

OVERSIGHT AS ATTENTION

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A focal point of corporate law is the set of duties owed by the board of directors to the corporation and its stockholders. When directors harm the corporation in breach of their fiduciary duties, stockholders can sue those directors on behalf of the corporation via derivative litigation. One type of derivative suit is an oversight claim, which existed in Delaware law for more than half a century before reaching trial for the first time in July 2025. The increased viability of oversight claims has brought into sharp relief the stakes, fault lines, and limits of Delaware corporation law. Yet, the future of Delaware oversight doctrine remains unclear.

This Note argues that the concept of attention helps to explain the development of Delaware oversight law and clarify the path forward for this contested doctrinal area. Part I sets the terms of analysis, clarifying that oversight is properly understood as an obligation of corporate fiduciaries, rather than a standalone fiduciary duty on par with loyalty and care. Part II reveals the incumbent paradigm of oversight as action and its shortcomings, locating attention even in cases that were decided under the action theory of oversight. Part III contends that attention is a meaningful but neglected dimension of oversight. Taken together, oversight as action and oversight as attention yield an integrated account of Delaware oversight doctrine and a way to render coherent this unsettled body of law.

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INTRODUCTION

In January 2024, a game designer walking along a road near Portland, Oregon, spotted an iPhone under a bush. It was set to airplane mode. When opened, the screen showed a baggage claim email for Alaska Airlines flight ASA 1282.¹ A few days later, a Portland science teacher found a sixty-three-pound, six-square-foot piece of Boeing 737-9 MAX fuselage in his suburban backyard.²

The U.S. National Transportation Safety Board recovered these and other items in the aftermath of yet another high-profile safety failure for American plane manufacturer Boeing.³ Ten minutes after takeoff, the Boeing 737-9 MAX plane carrying 171 passengers lost a chunk of its side.⁴ In the emergency descent, the difference in air pressure sucked headrests and personal belongings out of the plane through the door-sized hole.⁵ The incident caused injuries but no casualties.⁶

The 2024 Boeing door blowout carried a particular irony within corporate law because of what the shorthand term “*Boeing*” had come to represent among legal scholars and practitioners following a 2021 Delaware Court of Chancery decision.⁷ A few years before the door

¹ Ramon Antonio Vargas, *Working iPhone Found on Side of Road ‘Likely’ Fell from Alaska Airlines Flight*, GUARDIAN (Jan. 8, 2024, at 11:58 ET), <https://www.theguardian.com/us-news/2024/jan/08/iphone-found-alaska-airlines-door-flight-passenger> [<https://perma.cc/Q3MA-ZFH2>].

² *Oregon Schoolteacher Finds Missing Boeing Plane Part in Backyard Trees*, REUTERS (Jan. 9, 2024, at 16:43 ET), <https://www.reuters.com/world/us/oregon-schoolteacher-finds-missing-boeing-plane-part-backyard-trees-2024-01-09> [<https://perma.cc/HVD3-ZXAH>].

³ See Bill George, *Why Boeing’s Problems with the 737 MAX Began More Than 25 Years Ago*, HARV. BUS. SCH. WORKING KNOWLEDGE (Jan. 24, 2024), <https://www.library.hbs.edu/working-knowledge/why-boeings-problems-with-737-max-began-more-than-25-years-ago> [<https://perma.cc/F463-VQYQ>].

⁴ Colbi Edmonds & Rebecca Carballo, *The Frightful Minutes Aboard Flight 1282*, N.Y. TIMES (Jan. 7, 2024), <https://www.nytimes.com/2024/01/07/us/alaska-airlines-boeing-passengers.html> [<https://perma.cc/CK4X-STWR>].

⁵ See *id.*

⁶ See *id.*

⁷ See, e.g., Itai Fiegenbaum, *Director Oversight in Florida: Getting the Balance Right*, 78 FLA. L. REV. 61, 88, 90 (2025) (“The significance of *Caremark*’s third era crystallized in the litigation that followed two tragic crashes of [Boeing] 737 MAX airplanes . . . *Boeing* embodies Delaware’s evolving attitude toward the likelihood of board liability for ineffective

incident, the Delaware Court of Chancery's decision in a stockholder suit following Boeing's deadly 2018 and 2019 crashes had become an important case for oversight as a theory of liability.⁸ Oversight was a newly viable pleading in Delaware corporate law.⁹ In the *Boeing* lawsuit regarding harm to the company from the plane crashes, stockholders alleged that the company's board of directors had breached its obligation to oversee the company.¹⁰ The *Boeing* stockholder-plaintiffs brought what is known as a *Caremark* oversight claim,¹¹ arguing that the board's failure had harmed the company and seeking recovery on Boeing's behalf.¹²

Oversight as a theory of board liability has developed in a pleading structure unique to organizational law: that of direct and derivative actions.¹³ Oversight claims are brought as stockholder derivative suits

oversight.”); Roy Shapira, *Max Oversight Duties: How Boeing Signifies a Shift in Corporate Law*, 48 J. CORP. L. 119, 119 (2022).

⁸ *In re Boeing Co. Derivative Litig.*, C.A. No. 2019-0907-MTZ, 2021 WL 4059934 (Del. Ch. Sep. 7, 2021).

⁹ See Joseph P. Monteleone & H. Stephen Grace, Jr., *Boards' Duty of Oversight: From Caremark to the Continuing Travails of Boeing*, A.B.A. BUS. L. TODAY (May 13, 2024), https://www.americanbar.org/groups/business_law/resources/business-law-today/2024-may/boards-duty-oversight-caremark-continuing-travails-boeing [<https://perma.cc/YG2P-P7KN>] (describing the recent increase in oversight cases surviving the motion to dismiss stage).

¹⁰ *In re Boeing Co. Derivative Litig.*, 2021 WL 4059934, at *2–3.

¹¹ *Id.* at *5. A *Caremark* claim is so named after its formulation in the seminal case for modern oversight jurisprudence. *In re Caremark Int'l Inc. Derivative Litig.*, 698 A.2d 959, 960 (Del. Ch. 1996).

¹² *In re Boeing Co. Derivative Litig.*, 2021 WL 4059934, at *2–3.

¹³ A stockholder can pursue a direct or a derivative claim regarding the corporation in which they hold equity. Direct claims, in Delaware, require that the stockholder suffered harm (for example, through loss of voting power) and would be the party receiving the remedy. See *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1035 (Del. 2004). By contrast, derivative claims concern harm to the corporation, and the corporation is the party receiving the remedy. See Anne Tucker Nees, *Who's the Boss? Unmasking Oversight Liability Within the Corporate Power Puzzle*, 35 DEL. J. CORP. L. 199, 214 n.56 (2010). Derivative pleading arises because a stockholder cannot compel corporate action. Should the corporation have a potential legal claim, it is up to the board to decide whether to pursue it. But if its board is compromised, then a corporation cannot vindicate its rights. Thus, in a derivative action, the stockholder can step into the place of the board to bring a legal claim on behalf of the corporation. Effectively two lawsuits in one, a derivative suit alleges actionable harm to the corporation that its fiduciaries have failed to pursue on its behalf for improper reasons, such as director self-interest. Only where the board shows itself incapable of impartially judging a potential claim does Delaware law allow a stockholder in to step into the place of the board to pursue that litigation. To determine whether demand was futile, the court conducts a director-by-director analysis. Excusing demand on the grounds of futility requires that at least half of the directors on the demand board benefitted personally from the alleged misconduct, face a substantial likelihood of liability should the demanded litigation proceed, or lack independence from someone who meets the first or second criteria. See *United Food & Com. Workers Union v. Zuckerberg*, 250 A.3d 862, 878 (Del. Ch. 2020), *aff'd*, 262 A.3d 1034 (Del. 2021).

because they seek recovery for the corporation based on harm to the corporation.¹⁴ Corporate directors, entrusted with the affairs of the business, have managerial and supervisory authority governed by “immutable” fiduciary duties of care and loyalty.¹⁵ A viable derivative pleading requires that the stockholder-plaintiff adequately allege that corporate directors or officers breached their non-exculpable fiduciary duty.¹⁶ That could happen if directors failed to implement a reasonable information system, giving rise to an “information-systems” oversight claim.¹⁷ Or, the board could have breached its oversight duty by consciously ignoring warning signs about risks to the company, for a “red-flags” oversight claim.¹⁸ Either theory can support liability.

In *Boeing*, the stockholder-plaintiffs survived the motion to dismiss stage on both theories of oversight liability. They contended that the Boeing board had failed to establish safety oversight mechanisms prior to the October 2018 Lion Air crash (an information-systems claim).¹⁹ Plaintiffs further alleged that, following the Lion Air crash and in the lead-up to the March 2019 Ethiopian Airlines

¹⁴ The logic of derivative litigation comes from the corporation’s status as a legal fiction. It can act only through natural persons. Charge of the corporation rests first and foremost with its fiduciary, the board of directors, to which the judiciary largely defers. Also to preserve directorial discretion, stockholders’ role with respect to corporate affairs is limited, absent cause to believe those charged with the best interests of the corporation—the board of directors—have violated their fiduciary duties. See Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs, and Ownership Structure*, 3 J. FIN. ECON. 305, 311 (1976) (“The private corporation or firm is simply one form of legal fiction which serves as a nexus of contracting relationships The firm is not an individual.”).

¹⁵ See Gabriel Rauterberg & Eric Talley, *Contracting Out of the Fiduciary Duty of Loyalty: An Empirical Analysis of Corporate Opportunity Waivers*, 117 COLUM. L. REV. 1075, 1077 (2017).

¹⁶ Non-exculpability matters for the demand futility analysis. Exculpatory provisions under the Delaware General Corporations Law (DGCL) § 102(b)(7) and the business judgment rule protect directors from claims of breach of the duty of care that fall short of bad faith. Generally, for directors to face a substantial risk of personal liability, a breach of the duty of loyalty is required. DEL. CODE ANN. tit. 8, § 102(b)(7) (2025).

¹⁷ This Note follows Vice Chancellor Laster’s renaming of *Caremark* “prong one” and “prong two” to “information-systems” and “red-flags,” respectively. See *In re McDonald’s Corp. S’holder Derivative Litig.*, 289 A.3d 343, 359–60 (Del. Ch. 2023) (“[u]sing more functional terminology”).

¹⁸ See *In re Caremark Int’l Inc. Derivative Litig.*, 698 A.2d 959, 967–70 (Del. Ch. 1996); Monteleone & Grace, *supra* note 9; see also *In re McDonald’s Corp. S’holder Derivative Litig.*, 289 A.3d 343, 359–62 (Del. Ch. 2023) (holding that liability for breach of the duty of oversight can extend to officers); *In re McDonald’s Corp. S’holder Derivative Litig.*, 291 A.3d 652, 701 (Del. Ch. 2023) (dismissing oversight claims against director defendants); *City of Detroit Police & Fire Ret. Sys. v. Hamrock*, C.A. No. 2021-0370-KSJM, 2022 WL 2387653, at *48 (Del. Ch. June 30, 2022).

¹⁹ *In re Boeing Co. Derivative Litig.*, C.A. No. 2019-0907-MTZ, 2021 WL 4059934, at *68–70 (Del. Ch. Sep. 7, 2021).

crash, the board ignored warning signs about safety issues (a red-flags claim).²⁰ Vice Chancellor Zurn denied the motion to dismiss,²¹ and the case settled out of court.²²

In corporate law, *Boeing* bolstered the proposition that corporate boards have a heightened duty to oversee risks critical to the company's mission—such as, for an aircraft manufacturer, the safety of its planes.²³ Before the January 2024 door incident, it remained to be seen whether (and what) other American corporations had learned from Boeing's missteps. Left unasked was whether Boeing had learned from *Boeing*. The door blowout raised the question: Had nothing changed since hundreds died in the Boeing 737 MAX crashes in 2018 and 2019, despite five years of high-profile investigations, billions of dollars in liability, and internal corporate changes?²⁴

²⁰ *Id.*

²¹ *Id.* at *3.

²² Gray Reed, *Boeing's Board Agrees to \$237.5 Million Settlement in Litigation Alleging Failure to Oversee Airplane Safety*, JD SUPRA (Dec. 22, 2021), <https://www.jdsupra.com/legalnews/boeing-s-board-agrees-to-237-5-million-3235085> [<https://perma.cc/X6QV-V4FY>] (describing “a staggering \$237.5 million settlement”). The settlement also included corporate governance measures. See Co-Lead Plaintiffs’ Brief in Support of Settlement, Application for Award of Attorneys’ Fees and Expenses, and Incentive Award for Co-Lead Plaintiff FPPA at 11–12, *In re Boeing Co. Derivative Litig.*, C.A. No. 2019-0907-MTZ (Del. Ch. Nov. 5, 2021). The negotiated damages were capped at the directors and officers (D&O) insurance-funded \$237.5 million, with additional operational and oversight reforms imposed on Boeing’s board and management as part of the global settlement. See Stipulation and Agreement of Compromise, Settlement, and Release at 9–10, *In re Boeing Co. Derivative Litig.*, C.A. No. 2019-0907-MTZ (Del. Ch. Sep. 7, 2021). As such, the negotiated damages were a fraction of the total possible liability, with potential damages as high as \$22.5 billion. See *In re Boeing Co. Derivative Litig.*, 2021 WL 4059934, at *58. The total D&O insurance policy limit was \$550 million. Co-Lead Plaintiffs’ Reply Brief in Further Support of Settlement, Application for Award of Attorneys’ Fees and Expenses, and Incentive Award for Co-Lead Plaintiff FPPA at 3, *In re Boeing Co. Derivative Litig.*, C.A. No. 2019-0907-MTZ (Del. Ch. Sep. 7, 2021).

²³ See Katherine M. King, *Marchand v. Barnhill’s Impact on the Duty of Oversight: New Factors to Assess Directors’ Liability for Breaching the Duty of Oversight*, 62 B.C. L. REV. 1925, 1930, 1964 (2021); see also *Firemen’s Ret. Sys. ex rel Marriott Int’l, Inc. v. Sorenson*, C.A. No. 2019-0965-LWW, 2021 WL 4593777, at *31 (Del. Ch. Oct. 5, 2021).

²⁴ See Press Release, U.S. Dep’t of Just., *Boeing Charged with 737 Max Fraud Conspiracy and Agrees to Pay over \$2.5 Billion* (Jan. 7, 2021), <https://www.justice.gov/archives/opa/pr/boeing-charged-737-max-fraud-conspiracy-and-agrees-pay-over-25-billion> [<https://perma.cc/6V7Q-TF6T>] (on file with the New York University Law Review); David Koenig, *The US Says Boeing Violated a 2021 Settlement. That Doesn’t Mean the Company Will Face Charges*, ASSOCIATED PRESS (May 15, 2024, at 15:14 ET), <https://apnews.com/article/boeing-violated-settlement-max-crashes-25cde72e154f60adae54177ce35c9176> [<https://perma.cc/99N6-3QY9>]; Aaron Nicodemus, *Boeing Agrees to Plead Guilty, Pay Additional \$244M for Violating 2021 DPA*, COMPLIANCE WK. (July 8, 2024, at 14:41 ET), <https://www.complianceweek.com/regulatory-enforcement/boeing-agrees-to-plead-guilty-pay-additional-244m-for-violating-2021-dpa/35069.article> [<https://perma.cc/2MMX-VK48>]; see also Samuel W. Buell, *The Limits of Individual Prosecutions in Deterring Corporate Fraud*, 59 WAKE FOREST L. REV. 557, 616–19 (2024).

Given the swift recurrence of serious safety issues, Boeing's recent history arguably shows that the incentives for corporate directors under existing law do not adequately account for the true demands of managing and directing the modern American corporation—nor the significant externalities of corporate conduct, which seem to surpass regulatory capacity.

The rise of oversight as a theory of liability over the last half-century has been controversial. At minimum, the contested doctrine acknowledges that situations may arise where a corporate board should have done more to prevent disaster. Exactly how much more—and what that would have meant—remains subject to debate. The short-order recurrence of an unsafe Boeing plane in the skies in 2024 brought into sharp relief the stakes, fault lines, and limits of Delaware corporation law.²⁵ Yet, the path forward remains unclear.

As the fifty-year-old claim hinging on directors' fiduciary status has become newly viable,²⁶ scholarly debate and legal uncertainty have resulted.²⁷ Motivating the controversy are existential concerns—

²⁵ See, e.g., Katharina Pistor, *Boeing's Textbook Corporate Governance Problem*, THE ASSET (Apr. 18, 2024), <https://www.theasset.com/article-esg/51298/boeing-s-textbook-corporate-governance-problem> [<https://perma.cc/8GFP-AQGX>].

²⁶ See Edward B. Micheletti, *The Risk of Overlooking Oversight: Recent Caremark Decisions from the Court of Chancery Indicate Closer Judicial Scrutiny and Potential Increased Traction for Oversight Claims*, SKADDEN INSIGHTS (Dec. 15, 2021), <https://www.skadden.com/insights/publications/2021/12/insights-the-delaware-edition/the-risk-of-overlooking-oversight> [<https://perma.cc/ZKL6-DMVP>] (“In the past two years, five of 17 *Caremark* claims raised in the Court of Chancery have survived a motion to dismiss—an approximately 30% success rate.”); cf. Mercer Bullard, *Caremark's Irrelevance*, 10 BERKELEY BUS. L.J. 15, 19 (2013) (arguing before the recent uptick for reduced pedagogical focus on *Caremark* given its “insignificance relative to the far greater legal risk created by other sources of law”).

²⁷ See, e.g., Gail Weinstein, Philip Richter & Steven Epstein, *2024 Caremark Developments: Has the Court's Approach Shifted?*, HARV. L. SCH. F. CORP. GOVERNANCE (May 20, 2024), <https://corpgov.law.harvard.edu/2024/05/20/2024-caremark-developments-has-the-courts-approach-shifted> [<https://perma.cc/TA96-PBFS>] (observing that “in the past few years, the court has seemingly expanded the circumstances in which *Caremark* applies”); Ann M. Lipton, *The Legitimation of Shareholder Primacy*, 51 J. CORP. L. 83, 119 (2025) (“[The] conflation of shareholder harm and societal harm renders the doctrine unstable”); Yehonatan Shiman, *The Politics of Oversight: Caremark, Corporate Purpose, and Delaware's Judicial Landscape*, 62 AM. BUS. L.J. 165, 166 (2025) (characterizing the debate); Roy Shapira, *Conceptualizing Caremark*, 100 IND. L.J. 467, 467 (2025) (Delaware oversight “doctrine has become one of the most important in corporate law yet remains underarticulated”); Elizabeth Pollman, *Corporate Oversight and Disobedience*, 72 VAND. L. REV. 2013, 2013 (2019) (“Scholars have puzzled over what it means to have the potential for corporate accountability lodged within the duty of good faith, but almost never brought to fruition in terms of trial liability.”); Jennifer Arlen, *Evolution of Director Oversight Duties and Liability Under Caremark: Using Enhanced Information-Acquisition Duties in the Public Interest*, in RESEARCH HANDBOOK ON CORPORATE LIABILITY 194, 212 (Martin Petrin & Christian Anton Witting eds., 2023) (terming the recent spate of *Caremark* cases “*Caremark 2.0*,” and

Delaware wants to remain the preferred corporate home, and its political branches have proven willing to override the judiciary in service of that aim.²⁸ The appropriate calibration of individual directors' exposure to personal liability has prompted prior legislative override in ways that complicated the internal logic of Delaware organizational law.²⁹ In oversight, the same concerns are at stake.

Substantively, oversight doctrine requires the board of directors to monitor and superintend the corporation. What exactly that entails remains an open question—in part due to doctrinal uncertainty, and in part due to the fact-dependent nature of the inquiry. Adequate oversight for Corporation A may not look like adequate oversight for Corporation B. Still, what firms think that oversight requires of their boards will shape their policies and procedures, director conduct, and the landscape of corporate risk-taking.

Despite oversight's increased legal salience, until recently courts were unlikely to get the chance to rule on its unresolved issues and to establish clear standards.³⁰ The procedural framework for oversight

arguing that it reflects an extension in *Caremark* duties from lack of oversight harming stockholders to a lack of oversight harming societal interest); Jennifer Arlen, *The Story of Allis-Chalmers, Caremark, and Stone: Directors' Evolving Duty to Monitor*, in *CORPORATE LAW STORIES* 323, 323 (J. Mark Ramseyer ed., 2009) (discussing the remaining questions over what obligations are imposed on directors).

²⁸ For example, after the Delaware Supreme Court's reversal of the Chancery holding in *Smith v. Van Gorkom*, the Delaware legislature responded to concerns about a deterrent effect for prospective directors by enacting Section 102(b)(7) of the Delaware General Corporation Law in 1986. See T. Brad Davey & Mathew A. Golden, *What Litigators Need to Know About the Amendments to Section 102(b)(7)*, POTTER ANDERSON DE L. INSIGHTS (Aug. 3, 2022), <https://www.potteranderson.com/insights/publications/What-Litigators-Need-to-Know-About-the-Amendments-to-Section-102-b-7> [https://perma.cc/4UX8-CJAF]; see also Jonathan R. Macey, *Smith v. Van Gorkom: Insights About C.E.O.s, Corporate Law Rules, and the Jurisdictional Competition for Corporate Charters*, 96 NW. U. L. REV. 607, 628 (2002) (discussing the effects of *Smith v. Van Gorkom* in Delaware). More recently, the Delaware legislature responded to actions by Delaware Chancery, including (indirectly) the rise of *Caremark* claims enabled by § 220 books and records requests, by passing Senate Bill 21 (SB21) to amend key parts of the DGCL in a way that reduces stockholder rights. See John Orr & Willis Towers Watson, *Changes in Delaware Corporate Law: A D&O Liability and Insurance Perspective*, HARV. L. SCH. F. CORP. GOVERNANCE (May 1, 2025), <https://corpgov.law.harvard.edu/2025/05/01/changes-in-delaware-corporate-law-a-do-liability-and-insurance-perspective> [https://perma.cc/G8TK-WPCA].

²⁹ See Davey & Golden, *supra* note 28; see also *infra* Part II.

³⁰ For a description of the status quo before *Meta* and the reinvigorated *Marchand*, see Vice Chancellor Travis Laster's opinion in *City of Detroit Police & Fire Ret. Sys. v. Hamrock*, C.A. No. 2021-0370-KSJM, 2022 WL 2387653, at *49 (Del. Ch. June 30, 2022). Vice Chancellor Laster observed that “[n]o *Caremark* case has yet gone to trial, or proceeded meaningfully past the pleading stage, so many open issues remain,” such as “what form of causation must be shown to hold a fiduciary liable under *Caremark* for their bad faith inaction, or who would bear the burden of proof on that issue.” *Id.* Vice Chancellor Laster further noted: “Even the elements for establishing liability are unsettled.” *Id.* That is,

claims has meant that the Delaware Court of Chancery and Delaware Supreme Court at most weighed in at the motion to dismiss stage. Until July 2025, no oversight case had gone to trial.³¹ Delaware corporate law's exculpation provision permits companies to insulate directors from liability for non-intentional good faith breach of the duty of care. Thus, the *Caremark* doctrine functions to protect director non-action in a similar way to the business judgment rule's protection of action.³² The *Caremark* framework limits director liability for business non-judgments that result in corporate harm unless the board was so inattentive that its nonfeasance constitutes bad faith.

Because Delaware courts have yet to decide upon the merits of these cases, legal scholarship offers the next best avenue to work through oversight's doctrinal uncertainties. This Note clarifies the relationship between oversight and the fiduciary duties of corporate directors, showing oversight to be an obligation rather than a standalone duty. It reveals *attention* as a meaningful but neglected dimension of oversight. And it argues that scholarship on attention from other fields can help us make sense of oversight in the context of Delaware law.

"[d]oes a *Caremark* claim resemble a common law tort case where a plaintiff must prove the existence of a duty, breach in the form of bad faith conduct, causation, and damages?" *Id.* Or, in the alternative, "does the fact that the underlying theory invokes fiduciary duties and is an equitable tort mean that the plaintiff makes a *prima facie* showing of breach, at which point the burden shifts to the fiduciary breacher to justify her actions?" *Id.*

³¹ In July 2025, the first *Caremark* case made it to trial when stockholders of Meta (formerly Facebook) sued Mark Zuckerberg and current and former directors and officers of Meta Platforms. *In re Facebook Inc. Derivative Litig.*, C.A. No. 2018-0307-JTL (Del. Ch. Jan. 21, 2025). Stockholders alleged that the defendants ignored warning signs with Cambridge Analytica. *Id.* Before the second day of trial, the parties settled. Tom Hals, *Meta Investors, Zuckerberg Reach Settlement to End \$8 Billion Trial Over Facebook Privacy Violations*, REUTERS (July 17, 2025), <https://www.reuters.com/sustainability/boards-policy-regulation/meta-investors-zuckerberg-reach-settlement-end-8-billion-trial-over-facebook-2025-07-17> [<https://perma.cc/FXC5-24T2>] (noting the case was "the first time Caremark claims went to trial"); see also John Gilluly III, Andrew Serwin, Ronald N. Brown III & Matt Danaher, *Settlement Reached in Meta Investors Suit Over Privacy Violations: Key Takeaways*, DLA PIPER (Aug. 8, 2025), <https://www.dlapiper.com/en-us/insights/publications/2025/08/settlement-reached-in-meta-investors-suit-over-privacy-violations-key-takeaways> [<https://perma.cc/GG67-BPM8>] ("The trial did not conclude, meaning a Caremark trial has yet to run its full course. A decision could have had a rippling effect had it clarified directors' and officers' oversight liability. The bounds of such liability therefore remain unsettled.").

³² See DEL. CODE ANN. tit. 8, § 102(b)(7) (2025); *Wood v. Baum*, 953 A.2d 136, 141 (Del. 2008) (pleading around the statutory protection requires "particularized facts that demonstrate that the directors acted with scienter, i.e., that they had 'actual or constructive knowledge' that their conduct was legally improper").

Part I of this Note situates oversight in the fiduciary framework that underpins derivative pleading in Delaware law. Rightly understood, oversight is a type of fiduciary obligation that governs fiduciary conduct and is owed by each director to the corporation, by the board to the corporation, and by each director to the board. Parts II and III disentangle existing doctrine into two theories of oversight: *oversight as action* and *oversight as attention*. Part II builds on the discussion of oversight's place in the fiduciary framework to reveal the initial paradigm of *oversight as action*. Part III shows how attention operates in Delaware oversight doctrine and distinguishes *oversight as attention* from *oversight as action*. Part III argues that failure to apprehend attention's role in oversight doctrine has led to a disproportionate focus on *oversight as action*, which is part of the story, but not the whole picture. Taken together, *oversight as attention* and *oversight as action* have the potential to rationalize Delaware's unsettled oversight doctrine, help us better understand other aspects of corporate law, and illuminate areas beyond the law of corporations.

I

THE FIDUCIARY OBLIGATION OF OVERSIGHT

Delaware oversight doctrine grapples with the challenge of how to address director non-action. That question implicates fiduciary law. With oversight litigation building momentum, we need a sharper understanding of how, exactly, oversight relates to directors' fiduciary status.

A fundamental point of debate about oversight as a theory of liability concerns its purported fiduciary character. Scholarship and case law exhibit varying views about oversight's relationship to the existing fiduciary framework of Delaware law. At minimum, oversight is a directorial function governed by fiduciary duties.³³ Some case law and scholarship suggests that oversight is not, nor should it be, a fiduciary duty.³⁴ Other authorities go further, contending that oversight

³³ See, e.g., *Fiduciary Duties of the Board of Directors*, THOMSON REUTERS PRAC. L., <https://law.stanford.edu/wp-content/uploads/2023/01/Fiduciary-Duties-of-the-Board-of-Directors.pdf> [<https://perma.cc/BD7J-JP6T>] ("Courts . . . refer to . . . duties, such as the duty of good faith . . . , the duty of disclosure . . . , and the duty of oversight This nomenclature implies that these are standalone fiduciary duties Under Delaware law, however, they are treated as obligations that stem from the . . . fiduciary duties of care and loyalty.").

³⁴ See, e.g., *Stone v. Ritter*, 911 A.2d 362, 369–70 (Del. 2006); Pollman, *supra* note 27, at 2015; Elizabeth Pollman, *The Evolution of Delaware's Corporate Oversight Doctrine*, REGUL. REV. (Oct. 5, 2020), <https://www.theregreview.org/2020/10/05/pollman-evolution-delaware-corporate-oversight-doctrine> [<https://perma.cc/DJH7-XUYR>].

is or should be a standalone fiduciary duty, on par with loyalty and care.³⁵ If that were the case, it would raise a host of issues.³⁶

While it is not essential to resolve the dispute for purposes of this Note, it is useful for the analysis here to land at a defensible point on oversight's fiduciary status. To that end, this Part argues that oversight is best understood not as a fiduciary duty, but rather as a board-level obligation. Accordingly, board and director conduct can either discharge or fail to discharge the oversight obligation, in fulfillment or breach of the underlying duties of loyalty and care.

To determine whether oversight rises to the level of a standalone fiduciary duty requires first clarifying what fiduciary law means in the corporate context. Fiduciary law is overdetermined, with private ordering and public policy functions.³⁷ Fiduciary duties are distinct from statutory and contractual duties.³⁸ Fiduciary claims against corporate directors under Delaware law can be legal or equitable in

³⁵ See, e.g., *In re McDonald's Corp. S'holder Derivative Litig.*, 289 A.3d 343, 362 (Del. Ch. 2023) ("Everyone agrees that directors owe a fiduciary duty of oversight that includes both the Information-Systems Obligation and the Red-Flags Obligation."); Eric J. Pan, *Rethinking the Board's Duty to Monitor: A Critical Assessment of the Delaware Doctrine*, 38 FLA. ST. U. L. REV. 209, 210, 249 (2011) (arguing for a stronger fiduciary duty to monitor); Stephen M. Bainbridge, Star Lopez & Benjamin Oklan, *The Convergence of Good Faith and Oversight*, 55 UCLA L. REV. 559, 559 (2008); Lisa M. Fairfax, *Managing Expectations: Does the Directors' Duty to Monitor Promise More than It Can Deliver?*, 10 U. ST. THOM. L.J. 416, 416–17 (2012); Peter A. Atkins, Marc S. Gerber & Edward B. Micheletti, *Directors' Fiduciary Duties: Back to Delaware Law Basics*, HARV. L. SCH. F. CORP. GOVERNANCE (Mar. 10, 2020), <https://corpgov.law.harvard.edu/2020/03/10/directors-fiduciary-duties-back-to-delaware-law-basics> [<https://perma.cc/TN4J-V6XT>]; Mark J. Loewenstein, *The Corporate Director's Duty of Oversight*, 27 COLO. LAW. 33, 33 (1998).

³⁶ See, for example, the rise and fall of good faith as a standalone fiduciary duty in Delaware corporate law, as characterized by Elizabeth Pollman, *Corporate Disobedience*, 68 DUKE L.J. 709, 715 n.29 (2019), and Andrew S. Gold, *The New Concept of Loyalty in Corporate Law*, 43 U.C. DAVIS L. REV. 457, 459 n.4 (2009). Indeed, good faith and oversight are closely linked. For example, Elizabeth Pollman has described oversight (along with obedience) as an "aspect[] of the duty of good faith." Pollman, *supra* note 27, at 2013.

³⁷ See, e.g., Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 1988 DUKE L.J. 879, 880 (1988) (arguing against reducing fiduciary obligation to contract law); Yifat Naftali Ben Zion, *The Underlying Conceptions of Fiduciary Law*, in 3 OXFORD STUDIES IN PRIVATE LAW THEORY 143, 144 (Paul B. Miller & John Oberdiek eds., 2025) (characterizing the proprietary and interpersonal conceptions of the fiduciary).

³⁸ See Tamar Frankel, *Fiduciary Duties as Default Rules*, 74 OR. L. REV. 1209, 1211–12 (1995) (examining the status of fiduciary rules as default rules, in light of "the unique nature of fiduciary relationships and the law governing them"); Mariana Pargendler, *Modes of Gap Filling: Good Faith and Fiduciary Duties Reconsidered*, 82 TUL. L. REV. 1315, 1353 (2008) ("Fiduciary duties are untailored defaults that strike the hypothetical bargain to decide what most parties would have wanted at a higher level of generality—that of a fiduciary category."); Andrew S. Gold, *Dynamic Fiduciary Duties*, 34 CARDOZO L. REV. 491, 491 (2012) ("[A] key feature of fiduciary duties is that they are read differently across time and between firms.").

nature.³⁹ Unfortunately, despite the centrality of fiduciary duties to Delaware corporate law, inconsistent usage of fiduciary language to describe director oversight muddies the waters.⁴⁰ It is thus important to distill what is distinctly fiduciary from the mix of legal and equitable obligations placed on corporate directors.

To that end, this Part breaks the fiduciary determination into four parts: relationship, duty, obligation, and conduct. The simplified, synthetic framework does not seek to develop *de novo* jurisprudential distinctions—rather, the aim of this Part is to fix a stable point to enable consistent analysis across cases and scholarship.⁴¹

This Note draws on three corporate law concepts: *loyalty*, *care*, and *oversight*. It also introduces a fourth that is less often addressed in this context: *attention*. This Part defines each, fits them into the proposed four-part framework, and concludes that oversight is best described as an obligation of corporate fiduciaries.

A. *Fiduciary Relationships: Director-Corporation, Director-Board, Board-Corporation*

This Note argues that we cannot fully explain Delaware's oversight doctrine without understanding the operation of attention. The doctrinal significance of both oversight and attention requires a clear account of how they relate to directors' fiduciary status. That is why this Section defines the fiduciary relationship, which underpins directors' fiduciary role and provides the basis for their fiduciary duties, obligations, and conduct.

³⁹ In 2005, the Delaware Supreme Court affirmed that there are two types of corporate law claims for director breach of fiduciary duty: "a legal claim, grounded in the argument that corporate action is improper because it violates a statute, the certificate of incorporation, a bylaw or other governing instrument, such as a contract" and "an equitable claim, founded on the premise that the directors or officers have breached an equitable duty that they owe to the corporation and its stockholders." *Hollinger Int'l Inc. v. Black*, 844 A.2d 1022 (Del. Ch. 2004), *aff'd*, 872 A.2d 559 (Del. 2005).

⁴⁰ Ed Rock has described the problem of "[m]ushiness" in Delaware courts' treatment of fiduciary duties. Edward B. Rock, *Saints and Sinners: How Does Delaware Corporate Law Work?*, 44 UCLA L. REV. 1009, 1010 (1997); see also Melvin Aron Eisenberg, *Corporate Law and Social Norms*, 99 COLUM. L. REV. 1253, 1265, 1266 (1999) (noting that "a lot can be packed into the concept of good faith" and that courts define it through varied formulations).

⁴¹ The framework presented here aligns in part with a distinction in H.L.A. Hart's earlier work, which observed in ordinary use that obligations "may be voluntarily incurred or created" and "are owed to special persons (who have rights)," while duties arise from position, status, and role. H.L.A. Hart, *Legal and Moral Obligation*, in *ESSAYS IN MORAL PHILOSOPHY* 82 (A.I. Melden ed., 1958); H.L.A. Hart, *Are There Any Natural Rights?*, 64 PHIL. REV. 175, 179 n.7 (1955); see also R.B. Brandt, *The Concepts of Obligation and Duty*, 73 MIND 374, 374-75 (1964).

Directors' fiduciary status underpins much of Delaware corporate law.⁴² Delaware has kept director fiduciary duties as "exclusively a matter of judge-made law,"⁴³ developed through fiduciary litigation.⁴⁴ Unlike other substantive areas of law in which standards of conduct and standards of review converge, Delaware corporate law distinguishes between the standard of conduct (defined by fiduciary duties, and describing what directors are expected to do) and the standard of review (the test courts use to evaluate whether directors met the standard of conduct).⁴⁵ Delaware case law applies a standard of review "more forgiving of directors and more onerous for stockholder plaintiffs than the standard of conduct."⁴⁶ The divergence is in service of the Delaware policy interest in protecting directors' ability to make risky business decisions.⁴⁷ Ex ante fiduciary obligations are more stringent than the ex post standard of review.⁴⁸

⁴² See, e.g., *Malone v. Brincat*, 722 A.2d 5, 10 (Del. 1998) (noting that fiduciary duties are a "constant compass by which all director actions . . . must be guided," and that Delaware courts have tried to mark clear guidelines on fiduciary duties to help directors act within them); Claire A. Hill & Brett H. McDonnell, *Fiduciary Duties: The Emerging Jurisprudence*, in RESEARCH HANDBOOK ON THE ECONOMICS OF CORPORATE LAW 133 (Claire A. Hill & Brett H. McDonnell eds., Edward Elgar, 2012) ("Fiduciary duties are at the heart of corporate law."); Lawrence A. Hamermesh & Leo E. Strine, Jr., *Delaware Corporate Fiduciary Law: Searching for the Optimal Balance*, in OXFORD HANDBOOK OF FIDUCIARY LAW 872–74 (Evan J. Criddle, Paul B. Miller & Robert H. Sitkoff eds., 2019) (observing Delaware courts' development of fiduciary law in the corporate context).

⁴³ RESTATEMENT OF THE L., CORPORATE GOVERNANCE: CHAPTER 4, DUTY OF CARE AND THE BUSINESS JUDGMENT RULE, INTRODUCTORY NOTE (A.L.I. 2022).

⁴⁴ See, e.g., Lyman P.Q. Johnson, *Unsettledness in Delaware Corporate Law: Business Judgment Rule, Corporate Purpose*, 38 DEL. J. CORP. L. 405, 424 (2013) (arguing for deemphasis of the business judgment rule and elevation of fiduciary duties). Johnson describes the business judgment rule as "a doctrinal vessel of judicial review into which the fiduciary duties of care and loyalty are fitted and subsumed." *Id.* at 424.

⁴⁵ RESTATEMENT OF CORP. GOVERNANCE § 4.01 rep. note 5 (A.L.I. 2022). In this way, Delaware law reaches a more explicit approximation of what Meir Dan-Cohen captured in his model of acoustic separation, in which law speaks differently to different groups: Conduct rules provide ex ante guidelines to the public for conduct—here, guidelines to corporate directors—and decision rules are directed at officials for their ex post adjudication of the legal consequences for actors' conduct. See Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 630 (1984). In Dan-Cohen's imagined model of "acoustic separation," neither the public nor officials can "hear" the normative messages transmitted to the other group. *Id.* at 631.

⁴⁶ *Chen v. Howard-Anderson*, 87 A.3d 648, 667 (Del. Ch. 2014).

⁴⁷ *Gagliardi v. Trifoods Int'l*, 638 A.2d 1049, 1052 (Del. Ch. 1996) ("[O]nly 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!").

⁴⁸ See, e.g., Megan Wischmeier Shaner, *Privately Ordered Fiduciaries*, 28 GEO. MASON L. REV. 345, 362 (2020); see also *In re Walt Disney Co. Derivative Litig.*, 907 A.2d 693, 697 (Del. Ch. 2005), *aff'd*, 906 A.2d 27 (Del. 2006) (en banc) ("Delaware law does not—indeed the common law cannot—hold fiduciaries liable for a failure to comply with the aspirational ideal of best practices . . .").

The fiduciary relationship is a legal relationship in which one party, the fiduciary,⁴⁹ exercises discretion on behalf of another party, the beneficiary.⁵⁰ Fiduciary relationships are a subset of confidential relationships.⁵¹ The fiduciary relationship is analytically prior to the remaining three fiduciary concepts of duty, obligation, and conduct.⁵²

In a given case, whether someone owed a fiduciary duty at the time of the events in question depends on whether they were in a fiduciary relationship. The determination of the existence, nature, and scope of a fiduciary relationship is a matter of fact.⁵³ The fiduciary relationship may be of a *prima facie* type (based in status or role⁵⁴) or it may occur through certain facts and circumstances.⁵⁵ Certain formal legal relationships give rise to fiduciary duties distinct from contractual duties.⁵⁶ The paradigmatic *per se* or categorical fiduciary relationship

⁴⁹ In Delaware law, a fiduciary is “one occupying a fiduciary position.” *Oberly v. Kirby*, 592 A.2d 445, 463 (Del. 1991).

⁵⁰ As such, resulting and constructive trustees are not typically fiduciaries because they lack discretionary powers, the exercise of which would affect the interests of the beneficiaries of the trust. Matthew Harding, *Fiduciary Undertakings*, in *CONTRACT, STATUS, AND FIDUCIARY LAW* 71, 76 (Paul B. Miller & Andrew S. Gold eds., 2016). Harding identifies “discretionary powers as part of the factual backdrop against which the law will recognize a person as a fiduciary.” *Id.*; see also William Swadling, *The Fiction of the Constructive Trust*, 64 *CURRENT LEGAL PROBS.* 399, 406 (2011); DeMott, *supra* note 37, at 880–81; Paul B. Miller, *A Theory of Fiduciary Liability*, 56 *MCGILL L.J.* 235, 287 (2011).

⁵¹ See, e.g., *Weinberger v. UOP, Inc.*, 457 A.2d 701, 711 (Del. 1983) (“[O]ne possessing superior knowledge may not mislead any stockholder by use of corporate information to which the latter is not privy. Delaware has long imposed this duty even upon persons who are not corporate officers or directors, but . . . are privy to matters of interest or significance to their company.”).

⁵² See Paul B. Miller, *The Fiduciary Relationship*, in *PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW* 63, 67–68 (Andrew S. Gold & Paul B. Miller eds., 2014) (“[T]he kind-status of a relationship . . . determines whether fiduciary duties apply to it [R]elationship characterization is central to the formulation and adjudication of liability claims . . .”).

⁵³ See *id.* at 67; see also Kelli A. Alces, *The Fiduciary Gap*, 40 *J. CORP. L.* 351, 356–60 (2015) (discussing the factors courts and scholars consider in determining whether a fiduciary relationship exists, including the parties’ expectations, vulnerability, discretion, and the nature of their relationship).

⁵⁴ On the distinction between status-based fiduciaries and fact-based fiduciaries, see Jeff Berryman, *Equitable Compensation for Breach by Fact-Based Fiduciaries: Tentative Thoughts on Clarifying Remedial Goals*, 37 *ALTA. L. REV.* 95 (1999).

⁵⁵ The law ascribes *prima facie* fiduciary character to certain types of relationships, including those of status and of role occupancy. Incident to at least one party occupying a fiduciary role in *prima facie* fiduciary relationships are fiduciary norms. See, e.g., James Edelman, *The Role of Status in the Law of Obligations: Common Callings, Implied Terms, and Lessons for Fiduciary Duties*, in *PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW* 21, 22 (Andrew S. Gold & Paul B. Miller eds., 2014) (in the English law of obligations, “the role of a fiduciary relationship depends upon an understanding of the role of status in the law concerning voluntary undertakings [S]tatus performs the same role in relation to fiduciary duties that it performs generally in the law of obligations.”).

⁵⁶ *Id.*

is that of a discretionary trustee to the beneficiary of the trust.⁵⁷ In addition to the per se fiduciary relationships, there are informal or implied fiduciary relationships, in which “one party reasonably trusted another”⁵⁸ and relied on the other party’s exercise of discretion on their behalf.⁵⁹ Judicial determination of such bespoke or ad hoc fiduciary relationships is even more fact-dependent.⁶⁰

Fiduciaries do not exist in isolation. A fiduciary is always a fiduciary with respect to someone or something. The fiduciary in a fiduciary relationship exercises discretion on behalf of, and for the benefit of, another (the beneficiary).⁶¹ In the trust context, the most stringent fiduciary formulation, the trustee must act “solely in the interest of the beneficiary.”⁶² Other fiduciary positions are less demanding than trustee positions, but require conduct “at a level higher than that trodden by the crowd.”⁶³ The fact of the fiduciary relationship justifies reliance by the beneficiary on the fiduciary.⁶⁴

For the purposes of this Note, relevant fiduciary relationships exist between a corporate director and the corporation as a legal entity,⁶⁵ between the board and the corporation,⁶⁶ and between the director

⁵⁷ Status fiduciary relationships arise where a certain type of relationship exists. RESTATEMENT (THIRD) OF AGENCY § 1.01 (A.L.I. 2006).

⁵⁸ See *St. John’s Univ. v. Bolton*, 757 F. Supp. 2d 144, 166 (E.D.N.Y. 2010) (“[A] fiduciary relationship embraces not only those the law has long adopted—such as trustee and beneficiary—but also more informal relationships where it can be readily seen that one party reasonably trusted another.”).

⁵⁹ See D. Gordon Smith, *The Critical Resource Theory of Fiduciary Duty*, 55 VAND. L. REV. 1399, 1402 (2002) (“[F]iduciary relationships form when one party . . . acts on behalf of another party . . . while exercising discretion with respect to a critical resource belonging to the [other].”).

⁶⁰ See Andrew S. Gold, *Trust and Advice*, in FIDUCIARIES AND TRUST: ETHICS, POLITICS, ECONOMICS AND LAW 35 (Paul B. Miller & Matthew Harding eds., 2020) (discussing the types of fiduciary relationships).

⁶¹ See RESTATEMENT (SECOND) OF TRUSTS § 2 cmt. b (A.L.I. 1959) (“The duties of a trustee are more intensive than the duties of some other fiduciaries.”).

⁶² John H. Langbein, *Questioning the Trust Law Duty of Loyalty: Sole Interest or Best Interest?*, 114 YALE L.J. 929, 931 (2005).

⁶³ *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928).

⁶⁴ Frankel, *supra* note 38, at 1213 (“[Fiduciary law] vest[s] in entrustors the *legal right to rely on the honesty of their fiduciaries* by imposing on fiduciaries a duty of loyalty, as well as other specific duties, in order to deter fiduciaries from misappropriating the entrusted property or interests.”).

⁶⁵ For one perspective on corporate fiduciaries, see Edelman, *supra* note 55, at 23 (“A company, and its directors, are the creation of statute. The powers of the directors derive from statute. In many jurisdictions those powers have not been codified, so the construction of the statute will take place as set against the historical background of fiduciary duties in equity.”).

⁶⁶ See Darian M. Ibrahim, *Individual or Collective Liability for Corporate Directors?*, 93 IOWA L. REV. 929, 933 (2008) (observing that “courts generally have focused on the board as a whole in duty of care cases, and on directors as individuals in duty of loyalty cases”).

and the board.⁶⁷ While a fiduciary acts for the benefit of another, the fiduciary relationship itself is between the fiduciary and that with which they are entrusted—that is, the trust itself, or the corporation as an entity.⁶⁸

This Section has put forth the key fiduciary relationships for the purposes of this Note. From the fact of those relationships come all other fiduciary aspects of director duties (at the individual and board level), obligations, and the basis for judicial evaluation of their conduct. This Part defines the terms and bounds of the Note's discussion of oversight, action, and attention.

B. Fiduciary Duties: Loyalty and Care

This Note illustrates the operation of attention in Delaware's oversight doctrine. To facilitate that analysis, this Part breaks down directors' fiduciary role, duties, obligations, and conduct. This Section defines fiduciary duty, then applies that definition to find that oversight is not properly understood as a fiduciary duty on par with loyalty or care.

A fiduciary relationship gives rise to fiduciary duties as a matter of law.⁶⁹ A corporate director voluntarily assumes such strictures as attach to that position.⁷⁰ The framework presented here divides such fiduciary role-attendant strictures into broad duties and their operationalization through specific obligations (as addressed in Section I.C).

A fiduciary relationship entails at least one fiduciary duty that governs the relationship.⁷¹ Fiduciary duties are fundamental, general in formulation, and inherent to the fiduciary relationship. They guide behavior and provide a basis for liability if breached. Breach is determined by the fiduciary's conduct. Fiduciary duty is binary, either breached or not. Conduct can be either loyal or disloyal, an exercise of due care or failure thereof.

⁶⁷ This Note does not take up the invitation of Eckstein and Parchomovsky to develop a horizontal fiduciary duty between directors. Asaf Eckstein & Gideon Parchomovsky, *Toward a Horizontal Fiduciary Duty in Corporate Law*, 104 CORNELL L. REV. 803, 808–10 (2019) (proposing horizontal duty as a way to bridge individual and collective liability).

⁶⁸ See Paul B. Miller, *The Fiduciary Relationship*, in PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW 62, 64 (Andrew S. Gold & Paul B. Miller eds., 2014).

⁶⁹ THOMSON REUTERS PRAC. L., *supra* note 33.

⁷⁰ See, for example, Harding, *supra* note 50, at 75, discussing voluntary occupation of fiduciary roles with reference to DAVID OWENS, *SHAPING THE NORMATIVE LANDSCAPE* (2012) (“choice-dependent” theory).

⁷¹ Andrew S. Gold, *The Loyalties of Fiduciary Law*, in PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW 176, 176 (Andrew S. Gold & Paul B. Miller eds., 2014) (“[I]f a purported fiduciary does not owe a duty of loyalty to a beneficiary, then the relationship is not actually a fiduciary relationship.”).

Duties are visible in their traces. Case law shows the core duties as applied, from which we can infer the general shape of the underlying duties. Loyalty and care are the two fundamental fiduciary duties owed by corporate directors.⁷² *Loyalty* requires directors to place the interests of the company and the stockholders before their own personal and financial interests.⁷³ For example, a director would violate the duty of loyalty if they usurped a business opportunity for personal gain that rightly belonged to the corporation.⁷⁴ *Care* requires directors to make decisions to advance the corporation's interests with reasonable diligence and prudence.⁷⁵ For instance, it would breach the duty of care if a director made a business decision without first making a good faith effort to become informed on the issue.⁷⁶

Loyalty and care are the core duties that govern fiduciary relationships in Delaware corporate law and are the most relevant to this Note. Each director owes fiduciary duties of loyalty and care to the corporation. So, too, do the directors owe fiduciary duties of loyalty and care to the board. And the board owes fiduciary duties of loyalty and care to the corporation.

While a fiduciary may delegate authority and activities, the fiduciary retains the underlying duty. This is the mechanism by which the board superintends the corporation, and the basis for fiduciary duty claims against directors.

Compared with the fiduciary duties of loyalty and care, this Note contends that oversight is more of a role-attendant function than a fundamental fiduciary duty. Specifically: A board may delegate to management much of the day-to-day decisionmaking about the firm. That delegation should be properly motivated—not disloyal—and should be executed with due care. Part of delegating with due loyalty and care involves overseeing management's execution of that delegated mandate. If the board loyally and carefully asks the chief executive officer (CEO) to decide whether to enter a new market, the CEO never decides one way or another, and the board never follows up, then the

⁷² Corporate directors under the law of all fifty states owe the fiduciary duties of loyalty and care. *Fiduciary Duties of Corporate Directors*, NAT'L ASS'N CORP. DIRS. (June 6, 2024), <https://www.nacdonline.org/all-governance/governance-resources/governance-research/director-faqs-and-essentials/director-essentials-fiduciary-duties-of-corporate-directors> [<https://perma.cc/7UWX-KGBW>].

⁷³ *Duty of Loyalty*, CORNELL L. SCH., LEGAL INFO. INST. (July 2022), https://www.law.cornell.edu/wex/duty_of_loyalty [<https://perma.cc/EEF3-X7W8>].

⁷⁴ *Corporate Opportunity*, CORNELL L. SCH., LEGAL INFO. INST. (Aug. 2025), https://www.law.cornell.edu/wex/corporate_opportunity [<https://perma.cc/M9WE-3Z4V>].

⁷⁵ *Duty of Care*, CORNELL L. SCH., LEGAL INFO. INST. (Jan. 2022), https://www.law.cornell.edu/wex/duty_of_care [<https://perma.cc/BUE8-WAWP>].

⁷⁶ *Id.*

board becomes culpable (whether through disloyalty or lack of due care, depending on the facts) for its failure to properly oversee that delegation.

Oversight thus logically flows from and elaborates both loyalty and care.⁷⁷ Oversight is analytically subsequent to each, rather than prior or concurrent. It is thus not an underlying or standalone fundamental duty. Still, oversight is related to fiduciary law. The question is how. The next part of this framework, obligation, will argue that fiduciary obligation is a better fit for oversight than duty.

C. *Fiduciary Obligation: Oversight*

Director oversight of the corporation entails both action and attention. Delaware law is concerned with both. To show how, this Section reveals that oversight is most aptly framed as a director obligation, elaborating both loyalty and care.

At an intermediate level of abstraction between granular, as-applied fiduciary duty cases, and general fundamental duties, fiduciary obligations tailor the duties to types of fiduciary relationships and factual contexts. Fiduciary obligations are pursuant to, derived from, and realize the demands of core duties like loyalty and care. These obligations include norms, rules, and responsibilities associated with a fiduciary position. The concept of fiduciary obligation also encompasses those many “fiduciary duties” discussed in the case law that are not loyalty or care, but rather properly understood as obligations attendant to core duties.⁷⁸

The binary structure of fiduciary duty means a duty is either breached or not breached in a given case. Likewise, fiduciary obligations such as disclosure or candor may be performed or not, discharged or not. A fiduciary’s failure to discharge a fiduciary obligation constitutes breach of the underlying duty. For example, a failure to disclose can constitute a breach of the duty of care, the duty of loyalty, or both, depending on the facts.

It is possible for an obligation to be subsidiary to more than one fiduciary duty. For example, good faith in Delaware corporate law today operates as an obligation pursuant to both the fiduciary duty of loyalty

⁷⁷ *Beam ex rel. v. Stewart*, 833 A.2d 961, 971 n.16 (Del. Ch. 2003) (“The ‘duty to monitor’ is not a separate fiduciary duty, but rather stems from the core fiduciary duties of care and loyalty.”).

⁷⁸ For example, good faith, obedience to the law, and disclosure are sometimes described as “subsidiary duties,” but in the framework presented here would be understood as “obligations.” THOMSON REUTERS PRAC. L., *Fiduciary Duties of the Board of Directors*, *supra* note 33.

and the fiduciary duty of care.⁷⁹ As with the disclosure obligation, a failure to discharge the obligation of good faith in the context of loyalty will be distinct from a failure to discharge the obligation of good faith in the context of care.

It is also possible for an obligation to transcend doctrinal areas. While a fiduciary duty is distinct from any legal duty by the same name,⁸⁰ fiduciary obligations are different. Good faith as a subsidiary obligation to the fiduciary duties of loyalty and care takes on fiduciary character, in that it governs the fiduciary's conduct, and its absence can form the basis for liability for breach of the underlying fiduciary duty. That same good faith also occurs in the context of contractual relationships.⁸¹ The implied covenant of good faith and fair dealing shares its general substance with fiduciary good faith, differing due to context and consequence.⁸²

Oversight describes the responsibility of directors to supervise and monitor the corporation, including responding appropriately to blatant issues when they arise and establishing systems to ensure critical information reaches the board.⁸³ The hallmark corporate oversight case is *Caremark*, addressed in greater detail later in this Note.⁸⁴

⁷⁹ See, e.g., Hillary A. Sale, *Fiduciary Law, Good Faith, and Publicness*, in OXFORD HANDBOOK OF FIDUCIARY LAW 763 (Evan J. Criddle, Paul B. Miller & Robert H. Sitkoff eds., 2019) (“[I]n both the corporate and trust contexts, the duty of good faith has become an equitable gap-filler . . .”); David Rosenberg, *Making Sense of Good Faith in Delaware Corporate Fiduciary Law: A Contractarian Approach*, 29 DEL. J. CORP. L. 491, 491 (2004) (“[A] corporate director’s duty of good faith encompasses his adherence to all of his duties as director in the same way that good faith encompasses all of the duties imposed by a contract.”). The full history of good faith in Delaware corporate law is rich and unfortunately beyond the scope of this Note.

⁸⁰ For example, fiduciary care diverges importantly from tort care. John C.P. Goldberg, *The Fiduciary Duty of Care*, in OXFORD HANDBOOK OF FIDUCIARY LAW 405–07 (Evan J. Criddle, Paul B. Miller & Robert H. Sitkoff eds., 2019).

⁸¹ See, e.g., Richard R.W. Brooks, *Good Faith in Contractual Exchanges*, in OXFORD HANDBOOK OF THE NEW PRIVATE LAW 498 (Andrew S. Gold ed., 2020) (observing the “prevalence and persistence” of the doctrine of good faith in contractual exchanges).

⁸² See, e.g., Gregory Klass, *What if Fiduciary Obligations Are Like Contractual Ones?*, in CONTRACT, STATUS, AND FIDUCIARY LAW 93, 94 (Paul Miller & Andrew S. Gold eds., 2016) (explaining that “an obligation is a fiduciary one only if it has the right sort of content; notably, only if it requires of the fiduciary some degree of care and loyalty”). *But see* Hanoch Dagan & Avihay Dorfman, *Justice in Contracts*, 67 AM. J. JURIS. 1, 3 (2022) (advancing a broad conception of contractual good faith as a general duty giving rise to specific obligations).

⁸³ In 2006, the Delaware Supreme Court held in *Stone v. Ritter* (the case that transformed *Caremark* from dicta to law) that “the necessary conditions predicate for director oversight liability” include showing either “the directors utterly failed to implement any reporting or information system or controls” or the directors, “having implemented such a system or controls, consciously failed to monitor or oversee its operations thus disabling themselves from being informed of risks or problems requiring their attention.” 911 A.2d 362, 370 (Del. 2006).

⁸⁴ *In re Caremark Int’l Inc. Derivative Litig.*, 698 A.2d 959, 967 (Del. Ch. 1996).

Like the obligations of good faith, disclosure, and candor, corporate oversight in the fiduciary context derives from, and is governed by, the fiduciary duties of loyalty and care. Also like good faith, disclosure, and candor, oversight is not inherently fiduciary. It is a fiduciary obligation if it occurs in the context of a fiduciary relationship governed by fiduciary duties, but it can also arise in nonfiduciary contexts.⁸⁵ Thus, the director's fiduciary relationship to the corporation is governed by loyalty and care and elaborated through obligations. The same is true of the director's fiduciary relationship to the board and the board's fiduciary relationship to the corporation. Oversight is therefore a director obligation, stemming from both loyalty and care.

D. *Fiduciary Conduct: Action and Attention*

Sections I.A–I.C showed that directors' fiduciary duties and attendant obligations stem from their fiduciary relationship to the corporation and to the board. This Section answers the question: How can a director breach—or fulfill—the requirements of their fiduciary role? Director liability for failure to oversee can stem from inaction or inattention. To show how, this Section puts forward a framework for the evaluation of director conduct, but first, I will briefly define *action* and *attention* as used in this Section.

Action is taken by individual directors and by the board on behalf of the corporation.⁸⁶ The board meets, discusses agenda items, and makes decisions. Such action is subject to certain outer bounds: Directors may not act outside the corporation's charter, in violation of the law, or without stockholder approval where required.⁸⁷ Action is affirmative, external, and constrained by practicalities such as resource limitations.⁸⁸ Through action, directors and the board manifest their agency and intent.⁸⁹ Action is observable: An item made it into the board minutes, or did not.

⁸⁵ For example, oversight can be contractual—as, for example, specifying that the floor manager's role involves oversight of lower-level employees and general operations of the store. As another example, in the general principal-agent context, delegation entails a corresponding duty to oversee the performance of that delegation.

⁸⁶ See, e.g., R.N.D., *What Is Corporate Action?*, 6 MICH. L. REV. 692, 696 (1908).

⁸⁷ See *Powers and Duties of Corporation Directors and Officers*, WOLTERS KLUWER (May 7, 2024), <https://www.wolterskluwer.com/en/expert-insights/powers-and-duties-of-corporation-directors-and-officers> [<https://perma.cc/5744-W84A>].

⁸⁸ See Juan S. Piñeros Glasscock & Sergio Tenenbaum, *Action*, in STAN. ENCYCLOPEDIA OF PHIL. (Edward N. Zalta & Uri Nodelman eds., 2023), <https://plato.stanford.edu/entries/action> [<https://perma.cc/8V2N-KHHE>] (characterizing intentional human action as “practical manifestations of our rational capacities,” guided and structured by agents' planning and limited cognitive resources).

⁸⁹ *Id.*

Attention is a limited resource of value to the firm, which is allocated by individual directors and by the board.⁹⁰ It is thus individual and collective. Work from other disciplines, especially psychology, philosophy, and behavioral economics, offers a rough model of attention. Once something is subject to someone's attention (whether through internal or external impetus), the person is aware of that thing—and then they decide how to act accordingly.⁹¹ Attention entails “the noticing, encoding, interpreting, and focusing of time and effort” by organizational decisionmakers on issues and answers as available alternatives for action.⁹² Attention is selective, unevenly distributed, and responsive to stimuli and other events.⁹³ Attention devoted to one thing is generally diverted from another.⁹⁴ Attention prioritizes.⁹⁵ Attention is flexible.⁹⁶ And attention is necessary for action, albeit to varying degrees depending on the context.⁹⁷ As a result, rational inattention has its place, which oversight doctrine seems to recognize.

While this Section defines action and attention separately and the Note seeks to parse their respective contributions to oversight overall, it is also worth noting that action and attention are not categorically distinct. Directors may need to undertake concrete actions in order

⁹⁰ See, e.g., Christoph Brielmaier & Martin Friesl, *The Attention-Based View: Review and Conceptual Extension Towards Situated Attention*, 25 INT'L J. MGMT. REVS. 99, 107, 108 tbl. 2 (2022) (describing attention as a scarce organizational resource and arguing that how firms allocate managerial attention to issues and answers determines firm behavior and outcomes).

⁹¹ See, e.g., CAROLYN DICEY JENNINGS, THE ATTENDING MIND 3 (2020) (“[A]ttention is mental prioritization by a subject.”); SEBASTIAN WATZL, *Introduction: Structure in Mind, in STRUCTURING MIND: THE NATURE OF ATTENTION AND HOW IT SHAPES CONSCIOUSNESS* 1, 2 (2017) (“Attentional structure is organizing the mind into parts that are central or prioritized and those that are peripheral . . .”).

⁹² William Ocasio, *Towards an Attention-Based View of the Firm*, 18 STRATEGIC MGMT. J. 187, 189 (1997).

⁹³ See, e.g., Shameen Prashantham & Anoop Madhok, *Corporate-Startup Partnering: Exploring Attention Dynamics and Relational Outcomes in Asymmetric Settings*, 17 STRATEGIC ENTREPRENEURSHIP J. 770, 770, 773 (2023) (underlining “the distributed nature of attention”).

⁹⁴ WILLIAM JAMES, PRINCIPLES OF PSYCHOLOGY 261 (Encyclopedia Britannica 1952) (“Focalization, concentration, of consciousness are of [attention's] essence. It implies withdrawal from some things in order to deal effectively with others.”).

⁹⁵ WATZL, *supra* note 91, at 3.

⁹⁶ Christopher Mole, *Attention*, in STAN. ENCYCLOPEDIA OF PHIL. (Edward N. Zalta & Uri Nodelman eds., 2026), <https://plato.stanford.edu/entries/attention> [<https://perma.cc/TG34-42P5>], (“[A]ttention requires the unified activity of whichever processes happen to be relevant to the subject's task, but it does not require any *particular* processes to be taking place.”).

⁹⁷ Wayne Wu, *Action Always Involves Attention*, 79 ANALYSIS 693, 701 (2019) (“Attending in a certain way is something that one gets better at doing over time, and when it does, the salient development is not its abolition but its change of character.”).

to maintain fiduciary attention. For example, where a board fails to review reports that were not delivered to them, or a board neglects to track relevant regulatory developments, then preliminary fiduciary actions on behalf of the corporation are at stake. Some degree of attention seems required for fiduciary action, just as attention without action seems likely to fall short of what is required of a corporate board.

As a general rule, directors' exercise of their business judgment receives significant deference in Delaware law.⁹⁸ Exculpation under Delaware law's permissive (and widely used) indemnification provision further protects directors from judicial scrutiny.⁹⁹ Still, it is possible for directors to breach their fiduciary duties, sometimes severely enough to lead to liability.

The conduct of a fiduciary must not violate fiduciary duties (here, loyalty and care) in themselves or through failure to discharge those duties' attendant fiduciary obligations. To reiterate, fiduciary conduct that fails to discharge a fiduciary obligation breaches the underlying duty.¹⁰⁰ Obligations are elaborative but not necessary for breach to occur: Fiduciary conduct can violate duties absent failure to discharge any obligations. And breach of fiduciary duty is a *per se* harm, which does not require showing damages to state a claim.¹⁰¹ The harm lies in the fact of the fiduciary breach.

The constitutive norms of a fiduciary role within a fiduciary relationship are a source of expectations and provide a basis for the interpretation of the fiduciary's conduct.¹⁰² Doctrines of fiduciary breach include the legal elements of such breach. For example, the corporate opportunity doctrine is "a species of the duty of fiduciary to act with undivided loyalty."¹⁰³ A fiduciary obligation of "no conflict"

⁹⁸ This protection can even extend to inaction. See *Aronson v. Lewis*, 473 A.2d 805, 813 (Del. 1984) ("[A] conscious decision to refrain from acting may nonetheless be a valid exercise of business judgment and enjoy the protections of the rule.").

⁹⁹ DEL. CODE ANN. tit. 8 § 102(b)(7).

¹⁰⁰ See *supra* Section I.C.

¹⁰¹ See, e.g., *Oberly v. Kirby*, 592 A.2d 445, 463 (Del. 1991) ("[T]he absence of specific damage to a beneficiary is not the sole test for determining disloyalty by one occupying a fiduciary position . . .").

¹⁰² See *Harding*, *supra* note 50, at 87. *Harding* writes about "role-constituting norms" and the likely awareness of a voluntary role-occupant in a fiduciary position of its demands: "But the justification of the recognition of prima facie fiduciary relationships does not depend on the prevalence of belief that occupation of a role entails fiduciary strictures. It is enough that role-occupants typically assume their roles with a general belief that they are thereby committing themselves to role-constituting norms . . ." *Id.*

¹⁰³ *Gen. Auto. Mfg. Co. v. Singer*, 120 N.W.2d 659, 663 (Wis. 1963) ("The doctrine of corporate opportunity is a species of the duty of fiduciary to act with undivided loyalty.").

serves, by implication, to reinforce the proposition that a fiduciary role demands selfless conduct by the fiduciary.¹⁰⁴

Fiduciary conduct by directors and the board is expected to conform with the duties of loyalty and care and their attendant obligations, like good faith, disclosure, and oversight. Delaware law and courts do not prescribe exactly what conduct will suffice—what that means will depend on the context of the business. Delaware extends significant deference to the business judgment of the directors and the board.¹⁰⁵ As such, the standard for liability diverges from the standard for conduct.¹⁰⁶ Fiduciary conduct can thus realize the demands of loyalty and care in many ways. Liability for breach of fiduciary duty by a director or the board requires conduct that falls so far short of the conduct standard that it meets the liability standard.¹⁰⁷

Corporate fiduciary conduct can thus discharge (or fail to discharge) the oversight obligation in a variety of ways, which contributes to perceived uncertainty about oversight doctrine.¹⁰⁸ For example, take the case of an aircraft manufacturer like Boeing. While the board should meet regularly, the precise frequency and content of those meetings are up to the board. The aircraft manufacturer's board of directors should also adequately oversee the company. What precisely that entails is subject to the business judgment of the board—unless the board's action (or inaction) gives reason for the court to intervene and pierce the veil accorded by business judgment deference. After one of the company's planes falls out of the sky and kills hundreds of people, the board could respond in any number of ways—for example, via calling an emergency board meeting, creating a subcommittee, adding the issue to the agenda for their next meeting, or starting an internal investigation.

¹⁰⁴ Harding, *supra* note 50, at 86 (explaining that the fiduciary “no conflict” rule requires fiduciaries to act solely in a beneficiary's interests).

¹⁰⁵ See *The Delaware Way: Deference to the Business Judgment of Directors Who Act Loyally and Carefully*, DEL. DEP'T OF STATE, <https://corplaw.delaware.gov/delaware-way-business-judgment> [<https://perma.cc/V2GE-S9UE>] (describing how, under the business judgment rule, boards generally have power to make business decisions that will not be second-guessed by courts).

¹⁰⁶ Melvin Aron Eisenberg, *The Divergence of Standards of Conduct and Standards of Review in Corporate Law*, 62 FORDHAM L. REV. 437, 437–38 (1993) (noting the divergence between standards of conduct and liability).

¹⁰⁷ See *id.* at 443 (explaining that directors may act unreasonably without incurring liability so long as their decisions are rational).

¹⁰⁸ This indeterminacy in corporate law, as a function of business judgment deference and bifurcated conduct and liability standards, also fuels debate and uncertainty with respect to loyalty, care, good faith, and other fiduciary issues. See, e.g., Gold, *supra* note 71, at 176, 189–90 (emphasizing that fiduciary loyalty comprises multiple competing conceptions with no single core content, producing uncertainty).

From a judicial perspective, the problem arises when the board fails to respond at all, in a way that raises questions about the board's loyalty and care. As such, failure to oversee is the relevant fiduciary conduct. It is problematic, and can give rise to liability, because it fails to fulfill the fiduciary duties of loyalty or care, as applicable.

Taken together, these four components—relationship, duty, obligation, and conduct—capture the crux of what it means to be a corporate fiduciary. They also enable clarification of oversight's fiduciary status: Oversight is not a fundamental fiduciary duty like loyalty or care. Rather, oversight is an elaborative or subsidiary obligation. Its fiduciary dimension comes from the demands of the fiduciary role.

II

OVERSIGHT AS ACTION

Part I provided the framework for analysis: The director of a Delaware corporation may face non-exculpable personal liability for breach of the fiduciary duty of loyalty if they fail badly enough to discharge their oversight obligation.¹⁰⁹ This Part shows how. Drawing on the fiduciary director framework, it traces the development of modern oversight doctrine and reveals the dominant paradigm of *oversight as action*. This Part also identifies early ways that Delaware courts discussed attention in the context of oversight.

A. Arguing Oversight: A Theory of Director Liability

Under Delaware law, oversight liability may arise if a board fails to act in the face of a duty to act. For example, inaction upon the receipt of information that calls for a response would fall afoul of *oversight as action*. This Section expands on the oversight description put forth in the Introduction, showing not only oversight as a cause of action but also as animated by a theory of *oversight as action*.

As outlined in the Introduction, oversight cases often fail at the initial procedural hurdle for a derivative claim: the demand futility stage.¹¹⁰ To bring derivative litigation, plaintiffs first must show that

¹⁰⁹ See *supra* Part I.

¹¹⁰ See *supra* Introduction; see also DEL. CH. CT. R. 23.1; *Stone v. Ritter*, 911 A.2d 362, 367 n.9 (Del. 2006) (stating that allegations of demand futility under Rule 23.1 “must comply with stringent requirements of factual particularity that differ substantially from the permissive

current board members (the board on which the stockholder-plaintiff contends it would be futile to make a demand) face a substantial likelihood of liability for a non-exculpated claim, such that they could not be impartial in deciding whether the corporation should pursue the demanded legal claim.¹¹¹ Practically speaking, a director must have breached the duty of loyalty.

Despite the high bar to oversight claims, oversight as a theory of liability has recently begun to survive the motion to dismiss stage.¹¹² Uncertainty remains about what constitutes a board's failure to exercise adequate oversight.¹¹³ The incumbent doctrinal framework fails to provide clarity, leaving open questions like what constitutes a red flag (such that liability can follow if the issue is ignored), what constitutes a mission-critical risk, and what oversight demands of a board of a multi-industry, complex, large-scale business.¹¹⁴ Because of oversight's increased viability, the courts appear to be on a collision course with the Delaware legislature.¹¹⁵

Legal scholarship is well positioned to work through the open issues that shape director conduct and alter the landscape of corporate

notice pleadings governed solely by Chancery Rule 8(a)" (citing *Brehm v. Eisner*, 746 A.2d 244, 254 (Del. 2000)); Hillary A. Sale, *Leveraging Information Forcing in Good Faith*, in RSCH. HANDBOOK ON L. & TIME, 192, 193 (Frank Fagan & Saul Levmore eds., 2025) ("Like so much in the law, in the space of corporate fiduciary duties, the substance is largely delineated by the process or, here, by the procedural posture and timing of the litigation.").

¹¹¹ For the vast majority of companies that exercise indemnification authority under DGCL § 102(b)(7), that means only loyalty claims will suffice. That incents the submission of pleadings that frame oversight as a loyalty claim. See FRANK PARTNOY & ELIZABETH POLLMAN, *BUSINESS ORGANIZATIONS: A CONTEMPORARY APPROACH* 319 (4th ed. 2023) (citing *Malpiede v. Townson*, 780 A.2d 1075 (Del. 2001)).

¹¹² See *infra* Section III.A.

¹¹³ See, e.g., *In re Facebook, Inc. Section 220 Litig.*, No. 2018-0661-JRS, 2019 WL 2320842, at *14 (Del. Ch. May 30, 2019) ("Delaware courts are more inclined to find *Caremark* oversight liability . . . when the company operates in the midst of obligations imposed upon it by positive law yet fails to implement compliance systems, or fails to monitor existing compliance systems, such that a violation of law and resulting liability occurs.").

¹¹⁴ See, e.g., Shapira, *Conceptualizing Caremark*, *supra* note 27, at 484 ("[A]s notable commentators have long lamented, the case law has yet to fully explain why directors must address red flags, why maximizing profits by skirting regulations is a breach of loyalty, and why certain types of director ignorance should be culpable."); Itai Fiegenbaum, *Caremark's Fractured State*, 80 BUS. LAW. 1, 1 (Winter 2024–2025) ("The open-ended nature of the 'mission criticality' rubric has thrust *Caremark* to the forefront of corporate law's most divisive policy debates.").

¹¹⁵ In March 2025, the Delaware legislature amended Section 220 of the Delaware General Corporation Law to limit stockholder inspection rights of books and records, in part to curb the basis for *Caremark* and other derivative claims surviving the motion to dismiss stage. *Delaware Significantly Narrows Scope of Stockholder Inspection of Corporate Books and Records*, PERKINS COIE (Apr. 3, 2025), <https://www.ashurstperkinscoie.com/en/insights/delaware-significantly-narrows-scope-of-stockholder-inspection-of-corporate-books-and-records> [<https://perma.cc/X4P3-8BFK>].

risk-taking. For example, board liability for inadequate oversight over cybersecurity systems has thus far not been found for noncyber businesses,¹¹⁶ but in the near future may become a standard risk (and thus oversight obligation) for all corporations. The question of whether the oversight duty demands more of boards of large, complex multinational firms than those of small monoline businesses is also not yet settled.¹¹⁷ Nor is there a stable distinction between a red and yellow flag.¹¹⁸

Despite these doctrinal uncertainties and the factors making their judicial resolution unlikely, this Part suggests that it is possible to discern a dominant paradigm of *oversight as action*. On this action-oriented account, oversight entails monitoring, supervising, and responding.¹¹⁹ Liability thus largely arises due to inaction.

Certainly, oversight has an active dimension; a shopkeeper monitors the goings-on in the shop, observing the performance of employees and adjusting course as needed. But the *oversight as action* view has some shortcomings. Absent disloyalty, director oversight activity enjoys protection from judicial second-guessing. The judicial approach therefore rewards board effort itself, not the quality, calibration, or effectiveness of that effort. One risk of the action-based theory of oversight is that Delaware's overall posture of deference to director action, requiring bad faith (disloyalty) to pierce the veil, renders "nonmeaningful performative action" indistinguishable from "good-faith action."¹²⁰

Another limit of the *oversight as action* theory is that it does not adequately capture what is arguably the crux of oversight doctrine's functional concern: the dog that doesn't bark, the information that

¹¹⁶ See, e.g., *Firemen's Ret. Sys. of St. Louis ex rel. Marriott Int'l v. Sorenson*, No. 2019-0965-LWW, 2021 WL 4593777, at *19 (Del. Ch. Oct. 5, 2021) (holding that plaintiffs failed to plead bad faith in the Marriott board's role in leadup and response to the 2018 cyberattack).

¹¹⁷ See Shapira, *Conceptualizing Caremark*, *supra* note 27, at 486 ("The abovementioned examples of 'monoline' companies clearly fit the bill [for mission criticality]. But the mission-critical zone extends beyond single-product companies. Even boards of multinational corporations with dozens of products and subsidiaries face risks that are critical and cannot be ignored.").

¹¹⁸ See *id.*, at 498 ("[A] myriad of yellow flags can count as a big red flag once the number of warnings crosses a certain threshold.").

¹¹⁹ Cf. Fairfax, *supra* note 35, at 418 (observing "a growing desire to make the oversight role more robust to ensure that directors pay greater attention to their monitoring responsibilities so that they can be more informed regarding what is occurring within the corporation, better prepared to respond to those occurrences, and better equipped to prevent inappropriate conduct").

¹²⁰ Joshua Dana, *Performative Actions and Profits: A New Test for Delaware Derivative Oversight Claims*, 90 BROOK. L. REV. 589, 598 (2025) ("Under the bad-faith standard, courts cannot distinguish good-faith action from nonmeaningful performative action.").

doesn't make its way to the board, the board meeting that didn't happen. Oversight doctrine's current formulation tries to address it via both the information-systems and red-flags theories. But the challenge persists.

The next Section takes on oversight's relation to inaction by the board. It shows that the first generation of oversight cases sought to hold culpable directors for unjustified inaction.

B. From Dicta to Law: Legal Consequences of Director Inaction

Delaware case law shows that director liability for failure to oversee the corporation can stem from inaction or inattention. This Section argues that the early development of Delaware oversight doctrine began with the more director-protective *oversight as action* framework. Only later would *oversight as attention* become more of a threat to directors (addressed in Part III).

The doctrinal story of Delaware oversight typically begins in the early 1960s with a narrow theory of director liability in *Graham v. Allis-Chalmers*.¹²¹ In *Graham*, the company had pled guilty to illegal antitrust activity by its employees of which its directors did not have actual knowledge.¹²² Stockholders brought a claim on behalf of the convicted entity for director liability on the basis of "*gross inattention* to the common law duty of actively supervising and managing the corporate affairs," citing *Briggs v. Spaulding*.¹²³ As formulated in *Briggs*, directors needed to attend to their duty of active supervision and management; the duty of attendance was not formulated directly as attention to the corporation itself, but rather as a duty to attend to role-specific duties.¹²⁴

Though the Delaware Court of Chancery dismissed the case, its decision in *Graham* shows that the court was attuned to director attention. Distinguishing the case before the court from precedent cited by plaintiffs, the court observed that unlike the facts in *Lutz v. Boas*,¹²⁵ in *Graham* "the evidence establishes that corporate directors in fact paid close attention to the overall operation of a large corporation

¹²¹ 182 A.2d 328 (Del. Ch. 1962), *aff'd*, 188 A.2d 125 (Del. 1963).

¹²² *Graham*, 182 A.2d, at 329, 331–32.

¹²³ *Graham*, 182 A.2d, at 332 (emphasis added). The plaintiffs cited *Briggs v. Spaulding*, 141 U.S. 132 (1891), which the Court of Chancery had noted was "a case in which national bank directors in a five to four decision were actually absolved of liability for frauds perpetrated by the bank president." *Graham*, 188 A.2d, at 130.

¹²⁴ *Briggs v. Spaulding*, 141 U.S. 132, 173–74 (1891).

¹²⁵ *Graham*, 182 A.2d, at 332 (differentiating *Lutz v. Boas*, 171 A.2d 381 (Del. Ch. 1961) as "a case in which the evidence established that certain directors in effect gave little or no attention to the very purpose for which their corporation was created").

engaged in the manufacture and sale of diverse equipment throughout this continent and Europe.”¹²⁶ Liability should only ensue, the court concluded, “where the facts and circumstances of an employee’s wrongdoing clearly throw the onus for the ensuing results on inattentive or supine directors.”¹²⁷ No such inattentive directors were to be found in *Graham*, per the court: “The diverse nature of the manifold products manufactured by Allis-Chalmers, its very size, the nature of its operating organization, and the uncontroverted evidence of directorial attention to the affairs of the corporation . . . establish a case of non-liability on the part of the individual director defendants”¹²⁸ Unlike the *Briggs* court’s framing of attention to duty, the Court of Chancery in *Graham* described “directorial attention to the affairs of the corporation”—that is, entity-directed attention.

When the Delaware Supreme Court affirmed the Court of Chancery’s dismissal of *Graham*, the court recognized in dicta the possibility of director liability “for losses to the corporation through neglect of duty,” such as having “ignored either willfully or through inattention obvious danger signs of employee wrongdoing.”¹²⁹ This formulation came to be known as the red flags test,¹³⁰ and remains one of the two grounds for oversight liability (as described in the Introduction).¹³¹ As put forth in *Graham*, mid-century oversight law contemplated a narrow obligation, with directors not liable for operational failures absent notice and subsequent inaction based on that notice.¹³² The *Graham* court thus articulated a director-favorable vision of *oversight as action*, with the role for inattention cabined to its contribution to action.¹³³

Underpinning *Graham* and the red flags theory of liability is the logic of inquiry notice, which highlights the role of attention within the *oversight as action* framework.¹³⁴ Once a red flag calls the board’s

¹²⁶ *Graham*, 182 A.2d, at 332.

¹²⁷ *Id.*

¹²⁸ *Id.* at 332–33.

¹²⁹ *Graham*, 188 A.2d at 130 (emphasis added).

¹³⁰ See *In re Citigroup Inc. S’holder Derivative Litig.*, 964 A.2d 106 (Del. Ch. 2009).

¹³¹ See *supra* Introduction.

¹³² See David Yosifon, *Wandering Mind as Fiduciary Breach: Cognitive Duties of Corporate Directors*, 15 WM. & MARY BUS. L. REV. 1, 30 (2023) (citing *Graham* for the proposition that “[a]n early line of oversight cases held that directors were essentially not liable for operational failures unless they were actually on notice of some corporate problem and did nothing about it”); see also Bainbridge, Lopez & Oklan, *supra* note 35, at 577–78 (explaining that under *Graham*, directors have no duty to install compliance programs, absent being put on notice about red flags taking place).

¹³³ *Graham*, 188 A.2d at 130.

¹³⁴ See Joseph R. Long, *Notice in Equity*, 34 HARV. L. REV. 137, 144 (1920–1921) (“Notice based upon knowledge of facts or circumstances putting one upon inquiry is one of the most familiar and important instances of notice.”).

attention to an issue, the board is aware of that issue, and it must respond in some way. But, absent “obvious danger signs of employee wrongdoing,”¹³⁵ directors are entitled to rely on subordinates. The question under *Graham* is whether something “occur[red] to put [the board] on suspicion that something is wrong.”¹³⁶ Culpability emerges in their response once their attention is—or should be—called to something. Once the board is aware of something, its oversight liability can arise for failure to act appropriately.

Decades after *Graham*, *Caremark* became the landmark case on the directorial duty to oversee the corporation. In *Caremark*, Chancellor Allen supplemented the red flags test from *Graham*. Chancellor Allen outlined, also in dicta, “an affirmative duty [for boards] to ensure systematic monitoring.”¹³⁷ That information-systems theory became the second basis for oversight liability.¹³⁸ Chancellor Allen framed the analysis as focused on “director liability for inattention,”¹³⁹ with questions of oversight liability arising where directors failed “to satisfy fully the duty of attention.”¹⁴⁰ If “a director *in fact exercises a good faith effort to be informed and to exercise appropriate judgment*, he or she should be deemed to satisfy fully the duty of attention.”¹⁴¹ Chancellor Allen’s “duty of attention” analysis thus serves as a test for overall oversight liability. Using the language of “exercise,” the analysis was still exhibiting an action-oriented view of oversight.

Even as it invokes the language of attention, the *Caremark* decision largely tracks the *oversight as action* logic. Mirroring *Graham*, a factor for director liability is whether information came to the board’s attention, even as the ultimate question is whether the board acted accordingly.¹⁴² Chancellor Allen considered “the other potential avenue to director liability . . . director inattention or ‘negligence.’”¹⁴³ The conduct at issue was “ignorance of liability creating activities within the corporation.”¹⁴⁴ While ignorant, the *Caremark* board was not culpable for inattention;

¹³⁵ *Graham*, 188 A.2d at 130.

¹³⁶ *Id.*

¹³⁷ Dalia Tsuk Mitchell, *From Tort to Finance: Delaware’s Sedative Duty to Monitor*, in *COMPLEXITY AND CRISIS IN THE FINANCIAL SYSTEM* 121, 135 (Matthew Hollow, Folarin Akinbami & Ranald Michie eds., 2016).

¹³⁸ See *supra* Introduction.

¹³⁹ *In re Caremark Int’l Inc. Derivative Litig.*, 698 A.2d 959, 968 (Del. Ch. 1996).

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² Chancellor Allen observed that, in service of the “failure to monitor” claim, “the Board was to some extent unaware of the activities that led to liability.” *Id.* at 971.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

“only a sustained or systematic failure of the board to exercise oversight—such as an utter failure to attempt to assure a reasonable information and reporting system exists—will establish the lack of good faith that is a necessary condition to liability.”¹⁴⁵ Culpability would flow from the board’s *inaction*, not its inattention.

Even as Chancellor Allen ultimately cabined attention to its relationship to action, he engaged seriously with attention’s role. Chancellor Allen described the stakes in terms of when the judiciary should review “board attentiveness.”¹⁴⁶ Chancellor Allen contemplated the director “duty of attention or care,”¹⁴⁷ finding that “[d]irector liability for a breach of the duty to exercise appropriate attention may, in theory, arise in two distinct contexts.”¹⁴⁸ Allen’s formulation of *Caremark*’s two theories of liability—information-systems and red flags—invoked the concept of attention in determining when a director would be “liab[le] to the corporation for a loss” stemming from director inattention.¹⁴⁹ Red flags liability would “arise from an *unconsidered failure of the board to act* in circumstances in which due attention would, arguably, have prevented the loss.”¹⁵⁰ As in *Graham*, the court used the logic of notice, which (as described above) hinges on the relationship between attention and action.

The red flags theory of *Caremark* liability contemplates *oversight as action*, with a prominent role for attention as a test for whether inaction was appropriate.¹⁵¹ Chancellor Allen grappled with the problem of sorting the proper “subject[s] of director attention” from other types of “ordinary business decisions that are made by officers and employees deeper in the interior of the organization.”¹⁵² Decisions within the organization that, on their face, do not rise to the level of mandatory director attention may still “vitally affect the welfare of the corporation and its ability to achieve its various strategic and financial goals.”¹⁵³ This challenge still plagues oversight doctrine today.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 967 n.16 (framing the overall inquiry in the case as “judicial review of board attentiveness”).

¹⁴⁷ The plaintiffs “charge[d] the director defendants with breach of their duty of attention or care in connection with the ongoing operation of the corporation’s business.” *Id.* at 967.

¹⁴⁸ *Id.* (citing E. Norman Veasey & Julie M.S. Seitz, *The Business Judgment Rule in the Revised Model Act, the Trans Union Case, and the ALI Project—A Strange Porridge*, 63 TEX. L. REV. 1483 (1985)).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.* at 968.

¹⁵³ *Id.*

Subsequent oversight cases also relied on attention. Following the decision in *Caremark*, it was unclear what, if anything, would satisfy *Caremark*'s information-systems theory of liability, nor the relationship of oversight to the core fiduciary duties of loyalty and care (addressed in Part I).¹⁵⁴ At first, *Graham* lived on as the more viable theory of oversight liability under the red flags theory in *Caremark* dicta. For example, information-systems theory of oversight liability came up in *Ash v. McCall*, a 2000 case arising from accounting fraud allegations, but was not found to be properly pled.¹⁵⁵ In *Ash*, Chancellor Chandler applied *Graham* and *Caremark* as "the seminal Delaware cases addressing directors' oversight duties."¹⁵⁶ Chancellor Chandler found that upon "[becoming] aware of the accounting improprieties," the McKesson directors "immediately took decisive steps to disclose and cure them," "actions [that] do not bespeak faithless or imprudent fiduciaries."¹⁵⁷ In terms of good faith and prudence, Chancellor Chandler outlined the expectation that a board respond immediately and thoroughly once aware of an issue.¹⁵⁸

Subsequent cases have refined the doctrine but not unseated *Caremark*. In *Stone v. Ritter*, the Delaware Supreme Court adopted the *Caremark* dicta as law,¹⁵⁹ affirming and reformulating the *Caremark* framework of oversight liability.¹⁶⁰ While the Delaware Court of Chancery made no mention of attention,¹⁶¹ the Delaware Supreme Court did, in its quotation from the complaint.¹⁶² In their decision, the Delaware Supreme Court also quoted the *Caremark* information-systems formulation: "to assure the board that appropriate information will come to its attention in a timely manner as a matter of ordinary

¹⁵⁴ See *supra* Part I.

¹⁵⁵ *Ash v. McCall*, No. 17132, 2000 LEXIS 144, at *3, *48 (Del. Ch. Sep. 15, 2000).

¹⁵⁶ *Id.* at *51.

¹⁵⁷ *Id.* at *53.

¹⁵⁸ *Id.*

¹⁵⁹ The Delaware Supreme Court held that *Caremark* articulates the necessary conditions for assessing director oversight liability in *Stone v. Ritter*, upholding dismissal by the Chancery Court and citing also to its recent decision in *In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27 (Del. 2006). *Stone v. Ritter*, 911 A.2d 362, 365, 372 (Del. 2006).

¹⁶⁰ See Claire A. Hill & Brett H. McDonnell, *Stone v. Ritter and the Expanding Duty of Loyalty*, 76 *FORDHAM L. REV.* 1769, 1778 (2007) ("[W]hat had been generally understood to be an instance of the duty of care, indeed perhaps the leading operative instance of the duty of care, became officially an instance of the duty of loyalty.").

¹⁶¹ *Stone*, 911 A.2d at 372 (noting that "[m]ost of the decisions that a corporation, acting through its human agents, makes are, of course, not the subject of director attention") (quoting *In re Caremark Int'l Inc. Derivative Litig.*, 698 A.2d 959, 968 (Del. Ch. 1996)).

¹⁶² The Delaware Supreme Court in *Stone* quoted the complaint, which alleged that "the defendants had utterly failed to implement any sort of statutorily required monitoring, reporting or information controls that would have enabled them to learn of problems requiring their attention." *Id.* at 364.

operations.”¹⁶³ And, the court included attention in its restatement of the rule from *Caremark*.¹⁶⁴ Finally, in affirming the dismissal by the Court of Chancery, the court again quoted from *Caremark*’s treatment of director attention: “Delaware courts have recognized that ‘[m]ost of the decisions that a corporation, acting through its human agents, makes are, of course, not the subject of director attention.’”¹⁶⁵ The court’s decision in *Stone* shows that attention continued to be useful as courts sought to apply Delaware’s still-developing oversight doctrine.

A couple years later, in *Lear II*, Vice Chancellor Strine construed the duty to monitor narrowly.¹⁶⁶ Vice Chancellor Strine distinguished *Lear II* from *Caremark* using the concept of board attention—oversight doctrine would not apply to “a discrete transaction that was subject to almost daily board attention.”¹⁶⁷ Vice Chancellor Strine formulated inattention with respect to “duty”—that is, to the demands of the fiduciary director role.¹⁶⁸ Board attention is applied to transactions and director attention is applied to their duties, but attention is not itself a duty in *Lear II*.

In *Massey*, a 2011 derivative suit related to safety oversight of a mining operation, the Court of Chancery held that the board of the mining company failed to respond to “numerous red and yellow flags” that the company’s management was placing profits above safety.¹⁶⁹ Because the board acted with scienter in the fiduciary context, the very demanding pleading standard for an oversight claim was met because the directors acted in opposition to their fiduciary duties and knew they were so doing.¹⁷⁰ *Massey* set a high bar, applying only to situations where the board consciously flouted the law.¹⁷¹ The only explicit mention of attention in *Massey* is in the citation of *Stone*’s formulation

¹⁶³ *Id.* at 368 (quoting *Caremark*, 698 A.2d at 970).

¹⁶⁴ *Id.* at 370.

¹⁶⁵ *Id.* at 372 (quoting *Caremark*, 698 A.2d at 968).

¹⁶⁶ *In re Lear Corp. S’holder Litig.*, 967 A.2d 640, 653 (Del. Ch. 2008) (applying only to “independent directors with no motive to injure the corporation when they are accused of indolence in monitoring the corporation’s compliance with its legal responsibilities”).

¹⁶⁷ *Id.* (“[T]he very need of the plaintiffs to take legal doctrine that arose in the very different monitoring context and try to apply it to a discrete transaction that was subject to almost daily board attention suggests their desperation.”).

¹⁶⁸ *Id.* To Strine, “fidelity to one’s duty is inconsistent with persistent shirking and conscious inattention to duty.” *Id.*

¹⁶⁹ *In re Massey Energy Co.*, No. 5430-VCS, 2011 LEXIS 83, at *68 (Del. Ch. May 31, 2011).

¹⁷⁰ *See id.* at *71–72 (explaining that the *Massey* defendants pointed to evidence that the board knew about the company’s safety issues, so a faithful application of the pleading standard would preclude a dismissal of plaintiffs’ claims at the pleading stage).

¹⁷¹ *See id.* at *86. To that end, Vice Chancellor Laster has noted that a *Massey* claim “is not technically an oversight claim, but it has a similar feel.” *In re McDonald’s Corp. S’holder Derivative Litig.*, 291 A.2d 652, 677 (Del. Ch. 2023); *see also* *Leb. Cnty. Emps.’ Ret. Fund v. Collis*, 287 A.3d 1160, 1205 (Del. Ch. 2022) (“The principal difference [between a Red-Flags and a *Massey* claim] is that in a Red-Flags Claim, the fiduciary makes a conscious decision

of the test for oversight.¹⁷² *Massey* fits more clearly into the *oversight as action* theory, with its emphasis on intentional action in violation of positive law.

This Part has shown that Delaware courts from *Graham* through *Massey* have analyzed board culpability with explicit reference to the concept of attention. A close read of the cases reveals that what matters for board breach of the obligation to oversee is whether “information that would put [the board] on notice of a threatened corporate trauma”¹⁷³—that is, red or yellow flags¹⁷⁴—came to the board’s attention, and what the board decided to do once it became aware of that information. Part III argues that Delaware courts care not only about inaction in the context of oversight, but also about inattention.

III

OVERSIGHT AS ATTENTION

The main inquiry in the cases addressed in Part II, where *oversight as action* set the tone, was into director inaction. Part II laid out courts’ usage of attention in the early development of Delaware oversight doctrine, showing how attention was used for explanatory or elaborative purposes. This Part shows that also at stake in oversight doctrine is whether a director can be held personally liable for inattention: *oversight as attention*. It is more challenging as a theory of liability than the action-based approach, for substantive law as well as evidentiary reasons, but also cuts more directly to the heart of oversight doctrine’s concerns.

Director liability for failure to oversee originated in the director-protective *oversight as action* paradigm. This Part addresses the subsequent doctrinal development, with increased viability as a cause of action and the rise of *oversight as attention*.

A. Increased Viability: Legal Consequences of Director Inattention

Where the doctrine left off in Part II, oversight was still the “most difficult theory in corporation law.”¹⁷⁵ In 2019, a turning point occurred in *Marchand v. Barnhill*, when the Delaware Supreme Court overrode the Court of Chancery in holding that the *Marchand* plaintiffs met

to ignore red flags. In a *Massey* Claim, the fiduciary makes a conscious decision to prioritize profit over legal compliance.”).

¹⁷² *Massey*, 2011 LEXIS 83, at *85–86 n.157.

¹⁷³ *Leb. Cnty. Emps.’ Ret. Fund v. AmerisourceBergen Corp.*, No. 2019-0527-JTL, 2020 WL 132752, at *20 (Del. Ch. Jan. 13, 2020).

¹⁷⁴ *Id.*; *Massey*, 2011 LEXIS 83, at *68.

¹⁷⁵ *In re Caremark Int’l Inc. Derivative Litig.*, 698 A.2d 959, 967 (Del. Ch. 1996).

Caremark's demanding pleading requirements.¹⁷⁶ That ruling paved the way for subsequent claims surviving motions to dismiss.

In *Marchand*, Blue Bell Creameries sold a substantial quantity of ice cream contaminated by listeria and had to issue massive recalls.¹⁷⁷ The Blue Bell board was unaware of the unsanitary factory conditions that caused the deadly outbreak, despite inspection reports and regulatory inquiry.¹⁷⁸ Even so, on the red flags theory of oversight liability, the Court of Chancery found that plaintiffs did not adequately plead red flags ignored by the board.¹⁷⁹ The board was not liable for failure to respond to reports within the company that did not make their way to the board. *Oversight as action* did not work here.

But had the board of Blue Bell Creameries not seen red flags because they were not paying attention to food safety, an issue central to the company's business model? Ought they have put systems in place to ensure such reports came before them?

The Delaware Supreme Court focused on the information-systems theory of *Caremark* liability, which asks about measures the board put in place to learn of matters requiring its attention. It found that the Blue Bell board made no effort to adopt systems to monitor factory sanitation or food safety, nor did food safety appear on its meeting agendas.¹⁸⁰

At stake in *Marchand* was *oversight as attention*. The court considered whether lack of director attentiveness can reach the level of bad faith indifference such that it constitutes a breach of loyalty.¹⁸¹ Conceding the "mundane reality" of operating "in a highly regulated industry,"¹⁸² the *Marchand* court stipulated that having "complied with some of the applicable regulations does not foreclose any pleading-stage inference that the directors' lack of attentiveness rose to the level

¹⁷⁶ C.A. No. 2017-0586-NAC, 2025 WL 3540294, at *4 (Del. Ch. Dec. 10, 2025) (citing *Marchand v. Barnhill*, 212 A.3d 805, 807–09 (Del. 2019) (holding that the complaint stated a well-pled *Caremark* claim and alleged particularized facts creating a reasonable inference that demand was futile)). The Delaware Supreme Court remanded the case for further proceedings. *Id.* After remand, Blue Bell USA's board appointed an independent special litigation committee to investigate the allegations. *Id.* A month later, the parties told the Court they had agreed to stay the action, after which the court did not enter a stay and the parties did not follow up. *Id.* The Blue Bell USA special litigation committee investigated the matter for five years. *Id.*

¹⁷⁷ *Marchand v. Barnhill*, C.A. No. 2017-0586-JRS, 2018 WL 4657159, at *1 (Del. Ch. Sep. 27, 2018), *rev'd*, 212 A.3d 805 (Del. 2019).

¹⁷⁸ *Id.* at *6–7.

¹⁷⁹ *Id.* at *19–20.

¹⁸⁰ *Marchand v. Barnhill*, 212 A.3d 805, 822–24 (Del. 2019).

¹⁸¹ *Id.* at 820–24.

¹⁸² *In re Boeing Co. Derivative Litig.*, C.A. No. 2019-0907-MTZ, 2021 WL 4059934, at *29 (Del. Ch. Sep. 7, 2021) (applying and quoting *Marchand*, 212 A.3d at 823).

of bad faith indifference required to state a *Caremark* claim.”¹⁸³ Per the *Marchand* court, at least, lack of attention would appear to matter.

Later that year, in *Clovis*, the Chancery Court sustained a claim that, even though the board of a pharmaceutical company received regular reports through a reasonable system of internal controls, it failed to exercise adequate oversight because it did not follow up on red flags in those reports.¹⁸⁴ When the company’s most promising drug was in clinical trials seeking approval by the Food and Drug Administration (FDA), the board received presentations showing that management was not complying with the required protocols.¹⁸⁵ Yet, the board did nothing to remediate the situation. *Clovis* thus fits better with the *oversight as action* theory, as the problem was not a lack of board awareness or attention. Rather, the problem was inaction in response to a red flag.

Going into 2020, the Delaware Court of Chancery had its marching orders from the Delaware Supreme Court. Potential litigants had a better sense of which facts would be necessary for a successful pleading. Still, it was striking when multiple oversight cases survived the motion to dismiss stage.¹⁸⁶ First, in *Hughes v. Hu*, the board’s oversight system did not alert it to the electric vehicle parts manufacturer’s routine failures to meet reporting requirements.¹⁸⁷ The Court of Chancery held that the mere presence of an oversight system would not suffice to insulate the board from liability—the board also needed to pay attention to that system. Next, in *Teamsters Local 443 Health Services & Insurance Plan v. Chou*, the court found at the pleading stage that the AmerisourceBergen board ignored red flags of a subsidiary’s violations of applicable regulations.¹⁸⁸ The board even received a report from outside counsel calling the board’s attention to inadequate monitoring of the delinquent subsidiary.¹⁸⁹ But the board did not attend to it. Then, as previously detailed, in 2021 *Boeing* addressed director

¹⁸³ *Id.*

¹⁸⁴ *In re Clovis Oncology, Inc. Derivative Litig.*, C.A. No. 2017-0222-JRS, 2019 WL 4850188, at *13–36 (Del. Ch. Oct. 1, 2019).

¹⁸⁵ *Id.* at *36–43.

¹⁸⁶ Meredith Kotler, Pamela Marcogliese & Marques Tracy, *Recent Delaware Court of Chancery Decision Sustains Another Caremark Claim at the Pleading Stage*, HARV. L. SCH. F. CORP. GOVERNANCE (May 25, 2020), <https://corpgov.law.harvard.edu/2020/05/25/recent-delaware-court-of-chancery-decision-sustains-another-caremark-claim-at-the-pleading-stage> [<https://perma.cc/576Q-6SQW>]. The authors observed the striking shift from “decades of routinely dismissing such claims”—*Hu* marked the third Chancery Court decision since *Marchand* sustaining a *Caremark* claim at the pleading stage. *Id.*

¹⁸⁷ C.A. No. 2019-0112-JTL, 2020 WL 1987029, at *1 (Del. Ch. Apr. 27, 2020).

¹⁸⁸ The subsidiary likely violated FDA regulations for the marketing and storage of drugs. C.A. No. 2019-0816-SG, 2020 WL 5028065, at *24–25 (Del. Ch. Aug. 24, 2020).

¹⁸⁹ *See id.* at *19–20.

liability for the aircraft manufacturer's deadly 2018 and 2019 plane crashes, observing that "[t]he lack of Board-level safety monitoring was compounded by Boeing's lack of an internal reporting system by which whistleblowers and employees could bring their safety concerns to the Board's attention."¹⁹⁰ Each of these cases included aspects of both *oversight as action* and *oversight as attention*.

Today, Delaware courts are split on what constitutes a viable *Caremark* pleading.¹⁹¹ Oversight cases since *Marchand* have been controversial.¹⁹² For example, in *McDonald's I* and *II*, Vice Chancellor Laster dismissed the *Caremark* case against the McDonald's board of directors but sustained against a corporate officer.¹⁹³ The degree to which director fiduciary duties applied to corporate officers had been an open question.¹⁹⁴ Some scholars disagreed with Vice Chancellor Laster's extension.¹⁹⁵

Vice Chancellor Laster drew on "attention" in characterizing Delaware oversight law. In the *McDonald's Directors* opinion,

¹⁹⁰ *In re Boeing Co. Derivative Litig.*, C.A. No. 2019-0907-MTZ, 2021 WL 4059934, at *27 (Del. Ch. Sep. 7, 2021).

¹⁹¹ For example, in *Lebanon County Employees' Retirement Fund v. Collis*, the Delaware Supreme Court reversed the Court of Chancery's dismissal of a *Caremark* claim that alleged that the directors and officers of AmerisourceBergen had breached their fiduciary duties of oversight through "bad faith failure to oversee [AmerisourceBergen's] compliance with laws governing the distribution of opioids." 311 A.3d 773, 780, 806 (Del. 2023) (alteration in original) (quoting App. to Opening Brief at A190).

¹⁹² See *supra* Introduction.

¹⁹³ Compare *In re McDonald's Corp. S'holder Derivative Litig.*, 289 A.3d 343 (Del. Ch. 2023) (denying motion to dismiss), with *In re McDonald's Corp. S'holder Derivative Litig.*, 291 A.3d 652 (Del. Ch. 2023) (granting motion to dismiss).

¹⁹⁴ See Paul D. Weitzel, *The Case Against Officer Fiduciary Duties*, 102 NEB. L. REV. 344, 346 (2023); *Clarity at Last? Court of Chancery Confirms Corporate Officers Owe Oversight Duties*, DUANE MORRIS LLP (Feb. 13, 2023), https://www.duanemorris.com/alerts/clarity_at_last_court_chancery_confirms_corporate_officers_owe_oversight_duties_0223.html [https://perma.cc/BX9B-4NW5].

¹⁹⁵ See, e.g., Stephen M. Bainbridge, *Delaware Court's McDonald's Opinion: Another Step in Caremark's Ingestion of All Corporate Law*, WASH. LEGAL FOUND. (Feb. 9, 2023), <https://www.wlf.org/2023/02/09/wlf-legal-pulse/delaware-courts-mcdonalds-opinion-another-step-in-caremarks-ingestion-of-all-corporate-law> [https://perma.cc/5TH4-ULG8]; cf. Nathaniel Kritzer, *Look Beyond the Headlines: Delaware's Extension of Caremark Claims to Officers Is Not as Revolutionary as You Might Think*, STEPTOE LLP: CLIENT ALERTS (Jan. 31, 2023), <https://www.steptoel.com/en/news-publications/look-beyond-the-headlines-delawares-extension-of-caremark-claims-to-officers-is-not-as-revolutionary-as-you-might-think.html> [https://perma.cc/P9UX-7RK8] ("The decision by the Delaware Court of Chancery last week to deny a corporate officer's motion to dismiss *Caremark* claims against him has sent ripples through the corporate community under headlines hailing it as a 'landmark ruling' and a 'wake-up call' for corporate executives."); Chen Fu, *Duty of Oversight Extended to Corporate Officers: A New Expansion of Delaware Fiduciary Duties*, COLUM. BUS. L. REV. (2023), <https://journals.library.columbia.edu/index.php/CBLR/announcement/view/600> [https://perma.cc/B8A4-4ZBN] (noting the decision was "groundbreaking" on "an issue of first impression").

Vice Chancellor Laster described *Graham's* red flags framework as permitting directors to rely on management, such that they “only needed to act when ‘grounds for suspicion’ came to their attention.”¹⁹⁶ Vice Chancellor Laster also developed oversight law in recent cases involving Walmart’s oversight failures regarding opioid distribution.¹⁹⁷ In both *McDonald’s II* and *Walmart*, Laster wrote about directors’ time and attention as “precious” and “scarce commodities,”¹⁹⁸ such that their allocation is subject to the protections of the business judgment rule.¹⁹⁹

As cases continue to test the bounds of Delaware oversight doctrine,²⁰⁰ courts will face pressure to distinguish yellow flags from

¹⁹⁶ *In re McDonald’s Corp. S’holder Derivative Litig.*, 291 A.3d 652, 675 (Del. Ch. 2023) (quoting *Graham v. Allis-Chalmers Mfg. Co.*, 188 A.2d 125, 130 (Del. 1963)).

¹⁹⁷ See Ont. Provincial Council of Carpenters’ Pension Tr. Fund v. Walton, 294 A.3d 65, 99 (Del. Ch. 2023) (holding plaintiffs’ claims timely and denying motion to dismiss on that basis); Ont. Provincial Council of Carpenters’ Pension Tr. Fund v. Walton, C.A. No. 2021-0827-JTL, 2023 WL 3093500, at *52 (Del. Ch. Apr. 26, 2023) (granting motion to dismiss claims pertaining to Walmart’s distribution of opioids, denying motion to dismiss claims relating to Walmart pharmacies’ dispensing of opioids, and denying motion to stay the action).

¹⁹⁸ “Time and attention are precious commodities, and with limited supplies of each, officers and directors must make judgments about what risks to monitor.” *McDonald’s Corp. S’holder Derivative Litig.*, 291 A.3d at 679. “Time and attention are scarce commodities . . .” Ont. Provincial Council of Carpenters’ Pension Tr. Fund, 2023 WL 3093500, at *32.

¹⁹⁹ The business judgment rule protects the loyal, informed, good faith decisions that officers and directors make about how and where to devote their time and resources. Ont. Provincial Council of Carpenters’ Pension Tr. Fund, 2023 WL 3093500, at *32. (“Envision that a fiduciary may have failed to try to put an information system in place for a particular risk. . . . [T]hat decision initially could be a proper exercise of business judgment.”).

²⁰⁰ For example, *Fox* represented an expansion of viable oversight claims when the court considered defamation, a common law cause of action, as the source of corporate trauma giving rise to an oversight suit. See, e.g., *In re Fox Corp. Derivative Litig.*, C.A. No. 2023-0418-JTL, 2024 WL 5233229, at *9–10 (Del. Ch. Dec. 27, 2024). The plaintiffs in *Fox* argued under *Massey* that Fox company executives pursued violation of law as a business model—namely, defamation and economic harm to the company, which had already been established via settlement of underlying defamation claims. *October 1, 2025 Edition*, CHANCERY DAILY (Oct. 1, 2025). As the *Fox* court observed, although “Delaware oversight cases have generally involved corporate traumas resulting from statutory or regulatory violations. . . . Sensibly, the defendants have not argued that oversight liability cannot arise from a corporate trauma grounded in common law liability.” *In re Fox Corp.*, 2024 WL 5233229, at *10 (Del. Ch. Dec. 27, 2024). The court explained that this concession was sensible because the “common law is just as much ‘the law’ as statutory law, particularly for a well-established doctrine like defamation.” *Id.* In *Brewer*, Chancellor McCormick ruled that stockholder Katherine Richards Brewer adequately alleged that nine of fourteen board members faced a substantial likelihood of liability for consciously ignoring warnings about the bank’s unlawful overdraft practices between August 2018 and July 2021. *Brewer ex rel. Regions Fin. Corp. v. Turner*, C.A. No. 2023-1284-KSJM, 2025 WL 2769895, at *14 (Del. Ch. Sep. 29, 2025); see also *Giuliano v. Grenfell-Gardner*, C.A. No. 2021-0452-KSJM, 2025 WL 2502176, at *7–9 (Del. Ch. Sep. 2, 2025) (allowing *Caremark* claims brought by a bankruptcy plan administrator to survive the motion to dismiss); *In re Facebook Inc. Derivative Litig.*, C.A. No. 2018-0307-JTL, 2025 WL 262194 (Del. Ch. Jan. 21, 2025) (marking the first time a *Caremark* case went to trial, although the trial did not conclude). But see Transcript at 4–5, *Schertz ex rel. Carvana*

red, “utter failure” from “not in good faith,” the point at which legal violations rise to the level of director liability, and what constitutes a reasonable board-level system of monitoring and reporting.²⁰¹ Adequate oversight is a fact-dependent matter; the “mission-critical” test may seem clear-cut for an airplane manufacturer like Boeing, for which aircraft safety is critical to the long-term viability of the company, but less so for a multi-industry, multinational conglomerate.²⁰² As with other areas of law, the answer depends on the level of generality with which we pitch the question.²⁰³

Attention offers one way to sort through these questions. It does not explain everything about oversight doctrine. It is, however, an important piece. This Note argues that to understand oversight, we need to understand attention. Section III.B outlines the mechanism by which attention matters. It draws from other non-legal disciplines to put forward a model of attention, which helps explain the operation of oversight doctrine.

B. *Theoretical Groundings: Taking Attention Seriously*

The prior sections identified attention as a throughline and explanatory element for Delaware oversight doctrine, introducing the recent rise of *oversight as attention*. This Section addresses the concept of attention in greater detail, showing how *oversight as attention* is in line with prior scholarship and case law. This Section argues that we cannot understand oversight without attention. It engages with existing work from within and outside law to show how attention clarifies oversight doctrine.

Viewing board oversight through the lens of attention clarifies the stakes of unresolved issues. After all, what constitutes adequate oversight is a context-specific, fact-dependent inquiry. The conceptual promise of attention is to accommodate for variations of what it means

Co. v. Garcia, C.A. No. 2023-0600-KSJM (Del. Ch. Sep. 25, 2024) (denying plaintiff’s “novel controller oversight claim” as a matter of law); *In re TransUnion Derivative S’holder Litig.*, 324 A.3d 869, 883–84 (Del. Ch. 2024) (rejecting plaintiffs’ attempted distinction of oversight theories under *Caremark* and *Massey*: “Neither precedent nor logic supports the bright line the plaintiffs work to draw between *Caremark* and *Massey*.”).

²⁰¹ See Shapira, *Conceptualizing Caremark*, *supra* note 27, at 467, 469–71, 481–84, 505 (discussing the questions Fox raises concerning the underdeveloped oversight duty doctrine).

²⁰² *Marchand v. Barnhill*, 212 A.3d 805, 824 (Del. 2019) (holding that *Caremark* requires “a reasonable system of monitoring and reporting about the corporation’s central compliance risks,” and finding that the complaint sufficiently pleaded the claim that Blue Bell had no board-level food-safety monitoring system).

²⁰³ See Frank H. Easterbrook, *Abstraction and Authority*, 59 U. CHI. L. REV. 349, 358 (1992) (describing the interplay between levels of generality and legal outcomes).

to fulfill the oversight duty—to supervise, to monitor, to inquire—without sacrificing meaning.

Many legal scholars, jurists, and practitioners have written about oversight.²⁰⁴ Secondary literature often uses the language of attention to make sense of oversight, but without grappling with the meaning of attention in much detail.²⁰⁵ Some scholarship has addressed the attentional aspect of oversight implicitly or obliquely, making similar moves to the case law by referencing and invoking attention but not spelling out its content or fleshing out its implications.²⁰⁶

Fewer have directly addressed the attentional dimension of oversight. Though this Note is not the first to take up the question of what attention means in the context of oversight, it does break ground in its integration of recent case law, contextualization of prior scholarship and jurisprudence, and engagement with attention's conceptual core.

Attention's appearance in Chancellor Allen's *Caremark* opinion is no accident. Limited but important scholarship addressing the attentional aspects of oversight predated and was cited in *Caremark*. A few articles grappled with the question of director attention, establishing the intellectual scaffolding that Chancellor Allen used to construct the information-systems prong of *Caremark*.²⁰⁷ One approach framed a "director's attention to the business of the company" as an obligation subject to breach for failure to exercise the requisite care.²⁰⁸ A second

²⁰⁴ See *supra* Introduction.

²⁰⁵ See, e.g., Robert C. Bird & Julie Manning Magid, *Toward a Systems Architecture in Corporate Governance*, 24 U. PA. J. BUS. L. 84, 120 (2021) (characterizing *Marchand* as holding that "[m]ission critical risks should warrant heightened attention by anyone whose responsibility is relevant to that system. This, of course, includes heightened attention by boards of directors").

²⁰⁶ See, e.g., Hill & McDonnell, *supra* note 160, at 1776; Fairfax, *supra* note 35, at 421; Roy Shapira, *Mission Critical ESG and the Scope of Director Oversight Duties*, 2022 COLUM. BUS. L. REV. 732 (2022) (using the terms "attentive" and "inattentive" to discuss director conduct but not fleshing out their meanings).

²⁰⁷ See Donald E. Pease, *Aronson v. Lewis: When Demand is Excused and Delaware's Business Judgment Rule*, 9 DEL. J. CORP. L. 39, 71–72 (1984) (articulating a formulation of Delaware's business judgment rule and when that rule is applicable); Bayless Manning, *The Business Judgment Rule and the Director's Duty of Attention: Time for Reality*, 39 BUS. L. 1477, 1494, 1499–500 (1984) (discussing the implications of the business judgment rule being applied to corporate directors); James L. Griffith Jr., *Director Oversight Liability: Twenty-First Century Standards and Legislative Controls on Liability*, 20 DEL. J. CORP. L. 653, 684 (1995) ("[A] director gives sufficient attention to his duties if he properly delegates responsibility and reasonably relies on the reports he receives. While that standard does not create a bright line test, it does create a test which incorporates the new meanings which modern developments give to delegation and reliance."); E. Norman Veasey & Julie M.S. Seitz, *The Business Judgment Rule in the Revised Model Act, the Trans Union Case, and the ALI Project—A Strange Porridge*, 63 TEX. L. REV. 1483, 1503–04 (1985) (using attention to duty to derive "the standard of care in the oversight context").

²⁰⁸ Pease, *supra* note 207, at 71.

disagreed, arguing against the duty of care conception of oversight, and suggesting a duty of attention theory of oversight instead.²⁰⁹ In the second view, the duty of attention would better account for the board's "continuing flow of supervisory process."²¹⁰ It would involve, inter alia, "the amount of time devoted, the complexity of the enterprise, pace and deliberation, uncertainty and risk-taking, diversity of the board, the decisional process, the character of the agenda, agenda-setting, actions not taken, homework, attendance, reliance, depth of inquiry, and judgment."²¹¹ A third view reframed the test for oversight as whether "directors violate their duty of oversight when they fail to give sufficient attention to their duties," drawing on trends in business practices around delegation and reliance that implicated theories of director oversight.²¹² In the third view, abdication cases are excluded as loyalty rather than oversight issues, and the remaining oversight cases are analyzed according to the "duty of attention." The concepts and logic articulated in these sources shaped Chancellor Allen's *Caremark* decision and the logic of oversight doctrine today.

Following *Caremark*, a limited set of scholarship has considered the relationship between oversight and attention. One approach observed the omission liability problem of director inattention in the context of corporate oversight.²¹³ Under an alternate approach, oversight does require directors to pay attention to corporate operations, in a way that can be very specific.²¹⁴ That holds true even though "the oversight jurisprudence on its own terms does not set out a duty to literally sustain

²⁰⁹ Manning "take[s] it as axiomatic that a director should not be held liable for having failed in his duty of attention unless his conduct departs significantly from normal expectations of proper conduct." Manning, *supra* note 207, at 1480.

²¹⁰ *Id.* at 1494, 1499–1500. In his descriptive account of how corporate boards function, Manning made the case for what would become *Caremark*'s information-systems prong: Manning showed that healthy, well-functioning boards were already ensuring appropriate internal information systems were in place. *Id.* at 1484–85.

²¹¹ Griffith, *supra* note 207, at 672 n.120 (synthesizing Manning).

²¹² *Id.* at 684 ("[A] director gives sufficient attention to his duties if he properly delegates responsibility and reasonably relies on the reports he receives. While that standard does not create a bright line test, it does create a test which incorporates the new meanings which modern developments give to delegation and reliance.").

²¹³ See *id.* at 694 (reviewing cases in which the Delaware judiciary analyzed "director abdication claims under the duty of care or a gross negligence standard" that circumvented the omission of liability defense). See also Elizabeth A. Nowicki, *Director Inattention and Director Protection under Delaware General Corporation Law Section 102(b)(7): A Proposal for Legislative Reform*, 33 DEL. J. CORP. L. 695 (2008). Nowicki generally observed the omission liability problem of director inattention in the context of corporate oversight, considering the usefulness of a regime where "directors face some credible threat of personal liability for inattentive conduct at the corporate helm." *Id.* at 695.

²¹⁴ See Yosifon, *supra* note 132, at 20–22 (considering the cognitive duties of corporate directors).

attention in the course of any particular occasion,” but rather “concerns an ongoing, iterative duty of the board, which can and must take place across different meetings over extended periods of time.”²¹⁵ In this view, directors have “a bottom-line affirmative cognitive obligation [to the firm],” “a decisive, substantive requirement to concentrate and engage in active critical thinking in the course of board deliberations.”²¹⁶ But focusing on the minds of individual directors misses a fundamental piece of the attentional puzzle for the corporate board: the collective. Oversight is owed by the board to the corporation, even though potential liability accrues to individual directors. More is at work in the cases than individual-level inattention in the lead-up to a corporate trauma.

This Note has now canvassed the doctrinal sources on attention and developed a sense of attention’s importance to oversight. It now turns to a robust literature on attention in multiple disciplines outside of law. As previewed in Section I.D, scholars in fields including philosophy, psychology, and economics have written about attention, often in dialogue with each other and additional fields.²¹⁷ The empirical literature includes some work on director attention but does not engage deeply with the law.²¹⁸ From these sources emerges a rough model of attention. That in turn maps onto oversight, putting into relief open aspects of the doctrine. Ongoing advances in our understanding of attention may thus refine oversight doctrine moving forward.

Here is a basic synthetic model of attention, simplified for present purposes. In philosophy, as discussed above, attention prioritizes,²¹⁹ is flexible,²²⁰ and serves as a prerequisite for action.²²¹ Usefully supplementing theory, experimental psychology characterizes

²¹⁵ Yosifon likewise finds general silence in recent law and scholarship on the fiduciary implications of director attention or inattention. *Id.* at 22–23, 30.

²¹⁶ *Id.* at 28.

²¹⁷ See, e.g., WAYNE WU, *MOVEMENTS OF THE MIND: A THEORY OF ATTENTION, INTENTION AND ACTION* (2023); Mole, *supra* note 96; Bernhard Hommel, Craig S. Chapman, Paul Cisek, Heather F. Neyedli, Joo-Hyun Song & Timothy N. Welsh, *No One Knows What Attention Is*, 81 ATTENTION, PERCEPTION, & PSYCHOPHYSICS 2288 (2019); JENNINGS, *supra* note 91.

²¹⁸ See, e.g., Christopher S. Tuggle, David G. Sirmon, Christopher R. Reutzel & Leonard Bierman, *Commanding Board of Director Attention: Investigating How Organizational Performance and CEO Duality Affect Board Members’ Attention to Monitoring*, 31 STRATEGIC MGMT. J. 946 (2010).

²¹⁹ WATZL, *supra* note 91, at 3.

²²⁰ Mole, *supra* note 96 (“[A]ttention requires the unified activity of whichever processes happen to be relevant to the subject’s task, but it does not require any *particular* processes to be taking place.”).

²²¹ Wayne Wu, *Action Always Involves Attention*, 79 ANALYSIS 693, 701 (2019) (“Attending in a certain way is something that one gets better at doing over time, and when it does, the salient development is not its abolition but its change of character.”).

attention as a selective system of cognitive processing, which facilitates focus on certain stimuli and exclusion of others.²²² In 1953, cognitive scientist Colin Cherry investigated the cocktail party phenomenon, whereby humans are able to discern and carry out a single conversation amidst many other conversations and stimuli.²²³ Cherry's experiment paved the way for decades of subsequent work on attention's selective nature, including the identification of a feedback loop in attentional control and the differential processing of information on attended versus unattended channels.²²⁴ Dedication of attention to one channel diminishes attention to the other.²²⁵ For example, if the board of a corporation devotes regular attention to an information system set up regarding a mission-critical area, it has less attention available for other potential information streams. Depending on whether the information system was appropriately prioritized, the board's relative inattention to deprioritized information channels may be rational, and even protected by the business judgment rule if it resulted from a board decision.²²⁶ Rational inattention generally seems protected under the Delaware oversight doctrine; it is disloyal or egregiously careless inattention that could lead to liability.

Today, psychology understands attentional processing to include three distinct subsystems: alerting, orienting, and executive control.²²⁷ These attentional networks produce and maintain a state of cognitive readiness.²²⁸ The alerting function processes non-specific impending inputs.²²⁹ The orienting function selects relevant information from inputs within and across modalities.²³⁰ The executive control function detects and resolves conflict among competing mental processes.²³¹

²²² See Mole, *supra* note 96.

²²³ E. Colin Cherry, *Some Experiments on the Recognition of Speech, with One and with Two Ears*, 25 J. ACOUSTICAL SOC'Y AM. 975, 975–76 (1953).

²²⁴ See generally Adelbert W. Bronkhorst, *The Cocktail-Party Problem Revisited: Early Processing and Selection of Multi-Talker Speech*, 77 ATTENTION, PERCEPTION & PSYCHOPHYSICS 1465 (2015) (detailing Cherry's impact and further scholarship related to the cocktail-party problem).

²²⁵ WILLIAM JAMES, PRINCIPLES OF PSYCHOLOGY 261 (Encyclopedia Britannica 1952) (“Focalization, concentration, of consciousness are of [attention's] essence. It implies withdrawal from some things in order to deal effectively with others.”).

²²⁶ For a recent review of economic scholarship on rational inattention, see Bartosz Maćkowiak, Filip Matějka & Mirko Wiederholt, *Rational Inattention: A Review*, 61 J. ECON. LIT. 226 (2023).

²²⁷ Michael I. Posner & Steve E. Petersen, *The Attention System of the Human Brain*, 13 ANN. REV. NEUROSCIENCE 25 (1990).

²²⁸ Alfredo Spagna, Melissa-Ann Mackie & Jin Fan, *Supramodal Executive Control of Attention*, 6 FRONTIERS PSYCH., Feb. 24, 2015, at 1, 1.

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *Id.*

Self-relevance—that is, the personal salience of an input—affects attention via the executive control system of attentional processing (not the alerting or orienting systems).²³² The self-relevance mechanism provides a possible explanation for how the threat of personal liability for breach of the duty of oversight could prompt directors to direct more individual and collective attention to certain matters. Finally, attention operates at the social as well as the individual level.²³³ Social attention describes how individuals align their attentional focus with that of others.²³⁴ In a board meeting, for example, one director asking about an issue directs the collective attention to that issue.

Economics, including behavioral economics, has incorporated insights from philosophy and psychology. For example, a different way to justify rational inattention by the board to deprioritized stimuli is in terms of opportunity costs: “[B]ecause attention is in short supply and can be put to a variety of competing productive uses, it generates opportunity costs.”²³⁵ Put that way, an important part of the board’s job is to discern which matters do not require its attention.

A recent survey of economic scholarship on attention distilled three categories of mechanisms that direct it: bottom-up (stimulus-driven), top-down (internal state-driven), and motivational (automatic visceral states that influence volitional control of attention by modifying the appeal of specific attentional foci).²³⁶ These mechanisms underpin attention-based utility (as opposed to belief-based utility), whereby paying attention to certain external or internal stimuli has a direct effect on utility.²³⁷ In addition, there are two main theoretical frameworks in economics for studying the implications of attention: attentional choice (how people gather and integrate decision-relevant information) and attentional learning (how people gather and process information when forming beliefs).²³⁸

Taken together, insights into attention from other disciplines illuminate oversight’s meaning and function in Delaware corporate law. For example, organizational theory helps to bridge the gap between the

²³² Saga Svensson, Marius Golubickis, Sam Johnson, Johanna K. Falbén & C Neil Macrae, *Self-Relevance and the Activation of Attentional Networks*, Q.J. EXPERIMENTAL PSYCH. 1, 1 (2022).

²³³ See, e.g., Troy A.W. Visser & Ashton Roberts, *Automaticity of Social Cues: The Influence of Limiting Cognitive Resources on Head Orientation Cueing*, 8 SCI. REPS. 1 (2018).

²³⁴ *Id.*

²³⁵ George Loewenstein & Zachary Wojtowicz, *The Economics of Attention*, 63 J. ECON. LIT. 1038 (2025) (arguing that “the mental resource of attention should be added to the list of core productive factors studied by the [economics] discipline”).

²³⁶ *Id.* at 1041–42.

²³⁷ *Id.* at 1042, 1056–58.

²³⁸ *Id.* at 1059.

individual director and the board as a whole. Collective or institutional attention is addressed in scholarship on management and organizational behavior. That body of work has identified attentional dynamics within and between organizations, via the attention-based view of organizational action.²³⁹ The attention-based view of organizational action “posits that the allocation of attention in an organization is a combination of both bottom-up and top-down processes,” analogous to the operation of attention at the individual level.²⁴⁰ Schema-based attentional processes depend on the attentional priorities of individuals in different structural positions within the organization, and stimulus-based attentional processes are based on situational demands.²⁴¹ The attention of agents is measurable and valuable.²⁴² Attention scarcity is thus an organizational problem.²⁴³

Some scholars have written about law and attention in other contexts besides oversight.²⁴⁴ Within corporate law, institutional investor concerns about director overboarding are underpinned by an implicit theory about the allocation of scarce director attention.²⁴⁵ More broadly, a debate about attention rights asks whether attention should be legally protected.²⁴⁶ This thread of scholarship asks how attention is already protected legally, and in what situations a person has the right to attention under current law.²⁴⁷ For example, there are “duties that concern the agent’s being attentive to some type of stimuli or a

²³⁹ Ocasio, *supra* note 92, at 189–91 (explaining the attention-based theory’s view of firm behavior).

²⁴⁰ Prashantham & Madhok, *supra* note 93, at 773; *see also* Loewenstein & Wojtowicz, *supra* note 235, at 1041 (listing bottom-up and top-down mechanisms as two of the three main mechanism categories that direct attention).

²⁴¹ *Id.* at 773–74.

²⁴² *See, e.g.*, Kaisa Kärki & Visa Kurki, *Does a Person Have a Right to Attention? Depends on What She is Doing*, 36 PHIL. & TECH. 1 (2023), <https://doi.org/10.1007/s13347-023-00673-0> [<https://perma.cc/NA62-2MHY>].

²⁴³ Herbert A. Simon, *Designing Organizations for an Information-Rich World*, in COMPUTERS, COMMUNICATIONS, AND THE PUBLIC INTEREST 37, 40–42 (M. Greenberger ed., 1971).

²⁴⁴ *See, e.g.*, Marcel Kahan & Mitu Gulati, *Contracts of Inattention*, 46 L. & SOC. INQUIRY 1115 (2021); Bartłomiej Chomanski, *Mental Integrity in the Attention Economy: In Search of the Right to Attention*, 16:8 NEUROETHICS (2023), <https://doi.org/10.1007/s12152-022-09514-x> [<https://perma.cc/P78X-VZ48>]; Anuj Puri, *The Right to Attentional Privacy*, 48 RUTGERS L. REC. 206 (2021); Jasper L. Tran, *The Right to Attention*, 91 IND. L.J. 1023 (2016).

²⁴⁵ *See, e.g.*, Matteo Tonello, *The Evolution of Overboarding Policies*, HARV. L. SCH. F. CORP. GOVERNANCE (July 8, 2025), <https://corpgov.law.harvard.edu/2025/07/08/the-evolution-of-overboarding-policies> [<https://perma.cc/8XLL-8JXL>].

²⁴⁶ Kärki & Kurki, *supra* note 242, at 2 (observing that “legal regulation of attention can be found from the right to be free from distractions in certain situations in order to be able to concentrate on a task or in a duty to be attentive to certain stimuli in order to be able to act appropriately”).

²⁴⁷ *Id.* at 1.

field of stimuli in order to be able to react appropriately to changes in this field or set of stimuli.”²⁴⁸ These “[d]uties to be attentive regulate the agent’s ability to react appropriately to certain kinds of events,” such as a lifeguard’s ability to rescue a drowning child or an automobile driver’s ability to respond appropriately to a moose in the road.²⁴⁹ This formulation tracks well with director attention in the context of oversight. In oversight, as in the examples of the lifeguard or the driver, the director is meant to attend to “a field of stimuli in order to be able to react appropriately.”²⁵⁰ Instead of a drowning child or a moose in the road, the director needs to be ready to respond to an airplane crash (in the case of Boeing).

Just as work on attention in other areas of law informs our understanding of oversight, so, too, can a better understanding of attention in the context of oversight yield dividends for other bodies of law. For example, the legal reasoning in both types of *Caremark* claim (red flags and information-systems) invokes the logic of notice.²⁵¹ As in other areas of law, notice here can give rise to chargeable knowledge and a duty to act. Depending on the nature of the information on which it is now on notice, the board may have a duty to inquire further, to seek the advice of counsel, or to object to an illegal course of action and resign if the corporation does not correct the conduct. It is plausible that attention, as identified here, could function in similar ways in other bodies of law.

For efficiency and stockholder primacy reasons, Delaware corporate law seeks to calibrate the relationship between directors and officers. In the context of oversight, doctrine mediates the board’s attention. The articulated oversight obligation of directors, accompanied by the threat of oversight liability, focuses the board’s attention on red flags and information systems. This calibration is important from a doctrinal and a practical perspective: It changes the set of actions a board is likely to take, and influences the character, quantity, and quality of director attention. Taken together, *oversight as action* and *oversight as attention* offer a more complete account of oversight doctrine.

²⁴⁸ *Id.* at 10.

²⁴⁹ “When something that the agent should be attentive to happens, the agent’s duty to be attentive can transform into a more specific duty to perform an action, such as rescuing the drowning child.” *Id.*

²⁵⁰ *Id.*; see also *In re TransUnion Derivative S’holder Litig.*, 324 A.3d 869, 872 (Del. Ch. 2024) (observing that “directors must establish a reporting system informing them of material risks to the business and attend to clear signs of non-compliance”).

²⁵¹ See *supra* Part II.

CONCLUSION

Through analysis of case law, corporate law scholarship, and work in fields beyond law, this Note argues that we cannot understand Delaware oversight doctrine without a robust conception of attention. This Note shows that scholars and courts have not been focusing enough on attention, even as they use the language of attention and inattention to describe oversight. Despite its prominence in the *Caremark* line of cases, attention's meaning and legal implications were underspecified.

This Note shows that confusion about oversight's fiduciary status and an overreliance on the incumbent *oversight as action* framework has led to a failure to adequately apprehend attention's increasingly important role in oversight doctrine. Part I reframes the debate about oversight's fiduciary status by clarifying oversight and attention as obligations of corporate fiduciaries. Part II characterizes the *oversight as action* paradigm. Finally, Part III reveals attention as a meaningful but previously neglected dimension of oversight.

This Note goes beyond existing efforts by clarifying the respective places of oversight and attention in the fiduciary framework of Delaware corporate law, incorporating recent developments in Delaware *Caremark* doctrine, and showing that, properly understood, oversight includes the distinct operation of attention as well as action. By filling that gap, this Note offers a way to render coherent this unsettled body of law. It contributes to a burgeoning literature on law and attention and lays the groundwork for a descriptive account of attention in Delaware Court of Chancery jurisprudence in contexts beyond oversight.