

Global Warming Litigation and Insurance Coverage: Emerging Issues

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Global warming has captured the nation's attention. The issue has also made its way to the courts, where a number of suits seek recourse for contributions to climate change and its various ramifications. In the wake of a recent United States Supreme Court decision that sets the stage for Environmental Protection Agency regulation of greenhouse gas emissions from automobiles, more litigation is certain. See *Massachusetts v. E.P.A.*, No. 05-1120, 2007 WL 957332 (Apr. 2, 2007). Companies subject to litigation and regulation will look their insurers to address climate change-related potential liability. This paper provides a brief overview of climate change-related litigation and the insurance coverage issues raised by those suits.

DEVELOPMENTS IN GLOBAL WARMING LITIGATION

A. *Public Entity Nuisance Litigation*

State governments are pursuing global warming claims under public nuisance theories, thus far with mixed results. In *Connecticut v. American Elec. Power Co.*, 406 F. Supp. 2d 265 (S.D.N.Y. 2005), a host of states and non-profit land trusts sought abatement of the public nuisance of global warming. The State plaintiffs, claiming to represent more than 77 million people and their related environments, natural resources, and economies, and the private plaintiffs (non-profit land trusts) sought an order (i) holding each of the utility defendants jointly and severally liable for contributing to an ongoing public nuisance, global warming, and (ii) directing each defendant to abate its contribution to the nuisance by capping and reducing carbon dioxide emissions. The federal district court in New York granted defendants' motion to dismiss, holding that the suit raised non-justiciable political questions that were beyond the limits of the court's jurisdiction. *Id.* at 274.

In another case, filed last year on behalf of the people of the State of California against six major motor vehicle manufacturers, the complaint alleges a host of injuries to California, its environment, its economy, and the health and well-being of its citizens caused by defendants' production of "millions of automobiles that collectively emit mass quantities of carbon dioxide in the United States and have thus contributed to an elevated level of carbon dioxide in the atmosphere." See *California ex. rel. Lockyer v. Gen. Motors Corp.*, No. 3:2006 Civ. 05755-MJJ (N.D. Cal. Oct. 24, 2006) (Second Amended Complaint ¶ 2). The complaint's allegations are sweeping, and the demand for money damages includes millions of dollars "to study, plan for, monitor, and respond to impacts caused by global warming and impacts likely or certain to occur." *Id.* ¶ 44. The court has yet to rule on the sufficiency of the complaint.

B. *Private Plaintiff Litigation*

In addition to these governmental actions – and perhaps as a sign of things to come – 14 individual owners of properties damaged by Hurricane Katrina sought certification of various classes to prosecute claims against numerous chemical and oil companies who allegedly caused damage to the plaintiffs’ properties through actions that have contributed to global warming. *See generally Comer v. Nationwide Mut. Ins. Co.*, 2006 U.S. Dist. LEXIS 33123 (S.D. Miss. 2006). The complaint asserts claims of unjust enrichment, civil conspiracy, aiding and abetting, public and private nuisance, trespass, negligence, fraudulent misrepresentation and concealment. Numerous defendants have moved to dismiss the complaint and at least one defendant has moved for summary judgment. The court has indicated that it will not allow the case to proceed as a class action, but has yet to reach the merits of plaintiffs’ individual claims.

INSURANCE COVERAGE ISSUES

Although efforts to hold private parties responsible for climate change have to date achieved mixed results, these suits will undoubtedly continue and lead to insurance coverage claims and, in turn, coverage disputes. Some of the most significant coverage issues arising from global warming-related litigation are discussed below:

A. *Trigger of Coverage*¹

The “trigger of coverage” determines which, if any, insurance policies are available to respond to and provide coverage in connection with a claim. Coverage litigation may be required to address whether the public nuisance and similar theories raised in global warming suits trigger any coverage under typical CGL policies, which insure against “damages” arising from “bodily injury” or “property damage” during the policy period. Damages are a form of substitutional redress intended to compensate an injured party for a past injury or other loss. Such relief is not usually sought in public nuisance suits, which typically seek abatement, an equitable remedy not generally insured under a CGL policy.

B. *Expected Or Intended Losses*

The doctrine of “expected or intended losses” allows an insurer to demonstrate it is not responsible for indemnifying for harm intentionally or knowingly brought about by the insured. In many states, insurers need not indemnify that which is not “unexpected, unusual, and unforeseen,” including intentional pollution even though the insured’s acts “may well have been lawful and socially acceptable at the time they were taken”² Insurers may argue that corporate policyholders are

¹ This paper focuses on comprehensive general liability (“CGL”) insurance. Companies may seek coverage under all-risk property and environmental impairment liability and other policies.

² *Energynorth Natural Gas, Inc. v. Continental Ins. Co.*, 781 A.2d 969, 976 (N.H. 2001).

precluded from seeking indemnification because they knew about the environmental dangers of their greenhouse gas emissions, yet continued to engage in activities that contributed to global warming, resulting in a non-fortuitous harm. Insureds will rely on case law finding coverage where the act giving rise to the damage was intentional, but the resulting damage was unintended. Historically, litigation of these issues has been long, hard-fought, fact-intensive and company specific. We expect it to be the same in the global warming context.

C. *Pollution Exclusions*

An ISO pollution exclusion for the CGL policy provides that the coverage

does not apply to bodily injury or property damage (1) arising out of pollution or contamination caused by oil or (2) 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 water course or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.

Claims based on greenhouse gas emissions would seem to fit squarely within this standard pollution exclusion. Now that the Supreme Court has effectively ruled that greenhouse gases are pollutants subject to regulation by the Environmental Protection Agency, insurers justifiably may rely on the pollution exclusion as a bar to coverage. If confronted with a coverage claim, insurers should also carefully study any prior settlement agreements it executed with a policyholder to determine the scope of any release that may have provided with respect to pollution-related claims. Climate change-related claims may well fit within the scope of the policyholder's release.

D. *Other Issues*

Should these across-the-board defenses to coverage not succeed, climate change-related claims will raise myriad other coverage questions which have become commonplace in other contexts. By way of example, how many occurrences are presented by climate change-related losses? Is each greenhouse gas emission a separate occurrence or is a policyholder's decision to emit greenhouse gases despite their alleged climactic impact a single occurrence, subject to one policy limit? How should insurers allocate damages to their policies? How can insurers determine when the alleged climactic damage took place and what value should be assigned to that damage?

CONCLUSION

Global warming-related litigation against corporate America is on the rise and further litigation is anticipated. Few policyholders are immune from such suits given that, in theory, everyone contributes greenhouse gases to the environment. Defendants will look to the insurance industry to defend and indemnify them against these suits. Insurers possess multiple defenses to coverage. As

insurers adjust underwriting practices in response to climate change, they should think about how they may respond to emerging theories of liability generated by the public focus on global warming.

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