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INSURANCE COVERAGE FOR GLOBAL WARMING LITIGATION

By Kirk A. Pasich
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I. INTRODUCTION[1]

Global warming is a subject of growing public concern, as indicated by increasing media attention and the more formal consideration the issue is receiving in a wide variety of forums.[2] For example, the United States Supreme Court addressed the issue in its decision in *Massachusetts v. Environmental Protection Agency* (*Massachusetts*), 127 S. Ct. 1438 (2007). Climate change is also the subject of 300 bills now pending in 40 different state legislatures and a dozen bills that are before Congress.[3] In 2007, 53 countries lined up to debate climate change before the United Nations Security Council.[4] And, climate change is the subject of several lawsuits in which the plaintiffs seek to impose liability upon companies that they allege are responsible for substantial contributions to the increased carbon dioxide levels in the Earth's atmosphere.

The Supreme Court set forth the fundamental issue regarding global warming at the outset of its opinion in *Massachusetts*, as follows: "A well-documented rise in global temperatures has coincided with a significant increase in the concentration of carbon dioxide in the atmosphere. Respected scientists believe the two trends are related. For when carbon dioxide is released into

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[1] Because of the many variations in policy language, this white paper 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. This white paper may be considered advertising in some states.

[2] Global warming and its implications have been discussed in the press with greater frequency. Both *Time* and *Newsweek* devoted substantial portions of their weekly news magazines to numerous separate articles on the climate change, such as *Time*, Apr. 9, 2007. *The New Yorker* discussed the implications of growing levels of carbon dioxide and its absorption by the oceans. As more carbon dioxide is dissolved into the oceans, among other things, formation of shells and coral reefs becomes more difficult and eventually ceases, so that coral reefs may disappear. Control of emissions is not advocated by some of the article's contributors; instead, complete cessation of carbon releases is supposedly required to head off disruption of the oceans' delicate chemical balance. Elizabeth Kolbert, *Annals of Science: The Darkening Sea, What Carbon Emissions Are Doing to the Ocean*, New Yorker, Nov. 20, 2006, at 66. Global warming also has entered popular culture as the source of pending doom or, conversely, a conspiratorial hoax. In the 2004 Twentieth Century Fox movie, *The Day After Tomorrow*, Los Angeles and New York are destroyed by natural phenomena linked to global warming. In the same year, Michael Crichton's book, *State of Fear* (Harper Collins 2004), pointed to global warming concerns as nothing more than the product of a wide-ranging conspiracy among certain environmentalists.

[3] Karen Breslau, *Schwarzenegger's Crusade*, Newsweek, Apr. 16, 2007, at 55-56 ("Altogether, more than 300 bills related to climate change are pending in 40 different states, and more than a dozen bills are before Congress, raising the specter of a regulatory patchwork quilt that would be a nightmare for businesses").

[4] Darren Samuelsohn, *Climate: 53 Nations Set to Speak as U.N. Council Begins Historic Debate*, Greenwire, Apr. 17, 2007 ("The United Nations Security Council opened a historic debate this morning on the threats posed by global warming, with world leaders discussing the prospects of new wars, water and food shortages and a mass shift in human population all caused by changing climate.").

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the atmosphere, it acts like the ceiling of a greenhouse, trapping solar energy and retarding the escape of reflected heat. It is therefore a species—the most important species—of a 'greenhouse gas.'" 127 S. Ct. at 1447. Petitioners in *Massachusetts* called global warming, "the most pressing environmental challenge of our time." *Id.*

Much of the debate, such as the Supreme Court's decision in *Massachusetts*, centers upon imposing carbon dioxide emission limitations on future fossil fuel use. The Supreme Court found that the Environmental Protection Agency (EPA) is required to engage in rulemaking regarding carbon dioxide emission controls on new automobiles, rejecting EPA's various equivocations. Similarly, American politicians are considering legislation that seeks to control future greenhouse gas emissions (California has already passed such legislation).[5] Former Vice President Al Gore also testified before Congress, calling climate change "a true planetary emergency," and advocating an immediate carbon dioxide emission freeze, with emissions reduced by 90 percent by 2050.[6]

II. THE INSURANCE INDUSTRY IS PREPARING FOR GLOBAL WARMING'S ADVERSE CONSEQUENCES, INCLUDING LIABILITY LITIGATION

Although the issue of global warming liability is only now showing up in the courts, the insurance industry has been sensitive to the potential financial effects that are posed by global warming. Even a brief foray onto the Internet shows how the insurance industry is at the focal point of considerations regarding global warming, from calculating exposure for natural disasters to potential liability for litigation against companies and their directors and officers. Indeed, it has been reported that as early as 1973, insurers like Munich Re first publicly flagged the issue of global warming. *See* Paul D. Thacker, *The Insurance Industry Prepares for Climate Change: Interview with Evan Mills*, Envtl. Sci. & Tech., Apr. 19, 2006, available at http://pubs.acs.org/subscribe/journals/esthag-w/2006/apr/business/pt_insurance.html (hereinafter "Thacker").

For example, EPA's website makes specific reference to the growing risks presented by global warming for the insurance industry as follows:

> While the effects of climate change will impact every segment of the business community, the insurance industry is especially at risk. Extreme weather events of the past several years have—in addition to their human toll—caused tens of billions of dollars in losses for insurers. Given development and population trends in

[5] California Assembly Bill 32 (the "Global Warming Solutions Act") requires, among other things, California global warming emissions to be reduced by 2020 to 1990 levels.

[6] *Perspectives on Climate Change*, Hearing Before the Subcomm. on Energy and Air Quality of the H. Comm. on Energy and Commerce and the Subcomm. on Energy and the Environment of the H. Comm. on Science and Technology, 110th Cong. 9 (2007), (testimony of Al Gore, Former Vice President of the United States.)

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> high-risk areas, potential future impacts of global warming—such as sea level rise and increased storm activity and severity—could prove far more costly.
>
> - There were *four times as many natural catastrophes* in the 1990s as there were three decades ago.
> - Insured *losses from natural disasters* are 15 times higher today than they were in the 1960s, even after adjusting for inflation.
> - The total dollars paid out in *natural disaster-related claims* since 1990 is 50 percent greater than the losses incurred over the past 40 years combined.
> - People are moving to places like Florida at the rate of 1,000 per day, substantially increasing the *value of the property* in these high-risk areas.

Global Warming Actions: Insurance Industry, http://yosemite.epa.gov/oar/globalwarming.nsf/content/ActionsIndustryInsurance.html (last visited Mar. 27, 2008). Another website points to Swiss Re as one of the leaders among insurers in studying and anticipating the problems that may result from global warming:

> As a company that provides insurance to the insurance industry, Swiss Re is the "canary in the mine shaft with regards to climate change" because it does long-term risk analysis, said Chris Walker, managing director and head of sustainable business development at Swiss Re.
>
> "We do believe the climate is truly changing and that it could potentially disrupt how we do business, which is based on a predictive model," said Walker.

Martin LaMonica, *Smart Money Eyes Climate Change*, CNETNews.com, July 10, 2006, http://www.news.com/Smart-money-eyes-climate-change/2100-11746_3-6091772.html.

The risks lie not only in future storms or greater property damage risks. The insurance industry is also anticipating future liability for its insureds for their past greenhouse gas contributions. "Like health issues related to asbestos and tobacco did in the past, climate change could lead to lawsuits. Such litigation could target companies that either contribute to global warming or did not take sufficient steps to address regulations . . . ." *Id*. at http://www.news.com/Smart-money-eyes-climate-change---page-2/2100-11746_3-6091772-2.html?tag=st.num.

Evan Mills, a staff scientist at the U.S. Department of Energy's Lawrence Berkeley National Laboratory, who is often quoted for his analysis of the impact of global warming on the insurance industry and the ability to prepare for the impending change in risks, has cited the

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growing risk of global warming litigation as among the financial risks faced by the industry. *See* Thacker, available at http://pubs.acs.org/subscribe/journals/esthag-w/2006/apr/business/pt_insurance.html.

As far back as 2003, Swiss Re began distributing questionnaires to insureds to survey their global warming contributions and their preparedness. The *Wall Street Journal* reported that "Swiss Re is considering denying coverage, starting with directors-and-officers liability policies, to companies it decides aren't doing enough to reduce their output" of 'so-called greenhouse gases' linked to global warming. Jeffrey Ball, *Global Warming May Cloud Directors' Liability Coverage*, Wall St. J., May 7, 2003. The same article points to liability imposed on companies for their global warming gases contribution as one of the largest upcoming possibilities of liability for directors and officers. *Id*.

If, in fact, global warming becomes a major focus of liability litigation, the insurance industry's response may well be to vigorously fight liability regarding past policies and to rewrite future policies' scope of coverage with additional exclusions. The risks for global warming potentially dwarf the risks presented by earlier asbestos and environmental claims. The insurance industry's resistance to liability for these prior, large, "long-tail' liability exposures led to some of the most expensive litigation efforts ever. *See MacKinnon v. Truck Ins. Exch.*, 31 Cal. 4th 635, 644 (2003) ("*MacKinnon*") (describing litigation regarding meaning of "sudden and accidental" as part of early pollution exclusion as one of most expensive elements of litigation in the 1980s, and noting the insurance industry's drafting of more-restrictive pollution exclusions to avoid liability under future policies).

Fortunately, the prior coverage battles helped to develop insurance coverage law so that many issues that were initially uncertain for asbestos and environmental claims are now established matters of coverage law. Indeed, as the below mere summary indicates, there appear to be substantial insurance resources for companies to call upon, particularly regarding their initial need to fund their defense costs against any global warming liability claims.

III. INSURANCE COVERAGE FOR GLOBAL WARMING LIABILITY CLAIMS

A. CGL Policies

1. Broad "Occurrence" Coverage for Bodily Injury and Property Damage

Insureds should examine their historical and current comprehensive and commercial general liability (CGL) policies. Under CGL policies since at least 1966, the policies provide property damage and bodily injury coverage caused by an "occurrence." "Occurrence" is typically defined to be "an accident, including continuous and repeated exposure to substantially the same

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general harmful conditions." *See, e.g.*, Commercial General Liability Coverage Form, section I, Coverage A, Para. 1.b(1) & (2). Continuing releases of carbon dioxide that lead to rising temperatures could be considered an "occurrence."

In addition to identifying an occurrence, CGL policies typically require that there be property damage or bodily injury during the policy period to trigger coverage for that policy. *See Montrose Chem. Corp. v. Admiral Ins. Co.*, 10 Cal. 4th 645, 669-70 (1995). More than one policy can be triggered, because California applies what is called an "injury in fact" trigger of coverage for environmental contamination. *Id.* at 689 (all liability insurance policies' coverage for bodily injury or property damage is triggered for periods in which continuous or progressive bodily injury or property damage develops). "Where . . . successive CGL policy periods are implicated, bodily injury and property damage which is continuous or progressively deteriorating throughout several policy periods is potentially covered by all policies in effect during those periods." *Id.*

Arguably, the global warming injury is a continuous and progressive injury for which coverage for every policy period in which carbon dioxide buildup and resulting temperature change occurred will be triggered. Indeed, the global warming litigation today typically alleges that there is substantial impact on property as part of a process that began decades ago. And, there are suggestions that weather patterns—including the historic 2005 hurricane season (e.g., Hurricanes Katrina, Rita, and Wilma)—and their resulting damage are a direct result of a continuous multi-year process.

Courts have recognized that it is when injury occurs—even if not recognized as such at the time—not when legal liability results, that determines coverage. *See, e.g.*, *Armstrong World Indus., Inc. v. Aetna Cas. & Sur. Co.*, 45 Cal. App. 4th 1, 94, 96 (1996). Thus, many years of liability policies may apply.

Furthermore, current (or future) policies may apply when damage or injury (such as that caused by hurricanes) takes place in their policies' periods and results in litigation.

2. Personal Injury Coverage

Some of the pending lawsuits focus on public nuisance as the theory of recovery. These lawsuits may be covered under the "personal injury" provisions that have been found in CGL policies since 1966. "Personal injury" coverage began to be issued on a uniform basis in CGL policies starting in about 1966. *See* Donald F. Farbstein & Francis J. Stillman, *Insurance for the Commission of Intentional Torts*, 20 Hastings L.J. 1219 (1969) (hereinafter "Farbstein & Stillman").

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There are significant differences between personal injury coverage and the coverage afforded for bodily injury or property damage. To begin with, "personal injury," in the context of insurance, "is a term of art that describes coverage for certain enumerated offenses that are spelled out in the policy." *Atl. Mut. Ins. Co. v. J. Lamb, Inc.*, 100 Cal. App. 4th 1017, 1032 (2002) ("*Atlantic Mutual*"); *see also Gen. Accident Ins. Co. v. W. Am. Ins. Co.*, 42 Cal. App. 4th 95, 103 (1996) ("*General Accident*") ("'[T]he term personal [in personal injury] is used in a highly specialized sense. It does not mean physical damage to a person; rather, it means injury arising out of one or more specified offenses.'") (alterations in original) (citation omitted).

Unlike bodily injury or property damage coverage, the key to determining the applicability of personal injury coverage "is not . . . the nature of the damages sought in the action against the insured, but . . . *the nature of the claims* made against the insured in that action." *Atlantic Mutual*, 100 Cal. App. 4th at 1032. The particular personal injury "offenses" that may afford coverage for global warming liability claims like those asserted by California against the automakers is coverage first found in policies starting in 1966 for "wrongful entry or eviction, or other invasion of the right of private occupancy." *General Accident*, 42 Cal. App. 4th at 103. Subsequently, in the 1986 version of the coverage, the provision was modified to read "wrongful entry into, or eviction of a person from, a room, dwelling or premises that the person occupies." *Id.* at 104.[7]

Wrongful entry or violation of occupancy coverage applies to rights applicable to real property interests. *See Nichols v. Great Am. Ins. Cos.*, 169 Cal. App. 3d 766, 775-76 (1985) ("[T]he 'personal injury' contemplated by the business liability policies was the 'wrongful entry, eviction or other invasion of the right to private occupancy' relating to some interest in real property."). Nuisance claims, including public nuisance claims, are torts that relate to the interference with real property rights. *See, e.g.*, Cal. Civ. Code § 3479 (defining "nuisance" in part to be "an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property").

The personal injury language initially selected by the insurance industry clearly was anticipated by the industry to broadly cover nuisance and trespass claims when first adopted by the insurance industry. Farbstein & Stillman at 1241 n.96 (coverage for nuisance and trespass claims is like coverage for claims based on "obnoxious fumes"). The fact that neither nuisance nor trespass is expressly listed among the enumerated offenses does not prevent coverage for such claims. To the contrary, in California, the language of the generic enumerated personal injury offenses must be broadly construed "to encompass all specific torts which reasonably could fall within the general category." *Fibreboard Corp. v. Hartford Accident & Indem. Co.*, 16 Cal. App. 4th 492, 515 (1993) ("*Fibreboard*").

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[7] Even more recent policies revised this language so that it may limit the coverage to landlord-tenant disputes. However, the broader initial wording of "personal injury" coverage was in force for decades of policies and still is found in variations in many current policies.

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Applying this principle of broad interpretation, California courts have specifically found that "personal injury coverage" applies to claims sounding in trespass and nuisance. *See Martin Marietta Corp. v. Ins. Co. of N. Am.*, 40 Cal. App. 4th 1113 (1995) ("*Martin Marietta*"). More specifically, the court in *Martin Marietta* found that coverage for personal injury is dictated not by the damages sought, but the nature of the claim asserted, such as trespass or nuisance. *Id.* at 1125. The court found that insureds reasonably expect that coverage for wrongful entry and eviction or other invasions of the right of private occupancy includes coverage for trespass and nuisance claims. *Id.* at 1132 (the enumerated torts of wrongful entry, eviction, or other invasion of the right of private occupancy must be broadly construed to include all claims that fit within a generic category).

In particular, the *Martin Marietta* court found that "'[i]nvasion of the right of private occupancy' resembles the definition of nuisance, an "'interference with the interest in the private use and enjoyment of the land.""' *Id*. at 1134 (citations omitted). The court determined that the term is susceptible to multiple interpretations and, therefore, must be interpreted against the insurer to include a broad array of potential liability. *Id.* at 1131-32. The court further applied this coverage to statutory claims for environmental contamination.

A physical invasion or even a non-invasive form of interference with the enjoyment of property can fall within coverage for "other invasion of the right of private occupancy." *General Accident*, 42 Cal. App. 4th at 103-04; *see also Hirschberg v. Lumbermens Mut. Cas.*, 798 F. Supp. 600, 604 (N.D. Cal. 1992) ("'invasion of the right of private occupancy'" provides coverage for "'interference with possession and enjoyment'" (quoting Farbstein & Stillman at 1241 n.96)).

Additionally, the distinction between "occurrence" and "offense" coverage can be important when considering allegations of expected or intentional conduct, such as the assertion in some lawsuits that the automakers "knew" that carbon dioxide is an expected byproduct of an internal combustion engine's use of fossil fuel. Offense coverage for personal injury extends coverage to claims of nuisance, even if characterized as an intentional tort. *See* Farbstein & Stillman at 1239 (one of the most important aspects of the standard form personal injury endorsement is "the absence of any requirement that the loss be caused by an occurrence"); *General Accident*, 42 Cal. App. 4th at 103 ("Unlike liability coverage for property damage or bodily injury, personal injury coverage is not based on an accidental occurrence."). The *Atlantic Mutual* court put it directly when it stated, "even an *intentional* tort . . . may be covered." 100 Cal. App. 4th at 1032. Various insurance publications and commentaries recognize that personal injury provisions cover intentional conduct. *See, e.g.*, Robert Mehr, Emerson Cammack & Terry Rose, *Principles of Insurance* 310 (8th ed. 1983) ("Personal injury liability coverage . . . covers claims alleging intentional torts"); Farbstein & Stillman at 1239-40 ("The language [of the personal injury endorsement] is also sufficiently broad to extend coverage to liability for punitive damages and, in some cases, to harm inflicted intentionally by the insured. There is no effort to provide for a

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general exclusion of such harm . . . . The personal injury endorsement . . . [attempts] to furnish coverage under some circumstances for harm inflicted intentionally by the insured."); Jack P. Gibson & Maureen C. McLendon, Commercial Liability Insurance V.L. 27 (May 1990) ("the CGL policy's personal injury coverage insures liability arising from variety of intentional torts").

For there to be personal injury coverage, however, there does not need to be an intentional invasion of another's property right with an intent to cause dispossession. *See Pipefitters Welfare Educ. Fund v. Westchester Fire Ins. Co.*, 976 F.2d 1037 (7th Cir. 1992) ("*Pipefitters*") (wrongful entry does not require an intent to dispossess); *Blackhawk – Central City Sanitation Dist. v. Am. Guar. & Liab. Ins. Co.*, 856 F. Supp. 584, 590 (D. Colo. 1994) (coverage extends to private and public nuisance and there does not need to be an intent to dispossess for there to be coverage). Nor must the invasion involve the use or threat of force to dispossess. *Fibreboard*, 16 Cal. App. 4th at 511-12.[8]

Which policy period is triggered is also calculated differently when considering personal injury coverage. "Offense" coverage is triggered by the wrongful act taking place during the policy period, not the resulting injury taking place during the policy period. Personal injury insurance covers "offenses committed" during the policy period even if the injury or damage takes place later. *See Am. Cyanamid Co. v. Am. Home Assurance Co.*, 30 Cal. App. 4th 969, 981-82 (1994).

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[8] In *Fibreboard*, however, the court found there had not been any wrongful entry or eviction regarding product liability claims arising out of the sale and installation of asbestos in buildings. The court reasoned that there had not been a trespass due to the voluntary incorporation of the asbestos into the property.

> [The insured] may be liable for many wrongs, but they did not commit a trespass by selling a bad product. That the product ends up on a person's land and is intended to be used on the land does not change the picture. All products end up in a physical location that is owned by someone. If they are defective and cause harm, the manufacturer will be liable under a variety of products liability theories but not for a wrongful entry or invasion upon the land.

16 Cal. App. 4th at 512. The global warming situation arguably is far different. The California action does not involve automobile owners alleging injury to their own land. Rather, it is the use of the automakers' products that is creating an alleged nuisance worldwide, affecting all landowners generally, and more specifically, the state of California's land.

There have been a number of decisions about personal injury coverage. While some courts from around the country have taken a restrictive view of the scope of coverage, other courts have given the provision an extremely broad meaning, often via a conclusion that the provision is ambiguous. For example, in *New Castle County v. National Union Fire Insurance Co*., 243 F.3d 744 (3d Cir. 2001) (applying Delaware law), the court extended coverage under a commercial general liability policy that it found to be ambiguous so as to cover claims that the county's zoning and permitting decisions, denying a permit to develop one tract of land and rezoning the other, had violated the owner's due process and equal protection rights. In *Great American Insurance Co. v. Helwig*, 419 F. Supp. 2d 1017 (N.D. Ill. 2006), the court found that contamination claims were not excluded by the pollution exclusion. The court, however, did not find there to be coverage for certain claims for public nuisance in which no damages were sought.

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Thus, emission of the carbon dioxide would arguably be the triggering offense for successive policies even if the global warming occurs later.

Personal injury coverage for "offenses" also provides coverage throughout the period of potential nuisance or trespass. In the context of contamination, a "continuing trespass" or a "continuing nuisance" may be deemed to take place from the first contamination by a hazardous substance through abatement. *See Mangini v. Aerojet-General Corp.*, 230 Cal. App. 3d 1125, 1147 (1991) ("We note plaintiffs' land may be subject to a continuing nuisance even though defendant's offensive conduct ended years ago. That is because the 'continuing' nature of the nuisance refers to the continuing damage caused by the offensive condition, not to the acts causing the offensive condition to occur.").[9] An "offense" for coverage purposes should be deemed to be taking place as long as the offending substance or action is alleged to be present. This could result in coverage being the trigger in multiple policy periods.

The fact that some lawsuits have been, or may be, brought by states or other public entities does not preclude coverage. The term "person" includes artificial entities like the government or state. *See* Cal. Evid. Code § 175 ("'Person' includes a natural person, firm, . . . , or public entity."); 28 U.S.C. § 3002(10) ("'Person' includes a natural person . . . , a corporation, a partnership, an unincorporated association, . . . or any other public or private entity, including a State or local government . . . ."). Beyond its status as a person, California is the owner of substantial property or property held in trust for the people. For example, California owns the coastline and the waters of the state. In *Selma Pressure Treating Co. v. Osmose Wood Preserving Co. of America, Inc.*, 221 Cal. App. 3d 1601, 1616 (1990), the court held the State to be the guardian of water for the State's residents and entitled to pursue monetary damages for injury to that asset.

3. Does a Policy's Pollution Exclusion Apply?

The applicability of pollution exclusions found in CGL policies is a question that extends well beyond whether a policy's pollution exclusion applies to personal injury coverage. Naturally, older policies are not subject to this question because pollution exclusions did not begin to appear in most CGL policies until the early 1970s. Thus, older policies are a good place to start to seek insurance coverage. But even policies subject to a pollution exclusion should be analyzed and considered as a possible resource, particularly when the duty to defend is concerned (the defense duty is separately discussed below).

Without going over the extensive case law concerning the various versions of the pollution exclusion, first one must consider whether any version of the pollution exclusion even applies.

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[9] California Civil Code section 3490 provides that no statute of limitations applies to a public nuisance: "No lapse of time can legalize a public nuisance, amounting to an actual obstruction of public right."

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In short, is global warming a question involving a "pollutant" or "pollution"? And, even if carbon dioxide and global warming generally can be called "pollution," does the precise wording of the policy language in an insured's policies exclude that form of "pollution" and the manner in which it occurs?

Initially, the insurance industry used what is called the qualified pollution exclusion, excluding pollution coverage unless initially released "suddenly and accidentally." Later, the industry adopted what it likes to call the "absolute pollution exclusion." The recent California Supreme Court decision in *MacKinnon*, indicates that even the insurers' claim of an "absolute" pollution exclusion is far from absolute. 31 Cal. 4th at 644, n.3 ("[T]to refer to the current clause as an '*absolute* pollution exclusion' is to suggest an answer to the very question we address. Accordingly, we will refer to the 'current pollution exclusion' or simply the 'pollution exclusion.'"). [10]

Although not an issue before the court in *MacKinnon*, the text of the pollution exclusion at issue —a common version of the current pollution exclusion—should not apply to many lawsuits even if carbon dioxide is considered a pollutant for insurance coverage purposes. The exclusion requires that any pollution excluded must first result from a "discharge, dispersal, release or escape of pollutants . . . ***at or from the insured location***." *Id.* at 639 (emphasis added.) Carbon dioxide emissions from automobiles sold or leased to millions of independent, third-party drivers do not constitute releases from the insured automakers' locations.

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[10] The policy at issue in *MacKinnon* contained the following typical exclusion:

> "We do not cover Bodily Injury or Property Damage (2) Resulting from the actual, alleged, or threatened discharge, dispersal, release or escape of pollutants: (a) at or from the insured location'. The terms 'Pollution or Pollutants' are defined, in the definitions section at the beginning of the policy, as 'mean[ing] any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste materials. Waste materials include materials which are intended to be or have been recycled, reconditioned or reclaimed."

Id. at 639 (alteration in original). The court also quoted the standard language for the qualified pollution exclusion as follows:

> [This policy shall not apply to bodily injury or property damage] arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any watercourse or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.

Id. at 643-44 (alteration in original) (emphasis omitted).

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a. The Requirement That There Be a "Pollutant"

Putting aside the distinction as to where the discharge comes from, the *MacKinnon* decision poses the question whether a discharge can easily be characterized as a "pollutant." The court emphasized the limited scope of the pollution exclusion when it found the so-called absolute pollution exclusion at issue did not apply to the case, even though it involved insecticide sprayed near a building. The court found the insecticide was not a pollutant, nor was the act of spraying it what is typically thought of as environmental pollution.

The *MacKinnon* court indicated that the analysis of what is a "pollutant" is neither obvious nor a matter of generalized, broad application of the pollution exclusions. The court rejected the carriers' attempt to characterize anything that may irritate as a "pollutant," finding the carriers' proposed interpretation to be overbroad, and far too inclusive. Anything could be an irritant, the court concluded. *Id*. at 650, ("The unreasonableness of Truck Insurance's interpretation becomes clear when its full implications are considered. Virtually any substance can act under the proper circumstances as an 'irritant or contaminant.'"). Rather, the *MacKinnon* court focused on the term "pollutant." *Id.* at 652 ("The key to this inquiry, we believe, turns on the meaning of the term 'pollutant.' Because the definitional phrase 'any irritant or contaminant' is too broad to meaningfully define 'pollutant,' we must turn to the common connotative meaning of that term.").

The court looked to the commonplace view of what is a pollutant and the circumstances by which the offending substance was emitted—carbon monoxide is a pollutant when coming out of a smokestack, but not when emitted by a building's heater. *Id*. at 652-53. The court's analysis indicates that what is a "pollutant" is a matter of common understanding and circumstance, indicating further that the understanding of what is or was considered a pollutant may vary over time and use. The court admitted that "terms such as 'commonly thought of as pollution,' or 'environmental pollution,' are not paragons of precision, and further clarification may be required." *Id.* at 654.

Certainly, carbon dioxide, which we all exhale with every breath, cannot be considered at all times to be a "pollutant." Indeed, global warming purportedly leads to injuries to plant life, such as forests. Complaint ¶ 56. But carbon dioxide is the very substance required for existence by plants as part of photosynthesis. Moreover, a certain amount of carbon dioxide in the atmosphere is natural, and indeed necessary to maintain the planet at a livable temperature.[11]

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[11] The EPA describes the greenhouse effect in the following way: greenhouse gases trap energy, much like the glass panels of a greenhouse. The earth's surface is warmed by absorbing solar energy (visible light). The earth in turn radiates infrared energy (heat) back into space. A portion of the infrared radiation is trapped by greenhouse gas molecules, resulting in additional warming of the lower atmosphere and the earth's surface. This "greenhouse effect" is a natural phenomenon, without which the planet would be significantly colder and life as we know it would not be possible. EPA, *Global Warming-Climate*, http://yosemite.epa.gov/oar/globalwarming.nsf/content/climate.html.

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Thus, it can be argued that carbon dioxide is not inherently a pollutant. It is not what "the 'common understanding of the word "pollute" indicates [to be] something creating impurity, something objectionable and unwanted.'" *MacKinnon*, 31 Cal. 4th at 654 (citation omitted).

Although not defining the meaning of "pollutant" for purposes of insurance, the Supreme Court's decision in *Massachusetts* undoubtedly will be something that must be considered on the topic. The Court ruled that carbon dioxide is a "pollutant" to which the Clean Air Act applies. "The Clean Air Act's sweeping definition of 'air pollutant' includes '*any* air pollution agent or combination of such agents, including *any* physical, chemical . . . substance or matter which is emitted into or otherwise enters the ambient air . . . . On its face, the definition embraces all airborne compounds of whatever stripe, and underscores that intent through the repeated use of the word 'any.' Carbon dioxide, methane, nitrous oxide, and hydrofluorocarbons are without a doubt 'physical [and] chemical . . . substance[s] which [are] emitted into . . . the ambient air.'" 127 S. Ct. at 1460 (alteration in original) (footnote omitted).

The Court's ruling, however, begs the question, given that it encompasses any emission as a pollutant under the Clean Air Act, without dealing with the nature of what is a pollutant. The Court characterized the Clean Air Act's definition of "air pollutant," as "capacious." *Id*. at 1462. By comparison, an insurer's definition must be anything but capacious for it to apply its own pollution exclusion to carbon dioxide.

There is limited insurance-specific authority that can be cited from other states' courts on the issue of whether carbon dioxide is a pollutant. *See, e.g.*, *Donaldson v. Urban Land Interests, Inc.*, 564 N.W.2d 728 (Wis. 1997) ("*Donaldson*") (finding carbon dioxide was not a "pollutant"). *Donaldson*, however, dealt only with exhaled carbon dioxide. In a recent survey of case law on the subject, little authority exists regarding carbon dioxide's status as a pollutant to which insurance policies' pollution exclusions apply. *See* Claudia G. Catalano, *What Constitutes "Pollutant," "Contaminant," "Irritant," or "Waste" Within Meaning of Absolute or Total Pollution Exclusion in Liability Insurance Policy*, 98 A.L.R.5th 193 (2002 & 2007 Supp.).

But for insurance purposes, should carbon dioxide be considered a pollutant when it is emitted from automobile tailpipes? What about the millions of metric tons of carbon dioxide emitted from millions of cars every year? Even then, the carbon dioxide emissions do not involve an immediate impairment of air quality. Indeed, the focus of auto emissions control to date, such as mandatory use of catalytic converters, is to reduce emission of certain "pollutants" like carbon monoxide or unburnt carbon fuel by converting them to ***carbon dioxide***. *See* Wikipedia, http://en.wikipedia.org/wiki/Catalytic_converter, (last visited Feb. 28, 2007) (catalytic converters are designed to convert carbon monoxide to carbon dioxide, and to convert unburnt carbon to carbon dioxide and water).

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b. The Nature of Global Warming

The nature and cause of global warming also must be considered. It is not a classic contamination problem, such as contamination of water, air, or property, rendering any of them unusable or unhealthful. It is not creating smog that directly leads to higher incidences of asthma or respiratory problems in persons breathing the air. It is not an oil spill that kills wildlife and fish or ruins beaches. The greenhouse or global warming problem is not due to a direct impact of carbon dioxide on property or health. Rather, it typically is alleged to be the result of the accumulation of carbon dioxide in the atmosphere over time that is creating the problem that results from a chain reaction. Indeed, it is the *additional* human-produced carbon dioxide that adds to the already-existing carbon dioxide that increases the already-existing background carbon dioxide in the atmosphere and that allegedly results in an increased greenhouse effect.

Rising carbon dioxide levels that cause a ripple effect in the environment do not easily fit within the definition of "pollutant" established by the California Supreme Court. California's water supply is not injured by direct contact with carbon dioxide. It is allegedly injured because rising temperatures reduce snowfall and cause early melting. Nor does carbon dioxide directly lead to rising sea levels or the erosion of California's coastline. Carbon dioxide does not erupt into a forest fire. In and of itself, carbon dioxide is not immediately thought of as a pollutant.

If it ***does not clearly*** appear that fossil fuel's contribution to carbon dioxide's rise in the atmosphere and increase in global warming fits readily and easily within the pollution exclusion, that is an answer in itself. The court in *MacKinnon* stressed that the critical fact to keep in mind when interpreting policy language is the goal of maximizing coverage and limiting the scope of exclusions when possible. *See MacKinnon*, 73 P.3d at 1213 ("[I]nsurance coverage is interpreted broadly so as to afford the greatest possible protection to the insured, [whereas] . . . exclusionary clauses are interpreted narrowly against the insurer."(second alteration in original) (citations and internal quotation marks omitted).

When read narrowly, the pollution exclusion does not clearly and conspicuously apply to the greenhouse effect and, therefore, does not effectively exclude coverage. *See id*. ("'[A]n insurer cannot escape its basic duty to insure by means of an exclusionary clause that is unclear. As we have declared time and again, "any exception to the performance of the basic underlying obligation must be so stated as clearly to apprise the insured of its effect." Thus, "the burden rests upon the insurer to phrase exceptions and exclusions in clear and unmistakable language." The exclusionary clause "must be *conspicuous, plain and clear*."'" (citations omitted)).

An argument can be made that carbon dioxide emissions now, or at least until recently, with the only recently emerging awareness of global warming and carbon dioxide emissions' link to that problem, cannot be considered pollution as commonly understood. In fact, the desired result of operation of an automobile emission system is to cause an ***increase*** in carbon dioxide emissions.

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The goal of catalytic converters is to produce, not reduce, carbon dioxide to avoid carbon monoxide contamination and other "pollution." As such, carbon dioxide is the equivalent of the insecticide in *MacKinnon*, a release happening in the ordinary and expected course of proper conduct. *MacKinnon*, 31 Cal. 4th at 654 ("The normal application of pesticides around an apartment building in order to kill yellow jackets would not comport with the common understanding of the word 'pollute.'").

The California Supreme Court favorably quoted the North Carolina Court of Appeals decision in *West American Insurance Co. v. Tufco Flooring East, Inc.*, 409 S.E.2d 692, 699-700 (N.C. Ct. App. 1991) ("*Tufco Flooring*"), concerning the release of vapors (from styrene monomer resin) used to resurface the floor at issue. The fumes killed the livestock, so they were clearly toxic. However, the court found the fumes were not a "pollutant" under the insurance pollution exclusion.

> The flooring material (styrene monomer resin) brought upon the premises [by the policyholder] was wanted. It was not impure. When [the policyholder] purchased its CGL insurance, it understood "pollutant" in the same way that the Oxford English Dictionary defines "pollutant," as an unwanted impurity, not as the raw materials which [the policyholder] purchased to do its job.

Id. at 698.

There is the further argument that the increase in carbon dioxide emissions was mandated by government controls designated to reduce pollution. In 1970, Congress required a 90 percent reduction, by 1976, of pollutant auto emissions via Clean Air Act Amendments. This mandate led to development by the auto industry of the catalytic converter. *See* David Gerard & Lester B. Lave, *Implementing Technology-Forcing Policies: The 1970 Clean Air Act Amendments and the Introduction of Advanced Automotive Emissions Controls*, May 2003, *available at* http://www.epp.cmu.edu/httpdocs/people/bios/papers/gerard/Gerard_Lave%20TFl.pdf.

Even if insurers can make an argument that appears reasonable regarding the pollution exclusion's applicability, that is not enough. An insurer's interpretation seeking to exclude coverage must be the ***only*** reasonable interpretation in order to bar coverage. *See MacKinnon*, 31 Cal. 4th at 655 (even if insurer's "interpretation is considered reasonable, it would still not prevail, for in order to do so it would have to establish that its interpretation is the *only* reasonable one").

Even if a pollutant or pollution is the issue, the precise language of each policy's pollution exclusion must be analyzed for possible gaps. For example, some policies' so-called "absolute" pollution exclusions exclude only contamination emanating from property owned by the insured. *See id.* at 639 (exclusion applied only to "escape of pollutants: (a) at or from the insured

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location"). A typical policy provides: "This policy does not apply: . . . to bodily injury or property damage arising out of . . . escape of pollutants . . . *at or from premises owned, rented or occupied by the Insured* . . . ." Royal Insurance Company of Canada, Comprehensive General Liability Insurance Form No. 2P/0545W at 3 (emphasis added). If the carbon dioxide did not come from the insured's premises, the exclusion still may not apply. *See Pro-Tech Coatings, Inc. v. Union Standard Ins. Co.*, 897 S.W.2d 885 (Tex. App. 1995) (coverage for vinyl dust was not excluded because there had not been a discharge from insured's premises).

c. The Impact on "Personal Injury" Coverage

Finally, if the policy at issue contains a pollution exclusion, and that exclusion actually applies to carbon dioxide emissions (a question addressed in the next section), then that exclusion may restrict coverage under the personal injury policy, at least in California. In *Martin Marietta*, the policy at issue was a free-standing personal injury policy. The policy did not contain coverage for bodily injury or property damage, or a pollution exclusion. For that reason, *Martin Marietta* distinguishes a number of prior California decisions that found that the personal injury coverage was still subject to a policy's pollution exclusion, even though the exclusion was expressly applicable only to bodily injury and property damage. These latter cases interpreted the scope of the personal injury coverage more narrowly so as not to circumvent the pollution exclusion applicable to property damage. The courts ruled that the personal injury coverage in the policies at issue did not cover contamination injury, at least when the policy at issue contained a pollution exclusion, even though the exclusion expressly applied only to bodily injury or property damage. *See, e.g., Titan Corp. v. Aetna Cas. & Sur. Co.*, 22 Cal. App. 4th 457 (1994); *Legarra v. Federated Mut. Ins. Co.*, 35 Cal. App. 4th 1472 (1995).

Other states' courts have not followed the approach adopted by California courts. These courts found that coverage for personal injury is not subject to policies' pollution exclusions unless that exclusion is expressly made applicable to personal injury. *See, e.g., Titan Holdings Syndicate, Inc. v. City of Keene*, 898 F.2d 265, 270 (1st Cir. 1990) ("The pollution exclusion clauses only apply to liability for 'bodily injury and property damage'; they do not apply to coverage for 'personal injury . . . ' liability."); *Pipefitters*, 976 F.2d at 1042.

But even assuming that the policy at issue contains a pollution exclusion, the question must still be asked whether that exclusion even applies to global warming and its causes. More specifically, do automobiles' carbon dioxide emissions constitute pollution to which insurance policies' pollution exclusions apply? This question is addressed in the next section.

In short, all of an insured's CGL policies should be considered as a possible asset against possible greenhouse claims. Even the existence of a pollution exclusion that the insurance industry likes to call "absolute" is far from absolute. Indeed, there is a good possibility that such an exclusion does not even apply.

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4. Product Liability Coverage

The lawsuits that have been filed against automobile manufacturers allege liability because of the emission of carbon dioxide from automobiles that they manufactured. Many CGL policies provide separate policy limits for the products-completed operations hazard. Product liability coverage extends to "goods or products . . . manufactured, sold, handled, distributed or disposed of by [the insured]." *Hydro Sys., Inc. v. Cont'l Ins. Co.*, 929 F.2d 472, 474 (9th Cir. 1991) ("*Hydro Systems*").[12] Coverage extends only to products that are no longer in the possession of the insured. *Id.* That is clearly not a problem for the automakers. Indeed, many insurance policy's pollution exclusions only apply where the alleged pollution is released from property owned or operated by the insured.

There are several ways that coverage may be available. For example, the product liability coverage may provide a separate, express exception to the pollution exclusion of CGL policies. Or this exception may be implied. For example, some copies of the early pollution exclusion were accompanied by an Insurance Services Office (often referred to as "ISO") explanation suggesting that the exclusion was not intended to apply to matters otherwise within the products completed operations hazard. *See Tufco Flooring*, 409 S.E.2d 696. Commentary offered as part of the regulatory proceedings for approval of the more restrictive pollution exclusion further indicated that it was not directed at product liability coverage. *See, e.g.*, Transcript of Proceedings, Hearing on Proposed Exclusion of Sudden and Accidental Pollution Coverage from General Liability Policies, N.J. Dep't of Ins., at 31, (Dec. 18, 1995) (testimony of Robert J. Sullivan, Vice President, Crum & Forster) ("These are not total, absolute pollution exclusions. It does have significant coverage for completed operations and products liability in certain off-sites discharges. While that may seem narrow, when you talk to a manufacturer of an underground storage tank, it provides, even with the exclusion, significant pollution coverages provided to that manufacturer for pollution liabilities coverages arising out of product liability claim for his underground storage tank. So, there is still a considerable amount, admittedly for certain classes of risks, of pollution liability coverage, even under the almost total pollution exclusion that the current forms provide.").[13]

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[12] The products hazard definition found in the 1966 version of the CGL policy reads as follows: "'Products hazard' includes bodily injury and property damage arising out of the named insured's products or reliance upon a representation or warranty made at any time with respect thereto, but only if the bodily injury or property damage occurs away from premises owned by or rented to the named insured and after physical possession of such products has been relinquished to others."

[13] In February 1985, the ISO made a filing to the Texas State Board of Insurance regarding an earlier draft of the "absolute pollution exclusion." The filing demonstrates that the exclusion was not as "absolute" as that word might suggest. The Insurance Services Office wrote that the exclusion allowed coverage for certain types of discharges: "This endorsement introduces a total pollution exclusion for bodily injury and property damage arising from the discharge of pollutants. The exclusion does not apply to damages arising out of products or completed operations nor to certain off-premises discharges of pollutants." Record of Official Action of the State Board of Insurance, Feb. 19, 1985.

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Certain courts around the country also have rejected application of the pollution exclusion to claims arising out of an insured's principal or primary product unless that product is specifically identified as a pollutant. These courts refused to characterize a company's main product as a pollutant, because to do so would render much of the policy's coverage illusory. *See, e.g., Am. States Ins. Co. v. Kiger*, 662 N.E.2d 945, 948-49 (Ind. 1996) (gasoline leak from commercial gas station not excluded, finding it odd to characterize gasoline as a pollutant when it was the gas station's principal product).

In response to court decisions that carved out an exception for product liability, some insurers drafted and sold versions of the pollution exclusion that expressly state that the exclusion does not apply to product claims. *See Environmental Law & Practice Guide* § 8.03 (Matthew Bender 2003) ("Courts are divided on whether such claims are covered by the CGL policy as a products-completed operations claims, insurers have developed a product-completed operations exception endorsement that they add to the pollution exclusion in the CGL policy. The intent of this endorsement is to cover products and completed operations claims involving pollution."). Even insurers have argued that the products coverage creates an exception to the pollution exclusion. *See Nat'l Union Fire Ins. Co. v. Am. Re-Insurance Co.*, 351 F. Supp. 2d 201 (S.D.N.Y. 2005) (National Union asserted against reinsurer that pollution exclusion does not apply to traditional product liability claims, and the court agreed).

As noted above, one possible avenue of liability claims is product liability. *See* Grossman at 39-52. But the formality of the claim brought against the insured does not dictate, or exclude, the existence of coverage, particularly the duty to defend. As a result, the fact that the California global warming complaint chooses public nuisance as the legal theory being pursued does not affect the possibility of products coverage. The facts pled or asserted are what govern the availability of coverage. *See, e.g., CNA Cas. v. Seaboard Sur. Co.*, 176 Cal. App. 3d 598 (1986) (even though underlying action was labeled as uncovered antitrust claim, the facts alleged created potential for coverage). Even unpled claims may lead to a duty to defend. *Lunsford v. Am. Guar. & Liab. Ins. Co.*, 18 F.3d 653 (9th Cir. 1994).

What is important is a comparison to the facts and the scope of coverage. If any of the allegations fit within the product liability coverage, that coverage may apply. Products coverage includes all potential liability that arises out of the use of the product, without regard to the theory of liability or the causation alleged. *See, e.g., Fibreboard*, 16 Cal. App. 4th at 503-05 (The term "arising out of the named insured's products" does not regulate the theory of liability or the standard of causation, but instead "identifies a core factual nucleus, i.e., products manufactured, sold or distributed by the insured, and links that nucleus to the bodily injury or property damage covered under the policy.").[14]

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[14]The "products hazard" with respect to insurance is interpreted differently than it is for purposes of tort product liability. *See also Ott v. Crews*, 830 F.2d 773, 776 (7th Cir. 1987) (hogs covered as "products" under product

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B. Umbrella Policies

The exception for product claims that may be made by an insurer expressly regarding the applicability of its pollution exclusion, is a specific example of a more general rule that the specific language of any policy must be examined. That is just as important for an insured's umbrella policies, which do not use form language to the extent that primary policies do. Because umbrella policies are not written on a standardized basis, their specific wording must be analyzed.

Umbrella policies, as the name implies, were designed to provide additional, broader coverage than that provided by an insured's primary CGL policies. And, when they provide coverage that is broader, umbrella policies actually serve as an insured's first line of defense. As one court noted, "[u]mbrella policies differ from standard excess insurance policies in that they are designed to fill gaps in coverage both vertically (by providing excess coverage) and horizontally (by providing primary coverage)." "Moreover, this interpretation is consonant with the broader function served by umbrella policies—extending coverage even to unanticipated 'gaps.'" *Commercial Union Ins. Co. v. Walbrook Ins. Co.*, 7 F.3d 1047, 1053 (1st Cir. 1993).

Westview Associates v. Guaranty National Insurance Co., 740 N.E.2d 220 (N.Y. 2000), provides an example of the gap filling with respect to pollution coverage. In that case, the primary policy contained a specific exclusion regarding lead paint, while the umbrella policy contained only a general pollution exclusion. The umbrella policy was required to cover the liability for lead paint in a form of gap filling.

The obligation of an umbrella insurance carrier to respond if a primary policy will not can be seen in the recent decision by the California Supreme Court obligating umbrella insurers to defend administrative claims when the underlying policies provided for defense only of the formal "suits." *Powerine Oil Co. v. Superior Court*, 37 Cal. 4th 377 (2005) ("*Powerine II*"). The *Powerine II* court's analysis of the breadth of the duty to defend more than formal lawsuits is discussed below in the section concerning possible legislation. In this section, it is important to highlight the court's description of umbrella policies as "*not merely intended to operate as excess insurance*… [but policies that provide they will directly cover liability to which the policy's terms apply] 'in respect of each occurrence *not covered by said underlying insurances*.'"

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liability coverage of insurance policy even though they were not considered "products" for tort liability purposes). Having said that, the insured's product must be involved or connected to the liability in some way. In *Hydro Systems*, the Ninth Circuit concluded that the insured's product was not at issue. Rather, the court concluded that the styrene emitted as a waste by-product in the manufacture of the insured's product did not fall within the exception to the pollution exclusion. The products coverage of the policy "focuses on *products* and *completed* operations, and styrene gas liberated during the manufacturing process is not encompassed by these terms." 929 F.2d at 476-77. This is not the case where the automakers' product itself is the immediate source from which the alleged greenhouse gases, such as carbon dioxide, "arise out of." Indeed, the product in this case is the alleged direct cause of the emissions.

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Id. at 398 (quoting policy). These types of policies are called umbrella policies, affording "'alternative primary coverage as to losses "not covered by" the primary policy.'" *Id.* (quoting *Reserve Ins. Co. v. Pisciotta*, 30 Cal. 3d 800, 812 (1982)).

"The umbrella coverage" of an insured, the California Supreme Court noted, "may serve to fill any gaps in coverage left open by the underlying coverage." 37 Cal. 4th at 399 (citations and internal quotations marks omitted). Such policies tend to be broader than the underlying policy, necessitating that they must be separately examined in any evaluation of coverage applicable to global warming claims. *Id.* at 398 n.9 (an "umbrella policy may provide broader coverage than the underlying insurance") (citations omitted).

The older the form of the umbrella policy, the more liberal its coverage may be as a function of the original intent of this type of policy.

> [C]overage for that excluded by underlying liability policies is the *raison d'etre* of umbrella GL [general liability] policies. Lloyd's underwriters originated umbrella GL insurance policies "to provide in one policy, additional limits of liability, often not available in the domestic market, over all exposures covered by underlying insurance, and, *in addition, to provide protection for exposures not normally under a primary program* . . . ." "The new contract served almost as an errors and omissions policy for any exposures which have been overlooked."

Richard P. Lewis & Rachel Wertheimer, *Using Umbrella General Liability Insurance Policies to Avoid Getting Soaked by Nonexistent "Suit" and "Damages" Exclusions*, 11 Envtl. Claims J. 17, 25-26 (Spring 1999) (citations omitted).

Because their wording may not be standardized, and they may also provide broader coverage to which a duty to defend may attach, umbrella policies are an important potential asset. Each policy must be examined to determine if it is potentially unique, and possibly broader coverage language gives rise to a separate duty to defend that may not be found in any other policy.

C. Environmental or Pollution Liability Policies

Another source of possible coverage may be specialized pollution coverage purchased by the insured. These policies are sold for an additional, often high, premium. They are also usually written on a claims-made basis with a retroactive date set sometime in the past. The policies also may be limited to a particular site. The specific language of these policies must be consulted to determine if they afford any coverage.

Because these policies are typically claims made, they are not triggered by an injury or offense during the policy period like typical CGL coverage. Instead, coverage is applicable when a

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potentially covered claim is actually made against the insured, seeking some form of monetary relief. For example, in the case of the California global warming lawsuit, the filing and serving of the lawsuit may constitute a claim that triggers an environmental policy's coverage.

These specialized policies also are often limited by a retroactive date that excludes coverage for pollution that occurs before that date. Thus, carbon dioxide contamination that occurred before the retroactive date may not be covered.

D. The Broad Duty to Defend

At this stage, the question of what actual liability may result from the California global warming complaint is not critical. What is critical is whether potentially applicable policies, such as those discussed above, may provide at least some potential for coverage. That potential is the basis on which an insurer's duty to defend is triggered. A defense duty can be found in CGL policies, often in umbrella policies, as well as other types of coverage.

In California, as in most states, insurers must defend an insured against lawsuits even if the claims are eventually found to be groundless, meritless, or fraudulent. *See Horace Mann Ins. Co. v. Barbara B.*, 4 Cal. 4th 1076, 1080, 1086 (1993). Indeed, in California, if any aspect of the suit (whether true or not) exhibits a potential for coverage, then the insurer must provide defense of the entire action. *See Buss v. Superior Court*, 16 Cal. 4th 35, 48 (1997).

Thus, a hair trigger exists for the duty to defend. An insurer "must defend a suit which *potentially* seeks damages within the coverage of the policy." *Gray v. Zurich Ins. Co.*, 65 Cal. 2d 263, 275 (1966) ("*Gray*"). By comparison, an insurer escapes its duty to defend only if it can show that "'*by no conceivable theory* [does the claim against the insured] *raise a single issue which could bring it within the policy coverage*.'" *Montrose Chem. Corp. v. Superior Court*, 6 Cal. 4th 287, 300 (1993) ("*Montrose*") (quoting *Gray*, 65 Cal. 2d at 276 n.15).

The implications of this liberal standard favoring a duty to defend cannot be overstated. A good example can be found in environmental contamination cases involving a qualified pollution exclusion, where by all appearances the insured ultimately would not be able to satisfy the "sudden and accidental" exception of the pollution exclusion to obtain indemnification. California courts nonetheless find that, when judging the duty to defend, the slightest hint of a sudden and accidental potential release suffices to trigger an insurer's duty to defend. *See, e.g.*, *Vann v. Travelers Cos.*, 39 Cal. App. 4th 1610 (1995) (auto body shop with evident frequent spills and improper disposal practices entitled to defense absent uncontroverted evidence that none of the contamination occurred from a sudden and accidental release); *A-H Plating, Inc. v. Am. Nat'l Fire Ins. Co.*, 57 Cal. App. 4th 427 (1997) (evidence of years of spills created triable issue of fact regarding "sudden and accidental" and was not enough to negate duty to defend).

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It must also be stressed that any single policy for which the defense obligation is triggered must provide for the whole defense. *See Haskel, Inc. v. Superior Court*, 33 Cal. App. 4th 963, 976 n.9 (1995) (an insurer cannot undertake only "pro-rata" share of defense; to do so breaches duty of defense). The defense duty also extends to claims for injury beyond the policy period. *Aerojet-General Corp. v. Transp. Indem. Co.*, 17 Cal. 4th 38, 75 (1997) ("*Aerojet*") ("In a word, although the *trigger* of the duty to defend is limited to the policy period, the *extent* of the duty to defend is not.")

This requirement of a full defense applies even if there is only a single liability policy at issue and the insured is self-insured for the remaining time at issue. According to the *Aerojet* court, self-insurance is not true insurance, and therefore is not subject to any allocation of the burden of a duty to defend if true insurance is available. *Id*. at 72 & n.20. Thus, only a single policy with a defense duty needs to exhibit a potential for coverage. And in most CGL policies, as opposed to umbrella or specialized environmental policies, the duty to defend is not only a separate right, but also the cost of the defense does not deplete the policy limits of coverage. Thus, an insurer may have to pay defense costs greater than its indemnity limits.

It is also important to bear in mind, particularly given the nature of the liability at issue stemming from global warming, that far more than the cost of attorneys is included in the duty to defend. Among the costs that may be significant to the defense of global warming liability claims is the cost to investigate the "greenhouse" problem, and each alleged contributor's responsibility for the problem in relative comparison to other contributors, whether they be natural or man-made in origin. Investigation costs in the form of scientific consultants and studies are defense costs according to the California Supreme Court's decision in *Aerojet*. 17 Cal. 4th at 60-61 (finding environmental investigation costs part of defense if potential for coverage existed for policy period, cost is geared to defeat or limit liability, and cost is reasonable and necessary).

The burden of a duty to defend a global warming litigation in just investigation costs alone could equal millions of dollars if the California Attorney General's own projections are accurate. This serves only to illustrate the importance of the duty to defend. The California Supreme Court noted the significance of the duty to defend as follows:

> The insured's desire to secure the right to call on the insurer's superior resources for the defense of third party claims is, in all likelihood, typically as significant a motive for the purchase of insurance as is the wish to obtain indemnity for possible liability. As a consequence, California courts have been consistently solicitous of insureds' expectations on this score.

Montrose, 6 Cal. 4th at 295-96.

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In short, an unlimited defense can be triggered by the slightest possibility of coverage. Only one policy out of all of those available needs to exhibit a small possibility of coverage, no matter how slight or remote. That mere possibility of coverage, under a single policy, can add up to an asset worth millions for defending global warming claims.

IV. FUTURE LEGISLATION IMPOSING LIABILITY

Finally, it would be no surprise if legislation ultimately is passed in the United States that imposes liability for companies' contribution to the greenhouse problem via some liability scheme. The potential cost of resulting injury and the remedial measures that may be needed to address global warming's consequences could be enormous. Thus, even if court actions are dismissed, or if they go forward and impose some liability, the issue of liability may become the subject of legislation. But even then, insurance is the place where a company will need to turn for help to deal with legislatively imposed liability or remediation obligations.

Previously, the growing awareness of environmental contamination led to passage of a number of federal laws imposing strict liability.[15] In response to the new environmental statutory liability, insurers argued that their policies issued before the legislation was adopted should be free from responding to such new, unanticipated, liability. The California Supreme Court categorically rejected this argument. In *AIU Insurance Co. v. Superior Court*, 51 Cal. 3d 807, 822 n.8 (1990), the court stated that because the policies were "comprehensive" liability policies, "it was within the insured's reasonable expectation that new types of statutory liability would be covered."

If liability is imposed via administrative orders, one last wrinkle must be considered. California is among those states that obligates insurers agreeing to defend only "suits" to defend only formal lawsuits. In *Certain Underwriters at Lloyd's of London v. Superior Court* 24 Cal. 4th 945 (2001), and *Foster-Gardner Inc. v. National Union Fire Insurance Co. of Pittsburgh, PA*, 18 Cal. 4th 857 (1998), the California Supreme Court found that primary liability policies (CGL policies) give rise to a duty to defend and indemnify only formal lawsuits brought in court.

More recently, the California Supreme Court highlighted the importance of a company's umbrella and excess policies in *Powerine II*, 37 Cal. 4th 377. The court affirmed the appellate

[15] Regulatory liability also will not be limited to the United States. In part, Swiss Re's concern regarding global warming is its reaction to initiatives like the Kyoto Protocol, the international treaty that seeks to curb greenhouse-gas emissions. Swiss Re expects eventual regulatory controls to be the source of liability for companies and their directors and officers. Jeffrey Ball, *Global Warming May Cloud Directors' Liability Coverage*, Wall St. J., May 7, 2003. The fact that the United States is lagging behind in this regulatory effort does not necessarily create a safe-harbor for potential liability. According to Swiss Re's spokesman, "even U.S.-based multinationals could face legal and financial risk stemming from the treaty, since most of them have factories in countries that have signed the document." *Id*.

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court's decision that the insuring agreements of multiple umbrella policies issued by various carriers to Powerine afforded the possibility of coverage to Powerine Oil Company for the environmental liability imposed through administrative, rather than court, orders. Among other things, the policies extended the duty to defend to "claims" and "suits." *Id.* at 386-87.

The California Supreme Court concluded that "the express wording of the central insuring agreement in these nine excess umbrella policies goes well beyond mere coverage for court-ordered money 'damages,' and is broad enough to include coverage for the liability of environmental cleanup and response costs ordered by an administrative agency." *Id*. at 383. The court's conclusion holds umbrella insurers to their promise that umbrella policies will "fill any gaps in coverage left open by the [underlying] coverage." *Id*. at 399 (alteration in original) (citation and internal quotation marks omitted).

V. CONCLUSION

Whatever the contours and direction of litigation relating to global warming may be, many insureds will find that their current and/or historic liability insurance policies will be a valuable financial asset. These policies may fund their defense against lawsuits and pay for settlements of and judgments in those lawsuits.

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ABOUT THE AUTHOR

Kirk A. Pasich is the leader of Dickstein Shapiro LLP's Insurance Coverage Practice and serves on the Firm's Executive Committee. He has been named by *Lawdragon* as one of the nation's 500 "Leading Lawyers." According to *Chambers USA: America's Leading Lawyers for Business*, Mr. Pasich "is an unmistakable feature of California's insurance landscape" and is "the policyholder lawyer most likely to come up with a new argument or perspective concerning policy language." Mr. Pasich conducts an active trial and appellate practice, representing insureds in a wide range of complex insurance coverage matters. He has negotiated large insurance recoveries for his clients, including recoveries of $100 million and more, and has served as lead trial counsel in jury trials in which his clients have obtained verdicts that ranked among the ten largest verdicts of the year in California. Mr. Pasich also is the author or co-author of several books, including Casualty and Liability Insurance, and the author of more than 400 articles regarding insurance issues. He may be reached at pasichk@dicksteinshapiro.com.

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