

CORONAVIRUS

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An Important Reminder for Directors Amid the Coronavirus Pandemic: Satisfy Your Affirmative Duty of Oversight Today to Protect Against Potential Personal Liability Tomorrow

The Delaware Supreme Court's June 2019 decision in *Marchand v. Barnhill* emphasized the importance of a board-level compliance and reporting system to oversee a company's operations.¹ A board's compliance and reporting system is paramount in light of the company's response to the current coronavirus ("COVID-19") pandemic. More specifically, directors must do more than merely receive management's reports on the impact of COVID-19 on the company's operations, risks faced by the company, and its response to COVID-19-related challenges. Instead, directors must *proactively* make good faith efforts to implement and monitor board-level oversight systems.

Marchand elaborated on the *Caremark* standard² and directors' duty to make a good faith effort to oversee and monitor the company's operational viability, legal compliance, and financial performance. A board's "utter failure" to make sure a reasonable information and reporting system exists is considered an act of bad faith in breach of a director's duty of loyalty,³ which may expose a director to personal liability. *Marchand* emphasized that directors must make a good faith effort to implement and maintain a reasonable *board-level* system of monitoring and reporting on issues intrinsically critical to the company's business. For an ice cream manufacturing business—the focus of

Marchand—this meant keeping much closer oversight of the company's food safety compliance that could have prevented a deadly *listeria* outbreak, and the directors' failure to do so may ultimately leave them on the hook personally.

Today, as the unprecedented outbreak of COVID-19 continues to take its toll on human life and wreak business havoc, the virus may also pose the special strain of threat capable of breaching directors' duty of loyalty that was contemplated in *Marchand*. Directors should consider taking the following actions to *proactively* exercise their oversight function:

1. Designate a board committee specifically charged with overseeing COVID-19-related matters (it can be a newly designated committee or the committee already charged with risk oversight).
2. Implement a regular process or protocols that require management to keep the board apprised of the company's COVID-19 response, impact of COVID-19 on the company's financial position, and results of operations, as well as COVID-19-related compliance issues, risks, and opportunities on a regular basis.

3. Monitor and discuss COVID-19-related measures implemented by the company, as well as COVID-19-related compliance, impact, and risks (for example, include COVID-19 topics on the agendas for regularly scheduled or special board meetings, and discuss guidelines or guidance issued by government agencies applicable to the company's operations, such as the Securities and Exchange Commission).
4. Reflect the board committee and full board's COVID-19-related actions in the minutes.

We note that this alert refers to a Delaware law case. However, we think the action items described above represent best corporate governance practice.

Blank Rome is continuing to monitor the COVID-19 crisis and will provide further updates as they become available. If you have any questions, please call us or visit our [Coronavirus \("COVID-19"\) Task Force](#) page. We are all in this together.

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1. 212 A.3d 805 (Del. 2019).
 2. *In re Caremark Int'l Inc. Derivative Litig.*, 698 A.2d 959 (Del. Ch. 1996).
 3. *Id.* at 971.