Climate Change and Corporate Law in the United States: Not "Woke" but Eyes Open

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ABSTRACT: This Essay discusses the evidence that climate change and nature loss create financially material risks for corporations that must be carefully considered by officers and directors pursuant to their fiduciary duties of loyalty and care. This analysis concludes that under the current state of fiduciary duty law and the known financial risks presented by climate change and nature loss, officers and directors of corporations may breach their fiduciary duties by failing to implement and monitor a robust system to identify and manage each type of industry-specific climate-related and nature-related risk. Risk of breach is particularly acute for entity-specific compliance risks, such as those arising from climate-related breaches of disclosure laws.

Attending to the financial risks of climate change and nature loss does not imply changes in the corporate purpose. Rather, such attention is inherent in the directors' and officers' obligations to promote the long-term best interests of the corporation for the benefit, ultimately, of its shareholders. This conclusion is supported by recent caselaw in Delaware, particularly new Caremark *cases and* McRitchie v. Zuckerberg*, and the conclusions of the American Law Institute's current project developing an updated Restatement of Corporate Governance. Where a company's strategy to advance its long-term success has been developed in good faith and on reasonable investigation, its directors would prevail in litigation even if that strategy imposes costs in conflict with some shareholders' interests in short-term profit maximization.*

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Introduction

Three-and-a-half years ago, this Author and colleagues at the Commonwealth Climate and Law Initiative ("CCLI") published an analysis of directors' fiduciary duties with respect to climate change in the United States. That analysis concluded that directors' fiduciary duties require boards to analyze climate change risks to the company in developing corporate strategies, exercising oversight of law compliance, and structuring public disclosure.[1] The core of the analysis was that directors' oversight duties, as part of their duty of loyalty, their "*Caremark* duties," today require attention to analysis of climate change, particularly where "mission-critical" aspects of a company's

1. *See generally* Sarah Barker, Cynthia Williams & Alex Cooper, CCLI, Fiduciary Duties and Climate Change in the United States (2021) [hereinafter CCLI Analysis], https://ccli.ubc.ca/wp-content/uploads/2021/12/Fiduciary-duties-and-climate-change-in-the-United-States.pdf [https://perma.cc/4ZGS-KDHA]; Cynthia A. Williams, *Fiduciary Duties and Corporate Climate Responsibility*, 74 Vand. L. Rev. 1875, 1916 (2021). CCLI is an international collaboration between legal academics and practitioners based in London, England, focused on the fiduciary duties of company directors and investors across the common-law world to incorporate climate change and nature loss into strategies, oversight, and disclosure. *See* CCLI Analysis, *supra*, at 1. It commissions legal opinions from leading experts on the obligations of directors with respect to climate change, including in the United Kingdom, Australia, Canada, and South Africa, initially, and then expanding to Hong Kong, India, Japan, Malaysia, the Philippines, Singapore, and the United States. *See id.* More recently CCLI has begun to explore biodiversity and nature loss and the implications for directors' duties. *See id.*

operations and legal obligations are implicated.[2] We had the analysis peer reviewed by both prominent corporate and securities lawyers from firms in New York, Chicago, and San Francisco, and leading law professors prior to publication.[3] Former Chief Justice of the Delaware Supreme Court Leo E. Strine, Jr., provided comments and also led the discussion of the analysis among law firm partners. After it was published, the analysis was discussed in several corporate fora, including in a presentation by this Author organized by the National Association of Corporate Directors.

That analysis was based on core statutory and caselaw requirements as set out in Delaware, the predominant jurisdiction for incorporations in the United States. Its premise, and fundamental to the analysis, is that climate change poses a material, financial risk to many industries in many geographies and across numerous supply chains, and so, at the least, the potential for disruption and climate shocks needs to be analyzed within firms across industries.[4] The analysis did not depend on adopting a more European "double-materiality" approach to materiality, in which companies' actions on society and the environment can also be deemed "material." Rather, our analysis used the traditional U.S. definition of financial materiality as the frame of reference, evaluating the effects on a company from the physical, transitional, and litigation challenges of climate change. It recognized expansions since 2019 in core Delaware doctrine on directors' duty of oversight, their "*Caremark* duties," that we argued created the potential for broader litigation risk and possibly even liability for corporate directors who fail to incorporate climate change into their analyses of strategies, oversight, and disclosure. Nor were we the only authors to observe this expansion in the duty of oversight

2. *See* CCLI ANALYSIS, *supra* note 1, at 4–8, 20–38, 48–49.

3. *See id.* at 13 n.1. The list of law firm partners is underinclusive since some firms' policies would not permit public attribution of the person or firm participating in the review process. That law professors or lawyers were part of the review process does not necessarily mean they agreed with every aspect of CCLI's analysis. Some participants thought we should have gone further, for instance suggesting that we emphasize the duty of good faith more directly.

4. See *id.* at 13–18, annex I at 49–58 for evidence that climate change presents financial and systemic risk across industries and geographies and is recognized as such by multiple domestic U.S. and international financial regulators, accounting firms, and businesses.

caselaw and analyze its implications,[5] including evaluating it for the specific case of climate change litigation risk.[6]

This Essay revisits the question of directors' duties to incorporate climate change into strategies, oversight, and disclosure and asks whether any scientific, doctrinal, or political changes since October 2021 require revisiting our conclusions. Perhaps unsurprisingly, this Author concludes that no, our original conclusions stand. If anything, the litigation risk to directors who ignore climate change today is higher than three years ago. Today, the evidence of climate change as a financially material risk, both to individual companies and across the financial system as a whole, is stronger than even just three years ago.[7] Moreover, today it is increasingly clear that biodiversity loss and the degradation of nature are financially material risks for large swathes of every economy.[8] Doctrinally, in Delaware there have been no published cases yet discussing the litigation theories we espoused regarding corporate law duties and climate change. A number of new *Caremark* cases on the duty of board oversight outside of the climate law context continue to expand the scope of litigation risk, however, and support the conclusions we advanced.[9] So neither scientific nor doctrinal changes since 2021 require revisions in the theory that company directors need to incorporate climate

5. For just some of the important contributions to this discussion, see Leo E. Strine, Jr., Kirby M. Smith & Reilly S. Steel, Caremark *and ESG, Perfect Together: A Practical Approach to Implementing an Integrated, Efficient, and Effective* Caremark *and EESG Strategy*, 106 IOWA L. REV. 1885, 1886 (2021); E. Norman Veasey & Randy J. Holland, Caremark *at the Quarter-Century Watershed: Modern-Day Compliance Realities Frame Corporate Directors' Duty of Good Faith Oversight, Providing New Dynamics for Respecting Chancellor Allen's 1996* Caremark *Landmark*, 76 BUS. LAW. 1, 27 (2021); Roy Shapira, *A New* Caremark *Era: Causes and Consequences*, 98 WASH. U. L. Rev. 1857, 1861–66 (2021); Stavros Gadinis & Amelia Miazad, *Corporate Law and Social Risk*, 73 VAND. L. REV. 1401, 1458–65 (2020); Stephen M. Bainbridge, *Don't Compound the* Caremark *Mistake by Extending It to ESG Oversight*, 77 BUS. LAW. 651, 666–76 (2022); Brett McDonnell, Hari M. Osofsky, Jacqueline Peel & Anita Foerster, *Green Boardrooms?*, 53 CONN. L. REV. 335, 386–98 (2021); Elizabeth Pollman, *Corporate Oversight and Disobedience*, 72 VAND. L. REV. 2013, 2025–31 (2019).

6. *See* Lisa Benjamin, *The Road to Paris Runs Through Delaware: Climate Litigation and Directors' Duties*, 2020 UTAH L. REV. 313, 326–47.

7. *See infra* Section I.A.

8. *See infra* Section I.B.

9. *See generally In re* Caremark Int'l Inc. Deriv. Litig., 698 A.2d 959 (Del. Ch. 1996); *infra* Part II. For a thoughtful analysis of how the EU's Sustainability Due Diligence Directive could influence U.S. companies' actions regarding the environment and human rights, in light of *Caremark*, see Luca Enriques, Matteo Gatti & Roy Shapira, *How the EU Sustainability Due Diligence Directive Could Reshape Corporate America*, 78 STAN. L. REV. (forthcoming 2025), https://ssrn.com/abstract=5083571 [https://perma.cc/CQ3H-Y68L]. To date, *Caremark* duty of oversight claims are primarily based on "corporate traumas" or material penalties caused by violations of specific statutes or regulations, although this is changing. *See* Roy Shapira, *Mission Critical ESG and the Scope of Director Oversight Duties*, 2022 COLUM. BUS. L. REV. 732, 798. Professor Shapira has argued that *Caremark* liability today can also incorporate serious reputational risks that directors have either ignored or paid insufficient attention to, even without underlying statutory violations, such as failing to protect consumers' privacy (Facebook litigation), showing that the ambit of potential *Caremark* oversight liability has expanded. *See id.* at 767–71, 787–92.

change into their analyses of strategies, oversight, and disclosure as part of their fiduciary obligations to the company.

In contrast, the politics in the United States on questions of corporations' social and environmental obligations are changing and have changed over the past three years. Those political changes are likely to produce profound changes in some companies' actions regarding many internal and external matters, such as whether to limit misinformation or disinformation on widely-used social media platforms; whether to dismantle diversity, equity, and inclusion ("DEI") initiatives; or how much to invest in climate change solutions and opportunities.[10] Yet, as a matter of potential financial *risk* to a company, climate change and nature loss still need to be analyzed carefully—much as cyber risk to customers' data and company operations or the disruptive potential of AI need to be analyzed. Anything else by the board of a large, public company would be a dereliction of duty and thus risks litigation and possible liability for breach of the duty of loyalty, of which oversight is a component.

These topics will be taken up as follows. Section I.A will discuss the strengthening evidence of the financial materiality of climate change risk, and Section I.B will summarize some of the evidence of the financial materiality of biodiversity loss and the degradation of nature. Section II.A will summarize our CCLI analysis from 2021, concentrating on Delaware fiduciary duty law. Section II.B will discuss further developments in Delaware since 2021 which support our prior conclusions. Part III will take up the most significant counterargument that seems likely, which is that incorporating climate change and nature risk into the board's deliberations is not consistent with fiduciary obligations to the shareholders since that incorporation may produce decisions requiring expensive, short-term changes to the company's strategy, location of business operations or supply chains, or investments in expensive risk-mitigation measures.[11] Here, my discussion directly engages with the topic of this Symposium, the corporate purpose. I argue that the purpose of the firm, as expressed through the directors' fiduciary obligations, is to advance the best interests of the corporation and its shareholders.[12] Where there is a conflict between the two, the corporation's interests prevail as a matter of law. Are there industries where the board's fiduciary duties suggest or even require maintaining a business-as-usual approach that is dangerous to the climate, nature, and human flourishing? I suggest that the recent case in Delaware,

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10. *See, e.g.*, *Which US Companies Are Pulling Back on Diversity Initiatives?*, ASSOCIATED PRESS (Feb. 12, 2025, 9:59 AM), https://apnews.com/article/companies-diversity-equity-inclusion-dei-lawsuits-753f027bb73a1035a919482427553ea3 [https://perma.cc/WA8A-WAZP]; Clare Duffy, *Meta Is Getting Rid of Fact Checkers. Zuckerberg Acknowledged More Harmful Content Will Appear on the Platforms Now*, CNN BUS. (Jan. 7, 2025, 1:06 PM), https://edition.cnn.com/2025/01/07/tech/meta-censorship-moderation [https://perma.cc/34TV-NMHU].

11. See Bainbridge, *supra* note 5, at 667–76, for an argument close to this one, and to which I respond below.

12. *See infra* Section III.B.

McRitchie v. Zuckerberg,[13] gives us some insights into that thorny question, which needs more analysis than possible in this short Essay. Generally, I argue, it is in advancing the corporation's and its shareholders' long-term economic interests that climate change must be considered. While many shareholders may not have long-term interests in a particular corporation, that is one reason why holding fast to the interests of the corporation itself is and should be the North Star for constructing directors' fiduciary obligations.

One argument I don't engage with is that the new politics of the "anti-woke" and "anti-ESG" initiatives that are changing the context of corporate political calculations throughout the United States would make climate-aware leadership of a company politically risky. I have argued that these reactionary initiatives are responding to business leaders who have expressed concerns in 2019 and within COVID-19 times for stakeholders more broadly than shareholders, and who have recognized the urgency of responding to climate change.[14] Politics often demonstrates Isaac Newton's Third Law of Motion: "For every action, there is an equal and opposite reaction."[15] Certainly the politics of corporate social responsibility demonstrates that characteristic today in the United States. The CCLI analysis of directors' fiduciary duties is not based on either a stakeholder perspective on the firm or a view that companies must care about the effects of their actions on nature or biodiversity as an ethical or environmental matter (although they certainly may, as I will point out). Rather it is based on the core premise that climate change and nature loss are factors that may pose financially material risks to the firm. The politics of today may cause company directors to want to shy away from analyzing the effects of climate change or nature loss, but the political context does not change directors' fiduciary obligations to evaluate financially material risks in an objective and thoughtful process.

I. THE FINANCIAL MATERIALITY OF CLIMATE CHANGE AND NATURE LOSS[16]

A. *CLIMATE CHANGE SCIENCE AND FINANCIAL RISK*

"According to the UN Intergovernmental Panel on Climate Change (IPCC)'s assessment of the latest climate science, it is 'unequivocal'"[17] that "[h]uman activities, principally through emissions of greenhouse gasses, have

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13. *See generally* McRitchie v. Zuckerberg, 315 A.3d 518 (Del. Ch. 2024).

14. *See infra* Section III.A. *See generally* Cynthia A. Williams, *Private Climate Governance of Finance: "Net Zero" Prospects and Politics*, 26 U. PA. J. BUS. L. 1195 (2024) (providing analysis of the anti-ESG political pushback in the United States and its role in supporting the oil and gas industry and rejecting climate science).

15. Anne Helmenstine, *Newton's Third Law of Motion in Physics*, SCI. NOTES (Mar. 4, 2025), https://sciencenotes.org/newtons-third-law-of-motion-in-physics [https://perma.cc/KVQ4-TKLN].

16. Portions of this Section have relied upon the work of this Author and colleagues at the CCLI. *See* sources cited and discussion *supra* note 1.

17. CCLI ANALYSIS, *supra* note 1, at 2, 49.

. . . caused global warming,"[18] with effects on "the atmosphere, ocean and land. Global average temperatures now exceed 1.1°C (2°F) above those of pre-industrial times."[19] Although many aspects of the effects of climate change could be emphasized[20]—including the moral questions concerning distributed responsibilities to mitigate these harms, given that the most acute impacts will be felt by people who have historically had the least responsibility for causing the problems[21]—this brief recitation will emphasize economic and financial risks. Here, in overview, the IPCC AR6 Report from 2023, in its Summary for Policymakers, concludes as follows:

> Climate change has caused widespread adverse impacts and related losses and damages [both economic and non-economic] to nature and people that are unequally distributed across systems, regions and sectors. Economic damages from climate change have been detected in climate-exposed sectors, such as agriculture, forestry, fishery, energy, and tourism. Individual livelihoods have been affected through, for example, destruction of homes and infrastructure, and loss of property and income, human health and food security, with adverse effects on gender and social equity.
>
> In urban areas, observed climate change has caused adverse impacts on human health, livelihoods and key infrastructure. Hot extremes have intensified in cities. Urban infrastructure, including transportation, water, sanitation and energy systems have been compromised by extreme and slow-onset events, with resulting economic losses, disruptions of services and negative impacts to well-being. Observed adverse impacts are concentrated amongst economically and socially marginalised urban residents.[22]

18. *AR6 Synthesis Report Headline Statements*, IPCC (2023), https://www.ipcc.ch/report/ar6/syr/resources/spm-headline-statements [https://perma.cc/XBF3-2FJ8]. The IPCC states as follows about the Headline Statements: "Headline statements are the overarching conclusions of the approved Summary for Policymakers which, taken together, form a concise narrative." *Id.*

19. CCLI ANALYSIS, *supra* note 1, at 49 (footnote omitted).

20. These challenges are discussed in detail in *AR6 Synthesis Report Headline Statements*, *supra* note 18.

21. *Id.*; *see also* IPCC, CLIMATE CHANGE 2023 SYNTHESIS REPORT SUMMARY FOR POLICYMAKERS 5 (Hoesung Lee et al. eds., 2023) [hereinafter CLIMATE CHANGE 2023 SYNTHESIS REPORT], https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC_AR6_SYR_SPM.pdf [https://perma.cc/E862-K9B2] ("The 10% of households with the highest per capita emissions contribute 34–45% of global consumption-based household GHG emissions, while the bottom 50% contribute 13–15%.").

22. CLIMATE CHANGE 2023 SYNTHESIS REPORT, *supra* note 21, at 6 (footnotes omitted); *see also id.* at 6 n.14 ("Slow-onset events are described among the climatic-impact drivers of the AR6 [Working Group I] and refer to the risks and impacts associated with e.g., increasing temperature means, desertification, decreasing precipitation, loss of biodiversity, land and forest degradation, glacial retreat and related impacts, ocean acidification, sea level rise and salinization.").

"Climate change is now understood to pose material risks across both the real economy and the financial system."[23] In an influential speech in 2015 to Lloyds of London, then-Governor of the Bank of England Mark Carney summarized three categories of financial risks caused by climate change that companies and financial institutions need to understand: physical risks, transition risks, and legal risks.[24] Physical risks include chronic conditions such as drought, deforestation, desertification of formerly productive land, coral bleaching, and salination of previously fresh water,[25] as well as acute physical risks from the increasing frequency and intensity of events such as fires, floods, rain storms, and hurricanes.[26] Transition risks are those caused by

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23. CCLI ANALYSIS, *supra* note 1, at 2; *see, e.g.*, NETWORK FOR GREENING THE FIN. SYS., CLIMATE CHANGE, THE MACRO-ECONOMY AND MONETARY POLICY 6–7 (Oct. 2024), https://www.ngfs.net/system/files/import/ngfs/medias/documents/ngfs_climate_change_macroeconomy_and_monetary_policy_-_final.pdf [https://perma.cc/A35A-2JS6] (stating that there are financial and monetary policy implications of both chronic and acute physical effects of climate change and of regulations to address over short- and long-term time horizons). The Network for Greening the Financial System ("NGFS") is a voluntary coalition of Central Banks and Bank Supervisors established in 2017, which is developing analyses of the macroeconomic effects of climate change and sharing best practices for addressing them through policy and bank supervision. *See Origin and Purpose*, NGFS (Apr. 8, 2025), https://www.ngfs.net/en/about-us/origin-and-purpose [https://perma.cc/EB6A-KMF5]. The U.S. Federal Reserve became a member at the start of the Biden administration but withdrew its membership on January 17, 2025, given the return of the Trump administration. Press Release, NGFS, NGFS Membership Announcement (Jan. 17, 2025), https://www.ngfs.net/en/press-release/ngfs-membership-announcement [https://perma.cc/5J9K-5YNQ].

24. *See* Mark Carney, Governor of the Bank of Eng., Address Before Lloyd's of London: Breaking the Tragedy of the Horizon — Climate Change and Financial Stability (Sept. 29, 2015), https://www.bankofengland.co.uk//media/boe/files/speech/2015/breaking-the-tragedy-of-the-horizon-climate-change-and-financial-stability.pdf [https://perma.cc/XE6V-LZ2J]. Mr. Carney, who is Canadian, has recently been elected Prime Minister of Canada, based in significant part on his experiences as Governor of the Bank of Canada during the 2007 to 2008 global financial crisis; as Governor of the Bank of England during Brexit; and his determination to resist President Trump's tariffs on Canada and purported interests in absorbing Canada into the United States as its fifty-first state. *See* Matina Stevis-Gridneff, *Canada Election Highlights: Mark Carney Wins New Term as Prime Minister*, N.Y. TIMES (May 21, 2025), https://www.nytimes.com/live/2025/04/28/world/canada-election (on file with the *Iowa Law Review*).

25. These physical effects of climate change have been well documented in numerous sources. A summary is available in IPCC, CLIMATE CHANGE 2022: IMPACTS, ADAPTATION AND VULNERABILITY 8–20 (2022), https://www.ipcc.ch/report/ar6/wg2/downloads/report/IPCC_AR6_WGII_FullReport.pdf (on file with the *Iowa Law Review*).

26. On acute risks, then-Governor Carney cited insurance analyses indicating that "[i]nflation-adjusted insurance losses from these events have increased from an annual average of around $10bn in the 1980s to around $50bn over the past decade [to 2015]." Carney, *supra* note 24, at 4. By 2025, insurance and re-insurance companies face about $150 billion per year in losses from natural disasters, "and a lot more in bad years" according to a report by Verisk Analytics. Ian Smith, *Insurers Face $151 Billion in Yearly Losses from Natural Disasters, Report Forecasts*, FIN. TIMES (Sept. 3, 2024, 11:04 AM), https://www.ft.com/content/8908a823-58b1-4d1a-9435-5820c54e2c11 (on file with the *Iowa Law Review*); *see also* GALLAGHER RE, NATURAL CATASTROPHE AND CLIMATE REPORT: 2024, at 4 (2025), https://www.ajg.com/gallagherre/-/media/files/gallagher/gallagherre/news-and-insights/2025/natural-catastrophe-and-climate-report-2025.pdf [https://perma.cc/88EC-ZEDM]. According to the Gallagher Re report, insured losses are

changes in laws, policy, technology, or systems to either mitigate or adapt to climate change.[27] Legal risks include liability consequences, even decades in the future, as governments and citizens seek to hold major emitters and their insurance firms financially responsible for the costs of loss and damage.[28]

Climate litigation since the signing of the Paris Agreement in 2015 has increased rapidly: By 2023 there were 2,341 climate cases filed worldwide, two-thirds of which were filed since 2015.[29] Although historically, seventy percent of these cases have been brought against governments, since 2022 only fifty-four percent of new cases filed have been brought against governments, with "strategic litigation against companies contin[uing] to develop, with cases targeting corporate actors from across a growing range of sectors."[30] As a notable example of strategic corporate litigation, in May 2021 the Hague District Court in the Netherlands ruled that Royal Dutch Shell needed to accelerate its business model transformation and emissions reduction plan timeline to achieve a forty-five percent CO_2 reduction in Scopes 1, 2, and 3 emissions by 2030, relative to 2019 levels.[31] In 2024, the Court of Appeal in The Hague ruled that ordering the specific forty-five percent reduction was beyond the civil court's power, but the Court of Appeal did determine "that Shell has an obligation to counter dangerous climate change."[32]

As we summarized the data in our 2021 CCLI Analysis:

> These physical, economic transition, and litigation and liability risks pose direct risks to (and opportunities for) individual corporations (*entity-specific risks*), as well as cross-sectoral risks that extend across nearly every facet of the US economy (*systematic risks* or *economic cross-sectoral risks*). Collectively, the entity-specific risks and systematic risks

thirty-seven percent of total economic damage reported from natural disasters, so in 2024 natural disasters caused "direct economic cost[s]" of $417 billion. *See id.* at 6 ("[T]he portion of event costs not covered by insurance . . . stood at 63% . . . .").

27. *See* Carney, *supra* note 24, at 6.

28. *See id.*; *see also* JOANA SETZER & CATHERINE HIGHAM, GLOBAL TRENDS IN CLIMATE CHANGE LITIGATION: 2024 SNAPSHOT 47–49 (2024), https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2024/06/Global-trends-in-climate-change-litigation-2024-snapshot.pdf [https://perma.cc/8ZN2-NTD3].

29. *See* JOANA SETZER & CATHERINE HIGHAM, GLOBAL TRENDS IN CLIMATE CHANGE LITIGATION: 2023 SNAPSHOT 2 (2023), https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2023/06/Global_trends_in_climate_change_litigation_2023_snapshot.pdf [https://perma.cc/Y3D2-MSW3].

30. *Id.* at 3.

31. *See generally* Rb. Den Haag 26 mei 2021, JOR 2021, 208 m.nt. Biesmans, SJM (Milieudefensie/Royal Dutch Shell) (Neth.).

32. *See generally* Hof Den Haag 12 november 2024, JOR 2025, 81 m.nt. MJ Faber (Milieudefensie/Royal Dutch Shell) (Neth.). That obligation was grounded on numerous sources: Dutch tort law, EU treaty obligations, international human rights law, and EU and international climate law decisions. *Id.*

> could undermine the stability of the US financial system (*financial system risks* or *systemic contagion risks*) . . . .[33]

This systemic risk was recognized by the U.S. Financial Stability Oversight Council ("FSOC") in 2021 in its *Report on Climate-Related Financial Risk*, in which it concluded that "[c]limate change is an emerging threat to the financial stability of the United States."[34] As FSOC pointed out, "[i]n the United States and across the globe, climate-related impacts in the form of warming temperatures, rising sea levels, droughts, wildfires, intensifying storms, and other climate-related events are already imposing significant costs upon the public and the economy."[35]

It is not just scientists and regulators who recognize the enormity of climate change and its financial implications. Every year, the World Economic Forum commissions a survey of the risk perceptions of top business leaders and experts around the world in preparation for its annual meeting in Davos. In 2025, consistent with many of its most recent reports, business leaders ranked "[e]xtreme weather events" as the second most likely risk to have a severe impact over the next two years, following only "[m]isinformation and disinformation" as likely to have a severe impact over that time frame.[36] Over a ten-year time frame, the top five risks these business leaders and experts identified were: (1) extreme weather events; (2) biodiversity loss and ecosystem collapse; (3) critical change to Earth systems; (4) natural resource shortages; and (5) misinformation and disinformation.[37]

In the United States, the Sustainability Accounting Standards Board ("SASB"), an investor and industry collaboration to create disclosure standards for climate risks across seventy-nine industries and sub-industry sectors, found in 2017 that "climate change is likely to have material financial impacts on companies in [seventy-two] out of [seventy-nine] industries, representing [ninety-three percent] of the U.S. equity market."[38] In 2022, development of SASB's disclosure standards was transferred to the International Financial Reporting Standards Foundation, which is developing consolidated global climate disclosure standards that rely on the Taskforce on Climate-Related Financial Disclosures, SASB, and other globally-significant disclosure

33. CCLI ANALYSIS, *supra* note 1, at 4.

34. FIN. STABILITY OVERSIGHT COUNCIL, REPORT ON CLIMATE-RELATED FINANCIAL RISK 2021, at 3 (2021), https://home.treasury.gov/system/files/261/FSOC-Climate-Report.pdf [https://perma.cc/E8C5-SF2X]. The Financial System Oversight Council is an interagency council established by the Dodd-Frank Act, with representatives from federal and state banking, securities, and insurance regulatory agencies. *See id.* at 1–2.

35. *Id.* at 3.

36. *See* Mark Elsner, *These Are the Biggest Risks We Face Now and in the Next 10 Years*, WORLD ECON. F. (Jan. 15, 2025), https://www.weforum.org/stories/2025/01/global-risks-report-2025-bleak-predictions (on file with the *Iowa Law Review*).

37. *Id.* The survey was conducted from September to October 2024. *Id.*

38. *See* SUSTAINABILITY ACCT. STANDARDS BD., CLIMATE RISK TECHNICAL BULLETIN (2017) (foreword by former U.S. Secretary of the Treasury Henry Paulson).

standards.[39] SASB's update in 2023 shows financial risks from climate change are "undeniably present" in nearly every industry, and that because of that "ubiquity, investors cannot diversify away from climate risk; instead, they must focus on managing it—and encouraging portfolio companies to manage it—in all its forms."[40]

B. Biodiversity and Nature Loss Risk

In addition to climate change, there is a growing international consensus that ecosystem degradation and biodiversity loss present systemic and financial risks that businesses need to understand and governments urgently need to address. In 2020, the World Economic Forum ("WEF") worked with accounting firm PricewaterhouseCoopers ("PwC") to measure the economic effects of nature loss.[41] The report concluded that "$44 trillion of economic value generation – more than half of the world's total GDP – is moderately or highly dependent on nature and its services and is therefore exposed to nature loss."[42] This figure has been updated in 2023 by the global consultancy PwC to $58 trillion of economic value generation, equivalent to fifty-five percent of the world's GDP.[43]

In relation to the three largest sectors that are highly dependent on nature (construction, agriculture, and food and beverages), WEF stated that "[s]uch sectors rely on either the direct extraction of resources from forests and oceans or the provision of ecosystem services such as healthy soils, clean water, pollination [control] and a stable climate. As nature loses its capacity to provide such services, these sectors could suffer significant losses."[44]

It also stated that:

> [T]he consequences for secondary and tertiary industries can also be significant. For example, six industries – chemicals and materials; aviation, travel and tourism; real estate; mining and metals; supply chain and transport; retail, consumer goods and lifestyle – with less than [fifteen percent] of their direct [global value added] highly dependent on nature, still have "hidden dependencies" through

39. *See* SUSTAINABILITY ACCT. STANDARDS BD., CLIMATE RISK TECHNICAL BULLETIN (2023), https://sasb.ifrs.org/wp-content/uploads/2023/11/SASB-Climate-Risk-Technical-Bulletin-2023-0823.pdf [https://perma.cc/L293-922C].

40. *Id.* at 4.

41. WORLD ECON. F., NATURE RISK RISING: WHY THE CRISIS ENGULFING NATURE MATTERS FOR BUSINESS AND THE ECONOMY 8 (2020), https://www3.weforum.org/docs/WEF_New_Nature_Economy_Report_2020.pdf [https://perma.cc/WY8M-4XCN].

42. *Id.* at 8, 13.

43. WILL EVISON, LIT PING LOW & DANIEL O'BRIEN, PWC, MANAGING NATURE RISKS: FROM UNDERSTANDING TO ACTION 2 (2023), https://www.pwc.com/gx/en/strategy-and-business/content/sbpwc-2023-04-19-Managing-nature-risks-v2.pdf [https://perma.cc/4BK4-GNFT].

44. WORLD ECON. F., *supra* note 41, at 13.

> their supply chains. More than [fifty percent] of the GVA of their supply chains is highly or moderately dependent on nature.[45]

In July 2024, the Financial Stability Board, an entity of the G20, published a report on nature-related risks which concluded that biodiversity loss and the degradation of nature may have profound effects on the real economy and, in turn, the financial system.[46] These effects can occur through transmission channels for financial risks considered in prudential settings (e.g., credit risks, market risks and operational risks), and such risks may then feed back to the real economy again. A loss of ecosystem services can adversely affect a firm's financial position.[47] For example, production processes or supply chain disruptions can reduce profits or prevent production. In addition, efforts to "prevent the loss of such ecosystem services could raise financial risks for firms that are forced to write-down assets that are no longer economically viable."[48] Water, agriculture, and energy sectors have all been identified as highly dependent on nature services, of which many other sectors of the economy depend.[49] Disruptions could result in cascading impacts through supply chains and the real economy.

Other international regulatory entities such as the central banks' Network for Greening the Financial System ("NGFS") and the Organization for Economic Cooperation and Development have begun analytic work to develop frameworks and technical guidance on assessing nature-related financial risks.[50] Moreover, as with climate risk, a voluntary international disclosure framework for companies to measure and report on their nature-related financial risks is being developed. That framework, developed by the Task Force on Nature-Related Financial Disclosure, asks companies to disclose their identification and governance of nature-related dependencies; the effect of nature-related dependencies on company strategy and financial planning; the process used by the organization to assess, prioritize, and monitor dependencies; and the

45. *Id.* at 14.

46. FIN. STABILITY BD., STOCKTAKE ON NATURE-RELATED RISKS: SUPERVISORY AND REGULATORY APPROACHES AND PERSPECTIVES ON FINANCIAL RISK 1 (2024), https://www.fsb.org/uploads/P180724.pdf [https://perma.cc/U6ZT-L2WF].

47. *Id.*

48. *Id.* at 7.

49. *Id.* at 8.

50. *See* NETWORK FOR GREENING THE FIN. SYS., NATURE-RELATED FINANCIAL RISKS: A CONCEPTUAL FRAMEWORK TO GUIDE ACTION BY CENTRAL BANKS AND SUPERVISORS 12–19 (2024), https://www.ngfs.net/en/what-we-do/nature-related-risks [https://perma.cc/6FJB-GB4H]; ORG. FOR ECON. COOP. & DEV., ASSESSING BIODIVERSITY-RELATED FINANCIAL RISKS: NAVIGATING THE LANDSCAPE OF EXISTING APPROACHES 22–68 (2023), https://www.oecd.org/content/dam/oecd/en/publications/reports/2023/04/assessing-biodiversity-related-financial-risks_8f971348/d52137a5-en.pdf [https://perma.cc/J2Z5-7DYV].

metrics and targets the organization uses to assess and manage its performance with respect to its nature-related dependencies.[51]

In 2022, the international community concluded work on the Kunming-Montreal Global Biodiversity Framework, as part of the U.N.'s work on the Convention on Biological Diversity.[52] That framework establishes goals of bringing the areas of biodiversity loss "close to zero by 2030"; to "[r]estore thirty [percent] of all [d]egraded [e]cosystems" by 2030; and to "[c]onserve [thirty percent] of [l]and, [w]ater, and [s]eas" by 2030, especially areas of particular biological significance.[53] Target 15 specifically addresses the obligations of business, and aims for businesses to "[a]ssess, [d]isclose and [r]educe [b]iodiversity-[r]elated [r]isks and [n]egative [i]mpacts."[54]

There are ways in which biodiversity loss and risks of nature loss present more acute challenges for directors from both management and liability perspectives. Biodiversity risks have shorter time horizons of materialization compared to most climate risks, are location-specific, and may be irreversible.[55] Moreover, they are even more complex to address than climate risks, because biodiversity loss is driven by multiple factors and perturbed ecosystems may undergo rapid and non-linear changes.[56] Some sectors are particularly exposed, including:

> agriculture, construction and food and beverages. . . . Their impacts and dependencies on biodiversity can constitute latent risks for many others . . . . [that] have high or medium biodiversity risk exposure directly and/or indirectly through their value chains. For example, through products that use agricultural materials (e.g., cotton), forest materials (e.g., paper, cosmetics), mined materials (e.g., minerals in batteries), or plant ingredients (e.g., pharmaceuticals).[57]

51. *See Disclosure Recommendations*, TASKFORCE ON NATURE-RELATED FIN. DISCLOSURES (2025), https://tnfd.global/recommendations/#disclosures [https://perma.cc/V9GG-6B8H].

52. *See Kunming-Montreal Global Biodiversity Framework*, CONVENTION ON BIOLOGICAL DIVERSITY, https://www.cbd.int/gbf [https://perma.cc/575P-AH2U].

53. *2030 Targets*, CONVENTION ON BIOLOGICAL DIVERSITY, https://www.cbd.int/gbf/targets [https://perma.cc/MEA2-GD4N].

54. *Id.*

55. *See* COMMONWEALTH CLIMATE AND L. INITIATIVE, BIODIVERSITY RISK: LEGAL IMPLICATIONS FOR COMPANIES AND THEIR DIRECTORS 12–13 (2022), https://commonwealthclimatelaw.org/wp-content/uploads/2022/12/CCLI_Biodiversity_risk_paper_2022.pdf [https://perma.cc/9LA2-9C2F].

56. Katie Kedward, Josh Ryan-Collins & Hugues Chenet, *Biodiversity Loss and Climate Change Interactions: Financial Stability Implications for Central Banks and Financial Supervisors*, 23 CLIMATE POL'Y 763, 766 (2022).

57. COMMONWEALTH CLIMATE AND L. INITIATIVE, *supra* note 55, at 5.

II. DIRECTORS' FIDUCIARY OBLIGATIONS TO CONSIDER CLIMATE CHANGE UNDER EXISTING LAW

How directors' fiduciary duties could affect companies' management of these climate (and by implication nature) risks is the subject to which this discussion turns. Given Delaware's pre-eminent role in establishing corporate laws and governance standards for large public companies and U.S. subsidiaries of global companies, Delaware jurisprudence is the focus of this discussion, as it was in the initial CCLI analysis.

A. FIDUCIARY LAW IN DELAWARE AND CLIMATE-RELATED IMPLICATIONS

Based on principal–agent relationships, "Delaware law imposes two primary fiduciary duties on directors and officers: a duty of loyalty and a duty of care. These apply to directors and officers of both companies under private ownership and publicly listed companies."[58] Given the strength of protections to directors against successful duty of care claims,[59] both the business judgement rule and broad exculpation clauses in most public companies' incorporating documents in Delaware, our CCLI analysis of litigation risk primarily focused on the duty of loyalty. Yet, that litigation risk is higher (and growing, as will be discussed below) in the duty of loyalty context of *Caremark* oversight claims does not mean that the duty of care as a standard of conduct is irrelevant with respect to climate change. Financial losses that arise from failing to properly consider and address climate change risks can be extreme, as utility companies in California are finding from settlements and judgments to partially address the damage from wildfires caused by distribution lines that had not been maintained with climate change risks properly considered.[60] These losses can affect directors' reputations and future opportunities, and at some point could be construed as failing to act in good faith, if risks were consciously disregarded, at which point the business judgement rule and exculpation clauses are not applicable.[61]

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58. CCLI ANALYSIS, *supra* note 1, at 4; *see also* Smith v. Van Gorkom, 488 A.2d 858, 872–73 (Del. 1985) (finding a breach of duty of care where a company's board was grossly negligent in the procedure it used to agree to sell the company); Weinberger v. UOP, Inc., 457 A.2d 701, 710–11 (Del. 1983) (stating that the duty of loyalty requires both fair dealing and fair price when a parent company transacts business with its controlled subsidiary).

59. *See In re* Walt Disney Co. Deriv. Litig., 907 A.2d 693, 749 (Del. Ch. 2005) (stating that duty of care requires directors to "use that amount of care which ordinarily careful and prudent men would use in similar circumstances" but noting that "deficiencies in the directors' process are actionable only if the directors' actions are grossly negligent" because of the business judgment rule).

60. *See infra* text accompanying notes 97–98. "Partially" because of the number of people who lost their lives, their homes, and their sense of security, which are losses that cannot be compensated with money.

61. *See* DEL. CODE ANN. tit. 8, § 102(b)(7) (West 2022) (the limits of the company's power to exculpate its directors show that only breach of the duty of care can be exculpated); *In re* Walt Disney Co. Deriv. Litig., 906 A.2d 27, 67 (Del. 2006).

As we argued in our 2021 CCLI analysis:

> The duty of loyalty encompasses [a general obligation to put the company's interests above the agent's, and] a number of specific obligations, often overlapping, including a duty to avoid conflicts of interest; a duty to act in good faith, i.e., to act honestly, in the best interests of the corporation, and in a manner that is not knowingly unlawful or contrary to public policy; and a duty to provide oversight of legal compliance with relevant regulations . . . .[62]

Given developments in 2019 in the case law on the duty of oversight, as summarized below, we gave particular attention in the CCLI analysis to the potential for claims under the duty of oversight.[63] Yet, the duty to act in good faith is also directly relevant to directors' obligations with respect to climate change.

1. Duty to Act in Good Faith

A foundational element of directors' obligations is the requirement that all actions and decisions must be in good faith; that is, made with an honest belief that the action or decision is in the best interest of the company.[64] In *In re Walt Disney Co.*, the Delaware Supreme Court discussed good faith in detail and agreed that an "intentional dereliction of duty, a conscious disregard for one's responsibilities" defined one type of a lack of good faith.[65] Five months later, the same court clarified in *Stone v. Ritter* that good faith is not a free-standing fiduciary duty but is an aspect of the duty of loyalty.[66]

"Directors who consciously disregard, or are willfully ignorant of, climate-related financial risks in their governance of risk and strategy may be found to have acted in bad faith," we argued, and thus may face personal liability for breach of their duty of loyalty.[67] As the Delaware Supreme Court emphasized in *Disney*, "such misconduct [conscious disregard for one's responsibilities] is properly treated as a non-exculpable, non-indemnifiable violation of the fiduciary duty to act in good faith."[68] For example, we argued:

> [W]here directors' decisions are motivated in bad faith by an extraneous interest, such as "default denialism" consistent with the position promulgated by a partisan political or industry-based

62. CCLI ANALYSIS, *supra* note 1, at 20 (footnotes omitted); *see also* Cede & Co. v. Technicolor, Inc., 634 A.2d 345, 362 (Del. 1993); Weinberger v. UOP, Inc., 457 A.2d 701, 710–11 (Del. 1983); *In re Walt Disney Co.*, 906 A.2d at 62–68 (discussing the parameters of good faith, and which kinds of actions would show a lack of good faith); Stone v. Ritter, 911 A.2d 362, 370 (Del. 2006).

63. *See* CCLI ANALYSIS, *supra* note 1, at 26–32.

64. *See In re Walt Disney Co.*, 906 A.2d at 62–68.

65. *See id.* at 66.

66. *See Stone*, 911 A.2d at 370.

67. CCLI ANALYSIS, *supra* note 1, at 20–21.

68. *In re Walt Disney Co.*, 906 A.2d at 66; CCLI ANALYSIS, *supra* note 1, at 20.

> association with which the director is affiliated, a claim may potentially be raised that the director failed to discharge their duty to act [in] the best interests of the company, or acted with "deliberate indifference of the potential risk of harm to the corporation."[69]

2. Duty to Provide Oversight

It has long been understood that one aspect of directors' duties includes the duty of oversight, which is to pay attention to developments and risks within the company on whose board the director sits.[70] Given that duty, directors can be liable not only because of decisions that were made in a grossly negligent manner, which the business judgment rule would not protect, but also based on failing to act "in circumstances in which due attention would, arguably, have prevented the loss."[71] This duty of oversight, most often as regards oversight of law compliance, has been discussed by the Delaware Supreme Court since at least 1963[72] but has been given much greater emphasis in the last three decades based on *In re Caremark,* a Chancery Court opinion authored by the highly-regarded Chancellor William Allen.[73] The Caremark pharmaceutical company had settled civil and criminal enforcement actions brought by the U.S. Department of Justice and Department of Health and Human Services, alleging violations of federal anti-kickback legislation, ultimately paying $250 million to settle the claims after four years of federal and state investigations.[74] The opinion was based on the Chancery Court's approval of the settlement arising from derivative litigation that had alleged breach of the directors' duty of care, given the monetary settlement with the federal government.[75] In *Caremark*, the Chancery Court held:

> [A] director's obligation includes a duty to attempt in good faith to assure that a corporate information and reporting system, which the board concludes is adequate, exists, and that failure to do so under some circumstances may, in theory at least, render a director liable for losses caused by non-compliance with applicable legal standards.[76]

Caremark was a decision construing the duty of oversight as a component of the duty of care, but ten years later in *Stone v. Ritter*, the Delaware Supreme Court approved of the *Caremark* process of analysis but held that directors breach their duty of *loyalty* when they fail to provide proper oversight

69. CCLI ANALYSIS, *supra* note 1, at 20 (quoting *In re Walt Disney Co.*, 906 A.2d at 62 for the "deliberate indifference" standard).

70. *See, e.g.*, Francis v. United Jersey Bank, 87 N.J. 15, 29–39 (1981).

71. *In re* Caremark Int'l Inc. Deriv. Litig., 698 A.2d 959, 967 (Del. Ch. 1996).

72. *See generally* Graham v. Allis-Chalmers Mfg. Co., 188 A.2d 125 (Del. 1963).

73. *See generally In re Caremark*, 698 A.2d 959.

74. *Id.* at 960–61.

75. *Id.* at 960.

76. *Id.* at 970.

regarding law compliance.[77] Thus, because these are duty of loyalty claims, they are non-exculpable, non-indemnifiable claims, although it is possible that the company's D&O (directors and officers) insurance can protect directors, depending on the policy.[78]

Since the Delaware Chancery Court's opinion in *Caremark*, a relatively small number of cases premised on the *Caremark* theory of liability had survived motions to dismiss in Delaware[79]—until 2019. In 2019, in *Marchand v. Barnhill*, the Delaware Supreme Court reversed the Chancery Court's granting of the Blue Bell ice cream company directors' motion to dismiss on their *Caremark* duties regarding the company's food safety program.[80] Blue Bell produced only one product—ice cream—but even so it had no board oversight of the conditions of production of that product. As a result, the board was not apprised of an on-going pattern of potential and actual bacterial contamination in its ice cream, even though deficiencies had been flagged by state and federal regulators over a number of years. Tragically, there was ultimately an outbreak of *listeria* in the company's ice cream, causing the death of three people and a total recall of all Blue Bell's ice cream.[81]

"Importantly, the Court concluded that because food safety was one of—if not the most—important aspect of Blue Bell's business, the directors of Blue Bell had an obligation to do more than merely rely on the company's . . . management" and its "nominal" compliance with FDA regulations.[82] As we summarized the case:

> Instead, the Court held that *Caremark* required the creation of board-level monitoring and reporting systems given the crucial nature of food safety to Blue Bell's business. The fact that the board had undertaken no efforts to ensure it was informed of a compliance issue

77. *See* Stone v. Ritter, 911 A.2d 362, 370 (Del. 2006).

78. Exculpation clauses are permitted in a company's articles of incorporation that limit or eliminate liability for directors, but not officers, for violations of the duty of care. *See* DEL. CODE ANN. tit. 8, § 102(b)(7) (West 2022). No other fiduciary liabilities can be exculpated. *Id.* If loyalty concerns are at issue because of a conflict-of-interest transaction, then the business judgment rule can be reinstated, *see* DEL CODE ANN. tit. 8, § 144 (West 2025), but that circumstance is not at issue when discussing *Caremark* duties of oversight. However, liability insurance may still cover such claims in some instances. *See* RSUI Indem. Co. v. Murdock, 248 A.3d 887, 900 (Del. 2021) (D&O insurance can be available under DEL. CODE tit. 8, § 145(g) even where a company cannot indemnify under DEL. CODE tit. 8, § 145(a)).

79. *See, e.g.*, *In re* Am. Int'l Grp. Consol. Deriv. Litig., 965 A.2d 763, 799–808 (Del. Ch. 2009), *aff'd* 11 A.3d 228 (Del. 2011) (finding plaintiffs' allegations, that the board failed to exercise oversight over wide-spread fraudulent or criminal conduct, sufficient to overcome defendant's motion to dismiss); *In re* Wells Fargo & Co. S'holder Deriv. Litig., 282 F. Supp. 3d 1074, 1108 (N.D. Cal. 2017) (applying Delaware law and holding that knowledge of allegations of fraud and doing nothing demonstrates the predicate for a successful oversight fiduciary liability claim).

80. Marchand v. Barnhill, 212 A.3d 805, 808 (Del. 2019).

81. *See id.* at 805.

82. CCLI ANALYSIS, *supra* note 1, at 24; *see Marchand*, 212 A.3d at 823 (finding Blue Bell's FDA compliance to be "nominal," at best).

"intrinsically critical to the company's business operation" supported an inference that the board had not acted in good faith. In reaching this conclusion, the Court articulated the duty of oversight as including the responsibility for directors to monitor a "corporation's operational viability, legal compliance, and financial performance."[83]

Following *Marchand*, four *Caremark* claims had survived motions to dismiss up until the publication of our CCLI analysis in 2021, which was quite a change compared to the almost universal dismissal of *Caremark* claims prior to *Marchand*.[84] As noted above, CCLI lawyers were not the only lawyers recognizing this change in the law.[85] *Caremark* claims have been successfully pled after *Marchand* both where the board failed to implement a reasonable information and reporting system, or where it had failed to take seriously "red flags" that the system kicked up, especially in mission-critical areas.[86]

It was on the basis of this jurisprudence, in light of the financially material implications of climate change across industries and geographies, that we identified a number of potential avenues for directors to be held liable for failing in their oversight obligations.[87] Although at the time of our analysis, cases had only proceeded against directors for a breach of their duty of oversight in relation to law compliance, in principle we argued this duty could extend to oversight of mission-critical business operations as well, especially given the language in *Marchand* quoted above.[88] Still, we confined our analysis to failures to monitor law compliance in interactions with climate change. We provided examples of directors' responsibilities for oversight of compliance with climate specific legal requirements, such as environmental standards, or health and safety regulations. We particularly emphasized disclosure requirements for publicly listed companies, and the potential of liability for either misrepresentations of climate readiness, or failures to disclose material climate risks. While recognizing the continuing difficulties of derivative litigation, we concluded:

> This report concludes that under the current state of fiduciary duty law and the known risks presented by climate change, officers and

83. CCLI ANALYSIS, *supra* note 1, at 24 (quoting *Marchand*, 212 A.3d at 807, 809) (footnotes omitted).

84. *See In re* Clovis Oncology Inc. Deriv. Litig., No. 2017-0222, 2019 WL 4850188, at *38 (Del. Ch. Oct. 1, 2019); Hughes *ex rel.* Kandi Techs. Grp. v. Xiaoming Hu, No. 2019-0112, 2020 WL 1987029, at *13–17 (Del. Ch. Apr. 27, 2020); Teamsters Loc. 443 Health Servs. & Ins. Plan v. Chou, No. 2019-0816, 2020 WL 5028065, at *1–2 (Del. Ch. Aug. 24, 2020); *In re* Boeing Co. Deriv. Litig. No. 2019-0907, 2021 WL 4059934, at *24–25 (Del. Ch. Sept. 7, 2021).

85. *See supra* note 5 and accompanying text.

86. *See* cases cited *supra* note 84.

87. *See* CCLI ANALYSIS, *supra* note 1, at 26–34.

88. *See id.* at 24–26 (discussing *Marchand*, 212 A.3d at 809, which states that the duty of oversight includes responsibilities for directors to monitor a "corporation's operational viability, legal compliance, and financial performance").

> directors of corporations may breach their fiduciary duties by failing to implement and monitor a robust system to identify and manage each type of climate-related risk identified in this report. This is particularly so for entity-specific compliance risks, such as those arising from climate-related breaches of disclosure laws.[89]

B. *Recent Developments in Delaware in Oversight Litigation*

As anticipated, when a new approach to litigation opens up, or an old approach like *Caremark* shows new promise, many duty of oversight cases have followed *Marchand* and the subsequent burst of denials of motions to dismiss. One of the questions that CCLI had posed was whether the apparent opening up of the courts to evaluating directors' failures to attend properly to mission-critical business risk, and not just compliance risk, would come to fruition.[90] The answer is a qualified yes: To date, the challenged business risks that have been allowed to go forward over motions to dismiss are situations that can create serious reputational risks to the company, such as Facebook's failing to protect its customers' privacy, which was extensively criticized in the press,[91] or where the board has ignored red flags about serious risks with the potential for great harm to the public, such as the Boeing board's failure to attend carefully to the safety of its products, which led to two crashes of its 737 Max and hundreds of fatalities.[92]

Roy Shapira has extensively and thoughtfully analyzed post-*Marchand* duty of oversight cases, and has concluded that for most "pure" mission-critical business risk cases to survive a motion to dismiss, that is without intertwined legal compliance issues, there must be one of those two types of harm.[93] Shapira attributes this expanded scope of judicial review of the board's exercise of oversight duties both to *Marchand* but also to the Delaware courts' increasing willingness to allow broad discovery of board materials and internal communications pursuant to books and records motions under

89. *See id.* at 48.

90. *See id.* at 5.

91. *See In re* Facebook Deriv. Litig., No. 2018-0307, 2025 WL 262194, at *2–3 (Del. Ch. Jan. 21, 2025) (alleged privacy violations that were extensively discussed in the media).

92. *See In re* Boeing Co. Deriv. Litig., No. 2019-0907, 2021 WL 4059934, at *2 (Del. Ch. Sept. 7, 2021).

93. *See* Shapira, *supra* note 9, at 734–40; *see also* Roy Shapira, *Max Oversight Duties: How* Boeing *Signifies a Shift in Corporate Law*, 48 J. CORP. L. 121, 123–25 (2022); Roy Shapira, *Conceptualizing* Caremark, 100 IND. L.J. 467, 468–75 (2025) [hereinafter Shapira, *Conceptualizing* Caremark]. Shapira's *Conceptualizing* Caremark defines "mission-critical" risks that the Delaware courts will examine for proper oversight as those that are self-evident (as safety in an airline should be); those the company has identified as critical in its enterprise risk system or mission statement; and those that could be reputationally disastrous. *Id.* at 486. He does not view climate change risks as having the potential yet to be reputationally disastrous. Shapira, *supra* note 9, at 779.

Delaware General Corporate Law section 220.[94] He suggests that books and records discovery in the Boeing case led to Boeing's $237.5 million settlement of the subsequent shareholders' litigation, since it showed that the board treated the first 737 Max crash predominantly as a public relations problem, not as a safety or engineering problem.[95] In an analysis of even more recent cases, Shapira posits that in its more searching inquiry of oversight cases today, the Delaware Chancery Court is seeking to determine if directors have been willfully blind to mission-critical risk, having instituted "cosmetic compliance" systems rather than good-faith efforts at legal compliance, or whether companies are effectively "recidivists," unconcerned about law compliance or willing to accept higher levels of legal risk for short-term profit opportunities.[96]

How this more searching inquiry will play out in climate cases for failures of oversight will depend on which kinds of climate cases, in which industries and geographies. To date, such cases have been brought and successfully settled based on California corporate law against the officers and directors of PG&E, the country's largest investor owned utility, for its role in various tragic, hugely destructive wild fires in Northern California in 2018 through 2020.[97] In its settlement of one of these, the Dixie Fire, the company stated that "[t]here is no evidence that PG&E consciously and willfully disregarded a known risk with regard to the ignition of the Dixie Fire," and that it "followed the California Public Utilities Commission (CPUC) requirements when inspecting, maintain[ing] and operating our system."[98]

As in *Marchand*, management's efforts to comply with law, particularly if those efforts can be characterized as "nominal," may be unavailing as defenses for the *board* in claims of its failure to act to ensure that mission-critical business risks are embraced in good faith. Nothing in the trajectory of oversight cases and expanded books and records disclosure suggests that smart directors or officers should ignore climate or biodiversity business risks to their companies or supply chains simply because there are not yet specific regulations to constrain their emissions. Ignoring mission-critical business risks may still create litigation and oversight liability risks for the directors.[99]

Moreover, for many companies, especially large public companies in the United States and companies doing business in California or the European Union, newly emerging disclosure requirements imply newly emerging oversight

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94. *See* Shapira, *supra* note 9, at 747–50 (discussing AmerisourceBergen Corp. v. Lebanon Cnty. Emps. Ret. Fund, 243 A.3d 417 (Del. 2020)); *see also* CCLI ANALYSIS, *supra* note 1, at 37–38.

95. *See* Shapira, *supra* note 9, at 747–50.

96. *See* Shapira, *Conceptualizing* Caremark, *supra* note 93, at 20–28.

97. *See* Taylor Romine & Aya Elamroussi, *Utility Giant PG&E Agrees to $45 Million Settlement Related to California's Second-Largest Wildfire*, CNN US (Jan. 26, 2024, 1:39 AM) (discussing multiple settlements), https://www.cnn.com/2024/01/26/us/pacific-gas-electric-settlement-dixie-fire-california/index.html [https://perma.cc/3R5X-7QBU].

98. *Id.*

99. *See* CCLI ANALYSIS, *supra* note 1, at 23–26; Shapira, *supra* note 9, at 746.

risk.[100] CCLI argued that it was most likely that the first "climate oversight" cases in Delaware would be brought or could successfully overcome motions to dismiss where a company's public disclosures showed a pattern of materially misstated facts or half-truths about the company's "net zero" trajectory, or its climate readiness or risk profile.[101] Such a case could presumably be brought today against Duke Energy, which is incorporated in Delaware: It has recently been sued by a North Carolina town for its "'deception campaign' in order to obscure the climate hazards of fossil fuels."[102] Presumably a books and records request could produce information that is deeply embarrassing to the company if the board was aware of the deception campaign or participated in it, and even if it was not aware of the campaign. Neither finding would show excellent management and either could be argued to be a breach of the directors' oversight obligations. Massachusetts is successfully pursuing state-law consumer deception claims against ExxonMobil ("Exxon") for its decades of climate denial and deception, as well as its alleged false claims about the environmental benefits of its oil additives, having overcome Exxon's motion to dismiss on various grounds.[103] Directors' oversight claims may well provide the basis for follow-on litigation if there is ultimately a judgment against Exxon or settlement with substantial financial penalties.

One advantage of climate oversight litigation brought in the disclosure context is that it avoids the difficult causation questions that can otherwise arise and that might limit oversight climate liability in other kinds of cases. If a fruit company's business suffers a serious business downturn or failure because pollinator bees collapse, is climate change the cause of the bees' demise, or was there a pathogen? If a U.S. construction company suffers a serious business downturn because it cannot keep prices for its homes

100. *See* Enriques, Gatti & Shapira, *supra* note 9, at 31, 40 n.245. That analysis looks specifically at how potential *Caremark* oversight liability interacts with the human rights, environmental, and transition plan disclosure requirements of the newly enacted E.U. Corporate Sustainability Due Diligence Directive. *See id.* at 31–36.

101. *See* CCLI ANALYSIS, *supra* note 1, at 28–32 (discussing cases where climate statements were challenged by state regulators or investors and discussing disclosure hypotheticals that may lead to oversight liability); Williams, *supra* note 1, at 1911–14 (discussing deceptive disclosure, including of opinions, as a source of oversight risk for directors).

102. Cristen Hemingway Jaynes, *North Carolina Town Launches First U.S. Climate Lawsuit Against a Utility Company*, ECOWATCH (Dec. 6, 2024), https://www.ecowatch.com/carrboro-north-carolina-duke-energy-climate-lawsuit.html [https://perma.cc/WV8Q-NETZ].

103. *See generally* Memorandum of Decision and Order on Defendant's Motion to Dismiss Amended Complaint, Massachusetts v. Exxon Mobil Corp., No. 1984-CV-03333 (Mass. Super. Ct. June 22, 2021). The Massachusetts Supreme Court has rejected ExxonMobil's motion to dismiss these claims. Amy Antoniolli & J. Michael Showalter, *Massachusetts Supreme Court Permits Climate Related Action by Massachusetts State AG to Move Forward*, ARENTFOX SCHIFF (May 27, 2022), https://www.afslaw.com/perspectives/alerts/massachusetts-supreme-court-permits-climate-related-action-massachusetts-state [https://perma.cc/LJ2D-PRA2]. Discovery is proceeding. Chris McGreal, *Exxon Must Go to Trial Over Alleged Climate Crimes, Court Rules*, GUARDIAN (May 24, 2022, 4:00 PM), https://www.theguardian.com/environment/2022/may/24/exxon-trial-climate-crimes-fossil-fuels-global-heating [https://perma.cc/78DP-AT8X].

affordable for its target market, is it because climate change has caused the price of its lumber to increase by reducing the supply from its trading partners, either because of drought or soil depletion, or is it because of economic conditions generally leading to inflation, or is it because of the Trump administration's immigration policies decreasing the supply of labor or its tariffs raising the cost of importing Canadian lumber? There are many messy questions involved in trying to ascribe causation of a specific company's financial problems or failure to the broad range of physical and systemic risks that climate change and nature loss can portend. Yet, because climate change and nature loss can eventuate in different ways and through different channels for any individual firm, given its industry, assets, geography, and supply chains, the challenge for directors and officers is more acute to know what the facts are, get expert advice as needed, evaluate carefully, and possibly adjust strategies and disclosure. These are the analytic processes directors and officers must take in order properly to meet their duties of care and loyalty by acting in good faith to provide oversight of mission-critical business and compliance risk.

III. Is Considering Climate Change and Nature Risk Consistent with Directors' Fiduciary Duties? Potential Counter-Arguments

One challenge to the argument being made here is that directors' and officers' consideration of climate change and nature loss will inevitably cause them to need to balance environmental and social factors with company profits. Such balancing could be argued to be inconsistent with shareholder primacy and directors' fiduciary duties to shareholders. Stephen Bainbridge made such an argument in his article, titled *Don't Compound the* Caremark *Mistake by Extending it to ESG*.[104] Yet, CCLI's argument for climate and nature oversight duties is based on core Delaware doctrines and does not depend on adopting a stakeholder orientation to the interpretation of boards' fiduciary duties. It is based only on the financial materiality of climate change and nature risk across many industries, geographies, and supply chains. Financially material risks need to be identified, understood, analyzed, and potentially incorporated into strategies, oversight, and disclosure even under a shareholder primacy view of the corporate purpose and the board's fiduciary duties.[105]

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104. *See generally* Bainbridge, *supra* note 5. As the title implies, Bainbridge criticizes both the *Caremark* opinion and any expansion to oversight of ESG. *Id.* Bainbridge summarized his arguments in a blog post on the Columbia University Law School Blue Sky Blog. *See* Stephen M. Bainbridge, *Don't Compound the* Caremark *Mistake by Extending It to ESG Oversight*, CLS BLUE SKY BLOG (Aug. 24, 2021), https://clsbluesky.law.columbia.edu/2021/08/24/dont-compound-the-caremark-mistake-by-extending-it-to-esg-oversight [https://perma.cc/T8MH-4DNB].

105. "Potentially" since understanding and considering the specific risks to specific companies may suggest no changes are needed on a five-year or ten-year time frame for strategy development, depending on the industry. The oil majors, to the extent that they've evaluated the future markets for their products, seem to be determined to compete to be the last man standing, even those such as BP which had seemed to be undertaking a pivot to develop new energy markets

This point was made in an opinion issued in 2020 by leading New York law firm Debevoise & Plimpton.[106] Written by William Regner, a partner at the firm and then-Deputy Chair of its Corporate Department, in evaluating "whether and to what extent US directors have a duty to consider ESG factors," Debevoise concluded that "[t]o the extent that ESG factors present risks or opportunities that are material to the corporation, directors have an obligation to take them into account when making decisions."[107]

Jeffrey Gordon has argued for "unbundling" climate change risk from ESG, that is to treat climate change risk separately from ESG.[108] One of his arguments is that "mitigating climate change risk reduces systematic risk across a portfolio of diversified investments," and so by mitigating climate change risk, management can "improve risk-adjusted returns for investors."[109] This "pure financial case does not generally obtain for other elements of ESG," he argues.[110] Moreover, he points out that "ESG in the United States has become embroiled in the culture wars," precisely to "disrupt a growing consensus about the importance of addressing [climate change],"[111] an assertion with which I agree and have written about elsewhere.[112]

Yet, like some ESG matters, climate change risk is financial risk in many industries and geographies and relationships with supply chains, as are the risks of nature loss.[113] So, by the logic of the Debevoise analysis, "directors have an obligation to take them into account when making decisions."[114]

Arguably, that is a sufficient answer to the fiduciary duty challenge. Yet two subsidiary issues merit further consideration. First, is it consistent with directors' fiduciary duties for the board to consider and balance external

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and technologies. *See* Malcolm Moore & Tom Wilson, *BP Pivots Back to Oil and Gas After 'Misplaced' Faith in Green Energy*, FIN. TIMES (Feb. 26, 2025), https://www.ft.com/content/8bcf131f-c820-493f-8ea6-6a35440facd3 (on file with the *Iowa Law Review*).

106. *See* WILLIAM D. REGNER, DEBEVOISE & PLIMPTON, THE DUTY OF US COMPANY DIRECTORS TO CONSIDER RELEVANT ESG FACTORS 5–6 (Sept. 2020) [hereinafter DEBEVOISE], https://www.unpri.org/download?ac=11696 [https://perma.cc/3V94-TT8R].

107. *Id.* at 4–5.

108. *See* Jeffrey N. Gordon, *Unbundling Climate Change Risk from ESG*, CLS BLUE SKY BLOG (July 26, 2023), https://clsbluesky.law.columbia.edu/2023/07/26/unbundling-climate-change-risk-from-esg [https://perma.cc/A5CS-S2CE].

109. *Id.*

110. *Id.* Some ESG matters will have financially material implications, as the Debevoise analysis recognizes, that is they are "value" relevant, but some, such as human rights concerns for participants in companies' supply chains, may still be more of concern because of the "values" inherent in being concerned about how people are treated in their working environments. *See* Cynthia A. Williams, *Corporate Social Responsibility and Corporate Governance*, *in* THE OXFORD HANDBOOK OF CORPORATE LAW AND GOVERNANCE 634, 667–68 (Jeffrey N. Gordon & Wolf-Georg Ringe eds., 2018) (collecting empirical evidence on the financial materiality of some ESG and CSR initiatives).

111. Gordon, *supra* note 108.

112. *See* Williams, *supra* note 14, at 1223–24 (discussing the anti-ESG initiatives in the United States since 2021 and showing that they are primarily motivated by protecting the oil and gas industry).

113. *See supra* text accompanying notes 23–37.

114. DEBEVOISE, *supra* note 106, at 5.

factors if such consideration leads to decisions that require expensive investments or changes in firm strategies that reduce profits and thus shareholders' wealth in the short term? While there will be some, perhaps many, "win/win" solutions to difficult climate or nature issues, there will be plenty that do not have this nicely Panglossian character. What about those decisions that reduce profits? That is the scenario that seems most acutely to raise the concerns that Bainbridge identified. And second, what about the recent opinion in *McRitchie v. Zuckerberg*, which held that directors have no obligation to consider the effects of their decisions on society or the economy, even if the majority of their firm's investors are diversified investors and so could be harmed by decisions that impose portfolio-wide negative externalities? Does that decision undermine the argument being made here? These issues will be discussed in turn.

A. *The Context for the Discussion: The Corporate Purpose Debate*

Fifteen years ago, the proper understanding of boards' fiduciary duties and the implications of those duties for issues of the corporate purpose again became a matter of vigorous debate in the United States.[115] That reinvigorated debate was inspired by the late Lynn Stout's short, sharply critical book, written for a popular audience, titled *The Shareholder Value Myth: How Putting Shareholders First Harms Investors, Corporations and the Public,*[116] which provoked equally critical reactions.[117] Stout's book was a comprehensive argument against shareholder primacy, the dominant theory of corporate purpose in the corporate law academy, based on economic theory and corporate law, extending the team production theory of corporate governance that she had developed together with economist Margaret Blair.[118]

By 2019, the debate had settled back into its well-known arguments between shareholder and stakeholder perspectives on the nature of the firm and on corporate jurisprudence when it was upended by a surprise contribution

115. "Again" because the debate began in the 1930s with the publication of ADOLF A. BERLE, JR. & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 352–57 (1932), which asked what the social responsibilities of modern publicly held corporations are, given their concentrated economic power.

116. *See generally* LYNN STOUT, THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC (2012) (providing arguments why shareholder value maximization is a myth and leads to harm and outlining alternatives to the system). Professor Stout had been a prolific critic of shareholder primacy in the law literature from economic and legal perspectives, but it is her short popular book that seems to have inspired this iteration of the corporate responsibility debate. *See* Lynn A. Stout, *The Toxic Side Effects of Shareholder Primacy*, 161 U. PA. L. REV. 2003, 2005–07 (2013).

117. *See, e.g.*, Jonathan Macey, *Sublime Myths: An Essay in Honor of the Shareholder Value Myth and the Tooth Fairy*, 91 TEX. L. REV. 911, 923–24 (2013) (critiquing STOUT, THE SHAREHOLDER VALUE MYTH, *supra* note 116, arguing that to whatever extend shareholder value maximization is a myth, it is a useful myth).

118. *See* Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 315–18 (1999).

in August 2019 from the Business Roundtable in the United States.[119] In rapid succession, the Business Roundtable ("BRT") and the WEF each rejected shareholder primacy as the definition of the corporate purpose, and adopted a stakeholder definition.[120] The BRT statement was sandwiched in between statements from the British Academy, which followed up its 2018 analysis and rejection of shareholder primacy with a definition of the corporate purpose in November 2019 that is succinct and, at least implicitly, encompasses a stakeholder perspective: "The purpose of business is to solve the problems of people and planet profitably, and not profit from causing problems."[121]

As the Business Roundtable stated in its press release when adopting its new Statement on the Purpose of the Corporation in 2019:

> Since 1978, Business Roundtable has periodically issued Principles of Corporate Governance. Each version of the document issued since 1997 has endorsed principles of shareholder primacy – that corporations exist principally to serve shareholders. With today's announcement, the new Statement supersedes previous statements and outlines a modern standard for corporate responsibility.[122]

That "modern standard for corporate responsibility" is explicitly a stakeholder view of corporate obligation. The BRT statement articulates specific obligations to customers, employees, suppliers, communities, the environment, and "[g]enerating long-term value for shareholders."[123] It ends by rejecting shareholder primacy: "Each of our stakeholders is essential. We commit to deliver value to all of them, for the future success of our companies, our communities and our country."[124] In the stakeholder/shareholder

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119. *See About Business Roundtable*, BUS. ROUNDTABLE, https://businessroundtable.org/about-us [https://perma.cc/W3PB-F8CA]. The Business Roundtable is an organization comprised of over two-hundred CEOs of America's largest companies.

120. *See* Press Release, Bus. Roundtable, Business Roundtable Redefines the Purpose of a Corporation to Promote 'An Economy that Serves All Americans' (Aug. 19, 2019), https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans [https://perma.cc/A4LD-VJGN]; Klaus Schwab, *Davos Manifesto 2020: The Universal Purpose of a Company in the Fourth Industrial Revolution*, WORLD ECON. F. (Dec. 2, 2019), https://www.weforum.org/stories/2019/12/davos-manifesto-2020-the-universal-purpose-of-a-company-in-the-fourth-industrial-revolution [https://perma.cc/6LHD-J5GF].

121. PRINCIPLES FOR PURPOSEFUL BUSINESS, BRIT. ACAD. (Nov. 2019), https://www.thebritishacademy.ac.uk/documents/224/future-of-the-corporation-principles-purposeful-business.pdf [https://perma.cc/3GX2-B4UK]; Colin Mayer, *The Future of the Corporation: Towards Humane Business*, 6 J. BRIT. ACAD. 1, 11–12 (2018) (discussing problems with shareholder primacy). The British Academy is an organization of leading academics in the humanities and social sciences in the UK, including law and business. The British Academy's project on and statement of the corporate purpose was led by, and thus strongly influenced by, Prof. Colin Mayer and his then-most-recent book. *See generally* COLIN MAYER, PROSPERITY: BETTER BUSINESS MAKES THE GREATER GOOD (2018).

122. Press Release, Bus. Roundtable, *supra* note 120.

123. *Id.*

124. *Id.*

debate, the BRT has shifted its allegiance to stakeholders, at least rhetorically, while making clear that company obligations of course include shareholders, albeit those interested in "long-term value."

This Author is well aware that many of the signatories of the BRT statement lead companies that could do much more to deliver value for all stakeholders, particularly their employees. Serious questions have been raised about whether the BRT statement was meant to change business practices; some evidence suggests that it was not meant to make such changes.[125] Moreover, as Andrew Winston argued in an article in the Harvard Business Review, "we need a much bigger pivot to circular, renewable-energy-based business models that value the long-term, protect natural capital, and invest in human development and equality. That level of change is currently light years beyond the BRT statement."[126] Yet, as at least a rhetorical statement acknowledging the responsibilities of the modern public company today, the BRT statement represented an important challenge to shareholder primacy, as do the WEF and British Academy statements.

Five years later, in 2024, the BRT reiterated its commitment to its 2019 stakeholder view of corporate purpose, asserting that "[c]ountless undertakings by America's most successful companies demonstrate that a company's commitment to stakeholders and to profit go hand in hand."[127] It is striking that the BRT maintained its commitment to stakeholder governance, given the virulent anti-ESG pushback that had developed in the United States starting in 2021, and the numerous ways in which Republican state and federal officeholders are targeting companies and financial institutions that have made commitments to DEI initiatives or to be net zero by 2050.[128] How the business community will adapt to the accelerated attacks on DEI and climate science in the new MAGA Republican Administration remains to be seen, although some initial developments are not encouraging.[129]

B. *The Corporate Law Question*

Within corporate law, though, the debate is focused on whether it would be consistent with directors' fiduciary duties for directors to approve decisions

125. *See* Lucian A. Bebchuk & Roberto Tallarita, *Will Corporations Deliver Value to All Stakeholders?*, 75 VAND. L. REV. 1031, 1086 (2023) ("Overall, our findings support the view that the BRT Statement did not represent a meaningful commitment and was not planned or expected to bring about meaningful improvements in the treatment of stakeholders.").

126. Andrew Winston, *Is the Business Roundtable Statement Just Empty Rhetoric?*, HARV. BUS. REV. (Aug. 30, 2019), https://hbr.org/2019/08/is-the-business-roundtable-statement-just-empty-rhetoric [https://perma.cc/W2WK-FE3A].

127. *Five Years On: Corporate Purpose and Profit*, BUS. ROUNDTABLE (Aug. 16, 2024), https://www.businessroundtable.org/five-years-on-corporate-purpose-and-profit [https://perma.cc/DL73-2V39].

128. For an overview and analysis of the anti-ESG actions of state and federal officials, see generally Williams, *supra* note 14.

129. *See* sources cited *supra* note 10.

attending to stakeholders' interests, including the environment. Although CCLI and this analysis have emphasized the financial materiality of climate change and nature risk using standard definitions of materiality, some may still consider such consideration problematic because the financial risk comes from environmental hazards.[130] Here it is useful to connect the discussion in this analysis with the corporate purpose debate. Professor Edward Rock has identified the contemporary corporate purpose debate as being about four separate questions, the first of which is the proper objective of the for-profit business corporation, which he defined as "whose interests does the law expect directors to take as primary, if any, and what limitations does this impose on directorial decision making?"[131] Rock provides a clear and compelling argument for what he calls the traditional view of shareholder primacy, which is "to promote the value of the corporation for the benefit of its stockholders."[132] This view of shareholder primacy was carried forward into section 2.01 of the Restatement of the Law of Corporate Governance, Tentative Draft No. 1 (April 2022), in which the objective of the corporation, which will clearly shape the board's fiduciary duties, is stated to be "to enhance the economic value of the corporation, within the boundaries of the law . . . for the benefit of the corporation's shareholders."[133] Yet, section 2.01 as adopted by the ALI membership made clear the power of the corporation's directors and officers to consider other stakeholders, even in a shareholder-primacy jurisdiction. The black-letter text of the Restatement states that in advancing its economic value for the benefit of the corporation's shareholders, "a corporation may consider: (a) the interests of the corporation's employees; (b) the desirability of fostering the corporation's business relationships with suppliers, customers, and others; (c) the impact of the corporation's operations

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130. *See supra* Sections I.A–.B.

131. *See* Edward B. Rock, *For Whom Is the Corporation Managed in 2020? The Debate Over Corporate Purpose*, 76 BUS. LAW. 363, 369 (2021). Professor Rock is the Reporter for the new ALI Restatement of the Law of Corporate Governance, a project still being concluded. *Restatement of the Law, Corporate Governance*, AM. L. INST., https://www.ali.org/publications/restatement-law/corporate-governance-rs [https://perma.cc/9G34-VLS3]. The three other questions he identified as part of the contemporary corporate purpose debate are: how the corporation should be modeled in academic finance and economics; what the best management strategy is for building successful companies; and what the social obligations inherent in running large public corporations are.

132. Rock, *supra* note 131, at 371 (quoting eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 34 (Del. Ch. 2010)). Section 2.01 of Tentative Draft No. 1 of the Restatement of the Law: Corporate Governance articulated a separate standard for companies incorporated in jurisdictions with other-constituency statutes, but the discussion in this Essay only pertains to the "standard," shareholder-primacy obligations. RESTATEMENT OF CORP. GOVERNANCE § 2.01 (AM. L. INST., Tentative Draft No. 1, 2022).

133. RESTATEMENT OF CORP. GOVERNANCE § 2.01. This draft was submitted to the ALI Membership at the 2022 Annual Meeting in May 2022, and section 2.01 was approved by the Membership at that meeting. AM. L. INST., THE AMERICAN LAW INSTITUTE 2021–2022 ANNUAL REPORT 5, 19 (2022), https://www.ali.org/sites/default/files/2024-12/2021-2022_annual_report.pdf [https://perma.cc/F6WY-HMD5].

on the community and the environment; and (d) ethical considerations related to the responsible conduct of business . . . ."[134] The Reporter's Notes and the illustrations show that "boards of directors have substantial discretion to balance the interests of all stakeholders," including the environment.[135] Thus, it is clear that directors may consider other stakeholders in making decisions, so long as any such decision is made by the board or company officers to promote the corporation's best long-term interests, which would ultimately redound to the shareholders' financial interests as well.[136]

Section 2.01 made clear that its version of shareholder primacy was explicitly limited by an obligation to act "within the boundaries of law," a limit also recognized by the Debevoise analysis discussed above, and by *McRitchie v. Zuckerberg*.[137] I suggest there is another limitation, one advanced by leading lawyer Martin Lipton and the Wachtell Lipton law firm: The corporation's best interests prevail in any conflicts between the corporation and its shareholders. Rock analyzes this "corporation-centric" limitation as "largely consistent" with the traditional view of shareholder primacy that was adopted by the American Law Institute in its work on the Restatement of Corporate Governance.[138] It is best seen in Delaware's takeover jurisprudence. Twenty years ago, Norman Veasey, former Chief Justice of the Delaware Supreme Court, described the Delaware Court's takeover jurisprudence from the late 1980s as follows:

> [I]t is important to keep in mind the precise content of this "best interests" [of the corporate entity] concept—that is, to whom this duty is owed and when. Naturally, one often thinks that directors owe this duty to both the corporation and the stockholders. That formulation is harmless in most instances because of the confluence of interests, in that what is good for the corporate entity is usually derivatively good for the stockholders. There are times, of course,

134. RESTATEMENT OF CORP. GOVERNANCE § 2.01(a)(1).

135. *Id.* § 2.01 cmt. b; *id.* cmt. h, illus. 26–28 (discussing consideration of the environment).

136. *Id.* This consensus on managerial discretion does not solve all of the "corporate purpose" questions, including questions about distributional issues between employees, managers, and shareholders. Rock, *supra* note 131, at 369.

137. RESTATEMENT OF CORP. GOVERNANCE § 2.01 cmt. f (discussing the corporation's obligation to act within the law); DEBEVOISE, *supra* note 106, at 4 (stating that "the law imposes at least one limitation on the corporation's pursuit of value maximization: directors have an obligation to manage or direct the management of the corporation such that its business is *lawful*, whether or not that maximizes firm value for the benefit of stockholders."); McRitchie v. Zuckerberg, 315 A.3d 518, 572–73 (Del. Ch. 2020). For further discussion of *McRitchie*, see *infra* notes 146–63 and accompanying text.

138. Rock, *supra* note 131, at 377–79 (discussing Mr. Lipton's "corporation-centric" view of the "corporate purpose" as "largely consistent" with the traditional view of shareholder primacy ultimately incorporated into the Restatement of Corporate Governance, given that shareholder primacy does not demand short-term wealth maximizing, the protections of the business judgment rule, and the board's discretion as regards how to best position the corporation for long-term success for the ultimate benefit of the shareholders).

> when the focus is directly on the interests of stockholders. But, in general, the directors owe fiduciary duties [directly] to the *corporation*, not to the stockholders.[139]

It is because directors' fiduciary obligations are to the company, directly, and to the shareholders derivatively, that litigation to challenge directors' actions for breach of fiduciary duty must be brought by the company or, under limited circumstances, *derivatively* by the shareholders.[140] It is also because directors' fiduciary obligations are to "the company and its shareholders" that if the interests of the company and its shareholders diverge, the interests of the company predominate as a matter of fiduciary law.[141] The clearest indication of this principle is found in takeover defense cases such as *Paramount Communications v. Time*, in which the Delaware Supreme Court upheld the directors' power to advance its strategic vision for the future of the company by taking defensive measures against a well-above-market tender offer, notwithstanding frustrating shareholders' short-term financial interests.[142] It is thus the corporation's interests that must be given primacy as a matter of fiduciary law, as this Author has argued in support of Martin Lipton's "corporation primacy."[143]

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139. E. Norman Veasey & Christine T. Di Guglielmo, *What Happened in Delaware Corporate Law and Governance from 1992–2004? A Retrospective on Some Key Developments*, 153 U. PA. L. REV. 1399, 1431 (2005) (citing Paramount Commc'ns, Inc. v. QVC Network, Inc., 637 A.2d 34 (Del. 1994) and Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 1985)).

140. It could be argued that this simply reflects the authority structure within the company, since it is the directors and not the shareholders who have the statutory power to manage or direct the management of the corporation, including making decisions about important litigation. As a matter of statutory law, that argument correctly states the authority structure within the corporation. *See* DEL. CODE ANN. tit. 8, § 141(a) (West 2020). Shareholders are permitted to bring some claims directly, where they allege that disclosure to them has been misleading because accurate disclosure is a duty directly owed to the shareholders. *See generally* Tooley v. Donaldson, Lufkin, & Jenrette, Inc., 845 A.2d 1031 (Del. 2004) (discussing the distinction between direct and derivative litigation). For alleged breaches of the fiduciary duties of care or loyalty, shareholders have no direct rights to sue since those duties are directly owed to the corporation.

141. I've written about this topic and supported this argument in much more detail in Cynthia A. Williams, *For Whom Is the Corporation Managed and What Is Its Purpose? A Stakeholder Perspective Based on the Law of Delaware*, *in* RESEARCH HANDBOOK ON CORPORATE PURPOSE AND PERSONHOOD 165, 165–84 (Elizabeth Pollman & Robert Thompson eds., 2021) (discussing and arguing for "corporate primacy" based on Delaware Supreme Court precedents and the writings of Martin Lipton and Wachtell, Lipton creating and interpreting those precedents).

142. Paramount Commc'ns., Inc. v. Time Inc., 571 A.2d 1140, 1154 (Del. 1989). This result can also be argued to reflect the authority structure of the corporation. The important point is that the directors would not have the authority to treat the company's interests as primary if they actually had fiduciary obligations to maximize shareholders' wealth, or if the shareholders' interests are meant to prevail over those of the corporation when a conflict arises.

143. *See generally* Williams, *supra* note 141 (discussing and arguing for "corporate primacy" based on Delaware Supreme Court precedents and the writings of Martin Lipton and Wachtell, Lipton interpreting those precedents); Martin Lipton, *The New Paradigm: A Roadmap for an Implicit Corporate Governance Partnership Between Corporations and Investors to Achieve Sustainable Long-Term Investment and Growth*, 2016 WORLD ECON. F. 1, https://www.wlrk.com/webdocs/wlrknew/Attor

How this doctrine translates pragmatically into evaluating the legality of decisions that boards make is shaped by the business judgment rule. That doctrine allows directors to make decisions that are in the longer-term social or environmental interests of the corporation, such as investing in technologies to reduce greenhouse gas emissions, or paying entry-level employees well above minimum wages, even if some shareholders would rather that the company buy back shares or increase dividends.[144] There would be legal difficulties only if a board makes a social or environmental decision that has no conceivable long-term benefit to the company and its shareholders, and for which no long-term benefit has been or can be articulated. It is also well recognized that when the shareholders of a company are being cashed out in a takeover, or a public company is being sold to a controlled entity so a control premium is at issue, then the directors do have fiduciary obligations to get the best price possible for the company for the immediate benefit of its shareholders. These last-period problems gave rise to the holdings in *Revlon* and *Paramount v. QVC*, to which C.J. Veasey referred above when discussing the only circumstances in which "the focus is directly on the interests of stockholders."[145] Outside of those more limited circumstances, the law permits and protects board (and management) decisions that attend to stakeholders or the environment when the board (or management) determines such a decision is best for the corporation and its long-term value. This understanding of fiduciary law well supports recognition of boards' fiduciary obligations for corporate governance of climate change and nature risks (and opportunities) more specifically.

1. McRitchie v. Zuckerberg

It could be thought that the 2024 Delaware Chancery Court opinion in *McRitchie v. Zuckerberg* also undermines the argument being made in this Essay, which asserts that directors' fiduciary duties require consideration of climate change and nature loss as part of directors' obligations concerning firm strategy, oversight of mission-critical risks, and disclosure.[146] James

neyPubs/WLRK.25960.16.pdf (setting out a "corporation-centric" view of directors' fiduciary duties and the importance of long-term investors in promoting the best interests of the corporation).

144. *See* Stout, *supra* note 116, at 2, 24–46. Other scholars have made this argument about the power of the business judgment rule as well. *See, e.g.*, Lynne L. Dallas, *The New Managerialism and Diversity on Corporate Boards of Directors*, 76 TUL. L. REV. 1363, 1364–66 (2002) (outlining the discretion given to managers under the business judgment rule and the ways in which that discretion is used); Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733, 770–72 (2005) (discussing how courts have used the rule to allow managers to sacrifice profit maximization for the public interest). More recent work by David Millon rejecting "radical shareholder primacy" is particularly good on this point. *See* David Millon, *Radical Shareholder Primacy*, 10 U. ST. THOMAS L.J. 1013, 1013–15 (2014).

145. *See* Veasey & Di Guglielmo, *supra* note 139, at 1431.

146. *See generally* McRitchie v. Zuckerberg, 315 A.3d 518 (Del. Ch. 2024). *McRitchie* is a fascinating case that deserves more discussion than is directly relevant here. For more, see

McRitchie, a corporate governance expert in Delaware,[147] brought this strategic litigation against Mark Zuckerberg and Meta, the former Facebook, by challenging the company to "operate on the assumption that a corporation's stockholders are diversified."[148] Under modern portfolio theory, diversified shareholders' investment returns are based on the health of economies and markets as a whole, and not the returns of any one company.[149] The plaintiff introduced evidence of some of Meta's decisions, such as changes in its algorithms to emphasize "re-shares," that increased user engagement, on which advertising income depends and so were useful firm-specific decisions. Yet, plaintiff argued, these changes were harmful to society, citing internal memos stating that this change made Facebook "an angrier place" and which noted that "[m]isinformation, toxicity, and violent content are inordinately prevalent among reshares."[150]

McRitchie argued that the directors of Meta owe their duties to Meta's diversified investors, so "they must consider the effect of their decisions on the economy as a whole. Because externality-creating activities harm the economy as a whole, directors . . . have a fiduciary obligation not to pursue them."[151] Thus McRitchie challenged the "single-firm" model of fiduciary duties at Meta because of the harm to society and its diversified investors from single-firm decisions that produce negative externalities.[152]

Defendants Mark Zuckerberg—Meta's controlling shareholder—its board and Meta itself successfully moved to dismiss the diversified-investors construction of fiduciary duties in favor of the single-firm model.[153] Vice Chancellor Laster could have dispensed with the claim in summary fashion but did not. Rather, he delivered a professorial summary of fiduciary duty case law across history in Delaware, showing its single-firm focus, and then deeply engaged with plaintiff's arguments as a matter of theory.[154] Ultimately, the court concluded that "[d]irectors owe fiduciary duties to the corporation and its stockholders, meaning the class of stockholders who, in the aggregate, hold

generally Ernest Lim, *Corporate Law and Governance*, *in* THE OXFORD HANDBOOK OF CLIMATE CHANGE AND PRIVATE LAW (Douglas Kysar and Ernest Lim eds., forthcoming 2026).

147. *See About*, CORPGOV.NET (2025), https://www.corpgov.net/about [https://perma.cc/6FS8-B4HN] (stating that Mr. McRitchie has been publishing CorpGov.net since 1995).

148. *McRitchie*, 315 A.3d at 527.

149. *See id.* at 530.

150. *Id.* at 531.

151. *Id.* at 528.

152. McRitchie also argued that because Mark Zuckerberg, as the controlling shareholder, and all of the directors particularly benefited from the positive economics of this single-firm model in which they had concentrated holdings, the case should be evaluated under the entire fairness analysis of any conflict-of-interest transaction. *Id.* at 578–79. The Chancery Court rejected that argument rather readily after an extensive and thoughtful analysis of McRitchie's challenge to the single-firm model of board fiduciary duties. *Id.*

153. *Id.* at 579.

154. *See id.* at 526–79.

the residual claim to the value represented by the specific corporation that issued their shares, where the shares represent investments of presumptively permanent capital in a presumptively perpetual firm."[155]

Does this single-firm focus and its emphasis on shareholders in the firm undermine the arguments made in this Essay? No, not at all. The argument made here is premised on the effects on any individual company of climate change and nature loss—a single firm focus—and is not premised on the effects of directors' decisions on the climate or nature loss which may harm diversified investors. In fact, Vice Chancellor Laster emphasized that directors *may* consider the effects of their actions on stakeholders or society as a function of promoting the value of the corporation, but that the corporate law in Delaware does not *require* that consideration unless other statutes or regulations do, which legal standards Delaware directors and companies are then obligated to meet.[156]

Further, he stated that "Delaware decisions have long instructed directors to prioritize the long-term value of the corporation."[157] One implication of this long-term orientation that the Vice Chancellor discussed is the directors' power to consider the effects of their decisions beyond the immediate effects on shareholders. It is worth quoting this point from *McRitchie* at length:

> Directors must seek to maximize the value of the firm for the ultimate benefit of its stockholders. That can involve considering a broad spectrum of issues, including how a decision affects stakeholders, the economy, and society. Directors who cause their corporation to become a pariah because its actions consistently or profoundly harm the broader economy will not be able to create durable long-term value for firm-specific stockholders. Directors can and should consider those issues when making decisions about what will promote the value of the firm over the long-term.[158]

This statement in *McRitchie* is a succinct rejoinder to one of the arguments that Steve Bainbridge makes against extending *Caremark* to ESG matters: that such an extension would require directors to engage in difficult decisions requiring the balancing of stakeholder interests that directors are ill-equipped to make.[159] What Vice Chancellor Laster recognized is that often

155. *Id.* at 562.

156. *See id.* at 571–73. Vice Chancellor Laster included a thoughtful discussion of companies' obligations to the rule of law, rejecting the view that there could be permissible efficient breach of law. I am honored to have had my early work on this topic cited in that discussion. *Id.* at 572 n.199 (citing Cynthia A. Williams, *Corporate Compliance with the Law in the Era of Efficiency*, 76 N.C. L. REV. 1265, 1285–1300 (1998) (summarizing and criticizing the view of "law as price" and any right of "efficient breach of law")).

157. *McRitchie*, 315 A.3d at 562.

158. *Id.* at 565.

159. *See* Bainbridge, *supra* note 5, at 666–68. Prof. Bainbridge's arguments derive from his long-standing and thoughtful views on "director primacy" with a shareholder wealth-maximizing

in order to promote the long term success of companies, "[d]irectors can and should consider" broader stakeholder interests, including those of society.[160] Claire Hill explores this issue in an important new piece, *The Rhetoric and Reality of Shareholder Profit Maximization*, in which she argues that shareholder profit maximization does not really have the advantages idealized in theory, that of unidirectional accountability to shareholders and its presumably clear mandate, since real-world boards often cannot avoid considering stakeholder interests.[161] As she puts the point, "how much profit a firm makes is affected by present or anticipated lawsuits, regulatory scrutiny, regulatory disfavor, shareholder pressure, effects on reputation, and possible changes in law or regulation, *including as these reflect or relate to other stakeholders' interests*."[162]

What is different between my argument and that of Vice Chancellor Laster is that I have argued that directors and officers *must* consider climate change and nature loss, in the context of their financial materiality, and he has argued that directors and officers *may* consider those issues.[163] I do not go so far as to argue that directors must cause changes in their companies' strategies, oversight of mission-critical risks, or disclosure as a result of their consideration—much as I wish Delaware law required such changes. But as with cybersecurity, AI disruption, or trade wars, or any other newly emerging potential financial risks to the company, climate change and nature loss need to be on the board agenda and be given thoughtful, good faith evaluation and objective consideration.

CONCLUSION

Climate change and nature loss create financially material risks for corporations that must be carefully considered by officers and directors. Climate change poses physical, economic transitional, regulatory, and litigation risks. Biodiversity collapse and nature loss are risks to half of global GDP, with the most acute risk posed to the construction, agriculture, and food and beverages industries. Both climate change and nature loss can create entity-specific risks, depending on the industry, location of physical assets and investments, and breadth of supply chains.

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goal. *See generally* Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547 (2003) (discussing how "director primacy" influences director decision-making). To be sure, there is much emphasis in *McRitchie* and other Delaware opinions on the importance of shareholders' interests, but, as I sketched out above and have argued more extensively elsewhere, when the shareholders' interests conflict with those of the corporation, as determined by the board in good faith and on reasonable investigation, the interests of the corporation prevail. *See generally* Williams, *supra* note 141.

160. *McRitchie*, 315 A.3d at 565.

161. Claire Hill, *The Rhetoric and Reality of Shareholder Profit Maximization*, 99 CHI.-KENT L. REV. 39, 42 (2024).

162. *Id.*

163. *See McRitchie*, 315 A.3d at 565.

Given the potential financial materiality of these risks, directors and officers have fiduciary obligations to consider them carefully in developing their company's strategy, in providing oversight of legal compliance, and in producing accurate disclosure. Climate-related and nature-related risk applicable to their specific industry, geography, and supply chains will produce different outcomes for different companies, of course. Risk of breach is particularly acute for entity-specific compliance risks, such as those arising from climate-related breaches of disclosure laws.

Attending to the financial risks of climate change and nature loss does not imply changes in the corporate purpose. Rather, such attention is inherent in the directors' and officers' obligations to promote the best interests of the corporation for the benefit, ultimately, of its long-term shareholders. Where a company's strategy to advance its long-term success has been developed in good faith and on reasonable investigation of the potential risks of climate change and nature loss, its directors face little prospect of liability for adopting such a strategy, even if it is in conflict with some shareholders' interests in short-term profit maximization.