REINVENTING THE WHEEL: FIRESTONE AND THE ROLE OF ETHICS IN THE CORPORATION

> What does it profit a man if he gains the whole world
> and suffers the loss of his soul?
>
> —*Mark* 8:36[1]

Recently, the devastating consequences associated with unethical corporate behavior found their way into Alabama, as our highways provided the background for an automobile accident scene that took the life of a public leader and injured two others.[2] This, however, was not merely an unfortunate, yet isolated, incident; instead, it proved to be part of a more widespread, and in fact, global epidemic. The lawsuit that ensued, while unsettled at this moment, has revealed other issues involved in this morass of compounding problems.[3] All of this has brought to light the enormous importance of corporate ethics, as the legal strictures that guide the actions of corporate boards of directors may not always provide sufficient protection to consumers or shareholders of these large institutions.

Under typically accepted corporate governance policies, the board of directors of publicly held companies is responsible, in one way or another, for managing all aspects of a corporation.[4] Pursuant to these goals, directors are charged to act in accordance with specific fiduciary duties owed by the board to the corporation and its stockholders.[5] Most often, these fiduciary responsibilities are referred to as the duty of care and the duty of loyalty.[6] The duty of care is comprised of several components, including the respon-

[1] *Quoted in* MICHAEL NOVAK, BUSINESS AS A CALLING 159 (1996).

[2] *See* Bob Johnson, *Bridgestone, Ford Settle with 2 Hurt in Wreck*, BIRMINGHAM NEWS, Jan. 7, 2003, at B2 (discussing the June 11, 2000 accident in which civil rights leader Earl Shinhoster died when a Firestone tire blew out and the Ford Explorer that the group was traveling in rolled over).

[3] *Id.* Two passengers injured in the accident, Samimah Aziz and Ademah Hackshaw, entered into a confidential settlement with the corporations. *Id.* Mr. Shinhoster's widow has refused to settle the case and is moving forward with a wrongful death suit against the corporations. *Id.* Many issues are raised when corporations settle these civil cases confidentially, *see infra* notes 60, 111-15 and accompanying text; however, the potentially dangerous problems that are at the heart of such suits remain hidden from public scrutiny.

[4] *See* Stephen F. Funk, Recent Development, *In re* Caremark International Inc. Derivative Litigation*: Director Behavior, Shareholder Protection, and Corporate Legal Compliance*, 22 DEL. J. CORP. L. 311, 311 (1997).

[5] *See id. But see* CHARLES R.T. O'KELLEY & ROBERT B. THOMPSON, CORPORATIONS AND OTHER BUSINESS ASSOCIATIONS: CASES AND MATERIALS 260 (3d ed. 1999) ("Normally, directors owe fiduciary duties to the corporation, not to individual shareholders.").

[6] *See* O'KELLEY & THOMPSON, *supra* note 5, at 259-60. For the purposes of this Comment, only the duty of care will be examined.

sibility to act with reasonable care and diligence.[7] Within this duty of care framework, there are two generally recognized functions: decisional and oversight.[8] Typically, in the decisional setting, the conclusions of the board of directors will be subject to business judgment rule analysis.[9] Under this level of scrutiny, the decisions of directors will not be second-guessed by the court, absent a showing that the decision was grossly negligent.[10] In the oversight setting, directors are charged with monitoring the corporation's business.[11]

As noted previously, directors, in the duty of care context, are charged with making good faith, informed decisions, and with properly overseeing company activities of which it is their responsibility to know.[12] In the landmark decision *In re Caremark*,[13] the role of directors in this general corporate governance scheme was refined.[14] In announcing its decision, the court noted that a director has the general "duty to attempt in good faith to assure that a corporate information and reporting system . . . exists."[15] This decision appears to place a heightened importance on the role of the board of directors; however, the minimal requirements provided by the court actually do not change the responsibilities of the board of directors as significantly as it might appear—for the business judgment rule continues to stand as a bar to judicial intervention into the good faith and informed decisions of directors.[16]

Over the past few years, the Bridgestone/Firestone Corporation (Firestone) has been at the center of a public safety controversy that is responsible for the loss of several hundred lives and millions of dollars.[17] As accident scenes became commonplace and the death toll began to rise, both in this country and abroad, the cause of these devastating results became more evident: a tire separation problem working in conjunction with a suspect suspension on the Ford Explorer. This proved to be a deadly combination that produced tire blowouts and caused the large vehicles to roll over.[18] Lawsuits quickly mounted in courtrooms across the country.[19] As one after another of these cases settled, the worldwide tire manufacturer secured confidentiality agreements that kept relevant information out of the increasingly

[7] *See* Funk, *supra* note 4, at 311.

[8] O'KELLEY & THOMPSON, *supra* note 5, at 272.

[9] *Id.*

[10] *See generally* Smith v. Van Gorkom, 488 A.2d 858 (Del. 1985) (discussing a class action suit brought by shareholder in which the court found the board acted in a grossly negligent manner in approving amendments to merger proposals).

[11] O'KELLEY & THOMPSON, *supra* note 5, at 272.

[12] *Id.*

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

[14] *See generally* Funk, *supra* note 4, at 321.

[15] *Caremark*, 698 A.2d at 970.

[16] *See* Funk, *supra* note 4, at 323.

[17] *See* Public Citizen & Safetyforum.com, *Spinning Their Wheels: How Ford and Firestone Fail to Justify the Limited Tire Recall*, *at* http://www.citizen.org/documents/ACF266.pdf (Jan. 4, 2001).

[18] *See id.* at 1-2.

[19] *See id.* at 7.

prevalent public scrutiny.[20] Then, as overseas problems grew exponentially, and Firestone refused to replace the tires on those potentially dangerous vehicles, Ford was compelled to initiate its own overseas tire replacement program.[21] Both the tire and vehicle manufacturers kept this knowledge away from the National Highway Traffic Safety Administration (NHTSA).[22] Finally, a Houston television station broke the story of the increasing tire problems and rising death toll, leading to an NHTSA investigation and eventually Firestone's "voluntary" recall of millions of potentially deadly tires in the United States.[23] As more of this information was relayed to the public, and as Congress began to hold hearings with both Ford and Firestone about the problems, the focus shifted to an examination of how much knowledge the two companies had and whether or not earlier detection could have prevented the eventual loss of hundreds of lives.[24]

The Firestone public safety and public relations disaster illustrated the necessity for social responsibility and proactive compliance programs in the corporation. While directors do have an ultimate responsibility to the corporation, this requirement should not override the duty to ensure that a safe product is placed into the marketplace, for these obligations must coexist. This Comment analyzes the fiduciary duty of care, paying specific attention to the business judgment rule, and how it serves to protect the board of directors, despite seemingly overwhelming evidence that may, in hindsight, illustrate an unethical approach to corporate conduct. Part I looks at the fiduciary duties owed by a director to the corporation and its shareholders. In Part II, the *Caremark* decision is analyzed to illustrate the extent to which a director must monitor the actions of the corporation. Part III dissects the facts of the Firestone case. A timeline will establish what information was known, by whom this information was known, and when this information was known. Further, Part III will provide an insight into the decisions made by Firestone in an effort to determine if those decisions meet the relevant standard as established by the court's holding in *Caremark*. Finally, Part IV provides an ethical inquiry into the business judgment rule and seeks to advance standards that promote a proactive compliance program. Specifically, this Part examines whether simply deferring to a board's decisions is necessarily in the best interest of public safety, and whether the actions taken by Firestone regarding its faulty product in the marketplace prove to be ethical in light of the knowledge now obtained by the public, and presumably accessible to the corporation before these nightmarish events occurred.

[20] *See id.*

[21] *See id.* at 8.

[22] Public Citizen & Safetyforum.com, *supra* note 17, at 10.

[23] *Id.* at 26.

[24] *See, e.g., id.* at 13.

I. FIDUCIARY DUTIES OWED BY A DIRECTOR TO THE CORPORATION

For corporations operating in a regulated industry, compliance with the laws applicable to the corporation's business is required and violations of these laws that result in losses to the corporation may adversely affect the financial standing of the corporation.[25] A complicated issue that arises is whether the board of directors should be liable for these types of violations. To hold the board of directors liable would require imposing upon them a responsibility to ensure that the laws governing a corporation's pertinent industry are obeyed.[26]

The board of directors of a corporation owes fiduciary duties to the corporation and its shareholders.[27] There are two duties that are recognized as being owed by directors, the duty of loyalty and the duty of care.[28] The duty of care has many facets and, in accordance with its obligations, a director is required to act in good faith and in the best interests of the corporation.[29] In exercising this duty, a director is charged with utilizing due care to be informed of the facts and issues relating to a board decision and also to properly monitor corporate activities and appropriately respond to information that would cause a reasonably prudent person to be concerned.[30] However, to reduce the liability placed upon a board of directors, and because it is presumed that the board of directors stand in a better position than the judiciary to make corporate decisions, the duty of care has been said to be inescapably linked to the business judgment rule.[31]

"[T]he business judgment rule operates as a presumption that in making a business decision, the directors of the corporation acted on an informed basis, in good faith, and in the honest belief that the action taken was in the best interests of the corporation."[32] If the protection of the business judgment rule is applied, the courts will not second-guess the business decisions of the board of directors.[33] Essentially, the rule protects directors from liability for their decisions, provided they act with the requisite standard of care.[34]

However, liability for directorial decisions may be imposed in two instances.[35] First, liability may be imposed where the decision that results in a loss was "negligent."[36] Second, liability may be imposed when a loss results

[25] H. Lowell Brown, *The Corporate Director's Compliance Oversight Responsibility in the Post-Caremark Era*, 26 DEL. J. CORP. L. 1, 6 (2001).

[26] *See id.*

[27] *Id.* at 7.

[28] *Id.* at 8.

[29] *Id.*

[30] *See* Funk, *supra* note 4, at 311.

[31] Brown, *supra* note 25, at 10.

[32] *Id.* at 11-12.

[33] *See* O'KELLEY & THOMPSON, *supra* note 5, at 261.

[34] *See id.*

[35] *In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 967 (Del. Ch. 1996).

[36] *Caremark*, 698 A.2d at 967.

from an "unconsidered failure of the board to act" in a scenario where "due attention" could have prevented the loss.[37] Typically, the business judgment rule will shield the first class of cases from judicial review.[38] However, as the court announced in the prominent case *In re Caremark*, the second class of cases may, at least theoretically, subject a director to liability.[39]

II. *IN RE CAREMARK* AND THE DUTY TO MONITOR

In a seminal case, *In re Caremark*, the corporate shareholders of Caremark International Inc. sought recovery from the directors for damages paid by the company for violations of federal law occurring while the aforementioned directors were serving terms on the board for Caremark.[40] The five suits filed in Delaware Chancery Court alleged that Caremark's directors had breached their duty of care by "allow[ing] a situation to develop and continue which exposed the corporation to enormous legal liability."[41] The shareholders argued that this violated the board's duty to be "active monitors of corporate performance."[42] The suits did not claim that the directors were personally involved in any illegal activity; rather, they claimed that the directors' inattention to corporate wrongdoing and failure to implement law compliance programs, which, if present, would have prevented the offenses and penalties imposed, was responsible for the corporate losses.[43] The court held that corporate directors may be held personally liable for corporate losses stemming from illegal employee activity if the directors fail to make a good faith effort to ensure the existence of a monitoring and reporting system aimed at detecting misconduct.[44]

In announcing his decision, the chancellor noted that liability for a breach of the duty of care may be imposed on corporate directors in two situations.[45] First, board decisions that result in corporate loss because they are found to be negligent may be said to give rise to potential liability.[46] However, under this line of cases, claims will be subject to review under the business judgment rule, which typically shields directors from personal liability, assuming that the decision was made in an informed manner and in good faith.[47] Second, liability may be imposed where corporate loss results

[37] *Id.*

[38] *See id.*

[39] *See id.* at 970.

[40] *Id.* at 960-61; *see also* Richard S. Gruner, *Director and Officer Liability for Defective Compliance Systems:* Caremark *and Beyond*, *in* 995 PRACTISING L. INST. CORP. L. & PRAC. COURSE HANDBOOK SERIES 57, 67 (1997).

[41] *Caremark*, 698 A.2d at 967; *see also* Anne C. Flannery & Kristine Zaleskas, *Damage Control: Managing the Inevitable Corporate Crisis*, *in* 1121 PRACTISING L. INST., CORP. L. & PRAC. COURSE HANDBOOK SERIES 423, 432 (1999).

[42] *Caremark*, 698 A.2d at 967.

[43] *See id.*

[44] *See id.* at 970.

[45] *Id.* at 967.

[46] *Id.*; *see also* Funk, *supra* note 4, at 319.

[47] *See Caremark*, 698 A.2d at 967-68.

not from a board decision, but from "unconsidered inaction," or a failure to monitor the activities of the corporation, specifically, an "unconsidered failure of the board to act in circumstances in which due attention would, arguably, have prevented the loss."[48]

The claims in *Caremark* arose under the second theory. In analyzing the shareholders' claims that the directors breached their duty of care by failing to monitor, Chancellor Allen provided four elements that need be shown:

> (1) that the directors knew or (2) should have known that violations of law were occurring and, in either event, (3) that the directors took no steps in a good faith effort to prevent or remedy that situation, and (4) that such failure proximately resulted in the losses complained of.[49]

In finding that the board did not violate the breach of the duty of care from a failure to monitor, the chancellor noted that "only a sustained or systematic failure of the board to exercise oversight . . . [would] establish the lack of good faith that is a necessary condition to liability."[50] This test of liability imposes an extremely high burden on the plaintiff shareholders.[51] To establish that the directors breached their duty of care under this theory, one must show that the directors "lacked good faith in the exercise of their monitoring responsibilities or conscientiously permitted a known violation of law by the corporation to occur."[52]

So what message does the *Caremark* decision send to corporate directors and shareholders? At least initially, this landmark decision seems to require corporate boards to implement, or maintain, adequate reporting systems designed to identify illegal activity within the corporation or risk facing personal liability if the illegal activities result in losses for the corporation and its shareholders. However, as Chancellor Allen noted in the *Caremark* decision, only an "utter failure to attempt to assure a reasonable information and reporting system exists" is ground for liability stemming from a breach of the duty to monitor.[53] This suggests that any good faith effort on the part of the board will satisfy this standard, and only where sustained violations have gone undetected or unnoticed without action by the board to remedy the monitoring process will liability be placed upon the board.

It has been argued that this decision provides no new source of director liability.[54] This reasoning is based on the notion that directors, even in the post-*Caremark* era, need only take minimal steps in enacting a monitoring

[48] *Id.* at 967.

[49] *Id.* at 971; *see also* Brown, *supra* note 25, at 29-30.

[50] *Caremark*, 698 A.2d at 971.

[51] *See id.*

[52] *Id.* at 972.

[53] *Id.* at 971.

[54] *See* Funk, *supra* note 4, at 323.

system, as their business judgment in determining the extent and adequacy of a monitoring system will be afforded extreme deference.[55] Moreover, this decision probably does little to protect the shareholders from financial loss if damages follow from illegal activity undetected by the corporation's valid reporting system.[56] Because the board of directors' business judgment regarding a reporting system will be afforded deference, there is little a shareholder can do to recoup any potential losses following illegal activity by corporate employees that goes undetected by the monitoring system.[57]

III. THE FIRESTONE CASE

The Firestone-Ford saga did not originate in the United States with the hundreds of deaths and injuries occurring over the past several years. Numerous reports indicate that the two companies were aware of existing problems with the Explorer model sport-utility vehicle and the Firestone tires equipped on them as early as a decade ago.[58] In fact, shortly after the Explorer vehicle equipped with Firestone tires was introduced to the public, lawsuits began piling up.[59] Unfortunately for the public, most of these suits were settled with orders prohibiting any member of the suit, including the parties and their attorneys, from leaking any information to the public.[60]

However, these early incidents are not the only evidence that problems were present many years before the current crisis. Indeed, further reports indicate that as early as 1996, state agencies began complaining of problems with Firestone tires on Ford Explorers.[61] Unfortunately, after conducting an investigation into the source of these complaints, Firestone deemed the problems the result of owner abuse.[62]

Further, in 1997, Ford and Firestone learned of tire failures in foreign countries, including areas in the Middle East, Asia, and South America.[63] In

[55] *See id.*

[56] *Id.*

[57] *Id.*

[58] *See* Joan Claybrook, Statement on Firestone Tire Defect and Ford Explorer Rollovers Before the Transportation Subcommittee United States Senate Committee on Appropriations (Sept. 6, 1996), *available at* http://www.citizen.org/pressroom/print_release.cfm?ID=740 [hereinafter Statement]; *see also* Press Release, Joan Claybrook, President, Public Citizen, Public Citizen Applauds Recall of Firestone Tires, Action Should Have Come Sooner (Aug. 9, 2000), *at* http://www.citizen.org/pressroom/print_release.cfm?ID=743 ("The shame of this situation is that both Ford and Bridgestone/Firestone have known about this problem for eight years.").

[59] *See* Public Citizen & Safetyforum.com, *supra* note 17, at 7, 25 (showing that the first tread separation lawsuit was filed in February, 1991); *see also* Statement, *supra* note 58 (stating that at least five lawsuits were filed by 1993).

[60] Press Release, Public Citizen, Public Citizen Asks Texas Court to Deny Ford and Firestone Request to Keep Documents Secret in Tire Lawsuit (Sept. 18, 2000), *at* http://www.citizen.org/pressroom/print_release.cfm?ID=838 [hereinafter Press Release] ("Ford and Firestone have faced lawsuits over tire separations and crashes since the early 1990s, but because they settled the cases with gag orders, the public and federal regulators were kept in the dark about the tire defect until earlier this year.").

[61] Statement, *supra* note 58.

[62] *Id.*

[63] *Id.*; *see also* Public Citizen & Safetyforum.com, *supra* note 17, at 8-10.

1997, Ford attorneys met in Venezuela to discuss an increasing number of tread separations and rollover crashes.[64] Many of the same Firestone tires that were responsible for problems in Venezuela were manufactured at the company's Wilson, North Carolina, plant and were continuing to be used on Ford Explorers in the United States.[65] In response to the numerous complaints and after learning of the one hundred deaths and four hundred crashes linked to tread separation, Ford, and not the tire manufacturer, offered to replace the products in this area.[66]

The overseas problems did not end in Venezuela, however, as the two companies also experienced crises in Saudi Arabia. Virtually the same problems that transpired in Venezuela began occurring in Saudi Arabia.[67] This situation caused Ford to replace the tires on these vehicles.[68] Firestone, however, provided a litany of reasons as to why they were not responsible for the problems in Saudi Arabia.[69] Despite the severity of the problems in Saudi Arabia, neither Ford nor Firestone informed the NHTSA about their actions or the existence of a replacement program.[70] Even more shocking is the claim that the two companies "knowingly considered the ramifications of federal notification of a recall in the Arabian Gulf Coast Countries on tires sales in the U.S. and consciously chose to withhold from the American public that information."[71]

In May 2000, the foundation was laid for what would be an incredibly gruesome adventure when the NHTSA opened an investigation in this country into the Firestone tires that suffered from possible tread separation.[72] At that time, four deaths and numerous injuries were known, as several complaints had been filed.[73] In August, 2000, as complaints began to mount, Firestone initiated a voluntary recall of 6.5 million ATX, ATX II, and Wilderness AT tires.[74] By the end of August, more than 250 people had been injured in this country alone, while eighty-eight people had lost their lives, leading the NHTSA to upgrade their investigation to an engineering analysis.[75] Shortly thereafter, on September 1, 2000, the NHTSA released a list of some 1.4 million additional tires they deemed to be in need of recall; how-

[64] Public Citizen & Safetyforum.com, *supra* note 17, at 8.

[65] *Id.*

[66] *Id.*; *see also* Statement, *supra* note 58.

[67] *See* Public Citizen & Safetyforum.com, *supra* note 17, at 9-10.

[68] *See id.* at 9.

[69] *Id.* (stating that Firestone claimed that (1) they simply provided the tire specified by Ford in Saudi Arabia, (2) customer abuse and extreme conditions combined to cause the tire failures, and (3) there was no design problem).

[70] *Id.* at 10 ("Ford and Firestone decided to conceal that action from NHTSA."); *see also* Statement, *supra* note 58.

[71] Public Citizen & Safetyforum.com, *supra* note 17, at 10.

[72] *See Key Dates in Firestone Tire Case*, *at* http:www.accidentreconstruction.com/news/may01/052101g.asp (May 21, 2001) [hereinafter *Key Dates*].

[73] *Id.*

[74] *Id.*

[75] *Id.*

ever, Firestone refused to comply, claiming that the remainder of their products were safe.[76] By the beginning of December, the NHTSA had released new figures relating to accidents caused by Firestone tires, totaling 525 injuries reported and 148 lives lost.[77] At the end of that year, Firestone responded to the mounting problems by issuing a news release that tended to fault not only their tires, but also the design of the Ford Explorer and Ford's suggestion to its customers to under-inflate the tires.[78] On February 6, 2001, the NHTSA announced that 174 deaths had occurred and more than 700 injuries had been reported.[79] Shortly thereafter, in May, Ford and Firestone ended their ninety-five-year-long business relationship.[80] The next day, Ford offered to replace the thirteen million Wilderness AT tires that remained on the Explorer model, claiming to be concerned about safety issues.[81]

Firestone's reaction to the tire separation problems infuriated not only the public, but Congress as well.[82] In fact, many claim that Firestone, having suffered through a similar problem with its tires in the late 1970s, should have acted sooner in this instance. Firestone claims that the problems were not apparent until Ford analyzed Firestone's internal data and noted the "unmistakeable pattern of tread-peeling problems."[83] In statements made before Congress, Firestone officials claim to have acted as soon as this information became known.[84] Both Ford and the NHTSA, however, have stated that the tire manufacturer had enough information to recall the tires earlier than they did.[85] Firestone officials claim that this information was insufficient to alert the company because warranty claims are used for that purpose and the complaints noted previously were not warranty claims.[86]

[76] *Id.*

[77] *Key Dates*, *supra* note 72.

[78] Public Citizen & Safetyforum.com, *supra* note 17, at 1-2 (stating that Firestone issued a report acknowledging design flaws, but also blaming Ford for the results of tread separation in the Firestone tires; the four reasons proffered by Firestone in this report are the following: (1) design problems in the Ford Explorer lead to Ford's recommendation that the tires be inflated to an amount of 26 PSI, significantly lower than the Firestone suggestion; (2) problems existed in the Firestone Decatur Plant relating to the composition of rubber and the characteristics of adhesive used; (3) there was a design flaw in the tire itself, which could lead to cracking and eventually tread separation; and (4) customer abuse and misuse of the tires).

[79] *Key Dates*, *supra* note 72.

[80] *Id.*

[81] *Id.*

[82] *See* Cindy Skrzycki, *Tire Recalls Propel Stalled Safety Legislation*, WASH. POST, Sept. 19, 2000, at E1; *see also* Keith Bradsher & Matthew Wald, *More Indications Hazards of Tires Were Long Known*, N.Y. TIMES, Sept. 6, 2000, at A1.

[83] James R. Healey, *Firestone Leaves an Indelible Mark*, USA TODAY, Dec. 26, 2000, at 1B.

[84] *Id.*

[85] *Id.* Ford CEO Jacques Nasser said that "[i]t was pretty clear when we received (the data from Firestone) that there were some trends there that should have been caught a little earlier." *Id.* Further, an NHTSA administrator said that "[t]here would have been a recall years earlier that would have saved lives and been less damaging to the company" if the NHTSA had been made aware of the mounting claims that Firestone had been receiving. *Id.*

[86] *See* Healey, *supra* note 83, at 1B.

Despite the claims by the tire manufacturer that these safety problems were a "surprise,"[87] evidence now suggests that Firestone knew of the separation issues and in fact took action to remedy the problem.[88] In 1998, Firestone modified the design of a wedge located on the Wilderness AT; however, company officials claim that this measure was not taken in response to any particular problem.[89] These statements are contradicted by evidence tending to show that the redesign was initiated by the tire manufacturer as the result of rising tread separation problems on sport utility vehicles.[90]

In addition to the enormous loss of human lives both here and abroad, Firestone stands to suffer a substantial financial loss from these problems. One source estimates that Firestone's costs associated with the recall and legal settlements reached $750 million in 2000, causing the company to post a $500 million loss for the year, its first since 1992.[91] Further, the shareholders of Firestone's parent company, Bridgestoné, saw the price of their stock drop substantially, from a year 2000 high of twenty-four dollars per share to nine dollars per share in the months following the recall.[92] Business analysts noted that the recall was largely responsible for the drop in stock value.[93]

However, despite the mounting evidence that, to the average consumer, tends to implicate the Firestone board's decision making as being outside of the realm of good faith and not in the best interests of the corporation, it is likely the decisions made by the board of directors of Firestone have met the minimal standards established in *Caremark*. As noted previously, the decision in *Caremark* announced a four-part standard necessary to place liability upon a board of directors:

> (1) that the directors knew or (2) should have known that violations of law were occurring and, in either event, (3) that the directors took no steps in a good faith effort to prevent or remedy that situation, and (4) that such failure proximately resulted in the losses complained of.[94]

The issue of whether the Firestone board of directors knew, or should have known, of the problems associated with their Wilderness series tires is a difficult inquiry. Without knowing exactly what information the board of

[87] Public Citizen & Safetyforum.com, *supra* note 17, at 10.

[88] *Id.* at 25 ("June 24, 1998—An internal Bridgestone/Firestone memo acknowledges that in 1997, tread separations accounted for 92.8 percent of all ATX II tire claims and 53.6 percent of all Firestone light truck claims. It states that the tires warranty claims jumped from 42 in 1995 to 279 in 1997, an almost sevenfold increase, and that by 1998, tread separations accounted for 469 light truck claims, compared to only eight claims attributed to road hazards.").

[89] *Id.* at 10.

[90] *Id.* at 11.

[91] Healey, *supra* note 83, at A1.

[92] *Id.*

[93] *Id.*

[94] *Caremark*, 698 A.2d at 971.

directors had throughout this entire scenario, it is particularly difficult to implicate them for knowingly violating the law. Therefore, it is more appropriate to examine whether the board should have known of the existing problems. As far back as a decade ago, tire separation issues were raised.[95] Lawsuits were filed against the tire manufacturer; however, these settlements were obtained under confidentiality agreements.[96] Further, overseas problems could have alerted the company to potential problems with its product.[97] However, there is no evidence that establishes that Firestone did not have in place some semblance of a monitoring system, as required by *Caremark*. In fact, Firestone officials repeatedly noted that the warranty claim process is the system utilized by the corporation to track faulty products.[98]

As noted previously, *Caremark* requires only minimum compliance programs; thus, sufficient evidence establishes that Firestone probably met this standard. The fact that the corporation made the decision, at numerous instances, not to recall potentially faulty products, is a decision that will presumably be protected by the business judgment rule, because there is no evidence that it was not made in good faith. Indeed, Firestone redesigned the Wilderness tires, and they also "voluntarily" recalled tires in the United States.[99] Thus, the prong of the *Caremark* test that requires the board to take actions to remedy any situation that they deem to be a violation appears to have been met. Therefore, although hindsight seems to show that the corporation could have acted more quickly, there is no evidence to establish that Firestone did not act in compliance with the requirements of *Caremark*.

Finally, even if it is established that the corporation knew, or should have known, of a violation and that the actions taken by Firestone to remedy the problems were insufficient, it still must be established that these events led directly to the corporation's complained of losses.[100] While it can be argued that the decisions by the board not to recall certain tires, or to delay the recall of certain other tires, led to financial losses to the corporation, any shareholder claims based on these assertions probably would fail.[101] Moreover, as evidenced by Bridgestone shareholders in Japan, many shareholders refuse to join in a derivative suit against the tire manufacturer because of the increasing loss that would be inevitably thrust upon the corporation.[102] Therefore, it is unclear whether the loss is due to the recall, low consumer confidence, or a combination thereof. Further, it is even more uncertain

[95] Public Citizen & Safetyforum.com, *supra* note 17, at 7.

[96] *Id.*; *see also* Press Release, *supra* note 60.

[97] *See* Public Citizen & Safetyforum.com, *supra* note 17, at 8-10.

[98] Sara Nathan, *Drivers Complained Years Before Tire Recall*, USA TODAY, Nov. 15, 2000, at 1B, *available at* http://www.tireaccidents.com/Firestone/drivers_complained_years_before_.htm.

[99] Public Citizen & Safetyforum.com, *supra* note 17, at 15.

[100] *See In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 971 (Del. Ch. 1996).

[101] *See In re* Ford Motor Co. Sec. Litig., 184 F. Supp. 2d 626, 628-29 (E.D. Mich. 2001) (showing that a similar claim brought by the shareholders of Ford was dismissed).

[102] *U.S. Shareholders Sue Bridgestone Over Recall*, *at* http://www.ttnews.com/members/1mnews/0201.asp (last visited Jan. 1, 2003).

whether the specific decisions by the board are responsible for the large financial losses, as is required by the ruling in *Caremark*.

In summary, while it appears to the average consumer that the board of directors of this giant corporation acted with complete disregard to consumer safety, it is difficult to establish that the corporation did not meet the *Caremark* minimal monitoring standards governing this area of corporate governance. While the board was not as responsive with its decisions as the public and the NHTSA would have liked, it is hard to prove that the corporation did not have proper monitoring systems in place, for they have stated repeatedly that faulty products are found through the process of filing warranty claims.[103] This is probably a reasonable compliance program, and as such, the decisions of the board will probably be protected by the business judgment rule.

IV. CORPORATE ETHICS AND THE DUTY TO MONITOR

As noted previously, the business judgment rule protects the decisions made by a board of directors as long as it was made in good faith and with proper knowledge.[104] However, are these protections ethical in light of the severe consequences that may ensue as a result of the board's decisions? In the specific instance of a faulty product in the marketplace, the decisions of the board not only affect the shareholders of the company, but also the public in general.[105] The board must, in light of the knowledge obtained about the faulty aspects of the product, weigh the conflicting costs involved with the existence of a faulty product in the marketplace, including the potential harm to consumers if the product is not recalled and the potential damage to the corporation's financial stability if it is.[106] Oftentimes, a board may seek to avoid the substantial cost of a recall, even though ethically a recall would benefit the public.[107]

The costs associated with a recall are complex and can result in a decline in sales of the affected product and others manufactured by the company due to a loss of consumer confidence from the negative publicity of the recall.[108] Further, there exists the possibility of even greater losses stemming from a decline in stock value after the announcement of the recall.[109] The board is thus forced to weigh the social benefit of the recall against the potential financial losses associated with the recall.[110] Even if a recall is socially beneficial, a board, in weighing these opposing forces, may

[103] *See* Nathan, *supra* note 98, at 1B.

[104] *See* O'KELLEY & THOMPSON, *supra* note 5, at 260-61.

[105] *See* Jeffrey A. Lamken, Comment, *Efficient Accident Prevention as a Continuing Obligation: The Duty to Recall Defective Products*, 42 STAN. L. REV. 103, 154 (1989).

[106] *See id.* at 109.

[107] *See id.* at 154.

[108] *See id.* at 154-55.

[109] *See id.*

[110] *See* Lamken, *supra* note 105, at 126-27.

determine that compensating victims through lawsuit settlements is less costly because individual compensation potentially avoids the decline in stock value and loss of consumer confidence associated with a widespread recall.[111] Further, these settlements can often be sealed, so as to remain confidential and out of the public's attention.[112] Indeed, this prevalent tool has been perfected by Firestone's legal representation during this period of turmoil.[113]

In the case of the Firestone recall, many observers and critics accused the company of covering up knowledge of the faulty product in an attempt to avoid recalling a product that eventually proved to be devastating to the consumer.[114] In fact, members of Congress openly accused the company of "ignor[ing] public safety,"[115] presumably in an effort to protect their bottom line. As Senator Richard Shelby of Alabama suggested, "Firestone had at a minimum a moral obligation to make sure that the products they sell to the American public and other people in other countries are safe."[116] Ideally, companies do seek to protect the public interests while concurrently serving the interests of the corporation and its shareholders.[117] However, these ideals and goals may often conflict, as in the Firestone scenario. Despite the board's responsibility to the corporation's shareholders, one would hope that the overriding interest of the board would be to produce a safe product that also promotes the best interests of the company and its shareholders, for one cannot seemingly exist without the other. Indeed, once the consumer has lost faith in the company and the quality of its products, the company's financial stability will be called into question and, consequently, the shareholders will suffer.[118] Therefore, a company should ideally have in place not only the minimum oversight duties required by *Caremark*, but a more socially responsible and ethical approach to overseeing its company operations. The following is an analysis of the type of ethically responsible approach that many suggest is necessary in corporate America.

In his book, *Business as a Calling*, Michael Novak noted several internal responsibilities that a business ought to strive toward in achieving social conscientiousness.[119] The two most important ideas promoted by the author, and listed in order of significance, are satisfying customers with goods and services of value and making a reasonable return on investment for the shareholders.[120] The second concept, typically viewed as the singular goal

[111] *Id.* at 155.

[112] *See* Public Citizen & Safetyforum.com, *supra* note 17, at 7.

[113] *See supra* notes 3, 60, 112 and accompanying text.

[114] *See supra* notes 3, 60, 112 and accompanying text.

[115] Bradsher & Wald, *supra* note 82, at A1.

[116] *Id.*

[117] *See* NOVAK, *supra* note 1, at 139-40.

[118] *See id.*

[119] *Id.* at 138-45.

[120] *See id.* at 139-40.

of a corporation, will be satisfied only as the first goal is satisfied.[121] Thus, these two areas are necessarily intertwined.

Further, Novak expounds upon several external social responsibilities of a corporation.[122] Many of these ideas involve civic and community conscientiousness in the corporate setting.[123] One of the listed concepts is of particular relevance for this topic—open and full communication with consumers, employees, and shareholders.[124] It is imperative, offers Novak, to promote an intricate network of communication regarding information of the corporation's "purposes, needs, risks, dangers, and opportunities."[125]

Encouraging a conscientious corporate culture, Novak suggests, will help prepare a corporation to act more quickly, and more responsibly, when an unforeseen emergency arises.[126] Novak recounts the Tylenol crisis of the early 1980s, and reveals the details of how the manufacturer, Johnson & Johnson, dealt with the ordeal.[127] Because of a credo that Johnson & Johnson had in place, a directive that prioritized the responsibilities of the corporation, the company was able to quickly react to a faulty product in the marketplace and avert a financial catastrophe.[128] This credo placed the corporation's emphasis on its responsibility to the consumers who used its products, then to its own employees, its management, its communities, and finally to its stockholders.[129] Johnson & Johnson understood that profit was the reason for the corporation's existence; however, they believed that only once all of the aforementioned areas of responsibility were met could the stockholders receive a full return on their investment.[130] Novak, in discussing Johnson & Johnson's reaction to the Tylenol crisis, quotes the *Washington Post*, which stated, "Johnson & Johnson has succeeded in portraying itself to the public as a company willing to do what's right, regardless of cost."[131]

Shortly thereafter, the Bristol-Meyers Corporation was faced with a similar problem regarding its Excedrin product.[132] However, Bristol-Meyers did not have an instructive and socially responsible credo in place like Johnson & Johnson.[133] Thus, while the board acted quickly to recall the faulty product, they did so only in the geographic area where the problem was found,[134] and launched no formalized campaign to warn the public.[135] This scenario resulted in drastically different results for the two companies. As

[121] *See id.* at 140.

[122] *See* NOVAK, *supra* note 1, at 145-53.

[123] *Id.*

[124] *Id.* at 149.

[125] *Id.* at 150.

[126] *Id.* at 153-58.

[127] NOVAK, *supra* note 1, at 153-58.

[128] *Id.*

[129] *Id.*

[130] *Id.*

[131] *Id.* at 154.

[132] *See* NOVAK, *supra* note 1, at 155.

[133] *Id.*

[134] *Id.* (showing that Johnson & Johnson pulled the product out of the marketplace nationwide.)

[135] *Id.*

evidenced by the two scenarios, and further bolstered by scholarly commentary, "[m]atters of poor ethics, unresponsive behavior or lack of concern for the health and safety of consumers, workers, and the public can carry with it enormous costs—not the least of which are financial."[136]

In addition to creating a corporate culture which promotes, first and foremost, a moral institution that leads to the financial gains that a corporation seeks, proactive monitoring and compliance programs are appropriate to help balance the concerns of the company, its shareholders, and the public, and also to minimize the liability of the board of directors of the company.[137] These compliance programs are the most appropriate and comprehensive method of preventing crisis.[138] In the past decade, many companies have been instructed by the Securities Exchange Commission (SEC) that inadequate response to a crisis can subject the board to liability.[139] Proper monitoring and compliance programs help not only prevent the crisis itself, but help companies to respond appropriately and quickly in an emergency situation.[140] Typically, once company officials are alerted to a problem, the officials should, at a minimum, investigate both the current problem and whether other, similar problems exist.[141] Indeed, it has been noted that the monitoring duties imposed upon a board require the directors to "react affirmatively once they receive evidence that company compliance programs are not operating properly."[142]

So what steps are required to implement an appropriate and proactive compliance program, one that promotes social, as well as financial, responsibility? The following three steps have been discussed by commentators: determine the scope of the investigation; report potential violations to the appropriate regulatory authority, if required; and isolate the problem.[143] Another look at the Firestone case will establish that while the director's decisions were most likely open to protection by the business judgment rule, the corporation could have taken many other proactive steps to ensure a less devastating result.

Shortly after the first Ford Explorers equipped with Firestone tires hit the roadways, lawsuits began to mount due to tire separation problems.[144] State agencies in Arizona complained of vehicles experiencing the same problems.[145] Then, overseas vehicles began suffering from tire separations at an alarming rate.[146] Finally, in the United States, complaints increased after tread separations on Firestone tires occurred in large numbers.[147]

[136] MAX L. STACKHOUSE ET AL., ON MORAL BUSINESS 899 (1995).

[137] *See* Flannery & Zaleskas, *supra* note 41, at 425.

[138] Gruner, *supra* note 40, at 72-73.

[139] *See* Flannery & Zaleskas, *supra* note 41, at 425.

[140] *See id.* at 433.

[141] *See id.* at 427.

[142] Gruner, *supra* note 40, at 60.

[143] *See, e.g.*, Flannery & Zaleskas, *supra* note 41, at 433.

[144] *See* Public Citizen & Safetyforum.com, *supra* note 17, at 7.

[145] *Id.* at 5.

[146] *See, e.g.*, *id.* at 8 ("In 1997, Ford of Venezuela attended a meeting with lawyers there to discuss

Firestone, instead of initiating its own internal investigation to determine the scope of the problem at its first warning sign, chose to settle the cases that were brought against it,[148] presumably because settling multiple lawsuits was a less expensive alternative to instigating a mass recall.[149] These actions sought to protect the bottom line of the corporation; however, they completely ignored the coexisting component of creating a moral institution. While the initial costs of a recall may be greater than settling lawsuits, corporate ethics dictate that seeking to promote both of these components will provide a more secure financial outlook for the corporation.[150] Firestone officials could have more appropriately determined the scope of the investigation.

In Saudi Arabia, when Firestone tires were deemed to be responsible for vehicular accidents similar to those in Venezuela, Firestone officials denied responsibility and instead blamed the owner of the products.[151] Ford, under heavy scrutiny in the region, was forced to implement a replacement program on its own, without the assistance of the tire manufacturer.[152] Knowledge of this recall was withheld from the NHTSA and, in fact, evidence shows that the two corporations discussed the issue of notifying the NHTSA and decided against it.[153] Further, Firestone had long been settling lawsuits related to tread separation under confidentiality agreements.[154]

A proper compliance program requires a corporation to report problems to the appropriate regulation authority immediately.[155] This not only helps in solving the problem, but in the case of a faulty product in the marketplace, it can serve an important role in notifying the public regarding the potential safety hazard.[156] It appears again that Firestone sought to protect its bottom line,[157] while disregarding any concern toward the well being of its consumers. For a successful business to fulfill its social and financial responsibilities to the public, its employees and its shareholders must work together.[158]

Finally, it is important to isolate the problem, especially in the case of a faulty product in the marketplace.[159] As noted in the Johnson & Johnson

a rash of wilderness AT tread separations and resulting Explorer rollover crashes.").

[147] *See id.* at 10.

[148] *See id.* at 14.

[149] *See* Lamken, *supra* note 105, at 155.

[150] NOVAK, *supra* note 1, at 139-40.

[151] *See* Public Citizen & Safetyforum.com, *supra* note 17, at 9.

[152] *See id.* at 10.

[153] *See id.*

[154] *See id.* at 7.

[155] *See generally* Flannery & Zaleskas, *supra* note 41, at 433 ("If counsel determines that it is mandatory to report a potential violation to a regulatory authority, do so expediently.").

[156] *See id.*

[157] Press Release, Ford, Firestone Officials Took Narrow View When Recalling Tires, Ignoring Key Data While Admitting Tires Lacked Strength (Jan. 4, 2001), *at* http://www.citizen.org/pressroom/print_release.cfm?ID=561.

[158] *See* NOVAK, *supra* note 1, at 140.

[159] *See* Flannery & Zaleskas, *supra* note 41, at 433.

case, the corporation pulled its merchandise out of the marketplace immediately, presumably so that it could properly identify the problem areas.[160] Contrastingly, Bristol-Meyers chose to pull its faulty product only in the geographic region where the problem was initially reported.[161] This left open the possibility that similar problems might exist and remain undetected in other areas. Similarly, in the Firestone case, the corporation refused to recall all of the potentially affected tires, despite pressure by the NHTSA.[162] Ironically, Firestone officials actually appear to have been trying to isolate the problem, as they continuously held that the faulty tires were the product of only one of their factories.[163] However, the corporation probably acted too quickly in proffering this theory, as evidence would later surface that tended to illustrate that the problem was not unique to a particular Firestone factory.[164] If Firestone had in place a credo, similar to that of Johnson & Johnson, which prioritized the corporation's responsibilities and helped establish an emergency response plan, they could have voluntarily recalled all potentially affected tires, and then probed to isolate the problem.

V. CONCLUSION

Events transpiring over the past several years have shaken the American business world to its very core. The ethics of the new millennium corporation have disregarded those vital consumers and investors who support, and often help to build, the company. The media have recently brought to light many of the inequities involved in cases such as Enron, Worldcom, and Global Crossing.[165] These examples, while posing a serious threat to our economy, are more blatant than the crisis brought to light by the recent Firestone debacle because they potentially involve clear violations of law. In fact, the Firestone case is more potent to our society in general, not only because its damage is measured in terms of a toll on human life, but also because it illustrates corporate blindness to acceptance of a greater moral role in society. Moreover, the "Enrons" of the world involve what may end up being illegal activity engaged in by those owing affirmative duties of care and loyalty to the corporation. Indeed, in an effort to curb such inappropriate accounting practices, Congress, in 2002, passed the Sarbanes-Oxley Act, which places a greater burden upon the board of directors when dealing with such issues.[166] However, the eeriness associated with the Firestone case stems from the likelihood that the board of directors' actions

[160] *See* NOVAK, *supra* note 1, at 154.

[161] *Id.*

[162] *See* Public Citizen & Safetyforum.com, *supra* note 17, at 15.

[163] *Id.*

[164] *See id.* at 16.

[165] *See* Newsmax.com Wires, *Global Crossing Similar to Enron* (Mar. 21, 2002), *at* http://www.newsmax.com/archives/articles/2002/3/21/184158.shtml.

[166] *See* H.R. 3763, 107th Cong. (2002), *available at* http://news.findlaw.com/hdocs/docs/gwbush/sarbanesoxley072302.pdf (last visited Apr. 3, 2003).

would probably be subjected to the business judgment rule analysis and afforded deference, absent a development that implicated the corporation for a violation of law.

In the past few years, too many lives have been lost due to tire failures on our roadways.[167] It is likely that many of these lives could have been saved if knowledge of the problems causing these accidents had been made public. However, this information was not revealed to the public, or even to appropriate regulatory authorities.[168] Thus, the disaster ensued, lasting almost a full decade.

The decisions made by the Bridgestone/Firestone Corporation regarding the timing and scope of its recalls will almost certainly be protected by the business judgment rule. However, appropriate corporate ethics require that the board of directors not only look at the bottom line, but also to its greater social responsibility, as these two concepts are inescapably linked. Further, proactive compliance programs and corporate credos are effective ways to instill in a corporation the idea that the board of directors must look forward and anticipate emergency situations. Only then can a board act in an efficient and professional manner in responding to these crises.

Brian Allen Warwick

[167] *See supra* text accompanying note 79.

[168] *See supra* text accompanying note 22.