary market and that is alleged to have made a misstatement in violation of section 10(b) of the Securities and Exchange Act of 1934 (the “Exchange Act”) and Rule 10b-5 promulgated there under. A misstatement by an issuer can be a violation even if neither the issuer nor any of its officials traded in the issuer’s shares.”); Gideon Mark, *Event-Driven Securities Litigation*, 24 U. PA. J. BUS. L. 522, 564 (2022) (“[A]n investor presumptively relies on a misrepresentation that was reflected in

on the assumption that markets incorporate all relevant public information into the pricing of securities, a hypothesis termed the “efficient capital markets hypothesis.”²⁰ Under the efficient capital markets hypothesis, if all relevant public information is incorporated into a company’s share price, then simply trading a security while a material misstatement or omission has been made establishes reliance on the part of the trader because the price was incorrect when they traded.²¹ *Scienter* is knowing falsity of a misstatement, an intentional misstatement, or reckless disregard for the truthfulness of a statement.²² The plaintiffs carry the burden to show a “strong inference” of *scienter*.²³ *Scienter* can be imputed to a corporation from the actions of its superior officers and directors.²⁴ The last element, loss causation, requires plaintiffs to show that the misstatement actually caused their claimed damages, which is usually achieved through event studies and expert testimony.²⁵

Many securities fraud lawsuits are brought following accounting misstatements or financial restatements by companies. However, shareholder securities litigation driven by adverse events have become more common. The “likelihood that a public company will be sued in a securities class action in any

the market price at the time of her transaction, even if the investor was unaware of the fraudulent conduct at the time of her purchase or sale.”).

20. See Eugene F. Fama, *Efficient Capital Markets: A Review of Theory and Empirical Work*, 25 J. FINANCE 383, 415 (1970) (“Semi-strong form tests, in which prices are assumed to fully reflect all obviously publicly available information, have also supported the efficient markets hypothesis.”); see also Ronald J. Gilson & Reinier H. Kraakman, *The Mechanisms of Market Efficiency*, 70 VA. L. REV. 549, 550–51 (1984) (“The disparate ways in which the legal culture employs the [efficient capital markets hypothesis (“ECMH”)] . . . rest on legal and policy implications derived from the ECMH (particularly in its semi-strong form) without serious attention to how these implications depend on a more preliminary question: What makes the market efficient when it appears to be so?”); Ronald J. Gilson & Reinier Kraakman, *The Mechanisms of Market Efficiency Twenty Years Later: The Hindsight Bias*, 28 J. CORP. L. 715, 717 (2003) (“[W]e remain convinced that how quickly and accurately the stock market reflects information in the price of a security is a function of the performance of institutions.”).

21. Fox & Mitts, *supra* note 19, at 3 (“[Rule 10b-5] allows them to do so even if the purchasers cannot prove that they each relied upon (or even knew about) the misstatement and even if neither the issuer nor its insiders were sellers during the period that the misstatement inflated the issuer’s share price.”).

22. *Scienter*, BLACK’S LAW DICTIONARY (12th ed. 2024) (“A degree of knowledge that makes a person legally responsible for the consequences of his or her act or omission; the fact of an act’s having been done knowingly, esp. as a ground for civil damages or criminal punishment. A misrepresentation is made with *scienter* if its maker (1) knows or believes it to be false, (2) knowingly states or implies a false level of confidence about its accuracy, or (3) knowingly states or implies a basis for it that does not exist.”).

23. Private Securities Litigation Reform Act of 1995, 15 U.S.C. § 78u-4(b)(2)(A) (2024) (“[S]tate with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.”); *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 314 (2007) (examining the “strong inference” requirement under the PSLRA).

24. *Smallen v. W. Union Co.*, 950 F.3d 1297, 1312 (10th Cir. 2020) (“Corporations, of course, do not have their own state of mind. Rather, the *scienter* of a corporation’s agents must be imputed to it.”).

25. *E.g.*, *Meyer v. Greene*, 710 F.3d 1189, 1195 (11th Cir. 2013) (“[I]n a fraud-on-the-market case, the plaintiff must prove not only that a fraudulent misrepresentation artificially inflated the security’s value but also that ‘the fraud-induced inflation that was baked into the plaintiff’s purchase price was subsequently removed from the stock’s price, thereby causing losses to the plaintiff.’” (quoting *Hubbard v. BankAtlantic Bancorp., Inc.*, 688 F.3d 713, 725 (11th Cir. 2012)); *McCabe v. Ernst & Young, LLP.*, 494 F.3d 418, 437 (3d Cir. 2007) (using expert witnesses to establish loss causation through damage calculation).

given year has risen from 3.5% in 2014 to around 8.5% at the end of the first half of 2018.”²⁶ Event-driven securities fraud lawsuits are part of a larger trend in securities class actions to sue for misstatements by the company following negative events that caused the share price to drop.²⁷ Merritt B. Fox identifies the issues with event-driven fraud-on-the-market securities fraud claims:

Much or all of this price drop is due to a materialization of a risk, not a dissipation of any inflation in price due to the market’s underestimation of the risk, and as such would have occurred whether or not the issuer had made the misstatement.²⁸

Shareholder plaintiffs, usually undergirded by repeat player plaintiffs’ attorneys,²⁹ bring lawsuits based on an “untrue statement of a material fact” made about the risks or likelihood of the event following adverse events that cause a company’s share price to go down.³⁰

But securities fraud claims are not perfectly tailored to event-driven litigation. If the alleged misstatement was about the company’s exposure to a risk that came to pass, the shareholders are not suing because of their reliance on that misstatement; they are suing because the company had a hand in the adverse event that caused its share price to drop. This issue is especially notable when plaintiffs attempt to establish reliance through a fraud-on-the-market theory. In that scenario, the price drop is the only thing tying shareholders’ losses to the misstatement; the price drop occurred because the risk came to pass—not because the misstatement was revealed to be fraudulent.

In *In re: PG&E Corporation Securities Litigation*, plaintiffs-appellants filed for securities fraud following the 2017 North Bay Fires and the 2018 Camp Fire.³¹ In their brief, plaintiffs-appellants alleged that PG&E “lured the public into believing PG&E was a prudent, safe, fully-compliant corporate citizen worth more than \$71 per share and not the bankrupt wrongdoer it is now known to be.”³² Plaintiffs-appellants further alleged that defendants-appellees misstated

26. JEFFERY A. DAILEY, NEAL ROSS MARDER & AKIN GUMP STRAUSS HAUER & FELD LLP, *THE RISE IN EVENT-DRIVEN SECURITIES LITIGATION—WHY IT MATTERS TO DIRECTORS AND OFFICERS* 1 (2018), <https://www.akingump.com/a/web/99361/aokuj/the-rise-in-event-driven-securities-litigation-why-it-matters-to.pdf>.

27. *Id.* (“[The rise of securities class action filings indicate a] shift in the nature of securities class actions from traditional accounting-based allegations . . . to those filed in response to adverse company events.”); 17 C.F.R. § 240.10b-5(b) (2025); *see also* LaCroix, *supra* note 12 (“[T]he new securities lawsuit may represent something of a prototype for future litigation involving companies whose business operations are disrupted by changing climate conditions and by the increase in extreme weather conditions and events.”).

28. Fox & Mitts, *supra* note 19, at 4.

29. *See* Emily Strauss, *Is Everything Securities Fraud?*, 12 U.C. IRVINE L. REV. 1331, 1341 (2022) (“Rather, the real winner is a growing cohort of lawyers who are filing meritless lawsuits in federal and state courts across the United States every time . . . a corporate misfortune impacts a company’s share price.”).

30. 17 C.F.R. § 240.10b-5(b) (2025).

31. Brief for Plaintiffs-Appellants at 6 n.4, *In re PG&E Corp. Sec. Litig.*, No. 22-16711 (9th Cir., Mar. 6, 2023) (“During the Class Period, PG&E caused 17 or 18 of the 18 ‘North Bay Fires’ that together killed 44 and inflicted more than \$17 billion in damage in October 2017. PG&E then caused the November 2018 Camp Fire, which killed 85 more people and caused \$13 billion in damage. California found evidence of PG&E’s safety violations sparking most of these fires, and exacerbating *all of them.*” (citations omitted)).

32. *Id.* at 2.

their compliance with safety regulations and other fire-risk management, efforts which altered investors' understanding of defendants-appellees' "ability to prevent fires."³³ Plaintiffs-appellants alleged that these statements were material to investors "because they failed to disclose PG&E's systemic safety deficiencies and inadequate investment in wildfire mitigation."³⁴

The plaintiff-appellants in *In re PG&E* used a fraud-on-the-market theory to establish reliance because doing so does not require the purchasers to prove reliance or even knowledge of the misstatement.³⁵ Those who bought PG&E shares at an inflated price due to the misstatements by management relied on the misstatement simply by buying shares.³⁶ Once the truth came to light, that PG&E was not a prudent and safe company, the share price dropped from its inflated price and shareholders experienced an actionable loss. Plaintiff-appellants alleged loss causation through the loss experienced by shareholders when the share price dropped from \$71.56 "ultimately to a low of \$17.74 per share" after "the extent of [PG&E's] concealed imprudence" became known to the public.³⁷ The shareholders who "purchased PG&E securities at inflated prices during the Class Period suffered substantial damages" because they purchased under the impression that PG&E was in fact a prudent company.³⁸ This theory of loss causation is termed the "price maintenance theory." Price maintenance theory uses the actual misstatement as the beginning of the Class Period and the revealing of the misstatement as the end of the class period. Under the price maintenance theory, a misstatement does not need to have impacted the price at the time it was made; in fact, it may have had no effect on the price at all. Plaintiffs using a price maintenance theory allege that the misstatement artificially inflated the share price because the price *should* have been impacted by the truth.³⁹

Although some event-driven securities claims are meritorious, they are often settled early or dismissed at the pleadings stage due to the procedural hurdles imposed by the Private Securities Litigation Reform Act of 1995 ("PSLRA").⁴⁰ The most relevant pleading requirements here are (1) the particularity requirement,⁴¹ (2) a showing that the misstatement was the

33. *Id.* at 5 ("Defendants-Appellees' statements—affirming compliance with safety regulations, sufficient vegetation management, inspection of powerlines and poles every year . . . —directly impacted investors' views of PG&E's ability to prevent fires and recover fire-related outlays, and hence, affected its share price.").

34. *Id.* at 6 n.3.

35. Fox & Mitts, *supra* note 19, at 3.

36. Brief for Plaintiffs-Appellants, *supra* note 31, at 6.

37. *Id.* at 6–7.

38. *Id.* at 7.

39. Share price does not need to change to be artificially inflated following a misstatement. Even if share price remains the same as before a misstatement, this could be due to other market forces balancing out the fallout, not the immateriality of the misstatement.

40. 15 U.S.C. § 78u-4.

41. 15 U.S.C. § 78u-4(b)(1) ("[T]he complaint shall specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement

proximate cause of the loss suffered by the plaintiff-shareholders,⁴² (3) the strong inference of scienter requirement,⁴³ and (4) a stay on discovery until the plaintiffs show a strong inference of scienter.⁴⁴ Suing for securities fraud in the event-driven context begins to seem incoherent because the claim is based on the materialization of risk, not an underestimation of risk, and the PSLRA imposes a significant procedural hurdle for plaintiffs.

B. CAREMARK CLAIMS AS AN ALTERNATE AVENUE FOR EVENT-DRIVEN CORPORATE LAWSUITS

Merritt B. Fox's critique of event-driven fraud on the market litigation is especially salient in the fire risk context because of the increased frequency of disastrous wildfires. Suing PG&E for misstatements about its exposure to fire risk when fire disasters are seemingly inevitable does not seem to get at the issue facing corporate claimants. Instead, plaintiffs should look for a claim that aims to punish corporate conduct that had a hand in the materialization of fire risk, not the underestimation of fire risk. Delaware corporate law provides a cause of action against the directors of a corporation for a breach of their fiduciary duty to monitor risk. These claims are named after *In re Caremark International Inc. Derivative Litigation*, which set the standard for the duty to monitor. In that case, Delaware Chancellor William Allen demanded that boards maintain reasonably designed compliance systems so they can "reach informed judgments concerning both the corporation's compliance with law and its business performance."⁴⁵ In *Stone v. Ritter*, the Chancery Court identified two prongs to test whether the duty to monitor has been breached: "(a) the directors utterly failed to implement any reporting or information system or controls; or (b) having implemented such a system or controls, consciously failed to monitor or oversee its operations thus disabling themselves from being informed of risks or problems requiring their attention."⁴⁶ Historically, surviving the initial motion to dismiss for failure to state a claim under *Caremark's* two prongs has been a challenging hurdle for plaintiffs. However, plaintiff shareholders' claims can now survive a motion to dismiss where "breach of this minimal duty has been

or omission is made on information and belief, the complaint shall state with particularity all facts on which that belief is formed.").

42. 15 U.S.C. § 78u-4 (b)(4) ("In any private action arising under this chapter, the plaintiff shall have the burden of proving that the act or omission of the defendant alleged to violate this chapter caused the loss for which the plaintiff seeks to recover damages.").

43. 15 U.S.C. § 78u-4 (b)(2)(A) (requiring that a plaintiff "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind"—that the defendant knowingly issued a materially misleading statement or omitted material information.).

44. 15 U.S.C. § 78u-4 (b)(3)(B) ("In any private action arising under this chapter, all discovery and other proceedings shall be stayed during the pendency of any motion to dismiss, unless the court finds upon the motion of any party that particularized discovery is necessary to preserve evidence or to prevent undue prejudice to that party.")

45. *In re Caremark Int'l Inc. Derivative Litig.*, 698 A.2d 959, 960 (Del. Ch. 1996).

46. 911 A.2d 362, 370 (Del. 2006).

difficult for plaintiffs to plead and prove.”⁴⁷ Under *Marchand v. Barnhill* and *In re Clovis Oncology Derivative Litigation*, “mission critical” risks of “life and limb” or accompanied by red flag warnings of the risk are more likely to survive the initial motion to dismiss.⁴⁸

The pleading standard applied to *Caremark* claims is the motion to dismiss standard under *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal*, which inquires as to whether, taking the alleged facts to be true, the plaintiffs have stated a plausible claim for relief.⁴⁹ The Supreme Court explained that “a claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”⁵⁰ The standard for motions to dismiss under *Twombly* and *Iqbal* contrasts with the heightened pleading standard under the PSLRA.⁵¹

Caremark claims are “derivative” claims because they are brought by the corporation when shareholders compel it to do sue. In order to bring a derivative claim in the Chancery Court, the shareholders must plead demand futility, which under *United Food v. Zuckerberg*, requires a showing that the current board is too conflicted to bring a claim on behalf of the corporation, so the company must be compelled to bring a lawsuit.⁵² Demand futility poses an issue for many derivative claims, but because *Caremark* claims are against the board, the second prong of the *Zuckerberg* test, “(ii) whether the director would face a substantial likelihood of liability on any of the claims that are the subject of the litigation demand,” is likely to be satisfied.⁵³

Caremark claims provide a more salient deterrent effect than securities litigation following a disaster because the directors of the corporation are the ones being sued in a *Caremark* claim. Securities fraud holds the company responsible for a misstatement that caused its shareholders to experience loss. Securities fraud lawsuits should deter misstatements, but it is questionable

47. Robert C. Bird, *Caremark Compliance for the Next Twenty-Five Years*, 58 AM. BUS. L.J. 63, 63 (2021).

48. See *infra* Subpart.II.A.

49. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (“To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007))); see *Twombly*, 550 U.S. at 570 (“[W]e do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face.”).

50. *Iqbal*, 556 U.S. at 678.

51. See *infra* Subpart.III.B.i.

52. 262 A.3d 1034, 1058 (Del. 2021) (“[T]he Court of Chancery applied the following three-part test on a director-by-director basis to determine whether demand should be excused as futile: (i) whether the director received a material personal benefit from the alleged misconduct that is the subject of the litigation demand; (ii) whether the director would face a substantial likelihood of liability on any of the claims that are the subject of the litigation demand; and (iii) whether the director lacks independence from someone who received a material personal benefit from the alleged misconduct that is the subject of the litigation demand or who would face a substantial likelihood of liability on any of the claims that are the subject of the litigation demand.”); *infra* Subpart.III.B.ii.

53. *Zuckerberg*, 262 A.3d at 1058; see *In re Boeing Co. Derivative Litig.*, C.A. No. 2019-0907, 2021 WL 4059934, at *24 (Del. Ch. Sep. 7, 2021) (“[A] majority of the members of the Board have faced a substantial likelihood of liability for failing to make any good faith effort to implement and oversee a board-level system to monitor and report on safety.”).

whether they actually deter wrongdoing because the punishment for securities fraud does not perfectly match the corporate wrongdoing in the disaster context.

For example, imagine you are the director of a manufacturing company that is being sued because it made a material misstatement about its manufacturing capabilities. Your company should probably avoid misstating its manufacturing capabilities in the future, so it does not get sued again. But, if you are the director of a manufacturing company that is being sued because it misstated the risk of its factory blowing up, and then its factory did in fact blow up, are you supposed to avoid future misstatements of the risk of your factory blowing up? No, you are supposed to avoid future factory explosions. But the company is not being sued for securities fraud because its factory exploded. That the factory exploded is just a real-world manifestation of how inflated the stock price was due to the misstatement of the risk of explosion. Thus, in theory, companies are more likely to incorporate securities fraud class actions into its cost of doing business when they are sued for event-driven securities fraud. On the other hand, with *Caremark* claims, where directors and officers are the target of the litigation, companies should theoretically favor preventative behavior because it will be more likely that directors and officers, the ones responsible for the oversight in the first place, will avoid being sued in their individual capacity.⁵⁴

II. A BROADER CAREMARK STANDARD FOR FAILURE TO MONITOR

If event-driven securities lawsuits are often dismissed and are subject to the heightened pleading requirements of the PSLRA, plaintiffs' attorneys should look to the *Caremark* duty to monitor jurisprudence to bring claims better tailored to the disaster context.⁵⁵ There are two prongs under *Caremark*: "(a) the directors utterly failed to implement any reporting or information system or controls; or (b) having implemented such a system or controls, consciously failed to monitor or oversee its operations thus disabling themselves from being informed of risks or problems requiring their attention."⁵⁶ *Caremark* demands that boards maintain compliance systems that are "reasonably designed . . . to allow management and the board . . . to reach informed judgments concerning

54. *But see* Books Schatschneider & Jon Smollen, *The Caremark Decision at 2—Corporate Compliance Comes of Age*, TEMPLE 10-Q, <https://www2.law.temple.edu/10q/caremark-decision-21-corporate-compliance-comes-age> (last visited Dec. 31, 2025) ("*Caremark*'s influence on corporate boards was overstated. Although recognizing that compliance is undeniably a focus for corporate boards, he viewed this as largely attributable to factors beyond the opinion itself.>").

55. It is unclear whether event-driven lawsuits even compensate shareholders because they burden other shareholders who are not suing. *See* John C. Coffee, Jr., *Reforming the Securities Class Action: An Essay on Deterrence and Its Implementation*, 106 COLUM. L. REV. 1534, 1537 (2006) ("To punish the corporation and its shareholders in [a typical secondary market] case is much like seeking to deter burglary by imposing penalties on the victim for having suffered a burglary. Although such an approach might arguably encourage additional precautions, it will also encounter predictable resistance from those it is ostensibly seeking to protect."); *Id.* at 1557 ("[T]he moral entitlement of the plaintiff class to seek its recovery from the equally nonculpable continuing shareholders seems debatable at least.").

56. *Stone v. Ritter*, 911 A.2d 362, 370 (Del. 2006).

both the corporation's compliance with law and its business performance."⁵⁷ The standard for breach of fiduciary duty claims for failure to monitor risk under *Caremark* has historically been insurmountable for most claims.⁵⁸ However, *Marchand* and *Clovis Oncology* indicate that plaintiffs may be well positioned to punish corporate wrongdoing through fiduciary duty claims, suggesting that the standard under *Caremark* is broader than in the past. Compliance systems prior to *Marchand* and *Clovis Oncology* needed only to be created and maintained. However now, "mission critical" risks, especially those of life and limb or accompanied by red flags warning of the risk, are more likely to survive the initial motion to dismiss. Further, claims brought under both prongs of *Caremark* survived their initial motions to dismiss, despite the companies having compliance systems in place, in *In re Boeing Company Derivative Litigation* and *In re McDonald's Corp. Stockholder Derivative Litigation*.⁵⁹ These two cases are examples of the broader standard post-*Marchand* and *Clovis Oncology*. Plaintiffs in event-driven lawsuits may be well-served by the broader *Caremark* standard, and *Boeing* and *McDonald's* seem to be signs that the broader standard is here to stay.⁶⁰

A. *MARCHAND V. BARNHILL* AND *IN RE CLOVIS ONCOLOGY, INC. DERIVATIVE LITIGATION* SET OUT A BROADER *CAREMARK* STANDARD

Since *Caremark* was decided in 1996, lawyers and judges have considered the *Caremark* failure to monitor standard near impossible to plead if a company had some sort of monitoring system in place.⁶¹ However, the plaintiffs in *Marchand v. Barnhill* and *Clovis Oncology* opened the door for *Caremark* claims by surviving their respective motions to dismiss. In *Marchand*, the court denied the director defendant's motion to dismiss because the compliance system in place failed to monitor a risk that was "intrinsicly critical" to the business.⁶² Then, in *Clovis Oncology*, the court again denied the initial motion to dismiss because "the Board consciously ignored red flags that revealed a

57. *In re Caremark Int'l Inc. Derivative Litig.*, 698 A.2d 959, 970 (Del. Ch. 1996).

58. Bird, *supra* note 47, at 65 ("[P]laintiffs rarely succeed in pleading or proving their *Caremark* claims. The result has been a veritable graveyard of *Caremark* lawsuits.")

59. *In re Boeing Co. Derivative Litig.*, C.A. No. 2019-0907, 2021 WL 4059934, at *25 (Del. Ch. Sep. 7, 2021); *In re McDonald's Corp. S'holder Derivative Litig.*, 289 A.3d 343, 350 (Del. Ch. 2023).

60. *Boeing*, 2021 WL 4059934 at *25; *McDonald's*, 289 A.3d at 349; *see infra* Subparts.II.B–C; Roy Shapira, *A New Caremark Era: Causes and Consequences*, 98 WASH. U. L. REV. 1857, 1859 (2021); *see also* *Inter-Mktg. Grp. USA, Inc. ex rel. Plains All Am. Pipeline, L.P. v. Armstrong*, No. 2017-0030, 2020 WL 756965, at *15 (Del. Ch. Jan. 31, 2020) (denying a motion to dismiss for failure to plead demand futility because a general partner "face[d] a substantial likelihood of liability for breaching its contractual duty").

61. Shapira, *supra* note 60 ("[D]erivative actions over directors' failure of oversight were routinely dismissed at the pleading stage, and many commentators considered *Caremark* duties largely irrelevant."); *see also* *Caremark*, 698 A.2d at 967; *Stone*, 911 A.2d at 369.

62. *Marchand v. Barnhill*, 212 A.3d 805, 822 (Del. 2019).

mission-critical failure to comply” with risk monitoring protocols and regulations.⁶³

In *Marchand*, Bluebell Creamery’s failure to monitor the risk of a listeria outbreak was sufficient to overcome the standard set by *Caremark*.⁶⁴ In that case, the Chancery Court denied the defendant’s motion to dismiss because “the complaint allege[d] particularized facts that support[ed] a reasonable inference that the Blue Bell Board failed to implement any system to monitor Blue Bell’s food safety performance or compliance.”⁶⁵ Although Blue Bell “nominally complied with FDA regulations,” its lack of food safety risk compliance “at the board level” was sufficient to support a fiduciary duty claim.⁶⁶ The court highlighted two primary reasons that the plaintiffs survived the motion to dismiss. First, the compliance issue at the heart of the dairy corporation was “intrinsically critical” to the operations of Blue Bell.⁶⁷ Second, the court noted that the “failure to take remedial action . . . exposed consumers to listeria-infected ice cream, resulting in the death and injury of company customers.”⁶⁸

A matter of weeks later, the Chancery Court decided *Clovis Oncology*, yet again allowing a *Caremark* claim to survive a motion to dismiss.⁶⁹ In that case, defendants manufactured a drug called Rociletinib (“Roci”) as a treatment for a previously untreatable lung cancer.⁷⁰ Roci was to be developed using “a standardized and well-known clinical trial protocol” called Response Evaluation Criteria in Solid Tumors (“RECIST”).⁷¹ Defendants’ “management consistently represented that Roci’s [objective response rate]” (the success-defining metric for these drugs, *hereinafter* “ORR”) was as encouraging to the success of the drug, as their competitor’s drug.⁷² However, Roci’s ORR was not as encouraging as the company represented, and the Board was aware of the discrepancy.⁷³ Roci underwent trials, with its ORR at about 42%, while the Board represented an ORR of 60%.⁷⁴ The Chancery Court denied the motion to dismiss because the “Board consciously ignored red flags that revealed a mission critical failure to comply with the RECIST protocol and associated FDA regulations.”⁷⁵ The court further held that the Board’s “failure of oversight

63. *In re Clovis Oncology, Inc. Derivative Litig.*, No. 2017-0222, 2019 WL 4850188, at *15 (Del. Ch. Oct. 1, 2019).

64. *Marchand*, 212 A.3d at 824.

65. *Id.* at 809.

66. *Id.* at 823.

67. *Id.* at 822.

68. *Id.* at 824.

69. *In re Clovis Oncology, Inc. Derivative Litig.*, No. 2017-0222, 2019 WL 4850188, at *15 (Del. Ch. Oct. 1, 2019).

70. *Id.* at *4.

71. *Id.*

72. *Id.* at *5.

73. *Id.* at *6.

74. *Id.* at *7.

75. *Id.* at *15.

caused monetary and reputational harm to the Company [] sufficient to provide a causal nexus between the breach of fiduciary duty and the corporate trauma.”⁷⁶

Marchand and *Clovis Oncology* broadened the standard for director failure to monitor claims. Prior to these cases, it was rare for a claim to survive the initial motion to dismiss when the company had a compliance system in place. The mere existence of a compliance system is no longer sufficient for Delaware courts to turn away corporate litigants.⁷⁷ It may be the right moment for plaintiffs’ attorneys to bring event-driven corporate claims as breach of fiduciary duty claims under *Caremark*.

B. *IN RE BOEING COMPANY DERIVATIVE LITIGATION* IS A CASE STUDY OF THE BROADER STANDARD AT WORK IN A PRONG ONE *CAREMARK* CLAIM

In 2021, two Boeing 737 MAX planes crashed, killing every single person on board. In addition to the significant loss of human life, the crashes caused the aircrafts’ manufacturer, Boeing, to suffer substantial corporate harm.⁷⁸ Following these disasters, shareholder plaintiffs filed a derivative claim under both prongs of *Caremark*.⁷⁹ They were successful on the first prong: that “the directors utterly failed to implement any reporting or information system or controls[.]”⁸⁰ Thus, they survived the initial motion to dismiss because they pled sufficient facts within the contours of a *Caremark* prong one claim for “essential and mission critical” risks: airplane safety and risk monitoring by Boeing, an aircraft manufacturer.⁸¹

The complaint alleged that warning signs of the risk of crashes began when Boeing shifted its focus from safety to “cost-cutting” in 2001.⁸² This shift resulted in a forty-day strike by flight engineers, to which Boeing responded by relocating its headquarters in 2001.⁸³ Plane safety issues followed Boeing’s relocation and new corporate focus on “cost-cutting.” First, in 2013, the Federal Aviation Administration (“FAA”) grounded Boeing’s 787 Dreamliner because

76. *Id.*

77. *See infra* Subpart.II.B.

78. *In re Boeing Co. Derivative Litig.*, C.A. No. 2019-0907, 2021 WL 4059934, at *15 (Del. Ch. Sep. 7, 2021) (explaining that the resulting regulatory investigation totaled \$2.513 billion, which included a \$243.6 million criminal monetary payment, a \$1.77 billion payment to compensate 737 MAX airline customers, and creating a \$500 million crash-victim beneficiaries fund).

79. *Id.* at *20 (“[The plaintiffs alleged that the defendants] consciously breached their fiduciary duties and violated their corporate responsibilities by (1) before the Lion Air Crash, failing to implement any reasonable information and reporting system to monitor and oversee the safety of Boeing’s airplanes; (2) after the Lion Air Crash, despite being made aware of red flags concerning the operation, development, and nondisclosure of MCAS, consciously disregarding their duty to investigate and to remedy any misconduct uncovered[.]”); H. Justin Pace & Lawrence J. Trautman, *Climate Change and Caremark Doctrine, Imperfect Together*, 25 U. PA. J. BUS. L. 777, 788–90 (2023).

80. *Stone v. Ritter*, 911 A.2d 362, 370 (Del. 2006).

81. *In re Boeing*, 2021 WL 4059934, at *26.

82. *Id.* at *3–4.

83. *Id.* at *4.

of issues with battery fires.⁸⁴ Then in 2015, there were thirteen civil enforcement cases resulting in a \$12 million settlement with the FAA and an additional \$24 million deferred in additional fines pending implementation of “significant systemic initiatives, to strengthen its regulatory compliance processes and practices.”⁸⁵ Despite all of these issues, Boeing had no board committee specifically tasked with overseeing airplane safety.⁸⁶ Instead, Boeing used its audit committee as the “primary arbiter for risk and compliance.”⁸⁷ However, the audit committee generally handled risk and did not specifically deal with airplane safety.⁸⁸

With the Board’s audit committee as the sole arbiter of compliance, Boeing pressed forward with its “cost-cutting” goals and made the 737 MAX its primary focus.⁸⁹ At a Board meeting in which the 737 MAX was approved, not a single Board member asked about the safety implications of the reconfigured version of the 737 MAX.⁹⁰ Alongside Boeing’s “cost-cutting” mentality and lack of risk monitoring was a perceived urgency to keep up with its competitor in the development of a new airplane. Boeing’s response was to set a “frenetic” pace of development for the new 737 MAX.⁹¹ Hiding amidst Boeing’s fast-paced development and lack of an airplane safety committee was a faulty system called the Maneuvering Characteristics Augmentation System (“MCAS”) installed in the 737 MAX. Boeing placed a larger engine on the wings of the aircraft to increase fuel efficiency; this new placement required the MCAS to manage tilting caused by the added weight. Boeing’s internal safety analyses concluded that the MCAS “could cause ‘catastrophic’ failures” if tilting occurred unnoticed by a pilot, but Boeing rejected engineer proposals to implement safety features.⁹²

In the summer of 2018, while the 737 MAXs were flying off the shelves and Boeing had \$490 billion in back-ordered planes, a longtime general manager said he was hesitant about putting his family on a Boeing airplane.⁹³ Similar

84. *Id.*

85. *Id.*

86. *Id.* at *5.

87. *Id.*

88. *Id.*

89. *Id.* at *7–8 (“With the Board so distanced from safety information, and on the heels of recent safety incidents and inquiries, Boeing continued to push production and forego implementing meaningful systems to monitor airplane safety. . . . Boeing prioritized (1) expediting regulatory approval and (2) limiting expensive pilot training required to fly the new model.”).

90. *Id.* at *8.

91. *Id.*

92. *Id.* at *9 (“After MCAS was revised to rely on the single AOA sensor, internal safety analyses concluded that MCAS could cause ‘catastrophic’ failures if it took a pilot more than ten seconds to identify and respond to the software’s activation. But the analyses assumed the pilot would react within four seconds, and so concluded that the likelihood of a ‘hazardous event’ due to an MCAS failure was nearly inconceivable. It would later be revealed that Boeing’s four-second reaction time assumption was a ‘gross underestimate.’”).

93. *Id.* at *11 (“‘Right now all my internal warning bells are going off. . . . And for the first time in my life, I’m sorry to say that I’m hesitant about putting my family on a Boeing airplane.’ At a meeting, the engineer expressed that he had ‘seen larger operations shut down for far less safety issues . . . in the military and those

concerns came in from other employees regarding unrelenting and dangerous economic pressure from senior management to produce the 737 MAX rapidly and cheaply.⁹⁴ Further, despite the issues with the MCAS, Boeing used “tremendous pressure” and its significant sway over the FAA to obtain a pilot training program that did not require the use of costly flight simulator trainings and did not include any substantive description of MCAS.⁹⁵ It was later revealed that Boeing technical pilots “basically . . . lied” to the regulators in order to get the relaxed training program from the FAA. In an email one technical pilot bragged “that his ‘jedi mind tricks’ had worked on the FAA.”⁹⁶

As the issues with the tilting notification were continuously concealed, Boeing targeted customers in emerging markets, knowing the quality of pilot training was not as high as in the United States.⁹⁷ Boeing’s sales strategy exacerbated the concealed issues with the MCAS because it had received the more relaxed training standard from the FAA.⁹⁸ The Boeing Board had allowed the company to retrofit its planes with an undetectable faulty system that could cause planes to nosedive without warning, and sold it to unsuspecting customers worldwide.

On October 29, 2018, a 737 MAX flying for Lion Air crashed into the ocean off the coast of Jakarta because the MCAS malfunctioned, forcing the airplane’s nose downwards against the best efforts of the pilots.⁹⁹ Every single one of the 189 passengers and crew onboard were killed in the crash.¹⁰⁰ Despite the horrific accident, “[m]anagement did not bring the Lion Air Crash to the Board’s attention for over a week” and the directors continued to blame the crash on the pilots.¹⁰¹ Further, even once the Board was alerted of these red flags, it decided against an internal investigation of the fraud until the FAA regulatory

organizations have national security responsibilities.’ The manager responded, ‘The military isn’t a profit making organization.’ The engineer retired from Boeing soon thereafter.”).

94. *Id.*

95. *Id.* at *9–10.

96. *Id.* at *9. The chief technical pilot whose “jedi mind tricks” resulted in the relaxed training program was subsequently indicted for “deceiving the Federal Aviation Administration’s Aircraft Evaluation Group (FAA AEG) in connection with the FAA AEG’s evaluation of Boeing’s 737 MAX airplane, and scheming to defraud Boeing’s U.S.-based airline customers to obtain tens of millions of dollars for Boeing.” He was acquitted by a federal jury on March 23, 2022. Press Release, U.S. Dep’t. of Just., Former Boeing 737 MAX Chief Technical Pilot Indicted for Fraud (Oct. 14, 2021), <https://www.justice.gov/archives/opa/pr/former-boeing-737-max-chief-technical-pilot-indicted-fraud>.

97. Even once on market, the MCAS alert was part of an \$80,000 add-on feature, a feature that was not purchased for the two airliners which crashed causing the deaths of all of the passengers. *In re Boeing*, 2021 WL 4059934, at *10 (“[E]ven after the 2019 Ethiopian Airlines Crash, Boeing continued to insist that the AOA indicator display was not a ‘required’ safety feature and that it was appropriate to offer it as an optional ‘add on.’”).

98. *Id.*

99. *Id.* at *12 (“The plane’s black box data revealed that the pilots searched the Quick Reference Handbook’s checklist for abnormal flight events, but it said nothing about MCAS, which was later identified as the cause of the tragedy.”).

100. *Id.*

101. *Id.* at *13.

investigations concluded.¹⁰² When the audit committee, the board committee tasked with safety and compliance, presented material to the Board, it contained no information about the safety of the 737 MAX or even safety generally.¹⁰³ Four months later, on March 10, 2019, another 737 MAX flying for Ethiopian Airlines crashed because of the exact same issue with MCAS, killing all 157 passengers and crew.¹⁰⁴ In response to the Ethiopian Airlines crash, the FAA grounded the 737 MAX.¹⁰⁵

The Chancery Court held that the plaintiffs sufficiently pled demand futility for the director defendants because they would face “a substantial likelihood of liability” for their failure to monitor Boeing’s safety compliance.¹⁰⁶ The court cited similar failures to those in *Marchand* to support its denial of the defendants’ motion to dismiss: there was no board committee charged with monitoring airplane safety;¹⁰⁷ the Board did not monitor or address airplane safety on a regular basis;¹⁰⁸ there was no regular reporting process for airplane safety;¹⁰⁹ there were red flags leading up to the Lion Air Crash about MCAS but information never reached the Board;¹¹⁰ and an inference of scienter from these failures.¹¹¹

Boeing is an example of the Chancery Court applying a broader *Caremark* standard to “mission critical” risks of life and limb. Boeing tasked its audit committee with compliance, corporate conduct that likely would have sufficed before *Marchand* and *Clovis Oncology*. However, the egregious lack of board-level safety-specific compliance and the type of risk at issue in this case allowed the plaintiffs’ claim to survive a motion to dismiss.

102. *Id.* (“And [Muilenburg] blamed the Lion Air flight crew for the crash. He did not explain that Boeing knew MCAS was vulnerable and susceptible to failure, nor that pilots were not informed about or trained on MCAS.”).

103. *Id.* at *14 (“The Audit Committee met, too. The material it intended to present to the full Board included an ‘Ethics and Compliance Update,’ but did not contain any meaningful information about the 737 MAX’s safety or safety generally.”).

104. *Id.* at *16.

105. Operators of Boeing Company Model 737-8 and Boeing Company Model 737-9 Airplanes: Emergency Order of Prohibition, 84 Fed. Reg. 9705, 9706 (Mar. 18, 2019) (to be codified at 14 C.F.R. pt. 91).

106. *In re Boeing*, 2021 WL 4059934, at *23 (“Plaintiffs’ position is that nine of the twelve board members at the time the original complaint was filed face a substantial likelihood of liability for failure to fulfill their oversight duties under the standards set forth in *Caremark*”); see *United Food & Com. Workers Union & Participating Food Indus. Emps. Tri-State Pension Fund v. Zuckerberg*, 262 A.3d 1034, 1058 (Del. 2021).

107. *In re Boeing*, 2021 WL 4059934, at *27.

108. *Id.* at *27–28.

109. *Id.* at *28–31.

110. *Id.* at *31.

111. *Id.* at *32.

C. THE CHANCERY COURT APPLIED THE BROADER STANDARD IN A PRONG TWO *CAREMARK* CLAIM IN *IN RE MCDONALD'S CORPORATION STOCKHOLDER DERIVATIVE LITIGATION*

In *McDonald's*, the Chancery Court denied the defendant's motion to dismiss a *Caremark* claim for failing to monitor rampant sexual harassment at the fast-food chain McDonald's. Plaintiffs brought a claim under the second prong of *Caremark*, which holds directors liable if "(b) having implemented such a system or controls, [they] consciously failed to monitor or oversee its operations thus disabling themselves from being informed of risks or problems requiring their attention."¹¹² The court held that officers have an obligation to make a good faith effort to put in place reasonable systems to obtain the information necessary to monitor operations and report to the CEO and the Board.¹¹³ Further, officers could not consciously ignore red flags indicating that the corporation was going to suffer harm.¹¹⁴ Additionally, the court held an officer liable under *Caremark* for failure to monitor, something it refused to do in *Boeing*—only holding the directors liable for the failure to monitor.¹¹⁵

In *McDonald's*, dozens of workers filed complaints with the Equal Employment Opportunity Commission ("EEOC") against McDonald's Corporation.¹¹⁶ Additionally, an officer had reports against him as an individual for committing sexual harassment during company parties.¹¹⁷ In response, McDonald's took steps to address its issues with sexual harassment.¹¹⁸ The company detailed the steps it was taking in a memo, which included a holistic review of training programs, additional training programs, and the establishment of a harassment reporting hotline.¹¹⁹ The public allegations led stockholders to seek books and records under Delaware General Corporation Law ("D.G.C.L.") Section 220 ("Section 220").¹²⁰ Using the information publicly available and from the Section 220 request, the plaintiffs sufficiently pled a claim for the breach of the duty to monitor under *Caremark*.

The court set out the rule for pleading a "red flags" claim under the second prong of *Caremark* as requiring plaintiffs to "plead facts supporting an inference" that the fiduciary (1) "knew of evidence of corporate misconduct," and (2) "consciously failed to take action in response."¹²¹ These elements must

112. *Stone v. Ritter*, 911 A.2d 362, 370 (Del. 2006).

113. *In re McDonald's Corp. S'holder Derivative Litig.*, 289 A.3d 343, 350 (Del. Ch. 2023).

114. *Id.*

115. *Id.*; see *In re Boeing*, 2021 WL 4059934, at *36 ("Defendants argue that Plaintiffs do not plead with particularity facts establishing that demand is excused for Count II of their Complaint, alleging breach of fiduciary duty by Boeing's officers.").

116. *In re McDonald's*, 289 A.3d at 353.

117. *Id.* at 354.

118. *Id.* at 355–56.

119. *Id.* at 355.

120. DEL. CODE ANN. tit. 8, § 220 (1953); see *In re McDonald's*, 289 A.3d at 358.

121. *In re McDonald's*, 289 A.3d at 376; see *Teamsters Loc. 443 Health Servs. & Ins. Plan v. Chou*, No. CV 2019-0816, 2020 WL 5028065, at *24 (Del. Ch. Aug. 24, 2020) (allowing a prong two *Caremark* claim to

be satisfied at the pleadings stage, so the court must inquire “whether the complaint contained a short, plain statement of facts sufficient to support a claim against” the board of directors.¹²²

In *McDonald’s*, the plaintiffs sufficiently pled the first element using Section 220 documents, which supported the inference that management knew of the multitude of incidents, strikes, walk-outs, and complaints filed with EEOC.¹²³ The plaintiffs satisfied the second element with several instances of sexual harassment on the part of the officer and ignored complaints under the watch of the officer. The court recognized that the officer may have participated in a good faith response, but his own harassment and the possibility of going “through the motions” was sufficient to support a claim for breach of the duty of oversight.¹²⁴ Further, and more relevant to the disaster context, the absence of evidence in the documents produced by the Section 220 request indicated a failure to “report upward.”¹²⁵ This failure to report, while having a system in place, was sufficient for the second element of a “red flags” claim.¹²⁶

III. CORPORATE CLAIMS FOLLOWING FIRE DISASTERS ARE MORE COMPELLING AS *CAREMARK* CLAIMS THAN 10B-5 FRAUD CLAIMS

The Delaware courts seem to favor cases in which the risk at issue for breach of the duty of oversight is one that is “essential and mission critical” or is accompanied by conscious disregard of “red flags.”¹²⁷ *Caremark* claims are more tailored to event-driven claims following fire disasters because when directors fail to monitor risks of life and limb in a highly regulated industry, a

survive the initial motion to dismiss when the plaintiffs alleged sufficient facts to draw a reasonable inference that “the Board did nothing to correct the underlying mission critical compliance shortcomings” at an oncology supply company).

122. FED. R. CIV. P. 12(b)(6); see *In re McDonald’s*, 289 A.3d at 376–77 (“To plead a Red-Flags Claim that will survive a Rule 12(b)(6) motion, a plaintiff must plead facts supporting an inference that the fiduciary knew of evidence of corporate misconduct. The plaintiff also must plead facts supporting an inference that the fiduciary consciously failed to take action in response. The pled facts must support an inference that the failure to take action was sufficiently sustained, systematic, or striking to constitute action in bad faith. A claim that a fiduciary had notice of serious misconduct and simply brushed it off or otherwise failed to investigate states a claim for breach of duty.”).

123. *In re McDonald’s*, 289 A.3d at 378.

124. *Id.* at 379–80.

125. *Id.* at 379.

126. *Id.*

127. See, e.g., *In re Boeing Co. Derivative Litig.*, C.A. No. 2019-0907, 2021 WL 4059934, at *26 (Del. Ch. Sep. 7, 2021); *In re McDonald’s*, 289 A.3d at 380; see Pace & Trautman, *supra* note 79, at 791 (“The likelihood of a successful *Caremark* claim certainly seems to be higher, with five *Caremark* claims surviving a motion to dismiss between 2019 and 2021, compared to six successful *Caremark* claims between 1996 and 2018.”) (citations omitted); see also Zack Schrieber, *Caremark and “Mission-Critical” ESG Company Operations*, CADWALADER 2 (Feb. 28, 2022), https://www.cadwalader.com/resources/clients-friends-memos/caremark-and-mission-critical-esg-company-operations#_ftnref48 (“This article addresses Delaware courts’ recent application of *Caremark* claims to ESG issues, and how stockholders are using—and will likely continue to use—*Caremark* to hold directors legally accountable for failures relating to their obligations to monitor ‘mission-critical’ ESG aspects of a company.”).

Caremark claim is likely to survive a motion to dismiss.¹²⁸ Further, the procedural hurdles that plaintiffs must clear in the Chancery Court are easier in the event-driven context because a meritorious *Caremark* claim creates a “substantial likelihood of liability” sufficient for demand futility, which is required to bring a derivative lawsuit.¹²⁹ Plaintiffs pleading these claims based on Section 220 books and records requests have also seen success. Finally, after the *McDonald’s* decision, directors *and* officers can be held liable under *Caremark*, and even good faith participation in risk monitoring can fall short of the standard if those responsible for oversight are themselves involved in the misconduct creating the risk.

Caremark claims are about making sure disasters don’t occur again; they seek to punish insufficient compliance systems. In contrast, securities fraud class actions focus on compensating shareholders when fraudulent conduct removes their ability to make informed investment decisions. Corporate claims following fire disasters would be better suited as *Caremark* claims instead of securities class actions because (1) when directors fail to monitor a risk of life and limb in a highly regulated industry, a *Caremark* claim is likely to survive a motion to dismiss; (2) there is a possibility that distribution of the damages will prevent future harms; and (3) the procedural hurdles of the demand requirement are unlikely to pose an issue for plaintiffs like the PSLRA does for private securities class actions.¹³⁰

A. “MISSION CRITICAL” RISKS OF LIFE AND LIMB IN “HIGHLY REGULATED” INDUSTRIES ARE MORE LIKELY TO SURVIVE A MOTION TO DISMISS

The cases that set out the broader *Caremark* standard indicate factors for the sufficiency of a complaint to survive a motion to dismiss. It is unclear whether these are hardline rules, but the Chancery Court seems more willing to find director’s liable for failure to monitor when they are present. First, when the risk is of life and limb, as opposed to fines or legal action, the claim is more likely to survive a motion to dismiss. Second, “mission critical” risks are likely to survive the initial motion to dismiss, whereas risks that are merely peripheral or incidental are likely to be dismissed on the pleadings. Third, the Chancery

128. See Joshua S. Margolin & Sean Goldman-Hunt, *Caremark 2.0 Lends Shareholders Agency Against Polluters*, SELENDY GAY PLLC (Mar. 11, 2024), <https://www.selendygay.com/news/publications/2024-03-11-caremark-20-lends-shareholders-agency-against-polluters>; see also Michael Sosnick, *Caremark Claims for Workers’ Rights: Repeated Unfair Labor Practices as a Breach of Fiduciary Duty*, 58 COLUM. L. REV. 525, 539–41 (2025) (arguing that a shift in denying motions to dismiss when claims involved egregious facts could point to future success for plaintiffs in less extreme cases).

129. See *In re Boeing*, 2021 WL 4059934, at *24 (“[A] majority of the members of the Board have faced a substantial likelihood of liability for failing to make any good faith effort to implement and oversee a board-level system to monitor and report on safety.”); see also *In re Geron Corp. S’holder Derivative Litig.*, No. 2020-0684, 2022 WL 1836238, at *13 (Del. Ch. June 3, 2022) (finding no substantial likelihood of liability because “no directors are at risk of a judgment under the *Caremark* doctrine”).

130. The demand requirement is at likely to be less burdensome than the PSLRA is on private plaintiffs filing lawsuits following disasters.

Court demands a higher standard of compliance from industries that are “highly regulated.” Event-driven lawsuits following fire disasters are strong candidates for these claims because they are well within all three of these factors.

1. Fire Disasters Are a Risk of Life and Limb Likely to Survive a Motion to Dismiss

When the risk at issue for *Caremark* claims is one of life and limb, such as cancer drugs, listeria outbreaks, and airplane crashes, the Chancery Court is willing to find bad faith action on the part of the directors for failing to monitor such risks.¹³¹ The risk at issue in the fire disaster context is unquestionably one of life and limb. In 2017, the Napa Fires, caused by PG&E negligence,¹³² “forty-four people lost their lives several hundred were hospitalized, and millions of people were exposed to smoke from the fires.”¹³³ In 2018, the Camp Fire, ignited by PG&E equipment,¹³⁴ killed eighty-six people.¹³⁵ Then, in the 2020 Zogg Fire, a fire in which PG&E’s role is yet to be determined,¹³⁶ “[Thirty-three] people perished as a direct result of the fires.”¹³⁷ A court is likely to find that fire risk monitoring deals with a risk of life and limb, and plaintiffs’ attorneys would be well equipped to analogize the risks to those in *Boeing*, *Clovis Oncology*, or *Marchand* because the harm to human lives caused by fires is so well documented.¹³⁸ A *Caremark* claim based on a fire-disaster could also be an

131. See *Marchand v. Barnhill*, 212 A.3d 805, 824 (Del. 2019) (“[A]s a failure to take remedial action, the company exposed consumers to *listeria*-infected ice cream, resulting in the death and injury of company customers, the plaintiff has met his onerous pleading burden and is entitled to discovery to prove out his claim.”); see also *In re Boeing Co.* 2021 WL 4059934, at *2 (lamenting the “preventable loss of life” caused by plane crashes due to faulty MCAS); *In re Clovis Oncology, Inc. Derivative Litig.*, No. 2017-0222-JRS, 2019 WL 4850188, at *8 (Del. Ch. Oct. 1, 2019) (“The Board [] learned that one of the drug’s side effects, QT prolongation, was more common than management publicly reported. . . . Nevertheless, the Board sat idle as the Company reported a ‘manageable side effect profile.’”).

132. ENVISTA FORENSICS, INC. & WITT O’BRIEN’S, ROOT CAUSE ANALYSES: 2017-18 WILDFIRES 20 (2022), <https://www.cpuc.ca.gov/-/media/cpuc-website/divisions/safety-policy-division/reports/root-cause-analyses-of-the-2017-18-wildfires.pdf> (“[T]he California Public Utilities Commission (CPUC) later determined that 16 of the fires were ignited by PG&E electricity system equipment . . .”).

133. Mass & Ovens, *supra* note 1.

134. ENVISTA FORENSICS, INC. & WITT O’BRIEN’S, *supra* note 132, at 2 (“On November 8, 2018, the Camp Fire started and went on to become the most destructive wildfire then in California history. CAL FIRE and the CPUC determined that it was ignited by PG&E equipment.”).

135. Miller, *supra* note 2; Masters, *supra* note 2.

136. *2020 Zogg Fire Lawsuit Investigation*, N. CAL. FIRE LAWS., <https://www.norcalfirelawyers.com/2020-zogg-fire> (last visited Sep. 30, 2025) (“PG&E was recently ordered by a federal judge to ‘explain its role in the ignition of the Zogg Fire.’”).

137. Carreras-Sospedra et al., *supra* note 3, at 2.

138. See Margolin & Goldman-Hunt, *supra* note 128 (“Many have argued that the corporate operations that contribute to and will be impacted by climate change are precisely the sort of mission critical activities contemplated by *Marchand*.”); see also Schrieber, *supra* note 127 (“[S]tockholders are using—and will likely continue to use—*Caremark* to hold directors legally accountable for failures relating to their obligations to monitor ‘mission-critical’ ESG aspects of a company.”). *But see* Pace & Trautman, *supra* note 79, at 778 (“Climate change is certainly a mission critical risk at a societal level. But it would be a mistake in most circumstances to extend *Caremark* doctrine into the climate change context and the Delaware Court of Chancery is unlikely to do so.”).

opportunity for the Chancery Court to clarify whether *Caremark* claims are stronger when they allege failure to monitor risks of life and limb. So far, the importance of the type of risk has been inferred from the claims that have survived a motion to dismiss when brought in front of the Chancery Court.

2. Failure to Monitor “Mission Critical” Fire Risks Is Likely Bad Faith Under *Caremark*

Plaintiffs who sufficiently allege that a company failed to monitor fire risk under *Caremark* are likely to survive a motion to dismiss because the Chancery Court has denied motions to dismiss for “mission critical” risks for bad faith conduct by the directors. The Chancery Court first indicated this aspect of *Caremark* claims in *Marchand*, holding that a showing by the plaintiff that the board failed to monitor an “intrinsically critical” risk to the operations of the business supports an inference of bad faith by the board.¹³⁹ In *Marchand*, food safety was essential and “mission critical” to the business operations of an ice cream company.¹⁴⁰ Due to the critical nature of the risk, failure to comply with food safety regulations was bad faith on the part of the Bluebell Board. In *Clovis Oncology*, the Chancery Court continued to find that failure to comply with “mission critical” protocol and regulations was bad-faith conduct by the Board.¹⁴¹

For PG&E and SoCal Edison fire risks are “mission critical” to their overall business.¹⁴² SoCal Edison states on its website that “[o]ne-quarter of SCE’s service area is now in a high fire risk area, making wildfire mitigation one of our top priorities.”¹⁴³ PG&E’s Community Wildfire Safety Program states: “These safety efforts help prevent wildfires and improve your reliability.”¹⁴⁴ PG&E’s 2023-2025 Wildfire Mitigation Plan is 1,687 pages long, including response plans to critical issues, emergency preparedness, and asset inspections.¹⁴⁵ Highlighting the amount of work done by these companies related to fire risk

139. *Marchand v. Barnhill*, 212 A.3d 805, 822 (Del. 2019) (“When a plaintiff can plead an inference that a board has undertaken no efforts to make sure it is informed of a compliance issue intrinsically critical to the company’s business operation, then that supports an inference that the board has not made the good faith effort that *Caremark* requires.”).

140. *Id.* at 824 (“In Blue Bell’s case, food safety was essential and mission critical.”).

141. *In re Clovis Oncology, Inc. Derivative Litig.*, No. 2017-0222, 2019 WL 4850188, at *15 (Del. Ch. Oct. 1, 2019) (“Drawing all reasonable inferences in Plaintiffs’ favor, I am satisfied they have well-pled that the Board consciously ignored red flags that revealed a mission critical failure to comply with the RECIST protocol and associated FDA regulations.”).

142. *Cf. Pettry ex-rel. FedEx Corp. v. Smith*, No. 2019-0795, 2021 WL 2644475, at *12 n.125 (Del. Ch. June 28, 2021), *aff’d*, 273 A.3d 750 (Del. 2022) (finding that the risk of illegal cigarette shipments and resulting fines was not “mission critical” because it constituted “an infinitesimal fraction” of FedEx’s overall business on a yearly basis).

143. *Wildfire Safety*, S. CAL. EDISON, <https://www.sce.com/wildfire/wildfire-safety> (last visited Sep. 30, 2025).

144. *Community Wildfire Safety Plan*, PG&E (Feb. 6, 2025), <https://www.pge.com/assets/pge/docs/outages-and-safety/wildfire-safety/cwsp-fact-sheet.pdf>.

145. 2023-2025 WILDFIRE MITIGATION PLAN R8, PG&E (Feb. 13, 2025), <https://www.pge.com/assets/pge/docs/outages-and-safety/outage-preparedness-and-support/021325-2023-2025-wmp-r8.pdf>.

management and preparedness shows that fire risk is “mission critical” to these companies. It does not prove the sufficiency of their efforts.¹⁴⁶ Fire disasters continue to happen at an increased rate and magnitude despite their efforts; in fact, “the pace of these events has greatly accelerated.”¹⁴⁷ The Chancery Court is likely to hold that fire risk is “mission critical to the business” of public utilities companies. Thus, a finding of bad faith action on the part of the directors for failing to monitor that risk is likely.¹⁴⁸

3. The Public Utilities Industry Is a “Highly Regulated” Industry

In addition to “mission critical” risks, the Chancery Court mentioned in *Clovis Oncology* that being in a “highly regulated” industry is another factor when considering denial of a motion to dismiss.¹⁴⁹ There, the court expected more effective monitoring when the company engaged in a business that involved the close eyes of regulators. The presence of regulators or a comprehensive regulatory regime should aid directors and officers in enacting an effective monitoring system because the directors and officers don’t have to do all the work.

Public utilities companies are likely to be considered “highly regulated” businesses for purposes of considering a failure to monitor claim. The California Public Utilities Commission (CPUC) and the Office of Energy Infrastructure Safety (OEIS) are mandated by Public Utilities Code Section 8389(d)(4) to work together to develop safety plans specific to each electrical corporation.¹⁵⁰ Public Utilities Code Section 8389(e)(5) is also notable in this regard because it requires documentation showing that an “electrical corporation has established board-of-director-level reporting to the commission and office on safety issues” in order for the director of the OEIS to issue a safety certification.¹⁵¹ Under *Clovis*

146. *Cf.* Richardson v. Clark, No. 2019-1015, 2020 WL 7861335, at *9 (Del. Ch. Dec. 31, 2020) (“A failed attempt is not itself indicative of a bad-faith attempt.”).

147. Keeley & Syphard, *Large California Wildfires*, *supra* note 9.

148. *See* Marchand v. Barnhill, 212 A.3d 805, 822 (Del. 2019) (“When a plaintiff can plead an inference that a board has undertaken no efforts to make sure it is informed of a compliance issue intrinsically critical to the company’s business operation, then that supports an inference that the board has not made the good faith effort that *Caremark* requires.”); *In re Clovis Oncology, Inc.*, No. 2017-0222, 2019 WL 4850188, at *15 (Del. Ch. Oct. 1, 2019) (“Drawing all reasonable inferences in Plaintiffs’ favor, I am satisfied they have well-pled that the Board consciously ignored red flags that revealed a mission critical failure to comply with the RECIST protocol and associated FDA regulations.”); *Teamsters Loc. 443 Health Servs. & Ins. Plan v. Chou*, No. 2019-0816, 2020 WL 5028065, at *18 (Del. Ch. Aug. 24, 2020) (requiring boards to exercise a more rigorous oversight function over laws and regulations governing drug health and safety because compliance with the regulations is the “most central . . . safety and legal compliance issue facing the company” and the regulations govern its “mission critical” operations (quoting *Marchand*, 212 A.3d at 824)).

149. *In re Clovis Oncology*, 2019 WL 4850188, at *1 (“[T]o satisfy their duty of loyalty, directors must make a good faith effort to implement an oversight system and then *monitor it*.’ This is especially so when a monoline company operates in a highly regulated industry.” (quoting *Marchand*, 212 A.3d at 821)).

150. CAL. PUB. UTIL. CODE § 8389(d)(4) (“[The California Public Utilities Commission], after consultation with the [Wildlife Safety Division], shall adopt and approve . . . [a] process for the division to conduct annual safety culture assessments for each electrical corporation.”).

151. *Id.* § 8389(e)(5).

Oncology, the involvement of CPUC and OEIS with the creation, implementation, and certification of safety compliance systems for public utility companies is likely to weigh in favor of a claim surviving a motion to dismiss.

B. THE COMPENSATION STRUCTURE OF DERIVATIVE LAWSUITS ALLOWS FOR DIMINISHED FUTURE RISK THROUGH CORPORATE GOVERNANCE REFORM AND DIRECTOR LIABILITY

Caremark claims are derivative, so the settlement or judgment goes to the corporation itself, as it was the entity harmed for a breach of fiduciary duty. This compensation structure indirectly benefits shareholders because they are equity claimants. Additionally, unlike a direct lawsuit brought under Rule 10b-5, funds from derivative lawsuits could theoretically be used to prevent future harms because they are reinvested in the corporation. Additionally, the likelihood of compensating victims of fires increases when there are fewer claimants on the bankruptcy trusts of public utility companies following these disastrous events.¹⁵²

Although preventing future harm is not a guaranteed result of a derivative *Caremark* claim, derivative claims do result in large payouts and governance reforms aiming to prevent future harm. In most cases governance reforms are the only outcome of derivative lawsuits, however when payouts do happen, they are substantial.¹⁵³ For example, the parties in *Boeing* filed a joint settlement agreement with a \$237.5 million cash payment and a multitude of corporate governance reforms.¹⁵⁴ Included in those reforms were the addition of a board director with aviation, engineering, or product-safety oversight experience, mandatory reporting, and public disclosure of safety enhancement programs.¹⁵⁵

152. In the case of wildfire disasters, companies have gone bankrupt. See Kavya Balaraman, *Wildfires Pushed PG&E into Bankruptcy. Should Other Utilities Be Worried?*, UTIL. DIVE (Nov. 19, 2020), <https://www.utilitydive.com/news/wildfires-pushed-pge-into-bankruptcy-should-other-utilities-be-worried/588435>. When the company goes into bankruptcy, money for involuntary creditors is put into a trust and distributed by a bankruptcy court. If some of the involuntary creditors are shareholders bringing securities fraud lawsuits, then they would inevitably take a piece of the trust, diminishing compensation for the victims. However, this is only a policy argument, because at the end of the day, it is not the job of the plaintiffs' attorneys to compensate parties that are not their clients.

153. Laarni T. Bulan & Matthew Davis, *Parallel Derivative Action Settlement Outcomes*, CORNERSTONE RSCH. 2 (2022), <https://www.cornerstone.com/wp-content/uploads/2022/08/Parallel-Derivative-Action-Settlement-Outcomes.pdf> (“[M]ost settlements include only therapeutic provision instituting corporate governance reforms. . . . [H]owever, despite the low overall prevalence of a monetary component in derivative settlements, there have been very large monetary derivative suit settlements observed in the last decade.”).

154. *The Boeing Company Shareholder Derivative Litigation*, LIEFF CABRASER HEIMANN & BERNSTEIN, <https://www.lieffcabraser.com/securities/boeing> (last visited Oct. 1, 2025) (“It is the second largest insurer-funded derivative settlement in history and largest ever in Delaware Chancery Court.”).

155. *Id.* (“Boeing will establish a five-year Ombudsperson Program that provides Boeing employees with a channel for raising internal safety issues. The Ombudsperson, who will report to Boeing’s Chief Aerospace Safety Officer, will also weigh any concerns about interference or transparency related to a Federal Aviation Administration delegation program. Boeing also agreed as part of the settlement to: (1) elect an additional board director with aviation, engineering or product-safety oversight experience; (2) codify separation of the chief executive officer and Board chairperson roles in its bylaws; (3) ensure at least three Board directors have ‘knowledge, experience and/or expertise with aviation/aerospace, engineering and/or product safety oversight’;

All of these reforms aim to prevent future disasters by increasing the viability of the compliance systems that a company has in place, or putting new more, tailored compliance systems in place after the oversight failure has occurred.

The broader *Caremark* standard may also encourage more oversight from boards in the future. This would lead to better compliance systems and may aid plaintiffs bringing *Caremark* claims as the standard for compliance rises. Where, for years, corporate law only required boards to have compliance systems in place, after *Marchand* and *Clovis Oncology*, that is no longer enough.¹⁵⁶ Robert C. Bird claims that “[t]hese cases signal a new understanding of *Caremark* obligating boards to not merely attempt oversight, but to proactively ensure that such oversight is effective.”¹⁵⁷ Some scholars view this shift in the jurisprudence as “an aspirational call for boards to act with the highest ethical standards of honesty, fairness, and integrity.”¹⁵⁸ Others think these cases are flashes in the pan and the standard remains near impossible to survive.¹⁵⁹ Either way, the effects of *Marchand* and *Clovis Oncology* are not lost on directors of public companies. Now, “[a] more expansive approach to profit maximization takes into account an evolving and recursive notion of reputation,” and disasters ruin reputations.¹⁶⁰ If directors are held to a higher standard by their peers *and* the courts, then corporate compliance may be on its way to maximize shareholder value while protecting the public from disastrous cost-externalizations such as director negligence causing wildfires.

C. THE PROCEDURAL HURDLES UNDER *CAREMARK* ARE A BETTER FIT FOR EVENT-DRIVEN CORPORATE DISASTER LITIGATION THAN RULE 10B-5

The procedural hurdles that plaintiffs must clear for *Caremark* claims are better suited to the event-driven litigation context. The demand requirement for derivative claims should not be an issue for meritorious *Caremark* claims because of the second prong of *Zuckerberg*. Further, private securities fraud lawsuits are governed by the PSLRA.¹⁶¹ Rule 10b-5 securities fraud lawsuits require a strong inference of scienter under the PSLRA.¹⁶² Alleging a strong inference of scienter based on the pleadings can prove difficult for plaintiffs’ attorneys bringing securities fraud claims under Rule 10b-5. In addition to the scienter requirement, the PSLRA imposes a discovery stay on the litigation until

(4) implement mandatory reporting from Boeing’s Chief Aerospace Safety Officer and Chief Compliance Officer to its Aerospace Safety Committee; and (5) ensure public disclosure of Boeing’s safety enhancement programs.”).

156. *Supra* Subpart.II.A.

157. Bird, *supra* note 47.

158. *Id.* at 66.

159. *Contra* Shapira, *supra* note 60, at 1860 (“The combination of the courts’ increased willingness to scrutinize directors’ conduct in this context and plaintiffs’ increased ability to document directors’ conduct is likely to continue generating successful *Caremark* claims going forward.”).

160. Claire A. Hill, *Caremark as Soft Law*, 90 TEMP. L. REV. 681, 694 (2018).

161. Private Securities Litigation Reform Act of 1995, 15 U.S.C. § 78u-4.

162. *Id.*

a strong inference of scienter has been established.¹⁶³ These provisions aim to deter frivolous lawsuits that lack the evidentiary basis required to get over the strong inference requirement and are just seeking quick settlements. Plaintiffs bringing event-driven claims could avoid these procedural hurdles by bringing *Caremark* claims. Additionally, the use of Section 220 books and records requests to build an evidentiary basis to survive the initial motion to dismiss has been shown to be a successful strategy for the early stages of event-driven litigation.¹⁶⁴

1. The PSLRA Imposes Heightened Pleading Requirements on Private Plaintiffs

The PSLRA imposes heightened pleading requirements on private securities fraud plaintiffs requiring identification of specific misstatements and why those misstatements were misleading under (b)(1), a strong inference of scienter under (b)(2), a discovery stay under (b)(3)(B), and a showing of loss causation under (b)(4). Plaintiffs can and do overcome the heightened pleading requirements, but if plaintiffs bring *Caremark* claims, they could avoid the PSLRA altogether. The procedural hurdles posed by the PSLRA do have a purpose: deterrence of weak or frivolous claims. However, plaintiffs' attorneys can bring *Caremark* claims following disasters and avoid these hurdles altogether. There are two procedural hurdles that plaintiffs could avoid by bringing *Caremark* claims: the specificity requirement alongside the stay on discovery and the scienter requirement.

First, the specificity requirement requires “the complaint shall specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and belief, the complaint shall state with particularity all facts on which that belief is formed.”¹⁶⁵ The specificity requirement under the PSLRA imposes a high barrier for plaintiffs to cross in light of the discovery stay for private actions.¹⁶⁶ Without the tools provided by formal discovery, plaintiffs may be unable to put together sufficient facts to state the facts at issue with particularity. Additionally, in the event-driven context, the directors and officers are in the best position to know the facts at issue, whereas potential

163. *Id.* § 78u-4(b)(3)(B) (“In any private action arising under this chapter, all discovery and other proceedings shall be stayed during the pendency of any motion to dismiss, unless the court finds upon the motion of any party that particularized discovery is necessary to preserve evidence or to prevent undue prejudice to that party.”).

164. *In re McDonald’s Corp. Derivative Litig.*, 289 A.3d 343, 378 (Del. Ch. 2023) (“The Section 220 documents that the Company produced support the inference that the management team regarded these events as red flags.”); *infra* Subpart.III.C.iii.

165. 15 U.S.C. § 78u-4(b)(1).

166. See Sharon Nelles & Hilary Huber, *Pleading Securities Fraud Claims: The Good, the Bad, and the Ugly*, 45 LOY. U. CHI. L.J. 653, 659 (2014) (“Some commentators have argued that the PSLRA’s heightened pleading requirements, discovery stay, and mandatory Rule-11 inquiry have transformed the motion to dismiss into a significant access barrier for plaintiffs.”); see also *id.* at 659 n.41.

plaintiffs have limited tools at their disposal to establish an evidentiary basis for these claims.

Second, the scienter requirement poses a significant barrier to private securities claims because plaintiffs must “state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.” The required state of mind is that the defendant made the misleading statement knowing that it was false at the time it was made.¹⁶⁷ Scienter is a difficult barrier to plaintiffs because under the PSLRA, there is a stay on discovery until plaintiffs allege a “strong inference” of scienter.¹⁶⁸ Proving scienter in the event-driven context is difficult, and requiring plaintiffs to do so in that context encourages combing through disclosures post-disaster to try. The Supreme Court clarified the meaning of “strong inference” in *Tellabs, Inc. v. Makor Issues & Rights, Ltd.* to mean culpability that is “at least as likely” as non-culpability.¹⁶⁹ This standard is not impossible to reach, but doing so in light of circuit splits on particularity requirements for showing a “strong inference” of scienter and the discovery stay is no easy task for plaintiffs. Event-driven corporate claimants would be better served by avoiding the PSLRA altogether because, in the fire disaster context (b)(1)-(4) impose significant procedural hurdles, and a *Caremark* claim following a fire disaster is likely to survive an initial motion to dismiss because it is a mission-critical risk of life and limb.¹⁷⁰

2. Overcoming the Demand Requirement When Bringing *Caremark* Claims

Derivative claims do not carry with them a heightened pleading standard such as the PSLRA for securities fraud class actions. Instead, they are subject to the demand requirement. The demand requirement is an often-criticized aspect of derivative claims because it requires shareholder plaintiffs to show on the pleadings that the directors are too conflicted to bring the action on behalf of the corporation as its fiduciaries, and thus the shareholders can compel the corporation to sue.¹⁷¹ The Delaware Supreme Court, in *United Food v.*

167. 15 U.S.C. § 78u-4(b)(2).

168. *Id.*; *id.* § 78u-4(b)(3)(B) (“In any private action arising under this chapter, all discovery and other proceedings shall be stayed during the pendency of any motion to dismiss, unless the court finds upon the motion of any party that particularized discovery is necessary to preserve evidence or to prevent undue prejudice to that party.”).

169. *See Nelles & Huber, supra* note 166, at 657 (“An inference is ‘strong’ only when the culpable explanation is at least as likely as the non-culpable explanation. The inference ‘must be cogent and compelling, thus strong in light of other explanations.’” (*citing Tellabs, Inc. v. Makor Issues & Rts., Ltd.*, 551 U.S. 308, 310 (2007))).

170. *Supra* Subpart.III.A.

171. *See generally* Deborah A. DeMott, *Demand in Derivative Actions: Problems of Interpretation and Function*, 19 U.C. DAVIS L. REV. 461 (1986) (exploring “problematic features” of demand requirements in shareholder derivative litigation). DeMott argues that if the demand requirement is a device to promote intra-corporate dispute resolution, then “directors’ refusal to take action should not inevitably be dispositive of the derivative suit brought by the plaintiff, and demand should be excused when the directors appear unlikely to favor the litigation proposed by the plaintiff for some reason other than its merits.” *Id.* at 485–86.

Zuckerberg, clarified the demand requirement standard; in order to determine whether to excuse a demand as futile, the court applies the following three prong test to each director on the board:

- (i) whether the director received a material personal benefit from the alleged misconduct that is the subject of the litigation demand;
- (ii) whether the director would face a substantial likelihood of liability on any of the claims that are the subject of the litigation demand; and
- (iii) whether the director lacks independence from someone who received a material personal benefit from the alleged misconduct that is the subject of the litigation demand or who would face a substantial likelihood of liability on any of the claims that are the subject of the litigation demand.¹⁷²

Caremark claims require the directors to sue themselves, which is what the second prong (ii) of *Zuckerberg* aims to avoid. Prong (ii) compels corporations to sue the corporation's directors or officers if they would "face a substantial likelihood of liability." In the disaster context, prong (ii) should always be met because the directors and officers were tasked with monitoring the risk at issue.¹⁷³ The Delaware courts have held that *Caremark* liability is sufficient to satisfy prong (ii) of *Zuckerberg*.¹⁷⁴ Additionally, unlike the PSLRA's heightened pleading standard with specificity and strong inference of scienter, the standard for pleading demand futility "only requires that plaintiffs 'make a threshold showing, through the allegation of particularized facts, that their claims have some merit.'"¹⁷⁵

3. Using D.G.C.L. Section 220.6 Books and Records Requests to Build *Caremark* Claims

Finally, "a seemingly disparate development in shareholders' rights to information from the company, nestled in D.G.C.L. [Section] 220.6," may provide event-driven corporate litigants with better tools to uncover facts that would allow them to bring a *Caremark* claim as opposed to a securities fraud claim.¹⁷⁶ Roy Shapira argues that the success of recent *Caremark* claims may be because shareholders are better able to establish facts to hold directors

172. United Food & Com. Workers Union & Participating Food Indus. Emps. Tri-State Pension Fund v. *Zuckerberg*, 262 A.3d 1034, 1058 (Del. 2021).

173. See *In re Boeing Co. Derivative Litig.*, C.A. No. 2019-0907, 2021 WL 4059934, at *24 (Del. Ch. Sep. 7, 2019) ("[A] majority of the members of the Board have faced a substantial likelihood of liability for failing to make any good faith effort to implement and oversee a board-level system to monitor and report on safety."); see also *In re Geron Corp. S'holder Derivative Litig.*, No. 2020-0684, 2022 WL 1836238, at *13 (Del. Ch. June 3, 2021) (finding no substantial likelihood of liability because "no directors are at risk of a judgment under the *Caremark* doctrine.").

174. See, e.g., *In re Boeing*, 2021 WL 4059934, at *24; *In re Clovis Oncology*, 2019 WL 4850188, at *13.

175. United Food & Com. Workers Union & Participating Food Indus. Emps. Tri-State Pension Fund v. *Zuckerberg*, 250 A.3d 862, 887 (Del. Ch. Oct. 26, 2020), *aff'd sub nom.*, United Food v. *Zuckerberg*, 262 A.3d 1034 (Del. 2021).

176. Shapira, *supra* note 60.

accountable using books and records requests under D.G.C.L. Section 220.¹⁷⁷ If that is indeed the case, that the standard itself remains unchanged but the information available has simply grown, plaintiffs' attorneys may still be better off bringing *Caremark* claims instead of Rule 10b5 claims because they need only show that the directors "would face a substantial likelihood of liability on any of the claims that are the subject of the litigation demand."¹⁷⁸

CONCLUSION

Securities fraud litigation arguably provides shareholders a sort of double coverage against fraud because if the fraud comes to light, shareholders can sue under Rule 10b-5; but if it does not come to light, the shareholders receive the benefits of the company getting away with it.¹⁷⁹ Further, in the event-driven context, securities class actions may become a problematic breed of "double coverage" for shareholders "because rather than simply insuring against business loss, it reinforces a shareholder preference for managers to externalize costs to third parties to bolster stock price."¹⁸⁰ Thus, when stock price is the primary goal for directors, securities fraud litigation "could increase the likelihood that third parties will ultimately be harmed."¹⁸¹ Externalizing costs to third parties, when those costs are devastating fires, is unacceptable from a policy perspective.

Instead of securities class actions, corporate litigants may be better served by bringing *Caremark* claims following fire disasters. The problem is not that PG&E misstated its "safety deficiencies and inadequate investment in wildfire mitigation"; the problem is that PG&E *had* "safety deficiencies and inadequate investment in wildfire mitigation" and failed to act.¹⁸² And in this case, that failure to act resulted in millions of dollars of damages and a multitude of deaths. Securities litigation is supposed to deter corporate wrongdoing through the threat of imposing costly litigation on companies when they lie.¹⁸³ But in the

177. *Id.* at 1860.

178. *Zuckerberg*, 262 A.3d at 1058.

179. See Fox & Mitts, *supra* note 19, at 23 ("[A] system providing for this kind of wealth transfer provides a kind of insurance, a government-mandated spreading of the risk that an investor suffers such a loss."). *But see* A.C. Pritchard, *Who Cares?*, 80 WASH. U. L.Q. 883, 884 (2002) ("[T]he compensation provided to defrauded investors by securities class actions has a negligible effect on investment returns. No reasonable investor considering where to allocate his savings (real estate, bank accounts, bonds, stocks, etc.) would take into account the availability of class action settlements.").

180. Strauss, *supra* note 29, at 1363 ("[S]ecurities class actions in general constitute a 'litigation put' by which shareholders are entitled to recover a portion of their losses if the stock price falls a sufficient amount, irrespective of the merits of the claim under securities laws.").

181. *Id.*

182. Brief for Plaintiffs-Appellants, *supra* note 31 at 6 n.3.

183. Fox & Mitts, *supra* note 19, at 14 ("For deterrence to work, issuers that make misstatements must be subject to the threat of securities litigation that imposes damages liability on them."); *see also* Strauss, *supra* note 29, at 1358 ("[Event-driven securities litigation] cases arguably present a better case for deterrence than garden-variety financial misstatements, since they may depress share value, and therefore could give managers, who presumably own stock, the incentive to appropriately disclose the risks that may result in the disasters underlying these lawsuits.").

event-driven securities context, it is unclear whether Rule 10b-5 liability actually deters corporate wrongdoing. Why? Because the corporate wrongdoing when a disaster occurs is not misstating the likelihood of the event or the company's risk exposure. The corporate wrongdoing is the company's failure to provide adequate oversight of the risk—oversight that might have helped to prevent the disaster from happening in the first place.

If plaintiffs bring *Caremark* claims instead of securities fraud claims following disasters, boards may be more inclined to create and maintain better risk monitoring systems to avoid being held liable when those risks materialize. PG&E is supposed to be a prudent company that provides electricity to California; it is not supposed to cause the worst fires in California's history.¹⁸⁴ Better risk management systems in the context of wildfires would diminish future loss of life and property damage by preventing, or at least slowing, the occurrence of fire disasters.

184. Cf. *Professor Veronica Root Martinez on Building an Effective Corporate Compliance Plan*, DUKE L. (Apr. 29, 2025), <https://law.duke.edu/news/professor-veronica-root-martinez-building-effective-corporate-compliance-plan> (discussing the importance of corporate compliance and the broad reaching societal impacts of failure to comply, including billions of dollars in costs, harm to consumers and the environment, and loss of human life).