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Corporate Boards Should Gear Up for More Climate Litigation

Insight Sourcing Group's Brandon Owens says companies should heed recent climate litigation against multinationals and anticipate calls for greater clarity about ESG strategy and climate impact.

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In light of ClientEarth's most recent lawsuit against Shell, it's time to talk about the surge in climate change-related disputes and claims, and the high stakes they create for corporate board members.

These lawsuits aim to compel corporations to act, recover investments, and influence future strategy. Climate litigation has proven an effective tool to expedite the shift to renewable energy on a global scale.

As climate change effects loom over the political and economic landscape, valid potential legal claims have been employed to urge entities to reform, rescind, or explain their policies on sustainability.

RECENT OUTCOMES

Although climate litigation has effectively compelled companies to adopt more sustainable practices, not all cases have been successful. Just over half of cases filed in 2022 resulted in outcomes that were at least favorable to climate action.

Yet even in cases where companies avoid being held accountable for climate change harms, they may still face other consequences, such as liability for future climate-related damages, reputational harm, and public scrutiny for non-disclosure about climate change risks.

However, in some cases, the mere threat of legal action has motivated companies to change their behavior. In 2019, BP withdrew an ad campaign after ClientEarth lodged a complaint with the UK's National Contact Point. Although the case was not brought to court, the threat of legal action was enough to force BP to reconsider its approach.

Climate litigation cases that succeed could set a precedent for future environmental lawsuits against other high-emitting conglomerates that have yet to take sufficient steps to reduce their carbon footprint.

The 2021 landmark human rights and tort law case Milieudefensie v. Royal Dutch Shell is one example. Shell was ordered to reduce its global carbon emissions by 45% from 2019 levels by 2030—a groundbreaking judgment and first significant precedent in climate change litigation against a corporation.

Despite the ruling, Shell moved to appeal the decision, leaving the future of the case uncertain. Following the judgment, the company expeditiously shed "Royal Dutch" from its name and relocated its headquarters to London.

OUTLOOK FOR CLIENTEARTH

On February 9, ClientEarth, an environmental law charity and Shell shareholder since 2016, announced it would bring a derivative action against Shell's board of directors in England's High Court to address potential climate change risks facing the company.

Shell's pre-action letter from ClientEarth claims that the company's board has failed to manage climate risks effectively, resulting in the directors violating their obligations under the UK's Companies Act.

The charity alleges that Shell's directors have failed to manage climate risk properly and implement a strategy that aligns with the Paris Agreement goal of limiting global temperature rise to 1.5°C.

If ClientEarth is granted permission to proceed with the derivative claim and achieves a victory in court, the implications for Shell's board could be far-reaching. With an order to align its strategy with the Paris Agreement's goals, Shell could be forced to make significant changes to its business practices.

However, the permission stage is likely to present a considerable challenge. Shell's board may argue that it would not be in the company's best interest to pursue the claim, or that it has already authorized or ratified its climate strategy.

The case's outcome could set a new standard for climate-related litigation and warn corporations worldwide to take the issue of climate change seriously. The novel aspect of this case is that corporate executives and directors can now face lawsuits for breaching their fiduciary duties and responsibilities to disclose and address climate change risks.

If ClientEarth's lawsuit succeeds, it could set a precedent for others to file similar claims against companies that are being pushed to reform their climate change strategies.

FUTURE IMPLICATIONS

We are entering a time where climate litigation is no longer solely a means to pressure companies to act on climate change. It is also being used to hold board members accountable. This indicates a move towards greater responsibility for the effects of corporate operations on the environment.

The imperative to address the danger of climate change is producing increased consciousness of corporate and board member responsibility in shaping a sustainable future.

Corporate board members increasingly face a difficult choice as this new breed of climate change litigation gains momentum—to work with their leadership teams to pursue economically and environmentally sustainable strategies, or face personal liability.

The repercussions of their decision will extend beyond the future of their companies, impacting both the planet and the broader business world. It remains to be seen which path corporate board members will take, but the stakes are certainly high.