

Press release

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New legal analysis cautions Delaware company directors to take climate change seriously or risk personal liability

20 October 2021, London – Directors of Delaware companies could face civil liability for failing to consider climate change, warns a new legal analysis from the Commonwealth Climate and Law Initiative. The executive summary of the legal analysis can be read [here](#), and the full paper is available [here](#).

The new legal analysis finds that, with the clear evolution of climate change to a financial risk issue, directors or officers of a corporation could be exposed to liability for breaches of their fiduciary duties for failures to adequately govern for climate-related risks – in the same way as they could for a failure to adequately govern other material risks to their corporation.

This new legal analysis has been prepared by the Commonwealth Climate and Law Initiative (CCLI) by lead authors Sarah Barker (Head of Climate Risk Governance at MinterEllison), Cynthia Williams, (Senior Scholar and former inaugural Osler Chair in Business Law, Osgoode Hall Law School, and *emerita*, the University of Illinois College of Law), and Alex Cooper (CCLI, Lawyer), with the assistance of Ellie Mulholland (CCLI, Director). The CCLI acknowledges the assistance of Douglas Ruley and Tyler Highful (ClientEarth). The analysis was subject to peer review by legal academics and partners at leading law firms in New York, Chicago and San Francisco.

“Climate change is an incredibly dynamic issue, and regulatory, investor and market expectations of boards continue to elevate. Directors would be ill-advised to assume that ‘governance as usual’ – whether on strategy, risk oversight or disclosure - will continue to satisfy their duties.” said Ms. Sarah Barker, Head of Climate Risk Governance at MinterEllison and one of the lead authors of this analysis.

Mr. Leo Strine, Of Counsel at Wachtell, Lipton, Rosen & Katz, and former Chief Justice of the Delaware Supreme Court, said “Concerns about climate change and other systemic issues such as profound inequality have increased societal and investor focus on Employee, Environmental, Social and Governance (EESG) challenges. This focus on doing business the right way may increase the chance of a board being subject to oversight, so called *Caremark*, claims when companies don’t meet their legal obligations in those areas. The law rubs up against companies when companies rub up against stakeholders and society, and EESG properly conceived is about the same subject: how a company can thrive while respecting the stakeholders and communities its operations affect. Because *Caremark* focuses on the duty of directors to make a good faith effort to ensure their company complies with its legal obligations, directors establishing governance arrangements that treat the corporation’s environmental impact, its employees, and its other stakeholders in an ethical and well-considered manner will minimize the risk of breaking the law. EESG values bring life to compliance programs by explaining the why, and the legal bottom line is important so risks are not missed and for those few who always need a stick to do things the right way. Boards can effectively manage these intrinsically intertwined systemic risks by integrating existing compliance functions and EESG considerations.”

Mr. Doug Ruley, ClientEarth Americas Director said: “This report documents the multiple risks that climate change poses for almost all companies, and the legal liabilities of boards and officers who fail to monitor, disclose and manage these risks. Without monitoring and managing climate risk appropriately, companies could suffer financial losses and stranded assets and be left behind as the financial system adapts. Investors and shareholders are aware of this, and are increasingly expecting businesses to be held accountable.”

Mr. Robert Eccles said “Climate change and fiduciary duty have both been subject to ideological attacks that defy both science and the law. While ideologues rarely change their mind, for those who want clarity about the board’s fiduciary duty when it comes to climate change this superb study offers the definitive word.”



"Failure by directors or officers to have adequate regard to climate change-related issues could fail to satisfy the standard of conduct required to fulfil their duties and lead to potential litigation and liability exposures." said Professor Cynthia Williams, Senior Scholar and former inaugural Osler Chair in Business Law at the Osgoode Hall Law School at York University, and *emerita*, the University of Illinois College of Law.

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About the individuals quoted

Ms. Sarah Barker leads MinterEllison's international climate risk governance and sustainability team. She helps corporations, institutional investors and government agencies manage dynamic environmental, social and governance risks through a commercial lens. She has a particular expertise in the climate change related exposures under corporate and securities (rather than 'environmental') laws - including directors' fiduciary duties and financial reporting/disclosure obligations. She is Australia's representative of the Commonwealth Climate and Law Initiative. She sits as an academic visitor at Oxford University's Smith School and teaches sustainability in corporate governance for Cambridge University's Institute for Sustainability Leadership. She also sits on the board of one of Australia's largest pension funds.

Mr. Leo Strine is Of Counsel at Wachtell, Lipton, Rosen & Katz. Prior to this, Mr. Strine was the Chief Justice of the Delaware Supreme Court from early 2014 through late 2019. Before becoming the Chief Justice, he served on the Delaware Court of Chancery as Chancellor since June 22, 2011, and as a Vice Chancellor since November 9, 1998. In his judicial positions, Mr. Strine wrote hundreds of opinions in the areas of corporate law, contract law, trusts and estates, criminal law, administrative law, and constitutional law. Notably, he authored the lead decision in the Delaware Supreme Court case holding that Delaware's death penalty statute was unconstitutional because it did not require the key findings necessary to impose a death sentence to be made by a unanimous jury.

Mr. Doug Ruley is ClientEarth's Americas Director, leading the development of strategies and cases for using corporate, financial, and securities law to push North American corporations and financial flows toward Paris compliance. He has returned to the US after serving as the organisation's general counsel. ClientEarth's Americas work focuses on ensuring that companies and regulators take action on climate-related risks. Doug has been an environmental lawyer for more than 30 years, including serving as a staff attorney with Earthjustice in Alaska, as managing attorney for the Asheville office of the Southern Environmental Law Center, and as Director of the Environment and Natural Resources Law Clinic at Vermont Law School.

Mr. Robert G Eccles is the world's foremost expert on integrated reporting and a leader on how companies and investors can create sustainable strategies. He was previously a tenured Professor and Professor of Management Practice at Harvard Business School. He is the Founding Chairman of the Sustainability Accounting Standards Board (SASB) and one of the founders of the International Integrated Reporting Council (IIRC). He has recently joined the board of Mistra Centre for Sustainable Markets (MISUM) in Sweden. He is also on the Advisory Board of the JANA Impact Capital Fund.

Professor Cynthia Williams is a Senior Scholar and was the inaugural Osler Chair in Business Law, Osgoode Hall Law School, and *emerita*, the University of Illinois College of Law. She currently holds a part-time position as Professor of U.S. Corporate and Securities Law at the Vrije Universiteit (VU), Amsterdam. Before joining Osgoode, she was a member of the faculty at the University of Illinois College of Law, where she is an *emerita* Professor of Law, and, prior to that, she practiced law at Cravath, Swaine & Moore in New York City in securities, mergers and acquisitions, and civil rights. Professor Williams also engages in policy work through her board membership in the Climate Bonds Initiative, a London-based NGO creating a new asset class, Climate Bonds, to finance the transition to a low-carbon economy; the Commonwealth Climate and Law Initiative, part of the Oxford Sustainable Finance Programme, which is evaluating directors' and trustees' legal obligations to consider climate change risk in companies' strategies and securities disclosure; and was the principal author of a petition submitted to the U.S. Securities and Exchange Commission in October, 2018, asking the SEC to engage in rule-making



to require greater sustainability (environmental, social, and governance) and corporate disclosures, a process in which the Commission is now engaged.

About the CCLI

The CCLI is a legal research and stakeholder engagement initiative founded by Oxford University Smith School of Enterprise and the Environment, ClientEarth and Accounting for Sustainability (A4S). The CCLI examines the legal basis for directors and trustees to manage and report on climate change-related risk and climate mitigation and our research is at the forefront of the intersection of climate and biodiversity risks under existing companies and securities laws. It provides practical tools on how to integrate the risks and opportunities of climate change into corporate governance, to minimise the risk of personal liability and maximise efforts of the private sector in the transition to a sustainable economy. The CCLI convenes conferences and stakeholder events to disseminate these messages and build capacity across the corporate, regulator and civil society ecosystem. The CCLI does not litigate, but aims to demonstrate that prevailing company laws and fiduciary duties compel action on climate change.

Founded to focus on four Commonwealth countries: Australia, Canada, South Africa, and the United Kingdom, the CCLI has expanded its remit to the United States, Singapore, India, Hong Kong, Japan and Malaysia. The CCLI leverages the inter-disciplinary and cross-jurisdictional perspectives provided by its global experts from academia and the legal, accountancy, business, and scientific communities.

For more information, visit: www.commonwealthclimatelaw.org

About ClientEarth

ClientEarth is a non-profit organisation that uses the law to create systemic change that protects the Earth for – and with – its inhabitants. We are tackling climate change, protecting nature and stopping pollution, with partners and citizens around the globe. We hold industry and governments to account, and defend everyone's right to a healthy world. From our offices in Europe, Asia and the USA we shape, implement and enforce the law, to build a future for our planet in which people and nature can thrive together.

For more information, visit: <https://www.clientearth.org>

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