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Climate Change and Insurance

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Outline of Topics

- Sources of Potential Liability Alleged in Climate Change Cases and Related Issues
  - Clean Air Act
  - National Environmental Policy Act
  - Public Nuisance
  - Pre-emption and State Law Claims
- Coverage Under CGL Policies
  - Occurrence
  - Trigger
  - Expected or Intended Exclusion
  - "Known Loss" Doctrine and Known Injury or Damage Exclusion
  - The Pollution Exclusion
  - Personal Injury Coverage
  - Allocation and Stacking

NOTE: Because of the many variations in policy language, this presentation does not address all of the issues. It also does not replace, and should not be relied on instead of, legal advice based on the specific policy language involved and an insured's particular situation. However, it does provide a starting point and is intended to be an aid in considering what sometimes is a maze of factual and legal issues regarding insurance.

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Sources of Potential Liability Alleged in Climate Change Cases and Related Issues

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Clean Air Act (CAA)

- Sets emission standards for certain industries (including most large industrial and commercial facilities).
- Defines "air pollutant" to include "any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive . . . substance or matter which is emitted into or otherwise enters the ambient air." 42 U.S.C. § 7602 (g).
- *Massachusetts v. EPA*, 549 U.S. 497 (2007)
  - Prior to this decision, the EPA did not regulate carbon dioxide emissions. The EPA took the position that carbon dioxide is not an "air pollutant" under the CAA.
  - To date, the EPA has not implemented any regulations over carbon dioxide emissions.
  - The EPA did issue an Advanced Notice of Proposed Rulemaking seeking input. The public comment period has closed.

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National Environmental Policy Act (NEPA)

- Establishes a regulatory scheme requiring governmental agencies to prepare:
  - environmental impact statements; and
  - environmental assessments.
- Does not regulate private activity *per se* but can be an issue for private projects that require federal approval (permitting or federal financing).
  - A private company subject to NEPA might face challenges from activists opposed to the project or competitors.
  - A plaintiff does not have standing to assert a cause of action under NEPA unless the plaintiff is deemed within the "zone of interest" protected by the statute. *See, e.g., ANR Pipeline Co. v. F.E.R.C.,* 205 F.3d 403 (D.C. Cir. 2000).
- *Friends of the Earth, Inc. v. Watson*, No. C02-4106, 2005 WL 2035596 (N.D. Cal. Aug. 23, 2005):
  - Activists and cities have sued the Export-Import Bank and Overseas Private Investment Corp under NEPA, alleging that their assistance to certain ventures results in increased greenhouse gas emissions.

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Public Nuisance Claims

- Public Nuisance: An unreasonable interference with the exercise of a right common to the general public.
  - Unreasonableness is established where:
    - Conduct significantly interferes with public safety, health, peace, comfort, or convenience;
    - Continuing conduct or conduct that has produced a permanent or long-lasting effect; and
    - Defendants know or have reason to know that it has significant effect upon the public right or that the conduct is unlawful.
- Public Nuisance Allegations in the Climate Change Context:
  - *Native Village of Kivalina v. ExxonMobil Corp.*, (N.D. Cal.) (motion to dismiss pending).
  - *California v. General Motors Corp.*, No. C06-05755 MJJ, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007) (dismissed on political question grounds; appeal pending).
  - *Connecticut v. American Electric Power Co.*, 406 F. Supp. 2d 265 (S.D.N.Y. 2005) (dismissed on political question grounds; appeal pending).

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Federal Preemption of State Law

- Federal and state laws attempting to regulate greenhouse gas emissions might conflict with one another and create the potential for federal preemption.
  - Within the past few years, hundreds of bills were introduced before Congress and at least 40 state legislatures. California has been at the forefront of climate change legislation and regulation.
- Private industry has asserted that federal regulations preempt state regulations regarding emissions.
  - *Central Valley Chrysler-Jeep, Inc. v. Witherspoon*, 456 F. Supp. 2d 1160 (E.D. Cal. 2006) (court held that California's motor vehicle regulations were pre-empted by CAA unless granted a waiver).

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Federal Preemption of State Law

- The CAA's provisions applicable to motor vehicle emissions include express preemption language.
  - Section 209(a) of the CAA expressly prohibits states from regulating emissions from any new motor vehicle or new motor vehicle engine.
    - "No State . . . shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles . . . . No State shall require certification, inspection, or any other approval relating to the control of emissions from any new motor vehicle . . . . as condition precedent to the initial retail sale, titling (if any), or registration of such motor vehicle . . . ."
  - Section 209(b) of the CAA provides for a waiver of CAA preemption to states that adopted emissions standards prior to March 30,1966 (i.e., California), if the state determines that its standards are at least as protective as federal standards.
    - "The Administrator shall, after notice and opportunity for public hearing, waive application of this section to any State which has adopted standards . . . for the control of emissions from new motor vehicles . . . prior to March 30, 1966, if the State determines that the State standards will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards. . . ."
  - In December 2007, the EPA denied California's waiver request. On January 21, 2009, California requested reconsideration of that denial.

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Coverage for Climate Change Claims Under CGL Policies

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Demonstrating an Occurrence

- CGL policies typically cover all sums the policyholder is legally obligated to pay as damages because of bodily injury or property damage caused by an occurrence.
- 1973 ISO Form's "occurrence" definition:
  - "an accident, including **continuous or repeated exposure to conditions**, which results in bodily injury or property damage neither expected nor intended from the standpoint of the Insured." (emphasis added)
- 1986 ISO Form's "occurrence" definition is substantially the same, except the "expected or intended" language was moved from the definition into a separate exclusionary clause.
- Continuing releases of carbon dioxide that allegedly resulted in global warming and climate change fall within the "occurrence" definition.

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Trigger of Coverage

- CGL policies typically require that there be property damage or bodily injury during the policy period in order to trigger coverage.
- The global warming lawsuits allege continuous and progressive injury. Trigger theories in climate change coverage cases should be similar to those applied in environmental coverage cases.
- Under either a continuous trigger theory or an injury-in-fact trigger theory, coverage should be available for every policy period during which carbon dioxide buildup and resulting temperature change took place.
  - Continuous Trigger / Triple Trigger (time of first exposure through manifestation and all periods in between):
    - *Keene v. Insurance Co. of North America,* 667 F.2d 1034 (D.C. Cir. 1981) (Asbestos).
    - *Society Ins. Co. v. Town of Franklin*, 607 N.W.2d 342 (Wis. Ct. App. 2000) (Environmental contamination).
  - Injury-in-fact Trigger (triggered by any injury or damage in a policy period):
    - *South Carolina Ins. Co. v. Coody*, 813 F. Supp. 1570 (M.D. Ga. 1993) (Environmental contamination).
- Insurance companies often argue for either a manifestation trigger or exposure trigger:
  - Manifestation Trigger (triggered when injury or damage is discovered or manifests):
    - *Home Indem. Co. v. Hoechst Celanese Corp.*, 494 S.E.2d 774 (N.C. Ct. App. 1998) (Environmental contamination).
  - Exposure Trigger (triggered by exposure even if injury or damage is undetectable):
    - *Mapco Alaska Petrol, Inc. v. Central Nat'l Ins. Co.*, 795 F. Supp. 941 (D. Alaska 1991) (Environmental contamination).

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Expected or Intended Exclusion

- CGL Policies typically purport to exclude coverage for damage that was either expected or intended.
- The insurance company has asserted this defense in *Steadfast Insurance Co. v. The AES Corp.,* Case No. 2008-858 (Cir. Ct. Arlington County, Va. filed July 9, 2008).
- This provision often does not apply to CGL policies' "personal injury" coverage, under which nuisance claims may be covered.

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Expected or Intended Exclusion

- Subjective versus objective standard:
  - CGL policies typically exclude coverage for harm expected or intended "from the standpoint of the insured."
  - Courts have split on whether an objective standard or a subjective standard applies – i.e., whether a "reasonable" policyholder would have expected the harm or whether the policyholder actually expected or intended the harm. Most courts have applied a subjective standard.
    - Stonewall Ins. Co. v. Asbestos Claims Mgmt. Corp., 73 F.3d 1178, 1205 (2d Cir.1995) (rejecting objective standard in favor of the subjective standard under New York law).
    - *City of Carter Lake v. Aetna Cas. & Sur. Co.*, 604 F.2d 1052 (8th Cir. 1979) (employing the objective test under Iowa law).
- Difficult to demonstrate under either standard that the policyholder expected or intended to cause property damage or bodily injury. This is particularly the case with respect to past emissions.
  - Carbon dioxide is an organic substance appearing naturally throughout the environment – humans and animals exhale carbon dioxide with every breath.
  - Carbon dioxide emissions at issue were unregulated and legal.
  - The EPA, as recently as 2007, has stated that carbon dioxide is not a pollutant.
  - Lack of consensus regarding the effects of greenhouse gasses.

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"Known Loss" Doctrine and "Known Injury or Damage" Exclusion

- Insurance companies often assert the "known loss" or "loss in progress" doctrine as an extra-contractual coverage defense.
  - Insurance companies often argue that knowledge of property damage prior to the inception of the policy bars coverage. Policyholders typically argue that the relevant inquiry is whether the policyholder actually has been found liable for property damage prior to the inception of the policy. Although courts have split on this issue, the latter standard should apply, as liability, not property damage, is the "loss" covered by a CGL policy.
  - There also are disputes as to the level of knowledge necessary, and courts have employed various standards, including: "actual knowledge;" "reason to know;" "evidence of probable loss."
  - Courts generally place the burden of proof on the insurance company.
- In the 1990's, the Insurance Services Industry introduced the "known injury or damage" exclusion, which purports to bar coverage where the policyholder knew of the property damage or the bodily injury prior to the inception of the policy.

  "[Certain employees] authorized by you to give or receive notice of an 'occurrence' or claim, knew that the 'bodily injury' or 'property damage' had occurred, in whole or in part. If such a listed insured or authorized 'employee' knew, prior to the policy period, that the 'bodily injury' or 'property damage' occurred, then any continuation, change or resumption of such 'bodily injury' or 'property damage' during or after the policy period will be deemed to have been known prior to the policy period."
- Relevant factual questions:
  - Who had knowledge of the damage? Was he/she authorized to give or receive notice of an occurrence or claim?
  - What level of knowledge is required?

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The Pollution Exclusion

- Although there have been different versions of the pollution exclusion over the years, all permutations of it generally address releases of "smoke, vapor, soot, fumes, acids, alkalis, toxic chemicals, liquids or gasses, waste materials or other irritants, contaminants, or pollutants . . . ."
- The insurance company has asserted this defense in *Steadfast Insurance Co. v. The AES Corp.,* Case No. 2008-858 (Cir. Ct. Arlington County, Va. filed July 9, 2008).
- There are a number of arguments as to why the pollution exclusion should not bar coverage for global warming claims.
  - The pollution exclusion may not apply to CGL policies' "personal injury" coverage, under which nuisance claims may be covered. *See, e.g., City of Delray Beach v. Agricultural Ins. Co.*, 85 F.3d 1527, 1533 (11th Cir. 1996).
  - The pollution exclusion was not introduced until the early 1970's; therefore, with respect to claims potentially covered under earlier policies, the pollution exclusion defense should not even be an issue.
  - A few basic principles (not specific to the pollution exclusion):
    - Insurance companies generally bear the burden of proving the applicability of an exclusion;
    - Exclusions generally are construed narrowly; and
    - Ambiguities generally are construed in favor of coverage.

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The Pollution Exclusion – The "Pollutant" Requirement

- The pollution exclusion does not specifically refer to carbon dioxide or greenhouse gasses.
- Carbon dioxide does not fit within the plain and ordinary meaning of "pollutant."
  - Carbon dioxide is a naturally-occurring substance, that is emitted each time we exhale.
  - Greenhouse gas emissions have never been regulated by the EPA; in fact, as recently as 2007, the EPA asserted that carbon dioxide is not a pollutant.
- Most policyholders reasonably expect coverage for liability arising from damage caused by carbon dioxide emissions.
- Some courts have refused to apply the pollution exclusion to substances that are not "traditional pollution":
  - *MacKinnon v. Truck Ins. Co.*, 73 P.3d 1205, 1215 (Cal. 2003): The court limited the scope of the pollution exclusion "to injuries arising from events commonly thought of as pollution, i.e., environmental pollution."
  - *Rogers' Joint Training, Apprentice & Educ. Comm. v. General Accident Ins. Co. of Am.*, 713 N.Y.S.2d 615 (4th Dep't 2000): The court refused to apply the "total" pollution exclusion to liability arising out of bodily injury caused by exposure to toxic fumes, as fumes were not a "traditional" pollutant. The court reasoned: "Given the history of the pollution exclusion and the terms used therein, it is entirely reasonable that an ordinary insured would conclude that the [exclusion] is applicable only to bodily injuries caused by ***traditional environmental pollution***." *Id.* at 617 (emphasis added).

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Pollution Exclusion – The "Pollutant" Requirement

- *Donaldson v. Urban Land Interests, Inc.*, 564 N.W.2d 728 (Wis. 1997): The Wisconsin Supreme Court held that carbon dioxide was not a pollutant within the meaning of the pollution exclusion.
  - The court held that inadequately ventilated carbon dioxide from human respiration is not a pollutant under an absolute pollution exclusion, finding the exclusion ambiguous as applied to these facts.
  - The court relied on a "reasonable insured" analysis: Because carbon dioxide is "universally present and generally harmless in all but the most unusual instances," a reasonable insured would not consider exhaled carbon dioxide a pollutant.
  - The court did not address the alternative argument that carbon dioxide is not an irritant or contaminant within the meaning of the pollution exclusion.

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Pollution Exclusion – The "Pollutant" Requirement

- For certain types of climate change claims, there is an additional argument against the application of the so-called "absolute" pollution exclusion, which provides:

  "'Bodily injury' or 'property damage' arising out of the actual, alleged, or threatened discharge, dispersal, seepage, migration, release or escape of 'pollutants' . . . **at or from any premises, site or location which is or was at any time owned or occupied by, or rented or loaned to, any insured**. . . ." (ISO Form CG 00 02 12 07) (emphasis added).

- Although insurance companies likely will rely on *Massachusetts v. EPA's* ruling that carbon dioxide is a "pollutant" within the meaning of the Clean Air Act, that case should not bear on the construction of the pollution exclusion.
  - The Clean Air Act's definition of "pollutant" is different – and much broader -- than the language of the pollution exclusion.
  - Different rules of construction apply to insurance policies.
  - In any event, at a minimum, that ruling should not be relevant to pre-2007 emissions.

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Personal Injury Liability Coverage

- CGL personal injury liability ("PIL") coverage protects the policyholder from liability arising out of listed offenses, including –
  - "Wrongful entry or eviction, or other invasion of the right of private occupancy."
- Personal Injury Coverage may apply to nuisance claims:
  - *Martin Marietta Corp. v. Ins. Co. of N. Am.,* 40 Cal. App. 4th 1113 (1995).
    - The Government sought remediation of groundwater and contamination from landfills.
    - The policyholder sought coverage for the cleanup under a policy's PIL coverage.
    - The court recognized that nuisance claims raise a potential for coverage under "wrongful entry" and "other invasion of the right of private occupancy" *Id*. at 1136.
- The allegations in *Kivalina* arguably fall within PIL coverage.
  - The complaint alleges public nuisance, stating that the defendants' emissions of carbon dioxide contributed to global warming, and constitute a substantial and unreasonable interference with the rights to use and enjoy public and private property in Kivalina.
- The "expected or intended" exclusion and the pollution exclusion often do not apply to this coverage.

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Allocation and Stacking

- The method of allocation applied determines which triggered policies are responsible, and to what extent, for the policyholder's damages and defense costs.
- Policyholders usually argue in favor of an "all sums" approach.
  - Under the "all sums" approach, which is based on the policy language, the policyholder can select any triggered year of coverage and require each policy within that year to pay up to its full policy limits. *See, e.g., California v. Continental Cas. Co.*, 2009 WL 18696, at *8-*9 (Cal. Ct. App. Jan. 5, 2009).
  - Once the policies for that policy period have been exhausted, some courts then allow the policyholder to recover from triggered policies covering other years. *See, e.g., California v. Continental Cas. Co.*, 2009 WL 18696, at *20 (Cal. Ct. App. Jan. 5, 2009). Under this "stacking" approach, this process continues until all policies are exhausted or the policyholder has recovered in full. This approach is favorable to policyholders.
- Insurers typically argue in favor of a pro rata allocation method.
  - Courts have employed various formulas under which the policyholder's damages are allocated to, or spread across, all years at issue.
  - Some courts have held that damages should not be allocated to policy periods for which the policyholder could not have purchased insurance. *See Stonewall Ins. Co. v. Asbestos Claims Mgmt. Corp.*, 73 F.3d 1178, 1202-03 (2d Cir. 1995); *Owens-Illinois, Inc. v. United Ins. Co.*, 650 A.2d 974, 995 (N.J. 1994).
- The arguments regarding allocation in the climate change context are likely to be similar to those made in connection with other long-tail claims, such as environmental claims.

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