GLOBAL WARMING LITIGATION AND THE COMING INSURANCE COVERAGE BATTLES

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With the dangers of global climate change manifesting in Hurricane Katrina, and environmental activists' warnings finally moving public perceptions to recognize our growing environmental problems, companies who have allegedly contributed to global warming face threats of wide-ranging and expensive litigation. Companies will also be facing new regulations and expectations to clean up their operations and reduce emissions of greenhouse gases, particularly carbon dioxide. Insurance coverage for these challenges is sure to be one of the most hotly-contested issues as the full scope of the global warming crisis and its financial ramifications become clearer.

The Gathering Storm

The litigation has already begun. States and private parties alike are beginning to target the largest emitters of greenhouse gases to change their behaviors and exact enormous settlement payments. In Massachusetts v. EPA, the United States Supreme Court lent new weight to the argument that greenhouse gases are, in fact, pollutants that cause injuries and that they can be regulated.[2] On that basis, the Court concluded that several states had standing to sue the EPA to require the regulation of greenhouse gas emissions.

In several recent cases, states and citizens have sought damages from private companies for their greenhouse gas emissions. In one, the State of California demanded billions of dollars in damages for past emissions from six major automobile manufacturers, as well as a declaration of their liability for future damages. The stakes were enormous: billions for public spending to reverse warming trends, loss of the Sierra Nevada snow pack and its water supply, increased flooding risks, and more extreme heat. Similarly, in Mississippi, a class action was brought by

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2 127 S. Ct. 1438 (2007).

fourteen individuals against numerous oil and coal companies for damages to their properties caused by Hurricane Katrina, which was itself allegedly caused by global warming. Both of these cases were dismissed last year because they raised a "political question" that is more appropriate for resolution by the executive or legislative branches.[3] Nevertheless, both cases are being appealed, and similar cases are arising around the country in other jurisdictions.

A small trickle of easily-dismissed cases could easily swell to a flood if global climate change begins to displace populations, destroy cities, threaten water and other resources, or spread diseases. Global warming litigation could also take more traditional forms, with allegations of personal injuries, property damage, or nuisance. Directors and officers of companies that contribute or have contributed to global warming may also find themselves targeted by disgruntled shareholders, amongst others. We may even see the day when new laws create new liabilities for past behavior—like CERCLA did when it created strict liability for environmental pollution damage.

While we could see massive market-share type apportionments of liability, it is also quite possible that all that results is lawsuits and litigation costs, with no ski resort plaintiff able to prove that an oil company's carbon dioxide emissions led to the loss of snowpack at the resort. Regardless, somebody will still need to pay those costs, and policyholders purchase insurance policies to protect themselves from litigation costs, regardless of a lawsuit's legal merit.

When litigation concerns a company's actions over decades of operations, the company must review its historic insurance policies in effect during those periods. These policies may very well cover both litigation costs and indemnification for settlements if they ultimately prove necessary. Many policyholders' insurance claims will fall within the traditional coverages their commercial general liability (CGL) policies provide for liability created by property damage,

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3 California v. General Motors Corp., No. C06-05755 (N.D. Cal., Sept. 17, 2007); Comer v. Nationwide Mutual Insurance, No. 05-436 (S.D. Miss., Aug. 30, 2007).

personal injury, and bodily injury. For liabilities from more recent years, pollution-specific policies could be triggered.

Even if a company is never sued as a contributor to global warming, it may still find the need to make insurance claims for the effects of global climate change. First-party property insurance claims will skyrocket around the globe if some of the less optimistic global warming models prove accurate and the oceans begin to rise foot by foot. Interruptions in a company's business operations caused by supply chain disruption or natural disasters could lead to business interruption insurance claims for profits lost for time out of normal operations. Specialty policies may also specifically cover damages to certain types of property, livestock, crops, and supply chains. Homeowners will almost surely be making their own insurance claims.

Any of these policyholders seeking insurance coverage for global warming or related litigation will almost certainly face a long list of defenses, many of them novel. Still, the majority of the insurance industry's defenses will be familiar and predictable to anyone experienced with disputes over coverage for asbestos and pollution liability, though the stakes at issue could be even greater.

How Many "Occurrences"? What Policies Are Triggered?

One of the most litigated issues in insurance disputes that involve legal liability for conduct that occurred over more than one year is what is the "occurrence" at issue and how many policy periods and policy limits can be "triggered." Because insurance policies typically contain a "per occurrence" limitation on the amount an insurance company will pay for a loss, determining the number of occurrences in a loss can be crucial to obtaining sufficient funds to indemnify a series of larger losses. This issue will also determine how many deductibles or self-insured retentions a policyholder must pay before any insurance coverage comes into play.

The word "occurrence" is almost inherently ambiguous, defined in many standard post-1973 insurance policies as "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." In an earlier standard form, the definition was "an accident, including injurious exposure to conditions, which results during the policy period in bodily injury or property damage." Both of these definitions seem to suggest that continuous release of carbon dioxide and other greenhouse gases are all part of the same occurrence.

Further, policies sold to a company throughout its decades of carbon dioxide emissions should all be triggered, allowing the policyholder access to many years of available policy limits. Whether and how this can be done will depend on how the courts define "bodily injury" and "property damage." When the occurrence and the damage it causes take place at the same time, there is usually no issue, but if the injury takes place over more than one year, determining which policies are triggered can be a difficult issue.

In the asbestos and environmental liability contexts, courts have adopted several different theories on this topic, including the continuous or triple trigger, the exposure trigger, and the the manifestation trigger. The manifestation trigger considers those policies when the injury is first discovered or manifested. The exposure trigger focuses on the time that the harmful actions exposed the policyholder to damage. By contrast, the continuous trigger interprets the applicable injury as occurring throughout the period that damage is being caused, from the time of first exposure until the time the damage manifests itself. The continuous trigger is usually most favorable to policyholders and comports with the broad language of CGL occurrence policies, which defines an occurrence as not just the initial accident, but also the repeated exposures to the conditions that first caused the damage. This theory allows the policyholder to access coverage for a company's full history of emissions, from the moment it first began contributing to global warming until the damage caused by these activities were recognized as causing environmental injuries.

Insurance companies will typically argue that only one or several policies are triggered by long-tail losses. They usually adopt either the exposure or manifestation trigger (despite the obvious contradictions between these two theories), and they often claim that a policyholder is not permitted to "stack" the limits of its respective insurance policies from year to year. This anti-stacking argument has little basis in the actual language of the standard CGL insurance policy: while CGL policies do provide that continuous or repeated exposure to conditions is one occurrence, they do not limit recoveries to a single policy. Indeed, even if thirty years of pollution activity were considered one occurrence, there is nothing in the policy that limits the insurance company's duty to indemnify based on the duration of an occurrence.

Policyholders should remember, however, that the most recent standard liability policies, are typically "claims made" forms, which are less well-suited to respond to long-tail liabilities. While these policies should respond to a global warming loss, they are usually only triggered for the specific policy period when the policyholder gives notice of or tenders a claim to the insurance company.

The Pollution Exclusion

Most literature on insurance for global warming emphasizes the role of the widely-utilized series of pollution exclusions, which can be found on most insurance policies issued in the last few decades. For insurance policies issued prior to 1970, the pollution issue is much less of a factor, because the first pollution exclusions did not appear until 1970. As was the case in litigation over coverage for pollution liabilities under CERCLA, policies issued since 1970 will be the focus of yet another state-by-state debate over what, exactly, is excluded by the various pollution exclusions. These later policies may pose a challenge to policyholders seeking coverage for liabilities created by their carbon dioxide and other greenhouse gas emissions, but there are strong arguments in favor of coverage.

Policyholders frame the pollution exclusion question as whether the underlying liability arises from traditional industrial pollution of the environment, of the kind prohibited by governmental agencies, or whether it instead arises from some other activity that happens to involve an allegedly dangerous or hazardous substance. In short, when the various pollution exclusions were being proposed and submitted for regulatory approval, insurance industry documents and filing statements made clear that only the former type of liability was intended to be barred. Years later, insurance companies began a concerted and somewhat successful campaign to convince courts that the ambiguously-worded exclusions mean more than their earlier representations suggested, and that they apply to any type of negligence that involves or results in something that can be characterized as "pollution."

Regardless of the merits of the industry's position on the types of pollution covered by CERCLA, greenhouse gases are particularly ill-suited for consideration as the type of "pollution" contemplated by the exclusions. Greenhouse gases have never been regulated, let alone prohibited, by the U.S. government, and the EPA has taken the position that it is not a "pollutant." Further, carbon dioxide is emitted as a natural byproduct of breathing, and can hardly be described as a "contaminant," an "irritant," or even "waste material."

Even some insurance industry allies have acknowledged the inapplicability of the pollution exclusion to global warming claims. Reynolds Porter Chamerlain, a top law firm representing insurance companies, has urged the insurance industry to address the lack of an exclusion for global warming damages in current policies, and has stated that the status quo is "unlikely to be effective in meeting claims relating to climate change."[4] In a press release, the firm stated that "a number of cases have recently been launched against companies for their alleged role in contributing to global warming. The costs of defending such legal cases would normally be paid by a company's general liability insurance."

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4 "Climate Change Claims Could Hit Insurers Hard," Financial Times (Oct. 25, 2006).

The Expected or Intended Defense

Policyholders making claims for global warming can anticipate receiving reservation of rights letters or denials that claim there is no coverage because the policyholder "expected or intended" that its operations would contribute to the global warming effect. It will further be suggested that the policyholder expected or intended its contributions to global warming to result in whatever bodily injury or property damage is at issue. There are several responses to this oft-asserted defense.

First, most CGL policies do not contain an expected or intended exclusion for personal injuries such as nuisance claims. Therefore, on its own terms, the exclusion should only apply to claims for property damage or bodily injury. Insurance companies, however, like to assert the "expected or intended" defense even when there is no exclusion, claiming that it is implied in the definition of "occurrence"— "an accident"— and that an accident cannot be intentional. By that interpretation, however, the expected or intended exclusion would be superfluous and have no reason to exist, and its application to only some types of injuries would appear anomalous.

Second, the exclusion limits its application to cases where the damage is expected or intended "from the standpoint of the insured." Insurance companies may want to interpret the term "insured" to include any employee of a company—research scientists who may have raised concerns about global warming for example—but policyholders are on strong ground insisting that the clause only applies to key officers and directors.

Additionally, policyholders and insurance companies often split as to whether the policyholder must have subjectively expected the damage, while insurance companies like to rely on whether a "reasonable" policyholder "should have" expected it, an objective standard. Most courts agree with policyholders on this point, and require insurance companies to prove specific evidence of the company's actual intentions or expectations, particularly because the phrase "from the standpoint of the insured" seems to clearly call the policyholder's subjective

intentions into question. In typical environmental pollution insurance cases, many courts have held that a policyholders knowledge of polluting activities does not establish any intent to injure or an expectation of injury.[5]

Finally, policyholders should question what it means to "expect" bodily injury or property damage caused by global warming. Insurance companies typically insist that coverage is excluded if the policyholder expected or intended to act in the way that caused harm (i.e. intended to emit greenhouse gases), while policyholders argue that the relevant question is whether they actually expected or intended the resulting harm (i.e. intended to increase sea levels, melt snow pack, etc). The now-growing consensus regarding global warming and its causes has only recently become accepted by the public at large. Moreover, companies had little reason to expect any connection between their normal operations releasing carbon dioxide into the atmosphere and a viable legal causes of action. Even if new liabilities are eventually created by statute, it will certainly be problematic for an insurance company to project into the past an expectation or intent on the part of the policyholder to cause the injuries through carbon dioxide emissions that are still legal and unregulated.

Late Notice

Insurance companies faced with their policyholders' global warming claims also may contend that a policyholder failed to comply with timing and notice provisions in its policies. Insurance companies may take the position that policyholders should have made claims or given notice years ago, when the scientific community first began to address the impact of greenhouse gases like carbon dioxide on the environment, or perhaps when the first lawsuits regarding the policyholder's business practices were filed. This question is particularly relevant for policies

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5 See, e.g. Nestle Foods Corp. v. Aetna Cas. & Sur. Co., 842 F. Supp. 125, 128-29 (D.N.J. 1993); Union Pacific Resources Co. v. Aetna Cas. & Sur. Co., 894 S.W.3d 401, 404 (Tex. Ct. App. 1994).

that were issued on a claims-made or claims-made-and-reported basis, including D&O policies and more recent CGL policies.

Obviously, claiming that a policyholder's notice of a potential claim was "late" begs several difficult questions: what is global warming and how is it caused, did the policyholder contribute to global warming, and when should the policyholder have known (if at all) that it would be sued for company operations that contributed to global warming. These questions also lead to the obvious rebuttal that the insurance companies have or should have had access to the same information that could answer these questions, including the science supporting the global warming theory, thereby providing the insurance company with "constructive notice" of the claim. To whatever extent an energy company could be charged with the knowledge necessary to render notice late, an insurance company selling its products to an energy company would also have reason to know that global warming lawsuits are part of the company's risk portfolio.

While many delays in the claims process are surmountable, in some states they have entirely precluded policyholders from recovering otherwise undisputed claims payments, even when an insurance company cannot prove prejudice from the delay. For this reason, delays in providing notice should always be avoided. Insurance companies hardly need the additional ammunition when rationalizing a denial of coverage.

Conclusions

Global warming litigation is already here, and its potential scope is almost limitless. If they have not already, policyholders must begin to analyze their potential exposure and whether their risk management strategies will address it. Mitigation of damage should be a consideration in this analysis, and some insurance companies are now working with policyholders proactively to reduce their liability exposures. Still, policyholders must not neglect the importance of preparing for potential insurance coverage disputes now, and should consider whether it makes

sense to begin providing notice of potential claims, or at least begin discussions with their insurance companies.