



THE FOX EFFECT ? IMPLICATIONS OF RECRUITING CORPORATE LAW TO COMBAT MISINFORMATION

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In 2023, Fox Corporation settled U.S. Dominion’s defamation action over Fox News’ broadcast of false election fraud claims after the 2020 presidential election for the staggering sum of \$787.5 million. Now, a shareholder derivative action is pending in Delaware against the company’s board of directors for breach of state corporate law fiduciary oversight duties for their failure to prevent such defamatory programming. Beyond the specifics of the case, this development portends the emergence of a new politico-legal strategy—using corporate governance requirements as a weapon to promote press accountability and combat misinformation in public discourse. The question addressed in this Essay is whether corporate governance rules *should* be extended to impose board liability for oversight failures regarding editorial judgments of news media companies under this public-regarding rationale.

Without expressing approval for the programming decisions of Fox News on election coverage, the Essay argues that it is too threatening to the social value of freedom of the press to use the *Fox* case to expand board oversight duties of corporate-owned media companies to include defamation risk as a way to combat misinformation. We have dual social and democratic commitments—to the value of the free press and to the value of

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truthful political discourse—but need to be careful in their calibration. Expansive board oversight duties addressing news content and editorial decisions are both unworkable and too chilling for news organizations. And the likely effectiveness of corporate governance law in limiting political misinformation is uncertain. These circumstances advise caution in deploying shareholder derivative suits against the press lest the resulting journalistic self-censorship ironically serve to undermine informed political discourse in the long run. This is particularly true at a time when the Executive branch is demanding—and obtaining—exceptional press capitulation from a vulnerable industry.

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INTRODUCTION

In the wake of the mega-million-dollar settlement of U.S. Dominion’s defamation action against Fox News over the network’s broadcast of false election fraud claims after the 2020 U.S. presidential election,¹ shareholder derivative actions were brought in Delaware against the parent company Fox Corporation’s board of directors for breach of fiduciary oversight duties under state corporate law.² The shareholder plaintiffs claimed that the Fox Corporation board breached its fiduciary duties by allowing Fox News knowingly to air false programming that put the company at risk of massive defamation liability. The Delaware Chancery Court denied Fox Corp.’s motion to dismiss the action for lack of standing, so the derivative action is currently pending.³

But should corporate fiduciary duty law be interpreted to impose liability on the boards of companies that own news outlets for failing to control defamation and other speech tort risks associated with the editorial judgments made by their news subsidiaries? What makes the *In re Fox Corporation Derivative Litigation* (hereinafter “*In re Fox*”) significant beyond its specific facts is that the plaintiffs’ rationales seek to expand and supercharge the traditional oversight requirements of corporate law. If accepted, this turn to strengthening the disciplinary power of corporate governance in the news media context is likely to undermine press functions and the public interest in a free and independent press.

The expansive interpretations of corporate governance principles advanced in *In re Fox* could attract support on the basis that corporate oversight duties can serve

¹ See, e.g., Helen Coster & Jack Queen, *Fox Settles Dominion Lawsuit for \$787.5 Million Over US Election Lies*, REUTERS (Apr. 19, 2023), <https://perma.cc/8XD4-BXLY>.

² See *infra* Part I.A.

³ See *infra* Parts I.A.1 & 2.

to minimize misinformation in political discourse.⁴ Surveys reveal that many Americans see political misinformation as a social threat.⁵ If using corporate law to combat misinformation could lead to robust censorship effects on falsity, then many could consider this a significant public benefit. This could incentivize additional lawsuits against the press.

At the same time, such a development is likely to undermine press activity in ways harmful to public discourse. If these kinds of corporate governance claims are successful, they promise to generate a regulatory regime of editorial control by risk-averse corporate boards with much broader business interests than the protection of press freedom.⁶ The possibility of multi-million-dollar personal liability for parent company board members—or at least corporate insurers—is likely to generate excessive board-level micromanagement.

It is reasonable to expect that this would lead directly to journalistic self-censorship by news subsidiaries, deter journalism discouraged by a press-hostile government, and worsen journalistic timidity in covering the powerful and litigious. The self-regulatory compliance and oversight systems likely to be implemented in media companies as a response to heightened governance liability will inevitably extend to coverage of matters beyond clearly false information.

Enhanced board obligations may also lead to uneven effects. If the most likely plaintiffs in defamation actions continue to be the politically powerful, wealthy, or socially notable, parent company boards worried about follow-on oversight lawsuits might feel disproportionate pressure to reduce critical coverage of such elites. Society loses when the powerful are not held to account. Moreover, heightened compliance requirements could provide cover for targeted and politicized efforts by board members to influence the content of their news units.⁷ Such results would

⁴ In this Essay, I use the term “misinformation” as an umbrella descriptor to refer both to unintentional misinformation and intentional falsity or disinformation.

⁵ See, e.g., Christopher St. Aubin & Michael Lipka, *Support Dips for U.S. Government, Tech Companies Restricting False or Violent Online Content*, PEW RSCH. CTR. (Apr. 14, 2025), <https://perma.cc/3U65-S288> (noting that 51% of Americans support government restrictions on false information online and 60% support tech company restrictions).

⁶ See *infra* Parts III.A, III.B & III.C.

⁷ See *infra* Part III.B.

all be dangerous for the press function and, ironically, for the same public discourse that anti-misinformation initiatives seek to improve.⁸

Proponents of expanded oversight doctrine may attempt to dispute these predictions of a chilling effect on journalism by noting that damages payouts in successful shareholder derivative actions go to the corporate treasury. So if a derivative action based on the company's prior payments to defamation plaintiffs is successful, the recovery may in fact offset the company's defamation payouts by recouping the money from the culpable directors themselves.

But such theoretically reallocated liability cannot in fact be expected to temper either the corporate costs of expanded oversight litigations or the expected chilling effect on news companies' journalist functions. If the *Fox* plaintiffs' arguments to change corporate oversight doctrine are successful, the true costs are likely to be extensive.⁹ When oversight compliance requirements are effectively dictated by corporate insurers with little or no commitment to journalism, intrusive oversight into and second-guessing of the editorial process is practically guaranteed. Even if this would lead to desirable results for the most extreme cases, the consequences of overzealous compliance are likely to be overbroad and troubling for the public interest.

The functions of an independent press are democratically necessary and already subject to excessive economic, social, and governmental pressure (including legally aggressive lawsuits against FCC-regulated broadcast outlets by a sitting President).¹⁰ Adding even more pressure is bad policy. In light of the sustained recent attacks on constitutional press protections in defamation cases, the limits to other newsgathering protections, and press-skeptical courts and juries, the press is already in a particularly vulnerable spot legally. Recent settlements of lawsuits against CBS and ABC brought by President Trump trigger suspicions that the executive branch is not only demanding but also obtaining exceptional capitulation from conglomerate-owned press entities.¹¹

The anti-misinformation frame implicit in *In re Fox* thus offers an opportunity to address key questions about what types of trade-offs we should accept between

⁸ See *infra* Part III.

⁹ See *infra* Parts III.A, III.B & III.C.

¹⁰ See *infra* Part III.C.

¹¹ See *infra* notes 106–111, 115–120, and accompanying text.

two of our foundational social commitments—to the democratic value of the independent press and the democratic value of truthful political discourse. Because the deterrent effects on misinformation of expanding corporate oversight duties to this context are unclear and the negative consequences for the press are predictable, the likely effects of expanding corporate fiduciary liability to parent corporations vis-à-vis the coverage decisions of their news media organizations should be resisted—even by those who deplore Fox News’ 2020 election coverage. Ultimately, the Essay argues that courts should be reluctant to impose oversight liability in the news company context where executives or boards of directors did not actively direct clearly illegal conduct.

The Essay does not advance a doctrinal First Amendment argument. Nor does it request special and disproportionate exceptions or advantages for the press. It is, rather, a plea that before courts decide to advance anti-misinformation efforts by expanding ordinary corporate law principles to reach oversight of defamation risk in journalistic contexts, as proposed in *In re Fox*, they consider the potential impact of such an expansion on the ability of press organizations to perform their critical democratic functions.

To be sure, media owners are free to engage in intrusive oversight voluntarily. Nevertheless, the Essay argues that the effects of adopting a legal requirement are likely to lead to accelerated and industry-wide owner oversight over editorial decisions than is reported today. This poses a clear threat to journalistic independence. And since such intrusions are also unlikely to be open and transparent to those outside the organization in many instances, they could well obscure independent assessment of the degree of owner constraint on the outlet’s reporting.

The Essay proceeds as follows: Part I.A describes *In re Fox*, the Delaware Chancery Court’s denial of the defense’s motion to dismiss the suit for demand futility, and subsequent developments. In so doing, it provides a “mini-overview” on shareholder derivative suits to set the context and clarify the procedural posture of the case for the unfamiliar. Part I.B examines the *In re Fox* litigation through an anti-misinformation lens. Part II.A sketches board oversight duties under current Delaware corporate law. Part II.B unpacks the expanded board monitoring duties sought by the plaintiffs in *In re Fox*. Part III explores our dual—and here conflicting—social commitments to press editorial freedom and truthful political dialogue. Part III.A takes the first step by showing how the plaintiffs’ theories of liability in *In re Fox* do not justify expansion of current doctrine. Part III.B then addresses the

dangers of expanded monitoring obligations to press functions—particularly since many news outlets are owned by other entities and since the current politico-legal environment amplifies the vulnerability of the press. Part III.C argues that the anti-misinformation benefits of the doctrinal expansion sought in *In re Fox* are at best uncertain and likely outweighed by the predictable chilling effects of expanded corporate law oversight duties on press functions. While recognizing the limits of its suggestions, Part III.D ends with some thoughts on other ways to promote press accountability.

I. FOX NEWS PROGRAMMING MEETS CORPORATE LAW

In 2023, Fox Corporation agreed to pay the unprecedented sum of \$787.5 million to settle a defamation action by voting machine company U.S. Dominion over a series of Fox News stories and commentary aired in 2020 and 2021 that falsely suggested that U.S. Dominion’s voting machines could have been manipulated to reverse votes, creating doubt as to the validity of the 2020 presidential election.¹²

A. In re Fox Corp. Derivative Litigation

After U.S. Dominion and Fox News settled Dominion’s defamation action, plaintiff’s lawyers began to file lawsuits under state corporate law¹³ against the

¹² See, e.g., Coster & Queen, *supra* note 1. A similar action against Fox for \$2.5 billion by Smartmatic, another voting machine company, is still pending and scheduled for trial in 2025. See, e.g., Jonathan Stempel, *Fox Corp Must Face Smartmatic \$2.7 Billion Defamation Claim*, REUTERS (Jan. 9, 2025), <https://perma.cc/7Y32-7UN4>.

¹³ Early litigation was doubtless expected in light of the trove of publicly available discovery materials indicating that Fox News personnel knew that their election fraud coverage on their opinion shows was false. See, e.g., Jeremy W. Peters & Katie Robertson, *Fox Stars Privately Expressed Disbelief About Election Fraud Claims. ‘Crazy Stuff.’*, N.Y. TIMES (Apr. 24, 2023). See also Jim Rutenberg & Steven Lee Myers, *New Defamation Suit Against Fox Signals Continued Legal Threat*, N.Y. TIMES (May 10, 2023) (citing plaintiff Jankowicz’s reliance on discovery documents in the Dominion suit in her decision to sue Fox News). Lawyers representing the shareholder derivative plaintiffs also sought access to further corporate records from Fox under then-operative Delaware statutory documentary access rights.

board of directors and officers of Fox News' parent company, Fox Corporation,¹⁴ for breach of fiduciary duty.¹⁵

The complaint filed by the co-lead counsel in *In re Fox* claims that the individual defendants¹⁶ and the board of directors of Fox Corporation breached their fiduciary duties under Delaware corporate law by permitting Fox News personnel to air conspiracist theories about voting machine companies' involvement in the "stolen" 2020 election—despite knowing that the claims were false.¹⁷ The gravamen of the complaint is grounded in fiduciary duties of oversight stemming from a line of cases beginning with *In re Caremark*.¹⁸ Under that line of precedent, it is a breach

¹⁴ Fox Corporation is incorporated in Delaware. Fox Corp., Annual Report (Form 10-K) (Aug. 8, 2024), <https://perma.cc/HQC6-T2UP>. The current Fox Corporation has been a publicly traded company since 2019, when it was spun off from Twenty-First Century Fox, Inc. *Id.* at 1. (Disney acquired the remaining assets of Twenty-First Century Fox, which became a wholly owned subsidiary of Disney. *Id.*) The Murdoch Family Trust owns over 43% of Fox's voting shares and, because of the company's dual class vote structure, controls Fox Corporation. *See In re Fox Corp. Derivative Litig.*, Consol. C.A. No. 2023-0418-JTL, 2024 WL 5233229, at *3 (Del. Ch. Dec. 27, 2024). Rupert Murdoch is currently Chairman Emeritus of Fox Corporation. *Rupert Murdoch*, FOX CORP., <https://perma.cc/U68C-BWG7>. Lachlan Murdoch, Rupert's son, is currently Fox Corporation's Executive Chair and CEO. *Board of Directors*, FOX CORP., <https://perma.cc/5DPB-P4HK>. Among other assets, Fox Corporation wholly owns Fox News Media LLC, which operates the Fox News Channel. Murdoch was also Chair of Fox Corporation from 2019 to 2023.

¹⁵ The cases were ultimately consolidated as *In re Fox Corp. Derivative Litigation*. *See In re Fox Corp. Derivative Litig.*, 307 A.3d 979 (Del. Ch. 2023). The Delaware Chancery Court selected the law firms representing Fox's New York and Oregon institutional shareholders as co-lead counsel for the consolidated action. *See id.* at 998. Under Delaware law, a "derivative plaintiff and its counsel must be able to 'fairly and adequately represent the interests of the entity in pursuing the derivative action.'" *Id.* at 987 (quoting DEL. CH. CT. R. 23.1(c)(2)). "When more than one team can meet that test, '[t]he Court may resolve disputes over the appointment of derivative counsel, including who can best represent the interests of the entity in pursuing the derivative action, and may make further orders in connection with the appointment.'" *Id.* (quoting DEL. CH. CT. R. 23.1(c)(3)(A)). In the Fox Corporation litigation, six law firms and their clients sought to apply for leadership roles. *Id.* at 986. The Chancery judge named two firms as co-lead counsel for the consolidated action. *Id.* at 998.

¹⁶ The individual defendants included Rupert Murdoch, Lachlan Murdoch, CEO of Fox News Suzanne Scott, and former Chief Legal and Policy Officer Viet Dinh as officers of the company, as well as the board members. Verified Amended Stockholder Derivative Complaint, *In re Fox Corp. Derivative Litig.*, Consol. C.A. No. 2023-0418-JTL, 2024 WL 2087772 (Del. Ch. May 3, 2024).

¹⁷ *See generally id.* *See also In re Fox*, 2024 WL 5233229, at *6 (describing the complaint).

¹⁸ *In re Caremark Int'l Inc. Derivative Litig.*, 698 A.2d 959 (Del. Ch. 1996).

of the duty of loyalty if a corporate board fails to establish and monitor a system of information-forcing internal controls that would help it ensure legal compliance, ignores red flags of non-compliance with law, and consciously adopts a business model of illegal conduct for profit.¹⁹

1. A mini-overview of shareholder derivative suits in Delaware

For those unfamiliar with this terrain and to clarify the procedural posture of the *In re Fox* case, what follows is a quick overview of the shareholder derivative suit process in Delaware.²⁰ Plaintiff stockholders in derivative suits seek to represent the interests of the corporation itself. Under Delaware law, shareholders who wish to challenge board decisions must first make a demand on the board to bring the action on the corporation's behalf.²¹ This is because "[a] corporate claim is a corporate asset, and under Delaware law, the board of directors has authority over how to manage the company . . . includ[ing] making decisions about whether to assert corporate claims."²²

If the shareholder plaintiffs make such a demand on the board, however, they cannot forge ahead with their derivative claims if the board decides to forgo the litigation. As a result, plaintiffs bringing derivative suits typically claim that making such a demand on the board would be futile because the board could not make an independent and disinterested business judgment regarding whether it should press the claim on behalf of the company.

The current test for demand futility, established in *United Food & Commercial Workers Union & Participating Food Industry Employers Tri-State Pension Fund v. Zuckerberg*, requires the court to determine whether directors: (1) received material personal benefit from the alleged misconduct; (2) would face a substantial likelihood of liability on any of the claims that would be the subject of the litigation demand; or (3) lack independence from someone who received a material benefit from the alleged misconduct or would face a substantial likelihood of liability on any of the claims that are the subject of the litigation demand.²³ The point of this

¹⁹ *Stone v. Ritter*, 911 A.2d 362 (Del. 2006). See discussion in *infra* Part I.C.

²⁰ Those already familiar with this material are obviously invited to skip Part II.A.

²¹ DEL. CH. CT. R. 23.1(a).

²² *In re Fox*, 2024 WL 5233229, at *2.

²³ 262 A.3d 1034 (Del. 2021).

three-part test is to assess whether the directors are disqualified from making the litigation decision, either (a) because they are themselves conflicted due to self-interest or potential risk of personal liability, or (b) because their ability to make an independent and objective business decision is compromised by their lack of independence from conflicted board members.

In considering a defendant's motion to dismiss the shareholder suit for plaintiffs' failure to make demand on the board, the court applying the *Zuckerberg* factors must assess the ability of the whole board to respond to the demand objectively as a business matter. If, after an individualized evaluation of each director, the court finds a majority of the board to be competent to make a disinterested and independent judgment on the demand, then it will dismiss the shareholder derivative action.²⁴ If, on the other hand, a majority of the board is disqualified under one or more of the *Zuckerberg* factors, then the derivative action will be permitted to continue.

At the motion-to-dismiss stage in demand excusal cases, the court's findings on failure to make demand are based on the pleadings only. When making its determination, "the court must accept the complaint's well-pled allegations as true and grant the plaintiffs the benefit of all reasonable inferences."²⁵ It does not "assess the truth of the allegations at that stage"—"[t]he question instead is whether, taking [the plaintiffs'] allegations as true, [they] have standing to assert their claims."²⁶ Although a determination of whether a board member is disqualified because of a substantial likelihood of liability under the second *Zuckerberg* factor indirectly asks the court to assess the viability of the underlying substantive claim for standing purposes, that disqualification determination does not constitute a substantive ruling on the legal sufficiency of the plaintiff's claim such as would be made by a court

²⁴ *In re Fox*, 2024 WL 5233229, at *2 ("To analyze a Rule 23.1 motion, the court examines the board of directors in office when the suit was filed. Considering each director in turn, the court asks whether the complaint contains particularized allegations sufficient to raise a reasonable doubt about whether that director could make a disinterested and independent decision about whether to assert the claim. If that director-by-director analysis results in the board lacking a majority of independent and disinterested directors who could decide whether to sue, then the plaintiff has standing.").

²⁵ *Id.* at *1.

²⁶ *Id.*

denying a motion to dismiss for failure to state a claim upon which relief can be granted.

In order to withstand motions to dismiss for failure to make demand on the board, plaintiffs must plead facts sufficient to support their claim that the board in office at the time the suit was filed was too conflicted to make an independent and disinterested decision about whether to sue.²⁷ To do so successfully, plaintiffs have increasingly relied on their qualified right to access corporate books and records under Delaware General Corporation Law § 220.²⁸ The Supreme Court of Delaware has adopted the “tools at hand” doctrine, “encourag[ing] stockholders suspicious of a corporation’s management or operations to exercise [§ 220] right[s] to obtain the information necessary to meet the particularization requirements that are applicable in derivative litigation.”²⁹ This documentary access has been critical in plaintiffs’ ability to surmount standing-based motions to dismiss.³⁰

If derivative plaintiffs withstand motions to dismiss or summary judgment motions on demand grounds and ultimately prevail in the case, the company’s losses are shifted to the members of the board.

²⁷ DEL. CH. CT. R. 23.1(a); *In re Fox*, 2024 WL 5233229, at *2.

²⁸ See, e.g., Roy Shapira, *A New Caremark Era: Causes and Consequences*, 98 WASH. U. L. REV. 1857 (2021) (suggesting the documentary access provided under Delaware General Corporation Law § 220 is significant to the rise in shareholder derivative suits getting past pleading motions).

²⁹ *AmerisourceBergen Corp. v. Lebanon Cnty. Emps.’ Ret. Fund*, 243 A.3d 417, 426 (Del. 2020). The Delaware courts increasingly granted stockholder demands for access to formal corporate records such as board minutes and even required companies to produce director emails and other personal documents in some instances.

³⁰ See Shapira, *supra* note 28, at 1859 (“In recent years Delaware courts have liberalized their interpretation of section 220 requirements: both in terms of whether to provide internal documents (the ‘proper purpose’ requirement), and in terms of what internal documents to provide (the ‘permissible scope’ requirement).”). See also *infra* note 60 (noting recent Delaware Supreme Court reversal of Chancery denial of Section 220 books and records access request).

The Delaware legislature recently enacted some potentially significant limitations on documentary access under Section 220 as part of legislative provisions designed to curb reincorporation elsewhere by companies previously incorporated in Delaware (known as the “DExit” phenomenon). See, e.g., Daniel Meyer, *Blunting the “Tools at Hand”: Recent Developments in Delaware Books-and-Records Demand Law*, 33 U. MIAMI BUS. L. REV. 387, 396–410 (2025) (criticizing the development). See also *infra* notes 59–62 and accompanying text (noting possible impact of the changes).

2. The Fox motion to dismiss for failure to make a demand on the board

The most recently filed *Fox* complaint asserts that the Fox Corporation board breached its *Caremark* duties in three ways:³¹ (1) by consciously choosing an illegal business strategy of permitting misinformation in order to maintain the network's audience of Trump supporters who believed his claims of election fraud;³² (2) by failing, in contrast to other news organizations, to have written journalism standards requiring truthful programming and by thereby putting the company at risk of catastrophic defamation liability;³³ and (3) by consciously and knowingly allowing Fox News to air false claims despite their awareness of "red flags."³⁴

In response to Fox's motion to dismiss for failure to make a demand on the board, the plaintiffs claimed demand futility on the ground that a majority of the board could not make a disinterested and independent decision on whether to assert the corporate claims detailed in the complaint.³⁵ Vice Chancellor J. Travis Laster denied the defendants' motion to dismiss, holding that the complaint alleged

³¹ The complaints in the various actions against Fox Corporation's directors and officers appeared to rely on different sorts of *Caremark* claims. The text here reflects the most recently filed complaint by the co-lead counsel as of October 2025. See also Roy Shapira, *Conceptualizing Caremark*, 100 IND. L.J. 467, 505 n.266 (2025).

³² Complaint, *supra* note 16, ¶¶ 14–16. The complaint's principal narrative is that, although Fox News was the leading outlet catering to conservative audiences by 2016, it was "fac[ing] new business pressures . . . from pro-Trump digital media outlets such as *Breitbart*," and it realized that "[p]ressures from within its own media ecosystem meant that [it] was at risk of losing its audience if it adhered to journalistic standards for fact-checking." *Id.* ¶ 5. On this telling, Fox therefore adopted a business model that "created increased risk of defamation claims," *id.*, and "treat[ed] potential tort claims and settlements as unlikely or as a cost of doing business," *id.* ¶ 4.

³³ *Id.* ¶ 17.

³⁴ *Id.* After Fox News called the 2020 presidential election for Joe Biden on November 3, despite Donald Trump's allegations of election fraud, "[i]n the week between November 4 and November 11, 2020, Fox News's ratings cratered." *Id.* ¶ 120. See also *id.* ¶ 126 (describing the concurrent rise in audience for Fox's conservative media competitors). The complaint claims that in order to reverse the alarming loss of audience to other, pro-Trump conservative outlets, Fox decided to amplify Trump's claims of a stolen election despite the executives' and commentators' knowledge of the claims' falsity, and the Fox Corporation board consciously disregarded its fiduciary obligations in allowing the network to do so. See *id.* ¶¶ 121–34.

³⁵ *Id.* ¶¶ 238–90. The Fox Corp. board has eight members, so Vice Chancellor Laster found that "there must be at least five directors who qualify as disinterested and independent." *In re Fox Corp. Derivative Litig.*, Consol. C.A. No. 2023-0418-JTL, 2024 WL 5233229, at *2 (Del. Ch. Dec. 27, 2024).

“particularized facts sufficient to support a reasonable inference that [Rupert] Murdoch faces a substantial risk of liability for breaching his duty of loyalty by deciding in bad faith to have the Company violate the law,” and finding “facts sufficient to raise a reasonable doubt that at least three other directors lack independence from Murdoch.”³⁶

Starting with the proposition that oversight liability could arise from “a corporate trauma grounded in common law liability,” Vice Chancellor Laster found that “the complaint’s allegations support a reasonable inference that Murdoch understood that Fox News was broadcasting defamatory content and approved it. The complaint therefore states a claim that Murdoch knowingly caused the corporation to violate the law.”³⁷ Because he found two other directors not to be independent of Rupert Murdoch, the Vice Chancellor did not assess the independence of the remaining directors and denied the motion to dismiss on demand futility grounds under *Zuckerberg*.³⁸

Thereafter, the case appears to have been transferred from Vice Chancellor Laster to Vice Chancellor Bonnie David, who granted the defense’s motion for leave to file for summary judgment on the question of the independence of Fox board member Jacques Nasser from Rupert Murdoch.³⁹ If, after discovery, Fox moves for summary judgment, and if Vice Chancellor David grants the motion on the ground of Nasser’s independence from Murdoch and his family, then the shareholder derivative action would be dismissed. Even so, the Fox board could decide to bring fiduciary breach claims against Rupert and Lachlan Murdoch as officers of Fox News, or make any other staffing or policy decisions they consider appropriate.

³⁶ *Id.* at *2. The court did not analyze “whether other members of the Board face a substantial risk of liability, because the complaint alleges facts sufficient to raise a reasonable doubt that at least three other directors lack independence from Murdoch. A reasonable doubt exists about whether Lachlan could make an independent decision about whether to sue his father. A reasonable doubt also exists about two other directors—Chase Carey and Jacques Nasser. The complaint alleges particularized facts about close and longstanding business and personal ties between them and Murdoch that are sufficient to disqualify them.” *Id.*

³⁷ *Id.* at *10.

³⁸ *Id.* at *15–20.

³⁹ *In re Fox Corp. Derivative Litig.*, C.A. No. 2023-0418-BWD, 2025 WL 1220269 (Del. Ch. Apr. 28, 2025).

If not dismissed or settled, the action could go to trial in Delaware Chancery Court in 2026.

B. *Zooming Out—An Anti-Misinformation Lens on In re Fox*

Beyond the ordinary corporate goals of fiduciary duties, the plaintiffs' expansive reading of corporate oversight obligations in *In re Fox* is implicitly justified by a concern about the harms of political misinformation. Misinformation has emerged as a key public concern since at least 2016. Despite claims of speech protection, concerns about the ill effects of misinformation on public discourse have generated misinformation-based justifications for defamation (and other) legal claims.⁴⁰ With the turn to corporate governance as a new anti-misinformation legal strategy, the press now faces an indirect attack in the name of effectively enhancing democracy.

The programming at issue in the *Fox* case related to one of the most divisive political issues of our time—the 2020 U.S. presidential election. The assertion that the presidency had been “stolen” from Trump through Democratic election fraud spawned a conspiracy theory that even propelled the unprecedented January 6 attack on the United States Capitol. The apparent endorsement of the “stolen election” lies by Fox commentators on air doubtless added to political misinformation in public discourse and even fueled it further. False claims at this level of significance easily invite anti-misinformation efforts. But if the *In re Fox* suit continues, it is likely to generate a broader trend of actions that will seek to use corporate law principles to discipline news organizations for amplifying claimed political falsity.

⁴⁰ Anti-disinformation legal strategies have relied on, among other things, state defamation law, FCC regulation, and legislative reform of Section 230 ISP immunity. *See, e.g.,* Lili Levi, *Misinformation and the Defamation Renaissance: A Misleading Promise of “Truth”*, 57 U. RICH. L. REV. 1235 (2023). *See also* Rutenberg & Myers, *supra* note 13 (quoting Nina Jankowicz, the former head of the anti-misinformation division of the Department of Homeland Security, on her lawsuit against Fox: “I want to make the point that this sort of disinformation and hate campaign doesn’t have a place in American media or American politics; that this isn’t what we stand for.”). There have also been recent complaints to and by the FCC of news distortion contrary to the public interest in broadcaster editing and programming practices. *See infra* note 92. Another legally focused response to the dissemination of misinformation has been an attack on the protections for ISPs under 47 U.S.C. § 230. Nevertheless, the effectiveness of defamation cases as an anti-misinformation tool has been questioned (*see, e.g.,* Levi, *supra*), the FCC’s news distortion policy doctrine is limited both in scope and jurisdiction, and Section 230 reform is controversial and still in the offing.

Given the ideological partisanship that marks American politics today, suits alleging news bias are likely to be brought based on reporting as to matters far less consequential than those in *In re Fox* itself.

It is predictable that plaintiffs' lawyers bringing additional claims of this kind will emphasize the public-regarding goal of their suits. By offering a public-regarding rationale for such actions, plaintiffs can tap into the zeitgeist, gain support by purporting to represent more than just the parochial interests of a particular corporation's shareholders, and reorient the private law of corporations to advance what ideological plaintiffs of every stripe can assert as more desirable social directions.

As for constitutional objections, they would argue that although government-mandated content moderation and other government-coerced press regulation by proxy raise First Amendment eyebrows, the use of generally applicable corporate law to accomplish the same expressive public ends avoids those doctrinal criticisms.

At the most abstract level, such a regulatory justification could capture bipartisan support. Both progressives and conservatives have been calling for press accountability and responsibility. Progressives decry the partisan outlets of the right, including Fox, and insist that conservative media skew public discourse and promote conspiracism and political partisanship. Conservatives insist that mainstream media are liberal stooges, skew public discourse, peddle "fake news," and squelch the expression of conservative viewpoints. This bipartisan lack of trust in the press means that effective expanded *Caremark* claims could both be attractive to a variety of distinct constituencies and succeed in further politicizing and fostering knee-jerk partisanship in public and political discourse.

The problem is that high-profile situations and marquee cases often make bad law. The exceptional example of Fox News' 2020 election programming should not open the door to corporate board micromanagement of news editorial decisions. The more effective the corporate law anti-misinformation strategy becomes vis-à-vis the press, the more it imperils the press function and therefore—ironically—the richness of public information and debate. Enlisting corporate law to cleanse public discourse brings with it too great a risk of journalistic overdeterrence.

II. THE MOVE TO EXPAND CORPORATE OVERSIGHT DUTIES TO DEFAMATION RISK IN *IN RE FOX*

The plaintiffs in *In re Fox* argue that existing Delaware corporate fiduciary duties should be understood to include liability for insufficient attention to defamation risk. This Part describes current doctrine and explains the ways in which the plaintiffs' arguments would in fact constitute expansions.

A. Board and Officer Oversight Duties Under Delaware Corporate Law

While Delaware law provides that “[t]he business and affairs of every corporation . . . shall be managed by or under the direction of a board of directors,”⁴¹ it also imposes fiduciary duties of care and loyalty on board members.⁴² In *Stone v. Ritter*, the Delaware Supreme Court adopted the duty of oversight first articulated by the Chancery Court in *Caremark*, and characterized breach of such duties as breaches of the fiduciary duty of loyalty.⁴³ Thus, under the *Caremark* doctrine, the duty of loyalty requires boards to act in good faith in establishing sufficient internal controls to ensure they receive adequate information about legal compliance at the company.⁴⁴

To make a proper *Caremark* claim, a plaintiff must allege particularized facts showing that “(a) the directors utterly failed to implement any reporting or information system or controls; or (b) having implemented such a system or controls,

⁴¹ DEL. CODE ANN. tit. 8, § 141(a) (2024).

⁴² With respect to their duty of care, board members are protected from liability by the business judgment rule so long as they acted in good faith and exercised reasonable care in their decisions. The duty of loyalty prohibits board members from placing themselves in situations in which their personal interests could conflict with their board decision-making obligations. The duty of loyalty applies not only to the affirmative decisions of boards of directors themselves, but also to boards' failures to oversee compliance with law by others in the company.

⁴³ Until *Stone v. Ritter*, the courts had differed on whether the duty of good faith in a *Caremark* case should be considered a branch of the duty of care or a stand-alone fiduciary duty. *Caremark* itself could support various interpretations. Ultimately, the Delaware Supreme Court approved *Caremark* in *Stone v. Ritter* but made clear that a breach of the duty of good faith in having appropriate information and monitoring systems in place would be considered a breach of the broader duty of loyalty. *Stone v. Ritter*, 911 A.2d 362 (Del. 2006). This was a consequential decision for several reasons, including the fact that the exculpation provision available for directors under Delaware state law would not apply to breaches of *Caremark* duties. See DEL. CODE ANN. tit. 8, § 102(b)(7) (the exculpation provision).

⁴⁴ See *supra* text accompanying notes 18–19.

consciously failed to monitor or oversee operations thus disabling themselves from being informed of risks or problems requiring their attention.”⁴⁵ Under an additional standard associated with *Caremark*, “a fiduciary of a Delaware corporation cannot be loyal to a Delaware corporation by knowingly causing it to seek profit by violating the law.”⁴⁶ Still, the courts recognize that even a good faith exercise of oversight “may not invariably prevent employees from violating criminal laws, or from causing the corporation to incur significant financial liability, or both.”⁴⁷

The *Caremark* doctrine did not play a major role in Delaware corporate governance decisions until relatively recently.⁴⁸ The court in *Caremark* itself emphasized that liability for breach of oversight duties is “possibly the most difficult theory in corporation law upon which a plaintiff might hope to win a judgment.”⁴⁹

⁴⁵ *Stone v. Ritter*, 911 A.2d 362, 370 (Del. 2006). These have often been referred to respectively as “Prong 1” and “Prong 2” obligations under *Caremark* and its progeny. See *Teamsters Local 443 Health Servs. & Ins. Plan v. Chou*, No. 2019-0816-SG, 2020 WL 5028065 (Del. Ch. Aug. 24, 2020). This Essay uses the *Caremark* Prong 1 and Prong 2 terminology. See Shapira, *supra* note 31, at 481–82 (stating that “[w]hat was once dubbed ‘*Caremark* prong two’ is now referred to as a ‘red-flags claim,” and “[w]hat was once referred to as ‘*Caremark* prong one’ is now termed an ‘information-systems claim’”).

⁴⁶ *In re Massey Energy Co.*, C.A. No. 5430-VCS, 2011 WL 2176479, at *20 (Del. Ch. May 31, 2011) (often cited for then-Vice Chancellor Strine’s rousing statement that “Delaware law does not charter law breakers. Delaware law allows corporations to pursue diverse means to make a profit, subject to a critical statutory floor, which is the requirement that Delaware corporations only pursue ‘lawful business’ by ‘lawful acts.’”). For a further discussion of *Massey*, see *infra* note 51 and Part III.A.1. See also *In re McDonald’s Corp. S’holder Derivative Litig.*, 291 A.3d 652, 677 (Del. Ch. 2023) (indicating that a “*Massey* claim” “is not technically an oversight claim, but it has a similar feel”). Professor Shapira helpfully describes a *Massey* claim as a “business-plan claim”—meaning that directors “cannot affirm a business plan that is predicated on profiting by skirting regulations . . . [even if] skirting regulations will net profits to the company.” Shapira, *supra* note 31, at 482. See also *id.* at 483 (on the relationship between *Caremark* and *Massey* claims).

⁴⁷ *Stone*, 911 A.2d at 373. The *Stone* court also explained that oversight liability required a showing that the directors “knew that they were not discharging their fiduciary obligations.” *Id.* at 370. “Where directors fail to act in the face of a known duty to act, thereby demonstrating a conscious disregard for their responsibilities, they breach their duty of loyalty by failing to discharge that fiduciary obligation in good faith.” *Id.*

⁴⁸ See, e.g., Shapira, *supra* note 31, at 469–70, 476–81.

⁴⁹ *In re Caremark Int’l Inc. Derivative Litig.*, 698 A.2d 959, 967 (Del. Ch. 1996). The *Caremark* court explained that oversight failure claims require allegations of a “systematic failure of the board

Chancery judges consistently dismissed cases with *Caremark* claims on the ground that the plaintiffs had not met the high bar for liability in failed oversight contexts.

Over time, however, plaintiffs with *Caremark* claims more frequently survived the pleading stage at the Court of Chancery. In the watershed case of *Marchand v. Barnhill*, the Delaware Supreme Court opened the door to more *Caremark* claims by establishing that a failure to have and monitor a board-level information reporting system for critical compliance risks constitutes a breach of the fiduciary duty of loyalty.⁵⁰ Since *Marchand*, plaintiffs in a number of high-profile *Caremark* claims have survived motions to dismiss.⁵¹ Even where companies have “the trappings of

to exercise oversight—such as an utter failure to attempt to assure a reasonable information and reporting system exists.” *Id.* at 971.

⁵⁰ 212 A.3d 805 (Del. 2019). This was a notable early indication of an apparent shift in the Delaware courts’ approach to *Caremark* claims, in which the Delaware Supreme Court reversed the Vice Chancellor’s dismissal of an oversight claim under *Caremark* against the board of ice cream maker Blue Bell. The case involved the Blue Bell board’s failure to address food safety issues that led to a listeria outbreak in Blue Bell’s ice cream and catastrophic consequences for the company. The state Supreme Court found that the complaint alleged facts supporting a reasonable inference that the board “failed to implement any system to monitor [the company’s] food safety performance or compliance.” *Id.* at 809. “If *Caremark* means anything, it is that a corporate board must make a good faith effort to exercise its duty of care. A failure to make that effort constitutes a breach of the duty of loyalty.” *Id.* at 824. Nevertheless, the *Marchand* court explicitly affirmed the high standards for pleading *Caremark* claims and stated that directors have “great discretion to design context- and industry-specific approaches tailored to their companies’ business and resources.” *Id.* at 821.

⁵¹ In a very high-profile case, for example, Vice Chancellor Zurn denied Boeing’s motion to dismiss a *Caremark* action against the company over the board’s failure to address the safety problems of the 737 MAX aircraft. *See In re Boeing Co. Derivative Litig.*, C.A. No. 2019-0907-MTZ, 2021 WL 4059934 (Del. Ch. Sep. 7, 2021) (concluding that the plaintiffs had adequately pled *Caremark* liability under both prongs of the oversight obligation—because the Boeing board completely failed to establish a reporting system for airplane safety, and because they ignored catastrophic plane crashes as a red flag of safety problems with the aircraft at issue).

The Court of Chancery also refused to dismiss a shareholder action brought against Facebook for having violated “on a truly colossal scale” a consent decree over privacy violations that it entered into with the FTC. *In re Facebook, Inc. Derivative Litig.*, C.A. No. 2018-0307-JTL, 2025 WL 262194 (Del. Ch. May 10, 2023). According to the complaint in the case, Facebook sold data to third parties in direct violation of its consent order (leading to the Cambridge Analytica scandal of 2018) and removed disclosures to consumers required by the consent order from the company’s privacy settings. *See* Kevin LaCroix, *Court Denies Dismissal Motion in Facebook User Data Privacy Derivative Suit*, D&O DIARY (May 14, 2023), <https://perma.cc/LNR7-68GX>; Ann Lipton, *Possibly the Easiest Theory in Corporation Law*, BUS. L. PROF. BLOG (May 13, 2023), <https://perma.cc/GWN5-Q9N2>. The

oversight,” courts are now calling out oversight failures.⁵² In a recent oversight case concerning intentional lawbreaking, the Delaware Chancery Court explicitly expanded the application of *Caremark* duties to corporate officers.⁵³ In doing so, the Vice Chancellor expressed the view that *Caremark* claims apply not only to mission critical risks but range more broadly to “central compliance risks.”⁵⁴ Because directors cannot realistically oversee every risk, boards must have information systems that will bring to their attention the most important risks to the company’s viability.⁵⁵

Still, the overall breadth of *Caremark* and the prospect of the doctrine’s expansion are not fully clear under Delaware corporate law. The courts have not defined mission criticality or even compliance centrality. Virtually all the cases in which plaintiffs avoid early dismissal on *Caremark* grounds involve extreme facts, highly

case settled at the eleventh hour. Tom Hals, *Meta Investors, Zuckerberg Reach Settlement to End \$8 Billion Trial Over Facebook Privacy Violations*, REUTERS (July 17, 2025), <https://perma.cc/MS4T-5UKU>. See also *In re Clovis Oncology, Inc. Derivative Litig.*, Consol. C.A. No. 2017-0222-JRS, 2019 WL 4850188, at *1, *12 (Del. Ch. Oct. 1, 2019) (describing another “monoline” company developing a lung cancer drug and operating in a “highly regulated industry” whose board failed to report drug trial data accurately to the FDA even though complying accurately with FDA requirements was “mission critical”). See also *Marchand*, 212 A.3d at 822.

As for claims of fiduciary duty breaches resulting from board acquiescence in illegality, the principal case is the Court of Chancery decision *In re Massey Energy Co.*, 2011 WL 2176479. There, Vice Chancellor Bouchard noted that the board of directors of Massey Energy, despite cosmetic attempts to ensure compliance, had acquiesced in the company’s dominating CEO’s illegal activity. See also *infra* note 54.

⁵² *Hughes v. Hu*, C.A. No. 2019-0112-JTL, 2020 WL 1987029, at *16 (Del. Ch. Apr. 27, 2020) (defendants’ motion to dismiss was denied because, although the company “had the trappings of oversight,” including an audit committee and compliance department, they met sporadically and ignored indications of irregularities).

⁵³ *In re McDonald’s Corp. S’holder Derivative Litig.*, 289 A.3d 343 (Del. Ch. 2023).

⁵⁴ *Id.* at 678. There, the Global Chief People Officer of McDonald’s—who was the company’s head human resources executive—engaged in several acts of sexual harassment. In addition to this recurring sexual harassment, the court emphasized the company’s “party” and “boys’ club” atmosphere, allegations of workplace complaints ignored by HR, 30-city employee walkouts, a 10-city strike across the U.S., coordinated EEOC complaints and employment litigation, and a congressional inquiry. *Id.* at 664–67. Vice Chancellor Laster dismissed the plaintiffs’ failed oversight claims against the McDonald’s board because the board actively addressed the sexual harassment issues when they became aware of them.

⁵⁵ See Shapira, *supra* note 31, at 485–86.

regulated industries, and severe public consequences (often involving catastrophic physical harm), but it is not clear that these characteristics define the boundary of oversight. The courts distinguish between illegal conduct and more general business risk as a ground for failed oversight liability, but don't define either clearly.⁵⁶ And they continue to cite the statements articulating the difficulty of meeting the *Caremark* liability standards and reiterate the plaintiffs' obligation to plead knowing violations of the duty of good faith.⁵⁷ As one scholar has trenchantly put it, "it is hard to predict which missions count as critical, which flags count as red, and which business plans count as illegitimate."⁵⁸

Predicting the future of *Caremark* expansion has become even more complicated recently. Apparently spurred by the desire to combat the "DExit" phenomenon⁵⁹—referring to companies formerly incorporated in Delaware seeking to reincorporate in more defense-friendly states—the Delaware legislature recently passed changes to corporate governance law that advantage controlling stockholders and reduce shareholder access to corporate information.⁶⁰ Particularly given the

⁵⁶ In *In re Citigroup*, for example, the court distinguished between the oversight obligation for business risk and the duty to monitor legal risk. *In re Citigroup Inc. S'holder Derivative Litig.*, 964 A.2d 106 (Del. Ch. 2009). The plaintiffs had alleged violations of a duty of oversight based on a "failure to properly monitor Citigroup's business risk, specifically its exposure to the subprime mortgage market." *Id.* at 123. While recognizing the applicability of oversight obligations to business risk, the court found that the case was an example of "plaintiff shareholders attempting to hold the director defendants personally liable for making (or allowing to be made) business decisions that, in hindsight, turned out poorly for the Company." *Id.* at 124. These sorts of claims should be analyzed under the duty of care and the business judgment rule. *Id.* at 131. Even with respect to the business risk cases, however, some have argued that the Delaware courts have in fact gone far to extend the monitoring duty to business risk "while at the same time doctrinally disavowing that they have done so." Ezra Wasserman Mitchell, *Caremark's Hidden Promise*, 51 LOY. L.A. L. REV. 239, 239 (2018).

⁵⁷ *In re Plug Power Inc. S'holder Derivative Litigation.*, 2025 WL 1277166, *11–13 (Del. Ch. 2025).

⁵⁸ Shapira, *supra* note 31, at 483.

⁵⁹ See, e.g., Stephen M. Bainbridge, *DExit Drivers: Is Delaware's Dominance Threatened?*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Sep. 6, 2024), <https://perma.cc/Z35T-ZWR3>.

⁶⁰ See, e.g., David Bell, Marie Bafus & Dean Kristy, *Delaware Revamps Its General Corporation Law—Will It Stop Companies from Leaving?*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Apr. 6, 2025), <https://perma.cc/6AVJ-2STT>. Still, in *Wong v. Amazon.com, Inc.*, the Delaware Supreme Court recently reversed the Chancery court's decision to reject an Amazon stockholder's books and

importance of pre-filing Section 220 documentary access in building *Caremark* claims,⁶¹ these developments might lead to an overall reduction in the number of shareholder derivative actions surviving motions to dismiss.⁶² As for the future of *In re Fox* itself, the Delaware courts would not have an immediate occasion to assess the expanded *Caremark* theories proposed by the *In re Fox* plaintiffs if Vice Chancellor David ultimately grants a summary judgment motion by Fox and dismisses the case on standing grounds.⁶³

B. The Oversight Expansion Sought in *In re Fox*

Although it simply purports to make claims under traditional oversight duties, the complaint in *In re Fox* can reasonably be read as calling for the *Caremark* doctrine to be expanded on three fronts. First, the complaint urges that the *Massey* doctrine, under which courts have found boards liable for corporate illegality, should be expansively interpreted to include liability for board adoption of a business model that failed to limit defamation risk.⁶⁴

Second, the *In re Fox* complaint asserts that a news organization's failure to have and publish a detailed "best practices" policy for its journalism should be seen as an indicator of a failure by its board to have the internal controls necessary under *Caremark*. No prior *Caremark* case has effectively required corporate boards to adopt and publish specific, industry-wide best practices policies for their operations.

records request, indicating that the courts will continue to engage in detailed case-by-case analysis in Section 220 cases. No. 487-2024, 2025 WL 2104036 (Del. July 28, 2025). See Benjamin P. Edwards, *Amazon Loses Stockholder Books and Records Matter in Delaware Supreme Court*, BUS. L. PROF. BLOG (July 29, 2025), <https://perma.cc/K2LQ-53GR>.

⁶¹ See Shapira, *supra* note 31, at 513.

⁶² Professor Shapira has discussed how the Delaware courts' expanded approach to Section 220 in the past has enabled derivative suit attorneys to obtain documents indicative of directors' mental states and awareness. *Id.*; see also Roy Shapira, *Max Oversight Duties: How Boeing Signifies a Shift in Corporate Law*, 48 J. CORP. L. 121, 131–32 (2022).

⁶³ See *supra* note 39 and accompanying text.

⁶⁴ Although the complaint charges three bases for liability, the plaintiffs' "Massey claim" undergirds the other *Caremark* duty breach allegations. For further discussion of the impact of an "illegal business model" claim engrafted onto judicial consideration of a traditional *Caremark* analysis, see Part III.A.1 and particularly the text between notes 78 and 79.

Third, the *In re Fox* complaint claims that even a few instances of prior defamation liability should be considered “red flags” that would indicate inadequate board control of a news organization’s output. On this theory, *Caremark* would also impose an obligation on news organizations to correct programming after objections from the subject of coverage and public discussions of falsity, with failures to issue such corrections to be taken as evidence of bad faith by the board.

The following discussion focuses on the plaintiffs’ proposed doctrinal enhancements in *In re Fox* because the arguments set up a template for expanded *Caremark* claims against the press in future litigations against news media, and not to argue for a particular result in the case itself.

III. BALANCING DUAL COMMITMENTS TO PRESS FREEDOM AND TRUTHFUL POLITICAL DISCOURSE

Truthful and complete information in principle supports an informed public and the goals of democracy. Political misinformation obviously undermines those purposes, particularly in an information environment in which the biggest problem is no longer scarcity of information but scarcity of attention and capacity to process the contents of the informational firehose. At the same time, democratic commitments also include a commitment to the social benefits of a free and independent press.⁶⁵ The underlying tension, then, is thus that we have dual social commitments—our commitment to reducing the impact of misinformation on public discourse and our commitment to freedom of the press and the democratic value of independent editorial judgment.

These dual commitments can lead to a fundamental conflict at the meeting point between corporate governance and free press. Tradeoffs are inevitable and must be calibrated. How effective can we expect an expanded liability regime under *Caremark* to be in materially reducing political misinformation? Will such a use of

⁶⁵ In *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and its progeny, the Supreme Court articulated First Amendment restrictions on liability under state defamation law in order to protect speech about public officials and matters of public concern. In *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), the Court specifically highlighted the importance of the fundamental norm of editorial independence against government interference. While this provides no legal protection against private expressive control, it articulates an important expressive value. Surveys indicate that the great majority of Americans “see the freedom of the press as highly important to the well-being of society.” Kirsten Eddy, *Most Americans Say a Free Press Is Highly Important to Society*, PEW RSCH. CTR. (Apr. 23, 2024), <https://perma.cc/3TS4-KMYT>.

corporate governance unduly threaten the press function? This Part concludes that the balance ultimately tips against such an expansion of board oversight duties.

A. Assessing the Caremark Theories Promoted in *In re Fox*

Each of the theories of liability advanced by the plaintiffs in *In re Fox* calls for an expansion of existing doctrine in ways that go beyond the justifications of the *Caremark* doctrine (in addition to predictably undermining press functions as discussed in Part III.B below). The plaintiffs' arguments do not provide adequate reasons to justify such *Caremark* creep. The adoption of the expansions for which the plaintiffs are arguing would increase uncertainty in corporate governance litigation, invite ideological lawsuits, and open the door to substantive overreach by Delaware courts.

1. Expanding *Massey*'s definition of illegality

Vice Chancellor Laster's denial of Fox Corporation's motion to dismiss was driven largely by the argument that Fox, to maintain its preeminent position as programmer to America's conservative audience, had consciously adopted "an illegal business model by which Fox News pursues profits by committing actionable defamation."⁶⁶

It takes a significant leap to equate board acceptance of potential defamation liability with board failure to prohibit activity that has been adjudicated as clearly illegal (and criminal, at that). In the *Massey* case itself, for example, regulators had made numerous findings of illegal operations by the mining company—which the board of directors, under the thumb of an aggressive scofflaw CEO, had effectively ignored while engaging in mere "compliance motion."⁶⁷ Other *Massey* claim cases

⁶⁶ Complaint, *supra* note 16, ¶ 12. See also *id.* ¶ 14 ("Fox News adopted a tortious business model, which dates back at least to the Seth Rich scandal in 2017. Unlike other major media companies, Fox News gives its executives and hosts free rein to promote factually unfounded political narratives."). See *In re Fox Corp. Derivative Litig.*, Consol. C.A. No. 2023-0418-JTL, 2024 WL 5233229, at *1–2, *9–10, *13 (Del. Ch. Dec. 27, 2024).

⁶⁷ *In re Massey Energy Co.*, No. 5430-VCS, 2011 WL 2176479, at *21 (Del. Ch. May 31, 2011) ("To be plain, when a company already has been proven to have engaged in illegal conduct, it is a high risk strategy for it to embrace the idea that its regulators are wrongheaded and to view itself as simply a victim of a governmental conspiracy. Relatedly, when a company has a 'record' as a recidivist, its directors and officers cannot take comfort in the appearance of compliance motion at the pleading stage, when the plaintiffs are able to plead particularized facts creating an inference that the Board and management were aware of a troubling continuing pattern of non-compliance in fact

in which the derivative complaints avoided early dismissal have also involved clear illegality.⁶⁸

There is a good policy reason for limiting *Massey* liability to board failures to address adjudicated and regulatorily established (or at least clear and indubitable) illegality. Deciding how precisely to value and calibrate potential legal liability in lawsuits that have not yet been filed seems far closer to an abstract recognition and balancing of risk than to the knowing violation of positive law that is currently prohibited by the courts.⁶⁹ Publishing material that will lead to lawsuits is unavoidable

and of a managerial attitude suggestive of a desire to fight with and hide evidence from the company's regulators.”).

⁶⁸ See, e.g., *In re Facebook, Inc. Derivative Litig.*, Consol. C.A. No. 2018-0307-JTL, 2025 WL 262194 (Del. Ch. May 10, 2023) (about Facebook's direct violations of its privacy-focused consent order with the FTC); *Lebanon Cnty. Emps.' Ret. Fund v. Collis*, 311 A.3d 773 (Del. 2023) (about opioid medication wholesaler Amerisource Bergen's failure to reduce diversion of opioids for non-medical use in violation of the Controlled Substances Act); *Ontario Provincial Council of Carpenters' Pension Tr. Fund v. Walton*, C.A. No. 2021-0827-JTL, 2023 WL 3093500 (Del. Ch. Apr. 26, 2023) (about Walmart's failure to comply with its opioid-related settlement with the DEA and its obligations under the Controlled Substances Act).

⁶⁹ To be sure, Delaware courts have in the past distinguished between legal compliance and business risk calculations. See, e.g., *In re Citigroup Inc. S'holder Derivative Litig.*, 964 A.2d 106, 131 (Del. Ch. 2009). Even as a matter of corporate law theory, scholars have sought to explain and assess the rationales justifying Delaware's differential treatment of business and legal risk. See, e.g., Adi Libson & Gideon Parchomovsky, *Are All Risks Created Equal? Rethinking the Distinction Between Legal and Business Risk in Corporate Law*, 102 B.U. L. REV. 1601 (2022).

There does not appear to be a fundamental difference between business risk and legal risk conceptually. Professors Libson and Parchomovsky argue that the most persuasive justification for the differential treatment is that board members and managers have different levels of legal risk-tolerance, which leads to legal risk largely escaping board scrutiny and shareholders being deprived of board oversight. *Id.* at 1624–33. Libson and Parchomovsky recommend the adoption of a nuanced approach to rules relating to legal risk depending on type and severity. *Id.* at 1635–47.

Notably, however, these scholars focus on criminal law and administrative norm risks in their six-class template for the treatment of legal risks and do not include potential tort litigation (such as defamation law). *Id.* They recognize that, just like business risk, legal risk cannot be eliminated. *Id.* at 1616–17, 1647. Perhaps the issue centers on the certitude of legal risk and its importance to the viability of the firm. It is beyond the scope of this Essay to address the overarching question posed by those looking at the issue as a matter of corporate theory. Rather, this Essay seeks only to show how application of enhanced *Caremark* obligations with respect to defamation risk in the context of corporate-owned media subsidiaries raises particularly sharp normative conflicts. The issue here

for the press, but plaintiff victories in tort cases are far from a foregone conclusion under current law.

Particularly considering the politicized character of defamation litigation these days and the social value of the press function, the law should distinguish between the decision by a board overseeing a media company that respects editorial freedom and, for example, an airplane manufacturer board's decision to sacrifice public safety for profits. This is why board inaction in response to defamation suits should not, without more, be treated the same way as clear and knowing violations of law.

Massey's dictum about violating the law does not define what that means.⁷⁰ Defamation law is notoriously contextual, and liability depends on a multiplicity of factors—stemming from the common law elements of libel as well as the special inquiries required by First Amendment precedents. Even if *Caremark* were to be read as imposing expanded duties on boards and officers in situations where corporations disobeyed regulatory mandates, it is far from clear that this should be extended to the risk of defamation litigation for news organizations. Delaware courts have allowed boards of directors to breach contracts without characterizing such breaches as illegal.⁷¹ Efficient breach seems a better comparison point for tort cases than the established criminal liability in cases like *Massey*.⁷² If a corporate board is permitted to approve contract breaches, then why should there be liability for running a risk of civil lawsuits whose outcomes for the corporation are far from

is whether we should be cautious about enhanced obligations relating to legal risk in the news media context when legal liability is hypothetical and the likelihood of strategic political lawsuits is high.

⁷⁰ *In re Massey*, 2011 WL 2176479, at *21. It did not have to do so, as the company had “pled guilty to criminal charges, had suffered other serious judgments and settlements as a result of violations of law, had been caught trying to hide violations of law and suppress material evidence, and had miners suffer death and serious injuries at its facilities. Instead of becoming a corporation with a new attitude and commitment to safety that won recognition for that change from its regulators, Massey continued to think it knew better than those charged with enforcing the law, and in fact, often argued with the law itself.” *Id.*

⁷¹ See, e.g., Shapira, *supra* note 31, at 505; Ann Lipton, *Caremark and “Violation of Law”*, BUS. L. PROF. BLOG (Apr. 15, 2023), <https://perma.cc/SU9R-H46E> (and case citations therein).

⁷² Professor Lipton suggests that one difference between contract and tort is the availability of punitive damages “which is kind of like society’s way of saying that this is not simply priced behavior, but *unauthorized* behavior.” Lipton, *supra* note 71 (emphasis in original). The problem with that is precisely that the availability of punitive damages increases the likely chilling effect of liability on the press.

clear? (The risk posed to news organizations by a broad application of *Massey* would become even greater if the press-protective constitutional gloss on state defamation law were to be diminished or eliminated in the future by the Supreme Court.)

Such an expansion of *Massey* liability could also create legitimacy problems for the Delaware courts. An interpretation of fiduciary duty that would effectively turn the courts into super-boards of directors seems inconsistent with the traditional view that Delaware corporate law does not replace board decisions with substantive judicial decision-making.

In addition, if—as in *U.S. Dominion v. Fox*—legal liability is not established in the underlying tort lawsuit because the parties settled the case, it seems quite a stretch to base corporate law liability for a knowing violation of positive law on such a settlement. Further, this would put the Delaware Chancery court judges in the awkward position of deciding the defendant’s liability for defamation in a shareholder derivative lawsuit when it was not decided in the underlying defamation suit over which the derivative suit was brought.⁷³ Particularly when the underlying cases are politicized, this can also enmesh Delaware corporate law in partisan politics in ways that the Delaware courts have resisted in the past.⁷⁴

Finally, Vice Chancellor Laster reasoned in his denial of Fox’s motion to dismiss that since “[s]ophisticated and well-advised individuals do not formally document bad-faith decisions, . . . rarely will there be direct evidence to support a *Massey* claim.”⁷⁵ On this view, the court in a *Massey* case would have to “look[] at a series of fiduciary inactions and actions[] made over time” and determine if there was “[a] strong pattern of conduct [that could] support an inference” of an intentional decision to violate the law.⁷⁶ Query on what basis courts should make such inferences of bad faith in press cases when the issue is defamation risk. What should constitute a “strong pattern of conduct”? How much evidence of board decisions to avoid defamation risk should be considered sufficient to undermine claims that

⁷³ See Ann Lipton, *The Legitimation of Shareholder Primacy* 37 (Eur. Corp. Governance Inst., Law Paper No. 826, 2025), <https://perma.cc/HD8V-5A3C>.

⁷⁴ *Id.* at 2, 5 (noting Delaware corporate law’s stance as apolitical).

⁷⁵ *In re Fox Corp. Derivative Litig.*, Consol. C.A. No. 2023-0418-JTL, 2024 WL 5233229, at *9 (Del. Ch. Dec. 27, 2024).

⁷⁶ *Id.*

the board was operating under an illegal business model? If the evidence of a pattern were to be the existence of prior defamation cases, how many instances of prior defamation liability should be deemed sufficient for the inference? Should the amounts of awarded damages matter? How should settlements be treated?

In assessing what circumstantial evidence allows an inference that a board adopted an illegal business plan for profit, recent cases are said to look at “(1) how openly the company was flouting the law; (2) how widespread the lawbreaking was; and (3) what incentive structures were in place.”⁷⁷ Query how this sort of analysis would be applied with respect to a mainstream newspaper, an opinionated investigative journalism shop, or a data journalism hub covering an unfolding newsworthy story. What should courts look at in assessing the sufficiency of staffing of the compliance function, as they did in one of the *Caremark* cases involving opioids?⁷⁸ Given constitutional protections for speech and press, should courts really be determining the robustness of the outlet’s fact-checking function? And, in any event, on what objective basis could they do so? What should they make of the skepticism and source-protecting newsgathering techniques of the archetypical investigative journalist or anti-authoritarian national security reporter?

Applying corporate law in this context also promises worrisome skewing effects. For example, news organizations—such as *The Intercept*—that openly stake out partisan positions may well be more open than facially neutral media companies to claims of lying and inaccuracy by those of the opposite political camp. If corporate-owned, such entities would be more likely to invite (and bear the many ancillary costs of) *Caremark* lawsuits.

An “illegal business strategy” claim in the press context can supercharge the ordinary Prong 1 (information systems) and Prong 2 (red flags) claims under *Caremark*, at least in practice. Once a shareholder plaintiff argues that the board is incapable of making an objective decision on whether to pursue a corporate claim because of an inference of an illegal business strategy, it is plausible for every individual action or inaction by the board to be assessed through that broader “inferred business strategy” lens. Even if a company had board-level information systems in place—thereby meeting the *Caremark* minimum on Prong 1—the “illegal business

⁷⁷ Shapira, *supra* note 31, at 508.

⁷⁸ *Id.* at 508–09 (citing *AmerisourceBergen Corp. v. Lebanon Cnty. Emps.’ Ret. Fund*, 243 A.3d 417, 421–22 (Del. 2020)).

model” frame could well lead the court to undertake a more skeptical assessment of the systems’ adequacy than the *Caremark* precedent would warrant. This may be particularly the case for media companies that explicitly hew to a particular point of view in their coverage, because the taint of illegality can more easily color public assessments of programming that are already thought by many to be biased.

Looking for a pattern will arguably lead the viewer to interpret ambiguous evidence in ways consistent with the suspected pattern. If so, it is reasonable to expect an increase in denials of motions to dismiss in shareholder derivative actions alleging an “illegal business model,” an increase that would lead to a pro-plaintiff skew in final outcomes.

2. Industry “best practices” policies and *Caremark* information systems claims

In addition to the *Massey* claim, the plaintiffs in *In re Fox* also claim that Fox News’ failure to adopt written and published policies concerning journalism, as other press outlets have done, should be interpreted as evidence of a total failure to adopt the board-level internal controls required by *Caremark* Prong 1.⁷⁹ The plaintiffs’ claims here imply two theories: 1) that failing to adopt a policy that other companies in an industry have adopted should constitute a presumptive Prong 1 failure; and 2) that if a news company has articulated a policy of truthfulness, false programming should be seen as evidence of a mission-critical failure of board oversight.

But comparisons between press organs’ policies are troubling for a variety of reasons. First, to a significant degree, even written policies constitute guiding principles that contain broad and often vague or ambiguous language whose meaning is to be understood in context. Although it is easy to write a manual requiring journalists to “be ethical” or “offer balance,” that level of generality cannot provide

⁷⁹ In the *Fox* case, the defense brief in support of its motion to dismiss asserted that Fox did have Standards of Business Conduct that applied to Fox News. See Opening Brief in Support of Motion to Dismiss the Verified Amended Stockholder Derivative Complaint, *In re Fox Corp. Derivative Litig.*, No. 2023-0418-JTL, 2024 WL 3327903, at *6–7 (Del. Ch. July 3, 2024). See also Timothy L. Fort & Melissa Latini, *The Duty to Establish, Monitor, and Enforce: How Today’s Corporate Compliance Standards Provide a Workable Model to Limit Defamation and Protect First Amendment Freedoms*, 33 NOTRE DAME J.L. ETHICS & PUB. POL’Y 35, 36 (2019) (arguing that news disseminators should be required to “enact a policy that commits to standards of truthfulness, to monitor the work in producing and broadcasting news stories, and to enforce those standards”).

clear guidance on hard journalistic and editorial decisions, especially when decisions must be made in the moment. This is why tying *Caremark* liability to written policies is both substantively hollow and likely to skew against defendant news organizations in practice.

Second, even if such policies were written with greater specificity, there would inevitably be differences between the policies adopted by the various players in the complex media industry today. So how exactly the written policies from the industry as a whole should be evaluated is itself a question. Which written policies should courts use as behavioral litmus tests when organizations have a variety of policies?⁸⁰ Should legal compliance policies at the top corporate level be ignored if the company's news unit does not have its own? Should courts be wielding the possibility of liability under *Caremark* depending on the specificity of the policies adopted?

Perhaps even more fundamentally, the media landscape today consists of an array of different sorts of media organizations that offer news and information to the public. Different news organizations (and different types of journalists) focus on different things—for example, uncovering truth, or reporting with exact accuracy insofar as possible, or maintaining neutrality, or simply informing the public factually, or contextualizing new developments for the public, or challenging government and the powerful, or representing their audiences, or upholding journalistic and editorial independence. Some news organizations are clearly partisan and report with partisan slants on certain issues while others purport to report with comparative neutrality. And news organizations have different kinds of programming, ranging from hard news to entertainment news to political opinion and commentary. Should corporate law force courts to require a particular set of journalistic standards for all, particularly if they are drafted to reduce decisional discretion?

To be sure, if a publicly owned news company adopts workable policies providing a clear path to complain to the board, the board members might feel the pressure to engage in further inquiry when such complaints are raised or even to fire

⁸⁰ This question is likely to arise particularly where news organizations are parts of larger corporate entities. For example, in the Fox litigation itself, plaintiffs based their *Caremark* Prong 1 claim on their assertion that Fox News did not have news standards common to other news organizations, while Fox pointed to the company's Standards of Business Conduct which included "accuracy of information" as one of the company's "core values." See Motion to Dismiss, *supra* note 79, at *6.

policy violators whose misbehavior is discovered as a result of the complaints.⁸¹ But there is a difference between idealizing best practices as an aspirational goal and using the best practices of particular news organizations in particular contexts as litmus tests for board liability under *Caremark*.

Furthermore, should courts engage in institutional comparisons across the media industry when considering the appropriateness of a particular board of directors' responses to defamation risk? What should happen if the press defendant in a *Caremark* suit is only one of the entities to which claims could apply of insincerity, cutting corners, conspiracism, attention to market reactions, and strategizing not to lose audience?⁸² Including this in the analysis could expand the scope of the industry-wide comparison beyond the *In re Fox* laser focus on written policies. In any event, it reveals the possibility that an expanded *Caremark* doctrine could lead to selective, strategic, or politicized lawsuits designed to punish or pressure disfavored press outlets. Of course, strategic lawsuits of this type can be brought under defamation or other tort law. However, an expanded *Caremark* doctrine would have fewer safeguards for defendants than existing law.

Even beyond the question of the written policies themselves, the Delaware courts require board-level internal controls in circumstances involving matters mission-critical or central to the corporation.⁸³ Some corporate law scholars have

⁸¹ In the case of Fox, for example, it appears that the board fired Tucker Carlson, who had been one of the network's primary stars, after the members became aware of an email from him that had surfaced through the litigation process and that contained racist and vulgar statements. See, e.g., Bess Levin, *Report: Fox News Fired Tucker Carlson After Discovering He Wasn't Just Playing a Racist on TV (Among Other Things)*, VANITY FAIR (May 3, 2023).

⁸² Even if not as glaring as with respect to Fox, query whether there might not be some differences between public and private stances with respect to coverage issues if discovery were to lead to the release of emails at *The New York Times*, One America News Network, Mother Jones, The Intercept, and MSNBC on a variety of controversial programming issues. Wouldn't journalists and editors differ along a variety of axes on such issues? Should this alone be the justification for finding board liability under *Caremark*'s Prong 2?

⁸³ Professor Shapira classifies the Delaware courts' mission critical cases into three categories: risks that are (1) self-evident, (2) self-disclosed, or (3) reputationally disastrous. Shapira, *supra* note 31, at 486. It is difficult to fit the news media context into the elements of this taxonomy. While one could reasonably claim that falsity in public discourse is a self-evident risk, many people on all sides of our partisan political landscape today claim that information contrary to their beliefs is necessarily false. By contrast to the balance between corporate profit and harms to public safety, the press

suggested in connection with the *Fox* case that broadcasting false election fraud accusations is fundamentally inconsistent with the clear mandate of news organizations to report the truth accurately. For example, when the stockholder derivative action against Fox was filed, Professor Ann Lipton opined: “It would not be a hard sell for the court to say a news organization should avoid intentionally lying about people. . . . This is core to their identity and obviously presents legal risks.”⁸⁴

But how much further than the constitutionally required standard of defamation liability for public figures should Professor Lipton’s statement be interpreted as reaching? For example, an absolutist definition of established truth as the core test could prevent the publication of important early-stage journalism based on whistleblower claims. From CBS’s reliance on Jeffrey Weigand to put the spotlight on Big Tobacco to *The New York Times*’ stories triggered by Snowden and Assange national security revelations to the market-shaking reporting based on Enron whistleblowers’ information, history shows the importance of giving news organizations the legal space to publish developing stories relevant to the public interest when a strict liability truth standard might counsel otherwise. Reading corporate

context involves both controlling misinformation and promoting press freedom as two sets of self-evident values.

As for the second category, while a news organization’s mission statement could theoretically be used as the basis of a “promise/performance” assessment, the breadth, vagueness and contextual character of journalistic standards, the complexity of “truth” in the context of news, and the possibility of politicized abuse suggest caution.

Finally, with respect to the risks that could “disastrously” impact the company’s long-term reputation, it is particularly hard to calculate the “disastrousness” of reputational harm from particular stories and with respect to individual companies, across corporate units, and especially over time. In the Fox context, for example, is it potential harm to the Fox-owned *Wall Street Journal* that should be measured, or the impact from spreading falsity to the reputation of the Fox News cable network? And when society is politicized and partisans disbelieve claims of falsity, how and with respect to which publics is reputational harm from charges of disseminating misinformation to be assessed?

⁸⁴ Igor Derysh, “*Fox Knew*”: *Shareholder Sues Rupert Murdoch over Fox News’ “Stolen Election Claims”*, SALON (Apr. 12, 2023), <https://perma.cc/64QB-M92L> (quoting corporate law expert Prof. Ann Lipton).

Professor Sarah Haan also said: “If you’re a news company, and you become known for distributing blatantly false information, people aren’t going to watch your news program or trust it. . . . A competent board would have some oversight system in place—they would be made aware if there was some major campaign of false news being promoted through their outlets.” *Id.*

law obligations to impose more extensive duties on publishers than the constitutionally required minima in defamation cases could effectively end-run the *Sullivan* protections for the press.

“Truth” and “falsity” are not simple constructs to define. Even when a news outlet’s journalistic standards require the avoidance of falsity, there are vast gray areas where assertions of “falsity” do not clearly apply. This issue arises in many contexts—including where the press may not yet know that reported information was false; or where only part of the reporting is false or arguably false; or where the truth or falsity of the reported claims is contestable, or where assertions of truth or falsity are indirect, based on implication, inference, or editing; or where a simple single “truth” cannot be established; or where falsity is claimed as to opinion programming.⁸⁵ And while the degree of media endorsement of falsity is clear in some sorts of circumstances (such as Fox’s hyperbolic political commentary programming after the 2020 election), that is not always the case.

In *Marchand*, the defendant, Blue Bell, was a monoline company which only manufactured ice cream, and the safety of its ice cream for consumption was obviously “mission critical” to its operations.⁸⁶ It operated in a highly regulated context with specific safety requirements for avoiding bacterial contamination. As a practical matter, how should liability for oversight failures in that context be translated to the context of media organizations that provide wide ranges of information “products”? Should boards focus on particular programs, the organization’s programming as a whole, the practices of particular categories of programs, some combination of the above, or something else? Even beyond raising freedom of the press

⁸⁵ The arc of public discussion since 2020 about the origin of the COVID-19 pandemic is one example of uncertainty.

Questions can also be asked about the impact of falsity. Do audiences believe in the truth of what they see, hear and read in news media? To what extent and with respect to which issues? Do they distinguish between hard news and opinionated commentary programming? What about when many news organizations repeat the same sorts of false claims so that the causative effect of falsity in one media outlet is blurred? See *infra* Part III.A.1.

Scientific answers to these questions are beyond the scope of this Essay; the point here is simply to suggest that it would be useful to focus not only on the falsity of what is said but also on its impact in the world. While false claims regarding presidential elections may stoke the fears of some publics, for example, it is hard to believe that all false political claims have material impacts on the audience.

⁸⁶ *Marchand v. Barnhill*, 212 A.3d 805, 824 (Del. 2019).

concerns, the press context implicates many more operational issues than those raised in *Marchand* and other like decisions.

Defamation claimants will always assert that the news organization's statements about them were false, even if the claims of falsity are debatable or themselves untrue in the specific case. Moreover, the Supreme Court has recognized that error is inevitable in free debate and that independent editorial judgment is a First Amendment value—which is why the *Sullivan* line of precedent and *Miami Herald v. Tornillo* are press-protective.⁸⁷ While legal protections under the First Amendment apply only against government, the constitutional recognition of expressive rights reflects democratic values that should likewise be encouraged in the relationship of news outlet corporate directors with the outlet's editors.⁸⁸

⁸⁷ See *Levi*, *supra* note 40, *supra* note 65, and *infra* note 122.

⁸⁸ Indeed, some would argue that a news organization should be protected from tort liability to some degree when it relays assertions about a clearly newsworthy matter regarding a public figure because of its relevance, even if it suspects that the assertions are not true, so long as it does so neutrally in the course of reporting on a preexisting controversy. In *Edwards v. National Audubon Society, Inc.*, 556 F.2d 113 (2d Cir. 1977), the Second Circuit adopted the “neutral reportage privilege” to protect the press for publishing a newsworthy story recounting charges the reporter does not believe:

[W]hen a responsible, prominent organization like the National Audubon Society makes serious charges against a public figure, the First Amendment protects the accurate and disinterested reporting of those charges, regardless of the reporter's private views regarding their validity. . . . What is newsworthy about such accusations is that they were made. . . . The public interest in being fully informed about controversies that often rage around sensitive issues demands that the press be afforded the freedom to report such charges without assuming responsibility for them.”

Id. at 120. Although many circuits have not accepted the privilege, its justification seems persuasive, particularly in light of the limiting requirements identified by the court. Moreover, *Edwards* made clear that “a publisher who in fact espouses or concurs in the charges made by others, or who deliberately distorts these statements to launch a personal attack of his own on a public figure, cannot rely on a privilege of neutral reportage. In such instances he assumes responsibility for the underlying accusations.” *Id.*

Fox has argued that courts should recognize the social value of airing programming that the network knows is false but is newsworthy because of its source and impact. Query, though, whether both the justification for and requirements of such a privilege are met in the *Fox* case itself.

Fox's election coverage included political commentary programming in which hosts largely endorsed guests' electoral conspiracy theories, relied on unreliable and presumptively unbelievable sources, and kept up a barrage of programming on the subject far beyond what was considered

Under these circumstances, expanding *Caremark*'s Prong 1 information systems requirement in the media context as sought by the plaintiffs in *In re Fox* would unwisely invite acontextual application of abstract journalistic norms and mainstream media guidelines as a matter of legal doctrine. It would be inadvisable for the Delaware courts to adopt a reading of *Caremark* that would require all of today's different sorts of news and information outlets to hew to a single, cookie-cutter set of journalistic policies to judge legal compliance.

3. An expanded approach to *Caremark* "red flags" claims

The *In re Fox* plaintiffs' complaint also contains a Prong 2 "red flags" allegation that the individual defendants and the Fox board consciously failed in their duty to monitor legal compliance and that they ignored red flags. The complaint offers two principal bases for this claim: (1) that even though the board members received information about prior defamation liability, they did not act to reduce the risk of massive future damages by discouraging the reporting of false conspiracy theories; and (2) that the board's failure to correct Fox News' voting machine stories in response to objections and public discussion of their falsity evidenced bad-faith refusal to respond to "red flags" of legal risk.

Generalizing from *In re Fox* itself, the plaintiffs' theories: (1) effectively require any prior defamation litigation brought against a news organization to be classed by its parent company's board as a presumptive "red flag" for purposes of *Caremark* liability, and (2) impose obligations on such boards to respond when claims of falsity regarding their programming are extensively aired in public discourse.

newsworthy by other press outlets. It is true that all news sources, and not just Fox News, reported Donald Trump's claims of a stolen election in 2020. But to the extent that Fox News could claim "protection of the herd" at the beginning, its decisions to continue emphasizing such programming and to continue emphasizing the alleged involvement of the voting machine companies distinguished it from most of the rest of the mainstream news media.

Admittedly, society is not benefited by lockstep judgments of newsworthiness across all news organizations. But there is a difference between industry uniformity and a network's decision to keep airing what it knows are false claims by its guests for a much longer period than any other mainstream outlet and to do so without consistently and explicitly acknowledging the contested nature of the claims. This seems particularly true with respect to false programming concerning a corporation with little or no public reputation (as opposed to, say, false claims about a high-profile public figure).

a. The “red flags” of prior defamation liability

The *Caremark* jurisprudence has not yet defined what is to be deemed a “red flag.” Presumably, though, “red flags” should refer to prior instances of risks important and similar enough to the risks at issue in any given case that they should be deemed sufficient to justify board awareness and action in the current instance. It cannot be that *any* prior defamation threats, actions, or even liability or settlements should by definition be considered “red flags” for news organizations.⁸⁹

With regard to the risk of defamation liability, it is true that defamation damages and settlements since the *Gawker* case have increased exponentially.⁹⁰ However, people who are criticized by the media often sue for defamation if they can afford it—because they are angered by the allegations, because their reputation requires them to do so, because suing advances their political goals, or because they are attempting to forestall economic and social harm to themselves. They do so through litigation even if what is said about them is not substantially factually incorrect or the likelihood of their experiencing economic or reputational harm from the supposed defamation is negligible. There has been a notable increase in the number of defamation suits brought by public figures with at least arguably political aims.⁹¹ In this kind of litigious climate, news organizations operate under the risk

⁸⁹ The complaint’s first “red flags” claim is that the Fox board was warned about the risk of defamation liability as a result of the Seth Rich “scandal,” in which a false Fox News report about the death of DNC employee Seth Rich revived a conspiracy theory that Rich had been murdered because he was the source of leaked DNC emails to Wikileaks. Complaint, *supra* note 16, ¶¶ 86–96. The plaintiffs claim that the Seth Rich story should have alerted the board that it did not have adequate oversight systems in place, which then led to the programming over which Dominion and Smartmatic sued the company. Fox had retracted the story and settled the defamation action brought by Rich’s parents for an undisclosed amount. *Id.* ¶¶ 97–100. The shareholder derivative plaintiffs asserted that the “manufactured” Seth Rich story put the board on notice of major flaws with respect to defamation liability to which the board thereafter “pa[id] no heed.” *Id.* ¶¶ 88, 101. The plaintiffs asserted no evidence “of the Audit Committee [or the board] drawing any lessons from the Seth Rich scandal.” *Id.* ¶ 108.

⁹⁰ See Lili Levi, *The Weaponized Lawsuit Against the Media: Litigation Funding as a New Threat to Journalism*, 66 AM. U. L. REV. 761 (2017).

⁹¹ President Trump, for example, has brought actions seeking jaw-dropping amounts in damages in connection to news programming. See, e.g., *infra* text accompanying notes 106–111, 115–120. Most recently, President Trump sued *The Wall Street Journal* over an article discussing Trump’s name in connection with the Department of Justice’s Epstein files. See, e.g., Andrea Shalal

of defamation litigation at all times—regardless of how carefully they vet the accuracy of their programming.

Under those circumstances, should one or a few prior defamation actions—or even instances of prior liability—really be considered sufficient “red flags” of legal compliance failure?⁹² If so, how many actions and how much in prior damages should be the triggers for “red flag” liability in later cases? On what bases should such a calculation be made?

The *In re Fox* plaintiffs seek to expand the degree of connection between prior “corporate trauma” and what should be considered a red flag in a later “failure to

& Nandita Bose, *Trump Says Wall Street Journal, Murdoch Want to Settle Defamation Lawsuit*, REUTERS (July 29, 2025), <https://perma.cc/64R8-C4QV>.

⁹² In his opinion denying Fox’s motion to dismiss, Vice Chancellor Laster highlighted the plaintiff’s claim that the Fox News fact-checking department had advised management that they could not find evidence to support the allegations about Dominion and Smartmatic’s electoral interference. See *In re Fox Corp. Derivative Litig.*, Consol. C.A. No. 2023-0418-JTL, 2024 WL 5233229, at *1 (Del. Ch. Dec. 27, 2024). If true, this would present an additional “red flag” argument beyond the inferences to be drawn from the Seth Rich case alone.

In addition, and as has been noted by Professor Lipton, the *In re Fox* complaint and court papers do not highlight a possible argument—that the Fox board ignored a different type of red flag other than prior defamation actions. See Ann Lipton, *Yeah, Sorry, Still Talking Caremark*, BUS. L. PROF. BLOG (Sep. 23, 2023), <https://perma.cc/YKA6-N544>. Per this argument, the Fox Corporation board could be characterized as ignoring the possibility that the company could lose its television licenses if it were found to have violated the FCC’s news distortion and hoax programming policies.

Had this been a realistic possibility, the plaintiffs might make a plausible claim of a red flag ignored. However, the FCC’s news distortion policy had been dormant for years at the time of the programming at issue in the case. See, e.g., Lili Levi, *Reporting the Official Truth: The Revival of the FCC’s News Distortion Policy*, 78 WASH. U. L.Q. 1005 (2000). Moreover, it is not clear that the news distortion policy would have applied in its terms to this case. Admittedly, Brendan Carr, the Trump-appointed Chairman of the FCC, revived a previously dismissed news distortion complaint regarding CBS’s airing of an interview with Vice President and presidential candidate Kamala Harris. See, e.g., Benjamin Mullin, *F.C.C. Releases ‘60 Minutes’ Interview with Kamala Harris*, N.Y. TIMES (Feb. 5, 2025); Tom Wheeler, *Trump’s CBS Lawsuit Ties Media Freedom to FCC’s Regulatory Power*, BROOKINGS (Feb. 19, 2025), <https://perma.cc/S7VR-R28X>. See also Clay Calvert, *The FCC’s Misguided Efforts to Police News Trump Disdains*, AM. ENTER. INST. (Apr. 23, 2025), <https://perma.cc/5S5Z-HUYS> (detailing administrative efforts to target NBC and MSNBC’s reporting on Kilmar Abrego Garcia). But notably, the FCC Chairman has not sought to deploy the policy against Fox, see Wheeler, *supra*, and in 2020 there had been no indicators of its potential future deployment.

monitor” claim.⁹³ Their filings implicitly argue that any prior situations in which the news company has aired a false political story, been sued, and settled the action should suffice to put the parent board on notice of major flaws in their information and oversight systems.⁹⁴ By contrast, the defense brief argues that “[t]he single *Rich* settlement was not a ‘red flag’ warning of defamation claims made years later, alleging statements by different employees working in different media on a different subject.”⁹⁵ The defense thus contends that the context of the *Rich* settlement pointed to by the plaintiffs as a “red flag” is too different from that of the *Dominion* suit to be relevant to it, and that the fact that both cases involved defamation claims is not enough alone for one case to constitute a “red flag” for the other.

Zooming out from the *Fox* case itself, the point is that the more abstract the level of comparison, the more likely it is that a plaintiff will be able to argue for a connection between an asserted “red flag” and a prior “corporate trauma.” This is so even when the incidents are far apart in time. The generality of the level at which the connection is analyzed will determine its degree. This becomes particularly

⁹³ In *City of Detroit Police & Fire Retirement System v. Hamrock*, C.A. No. 2021-0370-KSJM, 2022 WL 2387653 (Del. Ch. June 30, 2022), Chancellor McCormick explained that:

For a red-flag theory to work, the red flag must be sufficiently connected to the corporate trauma at issue to elevate the board’s inaction in the face of the red flag to the level of bad faith. To quote former Chancellor Chandler, the relationship between the red flag and the corporate trauma cannot be “too attenuated.” Vice Chancellor Glasscock has described the requirement as one of “proximate cause,” stating that “the corporate trauma in question must be sufficiently similar to the misconduct implied by the red flags such that the board’s bad faith, conscious inaction proximately caused that trauma.”

Id. at *20.

⁹⁴ Plaintiffs’ Answering Brief in Opposition to Defendants’ Motion to Dismiss the Verified Amended Derivative Complaint, *In re Fox Corp. Derivative Litig.*, C.A. No. 2023-0418-JTL, 2024 WL 4132593 (Del. Ch. Aug. 27, 2024). The brief contends that the Seth Rich affair and the lies about *Dominion* and *Smartmatic* establish a sufficient connection: “[T]he Seth Rich scandal and the \$787.5 million *Dominion* settlement are two corporate traumas resulting from the promotion of defamatory, pro-Trump conspiracy theories by some of the same hosts and the same senior executives operating out of the same television studios and offices in midtown Manhattan.” *Id.*

⁹⁵ Reply Brief in Support of Motion to Dismiss the Verified Amended Stockholder Derivative Complaint, *In re Fox*, 2024 WL 4584941 (Del. Ch. Oct. 21, 2024).

worrisome if the prior corporate trauma did not involve adjudicated illegality or governmental enforcement actions.⁹⁶

There is also the question of what, if any, inferences should be drawn from media organization settlements. Should prior settlements of defamation litigations be interpreted as admissions of board oversight failure for the purposes of future suits? Since parties settle litigations for a variety of reasons, should courts be placed in the position of determining “the” reason for a prior settlement?

In addition, the size, wealth, and reputation of the media company impact both the likelihood of litigation and board decision as to the settlement of each case. For example, large companies with deep pockets and big audiences are likely to be targeted in a greater number of defamation suits. Their corporate coffers and insurance might also make confidential settlements of such cases more likely. How should this potentially skewed impact be interpreted in an expanded *Caremark* jurisprudence?

Finally, what types and degrees of oversight and monitoring would be warranted?⁹⁷ Even if prior successful defamation claims are deemed to raise “red flags” in the abstract, appropriate board responses need to be contextual. For example, if some of the defendant’s programming presents false information but other programming counters those claims, on what basis should a court—or a board—assign comparative weight to the two categories of programming in assessing a “red flags” claim? What if the evidence reveals internal inconsistency of views or executives changing their minds in their assessments of programming over time? Should corporate governance law require media boards of directors to look more searchingly for or interpret “red flags” differently with different kinds of programming? If so, how differently must boards evaluate the risks of programming at the many different points on the spectrum between totally factual, neutrally presented hard news at one pole and hyperbolically partisan, conspiracy-endorsing commentary programming at the other?

⁹⁶ See Shapira, *supra* note 31, at 498 (“The fact that a regulator initiated an investigation, or a plaintiff filed a lawsuit, may not count as a red flag if said investigation did not result in clear findings of corporate misbehavior.”).

⁹⁷ As further elaborated *infra* at Part III.B, the kind of broad review systems calibrated to eliminate potential defamation actions would doubtless be editorially intrusive.

b. A theory of “red flags” based on public discourse

The *Fox* complaint also points to a second type of “red flag” that it argues should have triggered board action—the public character of Fox News’ wrongdoing and the retraction demands made by Dominion.⁹⁸

The inference to be drawn from a failure to correct a story after receiving objections to it presents a more complex issue than is recognized in the expanded theory of *Caremark* liability urged by the plaintiffs in *In re Fox*.⁹⁹ They argue that “[w]hat matters is whether directors had the opportunity to ‘avert’ liability.”¹⁰⁰ The implication is that once objections are made and in light of public discussion, they serve as a red flag to which a board should respond by issuing a retraction.

In *Fox* itself, the equities appear weak for Fox on the facts: Dominion’s warnings were widely shared in the organization and largely concerned empirically verifiable matters. The broader point, though, is that adopting such an expanded definition of “red flags” would invite major doctrinal dangers in cases where the facts at issue do not resemble Fox’s election programming. If the *Caremark* precedent were to be interpreted this way, then plaintiffs planning a succession of cases would effectively be able to create “red flags” through their filings and public statements, plaintiffs’ assertions of falsity would effectively be accepted as true, incentives for plaintiffs to publicize their claims would be increased, and defendant media companies would be motivated to settle quickly regardless of the likelihood of ultimate victory.

There is also a timing question: At what point during the public discussion of a contested political issue should a board be deemed to have violated its duty of loyalty by failing to retract its objectionable statements or settle a defamation suit? Would a retraction necessarily avert the harm, or would it function as a reputational black eye to the news organization and an admission of guilt for the purposes of a later damages action? And what corporate governance norms should be associated with the company’s decision to, and decision of when to, settle? Moreover, should

⁹⁸ See Complaint, *supra* note 16, ¶¶ 12, 18, 248.

⁹⁹ The defense argues that no legal authority is cited by the plaintiffs “for the idea that a liability-causing event can be a red flag for the liability it caused.” Reply Brief, *supra* note 95, at *14. In other words, “[t]he ‘red flag’ must . . . precede the event giving rise to the trauma—they cannot be the same event.” Motion to Dismiss, *supra* note 79, at *34.

¹⁰⁰ Plaintiffs’ Answering Brief, *supra* note 94.

the board's perceived culpability be limited if the board had concluded that the allegedly defamatory statement was true and that a retraction of it would wrongly damage the company's reputation (and would be potentially interpreted as an admission in a future libel lawsuit, rather than averting such a lawsuit)?

It is also dangerous precedent to base liability on what a board should be deemed to have realized from public discourse about its company's programming. Some matters—including substantively important ones—do not engender massive public discussion and speculation for a variety of reasons, even if they would be expected to. As to those that do, many appear to divide the public—because of conflicting views or on partisan grounds.¹⁰¹ These realities would likely make the *Caremark*-type regulatory compliance regime proposed in *In re Fox* both over- and under-inclusive in operation.

If *In re Fox* prompts an expansion under Delaware law of corporate board obligations to oversee the editorial decisions of subsidiary news organizations,¹⁰² other states may also impose duty-of-loyalty-based oversight duties analogous to *Caremark*.¹⁰³

This does not mean that the press should be granted a special advantage and exception from generally applicable legal rules. Rather, the Essay simply calls for caution in judicial *expansion* of *Caremark*-type standards to reach the risk of defamation and other press tort liability. As a practical matter, implementing the doctrinal interpretations advanced by the *Fox* plaintiffs would entail a disproportionate burden, rather than simply denial of a special advantage, for press companies as opposed to other similarly situated entities for whom expression is not the principal product. The arguments made by the *Fox* plaintiffs in order to apply *Caremark* in the defamation context would require extending *Caremark* in ways inconsistent

¹⁰¹ Again, all this is not to argue for a particular outcome in the *Fox Corporation* litigation itself. Assessing those facts is beyond the scope of this Essay. Rather, the Essay suggests that defining red flags as broadly as is argued for by the *Fox* plaintiffs raises significant questions unaddressed in the litigation filings.

¹⁰² Of course, the *In re Fox* case can be seen as a “unicorn,” limited to its particularly egregious facts which arguably satisfy classic ideas of fiduciary duty failure. Nevertheless, the litigation—however it ultimately comes out—provides a notable occasion to address what is concerning about expanding *Caremark* in the press context.

¹⁰³ See, e.g., Joan Heminway, *Caremark Oversight Duties in Tennessee?*, BUS. L. PROF BLOG (July 28, 2025), <https://perma.cc/RN2C-LQWY>.

with our traditional American commitment to a robust and independent press. Especially if there is not a demonstrated likelihood of material benefits for political discourse, this is not a wise policy trade-off.

B. The Hazards for the Press Function of Expanded Caremark Obligations

Expanded oversight duties in the context of corporate-owned media can be expected to create material incentives for boards to interfere in the editorial and reporting decisions of their news units. While this may in theory increase newsroom accountability and improve reporting, it comes with serious dangers of overkill, politicization, and resulting press timorousness.

1. The chilling effects of corporate ownership

If the courts find parent companies liable for their media units' editorial decisions, the prospect of increased litigation against media-owning boards is likely to heighten pressure on those boards to micromanage their news divisions or subsidiaries.¹⁰⁴ Boards of directors fearing personal liability could reasonably take the most risk-averse interpretations of law regardless of the legal question at issue or the uncertainty of ultimate liability. The extension of *Caremark* liability would also likely increase the risk-aversity of the legal advice provided by the parent companies' lawyers both to parent boards and to the journalists who seek prepublication legal review.¹⁰⁵ Even if this is good policy in the context of food, pharmaceutical,

¹⁰⁴ Cf. Claire A. Hill, *Caremark as Soft Law*, 90 TEMP. L. REV. 681, 681 (2018) (arguing that even though liability for breach of *Caremark* duties is unlikely, *Caremark* functions as "soft law" with a "considerable penumbra beyond what the law requires").

Surprisingly, the only other law review article to have addressed corporate compliance requirements as a way to deter defamation ignores the issues discussed in this Essay. See Fort & Latini, *supra* note 79. It is also unclear how that article's recommendation of a strict truthfulness regulatory compliance regime fits with its decision not to reach a conclusion regarding whether "this model should be applied to non-governmental/political public figures." See *id.* at 65.

¹⁰⁵ Is the possibility of *Caremark* liability more chilling and threatening to the press function than liability under defamation law? The muting effect of a successful *Caremark* claim could be much broader than that of a defamation suit on the press defendant's future behavior because of the potential breadth of the internal control systems that parent boards are likely to put in place. Moreover, the threat of losing director & officer (D&O) liability insurance would be more compelling for directors than the company's possible loss of defamation insurance because the former would expose the board to personal liability over any of its decisions while the latter would only reduce the company's protection. In any event, two different paths to liability over the same conduct could

and airline safety, the press—and the public interest in its independent functioning—present a different context.

Conglomerate boards must balance the risks to all their business units. Since they have more at risk, they therefore have incentives to be more risk-averse with regard to the potential liability of their news operations. Parent boards may face different political pressures at the entity level than the news units do and may be subject to a variety of regulatory regimes that impose obligations on the whole entity or specific parts of it. They may wish to enter into mergers, acquisitions, or other transactions that could push them to sacrifice or undervalue the interests of their news units.

In several recent instances of lawsuits by President Trump against news subsidiaries, the parent companies settled even though both legal experts and journalists expressed surprise at their decisions to do so. For example, Paramount Global settled President Trump's \$20 billion lawsuit against CBS over the network's editing of a 60 Minutes interview with then-Vice President and presidential candidate Kamala Harris prior to the 2024 election.¹⁰⁶ Paramount, which was in merger negotiations requiring government approval with Skydance Media at the time, reportedly settled the case for \$16 million and an agreement by CBS to release full transcripts of future interviews with presidential candidates.¹⁰⁷ The merger was thereafter approved by the FCC.¹⁰⁸ And Paramount is not alone in having settled a stra-

reasonably increase journalist perceptions of legal threat and likely lead to some degree of cumulative chill.

¹⁰⁶ Prominent journalists criticized the settlement, *see, e.g.*, Michael Nied, *CBS News Legend Dan Rather Blasts Paramount for \$16 Million 'Sell-Out' to Donald Trump: 'Sad Day for Journalism'*, PEOPLE, (July 3, 2025), and "lawyers almost universally deemed the legal case unlikely to succeed," according to *The Washington Post's* report. Sarah Ellison & Jeremy Barr, *How Trump's Media War Brought Paramount to Its Knees*, WASH. POST (July 2, 2025). CBS News division staff expressed significant discontent over the decision by the network's parent company. *See, e.g.*, Alex Weprin, *Inside CBS News, Staffers Voice Disgust, Anger, Relief and Anxiety After Trump Settlement*, HOLLYWOOD REP. (July 2, 2025); Joseph A. Wulfsohn, *CBS Staffers Revolt over Paramount's 'Shameful' Trump Settlement, 'Betrayal' to the Network's Journalists*, FOX NEWS (July 3, 2025), <https://perma.cc/N76M-SZY3>.

¹⁰⁷ Weprin, *supra* note 106.

¹⁰⁸ *See, e.g.*, News Release, FCC, FCC Approves Skydance's Acquisition of Paramount CBS (July 24, 2025), <https://perma.cc/E5KK-P6UH>.

tegic lawsuit by President Trump. ABC News' parent company Disney settled President Trump's defamation action over George Stephanopoulos's statement that Trump was found liable for rape, rather than sexual abuse, in a civil suit brought by writer E. Jean Carroll.¹⁰⁹

There has been much speculation that these settlements were motivated by Paramount and Disney's broader business plans, their desire to curry political favor and avoid government retaliation, or perhaps the wish shared broadly across the industry to avoid judicial precedents that could lead to a diminution in the First Amendment press protections currently established by the *New York Times v. Sullivan* regime.¹¹⁰ Calling the CBS settlement "a cowardly capitulation by the corporate leaders of Paramount, and a fundamental betrayal of '60 Minutes' and CBS News," a veteran CBS News producer charged that "they settled to preserve [controlling shareholder] Shari Redstone's payday [once the Paramount/Skydance merger received government approval]."¹¹¹

Even if a parent company board does not have particular business reasons to interfere in its news subsidiaries' editorial decisions, there is little reason to expect that the members of a conglomerate's board will be selected by the news unit or that the board will reflect any journalistic representation in its membership. While non-journalist board members may certainly appreciate journalistic norms, it is

¹⁰⁹ *Id.* See also Michael M. Grynbaum & Alan Feuer, *ABC to Pay \$15 Million to Settle a Defamation Suit Brought by Trump*, N.Y. TIMES (Dec. 17, 2024) ("Mr. Trump sued ABC and Mr. Stephanopoulos in March, after the anchor asked Representative Nancy Mace, Republican of South Carolina, who has spoken publicly about being raped as a teenager, why she had continued to support Mr. Trump after he was found 'liable for rape' in a 2023 civil case in Manhattan."). *The New York Times* reported that "[s]everal experts in media law said they believed that ABC News could have continued to fight, given the high threshold required by the courts for a public figure like Mr. Trump to prove defamation," and that the judge in the Carroll case had explained that "because of New York's narrow legal definition of rape, the jury's verdict did not mean that Ms. Carroll had 'failed to prove that Mr. Trump "raped" her as many people commonly understand the word "rape."'" *Id.*

¹¹⁰ See *infra* note 122 and accompanying text.

¹¹¹ Wulfsohn, *supra* note 106 (quoting veteran 60 Minutes producer Rome Hartman). In the meantime, the head of the CBS news division and the top 60 Minutes producer resigned from the network. Ellison & Barr, *supra* note 106. Shari Redstone has disputed the suggestions of capitulation driven by her economic interests. James B. Stewart, *Why Did Shari Redstone Do It?*, N.Y. TIMES (Aug. 19, 2025).

reasonable to expect that board members with detailed familiarity with the journalistic profession and its processes would be more attuned to the complexities and risks of programming decisions than those with less or no such exposure.

In addition to corporate conglomerates, press ownership by hedge funds and finance companies as well predictably creates tensions with journalistic imperatives because of such entities' prioritization of economic values. Conflicts can also arise when news companies are owned by corporations with founders or controlling stockholders on the board or with billionaire owners who have other economic, social, or political interests.¹¹² Although these tensions exist even without expanded *Caremark* liability, it stands to reason that the existence of enhanced oversight duties, the breach of which could lead to personal liability of board members, would exacerbate these problems.

Realistically, boards could respond to enhanced *Caremark* obligations by creating new risk compliance committees. Since such committees would have a single

¹¹² As in the case of Fox, founders and controllers often have outsized influence on corporate decisions; and recent corporate governance legislation passed in Delaware is more deferential to controller transactions than previously. Such owners may be influenced not only by economic concerns—which traditional corporate law assumes to be the central concerns of shareholders—but also by ideological positions, personal vanity, interests in establishing legacies, and other such supra-financial concerns. And boards of directors can find themselves propitiating dominant founders or controlling stockholders not only in individual instances but also with respect to company culture.

Billionaire owners raise not only concerns about the impact of personal vanity but also the unilateral imposition of journalistic limits untethered even by the process of public company board consideration. In addition, some billionaire owners may have even more extensive political, regulatory, or economic interests in their *other* far-flung businesses than do parent boards of media conglomerates. For example, the billionaire Jeff Bezos is the founder of online marketplace Amazon and aerospace company Blue Origin as well as the owner of *The Washington Post*. Although Bezos apparently had a history of respecting the paper's editorial independence, he announced, weeks before the November 2024 presidential election, that the *Post* would not endorse a presidential candidate and, after the first month of the second Trump term, that the topics covered on the paper's opinion pages would be narrowed to defending personal liberties and free markets. See, e.g., Laurie Kellman, *Washington Post Owner Jeff Bezos Says Opinion Pages Will Defend Free Market and 'Personal Liberties'*, PBS NEWS (Feb. 26, 2025), <https://perma.cc/2C6R-DTS4>. Several senior editors resigned from the *Post* because of these actions. *Id.* While Bezos has denied political reasons for these shifts or concerns about retaliation from Trump, the *Post*'s former executive editor was reported to say: "There is no doubt in my mind that he is doing this out of fear of the consequences for his other business interests." *Id.*

focus and duty centered on legal risk, and since defamation risk is ever-present for news media, reason suggests that they would have the self-justifying incentive to engage in enhanced oversight of news unit editorial decisions.

Even if the parent boards or such committees did not seek to exercise direct control over all significant news decisions, an increased possibility of *Caremark* liability could turn news coverage away from risky areas, topics, or approaches to journalism—whether through self-protective editorial decisions or indirect parent company pressure (or both). Moreover, if the Supreme Court revises the *Sullivan* framework, more litigation against press organizations would be invited by the lure of massive defamation liability. It also seems likely that the details and operation of a legally required board oversight regime would often lead to less visible intrusions into editorial processes than are reported in the current environment.

In addition, the incentives of corporate insurers must also be included in the analysis. Enhanced *Caremark* liability is likely to have an impact both on the availability and cost of director and officer (D & O) insurance and on the insurers' incentives to control board compliance regimes and the conduct of *Caremark* lawsuits when cases are brought.¹¹³ While it could be argued that the availability of insurance would mute directors' fear of personal liability for oversight failures, the indirect pressure—through higher premiums, insurance availability, insurer-driven compliance regimes, and the recommendations of the compliance industry—will doubtless be extensive. This liability coverage by insurance underwriters pushes the issue of defamation risk to a tertiary level—one even more removed from the journalistic process than the parent company board. So even if a massively wealthy board member is unlikely to worry about personal *Caremark* liability, a corporate governance system of enhanced oversight liability will reshape governance in ways that undermine press independence.

Moreover, as of now, it is likely that the media marketplace as a whole reflects a significant degree of variation in owner and parent board oversight of editorial decisions. Thus, while both the extent of voluntary intrusion and its direction are

¹¹³ On the “effect of *Caremark*’s creep on D&O insurance,” see Angela N. Aneiros & Karen E. Woody, *Caremark’s Butterfly Effect*, 72 AM. U. L. REV. 719, 764–74 (2023).

Intrusive oversight which particularly undermines the independence of the press function could also be triggered to the extent that the parent companies employ outside compliance advisors. For a discussion of their incentives, see Asaf Eckstein & Roy Shapira, *Compliance Gatekeepers*, 41 YALE J. ON REGUL. 469 (2024).

likely to expand under a legal requirement, there may continue to be variations in degree. For example, although any interference sends a message to the newsroom, it is likely that an individual owner's decision not to let an outlet make political endorsements is less intrusive than a compliance committee's request to be informed of all potentially controversial news investigations. The point for our purposes is not that the degree of chill resulting from extended liability will always be high, but rather that it will exist overall to a degree that will have negative effects on public knowledge.

In addition, stealth politicization can follow if politically partisan board members are able to intervene strategically in editorial decisions under the guise of legally mandated obligations of risk oversight. Parent pressures on news organizations could be politicized—not only with respect to particular controversial stories, but with respect to the news outlet's entire reporting approach—depending on the ideological predilections of the parent board or reflecting political strategies favorable to the parent company at the expense of the news units. The chilling effect on a newsroom likely to result from such political interference would be particularly worrisome if it unduly hampered the publication of controversial material central to the public interest, and did so in partisan ways. What would the likely result have been of potential *Caremark* liability for newspaper corporations in a context like the *Pentagon Papers* case, for example?¹¹⁴

When parent companies of prominent press organizations such as CBS and ABC enter into content-related litigation agreements to settle lawsuits by a sitting President who has promised to “straighten out the press,”¹¹⁵ a chilling effect on the newsroom is predictable. If this already happens in the current environment in the absence of extended *Caremark* obligations, it is likely that additional pressure

¹¹⁴ *New York Times Co. v. United States*, 403 U.S. 713 (1971).

This raises a broader theoretical issue under corporate law as well. As Professor Lipton has pointed out, there is a tension between *Caremark* liability in such circumstances and shareholder primacy under Delaware law. See Lipton, *supra* note 73. The traditional understanding of Delaware law is that boards of directors must act with a view to the interests of the company's shareholders. But the distinction made in Delaware cases between business risk (which is assessed pursuant to the business judgment rule) and acquiescence in illegal conduct (which is deemed a breach of the duty of loyalty) cannot be justified on the basis of the classic agency theory justification for fiduciary duty—and must be justified by more social-regarding goals.

¹¹⁵ Ellison & Barr, *supra* note 106.

would follow if they were adopted. According to one report on Paramount's response to President Trump's lawsuit against CBS,¹¹⁶ "[t]hroughout the litigation and negotiations, Trump delivered steady attacks on the media and '60 Minutes.' Paramount responded by exerting extraordinary scrutiny over how its news organization covered the administration."¹¹⁷ Thereafter, in addition to the \$16 million in settlement by the prior Paramount owner, President Trump asserted that Skydance would provide another \$20 million in "advertising, PSAs, or similar programming" as part of "a long line of VICTORIES over the Fake News Media."¹¹⁸ The Chairman of the FCC characterized the Skydance merger condition that Paramount install an ombudsman at CBS News for two years as "basically a bias monitor that will report directly to the president [of Paramount]."¹¹⁹ Most recently, after a complaint about interview editing by the Homeland Security Secretary, CBS announced that it would no longer edit interviews conducted with newsmakers on its *Face the Nation* program.¹²⁰

To be sure, the possibility of liability and concern about director overreach into news decision-making could have salutary effects on news subsidiaries by incentivizing best journalistic practices. If so, the argument could go, boards would not be obliged to interfere with press functions. The difficulty with this argument relates not to its theory but to its practice. Even if a parent board's directors do not seek to control the news unit's editorial decisions for political reasons, what if best journalistic practices—which depend on context—sometimes lead to risk-taking? Will journalists operating under a regime of parent company board oversight be deterred from taking risks that would be journalistically justifiable? Will an extended *Caremark* oversight regime end up disproportionately suppressing some kinds of reporting (such as investigative and accountability reporting) because such reporting will often entail reliance on confidential or even anonymous sources, whistleblowers with mixed motives, or hard-to-vet document leaks, or potentially involve

¹¹⁶ See *supra* notes 108–111 and accompanying text.

¹¹⁷ Ellison & Barr, *supra* note 106.

¹¹⁸ Jon Brodtkin, *How the Trump FCC Justified Requiring a "Bias Monitor" at CBS*, ARS TECHNICA (July 28, 2025), <https://perma.cc/UAL5-KHV6> (quoting a Truth Social post from Trump).

¹¹⁹ *Id.* (quoting a comment FCC Chairman Carr made while appearing on Newsmax).

¹²⁰ Michael M. Grynbaum & Benjamin Mullin, *CBS Abruptly Changes Editing Rules After Attacks from Administration*, N.Y. TIMES (Sep. 5, 2025).

the press in newsgathering torts, or predictably trigger lawsuits from wealthy and powerful targets?

It is true that damages liability for breach of expanded oversight obligations would not increase the parent company's financial obligations to persons it defamed. This is because the money damages in shareholder derivative actions flow from the board members to the company rather than to the third parties harmed by the company's actions. In this way, expanded corporate obligations could reduce rather than expand the company's liability payouts. Does this refute the predicted chilling effect of *Caremark* expansion? Indeed, does the possibility of the corporation recouping defamation damages from board members increase an irresponsible company's incentives to increase risky journalism?

The answer is no. This is too narrow a view of liability costs for the company. The true costs are likely to be extensive if the courts accept the arguments raised by the plaintiffs in *In re Fox* case and change current oversight doctrine. Attorney interests and the specifics of the governance changes recommended in *In re Fox* are likely to generate numerous additional suits of this kind. In addition, early access to corporate documents can create a useful evidentiary record at the pleading stage not only for *Caremark* claims but also for additional suits grounded in defamation and breach of privacy. Even if such suits are not ultimately meritorious, they can entail unfavorable publicity, reputational damage, and other costs to the company. Particularly if courts expand the *Massey* "business strategy" argument, plaintiff's lawyers can bring a series of cases over every possible claim of false programming once they have obtained liability on a business strategy theory in the first case.

Costs associated with shareholder derivative suits for oversight failures under a regime of extended *Caremark* liability thus will likely include duplicative defense expenses, discovery burdens, reputational fallout, heightened D&O insurance costs, settlement costs, and the costs of possible politicization of the news process. Notable consequences can be expected both for the availability of insurance and via insurer-driven governance changes hostile to press independence. With such incentives, much material will likely be deterred even if it is far from crystal clear that it is misinformation.

To the extent that the resulting fiduciary duty model would skew media companies toward risk-aversion and timorousness in reporting, there might also be asymmetrical effects on different types of press organizations. For example, we

might expect more deterrence in mainstream organizations that are owned by conglomerates. The chilling effect might also vary among non-mainstream press outlets depending both on their ownership characteristics and the requirements of their insurers.

Extending liability under *Caremark* would also generate a variety of practical challenges. For example, as noted above, we could expect an increase in litigation against the press by people offended at their portrayal in news reports: Many such suits are filed even now, before any expansion of the *Caremark* precedent. Would the board of a media parent company have to address the viability of each of those claims? How would that work as a practical matter, considering the typical board meeting schedules of American public companies? How would outside legal advice be solicited and by whom? Would the rules have an impact on whether defense-side media law firms were hired to give advice to the board?

To be sure, there is nothing preventing media owners from engaging in intrusive and even politicized oversight voluntarily. So why would an oversight duty be a problem, particularly if it could promise some reduction in misinformation? This Essay argues that a legal *requirement* of the expansive kind pressed by the plaintiffs in *In re Fox* is likely to have an accelerating and universalizing impact. Compliance industry consultants and companies' lawyers are likely to recommend maximal compliance efforts. They—and board members—will worry about distraction, business disruption, and the deterrent effect of potential personal liability on the willingness to serve on boards (particularly if there is uncertainty over insurance coverage).

2. Press weakness and executive branch pressure as amplifying factors

The likelihood of a suppressive effect on reporting that is not clearly false—and indeed may prove to be accurate—is heightened at this time of particular danger to the American press.¹²¹ While people may disagree as to the likelihood of the concerns and predictions described above, the Essay argues that the particular condition and status of the American press today justify a lighter regulatory touch.

Much ink has already been spilled describing the increasingly challenging economic picture for the American press and the extent to which public trust in the

¹²¹ For a summary overview of challenges facing the press and the rationales for invigorated constitutional press protections, see Floyd Abrams et al., *The Press Clause: The Forgotten First Amendment*, 5 J. FREE SPEECH L. 561 (2024).

press as an institution has declined. The constitutional status of press protections is also currently under attack. Research by RonNell Andersen Jones and Sonja West has shown that the press no longer has any full-throated champions on the Supreme Court—and perhaps not even any half-hearted ones.¹²²

At the federal level, press-protective legislation has not been enacted¹²³ and the Department of Justice’s previous press-protective approach to reporter subpoenas has been reversed by the Trump Administration.¹²⁴ The picture is decidedly mixed at the state level as well: At best, state law seems to suggest a duality or ambivalence regarding press protections as such.¹²⁵

¹²² See, e.g., RonNell Andersen Jones & Sonja R. West, *The U.S. Supreme Court’s Characterizations of the Press: An Empirical Study*, 100 N.C. L. REV. 375, 423–28 (2022).

Recent statements by some Supreme Court Justices—such as Justice Gorsuch—suggest that at least some members of the Court hold the news media that amplify and spread misinformation in great distaste. See, e.g., *Berisha v. Lawson*, 141 S. Ct. 2424, 2427 (2021) (Gorsuch, J., dissenting from denial of certiorari) (“No doubt, this new media world has many virtues—not least the access it affords those who seek information about and the opportunity to debate public affairs. At the same time, some reports suggest that our new media environment also facilitates the spread of disinformation.”). Indeed, that is the rationale for Justice Gorsuch’s position questioning whether the Court should continue to adhere to the *Sullivan* framework of press protection in today’s media context. *Id.* Although none have yet succeeded, cases are being brought strategically and certiorari petitions filed in order to put pressure on almost 60 years of constitutional protection under the *New York Times v. Sullivan* defamation framework. Although this has not yet happened, new alliances on the Court could scale back the *Sullivan* precedent. See, e.g., Levi, *supra* note 40, at 1245–47, 1256–61.

¹²³ 2024 saw the introduction of federal anti-SLAPP and federal reporter’s privilege bills. See, e.g., Free Speech Protection Act, H.R. 10310, 118th Cong. (2024); PRESS Act, S. 2074, 118th Cong. (2023). These initiatives ultimately stalled during the 118th Congress.

¹²⁴ See *US Justice Department Announces Plans to Revoke Critical Protections for Journalists*, REPS. COMM. FOR FREEDOM OF THE PRESS (Apr. 25, 2025), <https://perma.cc/2MPL-Q8MR>.

¹²⁵ On the one hand, press defendants are still winning in many political defamation actions even in today’s less hospitable atmosphere. Some states effectively adopted the *Sullivan* actual malice standard as a matter of their own state law /or increased the scope and effectiveness of their anti-SLAPP legislation. See, e.g., N.Y. CIV. RIGHTS LAW § 76-a(1)(a)(1)–(2) (McKinney 2020); Austin Vining & Sarah Matthews, *Recent Changes in State Anti-SLAPP Laws*, REPS. COMM. FOR FREEDOM OF THE PRESS, <https://perma.cc/NJ8R-AJM5>. And scholars have found antecedents to the constitutional *Sullivan* protections under state law. See, e.g., Genevieve Lakier, *The Non-First Amendment Law of Freedom of Speech*, 134 HARV. L. REV. 2299 (2021); James Maxwell Koffler, *The Pre-Sullivan Common Law Web of Protection Against Political Defamation Suits*, 47 HOFSTRA L. REV. 153 (2018).

President Trump continues to criticize the “very corrupt” press and calls for news organizations to be disciplined by lawsuits.¹²⁶ The Chair of the Federal Communications Commission appears ready to enforce the Trump press agenda.¹²⁷ The press is already wary of retaliation from the Trump Administration and its officials.¹²⁸ Press settlements of lawsuits levied by Trump, as described above, have opened the door to further lawsuits and further settlements.

This combination of circumstances—added to the public’s growing distrust of media companies—suggests both that the press is particularly vulnerable today and that corporate-owned news organizations (and even the newsrooms themselves) are particularly likely to succumb to outside pressures.

C. *Calibrating the Trade-Off: Will Corporate Law Diminish Political Misinformation Effectively?*

To assess the balance between the needs of a particularly exposed press and the goal of reducing political misinformation, we must next determine whether corporate law will likely diminish misinformation effectively enough to justify the risks to the ability of the press to report about matters of public interest. The problem is that the question of what works to diminish misinformation is complex and lacks a clear answer. The classic mainstream media—newspapers as well as network and

On the other hand, some state legislatures—such as Florida’s—have proposed legislation that would immeasurably burden the press function through both procedural and substantive constraints. See Emily Hockett & Josh Lustig, *RCPA Analyzes Florida Legislation Aimed at Revisiting Defamation Law*, REPS. COMM. FOR FREEDOM OF THE PRESS (Mar. 15, 2023), <https://perma.cc/4SE8-YE3L>. Texas amended its anti-SLAPP law to limit the category of protected statements. Vining & Matthews, *supra*. Journalist access to public records is also reportedly more constrained. See, e.g., Angela Fu, *Access to Public Records and Officials Is Worsening, Investigative Reporters Warn in Survey*, POYNTER (Apr. 23, 2025), <https://perma.cc/M2Y7-CGKV>.

¹²⁶ Ellison & Barr, *supra* note 106.

¹²⁷ See, e.g., Gene Maddaus, *Trump Payout Just the Latest—and Most Blatant—Political Interference at FCC: ‘Sad That It’s Come to This’*, VARIETY (July 9, 2025).

¹²⁸ To be sure, it is possible that corporate boards would voluntarily insist on some of the oversight measures discussed here even without a realistic threat of *Caremark* liability. After all, many companies now profess to having adopted a “compliance mindset,” often solicit help from the burgeoning compliance industry, and have outside law firms whose client memos recommend best practices in oversight. See Shapira, *supra* note 62, at 133. On the other hand, there is a difference between voluntary commitments—which can be subject to negotiation and change—and the risk-averseness attendant on the possibility of personal liability for board members as a matter of law.

local television—have historically taken the position that they seek to avoid disseminating falsity and have procedures in place to reverse course if prior falsity is discovered. But their influence in setting the public agenda is now declining. And the mainstreaming of partisan press outlets complicates the assumption that misinformation isn't spread via the mainstream press. Still, much news and information today—including political conspiracy theories—are disseminated (even if not initially hatched) via social media. The degree to which false stories in mainstream media influence public discourse seems largely dependent on whether they are amplified online. Given the extent that political rumors and conspiracy theories are digitally circulated, it is unclear whether, to what extent, and in what way any single news organization's programming impacts public discourse and influences audience beliefs.¹²⁹ Under these circumstances, it seems reasonable to suspect that expanded *Caremark* duties for mainstream news organizations would be unlikely to reduce extensively the amount of misinformation infecting public discourse overall.¹³⁰

¹²⁹ More broadly, misinformation in political discourse is presumably thought to be harmful because people believe it, base their vote on it, or act upon it in other ways. But the science regarding the specific effects of misinformation is still evolving. What if only small groups of voters actually believe the truth of a particular piece of misinformation? What if the effect for many is demoralization and disengagement rather than belief in the truth of false information? What if more effective methods of correcting misinformation can be devised in the future? Shouldn't the decision to use corporate law to discipline misinformation be taken in light of what the social science data reveal as to these questions?

To be sure, since we often do the best we can based on policy judgments in numerous areas where good social science is not yet available, why not take the same approach here rather than waiting for social science to catch up while misinformation continues to cause harm? A key reason is that the *In re Fox* argument calls for an expansion of corporate law based on untested factual assumptions both about the impacts of misinformation and the likely effectiveness of responsive corporate litigation. Data analysts are actively looking at these issues. Even if the social science is incomplete at any given point, there is much to be gained by testing the *In re Fox* plaintiffs' assumptions empirically before adopting legal changes that threaten democratically beneficial press functions.

¹³⁰ This is not to deny that major mainstream news organizations have republished social media-circulated misinformation and carelessly disseminated false information by simply repeating their competitors' reports. Moreover, the rise of explicitly partisan media blurs the boundaries of "mainstream media." And there has been increased instability in the traditional distinction between hard news and opinion/news commentary/entertainment.

But what if, proponents of a *Caremark* expansion might ask, it could be proved that a few popular media outfits clearly followed a business model of spreading false information? In such circumstances, if such an outlet or small group of outlets consistently fed social media and reached large audiences, wouldn't heightened *Caremark* liability reduce their willingness to spread false news and thus wouldn't it have a significant deterrent impact on the circulation of harmful falsity?

Here too there is complexity. One problem is that the degree of impact this would have on the overall circulation of political falsity in the information environment is necessarily uncertain. What amounts and kinds of falsity would be reduced, and whether there would be topical, substantive, or identity skews in consequence, are unclear.¹³¹ Another problem has to do with whether and how companies would be able to prove their adherence to such a liability-focused business model in the midst of navigating complicated business operations that have many parts and many participants. The costs to the press and public of a broad *Caremark* compliance regime would likely outweigh the benefits of liability in deterring misinformation, since the regime's oversight obligations would impact all media organizations and not just the provably "bad actors."

In addition, an extended *Caremark* regime would probably risk greater journalistic chill overall than traditional causes of action over falsity, such as defamation. If the resulting oversight systems were operationalized in politically partisan ways by boards of directors, significant journalistic overdeterrence in one or another partisan direction would likely result. Moreover, *Caremark* duties wouldn't necessarily lead to lock-step compliance by all boards of popular media platforms. Some boards might seek to satisfy their obligations through the mere appearance of compliance. This would increase the uncertainty of anti-misinformation benefits even within the subset of media organizations that circulate false political information.

Since adoption of the *Caremark* extension proposed by the plaintiffs in *In re Fox* will likely increase newsrooms' self-regulatory overkill without ensuring a meaningful reduction of misinformation in our society, the balance of interests tips strongly against such a change in corporate law.

¹³¹ Admittedly, Fox News has a broad following among conservatives. Nevertheless, even if Fox News were to suffer from audience attrition because it did not circulate conservative conspiracy theories, that does not mean that its audience would not be exposed to such theories through social media and other information access platforms.

D. So What About News Organization Accountability?

Pointing out that expanded *Caremark* duties are dangerous for the news function today does not exonerate Fox Corporation's election coverage in its news commentary programs, nor argue for its victory in the *In re Fox* suit. Nor does it mean that the Fox Corporation board should not itself voluntarily take steps to curb falsity in Fox News' programming regardless of what happens in the pending litigation. Moreover, although this Essay urges caution regarding the use of expanded corporate governance law to promote press responsibility, there are other legal mechanisms—most obviously, tort lawsuits—that can hold the press to account.

In addition, reputational concerns driven by discovery in litigation; the fear of a judicial rollback of constitutional protections; journalistic oversight practices by press critics in journalism schools, media magazines, and press competitors; creative methods to incentivize accuracy, including improvements in fact checking; possible help from AI and other new technologies; and improved media literacy approaches could all incentivize responsible press reporting—at least for some media outlets.

For example, the U.S. *Dominion v. Fox News* defamation action, the extraordinary publicity given to the discovery evidence in the case, the eye-popping settlement figure, and the potential for liability in the even more expensive Smartmatic defamation case could all potentially encourage Fox News to further police its political commentary programming for accuracy going forward. Corporate risk assessments by boards of many media companies are likely to be influenced by the likelihood of growth in defamation litigation, high-value settlements, and the potential for more frequent liability under an expanded *Caremark* regime. Moreover, media lawyers advising boards will surely flag both the increased possibility of press-hostile juries in today's environment of heightened public distrust in the press, and the possibility of reductions in overall legal protections for the press in the future.

To be sure, some have argued that even a figure as large as the Fox News settlement with Dominion could be dismissed by Fox as simply a cost of doing business¹³²—and particularly if Fox’s defamation insurance covered much of the bill.¹³³ But the continuing availability of defamation insurance even to large media companies—particularly at the same price as pre-liability premiums—is not a foregone conclusion. Questions about choice of counsel and control of the case also remain, particularly for small newsrooms.¹³⁴ There is also little guarantee that the insurance coverage limits will keep pace with the astronomical damage awards being requested by plaintiffs today, especially if there is to be an uptick in defamation actions and potentially cumulative liability above the insurance limits. Moreover, defamation insurance may be scarce or the cost of its premiums prohibitive for many medium- or small-sized news companies or for independent journalists.¹³⁵

Press organizations can be encouraged to engage in journalistically responsible behavior. For example, bad editorial decisions, and particularly ones that have the potential to distort political discourse, can and should be called out. Press oversight by other press organs and publicizing the results could be helpful in this regard.¹³⁶

¹³² See, e.g., RonNell Andersen Jones, *The E. Jean Carroll Verdict Exposes the Limits of Libel Law*, N.Y. TIMES (Jan. 28, 2024).

¹³³ In addition to insurance, the tax deductibility of the settlement payment as a business expense would also reduce the cost. See Mae Anderson, *Fox’s Settlement with Dominion Unlikely to Cost it \$787.5M*, AP (Apr. 23, 2023), <https://perma.cc/8B49-TJVD>; Kevin LaCroix, *The Derivative Suit Against the Fox Board Just Got a Lot More Interesting*, D&O DIARY (Apr. 20, 2023), <https://perma.cc/B97B-4KC8> (citing a report that Fox could “realize a tax benefit from the settlement of as much as \$213 million”).

¹³⁴ Richard J. Tofel, *Newsrooms Are Playing Russian Roulette with Libel Insurance*, SECOND ROUGH DRAFT (Dec. 12, 2024), <https://perma.cc/MKU7-A2E6>.

¹³⁵ Richard Tofel, former general manager of ProPublica, recently announced an option for affordable libel insurance for smaller newsrooms. See Richard J. Tofel, *Some Good News for a Change: Better Libel Insurance Now Available for Smaller Newsrooms*, SECOND ROUGH DRAFT (July 1, 2025), <https://perma.cc/L39L-QZL6>. Nevertheless, this is only one option, negotiated through the efforts of Mr. Tofel and a philanthropy on whose board he serves. *Id.* It does not adequately mitigate the problems sketched in the text.

¹³⁶ The rise of a variety of platforms for journalistic assessment—such as the Darts & Laurels column of the *Columbia Journalism Review*—might be useful in this regard. Cf. Rory Van Loo, *The New Gatekeepers: Private Firms as Public Enforcers*, 106 VA. L. REV. 467 (2020) (discussing the emerging regulatory conscription of large firms at the center of the economy as public regulators

Internally, editors could be urged to make sure that their journalists have complied with the standards for newsgathering and reporting established by the organization for itself. Initiatives such as the appointment of ombudsmen or public editors, institution-wide stock-taking opportunities, and training in how to mediate differences and conflicts among newsroom participants could support this process. Press professionalism, improved fact-checking departments, adequate editorial staffing, and a clear separation between a press entity's reporting and opinion pieces may help the entity's reputation. While admittedly unrealistic for many news organizations, the use of such credibility markers could be distinguishing and brand-identifying factors for some. Media executives are surely aware that a perception of improved press accountability may help repair at least some publics' trust deficit in the press.

Scholars and media analysts can also help nudge press responsibility in innovative ways. Fact-checking might be improved, including by the use of AI in identifying deepfakes. Blockchain technology can be used to trace the source of images and information, and thus can reduce the spread of falsity.¹³⁷ Digital signatures could help verify the legitimacy of information and its sources. Of course, this is not to deny the potential dangers of using new technologies in these ways, given—for example—the instances we have already seen of various forms of bias in generative AI design, implementation, and use. But the scholarly attention that has already turned to generative AI design and ethics may well offer some hope of improvement.

and enforcers). Admittedly, though, generating sufficient general audience interest in this kind of evaluative material will pose practical challenges.

¹³⁷ See, e.g., Leo Schwartz, *How a Twitter Veteran Wants to Combat Disinformation with Blockchain*, FORTUNE (Oct. 7, 2024); Gregory Gondwe, *Can AI Outsmart Fake News? Detecting Misinformation with AI Models in Real-Time*, 3 EMERGING MEDIA 252 (2025). See also Yonathan A. Arbel & Michael D. Gilbert, *Truth Bounties: A Market Solution to Fake News*, 102 N.C. L. REV. 509, 509 (2024) (proposing truth bounties as “a contractual mechanism that would enable individuals, media, and others to pledge money to support the credibility of their communications. Any person could claim the bounty by presenting evidence of the falsity of the communication before a dedicated body of private arbitrators.”). For a list of other tools, see, for example, *Tools that Fight Disinformation Online*, RAND, <https://perma.cc/5CQ9-HZRG>.

Encouraging greater media literacy on the part of audiences might also help audiences evaluate information disseminated across multiple platforms.¹³⁸ To be sure, entrenched political partisanship probably diminishes the effectiveness of media literacy education, at least on certain topics.¹³⁹ But social scientists have found corrections of information by surprising validators to be effective.¹⁴⁰ If properly designed and trained, generative AI could be used to enhance media literacy education. If media literacy initiatives are designed with the specifics of the current political moment in mind, they may serve to promote press accountability via encouraging audience inquiry and push-back. Similarly, the effectiveness of debunking strategies could be increased if they were keyed to social science findings about variations in people's susceptibility to online misinformation.¹⁴¹

Ultimately, there is no certain way to guarantee press responsibility and accountability across the board. This is particularly true in today's fractured media environment, when television and cable are consistently losing viewership, when

¹³⁸ See ADELINE HULIN ET AL., WORLD ECON. F., RETHINKING MEDIA LITERACY: A NEW ECOSYSTEM MODEL FOR INFORMATION INTEGRITY (2025), <https://perma.cc/Q72T-4KKU>. See also Lili Levi, *Media Literacy Beyond the National Security Frame*, 2020 UTAH L. REV. 941.

¹³⁹ In addition, Zeynep Tufekci has argued that improvements in AI technology have made it increasingly unrealistic that "'critical thinking' or 'media literacy' are going to help us detect fake videos." Zeynep Tufekci, *The A.O.C. Deepfake Was Terrible. The Proposed Solution Is Delusional.*, N.Y. TIMES (Aug. 11, 2025). This does not mean that appropriate media literacy education and assessment tools would be useless in contexts other than AI-assisted video.

¹⁴⁰ See Levi, *supra* note 138, and sources cited therein. The idea is that people can start to question their own beliefs about an issue if authorities they respect endorse the contrary view. An example would be a conservative authority figure confirming the truth of an assertion by a liberal media source or vice versa.

¹⁴¹ See, e.g., Mubashir Sultan et al., *Susceptibility to Online Misinformation: A Systematic Meta-Analysis of Demographic and Psychological Factors*, 121 PROC. NAT'L ACAD. SCI. e2409329121 (2024). Recent studies show some positive results and directions for further study. See, e.g., Nick Anstead et al., *The Potential for Media Literacy to Combat Misinformation: Results of a Rapid Evidence Assessment*, 19 INT'L J. COMMUN. 2129 (2025); Charles Angelucci & Andrea Prat, *Is Journalistic Truth Dead? Measuring How Informed Voters Are About Political News*, 114 AM. ECON. REV. 887 (2024).

news outlets depend on niche audiences, when information is offered in individualized and targeted ways, and when TikTok influencers with no journalistic training or norms purport to disseminate “news.”¹⁴²

Even more troubling than the listed factors is the impact of today’s political partisanship. Regardless of what is said about the truth and falsity of a press outlet’s reports, we can predict that partisans will interpret media stories that do not reflect their political viewpoints as biased and unaccountable. This is obviously not a new problem, but it seems to be more intractable today. The modest point of this Essay is a warning that trying to use corporate governance rules to ensure press accountability is likely to lead to overkill in the corporate context—and without clear evidence that material amounts of misinformation would be deterred.

CONCLUSION

It would be hard to argue that political misinformation has not fueled conspiracy theories that contribute to the partisan landscape of today’s politics. Such misinformation spreads easily across many platforms. The structure of the media industry has changed, shifting from entities seeking mass audiences through assertedly neutral reporting to a fractured landscape of media voices serving niche or partisan publics by adopting more or less explicitly slanted points of view in their news coverage and commentary programming. Fox News’ election coverage over the 2020 presidential election became an object lesson for these developments.

Surveys reveal public concerns about misinformation; scholars and pundits worry about democracy at a time of political factionalism. Distress both about the impact of right-wing media such as Fox News and generally about the effect of misinformation on political discourse and voter engagement has led to calls for legal tools to combat falsity in political information. Those tools have included defamation actions seeking to reform political discourse and attempts to involve the Federal Communications Commission in combatting “news distortion.”

Now, with the *In re Fox* litigation, plaintiffs seek to conscript corporate governance law for the project of cleansing falsity from political discourse. This Essay has argued that expanding the *Caremark* regime’s oversight obligations in the context of corporate-owned news organizations is not likely to reduce misinformation to a

¹⁴² This Essay does not purport to address legal routes to the reduction of misinformation on social media.

degree sufficient to offset the predictably negative consequences to the press function.

This is far from an endorsement of the tactics of Fox News' hysteria-mongering commentary programming vis-à-vis the claims of voter fraud in the 2020 presidential election. Nor does it express approval for press promotion of political conspiracy theories to satisfy audiences' tastes. Instead, it is a plea to consider the likely consequences of corporate board oversight on the editorial freedom of news organizations tied to business conglomerates and other ownership structures that have economic and political interests separate from—and that can at least sometimes conflict with—journalistic excellence. While private law can often serve public interests, the prospect of interpreting corporate law expansively to achieve press accountability and truthful political discourse requires carefully facing what we might well lose with such a trade-off.

