INTRODUCTION

Jon Smollen[*]

Reaching the age of majority carries opportunities and responsibilities and, in rare instances, allows for reflection about the past and the future. The twenty-first anniversary of the celebrated opinion in *Caremark*[1] should be no exception. The 1996 *Caremark* opinion by Chancellor William Allen of the Delaware Chancery Court is a historic event in corporate compliance. Most observers believe that *Caremark* established an obligation by corporate boards to assure that the corporations they direct have compliance reporting systems and controls to detect, deter, and address illegal or problematic activities.[2]

From my prior vantage point as a practitioner, the landmark status of *Caremark* is unassailable and provided a standing invitation as a Chief Compliance Officer to enter board rooms as opposed to being summoned only when problems arose. No doubt those types of invitations continued despite the ambitious goals of *Caremark*. The opinion, along with other developments in the subsequent two-and-a-half decades, has fueled the corporate compliance movement.[3]

The fact that such a transformative opinion arose from the mere approval of a settlement of a shareholder derivative suit is a testament to the foresight and vision of Chancellor Allen.[4] There is no doubt that *Caremark* altered previously held notions of corporate governance and compliance, which placed the CEO at the center. However, the opinion's seminal status obscures its nuances, its contemporaneous context, and its intended and unintended consequences.

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* Practice Professor of Law and Director, Center for Compliance and Ethics, Temple University Beasley School of Law.

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

2. *See* James A. Fanto, Essay, *The Governing Authority's Responsibilities in Compliance and Risk Management*, 90 TEMP. L. REV. 699 (2018) (examining current principles of law for compliance and risk management); Todd Haugh, Caremark*'s Behavioral Legacy*, 90 TEMP. L. REV. 611 (2018) (analyzing the role of behavioral science in director compliance oversight); Claire A. Hill, Essay, Caremark *as Soft Law*, 90 TEMP. L. REV. 681 (2018) (exploring the influence of reputation and social responsibility on director compliance oversight); Donald C. Langevoort, Commentary, Caremark *and Compliance: A Twenty Year Lookback*, 90 TEMP. L. REV. 727 (2018) (assessing potential areas for greater director oversight in light of the current compliance environment); Paul E. McGreal, Caremark *in the Arc of Compliance History: Evolution of a Corporate Director's Fiduciary Duty to Oversee Compliance with the Law*, 90 TEMP. L. REV. 647 (2018) (tracing the evolution of director compliance oversight under Delaware law and the U.S. Sentencing Guidelines); *see also* Leonard McCarthy, *Coming of Age: The New Face of Integrity Compliance*, 90 TEMP. L. REV. 603 (2018) (symposium keynote) (reviewing the global compliance movement and the legacy of *Caremark*).

3. *See* Fanto, *supra* note 2, at 700 (discussing factors and noting that "growth and establishment of compliance in organizations is due to a complex interaction among judges, regulators, prosecutors, and the organizations themselves").

4. *See* Haugh, *supra* note 2, at 612–14.

On October 26, 2017, *Temple Law Review* and the law school's Center for Compliance and Ethics hosted a symposium titled "The *Caremark* Decision at 21—Corporate Compliance Comes of Age." Leading academics, practitioners, and regulators gathered to assess (1) the real meaning of *Caremark* given its status as dicta; (2) the nature and basis for its impact and legacy; (3) its relationship to other drivers of the compliance movement; and (4) its impact on corporate governance, risk management, and the legal and compliance professions. The symposium set aside *Caremark*'s iconic status for a day to reconsider its legacy, limitations, and role in the future of compliance. One clear measure of *Caremark*'s influence is the incredible scholars who wrote and presented their papers and the panelists who commented. Each of the pieces in this issue provides a thought-provoking perspective on the symposium's areas of inquiry.

In *Caremark in the Arc of Compliance History: Evolution of a Corporate Director's Fiduciary Duty to Oversee Compliance with the Law*, Paul McGreal examines *Caremark*'s status in the history of compliance through the parallel evolutions of director oversight obligations under Delaware law and the U.S. Sentencing Guidelines.[5] McGreal's brief tour of corporate scandals from the 1950s through the 1980s reinforces the fundamentally reactive approach to compliance prior to the 1990s.[6] He characterizes *Graham v. Allis-Chalmers Manufacturing Co.*,[7] which held that directors may "rely on the honesty and integrity of their subordinates until something occurs to put them on suspicion that something is wrong,"[8] as embodying the era's "cramped" and "impoverished conception" of compliance programs.[9] The 1991 Organizational Sentencing Guidelines established financial incentives for preventive compliance measures.[10]

McGreal posits that the Guidelines exerted a "gravitational pull" that set the stage for Chancellor Allen's decision in *Caremark* to reorient director oversight obligations under Delaware law.[11] However, the opinion provides no detail on director oversight—"In short, the *Caremark* standard for director oversight of a corporation's ethics program could be stated simply as 'do something, and then continuing doing something.'"[12] Within a decade, the U.S. Sentencing Guidelines had overtaken Delaware law.[13] The 2004 amendments to the U.S. Sentencing Guidelines signaled a more robust view of director

5. McGreal, *supra* note 2, at 648–49.

6. *Id.* at 649–51.

7. 188 A.2d 125 (Del. 1963).

8. *Graham*, 188 A.2d at 130–31.

9. McGreal, *supra* note 2, at 652.

10. U.S. SENTENCING GUIDELINES MANUAL § 8C2.5(f) (U.S. SENTENCING COMM'N 1991) (decreasing punishment where a convicted entity had an effective compliance and ethics program in place).

11. McGreal, *supra* note 2, at 655.

12. *Id.* at 663.

13. *Id.* at 675.

oversight.[14] For McGreal, the 2006 *Stone v. Ritter*[15] decision demonstrated that "the Delaware Supreme Court had no appetite for ratcheting up a director's duty of oversight for a compliance and ethics program."[16] He concludes that *Caremark* remained aspirational with the concrete nature of director oversight left for the future and to others.[17]

Looking forward, James Fanto's essay, *The Governing Authority's Responsibilities in Compliance and Risk Management*, analyzes the current framework for director oversight of compliance programs.[18] Fanto is one of the Associate Reporters for the American Law Institute Project, *Principles of the Law, Compliance, Enforcement and Risk Management for Corporations, Nonprofits and Other Organizations* (ALI Compliance Project).[19]

Fanto's essay makes clear that director oversight now extends well beyond a "do something standard." Although directors remain passive in many respects, he emphasizes consensus areas for active oversight.[20] One of the draft principles in the ALI Compliance Project addresses the education and background of directors "so that they will have the competence to evaluate knowledgeably management's proposed compliance program."[21] Fanto also focuses on the role of directors in ensuring appropriate resources exist and that compliance is sufficiently independent and empowered.[22] Although the ALI Compliance Project principles remain in draft, their formulation is indicative of the distance traveled from *Caremark*.

In her essay, *Caremark as Soft Law*, Claire Hill starts from the proposition that liability avoidance by directors fails to explain *Caremark*'s impact.[23] Hill argues that "directors (and officers) take abiding by *Caremark* duties extremely seriously, as do companies, notwithstanding how pale the specter of liability under *Caremark* is."[24] Hill posits that this phenomena reflects the "considerable

14. *Id.*

15. 911 A.2d 363 (Del. 2006).

16. McGreal, *supra* note 2, at 675.

17. *Id.* at 675–76.

18. Fanto, *supra* note 2, at 699–704.

19. *Id.* Professor Geoffrey Miller of New York University Law School is the chief reporter for this project, which seeks to identify principles of law that have emerged in compliance and risk management. *See* PRINCIPLES OF THE LAW: COMPLIANCE, ENFORCEMENT, AND RISK MANAGEMENT FOR CORPORATIONS, NONPROFITS, AND OTHER ORGANIZATIONS, at iv (AM. LAW INST., Preliminary Draft No. 3, 2017).

20. Fanto, *supra* note 2, at 711 (directors may no longer accept a compliance plan but must assess a management recommendation and "be convinced that it makes sense for the organization").

21. *Id.*

22. *Id.* at 714–15, 717–18 (noting also that specialized board committees that receive regular reports on compliance are commonplace)

23. In *Stone*, the Delaware Supreme Court noted that a claim against a director would be "possibly the most difficult theory in corporation law upon which a plaintiff may hope to win a judgment." *Stone*, 911 A.2d at 372 (quoting *In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 967 (Del. Ch. 1996)); *see also* Hill, *supra* note 2, at 682–83; Langevoort, *supra* note 2, at 727–28; Haugh, *supra* note 2, at 618–19.

24. Hill, *supra* note 2, at 683.

penumbra" of the opinion.[25] Directors and officers conceive of their *Caremark* duties much more broadly than "what they have to do to avoid liability."[26]

For Hill, the "economies of scope" in *Caremark*'s legal penumbra reflect the view that compliance programs are designed to protect corporations and employees from liability, not simply directors.[27] Beyond extending to corporate and executive liability *Caremark*'s legal penumbra includes deterring excessive risk taking and conduct violative of the spirit of the law.[28] Lastly, Hill tackles the role of reputation and corporate social responsibility.[29] Although reputational requirements can be unprincipled and highly variable, Hill concludes that their influence on *Caremark* is a cause for optimism.[30]

Todd Haugh's *Caremark's Behavioral Legacy* similarly examines the opinion's "outsized" impact.[31] While Hill relies on "soft law," Haugh turns to behavioral science for potential insights, arguing that "the reason the case had such a profound effect on corporate compliance had more to do with what was in the heads of corporate directors than in the head of a Delaware Chancery Court judge."[32] The tendency for directors to be loss averse—that is, to respond to potential losses more than prospective gains—offers a powerful behavioral explanation for *Caremark*'s impact on directors.[33] Behavioral theory would also suggests that despite the low probability of successful *Caremark* claims, directors have been susceptible to overestimating negative outcomes.[34]

Haugh characterizes *Caremark*'s legacy as decidedly "mixed" and largely agrees with critics who view the opinion as producing "paper programs" and stifling innovation.[35] His real interest is the behavioral reasons that these limited conceptions of compliance programs have persisted. For Haugh, "status quo bias" and "framing" make it difficult for even well-intentioned boards to change their compliance approach.[36] More optimistically, he believes that the "cognitive processes that have limited compliance effectiveness can be used to remake it."[37] Haugh's essay concludes with a series of behavioral compliance strategies to

25. *Id.* at 684 (the factors contributing to penumbras in corporate law—dicta; judicial pronouncements; and pressure from constituencies, shareholders, and regulators—seem particularly salient to *Caremark*).

26. *Id.* at 684–85.

27. *Id.* at 688–89.

28. *Id.* at 688–90.

29. *Id.* at 693–96.

30. *Id.* at 696.

31. Haugh, *supra* note 2, at 620 ("[C]onsidering the actual holding of the case, corporate boards should have given it no more than a passing read, and maybe even ignored it altogether.").

32. *Id.* at 615.

33. *Id.* at 625–27.

34. *Id.* at 627–29 (noting the overweighting of low probability outcomes may also be amplified by current events such as directors' continuous exposure to news of corporate scandals).

35. *Id.* at 630.

36. *Id.* at 634. (noting that status quo bias allows "inertia to determine our decision" while "framing" views any change to a compliance program as a loss),

37. *Id.* at 637.

bring *Caremark* back to its original goal of preventing unethical conduct.[38]

In *Caremark and Compliance: A Twenty Year Lookback*, Donald Langevoort examines whether the opinion "no longer suffices to address the contemporary milieu of aggressive compliance."[39] His commentary focuses on board decisionmaking about compliance investments, escalation of compliance issues and the relevance of culture and incentives.[40] In each area, *Caremark* is silent, deferring to the business judgment rule to define a board's oversight role.[41] For Langevoort, it is clear that evolving regulatory views have challenged such deference to this rule and now directors must consider social harms beyond the interests of shareholders.[42]

Langevoort emphasizes that board decisions on compliance investments are expected to reflect this broader perspective and to identify "how easily management's internal perspective can undervalue (and undermine) a truly potent compliance structure, turning it into cosmetic compliance."[43] Although Langevoort acknowledges the complexities of corporate information flows,[44] he concludes that "we cannot readily dismiss the possibility that the 'information forcing' function associated with added board-level compliance burdens and responsibilities will do some good."[45] Lastly, Langevoort notes that *Caremark* reflected the prevalent view at the time that legal sanctions would produce optimal procedures and controls to prevent illegal conduct.[46] However, the opinion provides no indication of the importance of an ethical culture and incentive systems for compliance programs which would become a staple of the compliance movement.[47]

Although his commentary could be viewed as emphasizing only *Caremark*'s shortcomings, Langevoort understands the context in which the opinion was written and appreciates Chancellor Allen's foresight.[48] As he notes, the "Chancellor knew that if boards fail to become more sophisticated and sensitive to doing this well . . . external pressures will continue to grow without regard to cost or efficiency."[49] For Langevoort, this insight is extremely pertinent today.[50]

38. *Id.* at 637–44.

39. Langevoort, *supra* note 2, at 729.

40. *Id.* at 734.

41. *Id.* at 730–31, 733, 736–37. The business judgment rule assumes decisions made by directors were "the product of *a process* that was *either* deliberately considered in good faith or was otherwise rational." *In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 967 (Del. Ch. 1996). A different standard would "expose directors to substantive second guessing by ill-equipped judges or juries, which would in the long-run, be injurious to investor interests." *Id.* at 967–68.

42. Langevoort, *supra* note 2, at 732–33, 736–37.

43. *Id.* at 733.

44. *Id.* at 735–37.

45. *Id.* at 737.

46. *Id.*

47. *Id.* at 737–40.

48. *Id.* at 740 ("Chancellor Allen was no ideologue, and understood that he was addressing only the shareholder litigation piece of the far larger compliance puzzle.").

49. *Id.*

Leonard McCarthy, former Vice President for Institutional Integrity at the World Bank, delivered the symposium keynote remarks on the influence of *Caremark* and the U.S. compliance movement on anti-corruption laws worldwide. Although acknowledging ongoing challenges in emerging markets, McCarthy was optimistic that the aspirational goals of *Caremark* would continue to drive ethical business practices in the developing world. For McCarthy, the opinion "spurred corporate compliance into an irreversible practice."[51]

The symposium's examination of *Caremark*'s impact and its enduring legacy is indicative of the inherently interdisciplinary nature of ethics and compliance as profession. There is no doubt that the duty to monitor articulated in *Caremark* is but a small factor in the compliance movement that followed. Understanding *Caremark*'s legacy involves an examination of the expectations of corporate behavior well beyond satisfying shareholder interests. Directors in the modern era must concern themselves with more than the law and current regulatory expectations about ethics and compliance programs. Corporate social responsibility appears to be at the heart of this inquiry.

The symposium pushes traditional ethics and compliance models to provide the flexibility to meet this challenge. Continuous improvement and innovation must drive the compliance movement in the future. It is fair and reasonable for prosecutors and regulators to demand that alternatives be rigorously studied. The role of today's compliance officer is complex, necessitating an understanding of law and regulatory expectations, the drivers of organizational culture, and individual behavior and the ability to grasp complex and rapidly evolving business strategies. For me, there is no doubt that the study of ethics and compliance and the necessary competencies for the next generation of compliance officers, lawyers, and business leaders is a worthy endeavor.

50. *Id.*
51. *See* McCarthy, *supra* note 2, at 603–04.