



Riders on the Storm. Investors' Fiduciary Duty and Liability in Climate Change Matters

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Some Context

- Every year since 2015, more renewable energy has been added globally than all other sources combined;
- Decrease of installed costs of renewable energy;
- Electric vehicles on track to reach cost-parity with petrol-based vehicles;
- In 2016, global employment in renewable energy reached 9.8 million people, over 1 million more than in fossil fuel extraction.





Company and Project Exposure (Capex) Beyond Carbon Budget

Santos	Australia	20% - 30%
Statoil	Norway	20% - 30%
Rice Energy	United States	20% - 30%
RSP Permian	United States	10% - 20%
Marathon Oil	United States	10% - 20%
OMV	Austria	10% - 20%



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**LANCET COUNTDOWN:
TRACKING PROGRESS
ON HEALTH AND
CLIMATE CHANGE**



We Need to Avoid Further Impacts on Health due to Investment

5 Indicators on Health and Climate Change:

- Climate change impacts, exposures, and vulnerabilities;
- Adaptation planning and resilience for health;
- Mitigation actions and health co-benefits;
- **Economics and finance;** and
- Public and political engagement.



Today's Discussion in a Nutshell

1. Fiduciary Duty

- a. Management – Shareholders
- b. Management – Community?

2. A Case Against the *Oljefond*?

3. Conclusive Remarks



1. What is the Fiduciary Duty?



1. The Fiduciary Duty

- A fiduciary duty is the legal responsibility to act solely in the best interest of another party.
- “Fiduciary” means trust, and a person with a fiduciary duty has a legal obligation to maintain that trust.
- Duty of care, loyalty, good faith. Duty of due diligence.
- E.g. Officers and directors toward shareholders.





1.a Management - Shareholders

- Derivative actions: shareholder commences action on behalf of the corporate entity upon the losses that the company suffered.
- Direct actions: shareholder initiates litigation in order to recover the losses that she suffered, also under the form of class actions.
- 2014 Open letter to Board of Directors (Shell).
- 2017 'Follow This' Shareholders Resolution (Shell).





1.b Management – Community?

- Multifiduciary duty?
- Boatright (1994) and US courts: yes, when fiduciary duty fulfilled (profit-making functions of the corporation are not at stake).
- When imposed by law.





1.b Management – Community?

- **Investigation** by Attorney Generals (*New York Attorney General Investigation of ExxonMobil, Martin Act and consumer laws*)
- **Actions** by Attorney Generals





1.b Management – Community?

- July 2017: San Mateo County, Marin County, and the City of Imperial Beach

29 companies (including Statoil)

Breach of duty of due diligence (design; test; inspect; distribute)
+ failure to warn → negligence.





1.b Management – Community?

- September 2017: City of San Francisco and City of Oakland
- * BP, Chevron, ConocoPhillips, Exxon, and Shell
Negligence is implied.





1.b Management – Community?

- December 2017: City and County of Santa Cruz
29 companies (including Statoil)

Breach of duty of due diligence (design; test; inspect; distribute) + failure to warn → negligence.





1.b Management – Community?

- January 2018: City of New York
 - Less than in the others;
 - * BP, Chevron, ConocoPhillips, Exxon, and Shell
Negligence is implied.





1.b Management – Community?

- April 2018: Milieudefensie v Shell, Netherlands (not a court case yet)

Aware of the solution, supporting the Paris Agreement, betting against it → social responsibility and **duty of care**.

- Legal responsibility for amending corporate strategy;
 - Phase out oil and gas by 2050;
 - Plan with Milieudefensie to elaborate, implement, embed and report *interim* emissions targets.
- Response requested within 8 weeks!





2. A Case Against the *Oljefond*?



2. A Case Against the *Oljefond*?

- Managed by NorgesBank
- Mandate from the Ministry of Finance
- Global Climate Index 2017 Rating The World's Investors On Climate Related Financial Risk:
 - Government Pension Fund Global (GPIG): maintains 44
 - Government Pension Fund Norway (GPFN): from 46 to 132
 - Kommunal Landspensjonskasse Gjensidige Forsikringselskap (KLP): from 12 to 7





2. A Lawsuit Simulation at NHH

- Natur og Ungdom + the Republic of Palau
- Against the Government Pension Fund Global ('Oljefondet')
- A the District Court of Bergen
 - Divestment (N og U)
 - Divestment and Damages (Palau)





2. A Lawsuit Simulation at NHH

- **Natur og Ungdom:**
 - Ethical Guidelines of the Fund + recent recommendation;
 - Mandate: Section 1.3 → A good long-term return is considered dependent on sustainable development in economic, environmental and social terms, as well as well-functioning, legitimate and efficient markets. Sections 4.10 + 6.2 (environmental risk and reporting requirement).
 - Article 9(3) Paris Agreement: “As part of a global effort, developed country Parties should continue to take the lead in mobilizing climate finance from a wide variety of sources, instruments and channels, noting the significant role of public funds, through a variety of actions, including supporting country-driven strategies, and taking into account the needs and priorities of developing country Parties. Such mobilization of climate finance should represent a progression beyond previous efforts.”





2. A Lawsuit Simulation at NHH

- Intergenerational equity.
- Paragraph 112 Constitution: (1) *Every person* has the right to an environment that is conducive to health and to a natural environment whose productivity and diversity are maintained + (3) The authorities of the state shall take measures for the implementation of these principles.
- Diversification since the economy is already based on oil and gas.
- Norwegian corporate law: due diligence. The duty is **proportional**.
- Active ownership is not enough: Shell as the single largest investment → bad ranking.
- Guidelines → giving yourself a golden star.





2. A Lawsuit Simulation at NHH

- The Republic of Palau: funding for adaptation
- Oljefond:
 - We also look at downstream emissions – more efficiency.
 - Focus areas: Environmental and social issues; Children's rights; Climate change and Water management;
 - Climate Change: 2009 expectation document by NB;
 - No blanket ban;
 - Active owner.





2. A Lawsuit Simulation at NHH

- Judge: Endre Nåmdal (PhD) (former Judge, former Assistant Professor at UiB, Lawyer)
 - Duty of care not fleshed out enough;
 - Claims dismissed.
- Alternative judgment?

Recommendations of the Council on Ethics + companies excluded (since 2004)/under observation. Active ownership.

Warsaw Mechanism.





3. Conclusive Remarks



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- Role of Norway: adverse effects of the implementation of measures to respond to climate change.

Article 4(10) UNFCCC: “This applies notably to Parties with economies that are highly dependent on income generated from the production, processing and export, and/or consumption of fossil fuels and associated energy-intensive products and/or the use of fossil fuels for which such Parties have serious difficulties in switching to alternatives.”





3. Conclusive Remarks

- Climate Litigation → Need for Companies and the *Oljefond* to prevent Liability Risk
- If litigation → Need for Cooperation
- Preventing Liability → Financial Stability Board of the G20: international Task Force on Climate-related Financial Disclosure, headed by Michael Bloomberg; UNEP Energy Transition Risk, supported by the Bank of England and by China's State Council and Central Bank





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