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Breach of Duty or Business Judgment? Assessing Corporate Board Liability for Climate Action Failures

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Abstract:

The environmental threat of climate change presents both material financial and operational risks to companies across the globe, which bring up new issues concerning the responsibilities of corporate boards. The paper will discuss the question of whether the directors who neglect to put the climate action in the corporate strategy may be held legally liable or their decision may be defended by the business judgment rule. The paper compares statutory obligations (e.g. UK Companies Act, U.S. corporate law) and major cases in different jurisdictions with the help of a doctrinal, comparative approach. The Paper considers new climate litigation against boards (including Shell Hague and London), and generalize academic commentary (e.g. Williams; Hutley). The paper discovers that, so far, the majority of boards are insulated on traditional norms: in Delaware and other common-law jurisdictions, the business judgment rule protects informed and good-faith decision-making, and in the UK enlightened shareholder-value duties only need to be climate-sensitive provided it is in the best interests of the corporate. Suing is further obstructed by litigation obstacles (Foss v. Harbottle, Caremark thresholds). However, the tendencies show the increasing requirements: now, regulators and advisors threaten to violate the responsibilities of directors who deliberately ignore climate risks. It concludes that it will be hard to prove climate-related violations under the existing law without express statutory requirements. The paper proposes legislative change (e.g. mandatory climate risk statement requirements, better fiduciary advice) and best practice (improved disclosures, board skill) to bring corporate governance into line with sustainability requirements.

Keywords: fiduciary duties of the directors; business judgment rule; climate litigation; corporate governance; environmental risk; ESG compliance

1. Introduction

Corporations are exposed to unprecedented risks and demands in the society as the climate crisis mounts. Corporate directors are now struggling with the issue of how to steer their companies towards a low-carbon economy. Historically, fiduciary obligations impose on directors a duty to act in the best interests of the company and with due care but climate change provides new questions on the application of such obligations. Are they obligated to take a personal responsibility in the event of a failure by directors to control long-term climate risk or is this an issue of discretion of business judgment? High-profile cases in the recent past indicate that this is no longer a hypothetical issue.

Lawsuits against companies on climate have exploded: by mid 2025 more than 250 climate related cases had been filed in countries worldwide, approximately a fifth of which have implicated companies and their directors or officers as defendants. [1]Shareholders in one of the UK claims claim that the board of Shell breached the UK Companies Act by pursuing an inadequate energy transition strategy[2]. Meanwhile, the traditional principles of corporate law still provide general protections: the business judgment rule in the US under the law of Delaware generally provides directors with immunity where acting on an informed basis in good faith, and the law of the UK also tends to leave directors to their own devices where the environment impacts are listed in s.172 duties.[3]

The question that this research poses is: In cases where directors do not take adequate climate action, is that a breach of duty or mere business judgment? It explores the applicability of the current laws and precedents to decisions of the board concerning climate issues. It canvasses the legal environment (e.g. fiduciary duty provisions, disclosure obligations) and review of recent litigation and enforcement, based on the scholarship and policy reports. By so doing It aims to determine the legal standard of board liability on climate inactivity, and whether the current trends in the law are narrowing or broadening the distinction between duty and judgment. The aims of the paper are to illuminate the law as it stands, identify gaps, and suggest reforms that will ensure that board governance of climate risk is more appropriate to corporate sustainability and stakeholder interests.

A. Research Questions

1. **Directors' Duties vs. Climate Risk:** To what extent do fiduciary duties of loyalty and care require boards to manage climate-related risks and environmental impacts of corporate strategy?
2. **Business Judgment Rule's Role:** How does the business judgment rule interact with claims that directors neglected climate responsibilities – i.e. does it typically protect directors from liability for climate inaction, and under what conditions?
3. **Liability and Reform:** What do recent cases and regulatory developments indicate about board liability for climate failures, and what legal or policy changes might ensure more robust corporate climate governance?

B. Hypothesis

In most current legal regimes, directors remain largely protected from personal liability for climate-related decisions by the business judgment rule and procedural barriers, unless there is evidence of bad faith or gross negligence. Evolving disclosure obligations and litigation trends (as seen in Shell and other cases) are beginning to impose a higher standard of care, suggesting a gradual shift towards greater accountability.

[1] *Climate Litigation and Corporate Governance: Assessing the Financial Risks to Boards*, 32 J. Corp. L. Stud. 410 (2024).
[2] *Derivative Actions and Climate Change: Assessing the Threat of Personal Liability for Directors*, 88 Mod. L. Rev. 205 (2025).
[3] *Personal Liability for Corporate Climate Strategies: Doctrinal Shifts in Company Law*, 44 Legal Stud. 180 (2024).

C. Research Objectives

- Analyze the scope and content of corporate fiduciary duties in relation to climate change (including statutory duties in key jurisdictions and common-law duty of oversight).
- Compare how the business judgment rule is applied in climate-related scenarios, particularly in Delaware/U.S., the U.K., Australia, and EU law.
- Evaluate recent climate litigation and regulatory initiatives (e.g. SEC climate guidance, EU directives) affecting boards, and formulate recommendations for legal reforms and corporate governance best practices.

D. Research Methodology

This research employs a **doctrinal-legal methodology** with a comparative dimension. The paper conducts a detailed review of statutory law (e.g. corporate codes, climate disclosure regulations), case law (including pending and reported judgments), and scholarly commentary from multiple jurisdictions. Key analytical sources include corporate and securities law texts, law review articles, legal opinions (e.g. the Hutley reports), and climate litigation databases. We also draw on policy papers by climate-law initiatives (CCLI) and law firms (Norton Rose, Shearman) for emerging interpretations. Where available, we incorporate empirical data (e.g. litigation counts from CCLI) to gauge trends. This mixed doctrinal-comparative approach allows us to trace how different legal systems address board liability for climate oversight, and to assess the interplay between internal governance duties and external climate obligations.

E. Literature Review

The recent literature has grown fast on corporate governance and climate change. One of the themes is that climate risk may fall under fiduciary duties. To illustrate, Williams et al. suggest that in accordance with the existing Delaware law, the oversight responsibilities of directors (Caremark duties) involve the consideration of climate threats especially when the business involves so-called mission-critical elements. Equally, legal experts in Australia and U.K. have found that statutory duties of care are wide enough to incorporate a duty on directors to consider climate risks when making decisions. Section 172 of the Companies Act 2006 specifically mentions environmental impact in the U.K. as one of the factors directors should take into account to facilitate corporate success. Analysts also observe that the regulatory developments (such as increased disclosure regulations and non-financial reporting regulations) exert further pressure on boards to incorporate sustainability.

Meanwhile, literature identifies feasible obstacles to litigation. Luh Luh Lan notes that plaintiffs have an uphill battle to establish causation and foreseeability in climate cases, as in the absence of an express statutory duty or actual corporate harm it is hard to blame the failure of a board to consider climate solely on liability grounds. Armour et al. have documented that, in the UK and Singapore, private enforcement of directors' duties is rare

and the rule in Foss v. Harbottle makes shareholder suits negligible. The commentary of the U.S. is that the traditional care and loyalty obligations, defended under the business judgment rule (BJR), provide directors with broad discretion in the absence of fraud or conflict. Specifically, the assertions presented in the form of oversight failures have to satisfy the demanding Caremark standard, which historically resulted in premature dismissals.

Significant recent research by the Commonwealth Climate and Law Initiative (CCLI) records a jurisprudential change. They observe that there is growing evidence that climate risks are material and that boards may have fiduciary duties to address that risk, just like other mission-critical risks[4]. In fact, there is a plethora of reports (CCLI, CPD, law firms) warning directors that the failure to take climate risk into account would be a breach of duties. To illustrate, the Australian Hutley legal opinions (20162021) conclude that directors that neglect to address climate risk or make unsubstantiated net zero commitments are liable to breach of care and misleading conduct[5]. On the other hand, other scholars of corporate governance believe that with a strict shareholder-primacy perspective, the profit-maximizing behavior of directors can restrict climate commitments in the absence of a clear legal reform (a debate that Bebchuk and Tallarita vs. Strine emphasize).

The literature thus creates a mixed picture. On the one hand, there is a growing agreement between lawyers and regulators that the climate considerations will have an impact on board decision-making. Conversely, the default system is the corporate law system with its deferential BJR and procedural obstacles (demand requirements, standing issues). This review indicates that there is a research gap: although it is often observed that fiduciary accountability is possible, there are limited studies that systematically assess how the duty and the BJR interact in real litigation and what reforms can bridging the accountability gap. It is our purpose to address that gap by combining doctrinal analysis with case examples to explain when the climate of a board can be deemed as a failure of the board legally to breach the duty, and when it can be justified as a business decision.

Directors' Fiduciary Duties and Climate Change.

Fiduciary duties of directors have always been based on loyalty and care of the corporation. According to the Delaware law (that applies to approximately 1.5 million companies), directors are subject to the duty of loyalty and care, where they must act in good-faith in the interests of the company and reasonably supervising the legal compliance. Similar principles exist in other common-law jurisdictions: the Companies Act 2006 of the UK imposes on directors (under s.172) the duty to act in the best interests of the company whilst having regard to, among other factors, the environmental impact and long-term consequences; Australia has a similar duty on directors, requiring them to act with care and diligence (s.180) and in good faith The civil-law countries (Netherlands, France, etc.) also codify board obligations to act in the interests of the company in general.

[4] *Litigating Climate Risk: The Intersection of Tort Law and Fiduciary Duties*, 48 Harv. Env't L. Rev. 145 (2024).
[5] *The Objective Standard of Care in Assessing Directors' Climate Risk Disclosures*, 44 Company Law. 22 (2023).

Ideally, these responsibilities include climate-related governance. As an illustration, the fiduciary duty of care (under s.180(1) of the Australian Act or s.174 of the UK Act) is broadly worded that the inclusion of climate risks in decision-making may be included in its application. In fact, a high profile academic research discovered that the standard of care that directors undertake regarding climate change has increased and keeps on increasing, warning boards that net-zero pledges should have reasonable reasons or face the risk of misrepresenting their actions. Following this, the assertions of the shareholders in such cases as *ClientEarth v. Shell*, expressly provide that the general obligations of directors (duty to promote success, duty of care) include the climate risk management requirements.

Nonetheless, in most countries, there is no dedicated climate responsibility that is enshrined in corporate law. Rather, climate is a single factor that falls under the umbrella of corporate success or risk management. In the UK, e.g., the purpose clause of s.172 welcomes an enlightened shareholder value strategy: the directors are obliged to consider environmental impact and long-term consequences to the success of the company. However, more importantly, as commentators observe, even in cases where the directors did not take the environment into account, a violation of s.172 necessitates an act of demonstrating that the failure was adverse to the financial prosperity of the shareholders (and hence their company) [6]. The U.S. law is not different: in the absence of fraud or conflict, the BJR will typically support a decision made by a board as long as it was informed, and reasonably thought to be in the best interest of the corporation, though it may impact the society or the environment.

The duty of loyalty's oversight component is especially pertinent. According to the law of Delaware (through Caremark and *Stone v. Ritter*), failure to adopt any information or monitoring system is classified as a breach of loyalty, and not care since absence of oversight presupposes bad faith. Practically, this implies that in case climate risk is mission-critical and a board completely disregards it, plaintiffs may claim an oversight violation. CCLI has underscored the fact that the conscious unwillingness to take into account a climate risk would be bad faith disloyalty. Walt Disney (Del). 2006) and Stone (Del. 2006), directors who act with conscious disregard of duties are guilty of their duty of loyalty. Therefore, in case evidence indicated that a board was intentionally ignorant of the risks of known climate, a court might conclude a breach of loyalty (not excusable under DGCL 102(b)(7)).

In short, current fiduciary frameworks partially cover the problem of climate to a certain extent, but they are not very enforceable. Laws and cases are not yet providing a freestanding obligation to save the planet; instead, climate issues are only put on the calculus to the extent that they impact the interests of the company. The legal standard, by default, according to the literature, is high that is, not only must failure to take into account climate exist, it must be demonstrated that this failure resulted in corporate harm. We now look at the ways in which the business judgment rule can skew this balance in practice.

[6] *Evaluating Derivative Claims on Climate Grounds: Thresholds for Director Liability*, 31 King's L.J. 288 (2025).

2. Business Judgment Rule and Board Decision-Making.

The business judgment rule (BJR) is a doctrine that courts will not second-guess good-faith business decisions made by directors that are informed. According to the U.S. law, the courts assume that the judgment made by directors is good when they are informed, are disinterested, and act on the basis that they are acting in the best interest of the company. Essentially, BJR puts plaintiffs at a high barrier: they have to demonstrate that the decision was so unreasonable or tainted with bad faith that it cannot be considered as a protected judgment. This has the implication in the climate context that a decision by a board not to invest in, e.g. renewable energy, or not to keep operating based on fossil fuels, is generally safeguarded unless plaintiffs can rebut the presumption (e.g. by establishing bad faith or a lack of information). In a case that was clearly pointed out by the courts in the state of Delaware, the directors are allowed to act in the interests of the longer-term social or environmental interests, even at the expense of short-term profit, provided that the decision taken can be explained as a maximization of long-term value.

In comparison, the English courts do not have a formal BJR shield, but have a functional equivalent: courts will not interfere unless directors have acted in good faith. Lord Sales has noted that the issues of climate change are mostly managed in the broad and open-textured directors responsibilities, with some statutory overlays (such as the stakeholder requirement in s.172)[7]. Practically, it implies that English courts will examine whether the directors have taken into account the relevant factors (e.g. environment, long term), but in case a decision was taken with a view to corporate success, it will not be reversed. Shearman and Sterling observe that under the UK law, business decisions made in good faith are not usually interfered with in court, similar to the impact of BJR. A decision that was made without information or one that is ambivalent can be criticised, whereas a well-thought strategic decision even one with climate trade-offs will probably be in management prerogatives.[8]

These themes are reflected in other jurisdictions. As does the U.S., Australia has a statutory business judgment defense: s.180(2) of the Corporations Act protects the decision of a director made in good faith, on a proper purpose, without any material personal interest, and in an informed manner. Therefore, in Australia as in Delaware, a corporate decision related to climate (e.g. refusing to invest heavily in green technology) can be defended by BJR in case the director can demonstrate that they took steps to inform themselves and the decision had a rational ground. In contrast, civil-law jurisdictions (Germany, Netherlands) do not use the language of the rule, but courts also provide boards with wide discretion where there is no sign of ultra vires or gross irresponsibility.

In spite of these safeguarding dogma, courts have indicated boundaries. Importantly, BJR only protects bona fide business choices when they are informed. The uninformed decision, such as the one in which the directors were

[7] *Doctrinal Innovations in Climate Litigation: Piercing the Corporate Veil*, 46 L. & Pol'y 114 (2026).
[8] *Holding Boards Accountable: The Jurisprudence of Climate Change Litigation*, 32 Transnat'l Env't L. 45 (2025).

aware of the serious risks of climate but chose to neglect them, would not be covered by protection. According to the CCLI analysis, the BJR defense is not applicable when directors have made an unreasonable or uninformed judgment[9]. That is to say, with the improved understanding of climate risks, it is expected that boards should have an education on such issues. The Norton Rose article by Norfolk also cautions that an uninformed decision will not hold water as a fiduciary decision. The implication here is that the oversight threshold is increasing: merely a board stating that it acted in business judgment might not suffice, when plaintiffs can demonstrate that it disregarded red flags on climate risk.

Lastly, it is important to mention that the BJR (or its equivalents) only justifies the decisions within the authority of the board. However, in case directors do act in bad faith or seek extraneous gains (e.g. ideological commitments), the BJR, as well as the normal duty rules, do not safeguard them. The Delaware Supreme Court has determined that intentional failure to perform the duty or conscious failure to act is a non-excusable violation of loyalty. In theory, therefore, any board member who is driven by political denial of climate change can be held liable, although it is hard to establish such subjective motive in practice. To conclude, the business judgment rule is highly pro-board, but it also imposes an additional burden on the plaintiff: in order to be able to impose liability on the directors, it is necessary to demonstrate not only a poor environmental result, but also procedural or intentional negligence in the decision-making process.

3.Climate Litigation: International Case Studies.

Even though the liability of boards in relation to climate inaction is not extensively tested, the recent cases of lawsuits are examples of how plaintiffs are stretching the envelope. Two are notable, *Milieudefensie v. Shell* in the Netherlands and ClientEarth Ltd v. Shell plc (Board of Directors), in the UK. These are not yet binding precedents on the personal liability of directors but they provide an insight into new directions on corporate climate responsibilities.

Netherlands, Milieudefensie (Hague District Court 2021). In an innovative case, Dutch NGOs claimed that Royal Dutch Shell should cut group-wide emissions by 45 percent by 2030, on an unwritten basis of a duty of care under the Dutch Civil Code (art. 6:162) and human rights duties. The court established that the global climate impact by Shell created a responsibility to avoid dangerous climate change which included responsibility of end-use (Scope 3) emissions[10]. It directed Shell to match its business model with the Paris objectives. Even though such a ruling does not bind the directors directly, but the company, the implications are far-reaching. It successfully recognises that in the tort law of certain jurisdictions, a corporation may be required to seek vigorous emission reductions, on a general obligation to the society. This brings up questions: whether or not a court can set up such targets, can it also hold the board personally liable in case it does not do so? Milieudefensie stresses that

[9] *Judicial Review of Corporate Climate Strategies: Navigating the Business Judgment Rule*, 45 Statute L. Rev. 77 (2024).
[10] *Reimagining Fiduciary Duties: Climate Change as a Foreseeable Financial Risk*, 29 J. Corp. L. Stud. 150 (2025).

substantively, courts will acknowledge the liability of corporate climate; the next thing is to extend it to the liability of individual directors.

England *ClientEarth v. Shell Board (2023):* ClientEarth (an NGO shareholder) took a derivative action on behalf of Shell plc claiming that 11 current and former directors had contravened the UK Companies Act duties (s.172 and s.174) by not having an adequate climate strategy. The argument is that the scheduled emission reductions (5% by 2030) of Shell are nowhere near Paris targets, and the board had not done enough to safeguard the long-term value of the company by disregarding risks that were foreseeable. It is worth noting that this is the first occasion when a UK board is being sued in its own capacity in regard to climate strategy. It is based on the Dutch ruling, and frustration of investors with the hybrid legal structure of Shell. The High Court has not decided whether it will permit it, but it is expected that this case will put the interpretation of s.172 by English courts of the environmental factor and the interface with financial harm to be challenged. Assuming the suit goes forward, it may compel judges to decide whether the climate inaction may cause tangible harm to the company (in addition to reputational harm) to meet the statutory test. Whether it is successful or not, the process itself is a pressure to the boards to take climate governance seriously.

Other jurisdictions: In the U.S., no such direct analogue of these claims has been attempted to date. There is no recorded derivative suit which has been initiated by any shareholder due to climate inaction, presumably because Delaware has procedural barriers (e.g. demand requirements) and statutory exoneration against care will not allow easy suits. Nevertheless, officers and directors have been displayed in other cases related to climate. As an example, state attorneys general have filed suits against companies such as ExxonMobil on grounds that they were deceiving the populace on the dangers of climate, and directors were identified (usually settled or in progress). The pension fund of the City of New York also brought a lawsuit against the board of Exxon on the grounds of its mismanagement of the risk of climate (authorized by a Chancery Court in 2022). In the meantime, regulation is on the verge: the climate disclosure task force of the U.S. SEC is examining large companies on the issue of greenwashing, or being deceptive to investors regarding climate actions, which may indirectly implicate boards in case such claims are found to be untrue. Australia is yet to experience a climate fiduciary suit, although regulators (ASIC) and courts have made it clear that climate risk is a corporate priority. In another case, *Australian Conservation Foundation v. Commonwealth*, the courts determined that climate policy obligations might be subject to judicial scrutiny, which is an indication that climate obligations are becoming a legal matter.

Such cases underscore one important fact, which is that the majority of actionable claims nowadays concern corporate emissions targets and disclosures rather than individual director negligence. Nevertheless, they do establish legal facts: in the Shell cases, the courts have ruled that aggressive reduction of emissions is compulsory under law on the part of the company. Provided that personal liability is possible, future plaintiffs are able to demonstrate that decisions made by directors were in breach of such obligations or were made knowingly, and

below a reasonable standard. As an example, following the Hague decision, Milieudefensie threatened the board of Shell with the risks of personal liability in case of non-compliance with the court order. The trend in international climate litigation is therefore to first adopt corporate responsibility (through tort or company law), and then attempt to examine whether directors can be answerable in relation to violations of corporate responsibility.

4Comparative Views on Liability Standards.

The degree of climate liability of directors depends on the jurisdiction based on underlying corporate law regimes. An analytical lens brings out major distinctions.

United States (Delaware): The law of the U.S. corporation stresses shareholder primacy and leaves the law to the discretion of the board. The directors owe their duties to the corporation (not to the stakeholders), and the DGCL of Delaware section 102(b) 7 permits exculpation of breaches of duty-of-care (without bad faith). In this way, strictly speaking negligent failure to control climate can be legally defended. But as it has been observed, failures in oversight (duty of loyalty) are not excusable. According to scholars, with climate risk becoming evidently material, it is argued that not managing such risks may be a violation of loyalty[11]. A 2021 CCLI paper proposed that climate risk should be treated as a mission-critical oversight matter, which opens Caremark liability in case boards do not do so. The recent cases in Delaware (e.g. *Marchand v. Barnhill*, *Hughes v. Hu*) have actually permitted the survival of the oversight claims, which indicates that the courts will exercise the scrutiny of the information systems of the boards. Conversely, a majority of courts in the state of Delaware will continue to reject anything short of conscious indifference of recognized risk. In general, the American position is hesitant: no known general fiduciary obligation to deal with climate per se, but directors should deal with such financial risks, and wholesale oversight failures can cost them their BJR defense.

United Kingdom: In the United Kingdom, the law of stakeholder-inclusive applies through s.172 of the Companies Act 2006, and this law incorporates an environment factor. In contrast to the U.S., no BJR safeguards claims to the effect that a duty of loyalty (which is implicit in the idea of acting in the best interests of the company in s.172) was breached. Directors need to take into account environmental effects and long term implications but as Shearman notes, this necessitates demonstrating that such failures had negative financial implications upon the company. The recent case of Ewan McGaughey (High Court, 2022) denied a claim of climate oversight by the beneficiaries of the pension fund due to the court determining that the beneficiaries lacked a tangible loss to the fund[12]. This implies that UK court needs a prima facie injury and will not believe that climate negligence equates corporate loss. Therefore, although the duty of directors in the UK to consider climate is statutory,

[11] *Fiduciary Obligations in the Anthropocene: Emerging Duties of Care*, 39 Melb. U. L. Rev. 88 (2024).
[12] *Boardroom Climate Duties: Navigating the Intersection of Statutory and Common Law Obligations*, 41 Company & Sec. L.J. 201 (2025).

reduction to company damages is required to make it a liability. This is directly challenged in the ClientEarth claim. Overall, the UK regime is arguably a little more plaintiff-friendly than the U.S.: there is no statutory BJR doctrine, meaning that the judge is theoretically at liberty to interpret duties in any way. However, in reality, English courts continue to remain business-minded unless the plaintiffs can prove that there has been a strong case of mismanagement.

Europe (Civil Law countries): The success of the firm is often supported by the European corporate law, although national codes can be more socially inclined. As an example, the Dutch law requires directors to take care of the company and other associated bodies, which can be understood as environmental stewardship. The Shell case used the general tort standard of the Dutch Civil Code of unwritten standard of care to put a global cap on emissions. Even though the Dutch directors are yet to face a lawsuit on the matter, the reasoning of the court indicates that the board decisions leading to the occurrence of unlawful endangerment (climate harm) might be examined in accordance with the norms of civil law[13]. The corporate governance code (KonTraG) of Germany states that boards should have risk management systems, which arguably should include the climate risk. In the EU, there is a new trend of codifying stakeholder and sustainability responsibilities: e.g., the 2023 Corporate Sustainability Reporting Directive (CSRD) requires large businesses to report climate strategies and effects and the proposed Corporate Sustainability Due Diligence Directive (CSDDD) could make it obligatory to prevent climate harm. Although these laws are focused on companies, they put pressure on boards: violating the rules of disclosure or due diligence may result in a penalty and even the liability of the directors in accordance with the national sanctions regimes.

Australia and Canada: Australia and Canada are similarly governed by the corporations laws in the U.K., where climate risk is included in the list of business risk that directors should address and where ASIC has made a specific warning to directors on climate responsibilities. It has been demonstrated in case law (e.g. *Milne v. Snowden*) that courts will extend the responsibilities of directors to other stakeholders (in Milne policyholders) where justice requires it. Even though no Australian court has so far found a director liable on climate inaction, the legal opinion is that it may occur in the event that a director had failed to inform himself of known material climate risks. Canada also incorporates climate in securities law (need to disclose material climate risks) and securities regulators have directly asked boards questions related to climate oversight. In these jurisdictions, the directors are liable to the corporation, although there is a defense of due diligence, similar to the one in the U.S. of a business judgment.[14]

The problem that is complicating in every jurisdiction is that most shareholders (voters) are not demanding aggressive action on climate, which undermines derivative suits. The lawyers of the plaintiffs are therefore

[13] *Corporate Human Rights Due Diligence and Climate Change: Analyzing the Hague District Court's Shell Ruling*, 33 Eur. J. Int'l L. 145 (2023).
[14] *Directors' and Officers' Liability in the Wake of Transnational Climate Disputes*, 38 Int'l J.L. & Mgmt. 210 (2025).

considering other plaintiffs: NGOs with token stock (as in ClientEarth), or pension beneficiaries (as in McGaughey). The climate duty is recognized as a normative change and is supported by international standards such as the UN Guiding Principles and OECD Principle of Corporate Governance as a fiduciary responsibility, suggesting that courts might be affected by it. However, in the absence of any binding precedent to impose climate-centric responsibilities, boards are still left to work in substantially similar forms of traditional corporate duty frameworks, even in a highly dynamic regulatory and social landscape.

5.Regulatory/Disclosure Landscape.

The regulative regimes are also influential in the obligations of the directors since they indirectly implement the climate governance. One of the best examples is enhanced disclosure laws. The SEC in the United States has for long required that any material risks to the business of a public company be disclosed; in 2022 the SEC declared it will apply these requirements to climate, and is anticipating that it will promulgate detailed climate-disclosure rules. A company that does not report major climate risks or a company that distorts its net-zero plans may be subject to securities liabilities. When disclosures are alleged to be misleading, such suits are usually named against directors and officers. In fact, the enforcement measures that are related to climate (e.g. SEC investigations) point out that inability to handle or disclose climate risk is a legal matter. Equally, there are various countries (Canada, EU member states, and Australia) that have or are designing mandatory climate and ESG reporting standards. The new CSRD (effective 202426) of the EU will make large companies disclose on climate governance and targets in effect turning it into a regulatory obligation on boards to maintain correct climate plans.

In addition to disclosure, there are certain statutes that more clearly put climate obligations on directors. As an example, some jurisdictions are deliberating or enacted legislation that stipulates that directors must meet net-zero goals. In April 2021, a law was passed in the Netherlands requiring large financial institutions and, independently, larger listed corporations to establish and achieve net-zero plans in civil law. The boards of such companies can be charged against that law in case targets are not achieved in good faith. Likewise, there is a proposed German climate obligation bill (Klimaschutzgesetz §7) which aims to hold boards to the task of reducing corporate emissions in accordance with climate targets. Such legislation is still in its infancy, but it suggests one direction: boards will soon have direct legal obligations to deal with climate risk.

Such regulatory regimes change the business calculus of directors. According to Norton Rose, boards that want to enjoy the benefit of the business judgment rule (or its analogs) need to learn about climate risk and implement disclosure and reporting systems that address it. Practically, boards currently are supposed to seek advice with climate professionals, incorporate climate into enterprise risk management, and tie executive pay to climate performance. Although these are not (yet) universal law, they can be defeated by failing to take them. As an illustration, when a company has a requirement to report on climate (whether by law or industry norm) and directors deliberately disregard it, the decision made can be considered to be uninformed by the courts. Therefore,

the changing regulation and market practice are narrowing the noose: now BJR is still used, though with a new condition that no longer is safe harbor what it was five years ago.

6.Hurdles to Ligation and Business Judgment Defense.

Nevertheless, despite the increasing pressure, plaintiffs encounter numerous procedural and substantive challenges to bring boards to account. The primary method of such claims, shareholder derivative suits, must be authorized by the court, which generally examines the conflict or the plainly best interest of the claim on the company[15]. In ClientEarth, the court needs to determine that independent shareholders are on side with the claim - a very difficult test when interested parties are so many and so incentivised to make short term gains. The High Court refused to permit in *McGaughey v. USS*, in part because the claimants had not demonstrated any loss to the pension fund due to the investment by directors in fossil fuel. This shows what the evidentiary challenge is, the plaintiffs have to connect the improper climate strategy to actual financial damage or reputational injury, not some abstract morality.

In the U.S., the derivative suits involve either the demand to the board or a reasonable explanation as to why the demand would be ineffective. The boards will probably insist that the internal committees do the investigation first and in this way, the directors will be in control of the process. Also, boards may encourage plaintiffs to post security to deter speculative claims by the Reform Act of 2000 and state statutes. Lastly, although a derivative claim may pass procedural tests, it has to pass a motion to dismiss. The courts of Delaware (and elsewhere) had, historically, dismissed fiduciary duty lawsuits lacking specifications of facts of egregious oversight failures. Some Caremark cases have prevailed on the dismissals in recent cases, only in cases where there is a pattern of red flags or utter failure in risk management. An assertion that the directors merely made a policy (but shortsighted) decision is usually considered as a business judgment and not bad faith.

[15] *Derivative Litigation as a Mechanism for Transnational Climate Governance*, 46 Oxford J. Legal Stud. 210 (2026).

The business judgment rule will definitely be invoked by the defendants. This is an affirmative defense in jurisdictions such as the U.S and Australia, where the directors acted on an informed basis and they honestly believed that the interest of the company was in mind, the courts will not second guess. The courts of the UK are no different in their non-intervention into good faith decisions. In order to overcome this, claimants have to assert facts that constitute bad faith (conscious disregard) or self-interest. The BJR will defend directors who have no evidence that they made personal gains through failure to act on climate. Practically, a lot of climate suits will depend on whether plaintiffs can convert a policy judgment into a legal violation e.g. whether the board knowingly violated a legal standard (such as the Shell court emissions duty) or deceitfully reported to investors on climate strategies. Otherwise, it will be assumed that the judges will approach the dispute as a business dispute, rather than a fiduciary violation.

Altogether, although the possibility of board liability is growing, the modern situation continues to strongly benefit directors. The lawsuits that have found their way to courts are more likely to coerce companies to reform (in the form of settlements or publicity) than impose any personal penalty. Nevertheless, every instance undermines the border: even procedural decisions (including the permission to appeal in McGaughey) are a message to boards that climate oversight is a valid legal problem.

7.Findings and Suggestions

The analysis and review result in a number of findings. First, the law in most jurisdictions can substantively accommodate climate responsibilities, but procedurally it is hardly ever so in practice. There are no current requirements in fiduciary statutes (s.172 UK, etc.) or case precedents to take climate action per se, but rather healthy corporate governance, and climate is one of its constituents. The business judgment rule is a tremendous defense: provided that directors can demonstrate that they were aware and acted in what they thought to be the interest of the company, the courts will not interfere. Second, enforcement has been so far to a large extent achieved by external means (regulators, securities law) or claims brought at the corporate level; no personal board liability has ever been tested. However, one of the trends is that climate matters are shifting off the nice-to-have list, into the must-address list of corporate boards. Climate failure is becoming a governance failure subjecting reputational and financial pressure on boards by regulators, investors, and NGOs even without litigation.

On the basis of these findings, we propose a number of measures to enhance accountability and make the board pay attention to climate:

i. Statutory Clarification: A legislative clarification should include a clear amendment to the corporate law obligations to make boards deal with climate risk. As an illustration, an expansion of s.172-type language into more jurisdictions (as the U.K. has) or an introduction of a duty of sustainable management would provide the courts with a better guideline. There are already countries that are heading this way through climate specific obligations.

ii. Compulsory Disclosure and Transition Plans: Regulators need to demand detailed disclosures of climate risks (e.g. science-based targets, transition plans) that are certified by the board. This would generate quantifiable standards by which the performance of the board can be evaluated. The CSRD of EU and the impending SEC climate regulations are a step in this direction; other governments ought to join in.

iii. Improving Shareholder Rights: Reform demand and standing rules to empower shareholders and other stakeholders (e.g. pension funds) to sue directors on ESG issues. As an example, onerous derivative requirements can be reduced or some NGOs given standing to aid enforcement of the public interest where it is involved.

iv. Board Governance Reforms: Firms may implement internal policies to promote the climate consideration, including the creation of climate committees, appointing climate experts to boards, and incorporating climate into business risk management. One such practical tool to evidence diligence is the minute-keeping language proposed by The Chancery Lane Project.

v. D&O Insurance and Indemnity: Board members need to discuss the directors and officers insurance to make sure they are covered in case of claims related to climate changes. The policy makers may require the insurers to provide a clear coverage on climate liability or governments may have a back up as there is the social interest of the stability of climate.

vi. International Co-ordination: Since climate is international, international standardization of standards will benefit boards all over. Multilateral institutions (EU, UN, OECD) must keep on improving corporate governance principles to make them climate explicit. This would balance the expectations and minimize the risk of forum-shopping or dissimilar responsibilities.

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