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Boeing's MAX Woes Reach the Boardroom

In an important decision this week, the Delaware Court of Chancery permitted a *Caremark* duty-of-oversight claim to proceed against the directors of the Boeing Company. Stockholder plaintiffs sued Boeing's board, seeking to recover costs and economic losses associated with the crash of two 737 MAX jetliners. The plaintiffs' complaint alleged that the directors failed to monitor aircraft safety before the crashes and then failed to respond to known safety risks after the first crash. The lawsuit seeks to hold the directors liable for the resulting loss of "billions of dollars in value."

The court [denied](#) the directors' motion to dismiss. The court first concluded that the pleaded facts described a board that "complete[ly] fail[ed] to establish a reporting system for airplane safety." Emphasizing that meeting minutes gave little sign of director engagement with safety issues, the court credited allegations that the board had no committee charged with direct responsibility to monitor airplane safety, seldom discussed safety, and had no protocols requiring management to apprise the board of safety issues.

The court then determined that Boeing's board "turn[ed] a blind eye to a red flag representing airplane safety problems," citing allegations that the directors "treated the [first] crash as an 'anomaly,' a public relations problem, and a litigation risk, rather than investigating the safety of the aircraft." The court added that Boeing was even alleged to have "publicly lied" about its own monitoring efforts. The company's directors now face the prospect of intrusive document discovery, extensive depositions, and either an expensive settlement or a trial to defend the effectiveness of their oversight.

The harsh decision reflects the court's obligation to accept all the plaintiffs' allegations as true in considering defendants' motion to dismiss. Indeed, the court reaffirmed that failure-of-oversight claims remain "the most difficult theory in corporation law upon which a plaintiff might hope to win a judgment." But the ruling nevertheless [reconfirms the courts' increasing willingness to subject directors to suit for corporate trauma](#): *Caremark* claims have been upheld at least six times in recent months. As we have previously observed, directors have ample tools to address the risk. Well-advised boards will [ensure the company has an appropriate enterprise risk and regulatory compliance systems that are reviewed at the board level](#); [consider risk management committees tasked with regular review of key enterprise risks](#); and take [care to document board-level risk management efforts](#) in corporate minutes and other books-and-records available to stockholders. Equally important, the *Boeing* decision highlights a cardinal principle of corporate governance: when crisis strikes, directors must engage immediately and personally, pressure-test all affected corporate functions, and act to ensure that the cause of the crisis is promptly addressed and remedied.

Edward D. Herlihy
William Savitt