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WHERE IS THE CARE IN CAREMARK?

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INTRODUCTION

At the core of any public or private organizational endeavour we find a tension between the value of expertise and the value of control. To achieve stated goals, business organizations and other forms of private and public bureaucracy must deploy, empower, and resource those who have expertise in the stated goals. But at the very moment of the transfer of the power and resources to the expert, the question of how to control the expert's exercise of power is invoked—how do we ensure that the expertise, power and resources are deployed to further the goals and purposes of that transfer, and how do we ensure that they are not deployed to further the personal interests of the expert?

Legal scholarship from the 1980s,[1] drawing on the work of post-structuralist scholars such as Jacque Derrida,[2] taught us that dichotomies which structure legal analysis and discourse, such as the public versus the private or expertise versus control, do not involve two distinct conceptual wholes, bounded and separate from their dichotomous opposite; rather each side of the dichotomy is formed and supplemented by the other. The idea of delegating power to experts instantaneously invokes the idea of control—it is an "implied condition" of delegation[3]—and we cannot think about control without invoking parameters of expertise: "control

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[1] For example: Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine,* 94 Yale L. J. 997 (1984); Gerald Frug, *The Ideology of Bureaucracy in American Law* 97 Harv. L. R. 1276 (1984); DAVID KENNEDY, INTERNATIONAL LEGAL STRUCTURES (1987); Duncan Kennedy, *The Structure of Blackstone's Commentaries* 28 Buffalo L. Rev. 205 (1979).

[2] JACQUE DERRIDA, OF GRAMMATOLOGY (G. Spivak's trans. 1976).

[3] VICTOR MORAWETZ, A TREATISE ON THE LAW OF PRIVATE CORPORATIONS 483 (2d ed. 1886).

should not kill the goose that lays the golden egg," it must be "intermittent."[4] Each side of the duality, therefore, bears the imprint of and is threatened by the other, which is why, for Derrida, the other pole is a "dangerous supplement."[5] Accordingly, although at different periods in time one side of the dichotomy may appear to dominate or to be favoured, each side of the dichotomy is always present and operational, even when it is not formally acknowledged or appears ostensibly to have been eradicated.

As this tension between expertise and control is immanent within the very idea of delegating power to experts to further private, business, policy and political goals, it is naturally part of the deep structure of any inquiry, conversation or debate about the operation and effects of expert bureaucratic forms, whether they are corporations, regulatory agencies, or the executive branch. In modern corporate legal debates, for example, this foundational dichotomy surfaces in other more visible and familiar forms such as the economic agency problem[6] or team production theory,[7] debates about shareholder empowerment and managerial insulation,[8] and frameworks for categorizing corporate legal regimes such as director and shareholder primacy.[9] It is the structural *sine qua non* of every modern policy debate about corporate law, from risk taking and hindsight bias in relation to fiduciary duties, to debates about incentivising long term decision-making, innovation and improving productivity, or the debate about corporate purpose.[10] And every corporate legal doctrine bears its imprint.

The late Professor Gerald Frug argued in his important article on *The Ideology of Bureaucracy in American Law*[11] that the dominant doctrinal and policy expression of

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[4] KENNETH J. ARROW, THE LIMITS OF ORGANIZATION at 77 (1974): "to maintain the value of authority it would appear that responsibility must be intermittent."
[5] *Supra* note 2 at 141-165.
[6] *See* generally: REINIER KRAAKMAN, THE ANATOMY OF CORPORATE LAW (2017).
[7] Margaret M. Blair and Lynn A. Stout, *A Team Production Theory of Corporate Law* 85 VIRGINIA L. REV. 247 (1999).
[8] *See,* for example: Lucian A. Bebchuk, Alma Cohen and Allen Ferrell, *What matters in corporate governance?* 22 REVIEW OF FINANCIAL STUDIES 783 (2009). William W. Bratton and Micheal L. Wachter, *The case against shareholder empowerment*, 158 UNIVERSITY OF PENNSYLVANIA LAW REVIEW 653 (2010); Daniel Ferreira et all, *Management Insulation and Bank Failure*, 54 JOURNAL OF FINANCIAL INTERMEDIATION 100909 (2021).
[9] Stephen M. Bainbridge, *Director primacy and shareholder disempowerment*, 206 HARV. L. REV. 1735 (2006).
[10] *See*: See Lucian A. Bebchuk & Roberto Tallarita, The Illusory Promise of Stakeholder Governance, 106 CORNELL L. REV. 91 (2020); David Kershaw & Edmund Schuster, *The Purposive Transformation of Corporate Law* 69 AMERICAN JOURNAL OF COMPARATIVE LAW 478 (2021); Edward B. Rock, For Whom is the Corporation Managed in 2020? The Debate over Corporate Purpose, 76 BUS LAWYER. 363, 389-390 (2021); Jill E. Fisch & Steven Davidoff Solomon, Should Corporations Have a Purpose? 99 TEX L. REV. 1309 (2021)
[11] Frug, *supra* note 1.

this tension between expertise and control[12] in modern bureaucracies were the ideas of, and the relationship between, subjectivity and objectivity.

> All the stories that seek to explain and defend bureaucratic organization have undertaken two tasks. First, they have sought to respond to the fear of managerial control by demonstrating that bureaucratic power is constrained by some kind of objectivity…Second, each of the stories has tried to show that bureaucratic organization does not limit the opportunity for personal self-expression…This side of the agenda, then, attempts to make bureaucracy consistent with self-expression.[13]

For Professor Frug, the idea of objectivity imposes control by reference to the value of commonality—the ideas, standards and expectations "that everyone is considered to hold in common";[14] it is an expression of the expectations that "we" as a community have of experts exercising delegated power. Subjectivity on the other hand focuses on the individuality of each actor and their freedom to express their individuality and expertise in furthering the corporation's or other bureaucratic form's goals. He observes:

> Objectivity is thought to protect people in the bureaucracy from domination and to ensure that the interests of constituents are not threatened by the consolidated power exercised by the bureaucracy itself….objectivity is so important to the security of those threatened by the organizational structure that it must not be infected by its antithesis, subjectivity…..
>
> [Yet] bureaucratic organization [must] not limit the opportunity for personal self-expression [for the expression of expertise]… This side of the agenda, then, attempts to make bureaucracy consistent with subjectivity… The search for subjectivity has taken many forms. Some…emphasize constituent's ability to ensure that bureaucracy does what *they want it to do*, and others emphasize the freedom of bureaucratic officials to apply their own expertise and training.

Although the subjectivity /objectivity dichotomy is welded to the dichotomy of expertise and control, the poles do not merely reflect or correspond to expertise or control respectively, rather they represent different accommodations of, and have

12 Note that Frug identified four stories or models—formalism/control, expertise, judicial review and markets (*id.* at 1279-1286). Here I argue that expertise/control is the base dichotomy of all these stories/models. The first traverse's expertise, delegation and formal control, the second, is explicitly focused on expertise, the latter two are alternative means of control.
13 *Id.* at 1286.
14 *Id.*

different valences in relation to, *both* of them. And there are multiple versions of those accommodations. Objective communal parameters imposed on the exercise of delegated power are the natural bedfellows of control, but expertise requires that such control takes account of the individual subject and the context in which the subject operates, otherwise the benefits of expertise are destroyed. The extent to which it does so determines the legal weightings of expertise and control. Subjectivity reflects the value of enabling the expert to do what she thinks should be done and the bureaucratic commitment to benefit from such free exercise of expertise. But deference to expert subjectivity still requires comfort that subjective expertise is being legitimately exercised. The value of subjectivity therefore is also a technique of control when it requires that the expertise and delegated power is used only in ways that *the expert honestly thinks* furthers the purpose for which she is empowered. In search of that element of control subjectivity must become infused with forms of objectivity—of collective expectation—because her subjective intent is, currently,[15] inaccessible. Again, the forms such objectivity takes determine the legal weightings of expertise and control.

In determining what forms of objective and subjective control the components of expert (directorial) behavior are subject to—the exercise of power, the process involved in making a decision, the oversight of the effects of exercising power—and in the relationship between the objective and the subjective within those forms, law mediates the tension between expertise and control. Subject to the gravitational pull of prior mediating legal choices, through the elevation and demotion of the importance of these two values legal systems are able to adjust for the intersecting moral, political and policy concerns about the exercise of corporate power within that jurisdiction at that time.

For Professor Frug, the project of legitimating bureaucratic forms such as corporations or agencies is intertwined with the endeavor to find a balance between these ideas of objectivity and subjectivity and, therefore, between expertise and control.[16] Whether the balance the law strikes between expertise and control is sufficiently proximate to societal expectations about the free exercise of expertise and its control, is what we mean when we talk about the legitimacy of corporate law and the corporate form. Corporate law must move in proximate synch with those shifting expectations or its legitimacy, and corrective political intervention, is threatened.

For Frug, this "project of bureaucratic legitimation is a failure" because any line drawn between the objective and the subjective is never stable as the objective

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15 Perhaps we are approaching a time when it might be accessible—see https://www.nature.com/articles/d41586-024-02368-8 —even if, in this regard, its authoritarian implications make us recoil at the idea.
16 At 1287.

and the subjective replace, irritate and threaten each other—intertwined dichotomies which always invoke each other and operate as the ever-present dangerous supplement of each of other.[17] For this article, however, this instability and movement between and within the objective and the subjective is precisely the reason corporate law succeeds in maintaining the legitimacy of the corporate form over time.

The site of engagement between the objective and the subjective in corporate law is *between* and *within* the duty of care and the loyalty obligations of directors in relation to the exercise of power. The duty of care is the portal for the imposition of objective communal expectation and control on the expert, empowered directors. In contrast, loyalty obligations require only individual honest pursuit of the goals for which the expertise was employed and the power delegated. It is *between* in the determination of what directorial actions these duties apply to—decisions, the process involved in making decisions, the supervision and monitoring of consequences of those decisions. It is *within*, as noted above, when the subjective forms and threatens the objective duty of care, and when the objective forms and threatens the subjective loyalty obligations, shifting these objective and subjective duties towards and away from expertise and collective control.

Expertise	Control
Individuality	Collective
Freedom	Responsibility
Subjectivity 1_{loyalty}	Objective 1_{care}
Subjectivity 2_{loyalty}	Objectivity 2_{care}

This article explores and reveals the nature and operation of objective and subjective conceptions of control in the context of a directors' obligations to monitor and supervise the exercise of power which the board delegates to senior managers. These

[17] In his project Professor Frug hoped that the revelation (through his work) of the operation of the ideas of objectivity and subjectivity in doctrine and policy, and the inability to find an optimal balance of the two, could result in the jettisoning of these concepts thereby opening space for the exploration of alternative, democratic forms of bureaucracy—"to deal with the problems of human association in other ways" (*id*. 1291) This article departs from Professor Frug in this aspirational respect. The concepts of objectivity and subjectivity and the relation between them are inseparable from the structural tension between expertise and control. As they are umbilically linked to the very idea of delegating power to experts there is no revelation that can enable us to go beyond them, short of abandoning delegation to experts.

obligations are known today as *Caremark duties.*[18] Through a series of cases in the late 1990s and early 2000s *Caremark duties* replaced an objective duty of care with a subjective duty as the means of assessing whether a director had complied with what Chancellor Allen usefully labelled a director's "organizational governance responsibility"[19]— that is, her responsibility for ensuring that the power she delegates and diffuses throughout the corporation is used to further the purposes of the corporation within applicable law and regulation.

As well as any aspect of corporate law, in the evolution of monitoring care obligations and *Caremark duties* we see how conceptions of objective (collective) and subjective (individual) control mediate the foundational bureaucratic tension between expertise and control. The article shows how we see this in the continual movement between, and irritation of, the objective and the subjective, and in the periodic rejection of one in favour of the other only to find its unacknowledged presence in and alongside the other.

Until *Caremark* the dominant approach to monitoring and supervisory obligations involved the application of an objective standard of care; a standard that aimed to enable courts to articulate, and directors to understand, the communal care expectations of directors—the shared values of care. This duty of care provided for a gross negligence standard to assess compliance. There were two components of this gross negligence standard, long embodied in the corporate law of other states, and adopted by the leading Delaware monitoring care case prior to *Caremark*, *Graham v Allis Chalmers Manufacturing Company*.[20]

The first component of this standard was an objective ordinary care standard adjusted to the circumstances of the case, which included the nature of the directorial role—a role, in relation to a non-executive director, which typically involves a limited understanding of the company, attendance at infrequent meetings to discuss papers prepared and presented by others, a long time-delay between meetings, and limited compensation for performing the role. How much care can be expected of a director who dedicates only "a short space of time, to the business of other persons from whom he receives [limited] compensation?"[21] The answer which many courts have given to this question over the years is: "very little." Accordingly, these courts naturally applied the label "gross negligence" to the benchmark of care produced by this objective ordinary standard.

The second component of this gross negligence standard, also adopted by *Graham*, was the use of a set of subjective labels that attempted to mark or describe the egregious lack of care that would amount to a breach of duty. Such terms

[18] *In re Caremark International Inc. Derivative Litigation* 698 A.2d 959 (1996).
[19] *Id.* at 970.
[20] 188 A.2d 125 (1963).
[21] *Swentzel v Penn Bank* 147 Pa. 140 (1892) which refers to "no compensation". Also noting:

included, for example, reckless disregard, conscious disregard, cavalier or actions that approached fraud. Here subjective, intention-based concepts are deployed to describe and anchor an undemanding objective benchmark of care, but *importantly* the care standard is never quite subjectivised—it did not involve an inquiry into what the director herself thought about the care taken.

Although these two components of gross negligence have often been treated independently, in the commercial care commentary and case law they are best understood as being two connected strands of the same gross negligence idea; with the latter operating to remind courts of the undemanding benchmark of care generated by the situation-adjusted ordinary care standard. Here the subjective supplements and supports the objective, but it does not replace it.

Prior to *Caremark*, co-existing with this objective standard, Delaware corporate law contained a distinct subjective approach to directorial care obligations. This subjective standard was an outcrop of the original business judgment rule that required the exercise of subjective good faith when exercising corporate power. In the hands of some courts, from the 1930s through to the mid-1980s, the good faith obligation became the only standard that applied to directorial actions. In these cases care in the decision-making process was assessed only by whether process failings could indicate an actual (subjective) bad faith exercise of power. Prior to *Caremark* this standard had never been applied to monitoring obligations only to decision-making process, but to accept it in relation to process naturally offered its extension to monitoring. This idea was precisely the dangerous supplement to the objective care obligation provided for in *Graham*. *Caremark* interacts this supplement with the "subjective" components of the *Graham* objective standard to produce *Caremark duties* which ostensibly remove the role of an objective ordinary care standard altogether, thereby elevating expertise and demoting common control.

Caremark duties require only a subjective, good faith effort to perform the director's organizational governance responsibility—including a good faith effort to put systems and controls in place, and a good faith effort to perform her role in relation to those systems and controls. This subjective standard is exceptionally undemanding of directors as monitors, but it is also on its own, in contrast to an objective care standard, incapable of enabling directors and courts to explore what "we", the community within which the corporation operates, expect of directors—the actions and steps they should take to fulfil their monitoring responsibility. This is because all we can expect of directors through a good faith standard is for them to do what *they think* they should do to fulfil their responsibility.

Parts I and II of the article expose the care foundations upon which this transition to *Caremark duties* was built. Parts III and IV then offers a close reading of Delaware law to explain how Delaware came to address monitoring care through subjective loyalty without acknowledging or interrogating the transition from an objective gross negligence standard. In Part V the article then turns to the effects of *Caremark* on modern cases which address monitoring failings. As the relationship between the corporation and its stakeholders, as well as the role of corporations in causing and alleviating social harms, has come into the modern spotlight, applying the *Caremark* standard appears anachronistic.[22] Courts have responded to this corporate responsibility impulse by seeking to explain the actions and steps directors should take in carrying out their monitoring function and by threatening liability by allowing derivative litigation to continue where the directors appear not to have met those expectations.[23] But the good faith *Caremark* standard is not capable of responding to these pressures. In its place the article identifies the steady, silent and unacknowledged return of an objective care standard that (dangerously) supplements and underpins the modern *Caremark* case law; the same standard that applied in *Graham* and which was comprehensively ignored and abandoned in *Caremark*.

The article concludes by asking whether *Caremark* should fall and by exploring the different ways in which Delaware could apply an objective, gross negligence monitoring care standard in way that openly acknowledges the work that it already does. Although Professor Frug was correct that there is no means of drawing a clear or optimal line between expertise and control and between the subjective and the objective—of ever separating them truly from each other—that does not mean that all points on the objective/subjective continuum are equal in law's attempt without end to find that optimal balance.

I. ORGANIZATIONAL GOVERNANCE RESPONSIBILITY

Through section 141(a) of the Delaware General Corporation Law,[24] the State of Delaware empowers the board of directors to manage and direct the corporation

[22] *See* generally: Leo E. Strine, Kirby M. Smith, and Reilly S. Steel, *Caremark and ESG, Perfect Together: A Practical Approach to Implementing an Integrated, Efficient, and Effective Caremark and EESG Strategy,* 106 IOWA L. REV. 1885 (2021) observing in the first sentence: "With concerns about climate change, growing economic insecurity and inequality, and a growing sense that some entities and industry sectors have grown so large, concentrated, and powerful that they may endanger our lives and the resiliency of our critical supply chains has come renewed concern about whether business entities conduct themselves in a manner that is consistent with society's best interests." *See also*: Leo E. Strine, *Good Corporate Citizenship We Can All Get Behind? Towards A Principled, Non-Ideological Approach to Making Money the Right Way*, 78 BUS. LAW. 329 (2023). Leo Strine. Then Justice Strine authored the judgment in the most important of recent *Caremark* cases, in *Marchand v Barnhill* 212 A.3d 805 (2019), discussed in detail in the article.

[23] *Marchand v Barnhill, id*; *In re Clovis Oncology, Inc Deriv. Litig.,* 2019 WL 4850188; *In re Boeing Company Deriv. Litig.,* 2021 4059934; *City of Detroit Police and Fire Retirement System*, 2022 WL. 2387658.

[24] DEL. CODE ANN. tit. 8, § 141(a).

which the corporate law of the State of Delaware has brought into being. For over 150 years, U.S. corporate law has presented directorial power as original and undelegated.[25] However, this presentation means only that it is not delegated from the shareholders and that as far as the organs of the corporation are concerned the starting point for corporate power is board power. Board power *vis a vis* the state is not original, it is a product of state action and state power—a qualified empowerment of a legal entity, only to be used to further the interests of the corporation within the boundaries of the state's own law and regulation.

Although directed to "manage and direct"[26] the company, the board does not engage in the day-to-day management and operation of the company. To enable the company to function the board must appoint and empower senior managers who, in turn, appoint and empower junior management and subordinate employees. Corporate power thereby diffuses through a power delegation waterfall from the board throughout the corporation.

The foundational legal corollaries of this corporate power structure are the obligations the law imposes on the directors when they exercise board power—including the decision to further delegate and provide for the diffusion of power—and the nature of the legal responsibility which the board retains in relation to the ongoing exercise of that diffused power. This latter responsibility is what Chancellor Allen in *Caremark*[27] refers to as the board's "organizational governance responsibility";[28] a responsibility which has several moving parts connected to ensuring that diffused power is used within the parameters of its delegation—to further corporate purposes, not other purposes; to further those purposes but only within the boundaries of law and regulation; to take risk in the furtherance of those purposes, but not existential risks; and to comply with corporate policies and procedures designed to manage such risk-taking and legal and regulatory compliance.

There are three questions directors require an answer to in relation to this organizational governance responsibility: *first*, what types of actions are you expected to do take to fulfil this responsibility; *second*, how well does the law expect you to do the things it expects you to do; and *third*, how badly do you have to do them to be personally liable? To answer all these questions, we must identify the behavioral standard the law imposes on directors in relation to this organizational governance responsibility.

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[25] *Hoyt v. Thompson* 19 N.Y. 207 (1859).
[26] *Supra* note 24.
[27] *Supra* note 18.
[28] *Supra* note 19.

In ideal type,[29] law deploys two such behavioral standards: an objective standard which accesses and imposes communal and shared behavioral expectations, and an intention-based, subjective standard, which individualizes the behavioral standard. The former, and across jurisdictions more typical, approach requires an objectively specified degree of care from the director.[30] Commonly this involves the deployment of one of law's objective characters—the ordinarily prudent director, the reasonable director, the reasonable bystander or observer—to enable the court to determine the benchmark of care. The court asks how this hypothetical person would have behaved in the corporate circumstances in question. The benchmark of care is typically set by how that average hypothetical person would have behaved (a negligence standard) or by a benchmark of care that keys-off that negligence benchmark but is below it—a sub- or gross-negligence standard. The former approximates to a benchmark of care that your average/median director would provide and is easier to grasp—what can we expect of the average person in those circumstances. The idea and the benchmark of a sub- or gross- negligence standard is much more difficult to articulate. A different underperforming objective character can be deployed to identify the sub-average/sub-median behavior—for example, an "inattentive and thoughtless man"[31] or an "habitually careless man"[32]—or instead we can use language and labels that attempt to linguistically capture an egregious lack of care—like a conceptual pin placed somewhere on the below average behavioral distribution—such as indifferent, reckless, or cavalier behavior.

These objective characters—as distinct from the mere behavioral labels of egregious behavior—serve three functions. First, they enable courts and directors to explore what is expected of directors when they act—what types of actions "we" would expect of them when performing the organizational governance function. Through an objective standard, we ask what types of action would a reasonable, average, ordinarily prudent director, or a habitually inattentive director be expected to take in performing this organizational governance responsibility. For example, we can use these characters to determine whether directors are expected to ensure that a system of information and reporting controls is in place to ensure compliance with applicable law and regulation, as well the steps, if any, that they are expected to take to ensure that such systems and controls work effectively. Similarly, such a standard

[29] On ideal types and their correspondence to "real phenomenon", *see* MAX WEBER, ECONOMY AND SOCIETY at 19-22 (1978).

[30] On the deployment of an objective standard in multiple U.S. states and the United Kingdom, *see* DAVID KERSHAW, THE FOUNDATIONS OF ANGLO-AMERICAN CORPORATE FIDUCIARY LAW, 135-283 (2018).

[31] WILLIAM JONES, AN ESSAY ON THE LAW OF BAILMENTS, at 7 (1781). For U.S. cases using this approach *see, for example: Tompkins v. Saltmarsh* 14 Serg. & Rawle 275 (1826); *Wiser v. Chesley* 53 Mo. 547 (1873); *Ferrick Excavating and Grading Co. v. Senger Trucking* 506 Pa. 181, 189 (1984).

[32] For Joseph Story, "the diligence which men habitually careless or of little prudence, generally take of their own concerns" (JOSEPH STORY, COMMENTARIES ON THE LAW OF BAILMENTS, at 12 (1832).

of care can identify what types of steps directors should take when faced with suspicious activity and "red flags". Secondly, these standards determine how careful a director needs to be in performing those expected actions. Thirdly, although such an objective standard in judicial application is unavoidably and deeply indeterminate, the process of its application—by the director, the court or the academic—offers a means of connecting to a collective sense of control over the exercise of corporate power and expertise. It offers this no matter how demanding or undemanding the benchmark of care that the standard produces. It loosely binds that power and expertise to shared control and thereby legitimates the exercise of that power; it seeks to varying degrees to "ensure[ ] that the interests of constituents are not threatened by the consolidated power exercised by the [corporation[itself."[33]

A second approach to directors' organizational governance responsibility is to ask only of a director to do what she thinks amounts to the care that is required to fulfill the organizational governance responsibility. This is a subjective intention-based/good faith/honesty standard which asks of the director: "have *you* taken the care *you think you* need to take to ensure that the power the board has delegated is being deployed for the purposes it was delegated / do *you think you* have sufficient information to be comfortable that delegated power is being appropriately deployed". This standard does not contain any means of specifying what it is directors generally are expected to do to fulfill their organizational governance responsibility; it offers no connection to the community's behavioral expectation. This is because any form of behavior which the director believes fulfils the organizational governance responsibility fulfils this standard. It does not matter that another businessperson, or your average director, or a judge would consider those steps to be insignificant, incompetent or absurd, so long as the director actually believes that her actions satisfy her responsibility.[34]

Although subjective in nature, as with any subjective standard, in application it inevitably takes on a quasi-objective form where circumstantial evidence is insufficient or unreliable to reach a conclusion as to the director's bona fides. In such circumstances, courts typically place reliance on behavioral proxies such as whether the behavior that can be rationally or plausibly understood by a director to satisfy the behavioral standard. In the context of business judgment, for example, courts in applying the good faith standard to business judgment have commonly asked: can this decision be rationally or plausibly be made sense of as an attempt to

[33] Frug, *supra* note 1 at 1276.

[34] In this regard, the Supreme Court of Pennsylvania in *Spering's Appeal* 71 Pa. 11 (1872) observed: "It seems unnecessary to pursue this investigation any further. These citations, which might be multiplied, establish . . . [that directors] are not liable for mistakes of judgment, even though they may be so gross as to appear to us absurd and ridiculous, provided they are honest and provided they are fairly within the scope of the powers and discretion confided to the management body."

further the corporate interest.[35] Alternatively, taking the other side of the plausibility coin, courts may ask, *inter alia*, whether the decision was so irrational, egregious, or arbitrary as to infer bad faith action.[36] Here we see the quasi-objective in the service of/replacing the subjective—rationality invokes the external and the communal; "can 'we' see a reason that connects the action to corporate interest". In so doing what initially appears to be deference to expertise is formed by a dangerous (although limited) supplement of communal control.

In the context of a director's organizational governance responsibility such inferential proxies must take the form of actions that could be understood plausibly or rationally to satisfy that responsibility or, reversing the coin, actions so extremely disregarding of that responsibility that they can only be construed as a bad faith attempt to fulfil it. It is central to understanding the application of these concepts that they serve as proxies for the conscious, intentional failure to carry out the organizational governance responsibility. That is, these concepts are tethered to an individual's dishonesty, something the law never easily infers. This generates a gravitational pull for a good faith behavioral standard toward extreme failure as a prerequisite to a determination of contravention.

Importantly, in the law's approach to organizational governance responsibility it is difficult for a good faith standard to operate alone because, as noted, it offers no means for a director or a court to determine or explore what the law expects the director to do—the steps she should take, the information she should require, the questions she should ask, the checks she could carry out. A good faith standard tells her to do just what she thinks satisfies the obligation. Moreover, as a mechanism of control it has no *direct*[37] connection to community and shared value—no direct legal conduit to "that which is usual with the majority of prudent [directors] in the same business or trade."[38] But such connection is fused into the nature and legitimacy of expert representational forms. Accordingly, to demote or ignore an objective approach does not, cannot, irradicate it. It remains embedded in our moral and legal consciousness, and so any attempt to replace an objective care

[35] Perhaps never better explained that in the New Jersey case of *Wildes v Rural Homestead Co.* 53 N.J. Eq. 452 (1895): "The question in such a case is one of intent, which ordinarily is susceptible of establishment only by inferences from proved circumstances, for rarely is dishonest intent admitted. These proofs [inferences of actual intent] must usually contend with excuse or reason more or less plausible which will be insisted upon as having been sufficient at the time of the act in question to command honest judgment in its favour, and hence the truth is not always susceptible to easy demonstration."

[36] *Warshaw v Calhoun* 43 Del.Ch. 148, 157: "In the absence of a showing of bad faith on the part of the directors or of a gross abuse of discretion the business judgment of the directors will not be interfered with by the courts;" *Meyerson v. El Paso Natural Gas Company* 246 A.2d 789, 792: "the question is reduced to one of business judgment with which the court should not interfere absent a showing *of gross and palpable overreaching*" (emphasis supplied).

[37] Although as noted above different forms of the objective creep in as the proxy for the subjective.

[38] *Maxwell v Eason* 1 Stew 514 (1828).

standard with an intention-based good faith standard alone will always find that an objective standard-*supplement* remains lurking silently and invisibly, but operationally active, beneath the subjective good faith legal text.

II. ORGANIZATIONAL GOVERNANCE RESPONSIBILITY IN HISTORICAL PERSPECTIVE

The directorial duty of care in the United States was formed by borrowing and adapting from the care jurisprudence developed in other commercial contexts, in particularly from the law of bailment.[39] This encounter produced two primary pathways to articulating the standard of care for directors, *both of which* are often described as a gross negligence standard. The first pathway—which is typically understood by contemporary commentators as more demanding than a gross negligence standard—is the "ordinary prudent person" standard, situation-adjusted to the circumstances in which the director in question was acting. For many nineteenth- and twentieth-century courts, because when adjusted for the actual circumstances this standard produced a very low benchmark of care it was often labelled a gross negligence standard. The second pathway derives from attempts to articulate and describe the egregious lack of care which justifies the label gross negligence. Although in non-corporate contexts courts often deployed a less careful hypothetical character to identify such a benchmark of care—such as an "inattentive and thoughtless man"[40]—in the corporate context this was not adopted. Instead, courts, typically deployed terms borrowed from intention-based subjective standards, such as conscious disregard, fraud, and bad faith to depict egregious care failings. But they did not, however, as discussed below, intend that the use of these terms would convert an objective care standard into a subjective one. The use by courts of these terms is best understood merely as descriptions of the undemanding benchmark of care produced by the situation-adjusted ordinary care standard.

1. *From Ordinary Care to Vituperative Epithets*

The ordinarily prudent person/director standard—the negligence standard—searches for a benchmark of care which reflects mean-average-behavior *in the actual circumstances* in which the person in question acted. It is the portal through which

[39] Kershaw, *supra* note 30.
[40] *Supra* note 31.

the common law explores and imposes upon us the shared, if always shifting, behavioral expectations of the communities in which we live and work.

For many contemporary commentators and judges, on its face this is a demanding corporate care standard which, as a liability standard, risks deterring board service or risk aversion in decision-making by directors who are concerned that ex-post—judging with the hindsight of failure—compliant behavior will be deemed by a court to be non-compliant.[41] There are cases in the evolution of the directorial duty of care that can be cited to support such a demanding reading of the ordinary care standard.[42] However, many nineteenth- and early twentieth-century courts understood this standard quite differently. This was in significant part because they had clearer sight of what could be expected of a director—as distinct from what could be expected of a senior manager—than we do today.[43] A negligence standard adjusts for the circumstances of the actual case, and those circumstances include the fact that the directorial role is performed by a person who will often have a limited understanding of the company and its industry, has no learning by doing information advantages, attends board meetings only 8-10 times a year, like all of us will have a limited ability to recall previous meeting's papers and conversations,[44] and may—in either absolute or relative terms—receive only limited compensation for performing the role.[45] How much care, attention and understanding can one reasonably of expect of such a director?

Nineteenth century courts were attuned to these considerations in both corporate and non-corporate contexts. In the context of bailment law for, example, in the Supreme Court cases of *New York Cent Railroad Co. v Lockwood*[46] in 1873 and *Preston v Prather*[47] in 1891 ordinary care, situation adjusted, takes account of the nature of the business in question, the extent to which the bailee was rewarded for performing the role and the skill set of the bailee. Such adjustment in these cases

[41] *See generally*: Baruch Fischhoff, 'Debiasing' IN DANIEL KAHNEMAN, PAUL SLOVIC AND AMOS TVERSKY, JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES, 422 (1982). *See Caremark supra* note 18 at note 16 and Gagliardi v Trifoods International, Inc 683 A.2d 1049 at 1052 (1996). *See* also: William T. Allen, Jack E Jacobs, and Leo B. Strine, *Realigning the Standard of Review of Director Due Care with Delaware Public Policy: A Critique of Van Gorkom and its Progeny As A Standard of Review Problem*, 96 NORTH WESTERN LAW REVIEW 449 (2002).
[42] *For example*: Hun v Cary 82 N.Y. 65 (1880); Williams v Mckay 40 N.J. Eq. 189 (1885); Francis v. United Jersey Bank 87 N.J. 15 (1981).
[43] *See* David Kershaw, *Corporate Laws Fiduciary Personas*, 136 LAW QUARTERLY REVIEW, 454.
[44] On Ebbinghaus's "Forgetting Curve" *see*: Jaap M.J. Murre and Joeri Dros, *Replication and Analysis of Ebbinghaus' Forgetting Curve*, 10(7) PLoS ONE e0120664; and HERMANN EBBINGHAUS, MEMORY: A CONTRIBUTION TO EXPERIMENTAL PSYCHOLOGY (1885).
[45] *See* Matthew Friestedt, Marc Trevino and Melissa Sawyer, *Trends in U.S. Director Compensation*, HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE (2020) available: here.
[46] 84 U.S. 357 (1873).
[47] 137 U.S. 604 (1891).

produced an undemanding benchmark of care, against which the actual care of the bailee was measured.

In these cases, the Supreme Court took a position traceable to English bailment case law, in particular *Shiells v Blackburne*[48] decided a century earlier in 1789, where Lord Loughborough labelled the application of this standard and the benchmark of care it produced, "gross negligence." In *New York Cent Railroad Co*, the Supreme Court eluded to the 1842 English case of *Wilson v Brett*,[49] which bears the imprint of *Shiells*, where the court observed that gross negligence was really ordinary negligence with "the addition of a vituperative epithet".[50] Justice Bradley delivering the judgment of the Supreme Court observed that:

> If very little care is due from him, and he fails to bestow that little, it is called gross negligence… If ordinary care is due…[the] failure to bestow that amount of care is called ordinary negligence… Negligence, whatever *epithet* we give it, is [the] failure to bestow the care and skill which the situation demands; and hence it is more strictly accurate to perhaps to call it simply 'negligence'.[51]

This "epithet" understanding of negligence and gross negligence flowed, alongside other versions of gross negligence, into U.S. corporate law in the 19th and early 20th century. Three notable examples are worthy of closer attention. First, consider the New York Court of Appeals case of *Wakeman v Dalley*,[52] a case dealing with the question of whether a director could be liable for a share purchase fraud, when he knew nothing of the fraud. The court focused studiously on what could be expected of a non-executive director:

> He was simply a director, and as such attended some of the meetings of the board of directors. As he was a director, must we impute to him, for the purpose of charging him with fraud, a knowledge of all the affairs of the company? If the law requires this, then the position of a director in any large corporation like a railroad, or banking, or insurance company, is one of constant peril. The affairs of such a company are generally, of necessity, largely entrusted to managing officers. The directors generally cannot know, and have not the ability or knowledge requisite to learn, by their own efforts, the true condition of the affairs of the company. They select agents in whom they have confidence, and largely trust to them. They publish their statements and reports, relying upon the figures and facts furnished by such agents; and if the directors, when actually cognizant of no fraud, are to be made liable in an action of fraud for

48 (1789) 126 E.R. 94.
49 11 M&W 114 (1843).
50 *Id.* at 116.
51 *Supra* note 46 at 382-383. (emphasis supplied)
52 6 Sickels 27 (1872).

> any error or misstatement in such statements and reports, then we have a rule by which every director is made liable for any fraud that may be committed upon the company in the abstraction of its assets and diminution of its capital by any of its agents, and he becomes substantially an insurer of their fidelity. It has not been generally understood that such a responsibility rested upon the directors of corporations, and I know of no principle of law or rule of public policy which requires that it should.[53]

Consider also the Supreme Court's decision in *Briggs v Spalding*,[54] decided in 1891 the same year as *Preston v Prather*. In *Briggs* the Supreme Court borrowed from *Preston* and *New York Cent Railway* to provide for a situation-adjusted ordinary care standard for directors. The case involved alleged monitoring failures by the board in relation to the First National Bank of Buffalo. The alleged transgressions involved the failure to prevent the bank from continuing to trade even though it was insolvent, the breach of multiple provisions of the National Banking Act, and the failure to prevent the CEO's abuse of power in making substantial unsecured loans to himself and his family. For this court, at the heart of the situation adjustment was what is expected of a director when he takes on the role. The Supreme Court explored the position and role of each director at length. Consider for example the case of Elbridge G. Spaulding, a former Major of Buffalo, former New York State Treasurer, former New York Assemblyman,[55] and who, as a Member of Congress, was closely involved in the drafting of the National Banking Act, which the bank in this case was in breach off. Spaulding was also a lauded public figure having led the introduction of fiat money in the Civil War; a role that led Cornelius Vanderbilt's biographer, T.J. Stiles, to observe that:

> Though his eminently forgettable name is eminently forgotten…if Wall Street had Saints then the college of financial cardinals would surely canonize Elbridge G. Spaulding…[who] performed a true miracle: he conjured money out of nothing, and so contributed more toward Union victory…than any single battlefield victory".[56]

The court provided a detailed account of Spaulding's understanding of his directorial role and what the bank had understood his role to be:

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53 *Id.* at 32.

54 11 S.Ct. 924 (1891).

55 AMERICA'S SUCCESSFUL MEN OF AFFAIRS, AN ENCYCLOPAEDIA OF CONTEMPORANEOUS BIOGRAPHY, (Henry Hal eds), Volume 2, 1896 (available here, written a year before Spaulding's death in 1897).

56 T.J. STILES, THE FIRST TYCOON: THE EPIC LIFE OF CORNELIUS VANDERBILT (2009) at 348. See further 348-352.

> His judgment was that his duty as a director was discharged if he attended the meetings to which he was summoned, performed such duties as were specifically required of him, and gave such advice as was asked from him; that his summers were spent upon his farm in the country; that in 1882 he was 72 years of age; that he was in a measure retired from business, so that he gave very little attention to the affairs of his own bank, but was ready to give any advice or suggestions when called upon for that purpose upon any special matters; that for many years it had been the practice in the corporations in which he was a director to treat him as an advisory director, and not as a director occupied in the daily management of their affairs; and that he accepted the position upon the understanding that he should occupy this relation…[57]
>
> Mr. Spaulding further testified that he never received any notice to attend directors' meetings; that he had no actual knowledge of the by-laws; that he was not appointed on any committee, or requested to perform any duty; that he supposed the bank was in a prosperous condition down to the day of its failure; that he had confidence in Lee's [the cashier's] capacity and integrity and that the business of the bank was being conducted safely and prosperously under his management; that he talked with Lee in regard to the affairs of the bank, who told him the bank was in good condition; that he examined the reports made to the comptroller, December 31, 1881, and March 11, 1882, and saw by them that everything was going right; and that he knew the duty of making an examination had not been devolved upon him; and further stated that it would have taken a month to have ascertained whether the reports to the comptroller were correct, and that it was the duty of the comptroller and the bank examiner to do so.[58]

The Court juxtaposed this situation-sense next to two important 19th century cases that similarly conceived of the directorial role in a very undemanding way. The second of these cases was *Wakeman v Dalley*, considered above, which the court quoted at length. The first, was *Scott v Depeyster*,[59] an 1832 New York Chancery Court case, which is the foundational monitoring care case in the United States. In this case the Chancery Court provided that the "trust" required of directors should be understood through the lens of bailment resulting in the application of a circumstance-adjusted ordinary care standard. The court observed in relation to monitoring and supervision:

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[57] *Supra* note 54 at 932.
[58] *Id.* at 933.
[59] 1 Edw.Ch. 513 (1832).

> I know of no law which requires the president or directors of any moneyed institution to *adopt a system of espionage* in relation to their secretary or cashier or any subordinate agent, *or to set a watch upon all their actions*. While engaged in the performance of the general duties of their station, they must be supposed to act honestly until the contrary appears; and the law does not require their employers to entertain jealousies and suspicions without some apparent reason. Should any circumstance transpire *to awaken a just suspicion of their want of integrity, and it be suffered to pass unheeded*, a different rule would prevail if a loss ensued. *But, without some fault on the part of the directors, amounting either to negligence or fraud, they cannot be liable.*[60]

For the New York Court of Chancery in *Scott v Depeyster*, an ordinarily prudent director was not expected to implement a system of corporate espionage to watch over all of their subordinates' actions, but he would be expected to act if a suspicion should have been awakened. Whether his suspicion should have been awakened, and what he should have done in response such an awakening, were also for the Chancery Court a function of a benchmark of care set by the ordinarily prudent director standard acting in similar circumstances.

In the Supreme Court's hands in *Briggs v Spaulding*, or more precisely in the hands of a 5:4 majority decision, situationally adjusted—to an understanding of the directorial role aligned with Elbridge Spaulding's understanding of it—the directors were not in breach of duty. For the majority, the resulting benchmark of care was so low that failing to meet it could fairly be given the epithet of gross negligence or "gross inattention":

> They are entitled under the law to commit the banking business, as defined, to their duly-authorized officers, but this does not absolve them from the duty of reasonable supervision, nor ought they to permitted to be shielded from liability because of want of knowledge of wrong-doing, if that ignorance is the result of *gross inattention*.[61]

Whether the majority was swayed by the idea of holding Spaulding liable—a civil war hero and dedicated and lauded civil servant in the twilight of his life—is not possible to parse from the judgment. But the minority were clearly not so swayed and vehemently disagreed with the outcome, revealing first, the deep indeterminacy in application of situational-care adjustment and the ever present risk that a situationally-adjusted ordinary care standard for directors can generate a benchmark of care that does not accommodate the epithet gross negligence or inattention, and,

[60] *Id.* emphasis supplied.
[61] *Id.* at 936, emphasis supplied.

second, that the epithet of gross negligence is an important component part of this standard as it can anchor a lower care benchmark against the accountability intuition of many judges. The minority judgment, written by Justice Harlen, channelling both Spaulding's significant experience and the societal threat of uncontrolled bureaucracy, observed:

> In the case of Mr. Spaulding there are absolutely no circumstances of a mitigating character. He was learned in the law and had large experience in banking…. It is plain from the evidence that if, with his long experience in banking business, he had given one hour, or at the utmost a few hours' time, in any week while he was director, to ascertain how this bank was being managed, he would have discovered enough that was wrong and reckless to have saved the association, its stockholders and depositors, many, if not all, the losses thereafter occurring. Upon his theory of duty, the only need for directors of a national bank is to meet, take the required oath to administer its business diligently and honestly, turn over all its affairs to the control of some one or more of its officers, and never go near the bank again, unless they are notified to come there, or until they are informed that there is something wrong; and when it is ascertained that these officers, or some of them, while in full control, have embezzled or recklessly squandered the assets of the bank, the only comfort that swindled stockholders and depositors have is the assurance, not that the directors have themselves diligently administered the affairs of the bank, or diligently supervised the conduct of those to whom its affairs were committed by them, but that they had confidence in the integrity and fidelity of its officers and agents, and relied upon their assurance that all was right. No bank can be safely administered in that way. Such a system cannot be properly characterized otherwise than as a farce. It cannot be tolerated without peril to the business interests of the country.[62]

The decision in *Briggs* left many subsequent judges aghast at the undemanding nature of the directorial care standard. At first instance in the Pennsylvania case of *Swentzel v Penn Bank,*[63] a case related to the collapse of Penn Bank, Ewing PJ—although clearly unimpressed with the majority's position in *Briggs* yet viewing himself as bound by it—in finding the directors not in breach of an ordinary care duty observed:

> But the law of the case is to be taken from the majority opinion [in *Briggs*]. If the whole opinion is to be taken as the law governing the liability of national

[62] *Id.* at 937.
[63] *Supra* note 21.

> bank directors to either stockholders or depositors, (and we would be bound to take it as such were this the case of a national bank,) there could scarcely be a case in which a director would be liable, unless he were guilty of actual fraud or of participation in the fruits thereof.[64]

Bitterly, tongue in cheek, in applying the majority's standard he added:

> Taking the whole case, and reading the rules laid down as to the duties of directors, it would appear that their ordinary duties are well performed when they meet and elect officers, hand the management of the business over to them, and, in case of the death of one of their number, meet and pass eulogistic resolutions in regard to the deceased.[65]

On appeal, the Pennsylvania Supreme Court agreed with PJ Ewing's assessment of the legal position, but it did not share his doubts about its appropriateness. For this court, following the earlier and more famous Pennsylvania Supreme Court case of *Sperings Appeal*,[66] directors should be understood as "gratuitous mandatories". This is a term which has now largely disappeared from our legal lexicon, but in the 18th and 19ths century was widely used to describe those who undertook to carry out an act for another but were not (then) rewarded, such as a gratuitous bailee or directors. For early English Law and US bailment and corporate law, the absence of reward was a central consideration in setting the standard of care because one could not expect much from a "friendly act for friend".[67] For Chief Justice Paxon, as "he receives no compensation for his services…[a director] is a gratuitous mandatory" and as such "it cannot be the rule that the director of a bank is to be held to same ordinary care that he takes of his own affairs."[68] He continued:

> Negligence is the want of care according to the circumstances, *and the circumstances are everything in considering this question*. The ordinary care of a businessman in his own affairs means one thing, *and the ordinary care of a gratuitous mandatary is quite another matter*. The one implies an oversight and knowledge of every detail of his business; the other suggests such care only as a man can give, *in a short space of time, to the business of other persons from whom he receives no compensation*.[69]

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[64] *Id.* at 150.
[65] *Id.*
[66] 71 Pa. St. 11 (1872).
[67] Coggs v Barnard (1703) LD Raym. 909, 914.
[68] *Supra* note 21 at 150.
[69] *Id.* emphasis supplied.

For Paxton CJ this understanding of the situation-adjusted ordinary care standard was necessary given the "prejudice [and] popular clamour" for leaders to be held accountable pursuant to the "misapprehension in the popular mind" "that they ought to take the same care of their own affairs that they do of their own private business."[70] Here situation adjustment leans toward the subjective by taking account of the experts actual role and circumstances to keep the common clamour for control at bay; a clamour that risks destroying the benefits of expertise. And in the Pennsylvania Supreme Court's hands, as for the US Supreme Court in *Briggs,* a situationally adjusted ordinary care standard as applied to directors truly deserved the epithet of gross negligence or gross inattention, although for them this was in no sense "vituperative".

2. Gross negligence as fraud but "never precisely equal to it"

Another eminently forgettable name, that has been eminently forgotten, is William Jones. Jones was a polymath – a lawyer, a judge in both the United Kingdom and in the Supreme Court of Judicature at Fort William in Calcutta during Indian colonial rule, an orientalist, philologist, apparently a fluent speaker of 13 languages, and for corporate and commercial lawyers Jones was also the author of a book in 1783 on the Law of Bailment.[71] The book is not, however, eminently forgettable although it has largely been forgotten. It is a book to which the law of bailment, tort law and corporate law in the United States owes a significant debt. Its ideas remain imprinted on the conceptual vocabulary of the corporate duty of care and it still today, as we shall explore below, has much to teach Delaware corporate law. The above analysis of the ordinary care standard is rooted in Jones' work. He provided one of the first accounts of an average, objective care standard—a "person of common prudence and capable of governing a family takes of his own concerns";[72] a negligence standard steeped in the British class system, and one that clearly connects an objective standard to the commonality, the shared expectations of the community. However, for our purposes in this part of the article, his account of the alternative ways of understanding gross negligence or neglect is of particular interest.

Following Lord Holt in the 1703 case of *Coggs v Barnard*,[73] Jones viewed care through the tripartite lens of slight, ordinary and gross neglect. For Jones, in most situations where the law imposes a duty of care, the "degree…of care…must lie somewhere between [the] extremes" of slight and gross neglect.[74] However, he

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[70] *Id.* at 414.
[71] *Supra* note 31.
[72] *Id.* at 7.
[73] *Supra* note 67.
[74] *Supra* note 31 at 5.

recognised that in some, rarer, instances a lower expectation and liability standard would be appropriate, most importantly where the bailee in question was unrewarded for her efforts. For Jones, to ask anything more of such unrewarded bailees risked both failing to acknowledge the gratitude that should be owed to them for offering their services free of charge, and undermining the willingness of people to serve as bailees, to the detriment of the effective functioning of commercial life:

> If the bailor only receive benefit or convenience from the bailment, it would be hard and unjust to require any particular trouble from the bailee, who ought not to be molested unnecessarily for his obliging conduct ...If he were to be made answerable for less than gross neglect few men, after one or two examples, would accept goods on such terms. And social comfort would be proportionately impaired.[75]

Jones explored two pathways to identifying the level of care that was required of such unrewarded bailees. In the first, the gross neglect standard deployed a less careful, objective, hypothetical character which he referred to as the "inattentive and thoughtless" man or a man "of common sense although absent and inattentive;"[76] that is, a person would be liable if he acted in way that fell below a benchmark of care set by how an inattentive and thoughtless man would act in the circumstances. The second pathway attempts to describe the low benchmark of care by identifying extreme almost immoral types of inattention. For Jones if a gratuitous bailee could only be held liable for gross negligence this would require a lack of care that "approached" fraud but "was never precisely equal to it."[77] Although in Jones' work the connection between the "inattentive and thoughtless man" and the approaching-fraud gross neglect standards are not clearly laid out, their juxtaposition in his text suggests a natural relationship—with the latter acting as a signifier for the benchmark of care produced by the former's application.

Joseph Story, the 19th century's preeminent U.S. jurist and whose work on bailment drew heavily on Jones's, rejected the use of this approximation altogether. Fraud and good faith, he argued, were entirely distinct from gross negligence standards, the latter being possible in the absence of the former.[78] Story, however, did not appear to grasp that the use of these terms to articulate or describe gross negligence did not mean that fraud and gross negligence were the same thing and that an objective gross negligence standard was subjectivized. Rather the vocabulary of fraud was being borrowed to attempt to roughly articulate or describe, *objectively*,

[75] *Id.* at 10.
[76] *Id.* at 7.
[77] *Id.*
[78] *Supra* note 32 at 15-16.

the egregious lack of care required for gross negligence, as well as its similar immoral character. One might say that this terminology was being used metaphorically to capture something objective. It was not deployed literally. This was why gross negligence "was never precisely equal to [fraud]" and it just "*approached*" fraud. In Story's literal confusion, he revealed how easy it is to miss the nuance of this distinction.

Later nineteenth century courts did not heed Story's advice, and, building on Jones work, which was very influential in the U.S.,[79] commonly referred to gross neglect as being akin to or "amounting to fraud". Consider for example, the Pennsylvania Supreme Court case of *Tompkins v Saltmarsh*[80] in 1826 where the bailee gave "an undertaking to perform a gratuitous act, from which he was to receive no benefit" and accordingly liability was predicated on gross negligence. For this court, "gross negligence" is "*dolo proximus* [which translates as close to or near to fraud], a practice equal to fraud," which the court then defines as "that omission of care that even the most inattentive and thoughtless men, never fail to take of their own concerns".[81] Here, equal-to / close-to fraud describes the objective benchmark of care produced by the inattentive man standard. U.S. courts of this period also deployed a range of terms within the penumbra of the concept of fraud to similarly identify a gross negligence standard, including "conscious disregard"[82] or "reckless disregard".[83] Commonly, as with the approaching-fraud idea, such terms were used alongside and described the benchmark of care generated by the objective inattentive man standard.[84]

As we saw above in relation to gross negligence as situation-adjusted ordinary care, when exploring the benchmark of care for directors, nineteenth-century U.S. courts analogized directors to bailees and drew on bailment law's standards of care.[85] As a result of this analogy, U.S. courts when addressing the directorial duty of care also deployed this gross negligence as akin-to-fraud idea.[86]

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[79] There are 288 citations to Jones' Bailment text in U.S. law reports prior to 1900 (Westlaw search).

[80] 14 Serg. & Rawle 275 (1826); 1826 WL 2258.

[81] *Id.* at 5. A position that remains Pennsylvania law today: Ferrick Excavating and Grading Co. v. Senger Trucking 506 Pa. 181 (1984) quoting *Tompkins* (at 189) as it has been "for at least 100 years" (at 189). *See* also the Georgia case of *McNabb v Lockhart* where the "inattentive and thoughtless man" is juxtaposed alongside the observation that "gross negligence was *dolo proximus*, amounting *almost* to fraud; " and the New York case of *McGrath v Hudson*, for example, the omission of care by "an inattentive and thoughtless man "is equal to fraud or bad faith"

[82] Tennessee, A & G Railway v. Hunt 13 Tenn. App. 590 (1931). For a comprehensive account of the evolution of this idea *see* Kershaw *supra* note 30

[83] Toledo & O.C.R. Co. v. Bowler & Burdick Co. 63 Ohio St. 274 (1900); Trexler v. Baltimore 28 Pa. Super. 207 (1905); 1905 WL 3691 (1905).

[84] Trexler, *id* at 5.

[85] *See* Scott v Depeyster 1 Edw. Ch. 513 (1832); Maisch v. Saving Fund 11 Philadelphia Reports 30; *Spering's Appeal*, *supra* note 34.

[86] For example, Maisch *id* at 31 (1862); Swentzel supra note 21 at 151.

For example, in *Maisch v. Saving Fund*, a case relied on by the Pennsylvania Supreme Court in *Swentzel*, "directors…[are] liable only for fraud or such gross negligence as amounts to fraud."[87] It is noteworthy, that in *Swentzel*, in contrast to the bailment cases on which it rests, it is the gross negligence benchmark produced by the situation-adjusted ordinary care standard which the metaphor of "approaching fraud" describes.

All of these "approaching and akin to fraud" terms, particular when they are deployed without reference to an objective standard which generates the benchmark they describe, risk slippage—by taking the legals metaphors literally—from the idea that they describe and represent the low benchmark of care produced by an objective standard, to the idea that what matters in relation to care is the subjective state of mind of the actor in question when she takes or is supposed to be taking care. Remarkably, most, but not all, courts have managed to resist this slippage. Nevertheless, this infiltration of subjective terminology threatens the objective and tilts law's balance from objective common control to subjective expertise.

III. DISCOVERING DELAWARE'S DUTY OF CARE

1. Delaware Care Beginnings

Before 1960 Delaware had no cases that addressed monitoring and organizational governance responsibility, and no cases that addressed process care in a business judgement context; it had *no* care *cases at all*. It is not that care issues were not prevalent in U.S. corporations,[88] it is just that until 1960 they were not litigated in Delaware. Even though Delaware was already a market leader in incorporations by 1960,[89] in many areas of corporate law it had little case law of its own,[90] nor, as a corollary of the lack thereof, did it at that time have a judiciary with a distinctive corporate expertise or any existing or plausible expectation of legal network externalities.[91] Delaware's success, therefore, had little to do with its law and everything to do with its implicit commitment to replicate the paths of law trodden

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[87] Maisch, *id.* at 31; Swentzel, *id.* at 151.
[88] *See* Kershaw, *supra* note 30 at 174-197.
[89] As of 1922, 55% of companies listed on the New York Stock Exchange were incorporated in Delaware—see William W. Bratton and Joseph A. McCahery, *The Equilibrium Content of Corporate Federalism* 41 WAKE FOREST LAW REVIEW 619, 630 (2006).
[90] *See* Kershaw, *supra* note 30.
[91] See Roberta Romano, *Law as a Product: Some Pieces of the Incorporation Puzzle*, 2 JOURNAL OF LAW, ECONOMICS AND ORGANIZATION 225 (1985); Michael Klausner, *Corporations, Corporate Law, and Networks of Products*" (1995) 81 VIRGINIA. L. REV. 843

in other states, combined with a management-friendly bias encoded into its size and fiscal base.[92]

Delaware's first care case in 1963 was *Graham v Allis-Chalmers Manufacturing*.[93] This derivative action alleged breach of duty for the failure of Allis-Chalmers' directors to identify and address anti-trust violations arising from price rigging in one of its divisions. Allis-Chalmers was one of the U.S.'s great manufacturing companies of this era. It was established in the mid-nineteenth century and its imprint remains on familiar U.S. and European names in our contemporary manufacturing universe from Briggs & Stratton to Fiat and Siemens. At the time the price-rigging took place, Allis-Chambers employed over 30,000 people, had 120 sales offices and a sales volume of over £500 million.[94]

In the Chancery Court, the legal question was whether the directors had performed their supervisory function in accordance with their duty of care. VC Marvel asked "what [could be] draw[n] from the cases dealing with the degree of care required of corporate directors in the selection and supervision of employees."[95] The only care case cited by the Chancery Court[96] was *Briggs v Spaulding* and the Vice Chancellor took seriously the direction it provided about situation-adjustment in delineating the benchmark of care. He observed that: "the degree of care in any specific case must…depend upon the surrounding facts and circumstances."[97] Each case "must be considered on its own facts, giving regard to the nature of the business, the extent, method and reasonableness of the delegation."[98] In this case, the court detailed the size of the business division in which the price fixing took place, the number of employees, "the complexity and the diversity of the corporation's products",[99] the inevitably limited time commitment of the non-executive directors,[100] as well as the significant operational distance between the board and the price setting process.[101]

Alongside, this situation-adjusted, objective understanding of care, the court also considers then section 141(f) of the Delaware Code,[102] which provided that where a director relies in "good faith" on books of account or reports he shall "be fully protected", thereby in relation to such reports pre-empting the application of

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[92] *See* Kershaw, *supra* note 30 at 225-228.
[93] 41 Del. Ch. 78 (1963).
[94] 182 A.2d 328, 329 (Del.Ch) (1962).
[95] *Id.* at 332.
[96] *Id.*
[97] *Id.*
[98] *Id.*
[99] *Id* at 330.
[100] *Id.* noting the meetings were held "once a month" for "several hours", where they consider the summary information provided to them.
[101] *Id.*
[102] Today DEL. CODE ANN. tit. 8, § 141(e).

the objective standard.[103] VC Marvel noted that this "principle is hardly applicable" in this case and then proceeded to observe, *in relation to this provision*, that there is no doubt that the directors could "become personally liable when they foolishly or recklessly repose confidence in an untrustworthy officer or agent *and in effect* turn away when corporate corruption could be readily spotted."[104] Here "recklessness" for VC Marvel, is a synonym for subjective bad faith *in the context of section 141(f)*.

Applying this situation-adjusted objective standard, the Court concluded that "the law clearly does not require directors in every instance to establish an espionage system in order to protect themselves generally from the possibility of becoming liable for the misconduct of corporate employees."[105] This is a phrase borrowed from *Briggs* which it in turn, as we saw above, borrows from a foundational 1832 New York duty of care case, *Scott v Depeyster*, where the court was similarly faced with the issue of directorial care obligations in relation to failure to identify officer wrongdoing. Note that the Chancery Court in *Graham* is not addressing systems and controls as we would understand them today, a question the plaintiff's action did not ask the court to have regard to. Rather here the system of espionage goes directly to monitoring the behaviour of the employees—a means of watching over them–a system the Supreme Court of Delaware on appeal calls a "system of watchfulness;"[106] language which also echoes the New York Court of Chancery in *Scott v Depeyster* when it observed that directors could not be expected to "*to set a watch upon all their actions*."[107]

The Delaware Supreme Court in *Graham* replicated the Chancery Court's decision. The court refers only to *Briggs v Spaulding*, *Bowerman v Hamner*[108]—where in 1919 the U.S. Supreme Court affirms *Briggs*—and two Federal Court of Appeals[109] cases that rely on *Bowerman*. The court asks whether directors who are bound to act as "ordinarily careful and prudent men in similar circumstances"[110] are required to put in place a "system of watchfulness" that "would have brought…to their attention" the individual employee misconduct.[111] The court understands this situation-adjusted ordinary care obligation as a duty "of control"[112] and as a standard of liability—"whether or not *by neglect* they have made themselves *liable* for failure to

[103] *Supra* at 94 332.
[104] *Id.* (emphasis supplied).
[105] *Id.*
[106] 41 Del.Ch. 78, 85 (1963).
[107] *Supra* note 85.
[108] 250 U.S. 504 (1919)
[109] *Gamble v Brown* 4 Cir. 29 F.2d 366 (1928); *Atherton* v. *Anderson* 6 Cir. 99 F2.d 883 (1938).
[110] *Supra* note 106at 84
[111] *Id.*
[112] *Id.*

exercise *proper control* depends on the circumstances of the particular case."[113] Their duty of care, the Supreme Court provides,

> [is] *fixed by the nature of the enterprise*, which employed in excess of 30,000 persons and extended over [a] large geographic area. By force of necessity the company's directors could not know all the company's employees.[114]… The very magnitude of the enterprise required them to confine their control to broad policy decisions."[115]

The Supreme Court repeats the Chancery Court's "system of espionage" idea, observing that "there is no duty upon the directors to install and operate a corporate system of espionage to ferret out wrongdoing which they have no reason to suspect."[116] However, note again the concern here is not with what we would understand to be systems and controls but with whether the directors should have in place a system to watch over and report on employees who exercise corporate power; a corporate "big brother".[117]

The Court then paraphrases the Chancery Court's position on reckless behaviour but in doing so the judgment does not make it clear that the observations on recklessness in VC Marvel's Chancery Court judgment went only to the application of section 141(f); any reader only of the Supreme Court's judgment would have no sight of this. In doing so, it juxtaposes the objective situation adjusted liability standard alongside what can be read as a subjective standard, and offers the general applicability of both:

> In the last analysis the question of whether a corporate director has become liable for losses to the corporation through neglect of duty is determined *by the circumstances*. If he has recklessly reposed confidence in an obviously untrustworthy employee, has refused or neglected cavalierly to perform his duty as a director, or has ignored with wilfully or through inattention obvious danger signs of employee wrongdoing, the law will cast the burden of liability upon him.[118]

This juxtaposition offers two readings of the relationship between the objective duty of care and this subjective supplement. One reading is to understand the "subjective" element as an aligned supplement which attempts to describe and anchor an undemanding *Briggs-like* benchmark of care. In this reading, the subjective

113 *Id.* (emphasis supplied).
114 *Id.* at 85.
115 *Id.* at 86.
116 *Id.* at 85.
117 GEORGE ORWELL, 1984 (1949).
118 *Supra* note 106 at 86.

is subordinate to and serves the objective and is not intended to be taken literally, *as an intention-based standard*. As we saw above, this is how courts understood the relationship between objective tests such as the "inattentive man" standard or the ordinary care gross negligence standard and the idea of "approaching fraud" and its synonyms. With a commitment to legal coherence, this is the stronger reading. Another, more contemporary, reading is to understand this juxtaposition of ostensibly immiscible objective and subjective approaches as reflecting an objective, demanding *expectation of care* and a subjective undemanding *standard of liability*—the subjective takeover of one of the objective standard's functions. Here the subjective standard is to be taken literally as an intention-based standard. However, this is a more strained reading. For the Supreme Court in *Graham* the ordinary care standard is a liability standard and through the lens of *Briggs*, which the Court adopts, the situation-adjusted objective standard generates an undemanding gross negligence benchmark which does not impose liability on behavior which would appear to many to be extremely careless.

Both readings, although to differing extents, reflect the intrusion of the subjective into the objective and the demotion of control and the elevation of expertise. And although we might see a technical failure in the Supreme Court not acknowledging that the idea of recklessness and the cavalier is rooted in the Chancery Court's judgment only in a specific legislative provision, we can also see the idea's detachment from the statutory provision in the hands of the Supreme Court, and the case law that follows it, as the discursive product of the impulse to temper common control with individual expertise in bureaucratic forms.

2. Aronson's hinterland

Delaware's modern approach to care is located in the demand-futility Derivative litigation case, *Aronson v Lewis*.[119] *Aronson* was not a case involving monitoring failings by the board, and it did not consider the standard that applies to such failings, however, the case is pivotal for understanding the monitoring care standard articulated in *Caremark*. In *Aronson* the Delaware Supreme court re-presented and re-made the business judgment rule. Prior to *Aronson* the business judgment rule provided merely for rationality review of business judgments, a standard that was the product of the requirement that corporate power must be exercised in good faith to further the corporate interest.[120] *Aronson's* re-presentation of the rule provided

[119] 473 A.2d 805 (1984).
[120] *See* IBEW Local Union 481 Defined Contribution Plan and Trust on Behalf of GoDaddy, Inc. v Winborne 301 A.3d 596, 623 (2023), *per* VC Laster observing that "Delaware's application of the business judgment rule remains true to the doctrines origins as an inquiry into the good faith exercise

that if the directors have acted in good faith, there is no-direct conflict of interest, and they are informed prior to making the decision, then, absent an abuse of discretion, the courts will not interfere with the exercise of business judgment.[121]

In *Aronson*, the Delaware Supreme Court held that whether a director is informed for the purpose of this business judgment rule involves the application of the duty of care,[122] and that the care standard is a gross negligence standard.[123] This was the first explicit articulation of these positions in Delaware law. Until then Delaware law evidenced, admittedly in a limited number of cases, deep uncertainty about whether there was the duty of care applicable in the context of decision-making process *at all*.

Although prior to *Aronson* there were several Delaware cases that referred to or implicitly applied a care standard to the decision-making process,[124] no case had engaged in a reasoned analysis of the nature of that standard. Moreover, there was also a second strand of case law which understood process failings to be relevant only to the validity of the business judgment—to the question of whether board power had been exercised in subjective good faith in the best interests of the company, namely the original business judgment rule.[125]

In this second strand of case law there is no objective duty of care applied to the decision-making process, directors are only required to perform their functions in subjective good faith to further the corporate interest. Accordingly, egregious process failings can *only* operate as a proxy for bad faith judgment; in the same way that in the evolution of the business judgment rule irrationality[126] or abuse of discretion,[127] or without the bounds of reason[128] served as inferential proxies for bad faith judgment.[129] The first, of three, Delaware cases to apply this idea was

of delegated power…Good faith thus was no simply an aspect of the business judgment rule; it was the whole of the rule"; citing Kershaw, *supra* note 30 in support.

121 *Supra* note 119 at 812.

122 *Id* referring to the "standard of care" addressing in this paragraph a "duty to inform themselves, prior to making a business decision, of all material information reasonably available to them."

123 *Id.*

124 For example, Cheff v Mathes 41 Del.Ch. 494 (1964) referring to good faith and reasonable investigation"; and Kaplan v. Goldsamt 380 A.2d 556, 569 (1977) citing *Cheff* and "reasonable investigation and advice."

125 *Supra* note 120.

126 Sinclair Oil Corp. v Levien 280 A.2d. 717 (1971).

127 *Aronson*, *supra* note 119

128 Gimbel v Signal Companies Inc. 316 A.2d 599 (1974).

129 *Supra* note 120 at 624 following Kershaw, *supra* note 30 observing: "When assessing whether the individual exercised judgment in good faith, courts have always looked for "for evidentiary inferences or indicators, such as "circumstantial evidence of irrelevant preferences or conflicts of interest," "evidence of extreme indifference to the consequences of action," and an action that seems extreme based on some minimal level of "objective testing of the quality of the reasons" offered for it." *Id.* at 30 (citation omitted). *See generally id.* at 31–47."

Mitchell v Highland-Western Glass Co.[130] The case involved a challenge to the sale of corporate assets on the ground that the sale was not made, as required by then section 64 of the Delaware General Corporation Law,[131]on terms which the directors subjectively deemed "to be expedient and in the best interests of the company." The court considered the claim that the board was not adequately informed when it made the decision—for example there had been no physical evaluation of the assets—solely through a subjective lens as required by the statute. In rejecting the complaint, the Chancery Court asked whether "the directors acted *so far* without information that they can be said to have reached an unintelligent and unadvised judgment."[132] Here, the "*so far without information*" acted as a quasi-objective proxy for the failure of the directors to act in a way in which *they thought* was expedient and in the best interests of the company.[133] There is no consideration of a separate objective ordinary care standard in the judgment, but notably, as in the Chancery Court in *Graham*, the dominance of the subjective standard is linked to the singular focus on a subjective standard in the applicable statutory provision.

The second case is *Gimbel v Signal Companies Inc.*,[134] which also involved an asset sale but where the statutory subjective requirement in section 271[135] was inapplicable because the Chancery Court held that the sale did not involve the sale of "all or substantially all" of the company's assets. Nevertheless, the Chancery Court takes the approach in *Mitchell* to be generally applicable and the process failings—"the failure of the board of directors to act…with informed reasonable deliberation"[136]—are considered only in relation to whether the directors had lost the protection of the business judgment rule—"that presumption which the law accords them of being actuated in their conduct by a bona fide regard for the interests of the corporation."[137] In this case although there were significant process failings "which suggest[ed] imprudence" they did not meet *Mitchell's* "so far" threshold to "be able to pierce the business judgment standard";[138] such process failings did not amount to "recklessness."[139] In *Gimbel*, as in *Mitchell,* there is no stand-alone duty of care, the subjective is supreme although qualified by the objective supplement in the "so far"-proxy for state of mind.

In the duality of expertise and control, this singular subjective good faith approach to control is infused with compelling deference to expertise. The

130 19 Del.Ch. 326 (1933).
131 Today, DEL. CODE ANN. tit. 8, § 271.
132 *Supra* note at 330.
133 Del. Ch., 167 A. 831 (1933).
134 *Supra* note 128.
135 The successor to the section applied in *Mitchell*— DEL. CODE ANN. tit. 8, § 271.
136 *Supra* note 128 at 611.
137 *Id.* at 609.
138 *Id.* at 614.
139 *Id.* at 611.

company through its shareholder meeting, appoints part-time, skilled directors to direct the management of the resources made available to the company. With those resources and their expertise, we ask of them only to do their honest best—to make decisions that *they (the experts) think* benefit the company and to engage in a decision-making process that *they (the experts) think* supports that decision. Moreover, the introduction of additional and distinctive duties, such as a process duty of care, threatens conflict and inconsistency with the claims made by such a singular good faith standard in relation to business judgment. If directors are required only to exercise delegated power in good faith to further the corporate interest and are not, therefore, to be held to account for honest mistakes or honest errors of judgment,[140] then to hold them accountable for a breach of an objective duty of care as applied to the decision-making process is inconsistent with this position. This is because a breach of the care obligation, *at the time of Gimbel*,[141] would have involved a remedial inquiry into loss suffered by the company, which necessarily would require consideration of whether the decision was one which an objective hypothetical director would have made following a duty compliant process. If such a director would not have made the actual decision and the decision generated loss for the company, then the director would indeed be liable for error and mistake, no matter that he complied with his good faith obligation. Of course, this is a remedial consequence of the breach of the duty of care rather than the direct application of a care standard to the quality of the judgment itself, but this is the stuff of angels on pinheads.

This uncertainty as to whether process failings are relevant to an objective care standard or to the subjective good faith exercise of power is seen most clearly in *Smith v Van Gorkom*, the most famous of Delaware's duty of care cases. At first instance in the Chancery Court,[142] the alleged process failings at issue in *Van Gorkom* connected to the sale of Trans Union were not addressed through the lens of an objective care standard—the language of care and duty of care were not used at all. Rather, the board's process failings were understood only through the lens of whether the directors had acted in good faith in approving and recommending the merger. The court's legal framework operated only within "the presumption…that corporate directors form their business judgments in good faith"[143] and it follows and cites *Mitchell* and *Gimbel* in asking whether the process failings were "so far

[140] *See supra* note 34.
[141] *See Cede & Co v. Technicolour, Inc.* 663 A.2d 1134 (1994) *per* Chancellor Allen, overruled by the Delaware Supreme Court in *Cede & Co v. Technicolour, Inc.* 634 A.2d 345 (1994). *See* Stephen Bainbridge, Star Lopez, Benjamin Oklan, *The Convergence of Good Faith and Oversight*, 55 UCLA L. REV. 559 at 587 (2008) explaining why entire fairness makes little sense in the context of the duty of care.
[142] Smith v Pritzker 8 Del. J. Corp. L. 406 (1982).
[143] *Id.* at 413.

without information" as to impugn the directors' good faith. In considering the well-known process complaints in this case the court concluded that:

> Trans Union did not *act* recklessly or improvidently *in determining on a course of action* which they believed to be in the best interest of the stockholders.[144]

3. The Aronson Repository

In the Delaware Supreme Court's decision in *Van Gorkom*[145] process failings are no longer treated as only relevant to a possible inference of bad faith, as they were at first instance, but to whether they complied with "their duty to exercise an informed business judgment"[146] which "is in the nature of a duty of care,"[147] and where the care standard is a gross negligence standard.[148] *Aronson v Lewis*[149] is the reason for this shift towards an objective standard of care in relation to the decision-making process, although, as argued below, it need not have been.

Aronson is a judicial nodal point that contains within it distinct subjective and objective approaches to how decision-making process failings should be legally filtered, without committing clearly to either one of them. The case involved a claim of breach of duty arising from a decision of the board to enter into a consultancy agreement with the company's majority shareholder. Although *Aronson* did not consider monitoring failings, the case upon which the Court's care conclusions rest is a monitoring case, *Graham v Allis Chalmers*. To see this, however, we must do a little digging. The Supreme Court does cite *Graham*, but only to the point that questions of liability for omissions do not raise issues of business judgment.[150] On the standard of care the court does not indicate that *Graham* has anything to offer. That *Graham* underpins the court's gross negligence statement is visible through its citation of an article from Veasy and Manning supporting its gross negligence position.[151] This article argues, relying directly on both strands of *Graham*—the

144 *Id.* at 415 (emphasis supplied).
145 488 A.2d. 858 (1985).
146 *Id.* at 873.
147 *Id.* at 872-873.
148 *Id.* at 873.
149 *Supra* note 119.
150 *Id.* at footnote 7.
151 *Id.* at 812 observing in the text: "under the business judgment rule director liability is predicated upon concepts of gross negligence. See Veasey and Manning, *Codified Standard—Safe Harbor or Unchartered Reef?* 35 Bus. Law. 919, 928". The reference to page 928 is to section 3 of the article where *Graham* is discussed at length. Section 3 is entitled "Level of Care Required by Delaware Law and MBCA Section 35: 'Gross Negligence'; 'Ordinary Negligence'; Does it Matter" (at 926).

situation-adjusted ordinary care standard *and* the recklessness and cavalier neglect idea[152]—that the standard is a gross negligence standard.

Aronson's gross negligence holding is, therefore, consistent with *Graham* and its historical precursors; consistent with the position that the monitoring care standard at this times was an objective duty of care. However, neither the article by Veasey and Manning nor, therefore, the Delaware Supreme Court, consider or evidence an understanding that *Graham's* reckless-and-cavalier strand originates in today's section 141(f) and its reliance on subjective good faith, or that, if it is be treated as a part of an objective care standard, then it should be the understood as the descriptive product of the application of an ordinary care gross negligence standard, and not as a stand-alone, intention-based definition of gross negligence. As noted above, the only other way to make sense of the two adjacent strands is as separate standards of conduct and liability which *Graham* explicitly and, in following *Briggs*, implicitly did not intend. Without sight or consideration of this, *Aronson* leaves it open as to whether these two strands should be treated as two distinct options from which courts can select in understanding and defining the meaning of gross negligence, or to organise them as separate standards of expectation and liability.

Although *Aronson* is silent about these strands it evidences a bias in favour of a "recklessness" approach as a stand-alone standard. This bias is seen in the only cases it cites in favour of its gross negligence holding which are not process care cases at all.[153] Rather they are business judgment cases that consider whether a decision was made in good faith (the original business judgment rule)[154] and which deploy egregious "fraud" markers—such as "gross abuse of discretion"[155]—as inferential proxies for bad faith.[156] To be clear, the Delaware Supreme Court in *Aronson* cites multiple cases in support of its gross negligence duty of care proposition that have nothing to do with and do not refer to either the duty of care or the gross negligence standard. The cases are only linked to a process duty of care on the linguistic surface by the fact that they deploy terminology which is similar to the terminology used in *Graham* and which outside of Delaware has long been used *metaphorically* in care cases to articulate and anchor the undemanding, gross negligence benchmark of care. For William Jones—as Story misunderstood[157]—the use of these "approaching fraud" terms was never intended to be taken literally in the context of the care standard. To take the terms literally would turn an objective standard, which enables directors and courts to explore circumstance-adjusted communal expectations of director behavior into a subjective standard.

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[152] *Id.* at 927.
[153] *Id.* at footnote 6.
[154] *Supra* note 120.
[155] Warshaw v Calhoun 43 Del.Ch. 148, 157 (1966).
[156] *See supra* note 129.
[157] *Supra* note 32.

The citation of these business judgment cases in *Aronson* can also be understood separately as affirming the *Mitchell*, *Gimbel, Van Gorkom (Chancery)* line of cases, that the only standard which applies to directorial behaviour—from business judgment to judgment-process to organizational governance responsibility—is the good faith standard. Whilst such an affirmation appears to conflict with both *Aronson's* identification of a "standard of care" and its implicit reliance on *Graham*, there is a symbiosis between its affirmation and taking the "approaching-fraud" care strand literally as a stand-alone gross negligence standard—both provide for an approach which focuses only on whether the director thought he was sufficiently informed.

These distinct and co-existing objective and subjective approaches to decision-making process found in *Aronson* are also all present in the Supreme Court's decision in *Smith v Van Gorkom*. This is to be expected given that all three judges in *Aronson*—Justices McNeilly, Moore and Christie—are also part of the bench of five in *Smith v Van Gorkom*, although Justices McNeilly and Christie dissented in *Van Gorkom*. The gross negligence standard in *Van Gorkom* is not defined, but the imprint of both an objective and subjective understanding of gross negligence are visible. Although the case does not refer to the situation adjusted ordinarily prudent director standard, it does refer to "reasonable inquiry"[158] and "reasonable care,"[159] and concludes that "Trans Union's board was grossly negligent in that it failed to act with informed reasonable deliberation."[160] Moreover, the decision is highly attuned to situation adjustment.[161] Equally, the imprint of the Chancery Court's position—that the only applicable lens is the good faith standard—is also visible. The only cases the Court cites in support of their conclusion that "the concept of gross negligence is also the proper standard for determining whether a business judgment reached by a board of directors was an informed one" are *Mitchell* and *Gimbel*. In dissent, Justice McNeilly holds that that the Chancery Court's decision "should have been affirmed"[162] and yet he had "no quarrel with the [Supreme Court] majority's analysis of the business judgment rule"[163] and his "opposition was to the evidentiary conclusions of the majority".[164] This suggests that that he thought that the majority was applying a good faith process standard, just not applying it properly. It is no surprise then that Justice McNeilly dissents given the egregious process failings that would be required to infer bad faith.

158 *Supra* note 145 at 875.
159 *Id.* quoting DEL. CODE ANN. tit. 8, § 141(e).
160 *Id.* at 881.
161 *Id.* at 874: "given these circumstances";"considering all the surrounding circumstances."
162 *Id.* at 893.
163 *Id.* at 897.
164 *Id.* at 893.

What we see in *Aronson* and *Van Gorkom* is best, although illogically, described as both the fusion and separate co-existence of two ideas within Delaware law; analogous to stirring two immiscible liquids that at a molecular level cannot bond and will separate if left alone, but as long as you keep stirring the mixture the fact that they are immiscible remains difficult to see. One of these ideas is of a separate objective duty of care which channels communal behavioral expectations through an undemanding situation-adjusted ordinary care standard, which applies to process and all other aspects of the directorial role. The other idea is that there is no objective duty of care at all and control over directorial actions is addressed only through the lens of the subjective good faith exercise of power. The reference to care, gross negligence and Veasey and Manning, and one reading of *Smith v Van Gorkom* (in the Supreme Court) support the former, and the care component of *Revlon duties*[165] are its progeny. The citation of the business judgment and good faith process cases support *both* the latter, as does treating the amounting-to-fraud strand of gross negligence as a stand-alone, distinct approach to care *that should be taken literally*. This approach dissolves the duty of care into subjectivity and intention, and into the duty of loyalty. *Caremark duties* are its progeny.

IV. THE MAKING OF CAREMARK DUTIES

1. *Subjectivity in process care*

Caremark involved an application to the Chancery Court to approve a derivative action settlement agreement with Caremark International Inc. The settlement did not involve any award of damages. The action was brought for breach of duty in relation to alleged monitoring failings by the board in relation to the company's violation of the regulation of referral payments to medical professionals. The complaint alleged that the directors had breached their "fiduciary duty of care."[166] More precisely, for Chancellor Allen the legal question was whether they had "violated a duty to be active monitors of corporate performance;"[167] a basis for

165 Partners v. Newmont Mining Corporation, 535 A.2d 1334, 1345 (1987); At 967; Cinerama Inc. v. Technicolor Inc. 17 Delaware Journal of Corporate Law, 551, 581 (1991); C&J Energy Services Inc. v. City of Miami General of Employees 107 A.3d 1049,1053 (2014).

166 *Supra* note 18 at 9

167 *Id.* at 967. *See* also the important recent acknowledgement of this by VC Laster, as well as of the care underpinning of *Caremark* in *Graham*, in *Ontario Provincial Council of Carpenters' Pension Trust* 203 WL 3093500 (2023) at 31.

liability which, famously, in his view was "the most difficult theory in corporation law upon which a plaintiff might hope to win judgment".[168]

To understand the genesis of Chancellor Allen's "*Caremark* duties" we must first address his consideration of the duty of care in a business judgment context, which was prior to his consideration of monitoring. His approach to the standard of care applied to board process in decision-making did not find direct traction in the subsequent development of Delaware law,[169] even though it is umbilically linked with his approach to monitoring, which did. For Allen, being informed in a business judgment context required a process that "was either deliberately considered in good faith or was otherwise rational."[170] He observed that a decision can "only be judicially determined…[by] consideration of the good faith or rationality of the process employed", which involved "a *good faith* effort to advance corporate interests."[171] Where the director "exercises *a good faith effort* to be informed…he or she should be deemed to satisfy *fully* the duty of attention."[172] This approach is the product of the "deep respect for all good faith board decisions".[173]

Aronson is the only care authority Chancellor Allen cites for this good faith process proposition. Necessarily therefore, his judgment operates within *Aronson's* parameters, namely—as was affirmed shortly thereafter by the Supreme Court in *Smith v Van Gorkom*—that the question of whether a director is informed involves the application of the duty of care, and that the applicable care standard is a gross negligence standard.[174] Yet, consistent with one reading of *Aronson*—and inconsistent with the implicit ordinary, situation-adjusted (gross negligence) standard in *Van Gorkom*—Allen channels Delaware's singular good faith standard even though its application in *Mitchell, Kaplan* and *Van Gorkom* in the Chancery Court was premised on the absence of a separate process care standard. On this reading

[168] *Id.*

[169] Although Allen's jurisprudence certainly contributed to deploying intention-based concepts to define gross negligence—*see* Solash v. Telex Corporation 13 Del. J. Corp.L. 1250 (1988) and Tomczak v. Morton Thiokol Inc. Del. J. Corp.L. (1989)—*per* VC Hartnett at 946 relying on *Solash* to define gross negligence as "reckless indifference or deliberate disregard to the of the whole body of stockholders", and then followed in In re Walt Disney Co. Derivative Litigation 907 A.2d 693, 751 (2005 —until courts rowed back on the use of "deliberate disregard" in light of subsequent cases including *Walt Disney* deciding that gross negligence was distinct from good faith (*see* also: Stone v. Ritter 911 A.2d 362, 370 (2008)—*see* McPadden v. Sidhu 964 A.2d 1262, 1274 (2008); Ironworkers District Council of Philadelphia & Vicinity Retirement & Pension Plan v. Andreotti WL 2270673 (2015) at note 254).

[170] *Supra* note 18 at 967.

[171] *Id.* at 968 emphasis in the original.

[172] *Id. at* 967 emphasis added.

[173] *Id.* at 968.

[174] *See* also *Solash*, *supra* note 169 where Chancellor Allen notes clearly that *Aronson* provides that process is subject to the gross negligence standard (*id*) and that this is part of the duty of care (at 1262).

he channels the consideration of process failings through a subjective loyalty standard but, to be consistent with *Aronson* and *Van Gorkom*, is required (forced) to present it through the lens of a presumptively objective duty of care.

Caremark should then be read as a corrective in relation to process—to *functionally* align Delaware law with the position that there is no general directorial duty of care in relation to process; to replace the objective with the subjective.[175] Note in this regard that there is no substantive difference between, on the one hand, a legal regime that deploys a good faith standard to any exercise of power and a good faith attempt standard in relation to decision-making process, and, on the other hand, a regime that applies only a good faith standard in relation to exercises of power and no process standard at all, on the other. It is not possible in the former to breach the process standard and not to breach the decision-making standard—a person who knows that he has not engaged in a process necessary to support the decision cannot believe that the decision is in the best interests of the company, because he knows he does not know.

Allen's position on the good faith attempt standard in relation to process is in no sense a misreading of *Aronson*. As we have seen, *Aronson* is an opaque repository of the objective and the subjective. It offers a control-focused objective gross negligence pathway and an expertise-focused singular good faith pathway. We can understand *Aronson* as a schizophrenic response to a period of significant societal change and uncertainty in the early 1980s about the appropriate role of markets, managers and experts, which generated legal uncertainty about the appropriate balance to be struck between expertise and control through subjective and objective legal standards, in a state which, in contrast to other corporate legal jurisdictions, had not previously comprehensively addressed the issue. By the time of *Caremark* this uncertainty had settled both politically and legally with several legal and policy standard bearers which had a valence towards expertise and therefore towards subjectivity. These included: section 102(b)(7);[176] the development and legal availability of takeover defenses;[177] and the accompanying fetishization of section 141(a) of the Delaware General Corporation Law, providing for the original and undelegated empowerment of directors.[178] In *Solash v. Telex Corporation*, Chancellor Allen articulated the expertise valance of the time as follows:

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[175] As part of this corrective, Allen tries to compartmentalize the Supreme Court's decision in *Van Gorkom* into an early example of the innovation of Revlon duties, only applicable in change of control contexts—*see supra* note 18 at footnote 26.

[176] DEL. CODE ANN. tit. 8, § 102(b)(7).

[177] Unocal Corp. v. Mesa Petroleum 493 A. 2d. 946 (1985); Unitrin v. American General Corp. 651 A.2d. 1361 (1995).

[178] DEL. CODE ANN. tit. 8, § 141(a). *See* Kershaw *supra* note 30 at 93-94.

> Because businessmen and women are correctly perceived as possessing skills, information and judgment not possessed by reviewing courts and because there is great social utility in encouraging the allocation of assets and the evaluation and assumption of economic risk by those with such skill and information, courts have long been reluctant to second-guess such decisions when they appear to be made in good faith.[179]

In *Caremark* itself, Allen observed *in relation to judgment*:

> To employ a…rule that permitted an 'objective' evaluation of the decision would expose directors to substantive second guessing by ill-equipped judges or juries, which would in the long run be injurious to investor interests.[180]

> It is doubtful that we want business men and women to be encouraged to make decisions as hypothetical persons of *ordinary* judgment and prudence might. The corporate form gets its utility in large part from its ability to allow diversified investors to accept greater investment risk. If those in charge of the corporation are to be adjudged personally liable for losses on the basis for losses on the basis of a substantive judgment based on ordinary or average judgment and average risk assessment talent regard as "prudent" "sensible" or even "rational", such persons will have strong incentives at the margin to authorize less risky investment projects.[181]

In *Gagliardi*, cited in and decided two months before *Caremark*, *inter alia* Chancellor Allen observed:

> Given the scale of operation of modern corporations, this stupefying disjunction between risk and reward for corporate directors threatens undesirable effects. Given this disjunction, only a very small probability of director liability based on "negligence", "inattention", "waste" etc,. could induce a board to avoid authorizing risky investment projects to any extent! Obviously, it is in the shareholders' economic interests to offer sufficient protection to directors from liability for negligence, etc., to allow directors to conclude that, as a practical matter, there is no risk that, if they act in good faith, and meet minimalist proceduralist standards of attention that they can face liability as a result of a business loss.[182]

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[179] *Supra* note 169 at 1262.
[180] *Supra* note 18 at 967.
[181] *Id.* at footnote 16 (emphasis in the original).
[182] Gagliardi v Trifoods International, Inc 683 A.2d 1049, 1052 (1996).

Through this lens, *Caremark's* good faith attempt standard is *a* natural product of the intersection of a shifting legal and policy valence towards expertise and the source materials of *Mitchell*, *Gimbel*, *Graham, Aronson, and Van Gorkom*. It is this valence and this standard that forms and reconstructs the material that Allen uses to build the argument for *Caremark duties*; a reconstruction interrogated below that elevates expertise by presenting the objective as subjective, even if the objective leaves an unacknowledged imprint.

2. Constructing Caremark Duties

Chancellor Allen then turned from the decision-making process to the monitoring context and naturally extended the good faith attempt standard he outlined in relation to process to directors' organizational governance responsibility. Although he recognized that formally the question the complaint raised is "have the directors breached their monitoring duty of care,"[183] his judgment is care-blind; the existing legal position is myopically filtered through the same subjective good faith lens he applied to process.

In *Graham*, both the Chancery Court and the Delaware Supreme concluded that the board did not have to implement a system of espionage or watchfulness when there was no reason to suspect any wrongdoing. This was because a situation-adjusted ordinarily prudent director would not have to be watchful, where there was no reason that a situation-adjusted average director would identify as a basis for suspicion and subsequent action. Allen commences the analysis by stating *Graham's* conclusions, however, he does so without reference to the objective care standard applied in *Graham*, which receives no mention *at all* in the *Caremark* judgment apart from noting separately, as we observed above, that an average or ordinary person approach to business judgment incentivizes risk aversion and is "injurious to investors."[184] Stripped of the care standard that underpins *Graham's* holding, the decision merely provides that in relation to watchfulness, absent suspicion, Delaware requires a director to do nothing. Chancellor Allen then extrapolates this do-nothing position from espionage and watchfulness into information systems and controls. He asks:

> How does one generalize this holding today? Can it be said today that absent some ground giving rise to suspicion of violation of law, that corporate directors have *no duty to assure that a corporate information and gathering and reporting system exists* which *represents a good faith attempt to provide senior management and the*

[183] *Supra* note 18 at 964.
[184] *Supra* note 181.

> *board with information respecting material acts, events or conditions within the corporation, including compliance with application statutes and regulations*? I certainly do not believe so. I doubt that such a broad generalization of the *Graham* holding would have been accepted by the Supreme Court in 1963.[185]

This question, and its effect on how we think about monitoring care, needs to be carefully unpackaged. That there was no requirement to engage in espionage and watchfulness in 1963 does not tell us what directors should do in relation to systems and controls in either 1963 or 1996. This is because watchfulness in *Graham* was not about information systems and controls. It was about whether the directors in *Allis-Chalmers* should have imposed a system of spying-like supervision over the activities of employees in order to directly identify and address their wrongdoing at an earlier date. Nor, importantly, does a decision on watchfulness in 1963 tell us what directors should do in relation to watchfulness in 1996. These are distinct questions about the types of actions required of directors to comply with their monitoring duty of care *at the time they act*. These distinct questions would be answered by a court which adopts *Graham's* approach by applying a *Briggs*-like objective gross negligence standard—namely, by asking what could be expected of a situation adjusted ordinary director in 1996 in relation to both (separately) corporate systems and controls and watchfulness over employees. As market behavior, the legal and enforcement frameworks, and directors' roles change over time so do the legal benchmarks of care produced by an objective situation adjusted standard at the reference point in time. Indeed, from the late 1970s though to today, although most directors still perform a part-time role and often have a limited understanding of the business as well as limited learning by doing advantages, this benchmark of care has arguably been elevated by, *inter alia*, regulation on the role and composition of the board,[186] changes in non-executive directorial compensation[187] and the more extensive regulatory regimes to which contemporary companies are subject.[188] Moreover, as Chancellor Allen was acutely aware, *Van Gorkom* embodies the risk that in some judges' hands this standard can generate more demanding outcomes, even liability.

Within this silence about *Graham's* objective gross negligence standard and the conflation of watchfulness with systems and controls, Allen inserts into his question the good faith attempt standard he provided for in the context of decision-making process. However, not only did *Graham* not ask what care obligations directors have in relation to systems and controls, its watchfulness conclusion had nothing to do with whether the directors had made a good faith attempt to consider

[185] *Supra* note 18 at 969 emphasis supplied.
[186] *See*, for example, Section 3 New York Stock Exchange Listed Company Manuel.
[187] *See supra* note 45.
[188] *See* generally: NEIL GORSUCH AND JANIE NITZE, OVER RULED: THE HUMAN TOLL OF TOO MUCH LAW (2024).

whether they should be watchful. *Graham* did not consider or apply such a subjective standard. Accordingly, when Chancellor Allen "doubt[s] that such broad generalization of the *Graham* holding would have been accepted by the Supreme Court in 1963,"[189] he is correct to have such doubts. But that is because the Supreme Court did not consider this question in 1963 and it did not apply the standard Chancellor Allen presumes to be applicable.

As watchfulness and systems and controls are conflated and the objective care standard in *Graham* is ignored, this allows Chancellor Allen to understand *Graham* as a director friendly decision that may require *nothing* of directors in the context of monitoring and, therefore, to infer that the good-faith-attempt approach generates increased director accountability; a position that is widely supported in the *Caremark* literature.[190] He observes:

> A broader interpretation of *Graham v Allis-Chalmers*—that it means that a corporate board has *no responsibility* to assure that appropriate information and reporting systems are established by management—would not, in any event, be accepted by the Delaware Supreme Court *in 1996*.[191]

His conclusion, answering his own question, that "a director's obligation includes a duty to attempt in good faith to assure that a corporate information and reporting system, which the board concludes is adequate, exists," [192] thereby becomes an accountability driven corollary of modern conditions and expectations.

Seen from the vantage point of "no responsibility", the good-faith-attempt standard does indeed amount to accountability progress—although it is undemanding, *it is not nothing*. This is misleading. *Graham* did not ask the systems and

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[189] *Supra* note 18 at 969.

[190] Commonly, the literature follows *Caremark* in stating the outcome in *Graham*, but without considering the standard (and its situation dependence) that generated the outcome. For excellent work on *Caremark* making this assumption, *see*, for example: Roy Shapira, *Mission Critical ESG and the Scope of Director Oversight Duties* 2 COLUMBIA BUSINESS LAW REVIEW 734 at 744 (2022); Stephen M. Bainbridge, *Don't Compound the Caremark Mistake by Extending it to ESG Oversight*, 77 Bus. Law. 651, 655-61 (2022) (in an excellent article Professor Bainbridge makes the case for a return to *Graham* on the basis that *Caremark* was a pro-accountability decision); Stephen M. Bainbridge, *A Critique of the American Law Institute's Draft Restatement of the Corporate Objective*, UCLA Law and Economics Research Paper No. 22-07 (2023) arguing that *Graham* stands for the "reckless" care liability standard; Katherine M. King, *Marchand v Barnhill's Impact on the Duty of Oversight: New Factors to Assess Director's Liability for Breaching the Duty of Oversight* 62 B.C.L. REV. 1925 at 1940-1942 (2021); Elizabeth Pollman, *Corporate Oversight and Disobedience* 72 VAND. L. REV. 2013 (2019); Todd Haugh, *Caremark's Behavioral Legacy 90* TEMP. L. REV. 611 (2018); Jennifer Hill, *Deconstructing Sunbeam-Contemporary Issues in Corporate Governance* 67 UCINLR 1099 at 1116-7 (1999) (viewing *Caremark* as in theory more demanding but doubting that it will result in "more proactive monitoring by directors"); Eric J. Pan, *A Board's Duty to Monitor* 54 NYLSLR 717, 724-726 (2010); William W. Bratton, *Lyondell: A note of Approbation* 55 NYLSLR 561 at 561 (2011).

[191] *Supra* note 18 at 970 (emphasis supplied).

[192] *Id.* at 970.

controls question because, as noted, it was not in play on the 1963 facts. If it had been, as noted, it would have answered it through a situation-adjusted, *Briggs*-type, gross negligence standard that would, in the context of 1996, have produced a benchmark of care in relation to systems and controls expectations in *Caremark*. Such a benchmark, although undoubtedly undemanding in practice, would be some way above either a "*no responsibility to assure*" position or an approach requiring only a good faith, intention based, attempt to put one in place—violation of which requires proof that the director did not think she had done so, or an inferential proxy so egregious as to infer dishonesty.

3. The Shadow of Van Gorkom and 102(b)(7)

The outcome in *Smith v Van Gorkom* and the resulting enactment of section 107(b)(7) casts a shadow over Chancellor Allen's acceptance of *Aronson's* subjective good-faith invitation. Naturally, commentors have attempted to make sense of *Caremark* in light of this.[193] However, the case for such an effect is weak.

As noted, in *Van Gorkom* the Supreme Court provided that the care standard for being informed was a gross negligence standard but held the director liable for care failings, which for many commentators did not merit the designation gross negligence.[194] The majority in *Van Gorkom* did not state the standard it was applying but *a* strong reading of the case it that its attention to circumstance and context clearly imply a situation adjusted, ordinary care gross negligence standard. Could we then understand *Caremark* simply as a pro-managerial correction to the effects of *Van Gorkom*? It is, however, difficult to do so considering the effect of the liability waivers made available by section 102(b)(7) of the Delaware General Corporation Law. Section 102(b)7 predates *Caremark* and was introduced in response to the liability imposed on the directors in *Van Gorkom*. As by 1995 nearly all companies had adopted liability waivers,[195] the good-faith-attempt approach cannot have been motivated by a desire to ensure that directors were protected from the liability risks associated with an adjusted ordinary care standard because their adoption renders such a standard merely a standard of expectation.

Alternatively, could one view the decision from the flip side of the accountability coin—as an attempt by Chancellor Allen's to address the excessive swing of the pendulum in the no-liability direction after the introduction of

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193 For example, *see* Bratton, *supra* note 190.
194 *Supra* note 145
195 See Roberta Romano, *Corporate Governance in the Aftermath of the Insurance Crisis* 39 EMORY LAW JOURNAL 1155, 1160–1161 (1990) (by the end of the 1980s 90% of Professor Romano's sample of 180 corporations had a 102(b)(7) liability waiver).

102(b)(7)? However, this is also uncompelling because the standard he applies is a good faith standard and section 102(b)(7) provides a window for liability for bad faith even where there is a breach of the care standard. That is, unless what Allen means by good faith, or the lack thereof, is different than 102(b)(7)'s use of the same term—and there is no indication that it is—then his adoption of the good-faith-attempt standard is liability neutral for a company with a waiver.

Perhaps we might see *Caremark* simply as an exploration of the only practical game in town after the introduction and widespread adoption of 102(b)(7)—an exploration of the application of bad faith in the monitoring setting. But *Caremark* is much more than this, it does not place good faith separately alongside the duty of care, rather it elevates the pre-existing good faith-only strand of Delaware law and thereby provides for a good-faith reconstruction of *Graham* and of the duty of care.

4. Expectation and the objective care subconscious

Allen's approach in *Caremark* has inescapable limitations. Not only does it provide for a standard that is less demanding than a situation-adjusted gross negligence standard, but it also provides no guidance to courts and directors in answering the central question: what is it that directors are supposed to do in fulfilling their monitoring duties / what types of monitoring action should a good faith attempt standard apply to? In the context of *Caremark*, for example, how do we know to ask the question whether a director must make a good faith attempt to *put in place information systems and controls*, before we even get to the question of how we test good faith?[196] How do we know, how do we work out, what a director should aim her attention at in fulfilling her organizational governance responsibility?[197] Such a standard does not apply to what a director is supposed to do, because what it is she is supposed to do requires input from an objective standard that can channel communal expectations. A subjective standard, acting alone, requires only that the director does what she thinks she should do.

Accordingly, in the formal absence of a objective standard, specific monitoring actions that are subject to the good faith standard are either plucked out of the legal air—possibly the product of what the plaintiff says the director has not done and should have done—alternatively they are the product of the silent

[196] In *Caremark*, Chancellor Allen provides that "sustained and systemic" failure to implement such systems and controls, or an "utter failure" to consider them.

[197] An issue raised recently in the literature exploring the relationship between Caremark Duties and ESG issues or other compliance issues such as cyber security. *See*, for example: E. Norman Veasey & Randy J. Holland, *Caremark at the Quarter-Century Watershed: Modern-Day Compliance Realities Frame Corporate Directors' Duty of Good Faith Oversight, Providing New Dynamics for Respecting Chancellor Allen's 1996 Caremark Landmark*, 76 BUS. LAW. 1, 27 (2021).

operation of an objective expectation standard that operates in the legal sub-conscious of monitoring judgments—a silent and uninterrogated ordinary care/average behavior like-standard that serves as control's dangerous supplement to expertise's subjective preference.

The identification in *Caremark* judgment of information systems and controls as something that directors should be engaged with can be understood in this way. Whilst in the judgment it simply appears as an accepted, self-evident component of directorial monitoring, Allen's sporadic and uninterrogated deployment of the notion of reasonableness—for example, "the obligation to be reasonably informed concerning the corporation" and the "reasonably designed" control systems—suggests an unarticulated standard of "average" or "normal" behavior is doing hidden work in identifying directorial monitoring expectations. Moreover, one sees in Allen's judgment components of situation-adjustment which alter what an objective care standard would expect a director to do in 1996 as opposed to 1963. In particular, what amounts to being "reasonably informed" and "reasonably designed" control systems are the product of contextual factors including the impact of the federal organizational sentencing guidelines as well changes to the corporate governance landscape and the role of the board.[198] In this hidden ordinary care borrowing, the typical product of an ordinary care standard is split in two and only the first part is borrowed—the first part is the specification of actions and steps that would be taken by such a director and the second, ignored, part is the care that he should take in performing those actions and steps.

This approach is far from optimal—this objective standard is hidden and unexamined and, therefore, deeply indeterminate. And it avoids the formal recognition of the collective, shared values of control, generating a legitimacy deficit which the acknowledgment of its actual operation would ameliorate.

5. The Logic of Loyalty

Caremark duties create two linked structural anomalies; both of which are not surprising given that Chancellor Allen's judgment functionally irradicates[199] care while ostensibly operating within it. The first problem is one of duty categorization. Although Chancellor Allen in *Caremark* is circumspect in providing only a few references to the duty of care in his judgment, he had no choice but to acknowledge that the standard he articulates is, following *Aronson and Graham*, part of the duty of

[198] *Supra* note 18 at 970.
[199] *See supra* text to notes 174-176.

care.[200] He observes, for example, that "the complaint charges the director defendants with breach of their duty of attention and care";[201] and, following his legal analysis of the standard, that "I now turn to an analysis of the claims asserted with this concept of the directors duty of care".[202] Moreover, as *Aronson* provided that the duty of care was subject to a gross negligence standard, necessarily, therefore, Allen's good-faith-efforts standards for judgment and monitoring are gross negligence standards, even though he did not deploy the language of gross negligence at all in the judgment. The problem, however, is that a subjective good faith standard is an individual loyalty-based, not an objective care-based, standard—to act in a way that you honestly (subjectively) believe furthers the company's interests.[203]

The second linked-problem is that although Chancellor Allen consistently applies the good-faith-efforts standard to care in business judgment and monitoring contexts, at noted above, subsequent courts very quickly recoiled from the assimilation of good faith and gross negligence in a business judgment context.[204] Such a position was not tenable given the introduction of section 107(b)(7) which provides for care liability waivers but only if the director acts in good faith. This meant that if courts used a good faith approach to gross negligence in a business judgement context then, nonsensically, there would be no case in which 102(b)(7) would be needed in a care case—because if you were in breach of a good-faith-gross negligence standard then you would have acted in bad faith and could not rely on 102(b)(7). This then meant that if *Caremark* duties continued to apply to monitoring then the good-faith standard could not be understood as a gross negligence standard. That is, although in *Caremark* the good-faith-attempt standard was *and had to be* a gross negligence standard, to adopt *Caremark* would mean that it could no longer be treated as a gross negligence standard.

In *Stone v Ritter*[205] the Delaware Supreme Court followed the logic of these structural anomalies. In adopting *Caremark* the Supreme Court clarified first that "the failure to act in good faith may result in liability because the failure to act in good faith is 'a subsidiary element [ ]', ie., a condition 'of the fundamental duty of

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[200] At the time of the *Caremark* judgment, the case was widely viewed as addressing the duty of care. *See*, for example: Lyman Johnson, *Rethinking Judicial Review of Director Care*, 24 Del. J. Corp. L. 787 (1999).
[201] *Supra* note 18 at 967.
[202] *Id*. at 970. For an important recent acknowledgment of this, see VC Laster in *Ontario*, *supra* note 167.
[203] *See* Stephen M. Bainbridge, *Don't Compound the Caremark Mistake by Extending it to ESG Oversight*, 77 Bus. Law. 651, 655-61 (2022) exploring the duty categorization problem in *Caremark* and its evolution.
[204] *In re Walt Disney Co. Deriv. Litig.,* 906 A.2d 27, 65 (Del. 2006), affirmed in *Stone v Ritter*, *supra* note 169.
[205] *Supra* note 169.

loyalty"',[206] and, second, that "the failure to act in good faith requires conduct that is qualitatively different from, and is more culpable than, the conduct giving rise to a violation of the fiduciary duty of care (ie., gross negligence)."[207] Moreover, for any avoidance of doubt that good-faith was a intention-based loyalty standard, the Supreme Court clarified that pursuant to *Caremark* duties "liability requires a showing that the directors knew that that they were not discharging their fiduciary obligations."[208]

V. *MARCH*-ING TO DELAWARE'S CARE SUB-CONSCIOUS

1. *Objective Care returns to Caremark*

In *Marchand v Barnhill*,[209] a derivative action was brought on behalf of Blue Bell Inc, one of the country's largest ice cream manufacturers, in relation to an alleged breach of duty connected to monitoring failures that led to health and safety failings, which in turn resulted on several customer deaths from listeria poisoning. The action was brought against officers for breach of their duty of care and against the board for breach of their *Caremark duties*. At first instance, the Chancery Court[210] held that demand futility had not been established, that the court would not engage with the question of breach of the duty of care for officers, and that particularized facts had not been pleaded to support the alleged breach of *Caremark duties*.[211] The Delaware Supreme Court overruled the Chancery Court on both the issues of demand futility and *Caremark duties*.

In the Chancery Court's decision, the logic and spirit of *Caremark* is correctly applied. A good faith attempt standard is an exceptionally undemanding standard. It requires from directors that in fulfilling their organizational governance responsibility they *subjectively think or believe* that they have performed their governance responsibility. To remind the reader, Chancellor Allen required only an "*attempt in good faith* to assure that a corporate information and reporting system, that *the board concludes* is adequate, exists."[212] This means that in relation to systems and controls if a director believes the systems and controls are adequate and believes he

[206] *Id.* at 370 citing Gutman v. Huang, 823 A.2d. 492, 506 n.24 (2003).
[207] *Id.* at 369.
[208] *Id.* at 370.
[209] 212 A. 3d 805 (2019).
[210] WL 4657159 (2018).
[211] *Id.* at 2.
[212] *Supra* note 18 at 970.

has performed his role in relation to them—even though others (average actors, courts or any other external or common reference point) consider those actions and systems to be useless, terrible, irrational (or whatever your preferred label)—the director is duty compliant. *It does not matter* according to this standard that you did not do or think about many of the steps and actions that—seen from a common reference point—another person or a judge thinks you should have taken in relation to such systems and controls. All that matters is that the director thought he was fulfilling his responsibility.

As noted at several junctures in this article, the problem with any intention-based standard is that no one, apart from the actor herself, has access to her internal minds-eye to determine compliance with the standard. This means that courts must, alongside circumstantial evidence of state of mind, look to inferential proxies to infer that the director knew she was or was not acting as she should. Necessarily, given that for a finding of non-compliance such proxies are inferring a form of dishonesty, the inferential proxy must be at the outer boundaries of the egregious. In the context of *Caremark*, the inferential proxy is that the director "utter[ly] fail[ed]" to implement systems and controls or systematically failed to exercise oversight.[213] The Chancery Court in *Marchand* held that this was not established in a company that had health and safety processes and systems in place and in a business that was subject to rigorous regulatory oversight and regulatory procedural requirements which the plaintiffs had not claimed the company was in breach of.[214]

The Chancery Court also understood that *Caremark Duties* have no means of identifying certain specific steps and measures which the directors should have regard to in performing their monitoring function.[215] A good faith standard, as noted earlier in this article, has no means of providing guidance to courts and directors to determine what types of actions and steps directors should be taking to perform their organizational governance responsibility or, more granularly, to assist them in identifying which actions and steps they should take to implement systems and controls—namely, the actions and steps to which the good-faith-efforts standard would apply to, and in relation to which we could ask whether the directors had "utterly disregarded" them. As complying with an intention-based monitoring standard requires only that you think you have performed that role, whatever you think is required to perform it is sufficient, even if you don't think about, or utterly disregard, other steps which others think it would have made sense/be wise/competent to have considered or to have taken. This means that through the

[213] *Supra* note 18 at 971.
[214] *Supra* note 210 at 17.
[215] *Id.* at 16 observing: "Plaintiff, of course, cites no authority for the proposition that a board of directors must create a committee to monitor and manage every aspect of risk the corporation might face."

lens of *Caremark* courts must remain open to a broad range of direct and indirect actions that directors could have thought supported their view that they have fulfilled their monitoring responsibility, including in relation to systems and controls. Moreover, a strong case can be made that if *any* external, independent court concludes that the directors have made a good faith attempt, then it should be very difficult, absent a clear abuse of judicial discretion, to conclude on appeal that the directors are not compliant—such a finding provides that an independent, expert judge is saying: "I can see how someone could honestly think that those steps fulfil their responsibility."

This is the logic of *Caremark*, a decision, which although deeply flawed, reflects Delaware's late 20th century commitment to subjective expertise and remains Delaware law today. Accordingly, its logic is difficult to ignore. Until *Marchand*, Delaware courts had applied the duties in accordance with this logic.[216] Nevertheless, it is clear that the nature of these duties can generate judicial discomfort in application when what appears to be very poor and irresponsible directorial behavior goes without sanction; judicial discomfort that arguably reflects the disconnect between *Caremark duties* and societal expectations about expert control formed most recently by the financial crisis, ideas about sustainable capitalism and the corporate purpose debate.[217] It is particularly uncomfortable when those failings result in loss of life as was the case in *Marchand* and its progeny, including *In re the Boeing Corporation*[218] and *City of Detroit Police and Fire Retirement System v Hamrock*.[219] In this context, *Caremark duties* strong valence towards expertise produces a legitimacy deficit in relation to contemporary societal expectations of control; a deficit that opens the judicial mind to such expectations and to the legal means of accessing them, namely, through objective standards of care, both explicit and implicit.

The Delaware Supreme Court in *Marchand*, when faced with this discomfort and looming deficit, ignored the logic of *Caremark* and overruled the Chancery Court's impeccable, *Caremark*-consistent judgment. In doing so, but without saying so, it applied a hidden situation-adjusted ordinary care standard. Put differently, in *Marchand* Delaware channeled a deeply embedded objective common law sub-conscious, which tests the care commercial actors should take by reference to ordinary care adjusted for the circumstances of the case; a sub-conscious commitment, the imprint of which, as argued above, can also be seen in *Caremark* itself. This is *Caremark's* objective dangerous supplement.

This hidden standard structured the Supreme Court's decision, although there is no acknowledgement at all that it does so. It determines the types of

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216 *See*, for example: In re Citigroup Inc. Shareholder Derivative Litigation, 964 A.2d 106, 113 (2009).
217 *See* references in *supra* note 22.
218 WL 4059924 (2021).
219 WL 2387653 (2022).

(in)action the court in *Marchand* focuses on and the court's conclusion that the plaintiff pleaded particularized facts which supported an inference of breach. This leaves Delaware law in an unstable position: *Caremark duties* were formed by ignoring the situation-adjusted gross negligence standard that underpinned the holding in *Graham*, but those duties are now applied in a way that is both inconsistent with their own nature and logic and yet consistent with the standard in *Graham* that was ignored by Chancellor Allen to bring them into being.

Consider first in this regard the Supreme Court's requirement that directors should consider board level monitoring structures. The Court observes that *Caremark* has a "bottom line" which is that "the board must make a good faith effort—i.e., try—to put in place a reasonable board level system of monitoring and reporting,"[220] which meant that the "the key issue" for the Supreme Court was whether "the plaintiff has pled facts from which we can infer that Blue Bell's board made no effort to put in place a board-level compliance system."[221] As noted, it is in the nature of *Caremark duties* that compliance depends on whether a director thought that he had complied with his organizational governance responsibility. In the context of systems and controls this requires that he thinks he has taken steps to put in place adequate system and controls. Compliance with this standard is not dependent on engaging with one approach to systems and controls, such as having board level committees or controls. In this regard, the court later, and correctly, observes that "the fact that Blue Bell nominally complied with FDA regulations does not imply that the board implemented a system to monitor board safety *at the board level*."[222] It does not. But if the directors believed that compliance with the FDA's regulatory structures, procedures and supervision processes were sufficient to ensure their organizational governance responsibility in relation to health and safety controls, then they would be compliant with their *Caremark duties* to make a good faith effort to provide the systems and controls which they *thought/concluded* were adequate, *even* in the absence of board level structures or *even* in the absence of *any* consideration of the need for such structures.

Where does the idea that such board levels controls are an important part of monitoring controls come from? Necessarily, it comes from an idea of what we should expect of directors in performing their role, which in turn necessarily comes from a sense of what is common, normal, average or standard practice in an area of activity—an expectation produced by the court's implicit objective situation-adjusted ordinary care standard. This standard is implicit in the court's reference to

[220] *Supra* note 210 at 821.
[221] *Id*. The absence of a board level compliance system was, following *Marchand* central to the court allowing the *Caremark* litigation to continue in *Boeing*, *supra* note 218.
[222] *Id*. at 823 (emphasis in the original).

a "reasonable board level system"[223] and from the final paragraph where the court presents *Caremark Duties* as a requirement to make a good faith attempt by the board to "exercise its duty of care".[224] However, this standard and process of reasoning that leads to this "board-level" expectation is not visible on the face of the judgment. The expectation just appears.

A similar invisible ordinary care standard is operable in relation to other care failings mentioned in the complaint which are influential for the court—the absence of regular processes and protocols to "keep the board apprised of food safety compliance practices" or the absence of a "schedule for the board to consider on a regular basis…any key food safety risks."[225] But again, although these actions are easily understood as the expectation-product of a situation adjusted average care standard, the standard and its application are not visible and are, therefore, free from critique and contestation about the nature of common corporate and market practices and expectations.

A final example of the silent operation of a situation-adjusted ordinary care standard, comes from what is increasingly taken to be the judicial innovation in *Marchand*,[226] namely that the duty adjusts to take account of whether the control failure can be described as mission critical to the company.[227] In this case, as Blue Bell was a monoline ice cream company the food safety of its single product was clearly central to the success and survival of the company, as the aftermath of the listeria scandal demonstrated, with significant loss of shareholder value and emergency funding required to avoid the collapse of the company.[228] However, a good faith attempt standard, correctly applied, has no means of connecting the nature of duty scrutiny to the importance of a particular control function. It only requires that you subjectively believe that you have put in place the systems and controls that you think are necessary to further the company's wellbeing. If a director subjectively and honestly decides that one part of the control landscape is less important than another, duty compliance is unaffected by another's view that the other part is much more important or mission critical. In contrast, an objective ordinary care standard can adjust for this. Situation adjustment takes account of the role and function of the director, but also of the nature of the company and the

[223] *Id.* at 821.
[224] *Id.* at 824.
[225] *Id.* at 822.
[226] *See* Roy Shapira, *Max Oversight Duties: How Boeing Signifies a Shift in Corporate Law*, 48 Journal of Corp. L. 120 (2022); H. Justin Pace & Lawrence J. Trautman, *Mission Critical: Caremark, Bluebell, and Director Responsibility for Cyber Security Governance* WIS. L. REV. 887 (2022).
[227] *Supra* note 209 at 824. See also, In re Clovis Oncology, Inc. Deriv. Litig. WL 4850188 (2019) ("Our Supreme Court's recent decision in Marchand v. Barnhill underscores the importance of the board's oversight function when the company is operating in the midst of "mission critical" regulatory compliance risk.")
[228] Marchand, *id.* at 807.

markets in which it operates. Situation adjustment would require enhanced care in relation to controls that are existential to the company. Of course, the benchmark is still comparatively undemanding if a director dedicates only a short amount of time to the business of someone else for limited compensation. Nevertheless, the adjusted benchmark will be more demanding of systems and controls in relation to mission critical components of the company's business. Accordingly, this mission critical judicial innovation is not the product of *Caremark duties* rather it is the product of a silent and unacknowledged situation-adjusted ordinary care standard.

Marchand's concept of "mission critical" was central to the Chancery Court's decision in *In re Clovis Oncology Inc*[229] that the plaintiffs has pled facts supporting a substantial possibility of liability for the directors for breach of their *Caremark duties*. The Court concluded that *Clovis Oncology's* board had failed to identify and act upon "red flags" connected to mission critical concerns. These concerns related to red flags that revealed that the company's preliminary drug trial was based on both "unconfirmed" and not just "confirmed" positive participant-results.[230] In particular, the court focused on the fact that board presentations noted that the results might change following second and third scans for some participants. This disclosure indicated, or should have indicated, to the board that although these participants had had their first scan evidencing positive results these results were not yet "confirmed". This drug trial was mission critical for Clovis Oncology because the drug in question was one of a small number of drugs that could result in profitability for the company.[231]

Applying a situation-adjusted ordinary care standard, the questions for the court would be—in all the circumstances of the case, including the directors' role and the nature of the company—first, whether an average director would have realized from the disclosure of that information that there was a compliance failure, and second, what would that hypothetical director have then done in response to it? If the answer to the first question was "no" then there would be nothing more for that director to do to be duty compliant. It seems clear that the facts of *Clovis* could satisfy such a preliminary-dismissal hurdle. However, under *Caremark* the question for the court is whether the directors have engaged in good faith with those "red flag" facts. Breach of this duty would require that they subjectively realized there was a problem when given sight of that flag and yet they then consciously did nothing to address it. Evidencing such bad faith requires an egregious and irrational behavioral proxy. On the facts of *Clovis*, rational responses consistent with good faith are readily available. For example: that the directors interpreted the first scan

[229] *Supra* note 227.
[230] *Id.* at 6.
[231] *Id.* at 5: "the company's prospects relied on one of its three developmental drugs", namely Roci, the subject of the derivative litigation.

as amounting to being sufficiently "confirmed" pursuant to the FDA-approved accelerated-trials method, which the defendants argued applied in this case.[232] Moreover, even if this view of the meaning of "confirmed" was not correct in the court's final adjudication, if the directors believed it, or if there was some *ex-ante* basis for believing it,[233] then the notion that their actions in this regard amount to bad faith is implausible, and the case to summarily dismiss a strong one.

The Chancery Court in *Clovis* explored these mission critical red flags by ostensibly applying *Caremark* but instead it applies an implicit care standard. It then reverses a finding of non-compliance with that implicit standard into a determination of scienter in relation to the red flags.[234] The Court notes, for example: "as *Marchand* makes clear *the careful observer* is one whose gaze is fixed on the company's mission critical regulatory issues;"[235] and "given the degree to which *Clovis* relied upon ORR [the testing method], it is *reasonable to infer* the board would have understood the concept and would have appreciated the distinction between confirmed and unconfirmed responses."[236] The "careful observer" is an objective hypothetical character, and these substantive holdings the product of its application. It is this standard that underpins the court's denial of the defendant directors' motion to dismiss.

This effect can also be seen from the *Chancery Court's* decision in *In re the Boeing Corporation*.[237] Following *Marchland* to require "board level" governance as part of its systems and controls, the court observed that:

> *An effective safety monitoring system* is *what allows* directors *to believe* that unless issues or red flags make it to the board through that system, corporate officers and

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232 Which the defendant directors claimed the drug trail was subject to, id. at 14.

233 *Id.* at footnote 214: the court noted "an October 7, 2015 Board report stating "a few highlights" "in terms of the FDA review so far." One of those highlights was that "[w]e will cite the unconfirmed investigator assessed response rate of [ ] 46%")

234 *Id.* at 1 for the purposes of this action, to allow the derivative claim to continue: "plaintiffs have well-pled that defendants face a substantial likelihood of liability under Caremark", and at 14 ("I am satisfied they have well-pled that the Board consciously ignored red flags that revealed a mission critical failure").

235 *Supra* note 227 at 13 borrowing language from the 2003 case of *In re Citigroup Shareholders Litigation* WL 21384599 (2003) at 2 where Vice Chancellor Lamb observed: "'Red flags' are only useful when they are either waived in one's face or displayed so that they are visible to the careful observer."). *See* also In re McDonald's Corporation Stockholder Deriv. Litig. 291 A.3d 652 679 (2023) (*per* VC Laster: "All else equal, if a red flag concerns a central compliance risk, then it is easier to draw an inference that a failure to respond meaningfully resulted from bad faith. Vice Chancellor Slights explained this point in Clovis when he repeated the oft-quoted phase that "red flags are only useful ... when visible to the careful observer," and added the gloss that "as Marchand makes clear, the careful observer is one whose gaze is fixed on the company's mission critical regulatory issues").

236 *Id.* at 40.

237 *Supra* note 218.

> employees are exercising their delegated powers in the corporation's best interests.[238]

Here an "effective safety monitoring system" becomes a prerequisite to being able to "believe" that a director has complied with her organizational governance responsibility.[239] Ostensibly this retains the *Caremark* subjective standard as it requires "belief," but a court will only accept that a director can only "believe" if an "effective safety monitoring system" is in place, rendering belief in effect irrelevant. What determines the make-up of that "effective system" thereby determines whether a director is in breach. In *Boeing*, an implicit, objective situation-adjusted ordinary care standard determines this. The court observes, for example, in exploring this effective monitoring system, that: "for mission critical safety, discretionary management reports that mention safety as part of the company's overall operations are insufficient to support the inference that the board expected and received regular reports on product safety."[240] Whereas in fact a good faith standard correctly applied would be satisfied if the director believed that such discretionary management reports were sufficient or in the absence of an egregious proxy that indicated that he did not.

In *City of Detroit Police and Fire Retirement System v Hamrock*[241] this implicit standard becomes more explicit, even than the "careful observer" referred to in *Clovis*. Addressing a "red flag" question, Chancellor McCormick first details some of the prior case law on "red flags" which has suggested that the determination of bad faith is dependent on the "red flag" being "sufficiently connected to"[242] or being a "proximate cause"[243] of the "corporate trauma". Such proximity "elevate[s] the board's inaction in the face of the red flag to the level of bad faith."[244] This idea is another corollary of a standard that is, when applied correctly, incapable of imposing any monitoring accountability on directors. A good faith attempt standard in relation to "red flag" information requires only that the director thought that she had responded appropriately in understanding and responding to the red flag at the time she encountered the red flag. It has no connection to what was caused because of that understanding and response; the two are temporally and legally separate.

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238 *Id* at 29 (emphasis supplied).

239 *See* similarly *City of Detroit Police and Fire Retirement System v Hamrock* WL 2387653 (2022) at 12: "this court must look beyond the mere existence of a system to some indicia of effectiveness when determining whether a board made the required good faith effort. The court must evaluate, for example, whether the system functions in earnest, as oversight requires more than just 'going through the motions'". Citing *In re Massey Energy Co.* WL 2176479 (2011).

240 *Id.*

241 WL 2387653 (2022).

242 *Id.* at 20.

243 *Id.*

244 *Id.*

Questions of proximity are only relevant the director's liability for the damage caused by the failure to act in good faith—the relationship cannot be "too attenuated".[245] This proximate-cause idea attempts to marshal the ex-post egregious consequences of the monitoring failure in the service of giving the standard some teeth. But it is the egregious behavior *at the time of exposure to the red flag* that is relevant to this standard as an inferential proxy for bad faith. Chancellor McCormick's judgment appears aware of the inadequacy of this idea as she notes the multitude of unanswered questions that this theory raises.[246] And then, in the wake of these unanswered questions, she allows the implicit ordinary care standard to become visible. Although limiting her observations to the pleading-stage decision, she holds:

> The question for present purposes is therefore whether it is ***reasonably conceivable*** that the identified red flag would have placed a ***reasonable observer*** on notice of the risk of the corporate trauma that ensued.[247]

She then proceeds to apply this standard to conclude that on the facts of this case a reasonable observer would not have been placed "on notice of the risk"[248] which was realized in this case.[249]

2. Revisiting Conduct and Liability

This increasingly visible operation of the situation adjusted gross negligence standard alongside the idea of a good faith attempt to "exercise its duty of care" also suggests another way of making sense of the recent evolution of *Caremark Duties* through the lens of standards of conduct (or expectation) and liability.

As I have argued elsewhere,[250] although we see evidence of this standard separation in several U.S. states commencing in the late 19th century, in Delaware until recently there was no use or judicial notice of it.[251] In this regard note that

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245 *Id.* quoting *In re Dow Chem. Co. Deriv. Litig., 2010 WL 66769, at *13 (Del. Ch. Jan. 11, 2010).*
246 *Id.* ("No Caremark case has yet gone to trial, or proceeded meaningfully past the pleading stage, so many open issues remain.")
247 *Id.*
248 *Id.*
249 *See* also *Teamsters Local 443 Health Services & Insurance Plan* 2020 WL 5028065 using a standard of whether it is "reasonably conceivable" (at 15, 19) or "reasonably infer" that the information in this case amounted to a "red flag". See also *ATR-Kim Eng Fin Corp. Areneta* 2006 WL 3783520.
250 *Supra* note 30 at 185, 221-22.
251 *See* In re Trados Inc. S'holder Litig, 73 A.3d 17, 36 (2013). *See* also, citing Kershaw, *id.* for this point but noting its imprint in earlier cases and in other States, In re Sears Hometown and Outlet Stores, Inc. S'holder Litig, 309 A.3d 474, 513 (2024) ("Delaware law distinguishes between the standard of conduct and the standard of review. Although Delaware decisions traditionally did not acknowledge the distinction, Delaware jurists now do so openly to explain the divergence between

Graham's (and *Brigg's) situation adjusted ordinary care* standards were standards of expectation *and* liability.[252] Through this separate-standards lens, *Caremark Duties* become a liability standard connected to the good faith attempt to comply with the expectations arising from the standard of conduct—the steps directors should take such as putting in place board level systems and controls. Here the product of the ordinary care standard is divided into two parts with only the first part being borrowed—part one is the specification of actions and steps that would be taken by such a director and the other part, which is ignored, is the benchmark of care that he should take in performing those actions and steps. In this understanding, the hidden care standard does not, as appears to be the case in *Boeing*, determine what is an minimum effective system of monitoring to be deemed to have acted in good faith—rather the application of the standard of conduct provides merely granular action expectations to which a good faith attempt standard is then applied to.

On the one hand, this appears to be inconsistent with *Caremark* which provided for only a good faith attempt to provide for systems and controls which the directors consider to be adequate no matter what that attempt involved. On the other hand, as noted in the discussion of *Caremark*, one could argue that this separation idea is present in *Caremark* itself if one sees Allen's assertion that a director's monitoring responsibility requires regard to systems and controls as the product of this same ordinary-care legal sub-conscious.

Acknowledgment of such an approach could bring significant substantive change to the monitoring obligations of directors if this unarticulated hidden standard of conduct results in the identification of precise and granular expectations, some of which directors have not paid attention to even if they have applied in subjective good faith careful monitoring attention elsewhere. However, one should note that this approach would in an important way be different to mainstream ideas about standards of conduct and review. The typical way in which the separation between standards of conduct and liability is understood is that the standard of conduct and its breach has no liability implications. Whereas, here, if the standard of conduct generates a monitoring expectation, then a director would be exposed to liability resulting from her failure to make a good faith attempt to fulfil that expectation—such as having board level systems and controls. Accordingly, in an important respect the standard of conduct would be a liability standard.

It is noteworthy that such an approach bears a close affinity with the more natural reading and structure of 102(b)(7) in a monitoring context—situation-adjusted standard of care is a liability standard but where the company (as most do) has a liability waiver then the good faith obligation is *the* liability standard and is

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the normative framing of what fiduciary duties require and their practical application to the facts of a case"); and In re Columbia Pipeline Group, Inc. Merger Litigation 299 A.3d 393, 453 (2023).

[252] *See supra* text to notes 111-118.

assessed by reference to the performance of the expectations set by the situation-adjusted ordinary care obligation (have they performed them in bad faith). In such an approach a 102(b)(7) waiver prevents liability arising only from the *performance* of such an expectation which is below the benchmark of care set by that situation adjusted ordinary care standard but does not amount to its bad faith performance.

To take this approach seriously, judges need to provide sight of the objective standard that sets the expectations, and we need to understand how judges apply it in practice. As the standard must be situation adjusted to take account of the role of the director and the context in which she performs that role, this enables significant judicial discretion to identify care expectations. That discretion can only be disciplined if the role of the standard is acknowledged, and its application justified in the judgment. Otherwise, judges are empowered to interpret and select communal expectations without any serious external oversight.

This alternative is an approach which can make sense of cases focusing on the utter failure to take certain steps, such as *Marchand* where board level systems were identified as necessary and there had, the plaintiffs argued, been no attempt to put them in place. However, it cannot make sense of *Boeing* where the objective "effective" system was a prerequisite to being able to act in good faith, rendering the objective determinant of that "effective system" the standard of liability. And it cannot make sense of the red flag cases such as *Clovis* and *City of Detroit Police*, where motions to dismiss were not granted on the basis of the failure of the board to act in a way that a reasonable objective observer would have acted in relation to the red flags. Moreover, the failure of these cases to fit within this conduct-liability idea, reveals their deep inconsistency with 102(b)(7). In these cases, rather than an objective duty of care creating expectations of behavior that are subject to the good faith standard—which is consistent with 102(b)7)—the objective duty of care pre-empts the good faith standard. For a company with a care liability waiver, this means that directors can still be subject to duty of care violations because care has infiltrated good faith, which is excluded from the ambit of 102(b)(7); a position that cannot stand if 102(b)(7) is to be remain at all meaningful.

VI. CONCLUSION

As Professor Frug showed us, objective and the subjective forms of controlling delegated power are a means of mediating between expertise and control in bureaucratic organization forms. Law's movement between the subjective and the objective mediates between those two different values in light of shifting societal and judicial valences in relation to them. Whether business judgment, or organizational governance responsibility, or the decision-making process are subject to a subjective standard or an objective standard is part of that mediating process, as is the relationship between the subjective and the objective *within* those subjective and objective standards.

There is no permanent optimal line that law can draw to maximize the benefits of expertise whilst fulfilling our collective control expectations. This is because our societal commitment to these values is always in flux, with any dominant view in relation to them either very difficult to identify or, where it can be, transitory and fragile. If subjective and objective forms of control are responsive to this flux and fragility, then necessarily corporate legal discourse will involve continual movement between, and shifting reliance on, both of them. Accordingly, at all times in the corporate legal tool-box the objective threatens, forms and alters the subjective and the subjective threatens, forms and alters the objective. They are at the same time complementary supports to each other and "dangerous supplements" threatening to replace or overwhelm the other. Whether such threats are realized in individual cases is a function of how the intricacies of the common law method interact with that societal flux and the judiciaries' reading of, and responsiveness, to that flux. In this way the common law, although often roughly and erratically, maintains the legitimacy of public and private bureaucratic forms, including the corporation.

This article has revealed the nature of this legal discourse in Delaware corporate law through close attention to the law's requirements in relation to organizational governance responsibility. We have seen that from the historical beginnings of an objective corporate duty of care, the subjective irritated and formed this objective standard of control, both through circumstance adjustment and through the use of intention-based concepts to describe and anchor the gross negligence standard. We have seen how the objective supports the subjective through inferential proxies for the legally-inaccessible subjective—such as rationality, bounds of reason, so far without information and utter failure; proxies that channel minimalist communal expectations of control. We have seen how subjective good faith standards for regulating all corporate actions co-existed in Delaware alongside separate objective ideas, both between cases and within the same cases (*Aronson* and *Van Gorkom*). When we turned to *Caremark*, we saw a subjective filtration and reconstruction of the existing objective standard, but we saw the limits of this with the objective remaining operational although invisible—a dangerous supplement that in recent case law has more confidently asserted itself, although it has remained unacknowledged.

From this vantage point, there is nothing unusual about the evolution of Delaware standards applied to a director's organizational governance responsibility, as chaotic as close attention to its evolution reveals. However, there is something worth pondering about the highly protean nature of this Delaware doctrinal story.

Delaware encountered this legal issue over the last half of the twentieth century in a sui generis position. It was already widely recognized as the leading U.S. corporate law jurisdiction by mid-century, yet it had very little of its own case law.[253] In some areas, for example, in relation to the duty of care, prior to mid-century it had none at all. As we have seen, at times it borrowed from other jurisdictions or from the U.S. Supreme Court, as we saw in *Graham*, but often Delaware case law also leaves the reader with the impression that such borrowing was inapposite for a leading jurisdiction in corporate law, which should have the confidence to develop law from its own first principles. We see this impulse in *Mitchell* and *Gimbel* as the subjective good faith duty is expanded into process failings. By the time we get to the 1980s, in relation to process failings these conditions and limited case-flow leave us with deeply conflicted strands of authority based on very few cases. *Aronson* provides a repository for this conflict and uncertainty but makes no attempt to take a clear position on it. *Van Gorkom* in Chancery and the Supreme Court whilst moving the law on decision-making process towards the objective continues to reflect that uncertainty.

Accordingly, at the time organizational governance responsibility is addressed in *Caremark* in 1996 there is a real sense of unresolved openness in Delaware law—all subjective and objective tools were available in the Delaware legal tool-box and all could be presented as having the imprimatur of the Delaware Supreme Court. One could say that there was a youthfulness and immaturity of Delaware corporate law at this time and in this legal context which rendered the law even more open than it often is to policy formation. For Allen, as we have seen, his policy lens was skewed in favor of the societal benefits of expertise, enabling him to lean into expertise and subjectivity and, arguably, to too heavily discount the importance of, and weight of existing support for, collective communal control through an objective duty of care.

The problem with the resulting expertise/subjectivity-skewed outcome is that *Caremark duties* provide no legal means of enabling courts and directors to explore what it is that they should be doing and limited means of imposing collective behavioral expectations of control on directors, although they find some expression in the objective proxies for subjectivity. The law *per Caremark* expects of directors only to do what *they think* they should be doing to further the corporate interest. In theory, there is no reason why such a standard should not be maintained over the long run in a society that elevates the value of expertise and is willing to make control trade-offs when the experts abuse the power they hold or fail to deliver on the promise of their expertise (which some of them always will). But in a society that values collective expectations of public and private bureaucratic control, it is unlikely in the long run that such a standard will survive alone and keep its objective

[253] *See* Kershaw, *supra* note 30 at 39-68; 198-229; 322-409; 439-462.

dangerous supplement at bay. Such societal expectations will continually come into conflict with corporate law outcomes, de-legitimizing the applicable legal system and its judges. In such circumstances, it is inevitable that the objective supplement will reassert itself and ultimately reappear. This is precisely what is now happening in Delaware.

When the law gets too far out of synch from societal expectations, its legitimacy is dependent either on legal change or on plausibly justifying its refusal to change. When legal change occurs, it is essential that courts own the legal development and that they do not deploy legal obfuscation and hidden workarounds. *Marchand* in the *Supreme Court* simply did not apply *Caremark*; it applied a situation adjusted ordinary care standard, as has the Chancery Court case law that has followed it. How exactly it is doing so is open to debate—is it a situation adjusted gross negligence liability standard, or is it merely a situation adjusted expectation standard to which the good faith standard then applies? To work this out—to effectively explore the optimality of these different solutions—the courts must openly acknowledge this legal development. And they must acknowledge the fact that the strong valence towards expertise and the absence of collective control that seemed apposite in 1996 may no longer be justifiable. Alternatively, as Delaware has often done heroically in the past, it should make the strong case for maintaining it in opposition to broader societal trends. But if that is the approach, then Delaware courts need to own that defense and apply it properly.