GLOBAL WARMING: The "Next Big Thing" Or "Much Ado About Nothing" For General Liability Insurers?

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GLOBAL WARMING: The "Next Big Thing" Or "Much Ado About Nothing" For General Liability Insurers?

by

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Hurricanes Katrina, Rita and Wilma in 2005 raised awareness, within the Insurance Industry and society in general, of the troubling apparent connection between the increased frequency and intensity of these natural catastrophes and the climate-change phenomenon now commonly referred to as "global warming". Recent significant increases in the ambient temperature of the earth's lower-level atmosphere, surface, and ocean waters are believed to be triggering more frequent and intense tropical storms, as well as a host of other natural catastrophes such as heatwaves, droughts, wildfires, and other disasters contributing to the loss of life and property, in some instances on a broad scale. As might be expected, the Insurance Industry's concerns with "global warming" and its presumed causal connection to natural disasters such as Hurricane Katrina have focused principally upon first-party property exposures. However, given the increasing extent to which human activity -- much of it of a corporate, industrial nature -- is being blamed for causing or significantly contributing to this adverse climate change, commentators increasingly suggest that "global warming" may also have

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significant *third-party liability* exposure implications. However, whether global warming ultimately proves to be "the next asbestos" for general liability insurers, or more akin to the radically overhyped "Y2K" in terms of real-world claims exposure, remains to be seen.

I. GLOBAL WARMING -- WHAT IS IT?

Although the underlying scientific principles affecting "global warming" are numerous and complex, the phenomenon has been described in relatively straightforward terms:

> Energy from the sun drives the earth's weather and climate, and heats the earth's surface; in turn, the earth radiates energy back into space. Atmospheric greenhouse gases (water vapor, carbon dioxide and other gases) trap some of the outgoing energy, retaining heat somewhat like the glass panels of a greenhouse. Without this natural "greenhouse effect" temperatures would be much lower than they are now, and life as known today would not be possible. Instead, thanks to greenhouse gases, the earth's average temperature is a more hospitable 60°F. However, problems may arise when the atmospheric concentration of greenhouse gases increases.
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> What has changed in the last few hundred years is the additional release of carbon dioxide by human activities. Fossil fuels burned to run cars and trucks, heat homes and businesses, and power factories are responsible for about 98% of U.S. carbon dioxide emissions, 24% of methane emissions, and 18% of nitrous oxide emissions. Increased agriculture, deforestation, landfills, industrial production, and mining also contribute a significant share of emissions. In 1997, the United States emitted about one-fifth of total global greenhouse gases.
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> Estimating future emissions is difficult, because it depends on demographic, economic, technological, policy, and institutional developments. Several emissions scenarios have been developed based on differing projections of those underlying factors. For example, by 2100, in the absence of emissions control policies, carbon dioxide concentrations are projected to be 30-150% higher than today's levels.[1]

This aggravation of the so-called "greenhouse effect" due to the accumulation of excessive concentrations of greenhouse gases in the earth's atmosphere has potentially stark consequences.

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[1] U.S. Environmental Protection Agency, *Global Warming: Climate* at 1-2, *available at* http://yosemite.epa.gov/oar/globalwarming.nsf/content/climate.html (last visited Aug. 25, 2006) (hereinafter "*EPA-Global Warming*").

"Since the industrial revolution, the Earth's average temperatures have increased substantially and rapidly from a historical perspective, and all ten of the hottest years on record have occurred since 1990. 2005 was the hottest year in over a century."[2] Moreover, "scientists expect that the average global surface temperature could rise 1-4.5°F (0.6-2.5°C) in the next fifty years, and 2.2-10°F (1.4-5.8°C) within the next century, with significant regional variation. Evaporation will increase as the climate warms, which will increase average global precipitation. Soil moisture is likely to decline in many regions, and intense rainstorms are likely to become more frequent. Sea level is likely to rise two feet along most of the U.S. coast."[3]

A watershed development in the protracted scientific debate over whether global warming was actually occurring came in 2001, with the issuance of a report by the Intergovernmental Panel on Climate Change ("IPCC"), an advisory body to the United Nations Framework Convention on Climate Change. The IPCC concluded that "[i]n light of new evidence and taking into account the remaining uncertainties, most of the observed warming over the last 50 years is likely to have been due to the increase in greenhouse gas concentrations,"[4] with "likely", as used in this context, denoting a confidence level on the part of the authors in the range of 66-90 percent.[5] The IPCC's assessment was independently corroborated later in 2001

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[2] Allianz Group & World Wildlife Federation, *Climate Change and Insurance: An Agenda for Action in the United States* at 5 (October 10, 2006), *available at* http://worldwildlife.org/news/printPR.cfM?prID+317 (*citing* NASA "*2005 Warmest Year In Over A Century*" (January 24, 2006), *available at* www.nasa.gov/vision/earth/environment/2005-warmest.html).

[3] *EPA-Global Warming*, *supra*, at 2.

[4] U.N. Framework Conv. on Climate Change, Intergovernmental Panel on Climate Change, Working Group I, *Third Assessment Report -- Climate Change 2001: Summary for Policy Makers, The Scientific Basis*, Jan. 2001, at 10 (hereinafter "*2001 IPCC Report*").

[5] *2001 IPCC Report*, *supra*, at 2 n.7 (defining probability nomenclature utilized in the Report in accordance with respective confidence levels).

by the National Research Council ("NRC") of the National Academy of Sciences. In an NRC study, based on a White House request that the Academy opine on the merits of the IPCC's Report, the NRC definitively stated that "[t]he IPCC's conclusion that most of the observed warming of the last 50 years is likely to have been due to the increase in greenhouse gas concentrations accurately reflects the current thinking of the scientific community on this issue."[6]

The 2001 IPCC Report catalogued numerous possible weather-related manifestations of the effects of global warming and assessed their probability over the decades of the 21st century. It characterizes as "very likely" to occur -- *i.e.*, at a confidence level of *90-99%*[7] -- such problems as "more hot days over nearly all land areas," "fewer cold days and frost days over nearly all land areas," increases in the heat index, a greater frequency of intense precipitation events, and the like.[8] Predicted as "likely" (*i.e.*, 66-90% confidence level) were "increased summer continental drying and associate risk of drought" and increased tropical cyclone wind peak and precipitation intensities."[9] While the need for caution in relying upon such projections has been duly noted within the scientific community,[10] at least some of the phenomena the IPCC

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[6] Nat'l Academy of Sciences, Nat'l Research Council, *Climate Change Science: An Analysis of Some of the Key Questions* (2001), at 3 (hereinafter "*Climate Change Science*").

[7] *See supra* n.6.

[8] *See* 2001 IPCC Report, *supra*, at 15.

[9] *Id*; *see also* U.N. Framework Conv. on Climate Change, Intergovernmental Panel on Climate Change, Working Group II, *Third Assessment Report -- Climate Change 2001: Summary for Policymakers: Impacts, Adaptation and Vulnerability*, Feb. 2001, at 7 (elaborating on specific impacts associated with projected increases in the frequency of each of the identified phenomena).

[10] *See Climate Change Science*, *supra*, at 22 (noting that the IPCC Working Group I Summary for Policy Makers "frequently uses terms (*e.g.*, likely, very likely, unlikely) that convey levels of uncertainty; however, the text less frequently includes either their basis and caveats" and cautioning that, without their underlying bases, the IPCC confidence levels "could

predicted in 2001 appear to be already occurring, as reflected by current media coverage of more recent scientific findings.[11] Moreover, in a revised analysis more recently released, the IPCC itself has concluded, based on additional data and improved techniques for interpreting prior data, that the confidence levels attending its 2001 predictions as to the anticipated manifestations of climate change have increased.[12] In any event, however, "perception is reality." From a *perception* standpoint, the causal connection between global warning and a future of climatic problems of increasing variety, frequency and severity appears to be cemented in the minds of the news media and the general public.

Insurers share the perception. A 2006 Lloyd's of London report, entitled *Climate Change: Adapt or Bust*, surveyed the then-current scientific literature, and summarized the risk implications for international insurers. It anticipated the consequences of global warming in respect to such phenomena as more frequent and more severe hurricanes due to elevated ocean water temperatures; increased sea levels attributable to the melting of glaciers and polar ice caps and attendant inundation of coastal areas (including major metropolitan areas), impacts of increasing land and air temperatures, as manifested by greater drought and wildfire conditions in some areas and more severe precipitation events and resulting flood conditions in others, and the

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give an impression that the science of global warming is 'settled,' even though many uncertainties still remain.").

[11] *See, e.g.*, Gautam Naik, *Study Warns of Rapid Rise In Earth's Temperature*, Wall Street Journal, Sept. 26, 2006, at A2; Andrew C. Revkin, *NASA Scientists See New Signs of Global Warming*, N.Y. Times, Sept. 14, 2006, at A4; Andrew C. Revkin, *Study Links Tropical Ocean Warming to Greenhouse Gases*, N.Y. Times, Sept. 12, 2006, at A1; Emma Duncan, *Survey-Climate Change: The Heat Is On*, The Economist, Sept. 9, 2006, at 3.

[12] *See generally* U.N. Framework Conv. on Climate Change, Intergovernmental Panel on Climate Change, Working Group I, *Fourth Assessment Report, Climate Change 2007: The Physical Science Basis, Summary of Policymakers*, February 2, 2007, *available at* http://www.ipcc.ch/SPM2feb07.pdf.

like.[13] More recently, similar reports have been issued by or on behalf of other major insurers, indicating their increasing awareness of "global warming" and its potential impact on the worldwide Insurance Industry.[14]

II. GLOBAL WARMING CLAIMS

Media coverage of the potential impact of "global warming" on the Insurance Industry has largely been *forward-looking*. The focus has been: (i) the future exposure implications for insurers due to the projected natural catastrophes linked to adverse climate change; and (ii) how insurers have begun, or should begin, to alter their business practices over the long haul -- in respect to underwriting as well as investment philosophy -- in response to the risks posed by climate change.[15]

Although this emphasis on future first-party exposures and possible avenues of avoidance is certainly appropriate, the Insurance Industry should also be aware of the prospects for

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[13] Lloyd's of London, *Climate Change: Adapt or Bust* (2006), *available at* http://www.lloyds.com/News_Centre/360_risk_project/Catastrophe_trends/Climate_change/ (hereinafter "*Adapt or Bust*").

[14] *See, e.g.*, *Climate Change Futures*, *supra* at n.8 (report of The Center for Health and The Global Environment of the Harvard University Medical School, co-sponsored by Swiss Re in conjunction with the United Nations Development Programme); *see also* Allianz Group & World Wildlife Federation, *Climate Change and Insurance: An Agenda for Action In The United States*, *supra*, at 30 (listing additional research reports on climate change by European insurers); American International Group, *AIG's Policy and Programs on Environment and Climate Change* (May 2006), *available at* http://media.corporate-ir.net/media_files/irol/76/76115/aig_climate_change_updated.pdf (last visited Oct. 4, 2006).

[15] *See, e.g.*, Matthew Yeomans, *Weather or Not?: Insurance Companies May Have To Save The Climate To Save Their Bottom Line*, Time, Sept. 6, 2006, at A41; *see also* Ron Scherer, *New Combatant Against Global Warming: Insurance Industry*, The Christian Science Monitor, Oct. 13, 2006, at USA-1; Alison Ryan, *Insurance Industry Sees Real Value In Offering Discounts to Green Building Owners*, St. Louis Daily Rec., Sept. 26, 2006; John Simons, *Risky Business*, CNNMoney.com (Aug. 24, 2006); Marc Gunther, *Insurance Companies Take On Global Warming*, CNNMoney.com (Aug. 23, 2006); Verena Horne, *Feeling The Heat: Growing Insured Losses from Extreme Weather Events Have Thrust Climate Change to The Forefront of Insurers' Minds*, Euromoney Institutional Investor, July 1, 2006, at 22; *see generally* Evan Mills, Ph.D. and Eugene Leconte, *From Risk to Opportunity: How Insurers Can Proactively and Profitably Manage Climate Change* (CERES Aug. 2006).

substantial liability coverage claims against corporate policyholders based on these insureds' alleged responsibilities for the *already-existing manifestations* of "global warning". While a critical mass of liability claims against corporations giving rise to such coverage demands has not yet emerged, signs suggest that it could be coming soon.

A. Existing "Global Warming" Litigation

Litigation linking existing and prior corporate business practices to the deleterious present and future impacts of "global warming" had, until very recently, taken two alternative forms -- neither directly implicating general liability coverage concerns. The first of these two archtypes involves challenges to regulatory inaction -- *i.e.*, cases brought against governmental regulatory authorities, seeking to compel their adoption and imposition of environmental regulations that would require corporate entities to reduce their emissions of greenhouse gases. Highest in profile and most closely-watched within this class of cases is *Commonwealth of Massachusetts v. U.S. Environmental Protection Agency*, which was argued before the Supreme Court of the United States in November 2006 and was decided April 2, 2007.

The case began as a notice-and-comment rulemaking proceeding initiated by environmental groups in October 1999, seeking to have the EPA regulate CO_2 and other greenhouse gas emissions from new automobiles under Section 202(a)(1) of the Clean Air Act, 42 U.S.C. § 7521(a)(1). After nearly four years, EPA concluded in August 2003 that it lacked statutory authority to regulate greenhouse gas emissions from motor vehicles and that, even if it had such authority, it would decline to exercise it for a host of policy reasons.[16]

Following EPA's denial of the petition, twelve states, three municipalities, two U.S. territories and a host of "public interest" environmental groups collectively challenged the

[16] *See generally* 68 Fed. Reg. 52,922 (September 8, 2003).

agency determination in the U.S. Court of Appeals for the D.C. Circuit,[17] contending that the Clean Air Act empowers the EPA to promulgate "standards applicable to the emission of any air pollutant from . . . new motor vehicles . . . which . . . cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare," and that EPA's refusal to regulate greenhouse gas emissions from automobiles under this standard was arbitrary, capricious, and contrary to law.

On July 15, 2005, a divided panel of the D.C. Circuit -- assuming, without squarely deciding, that the petitioners had "standing" to sue -- denied their appeal, concluding that the EPA Administrator acted within the scope of her statutory discretion in refusing to promulgate regulations to limit greenhouse gas emissions from new vehicles.[18] The U.S. Supreme Court granted a petition for *certiorari* in June 2006, to review the D.C. Circuit ruling. Following full briefing, argument and four months' deliberations, the Supreme Court rendered its decision on April 2, 2007, reversing the D.C. Circuit's decision by a 5-4 majority determination. Justice Stevens (joined by Justices Kennedy, Souter, Ginsberg and Breyer), concluding that automobile-emitted greenhouse gases are unquestionably within the broad parameters of the statutory definition of "air pollutants" as set forth in the Clean Air Act, held that the petitioners had the requisite constitutional "standing" to sue and that EPA clearly has statutory authority under 42 U.S.C. § 7521(a)(1) to regulate such greenhouse gas emissions and may not simply decline to exercise that authority on the basis of broad policy rationales having no foundation in the

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[17] *Commonwealth of Massachusetts v. EPA*, 415 F.3d 50 (D.C. Cir.), *reh'g den.*, 433 F.3d 66 (D.C. Cir. 2005), *cert. granted*, 548 U.S. __, 126 S. Ct. 2960 (2006).

[18] *See* 415 F.3d at 57-59 (Randolph, Cir. J., for the majority); *id*. at 60-61 (Sentelle, Cir. J., concurring in the judgment).

statutory language. *Massachusetts, et al. v. Environmental Protection Agency*, 549 U.S. __, 127 S. Ct. 1438, 1453-63 (2007).[19]

While much was riding on *Commonwealth of Massachusetts v. EPA* from a federal environmental regulatory standpoint, including the critical threshold question as to whether CO_2 and the other greenhouse gases emitted from the exhaust pipes of automobiles constitute "air pollutants" within the contemplation of Section 202(a)(1) of the Clean Air Act, the case, and others like it,[20] did not directly implicate general liability insurers' coverage under current or previously-issued policies. This is because the regulatory actions -- even if successful -- were

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[19] Chief Justice Roberts authored the principal dissenting opinion, joined in by Justices Scalia, Thomas and Alito, which focused upon the petitioners' purported lack of constitutional "standing" based upon the Chief Justice's view that any injury alleged by the petitioners and purportedly attributable to adverse climate change allegedly caused by automobile emissions of greenhouse gases was completely speculative. 549 U.S. __-__, 127 S. Ct. at 1463-71 (Roberts, Ch.J., dissenting, joined by Scalia, Thomas and Alito, JJ.). Justice Scalia issued a separate dissenting opinion, joined by the other three dissenters, attacking the majority decision on the merits. *See* 549 U.S. __-__, 127 S. Ct. at 1471-78 (Scalia, J., dissenting, with Roberts, Ch.J., and Thomas and Alito, JJ., concurring).

[20] *See also Korinsky v. U.S. Environmental Protection Agency, et al.*, Case No. 05 Civ. 859 (NRB), 2005 U.S. Dist. LEXIS 21778 (S.D.N.Y. September 29, 2005) (action against EPA and New York State environmental regulatory agencies for contributing to and failing to abate the "public nuisance" of global warming; case dismissed for lack of Article III standing on the part of the plaintiff), *aff'd*, 192 Fed. App'x 71 (2d Cir. 2006); *Our Children's Earth Foundation, et al. v. U.S. Environmental Protection Agency*, Case No. CV-03-0770, Complaint (N.D. Cal. February 21, 2003) (mandamus action seeking to require EPA Administrator to promulgate regulations limiting greenhouse gas emissions from fossil fuel-fired electrical utility plants pursuant to provisions of Clean Air Act; case dismissed by stipulation after issuance by EPA of decision declaring its lack of statutory authority to regulate greenhouse gas emissions in August 2003, as addressed in *Commonwealth of Massachusetts v. EPA, supra*). A closely-analogous variation on essentially the same theme is presented by *Friends of the Earth, Inc. et al. v. Watson, et al.* Case No. C 02-4106, 2005 WL 2035596 (N.D. Cal. August 23, 2005). In that case, environmental groups and several municipalities assert claims against the chief executives of the Overseas Private Investment Corporation ("OPIC") and the Export-Import Bank of the United States ("Ex-Im Bank"), each in their official capacities, alleging that OPIC and Ex-Im Bank have provided funding for fossil fuel-fired power projects in foreign countries which emit greenhouse gases and contribute to global warming, without complying with the National Environmental Policy Act ("NEPA") provisions requiring the preparation of environmental impact statements for federally-funded projects likely to have an effect on the environment. The district court denied the defendants' motion for summary judgment in August 2005, rejecting their arguments that plaintiffs lack Article III standing, that defendants' funding decisions did not constitute "final agency action" subject to judicial review under the Administrative Procedure Act, and that OPIC is not subject to NEPA. 2005 WL 2035596 at *2-*8.

focused on requiring governmental entities to impose regulations that would mandate prospective "behavior modification" on the part of corporate policyholders *vis-à-vis* the emission of greenhouse gases. These lawsuits do not name the corporations as defendants, much less allege any sort of corporate culpability for *previous or existing injury or damage* of the type cognizable under general liability policies.

The second form of "global warming" litigation previously initiated, as distinct from the regulatory actions just discussed, targeted corporations as defendants. In these lawsuits, various plaintiffs, including environmental groups and state and local governments, sought declaratory and injunctive relief against emitters of greenhouse gases, premising their claims upon common-law "public nuisance" theories. The most prominent of these cases was filed by the States of Connecticut, New York, California, Iowa, New Jersey, Rhode Island, Vermont and Wisconsin, along with the City of New York, against American Electric Power Company, The Southern Company, the Tennessee Valley Authority, XCel Energy, Inc. and Cinergy Corporation in federal district court in New York City in July 2004.[21] As set forth in the plaintiffs' initial pleading:

> Defendants' power plants emit large quantities of carbon dioxide and are contributing to an elevated level of carbon dioxide in the atmosphere. . . . This Complaint seeks an order requiring defendants to reduce their emissions of carbon dioxide, thereby abating their contribution to global warming, a public nuisance.
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> * * *
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> Global warming already has begun to alter the climate of the United States. The threatened injuries to the plaintiffs and their citizens and residents from continued global warming include increased heat deaths due to intensified and prolonged heat waves; increased ground-level smog with concomitant increases in respiratory problems like asthma; beach erosion, inundation of coastal land, and salinization of water supplies from accelerated sea level rise; reduction of

[21] *State of Connecticut, et al. v. American Electric Power Co., et al.*, Case No. 1:04-CV-05669-LAP, Complaint (S.D.N.Y. filed July 21, 2004).

> mountain snow pack in California that provides a critical source of water for the State; lowered Great Lakes water levels, which impairs commercial shipping, recreational harbors and marinas, and hydropower generation; more droughts and floods, resulting in property damage and hazard to human safety, and widespread loss of species and biodiversity, including the disappearance of hardwood forests from the northern United States.
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> Plaintiffs seek judicial relief under the federal common law of public nuisance or, in the alternative, under state law of public nuisance. Plaintiffs seek an order (i) holding each of the defendants jointly and severally liable for contributing to an ongoing public nuisance, global warming, and (ii) enjoining each of the defendants to abate its contribution to the nuisance by capping its emissions of carbon dioxide and then reducing those emissions by a specified percentage each year for at least a decade.[22]

The "public nuisance"-based injunction actions against private corporate defendants have not, thus far, proven viable.[23] Moreover, these cases have drawn little attention from general liability insurers, because although the cases are premised upon allegations that could, in theory, be read to implicate claims of existing or imminent bodily injury or property damage, the complaints *do not seek monetary relief of any kind, but rather only prospective injunctive relief*, and therefore do not even arguably implicate the "as damages" inquiry that animated a previous generation of environmental insurance coverage disputes.[24]

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[22] *Id.*, ¶¶ 1, 3 and 6 at 1-2. A virtually identical lawsuit was filed against the same defendants in the same court on the same day by environmental groups asserting purported rights to protect private lands owned and preserved by them for recreation, conservation, resource and wildlife protection purposes in New York and New Hampshire from the effects of global warming. *Open Space Institute, Inc., et al. v. American Electric Power Co., et al.*, Case No. 1:04-cv-05670-LAP, Complaint (S.D.N.Y. filed July 21, 2004). The *Open Space Institute* action asserted both "public nuisance" and "private nuisance" theories of recovery but, like the *State of Connecticut* action, sought purely declaratory and injunctive forms of relief.

[23] *See State of Connecticut v. American Electric Power Co.*, 406 F. Supp. 2d 265, 271-74 (S.D.N.Y. 2005) (dismissing both *State of Connecticut* and *Open Space Institute* actions in consolidated decision on the grounds that complaints in both actions implicated questions of overarching national and international environmental policy constituting "non-justiciable political questions" beyond the Court's subject-matter jurisdiction).

[24] The standard language of the general liability policy, obligating the insurer to indemnify the insured for "all sums which the insured shall become legally obligated to pay *as damages*

B. Emerging "Global Warming" Liability Claims

While the "global warming"-related cases discussed above show that the litigation as a whole targets *prospective* business practices that are perceived to contribute to adverse climate change, a significant change in this pattern is certainly possible in light of recent developments. Specifically, lawsuits asserting claims against corporate defendants *seeking the recovery of damages for existing injury or damage* allegedly attributable to the effects of "global warming" caused, at least in part, by these corporations' *past conduct*, have commenced. Many more of such claims can realistically be anticipated. The coverage exposure implications for general liability insurers of targeted companies are apparent, and potentially serious.

The initial lawsuit presenting tort claims for damages against corporate defendants based upon their alleged responsibility for "global warming" was a Hurricane Katrina-related class action -- *Comer v. Nationwide Insurance* -- filed in federal district court in Mississippi in September 2005. The case was initially brought solely against property insurers, and originally focused solely upon the insurers' alleged wrongful conduct in limiting or denying coverage for hurricane-related property damage under homeowner's policies on the basis of the policies' flood

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because of bodily injury or property damage to which this insurance applies, caused by an occurrence," and to defend the insured against actions seeking such relief, spawned voluminous litigation regarding whether amounts for which the insured was held liable by a governmental regulatory agency pursuant to an injunctive order requiring the insured to remediate environmental contamination caused by its acts or omissions constituted sums the insured was legally obligated to pay "*as damages*." Although the weight of decisional authority ultimately swung in favor of policyholders on this question, a split in the caselaw persists. *See and compare Compass Insurance Co. v. City of Littleton*, 984 P.2d 606, 610, 621-23 (Colo. 1999) (costs to insured of complying with governmental cleanup order constitute "damages"), *with Patrons Oxford Mutual Ins. Co. v. Marois*, 573 A.2d 16, 18-20 (Me. 1990) (costs to insured of complying with governmental cleanup order are *not* "damages"). This entire issue is avoided, however, by cases involving claims for purely prospective injunctive relief, without a monetary component, as even courts applying the law of jurisdictions holding that environmental remediation costs are "damages" have readily recognized. *See, e.g., AIU Insurance Co. v. FMC Corp.*, 51 Cal. 3d 807, 799 P.2d 1253, 1279 (1990) (distinguishing environmental response costs deemed under California law to constitute "damages" covered by CGL policies from purely "prophylactic costs" incurred by the insured to prevent pollution from occurring in the future, for which no coverage exists).

exclusions. However, almost immediately, the plaintiffs in *Comer* amended their pleadings in order to add named and "John Doe" petrochemical companies as additional defendants, against which separate claims for compensatory and punitive damages were asserted based on the following core allegations:

> 30. Hurricane Katrina evolved into a storm of unprecedented strength and destruction, fed and developed by the warm waters and warm environmental conditions present in the Gulf of Mexico.
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> 31. The environmental conditions present in the Gulf of Mexico which fostered the strengthening of Hurricane Katrina are the direct result of a condition sometimes described as "Global Warming" which has been manifested by a marked increase in global air and water temperatures, melting of the polar ice caps, and significant increases in the frequency and intensity of storms known as hurricanes including a doubling in the number of category 4 and 5 hurricanes in recent years.
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> 32. "Global Warming" is caused by a depletion of protective ozone and a build-up of greenhouse gases including, but not limited to, carbon dioxide, all of which is a by-product of the oil refining and production activities of the Oil Company Defendant Class.
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> 33. The Oil Company Defendant Class has engaged in activities that have produced the greatest single source of by-products leading to the development and increase of global warming. Despite warnings from scientists and other knowledgeable advocates about the adverse effects of their activities on the environment in general and global warming in particular, the members of the Oil Company Defendant Class have continued to engage in or increase the activities that have increased Global Warming. Further, the Oil Company Defendant Class has taken no action to counteract the adverse impact of their activities on the environment.
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> 36. As a direct and proximate result of the activities of the Oil Company Defendant Class and the environmentally harmful by-products produced thereby, there has been a marked increase in global warming which, in turn, produced the conditions whereby a storm of the strength and size of Hurricane Katrina would inevitably form and strike the Mississippi Gulf Coast consequently causing extensive death and destruction. As a result thereof, the Plaintiff Class has sustained the following non-exclusive damages:
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> a. Loss of property;

b. Loss of use of their property;

c. Loss of their business and/or income;

d. Incurred clean-up expenses, past, present and future;

e. Disruption of the normal course of their lives;

f. Loss of loved ones;

g. Mental anguish and emotional distress; and

h. Such other elements of damage as may be shown at the trial of the merits herein.[25]

The Court (Senior Judge L.T. Senter, Jr.) quickly recognized that the action framed by the plaintiffs' Amended Complaint, which purported to combine -- in one case -- three separate proposed class actions against three disparate sets of defendants, based on three distinct sets of legal theories and claims, was completely unmanageable. The Court dismissed the plaintiffs' causes of action against non-"global warming" defendants by order dated February 23, 2006.[26] Shortly thereafter, the plaintiffs filed a third amended pleading, expanding the scope of their "global warming" allegations and claims to encompass additional defendants including public utilities, power companies and coal mining and chemical manufacturing companies.[27] After protracted motions practice, defendants' motions to dismiss were finally granted at a hearing on August 30, 2007, based on the conclusion of District Judge Louis Guirola, Jr. (to whom the case

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[25] *See Comer, et al. v. Nationwide Mutual Insurance Co., et al.*, Case No. 1:05-CV-00436-LG-RHW, First Amended Complaint at 11-13 (S.D. Miss. filed September 30, 2005). The plaintiffs' Amended Complaint, in an additional Cause of Action, named banks and mortgage-lending companies as yet a third group of defendants, against which claims for declaratory relief were asserted to preclude those defendants from bringing actions against plaintiffs for the value of mortgaged properties, destroyed or damaged by Hurricane Katrina, as to which the defendants failed to independently procure adequate (or any) mortgage insurance. *Id.*, ¶¶ 39-44 at 14-16.

[26] *Comer, et al. v. Nationwide Mutual Insurance Co.*, Case No. 1:05-CV-436 LTD-RHW, 2006 WL 1066645 at *3-*4 (S.D. Miss. February 23, 2006).

[27] *Comer, et al. v. Murphy Oil Co., et al., supra*, Third Amended Complaint (S.D. Miss. filed April 19, 2006).

was reassigned) that the plaintiffs lacked standing and that their claims were non-justiciable "pursuant to the political question doctrine."[28] An appeal of the order of dismissal is pending.

Meanwhile, a second major lawsuit asserting damages claims against private corporate defendants premised expressly upon allegations that they contributed to "global warming" was commenced in federal district court in San Francisco by the California Attorney General on September 20, 2006.[29] Named as defendants in the action were the "Big Six" domestic and Japanese automobile manufacturers -- GM, Toyota, Ford, Honda, Chrysler and Nissan --which, according to the pleading, "by their annual emissions in the United States of approximately 289 million metric tons of carbon dioxide and other greenhouse gases, are substantial contributors -- among the world's largest contributors -- to global warming, and to adverse impacts on California."[30] The Complaint went on to generally allege as follows:

> 4. Global warming has already injured California, its environment, its economy, and the health and well-being of its citizens. California is responding to the ongoing impacts and inevitable additional future impacts of global warming. The State is spending millions of dollars on planning, monitoring, and infrastructure changes to address a large spectrum of current and anticipated impacts, including reduced snow pack, coastal and beach erosion, increased ozone pollution, sea water intrusion into Sacramento Bay-Delta drinking water supplies, and to respond to impacts on wildlife, including endangered species and fish, wildfire risks, and the long-term need to monitor on-going and inevitable impacts. California already has begun to expend money and other resources to address the declining snow pack and earlier melting of the snow pack in order to avert future water shortages and flooding.
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> 5. Damages caused by global warming are cognizable, ongoing and increasing. Defendants are aware of the impacts and have chosen to continue to produce products that generate enormous quantities of carbon dioxide, to the

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[28] *Comer, et al. v. Murphy Oil USA, inc., et al*., Case No. 1:05-CV-436-LG-RHW, Order Granting Defendants' Motion to Dismiss at 1 (S.D. Miss. August 30, 2007).

[29] *People of the State of California ex rel. Lockyer v. General Motors Corp., et al.*, Case No. 3:06-cv-05755-EMC, Complaint for Damages and Declaratory Judgment (N.D. Cal. September 20, 2006).

[30] *Id*., ¶ 3 at 2.

detriment of California.

> 6. *The People seek compensation for the large-scale damage caused by these defendants*. California seeks a judgment holding each defendant jointly and severally liable for contributing to a public nuisance -- global warming and the impacts resulting from global warming in California -- and awarding monetary damages to the State. The People also seek a declaratory judgment that each defendant is jointly and severally liable to pay for such additional damages incurred by California in the future for contributing to the ongoing nuisance of global warming.[31]

Following detailed allegations concerning the "science" of global warming and its purported specific impacts on the State's property and citizens, the Complaint set forth alternative causes of action, seeking "millions (if not billions)" of dollars in incurred and prospective money damages under "public nuisance" theories of recovery pled under federal common law and state law.[32]

After extensive briefing and argument of the defendants' motions to dismiss, the federal district court ruled in September 2007, holding that the State's damages claims implicated non-justiciable political questions which were required to be dismissed, based on reasoning consistent with that articulated by the district curt in *State of Connecticut v. American Electric Power Co.*, *supra*.[33] *See People of the State of California v. General Motors Corp.*, Case No. 3:06-cv-05755-MJJ, 2007 WL 2726871 at *10 (N.D. Cal. September 17, 2007) ("[T]he Court finds that injecting itself into the global warming thicket at this juncture would require an initial policy determination of the type reserved for the political branches of government. A judicial determination of monetary damages for Plaintiff's global warming nuisance tort would improperly place this Court into precisely the geopolitical debate more properly assigned to the coordinate branches[.]").

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[31] *Id*., ¶¶ 4-6 at 2-3 (emphasis added).

[32] *Id*. at 12-14.

[33] *See supra* n.23.

Notwithstanding the unimpressive results of these early efforts, many commentators believe that the *Comer* and *State of California* actions may represent but the tip of the proverbial (melting) iceberg -- bad pun intended -- in regard to tort actions for damages against corporate defendants, seeking to hold them accountable for their alleged contributions to adverse climate change and its current and future effects. Steven Susman, founding partner of the prominent Houston, Texas trial litigation boutique Susman Godfrey LLP, has predicted that a consortium of plaintiffs mass-tort lawyers will devise and pursue a major "global warming" lawsuit against corporations in the near future.[34] Susman compared this predicted collaboration to the so-called *Castano* Group of plaintiffs' lawyers that joined forces to craft the theory of tobacco company responsibility for governmental healthcare costs expended to treat citizen's tobacco-related illnesses that ultimately resulted in those companies' landmark $206 billion settlement with state attorneys general.[35] At least some insurers have concluded that this reported activity's potential implications for the Insurance Industry must be taken seriously. Thus, in its *Adapt or Bust* report,[36] Lloyd's of London stated:

> We foresee an increasing possibility of attributing weather-related losses to man-made climate change factors. This opens the possibility of courts assigning liability and compensation for claims of damage. Legal liability is now being actively pursued by several groups of lawyers and scientists who wish to use the same lines of argument as used against tobacco companies. If the courts conclude that damage was reasonably foreseeable then liability could follow, as would the search for "deep pockets" to meet the costs, with insurers a likely port of call.[37]

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[34] Juriaan Kamp, *The Courthouse Effect*, Ode, June 2006, at 29 (hereinafter "*The Courthouse Effect*").

[35] *The Courthouse Effect*, *supra*, at 32-35; *see also* Roberto Ceniceros, *U.N. Climate Report Stirs Liability Fears*, Business Insurance, Feb. 5, 2007, at 1; John Carey & Lorraine Woellert, *Global Warming: Here Come The Lawyers*, BusinessWeek Online (Oct. 30, 2006).

[36] *See supra* n.13.

[37] *Adapt or Bust*, *supra*, at 14.

The *Comer* case, brought on behalf of a putative class of private citizens alleging loss of life or property due to Hurricane Katrina, and the *State of California* action, brought by the State Attorney General in a *parens patriae* capacity on behalf of the citizens, property and natural resources of the State, certainly do not define the universe of such actions. It takes no great stretch of imagination to contemplate inter-corporate litigation in this context such as, for example, a timber company owning vast stands of commercial lodgepole pine in British Columbia recently destroyed by the mountain pine beetle, as plaintiff, against corporate defendants it believes contributed to the climate change eliminating beetle-controlling killing frosts that formerly protected the forests, as detailed in one of the many commentaries reviewed in researching this article.[38]

III. GENERAL LIABILITY COVERAGE CONSIDERATIONS

Corporate demands for insurance coverage under general liability policies for "global warming"-related damages cases are likely to bear at least some superficial resemblance to the types of "long-tail" coverage claims with which general liability insurers have had substantial experience since the 1970s. According to the relevant science, "global warming" is not an instantaneous phenomenon, but rather has developed gradually over time due, at least in part, to corporations' alleged acts or omissions in emitting, or in manufacturing products that emitted, greenhouse gases over many decades. The analogy to "delayed manifestation" problems such as asbestos-related disease and gradual hazardous waste-caused pollution which have been the principal subjects of "long-tail" insurance coverage claims and litigation seems apparent. The two actions reviewed above, as illustrative of the types of tort claims for damages based upon

[38] *See* John Carey, *Business On A Warmer Planet*, BusinessWeek Online (July 17, 2006).

"global warming" that may soon become commonplace, also reflect the potentially broad temporal scope that is likely to characterize these claims.

In *Comer*, the Hurricane Katrina-related action, the plaintiffs' Third Amended Complaint broadly alleged that "[d]efendants emit substantial quantities of . . . 'greenhouse gases,' increasing the concentration of these gases in the Earth's atmosphere"; that "[t]he Earth's climate has 'demonstrably changed' as a result of Defendants' greenhouse gas emissions . . . includ[ing] higher and rapidly increasing air and water temperatures, rapid sea level rise, melting of arctic, Antarctic, and alpine glaciers, more severe droughts, increased El Niño events, and increased weather-related economic losses"; and, that "[p]rior to striking the Mississippi Gulf Coast, Hurricane Katrina had developed into a cyclonic storm of unprecedented strength and destruction, fueled and intensified by the warm waters and warm environmental conditions present in the Atlantic Ocean, Caribbean Sea, and the Gulf of Mexico, all of which were a direct and proximate result of the defendants' greenhouse gas emissions."[39] No temporal parameters on defendants' alleged emitting activities were expressly alleged; however, the pleading invoked the 2001 IPCC Report's finding, attributing the rapid increase in global warming principally to human activities "over the last 50 years."[40] If the IPCC's conclusion in 2001, implicating human activities *dating from 1951*, can reasonably be viewed as a surrogate for specific allegations in the Complaint as to the time frame within which the corporate defendants' offending acts or omissions took place, the "long-tail" potential of resulting insurance coverage claims becomes clear.

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[39] *Comer, supra*, Third Amended Complaint, ¶¶ 3, 5 and 15 at 7-11.

[40] *Id.*, ¶ 5 at 8 & n.1.

The *State of California* action against the automobile manufacturers had comparable "long-tail" potential. As in *Comer*, the State's Complaint advanced broad allegations linking past, present and on-going greenhouse gas emissions from the defendants' motor vehicles to global warming, unbounded by any specific temporal parameters, but subject to references to the IPCC Report's findings.[41] For the domestic carmakers -- Ford, Chrysler and GM -- the Complaint thus could plausibly be construed to implicate their manufacturing activities dating back to at least 1951, with more recent liability-inception dates for Honda, Nissan and Toyota, presumably tied to when each of these respective foreign companies began importing vehicles to the U.S. market. Each defendant's liability policies that might have been called upon to provide coverage would presumptively span the same time periods.

As regards the trigger of coverage -- a critically-important threshold issue in any general liability coverage inquiry -- apparent similarities between putative "global warming" claims and familiar types of "long-tail" coverage claims exist, but should not be overstated. For example, while the plaintiffs in *Comer* attempted to establish, by their allegations, a causal chain from: (i) the defendants' continuing greenhouse gas emissions; to (ii) the progressive worsening of "global warming"; to (iii) creation of the climatic conditions allowing a storm such as Hurricane Katrina to develop; to (iv) their injuries and damage resulting from the storm itself, it is far from clear that for purposes of trigger-of-coverage analysis, anything but the injury- or damage-causing storm itself is relevant. Certainly a strong argument could be made, on the facts as alleged, that to the extent coverage were available at all, only policies in effect during the approximately two-week period from Katrina's initial formation as a tropical depression in the Atlantic Ocean through the date of its Gulf Coast landfall as a Category IV hurricane would be

[41] *State of California ex rel Lockyer v. General Motors Corp.*, *supra*, Complaint, ¶¶ 20-21, 24 at 5-6.

triggered. There was simply no contention in *Comer* that "global warming" *in and of itself* caused the loss of life or other bodily injuries, or the damage to property, for which the plaintiffs sought damages; instead, under plaintiffs' own theory, "global warming" at most established *the conditions* under which a storm the size and strength of Katrina could be formed. Thus, triggering any coverage on the basis of the time period in which the defendants' alleged acts or omissions merely contributed to "global warming" would appear to lack factual or legal foundation. An arguably different analysis, and a potentially different trigger outcome, might apply to the *State of California* action, in which "global warming" was more directly targeted by the allegations in the Complaint as the specific cause of the harms to the State and its property and resources for which damages were sought, and the alleged harms themselves were of a gradual and progressive, rather than instantaneous, nature. However, the timing and character of each category of alleged injury or damage would require careful examination in this regard.

Beyond the complexities presented by the threshold trigger issue merely sketched above, insurers can reasonably expect to be confronted with a panoply of additional complex coverage issues analogous to those they have addressed in the context of "long tail" claims, such as:

- Especially where "global warming" claims against corporate policyholders implicate those companies' activities dating back as far as the1950s, it can easily be foreseen that, as a threshold matter, resulting coverage claims will likely raise substantial questions with respect to the existence and/or terms and conditions of lost policies and the standard of proof that will govern such issues;

- Complex choice-of-law analyses will almost certainly be required, given the multijurisdictional nature of both the insureds' alleged acts or omissions and the geographic scope of the resulting "global" harms;

- Do the policyholder's greenhouse gas-emitting activities, or manufacture of emission-generating products, constitute an "occurrence" (where the activities and/or the allegedly resulting injury or damage were "accidental"), or was the injury or damage "expected" or "intended" from the policyholder's standpoint and therefore not covered? The plaintiffs' pleadings in the *Comer* and *State of California* actions are replete with assertions that the corporate defendants in each case, despite their awareness of warnings concerning the increasingly clear

linkage between greenhouse gas emissions and worsening climate change, *knowingly and intentionally* continued to engage in activities that caused such emissions and/or continued to manufacture emissions-generating products.[42]

- Do the harms upon which the "global warming" claims for damages against the policyholder are based constitute "bodily injury" or "property damage", as contemplated by the provisions of the policy? While the prospect of actions premised upon actual "bodily injury" or "property damage" allegedly attributable to the impacts of global warming is certainly plausible -- the timber company lawsuit for destruction of its lodgepole pine stands hypothesized above is an example -- some lawsuits of this nature may instead be premised upon harm that constitutes pure "economic loss" for which, under the settled law of most jurisdictions, general liability policies do not provide coverage.[43]

- Alternatively, are the "global warming" claims for damages against the policyholder for which coverage is sought based upon "personal injury", as contemplated by the provisions of the policy? Mirroring insurers' past experience in addressing policyholder demands for coverage of environmental contamination claims, some insureds will likely contend that "global warming" claims for damages asserted against them, particularly those of individual claimants premised upon a "private nuisance" theory, implicate the enumerated offense of "wrongful entry or eviction or other invasion of the right of private occupancy" under the "Personal Injury" provisions of some general liability policies. [44]

- Were there facts and circumstances relating to the alleged causal connection between the policyholder's acts or omissions and the emergence and/or exacerbation of "global warming" brought to the policyholder's attention before

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[42] *See, e.g., Comer, supra*, Third Amended Complaint, ¶ 11 at 10 ("Despite warnings from scientists and governmental agencies about the adverse effects of their activities on the environment in general and global warming in particular, the Defendants have knowingly and willfully continued to engage in the activities which cause Global Warming."); *State of California, supra*, Complaint, ¶¶ 58, 61 at 12-13. Allegations of this character will almost certainly provoke the assertion by insurers of "expected or intended" defenses under the "occurrence" provisions in their policies and, depending on the timing of the policies, common-law "known loss" or "loss-in-progress" defenses as well.

[43] One commentator theorized a lawsuit brought by the owner of a ski resort against greenhouse gas emitters, asserting that global warming has resulted in a diminution of natural snowfall levels resulting in the resort's loss of business. That type of action would not rest upon allegations of "physical injury" to the ski resort owner's property or "loss of use" thereof, but rather upon diminished business opportunities and/or profit levels. Insurers would contend that this claim fits squarely within the parameters of the "economic loss" doctrine, and that general liability coverage would be barred accordingly. *See generally* 2 Allan D. Windt, *Insurance Claims and Disputes* § 11:1 at 274 & n.9 (4th ed. 2001 & 2006 Supp.) (collecting authorities).

[44] *Cf. Titan Holdings Syndicate, Inc. v. City of Keene*, 898 F.2d 265, 272 (1st Cir. 1990); *Martin Marietta Corp. v. Insurance Co. of North America*, 40 Cal. App. 4th 1113, 1131-34, 47 Cal. Rptr. 2d 670, 681-83 (2d Dist. 1995).

the time when the third-party claim for damages was asserted, such that the policyholder's "notice of occurrence" obligation under the policy might have accrued long before notice was actually provided to the insurers?

- Do any policy exclusions preclude a coverage obligation for "global warming" claims, either in whole or in part? To the extent any exclusion is "in play", is its applicability sufficiently clear that coverage can be disclaimed outright, or does uncertainty dictate the insurer's assumption of the duty to defend, subject to a reservation of rights? Given that the fundamental premise of damages claims based on "global warming" is that the corporate defendants have intentionally engaged in activities causing, directly or indirectly, the emission of greenhouse gases into the atmosphere over extended periods of time, coverage may well be foreclosed by operation of the qualified (*i.e.*, "sudden and accidental") pollution exclusions incorporated in general liability policies beginning in 1972 -- especially in those jurisdictions in which the law establishes that "sudden" has a temporal connotation -- as well as by the "absolute" (or "total") pollution exclusions employed by the Insurance Industry in policies issued beginning in 1985.[45]

- Finally, assuming no categorical impediments to coverage, what is its scope -- *i.e.*, is there an applicable aggregate limit of liability and, if not, do the underlying allegations against the policyholder comprising the "global warming" claim implicate one or multiple "per occurrence" limits of liability? Moreover, what principles -- if any -- govern the allocation of insurance coverage if policies issued by multiple insurers are triggered?

The range of complex and potentially serious coverage issues that general liability insurers may become obligated to address, to the extent lawsuits analogous to the *Comer* and *State of California* actions proliferate, does not necessarily suggest that catastrophic indemnity exposure for general liability insurers is looming on the horizon. Based on what is currently known, the opposite inference may well be more likely justified. At present, it appears that

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[45] If the Supreme Court had expressly affirmed the decision of the D.C. Circuit on the proposition, advocated by EPA, that CO_2 and other automobile-emitted greenhouse bases were not "pollutants" within the contemplation of the Clean Air Act, policyholders would have argued that such a holding cut against insurers' efforts to rely on their pollution exclusions as an absolute bar to coverage for "global warming" claims for damages. *See generally* Sally Roberts, *Cover May Hinge On Status of Carbon Dioxide as Pollutant*, Business Insurance, Aug. 14, 2006, at 28. However, the Supreme Court's majority decision concluded otherwise and confirms that greenhouse gas emissions from automobiles are, as a matter of law, "air pollutants". *See* 549 U.S. __, 127 S. Ct. at 1459-62. This holding would seem to clearly enhance insurers' leverage in arguing that their pollution exclusions should categorically bar liability coverage for "global warming" claims.

plaintiffs in "global warming"-related actions (existing or putative) against corporations for damages face a truly daunting task in establishing any entitlement to obtain relief. It seeks likely that many courts will simply refuse to recognize and wrestle with these claims at all, finding, as did the federal district courts in *State of Connecticut*, *Comer* and *State of California*, that these claims are so inextricably intertwined with matters of domestic and international environmental policy that they present non-justiciable "political questions", and thus dismiss the cases accordingly, often at the pleadings stage.

Even assuming that the cases survive threshold challenges premised upon lack of standing, "non-justiciability" and the like, the hurdles posed by the burden of proof upon the plaintiffs with respect to *causation* may well be too high to clear; at a minimum, the claimant's inability to establish a "proximate cause" relationship between a particular corporate policyholder's acts or omissions allegedly contributing to "global warming" and the specific "global warming"-related injury or damage for which the claimant seeks to be compensated will signal the death knell for many -- if not most or all -- of these cases at the summary judgment stage of the proceedings. In this regard, even though Senior Judge Senter of the Mississippi federal district court permitted the plaintiffs to amend their pleadings for a third time in the *Comer* litigation, prior to the subsequent dismissal of the case, he was constrained to comment on the steeply uphill nature of the plaintiffs' ultimate battle:

> Without in any way expressing an opinion on the merits of the plaintiffs' claims against these defendants, I will observe that there exists a sharp difference of opinion in the scientific community concerning the causes of global warming, and I foresee daunting evidentiary problems for anyone who undertakes to prove, by a preponderance of the evidence, the degree to which global warming is caused by the emission of greenhouse gases; the degree to which the actions of any individual oil company, any individual chemical company, or the collective action of these corporations contribute, through the emission of greenhouse gases, to global warming; and the extent to which the emission of greenhouse gases by

> these defendants through the phenomenon of global warming, intensified or otherwise affected the weather system that produced Hurricane Katrina.[46]

The causation burden for the plaintiff in the *State of California* action may have been even weightier than that confronting the Mississippi homeowner plaintiffs in *Comer*. The State, if the case had been permitted to go forward, would have had to establish that the automaker defendants -- which are not direct emitters of greenhouse gases themselves, but rather are the manufacturers of socially-useful but emissions-generating products which are placed into the stream of commerce and purchased by or leased to intervening parties, *i.e.*, *drivers*, who effectively control the nature and extent of the use of the products and thus the volume of their emissions -- were nevertheless not only responsible for causing or exacerbating "global warming", but legally responsible for global warming's causation of the injuries and damage to the State's people, property and natural resources for which money damages were sought. Even if the contribution of automobile emissions to harmful "global warming" is *presumed* for these purposes, attributing liability to any individual automaker or to the automakers collectively under these circumstances would be no easy task -- indeed, we strongly suspect this objective would prove unattainable under current notions of tort liability.[47]

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[46] *Comer*, 2006 WL 1066645 at *4; *see generally* Congressional Research Service, *Global Warming: The Litigation Heats Up* at 19 (updated April 3, 2006) ("Causation, of course, is not only a component of the threshold standing test but a component of the plaintiff's case on the merits. No relief under [Clean Air Act] section 202, the federal common law of nuisance, NEPA, or international law will be forthcoming unless the science is there to link together the challenged acts of the [greenhouse gas] emitter with the alleged harms to the complainant. . . . .[¶] In either the standing or case-in-chief contexts, the global warming issues before the courts reprise a common problem in environmental law: imposing liability for harms that are remote in time and place from the pollution sought to be abated, particularly where the pollution comes from multiple sources." (Footnotes omitted.)), *available at* http://ncseonline.org/NLE/CRSreports/06Apr/RL32764.pdf (last visited Oct. 19, 2006).

[47] From the standpoint of the degree of difficulty "global warming" claims pose to plaintiffs attempting to tie a specific defendant into the causation of an environmental condition to which that defendant's entire industry has contributed, the cases might be analogized to the lead paint liability actions in which, due to the "generic" nature of the injury-causing product itself, the passage of time, and other factors, individual claimants have been unable to offer definitive proof

For all of these reasons (and likely a host of others not even touched upon here), it is not, in our view, the ultimate financial impact of the duty to indemnify under general liability policies that ought to most concern insurers with respect to the specter of "global-warming"-related coverage claims. That said, a note of caution is in order. There was almost certainly a time, in the nascent stages of the earlier generations of tort litigation premised upon allegations of mass injury or damage caused by substances such as asbestos, hazardous wastes, tobacco, and the like, when prognosticators confidently opined that such claims were contrived, implausible, and doomed to fail in relatively short order. Yet, history has a way of repeating itself, and determined, creative plaintiffs' lawyers have time and again demonstrated their capacity to refine their causation theories and liability themes to a point where the claims seem progressively less outlandish and more within the realm of acceptability to a once-skeptical public and judiciary. Corporate defendants and their insurers have been down this road too many times to dismiss "global warming"-related tort claims as unlikely to ever gain "traction" in the U.S. courts.

Nevertheless, for the reasons stated, the immediate problem we foresee for general liability insurers is not the duty to indemnify but *the duty to defend*. Recent history is replete with examples of categories of underlying third-party liability claims that were never any real threat to insurers' policy limits of liability from an indemnification standpoint, but which threatened massive defense obligations. That is precisely the concern that may presented by putative "global warming" claims which, based on current science, can almost certainly be pled

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as to which specific paint manufacturer was responsible for the particular paint that injured the claimant and/or his or her child. Although tort doctrines such as "market share" liability (or "enterprise" liability) have emerged as an alternative to strict requirements with respect to the establishment of "proximate cause" in order to respond to such situations -- *see generally Skipworth v. Lead Industries Ass'n, Inc.*, 690 A.2d 169, 171-72, (Pa. 1997), *citing Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, 607 P.2d 924, *cert. denied*, 449 U.S. 912 (1980) (describing doctrine) -- courts have been extremely reluctant to broaden the application of these doctrines beyond specific narrow circumstances (*see id.* at 172-73), and there is no basis to presume that "global warming" claims will be held to come within their scope.

in such a way as to evade characterization as “frivolous” or dismissal on threshold motions for “failure to state a claim.” Moreover, these claims can be accompanied by demands for damages of sufficient magnitude that they must be vigorously defended by corporate policyholders and their high-priced defense attorneys, even if the prospect of ultimate liability appears remote.

It is with these concerns in mind that we must urge general liability insurers to watch the emerging trend of claims for damages against corporations for their alleged contributions to the phenomenon of “global warming” closely, to begin thinking now about strategies for responding to and/or defending against those corporate policyholders’ demands for coverage, and to prepare for the eventuality that substantial defense costs may have to be incurred, even though the potential for substantial indemnification obligations under their respective policies appears unlikely.

CONCLUSION

While all three principles -- the existence of “global warming”; the extent to which the phenomenon, if it exists, is a product of human activities; and the extent to which extreme natural catastrophes are attributable to the phenomenon -- may remain subject to serious analysis and debate in some circles, they are no longer open questions insofar as general public perception is concerned. The quest to fix blame and impose liability for the consequences of “global warming”, principally upon corporate actors who are perceived, rightly or wrongly, as the main villains in regard to their degree of responsibility for greenhouse gas emissions, has begun and appears likely to intensify in the immediate future. Corporations and their general liability insurers must heed the warning signs and prepare accordingly.