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Articles

The Costs of Climate Change: Why Industry Should Not Look to Liability Insurance to Bear Them

by Seth A. Ribner and Deborah L. Stein

I. Introduction

On April 2, 2007, a divided (5-4) United States Supreme Court rendered its decision in *Massachusetts v. Environmental Protection Agency.*[1] The majority opinion, authored by Justice Stevens, held that a state could challenge a decision by the Environmental Protection Agency (the "EPA") to regulate the emissions of "greenhouse gases." The majority held that the Commonwealth of Massachusetts had standing to challenge the "EPA's steadfast refusal to regulate greenhouse emissions,"[2] finding that greenhouse gases fit within the Clean Air Act's definition of "air pollutant" and that the EPA's actions were "arbitrary, capricious, . . . or otherwise not in accordance with law."[3]

The following day, the National Underwriters Online News Service ran a story, which began as follows:

> *WASHINGTON*—Insurance companies will be forced to pay huge costs resulting from litigation that will follow the Supreme Court's decision yesterday allowing states and municipalities to sue companies over greenhouse gas emissions, according to one legal expert.
>
> "Insurers will pick up much of the tab, pollution exclusions notwithstanding," said James Davis, managing partner of the Chicago office of Anderson Kill & Olick, who foresees emission claims rivaling the cost of asbestos injury actions. . . .

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The attorney quoted in the National Underwriters story subsequently expanded on its theme in an article entitled *Managing the Risks of Global Warming: Avoiding the Mass Tort Template and Insurance Coverage Implications.*[4] Specifically, the article concluded that:

(i) The *Mass v. EPA* decision affords significant impetus to civil global warming suits by states, municipalities and private parties,[5] and that global warming litigation is the next asbestos;[6]

(ii) The reasonable expectations of policyholders under older and even newer liability insurance policies are that they have coverage for such suits "because policyholders reasonably expected coverage for such damages resulting from their core operations";[7] and

(iii) Pollution exclusions in liability policies that first appeared in the 1970s would not preclude coverage because, notwithstanding the fact that the holding of *Mass v. EPA* is that greenhouse gases are "pollutants" within the meaning of the Clean Air Act,[8] applying such exclusions would run contrary to a policyholder's reasonable expectations. As the authors stated: "In other words, if a company's normal operations involve the release of GHGs [greenhouse gases] and GHGs are not regulated emissions, then a company can reasonably expect its insurance policy will cover lawsuits relating to these activities regardless of a 'pollution exclusion.' "[9]

"[A]s a matter of public policy, we should not want industrial enterprises to collect insurance proceeds for routine activity that externalizes their costs of production."

First, whatever might be the application of the pollution exclusion, as it has evolved since the early 1970s, to insurance claims for greenhouse gas emissions, the discussion of the pollution exclusion in *Managing the Risks of Global Warming* very much puts the cart before the horse. Exclusionary clauses in liability insurance contracts can have no bearing on coverage if there is no coverage in the first place. And, here, there can be no liability coverage for harm from global warming because the consequences, even the unanticipated consequences, of ordinary industrial operations cannot be deemed an "accident" or an "occurrence." Accordingly, there is no need to consider whether any exclusions from coverage apply. The enterprises that benefited from such emissions by lower cost operations and cheaper, more available products do not have an insurance claim. And, as a matter of public policy, we should not want industrial enterprises to collect insurance proceeds for routine activity that externalizes their costs of production.

Second, under basic principles of liability insurance, the "60 years of historic coverage"[10] that the article's primary author claims are implicated by global warming are not available to pay claims. Liability insurance policies respond to "bodily injury" or "property damage" during the period of the policy. However, the emission of carbon dioxide and other greenhouse gases does not itself cause bodily injury or property damage. Rather, it is the greenhouse effect that causes the harm. And the harm, as alleged in the few global warming cases commenced to date, is of relatively recent vintage.

Whether or not global warming litigation becomes the "next asbestos" in terms of liability for industry, it is not the "next thing" for insurers.

II. A Short Overview Of Understanding About Global Warming And Governmental Responses In The United States

The greenhouse effect was postulated as early as the 1890s, when a Swedish chemist theorized that the human emission of carbon dioxide could affect the temperature of the atmosphere.[11] However, there was far from universal agreement that carbon dioxide emissions could cause global warming. Indeed, a 1975 *Newsweek* article even posited a coming "ice age."[12] During the late 1970s, the United States federal government began to focus on the possibility that human activities were creating climate change through carbon dioxide emissions.[13] Congress passed a bill in 1978 directing the President to investigate climate change, and another bill in 1987 requiring the EPA to formulate national policy on climate change.[14] Scientific knowledge about global warming progressed, and in 1990, the Intergovernmental Panel on Climate Change ("IPCC") issued its first comprehensive report on climate change.[15]

In 2001, the IPCC released a report that the Supreme Court relied upon in *Mass v. EPA.*[16] That report stated: "An increasing body of observations gives a collective picture of a warming world and other changes in the climate system . . . . There is new and stronger evidence that most of the warming observed over the last 50 years is attributable to human activities."[17]

In 2007, the Bush administration displayed a subtle, yet significant change in its position on global

warming. While in June 2006, President Bush had stated that "[t]here's a debate over whether [global warming is] manmade or naturally caused,"[18] in February 2007, administration officials issued a letter stating that "President Bush has consistently acknowledged climate change is occurring and humans are contributing to the problem,"[19] and in August 2007, the President invited world leaders to a summit on climate change to set voluntary goals for lowering greenhouse gas emissions.[20]

In *Mass v. EPA,* the Supreme Court stated that "[t]he harms associated with climate change are serious and well recognized."[21] While there may be a scientific consensus that we are experiencing climate change, the cause of such climate change and any resulting cognizable harms are harder to pinpoint. The IPCC, though, has identified the following harms potentially associated with global warming:

- **Loss of coastline due to rising sea levels.** In its 2007 report on climate change, the IPCC states that sea-level rise over the past 100 to 150 years is probably contributing to coastal erosion in places like the United States' East Coast, and also cites a study indicating that 67% of the eastern coastline of the United Kingdom has retreated over the last century.[22] However, the IPCC states that "[a]n unambiguous attribution of current sea-level rise as a primary driver of shoreline change is difficult to determine at present" because it is a "major challenge" to separate all the other processes that affect the shoreline.[23] For instance, land subsidence has led to high rates of coastline retreat in Louisiana, and erosion along other beaches worldwide has been associated with shoreline development and other human activities.[24]
- **Extended weather phenomena such as drought.** The IPCC notes that "[m]ore intense and longer droughts have been observed over wider areas since the 1970s."[25]
- **Short-term weather phenomena, such as storms along the Gulf Coast due to increased temperatures in the Atlantic Ocean.** The IPCC states that "[t]here is observational evidence for an increase in intense tropical cyclone activity in the North Atlantic since about 1970, correlated with increases of tropical sea surface temperatures," and assesses it "likely"[26] that such a trend has occurred in some regions since 1970.[27]
- **Changes in biological systems such as extinction of native species, or invasion by nonnative species.** The IPCC points to the recent example of the extinction of approximately seventy-five species of frogs, which was probably due to a global warming-enhanced outbreak of a certain fungus.[28]
- **Detrimental affect on human health, including heat-related mortality in Europe.** Specifically, the IPCC points to the 2003 heat wave in western and central Europe, when there were high rates of mortality during the hottest summer since 1500.[29]

III. The *Mass v. EPA* Decision

On October 20, 1999, a group of 19 private organizations filed a rulemaking petition asking the EPA to regulate greenhouse gas emissions from new motor vehicles pursuant to Section 202 of the Clean Air Act.[30] The petition alleged, among other things, that greenhouse gases have accelerated climate change and that climate change would have "serious adverse effects on human health and the environment."[31] On September 8, 2003, the EPA entered an order denying the petition because, according to the EPA: (i) "the Clean Air Act does not authorize EPA to issue mandatory regulations to address global climate change"; and (ii) "even if the agency had the authority to set greenhouse gas emission standards, it would be unwise to do so at this time."[32]

Petitioners, joined by state and local governments, sought review of the EPA's order in the United States Court of Appeals for the District of Columbia Circuit.[33] The Court of Appeals denied the petition for review.[34] The United States Supreme Court agreed to hear the case because of the "unusual importance of the underlying issue."[35]

The Supreme Court in *Mass v. EPA* addressed two main issues concerning the meaning of Section 202(a)(1) of the Clean Air Act, which provides:

> The [EPA] Administrator shall by regulation prescribe (and from time to time revise) in accordance with the provisions of this section, standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare . . . .[36]

First, the Court considered whether the EPA has the statutory authority to regulate greenhouse gas emissions from new motor vehicles.[37] Second, the Court evaluated whether the EPA's stated reasons for refusing to regulate such emissions were consistent with the statute.[38] The majority concluded that the EPA had the authority to regulate greenhouse gas emissions from automobiles, and that the agency could not avoid regulating such emissions when presented with a petition unless the agency could

"ground its reasons for action or inaction in the statute."[39] According to the Supreme Court, the EPA failed to do so. The *Mass v. EPA* decision, however, may become most remembered for its standing analysis.

In order to have standing to sue, a party must establish: (i) a concrete and particularized injury that is either actual or imminent; (ii) that the injury is fairly traceable to the defendant; and (iii) that it is likely that a favorable decision will redress the injury.[40] The Court held that Massachusetts had standing to bring the action because, among other reasons, Massachusetts owned a large portion of the coastline that had allegedly been damaged as a result of global warming. The Court granted Massachusetts "special solicitude in our standing analysis" because, among other reasons, Massachusetts has a statutorily prescribed procedural right to challenge the rejection of its rulemaking petition and because the Court acknowledged "Massachusetts' stake in protecting its quasi-sovereign interests."[41]

The EPA argued that the petitioners did not have standing because greenhouse gas emissions presented widespread harm, but the Court disagreed.[42] The Court acknowledged that the "harms associated with climate change are serious and well recognized" and that global warming may threaten, among other things:

- "a precipitate rise in sea levels by the end of the century";
- "severe and irreversible changes to natural ecosystems";
- "a significant reduction in water storage in winter snowpack in mountainous regions with direct and important economic consequences"; and
- "an increase in the spread of disease."[43]

According to the Court, "[t]hat these climate-change risks are 'widely shared' does not minimize Massachusetts' interest in the outcome of this litigation."[44] Noting that "rising seas have already begun to swallow Massachusetts' coastal land" and that Massachusetts "owns a substantial portion of the state's coastal property," the Court concluded that Massachusetts had alleged a particularized injury "in its capacity as a landowner."[45]

With respect to whether the alleged injury is traceable to the EPA's refusal to act, the Court stated that the "EPA does not dispute the existence of a causal connection between man-made greenhouse gas emissions and global warming. At a minimum, therefore, EPA's refusal to regulate such emissions 'contributes' to Massachusetts' injuries."[46] The EPA argued that its decision not to regulate greenhouse gas emissions from new motor vehicles contributed so insignificantly to the alleged injuries that the EPA "cannot be hauled into federal court to answer for them."[47] The Court, however, refused to accept the proposition that "a small incremental step, because it is incremental, can never be attacked in a federal judicial forum."[48] In any event, the Court found that motor vehicle emissions in the United States contribute in a meaningful way to greenhouse gas concentrations.[49]

Finally, the Court concluded that petitioners satisfied the "redressability" requirement for standing by reasoning that "[w]hile it may be true that regulating motor vehicle emissions will not by itself *reverse* global warming, it by no means follows that we lack jurisdiction to decide whether EPA has a duty to take steps to *slow* or *reduce* it."[50] Although the Court acknowledged that the risk of catastrophic harm is remote, the Court concluded that the risk "would be reduced to some extent if petitioners received the relief they seek."[51]

In their commentary on *Mass v. EPA*, the authors of *Managing the Risks of Global Warming* conclude that the decision "sets a surprisingly low bar for future plaintiffs to achieve standing,"[52] that the Court's findings on standing "seem to create a legal basis for a large landholder to bring suit" and that "the decision represents the surest sign thus far that civil tort suits will play a major role in addressing the global warming debate."[53] Yet the Court clearly states that its standing analysis applies to states and not private parties, emphasizing that "[i]t is of considerable relevance that the party seeking review here is a sovereign State and not, as it was in *Lujan*, a private individual."[54] In addition, *Mass v. EPA* is essentially a regulatory decision ordering the EPA to "ground its reasons for action or inaction" regarding regulation of greenhouse gases in the Clean Air Act,[55] and, as such, may have little relevance to private party suits. Indeed, the Court is silent with regard to the significant causation and proof problems[56] that will be a major hurdle in litigation seeking damages for global warming. However, whether or not litigation seeking damages from private parties for their contributions to global warming ever gets off the ground, there should be no liability insurance coverage for such suits.

IV. Liability Insurance Covers Risks, Not Costs

For many years, factories have been emitting greenhouse gases on a daily basis through their smokestacks, and motor vehicle manufacturers have been designing and producing vehicles that emit exhaust through their tailpipes. There can be no meaningful debate that industry knew that their ordinary business operations—and the operation of

their products—created these byproducts but nonetheless continued to operate their factories and produce goods.

Before a liability insurance policy is implicated by a loss, any loss, there must be an "occurrence." The insuring agreement of a liability policy typically provides that the insurer "will pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as damages because of bodily injury or property damage to which this insurance applies, ***caused by an occurrence***." The term "occurrence" is typically defined in a liability policy. In 1966, the ISO form defined "occurrence" as "an accident, including injurious exposure to conditions, which results, during the policy period, in **bodily injury** or **property damage** neither expected nor intended from the standpoint of the **insured**."[57] In 1973, the definition was revised to "an accident, including continuous or repeated exposure to conditions, which results in **bodily injury** or **property damage** neither expected nor intended from the standpoint of the **insured**."[58] As explained by a contributing author to a publication of the Defense Research Institute, Inc.: "The 1973 version still retains the word 'accident' but the clause, 'injurious exposure to conditions' in the 1966 policy, has been changed to 'continuous or repeated exposure to conditions.' The change was made to prevent the occasional misinterpretation that coverage is contingent on suddenness of the damaging event."[59]

"While the heating up of the planet may not have been an intended consequence decades ago, even now, knowing everything that we know, we are behaving in largely the same manner. Accordingly, the test for whether we should view the consequences of decades-old operations as an "accident," even though there may not have been a general awareness of the consequences at the time, is to evaluate how we address the same activity based on what we do and know today."

Notwithstanding the fact that in the 1960s and 1970s the concept that industrial or consumer activity could cause climate change may have only been a subject of scientific inquiry or a topic for policymakers, any harm sustained today by the build-up of emissions from that era or an earlier time should not be insurable because this is activity that benefited society and remains ongoing. While the heating up of the planet may not have been an intended consequence decades ago, even now, knowing everything that we know, we are behaving in largely the same manner. Accordingly, the test for whether we should view the consequences of decades-old operations as an "accident," even though there may not have been a general awareness of the consequences at the time, is to evaluate how we address the same activity based on what we do and know today. Since with much more complete knowledge industrial behavior is the same, what we did in an earlier age should not be deemed an "accident." The consequences of such economic activity are "costs" and not "risks."

"In other words, what makes greenhouse gas emissions different from asbestos is that while most if not all people would reject any use of asbestos in their communities, most Americans drive automobiles knowing full well that they release greenhouse gases into the atmosphere."

In other words, what makes greenhouse gas emissions different from asbestos is that while most if not all people would reject any use of asbestos in their communities, most Americans drive automobiles knowing full well that they release greenhouse gases into the atmosphere. As one commentator noted in another context, "[w]hile society has [little] use for . . . toxic [products], it does have a need for electricity and cars. Moreover, these needs are not merely incidental, but are critical to the sustainability of modern economies."[60] To this day, government officials have continually expressed their concern and hesitation with regulation of greenhouse gas emissions.[61] To impose on insurers a cost that is a product of our economy and lifestyle would not be sound public policy and would be inconsistent with the occurrence definition.

A leading insurance treatise explains that regular costs of doing business are not covered because:

> The concept of *accident* reflects the underwriting principle that all insurance should provide indemnity for fortuitous losses, not losses that are certain or highly expectable. Insurance contracts do not usually cover the kind of economic detriment that occurs so regularly that it is regarded as a cost of doing business rather than a risk of an enterprise or activity. Although it is often difficult to determine whether a risk is or is not "highly expectable," expectability of loss (at least in the context of products liability coverage) may be gauged in terms of recurrence, and *highly expectable* loss may be characterized generally as a "cost" rather than a "risk" of the insured business."[62]

What goes unsaid in industry's desire to make their old, long-paid-for insurance policies respond to current harms as much as possible is that this reflex essentially imposes the true costs of beneficial economic activity in the past onto the current group of insurance consumers through increased premiums, or

on insurance guarantee funds if insurers which initially wrote the coverage are bankrupt. In the case of global warming, it makes more sense to spread current costs associated with past activity more generally through the tax system to all of us who were beneficiaries and make legislative, and not judicial, policy choices about what kind of remedial measures should be taken and who should be compensated.

Whether or not policyholders "reasonably expected" that they would be protected from any and all consequences of their routine activity, the "reasonable expectations" doctrine cited in *Managing the Risks of Global Warming* is simply an interpretation tool used as an aid in the construction of ambiguous policy terms.[63] The issue here, however, is not one of resolving contract ambiguity—it is one of first principles. Whatever their "expectations" about insurance paying for accidents, policyholders should not expect insurance coverage for the consequences of their routine economic activity.

V. General Liability Policies Respond To Property Damage That Happens During A Policy Period, Not The Cause That Results In Property Damage

"In the asbestos context, courts generally have determined that injury begins at or near the time of asbestos exposure and continues thereafter, potentially implicating many decades' worth of policies. However, in the context of current and any future lawsuits alleging harm caused by global warming, it is by no means evident that the harm alleged to have been caused by global warming happened contemporaneously with the climate change itself."

Although the policyholder bar may well seek to compare global warming suits to long-tail asbestos claims, the analogy breaks down because of the nature and timing of the harm. In the asbestos context, courts generally have determined that injury begins at or near the time of asbestos exposure and continues thereafter, potentially implicating many decades' worth of policies. However, in the context of current and any future lawsuits alleging harm caused by global warming, it is by no means evident that the ***harm*** alleged to have been caused by global warming happened contemporaneously with the climate change itself. Indeed, the allegations in lawsuits filed to date on this issue seem to seek damages as a result of relatively recent losses.

"Occurrence" policies, including those written prior to 1986, typically respond to bodily injury or property damage that occurs during the policy period. Although the word "trigger" does not appear in commercial liability policies, as the California Supreme Court explained in *Montrose Chemical Corp. of California v. Admiral Insurance Co.*,[64] "trigger of coverage" is a "term of convenience used to describe that which, under the specific terms of an insurance policy, must happen in the policy period in order for the potential of coverage to arise. The issue is largely one of timing—what must take place within the policy's effective dates for the potential of coverage to be 'triggered'?"[65] In *Montrose*, the court rejected the suggestion that the "causative event" of initial exposure triggers coverage, and instead held it is the bodily injury during the policy period that governs:

> When [the definition of "occurrence" is] read together with the aforementioned clauses defining covered bodily injury and property damage, this policy language unambiguously distinguishes between the causative event—an accident or "continuous and repeated exposure to conditions"—and the resulting "bodily injury or property damage." It is the latter injury or damage that must "occur" during the policy period, and "which results" from the accident or "continuous and repeated exposure to conditions." In this case, it is the third party litigants' bodily injuries . . . which are alleged to have been continuous or progressively deteriorating throughout [the insurer's] policy periods . . . that triggers potential coverage under the policies in question.[66]

A California appellate court applying the *Montrose* decision in the asbestos context concluded that coverage may be triggered under a number of policy periods because of "extensive medical testimony" and "documentary evidence" establishing that independent injury occurs at many points in time following initial exposure to asbestos.[67] The reason the court looked to such testimony and evidence was because of the undisputed principle that "occurrence policies . . . cover occurrences that result in injury 'during the policy period,' " and thus "the courts in California and elsewhere have concluded that the policies are invoked, or 'triggered,' *when the injury takes place.*"[68]

Greenhouse gas emissions claims do not fit neatly (or, indeed, at all) into the asbestos paradigm, which contemplates injury to a person inhaling asbestos immediately or soon after he or she inhales the asbestos. In the emissions context, the harm does not correlate with the timing of the historic emissions: property damage did not happen immediately upon

the release of greenhouse gases into the atmosphere. To the contrary, the harm alleged in the cases filed to date is significantly attenuated from the emissions themselves. The vastly simplified chain of progression would be something like: (1) greenhouse gases are emitted; (2) greenhouse gases build up in the atmosphere; (3) the buildup of such gases results in global warming; (4) the higher temperatures cause glaciers to melt and the seas to rise; (5) some form of property damage results.

In *Comer v. Nationwide Mutual Insurance Co.*,[69] for example, a case in which plaintiffs seek to hold certain defendants responsible for allegedly creating products and engaging in other business activities that led to an increase in global warming, plaintiffs contend that "Defendants' emissions have also substantially increased in frequency and intensity of storms known as hurricanes; effectively doubling the frequency of category four and five hurricanes over the past thirty years."[70] However, the plaintiffs in *Comer* seek class certification for "the class of plaintiffs who were residents of and/or property owners in the State of Mississippi who suffered loss and harm as a result of Hurricane Katrina."[71] Thus, the property damage actually alleged could not implicate policies prior to August 2005, when Hurricane Katrina struck. Similarly, in *California v. General Motors Corp.*,[72] a case in which the State of California is seeking to hold automobile manufacturers liable for their alleged contributions to the effects of climate change, none of the claimed "catastrophic climate events" pre-dated 1997.[73] And while the State of California in *General Motors* contends that global warming has been happening for some time, according to the complaint it was not until "between 1996 and 2005 [that] scientists detected a widespread glacier acceleration and consequently an increased rate of ice discharge from the Greenland ice sheet."[74] Although the State of California does allege beach erosion and increased flooding, it is not evident how far back in time the State will claim (or will be able to prove) the damage took place—much less damage specifically attributable to greenhouse gas emissions.

Because the "timing of the accident, event, or conditions *causing* the bodily injury or property damage . . . is largely immaterial to establishing coverage,"[75] and because the question of when cognizable harm resulting from greenhouse emissions took place has not been vetted in the courts, there is a serious question as to whether the harm that is alleged or proved will have a long tail. Only the "effect" of the accident, event or conditions "triggers potential liability coverage."[76] Leaving aside questions of the viability of civil actions based on greenhouse gas emissions, it is a mistake to conclude that such complaints necessarily implicate decades-old policies simply by virtue of the timing of the emissions themselves.

VI. Conclusion

Whether or not civil suits for global warming damages against industry will have any viability, historic liability insurance should not cover such litigation. "Occurrence" policies do not answer the consequences of ordinary industrial activity. And it is far from evident that the harm alleged in such suits implicates policies from the 1960s, 1970s and 1980s. As a policy matter, insurance consumers today will be grateful if the impending storm of litigation predicted by some misses the insurance system.

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1 Massachusetts v. Environmental Protection Agency, 127 S. Ct. 1438 (2007).

2 *Massachusetts*, 127 S. Ct. at 1455.

3 *Massachusetts*, 127 S. Ct. at 1463 (quoting 42 U.S.C. § 7607(d)(9)(A)) (internal quotation marks omitted).

4 James M. Davis & Noel C. Paul, *Managing the Risks of Global Warming: Avoiding the Mass Tort Template and Insurance Coverage Implications*, 17 Coverage 1, May/June 2007.

5 James M. Davis & Noel C. Paul, *Managing the Risks of Global Warming: Avoiding the Mass Tort Template and Insurance Coverage Implications*, 17 Coverage 1, May/June 2007, at 10–11.

6 James M. Davis & Noel C. Paul, *Managing the Risks of Global Warming: Avoiding the Mass Tort Template and Insurance Coverage Implications*, 17 Coverage 1, May/June 2007, at 15–16.

7 James M. Davis & Noel C. Paul, *Managing the Risks of Global Warming: Avoiding the Mass Tort Template and Insurance Coverage Implications*, 17 Coverage 1, May/June 2007, at 13.

8 *Massachusetts*, 127 S. Ct. at 1459–60.

9 James M. Davis & Noel C. Paul, *Managing the Risks of Global Warming: Avoiding the Mass Tort Template and Insurance Coverage Implications*, 17 Coverage 1, May/June 2007, at 14.

10 Matt Brady, *US Environment Ruling a Huge Blow to Insurers?*, NU Online News Service, Apr. 3, 2007, http://www.propertyandcasualtyinsurancenews.com/cms/nupc/Breaking%20News/2007/04/03-GASES-mb.

11 *See, e.g.*, National Geographic, What is Global Warming?, http://green.nationalgeographic.com/environment/global-warming/gw-overview.html (last visited Aug. 14, 2007).

12 Peter Gwynne, *The Cooling World*, Newsweek, Apr. 28, 1975, at 64. In 2006, *Newsweek* published an article in which it admitted that its 1975 article "was so spectacularly wrong about the near-term future." *See* Jerry Adler, *Remember Global Cooling? Why Scientists*

Find Climate Change So Hard to Predict, Newsweek, Oct. 23, 2006, *available at* http://www.msnbc.msn.com/id/15391426/site/newsweek/.

[13] *Massachusetts,* 127 S. Ct. at 1448.

[14] *Massachusetts,* 127 S. Ct. at 1448.

[15] *See Massachusetts,* 127 S. Ct. at 1448.

[16] *See Massachusetts,* 127 S. Ct. at 1447 n.9.

[17] Intergovernmental Panel on Climate Change [IPCC], Working Group I, *Summary for Policymakers.* In: *Climate Change 2001: The Scientific Basis. Contribution of Working Group I to the Third Assessment Report of the Intergovernmental Panel on Climate Change (IPCC),* at 2, 10 (2001), *available at* http://www.ipcc.ch/pub/spm22-01.pdf. After the IPCC published its report in 2001, sixteen science academies issued a joint statement endorsing the IPCC report, stating that "[t]he work of the Intergovernmental Panel on Climate Change (IPCC) represents the consensus of the international scientific community on climate change science." *See* "The Science of Climate Change," May 17, 2001, *available at* http://www.royalsociety.org/displaypagedoc.asp?id=13619.

In 2007, the IPCC Working Group I released its Summary for Policymakers, which contained the more definite statement that "[m]ost of the observed increase in global average temperatures since the mid-20th century is *very likely* due to the observed increase in anthropogenic greenhouse gas concentrations." *See* IPCC, Working Group I, *Summary for Policymakers.* In: *Climate Change 2007: The Physical Science Basis. Contribution of Working Group I to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change,* at 10 (2007) (S. Solomon et al., eds.), *available at* http://ipcc-wg1.ucar.edu/wg1/Report/AR4WG1_Pub_SPM-v2.pdf. "*Very likely*" is defined as >90% probability of occurrence. *See* IPCC, Working Group I, *Summary for Policymakers,* at 3 n.6 (2007) (S. Solomon et al., eds.), *available at* http://ipcc-wg1.ucar.edu/wg1/Report/AR4WG1_Pub_SPM-v2.pdf.

[18] Glen Johnson, *Invigorated Kerry Outlines Updated Energy Plan,* Associated Press State & Local Wire, Jun. 26, 2006.

[19] James L. Connaughton & John H. Marburger, III, Open Letter on the President's Position on Climate Change, The White House, Feb. 7, 2007, http://www.whitehouse.gov/news/releases/2007/02/20070207-5.html.

[20] Michael A. Fletcher, *Bush Sets Emissions Summit,* Washington Post, Aug. 4, 2007, at A07, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2007/08/03/AR2007080301906.html?sub=AR.

[21] *Massachusetts,* 127 S. Ct. at 1455.

[22] IPCC, Working Group II, *Assessment of Observed Changes and Responses In Natural and Managed Systems.* In: *Climate Change 2007: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change,* at 92 (2007) (Cynthia Rosenzweig et al.), *available at* http://www.gtp89.dial.pipex.com/01.pdf.

[23] IPCC, Working Group II, *Assessment of Observed Changes and Responses In Natural and Managed Systems,* at 92 (2007) (Cynthia Rosenzweig et al.); *available at* http://www.gtp89.dial.pipex.com/01.pdf.

[24] IPCC, Working Group II, *Assessment of Observed Changes and Responses In Natural and Managed Systems,* at 92 (2007) (Cynthia Rosenzweig et al.), *available at* http://www.gtp89.dial.pipex.com/01.pdf.

[25] IPCC, Working Group I, *Summary for Policymakers,* at 8 (2007) (S. Solomon et al., eds.), *available at* http://ipcc-wg1.ucar.edu/wg1/Report/AR4WG1_Pub_SPM-v2.pdf.

[26] The IPCC defines "likely" to have a confidence level of greater than 66 percent probability of occurrence. *See* IPCC, Working Group I, *Summary for Policymakers,* at 3 n.6 (2007) (S. Solomon et al., eds.), *available at* http://ipcc-wg1.ucar.edu/wg1/Report/AR4WG1_Pub_SPM-v2.pdf.

[27] IPCC, Working Group I, *Summary for Policymakers,* at 8, 9 (2007) (S. Solomon et al., eds.), *available at* http://ipcc-wg1.ucar.edu/wg1/Report/AR4WG1_Pub_SPM-v2.pdf.

[28] IPCC, Working Group II, *Assessment of Observed Changes and Responses In Natural and Managed Systems,* at 103 (2007) (Cynthia Rosenzweig et al.), *available at* http://www.gtp89.dial.pipex.com/01.pdf.

[29] IPCC, Working Group II, *Assessment of Observed Changes and Responses In Natural and Managed Systems,* at 108 (2007) (Cynthia Rosenzweig et al.), *available at* http://www.gtp89.dial.pipex.com/01.pdf.

[30] *Massachusetts,* 127 S. Ct. at 1449.

[31] *Massachusetts,* 127 S. Ct. at 1449.

[32] *Massachusetts,* 127 S. Ct. at 1450.

[33] *Massachusetts,* 127 S. Ct. at 1451.

[34] *Massachusetts,* 127 S. Ct. at 1451.

[35] *Massachusetts,* 127 S. Ct. at 1447.

[36] *Massachusetts,* 127 S. Ct. at 1447 (quoting Clean Air Act) (quotation marks omitted).

[37] *Massachusetts,* 127 S. Ct. at 1459–60.

[38] *Massachusetts,* 127 S. Ct. at 1460–63.

[39] *Massachusetts,* 127 S. Ct. at 1463.

[40] *Massachusetts,* 127 S. Ct. at 1453.

[41] *Massachusetts,* 127 S. Ct. at 1454–55. Only one petitioner is required to have standing in order to permit the Court to consider a petition for review. *Massachusetts,* 127 S. Ct. at 1453.

[42] *Massachusetts,* 127 S. Ct. at 1453, 1458.

[43] *Massachusetts,* 127 S. Ct. at 1455–56 (citations and internal quotation marks omitted).

[44] *Massachusetts,* 127 S. Ct. at 1456.

[45] *Massachusetts,* 127 S. Ct. at 1456.

[46] *Massachusetts,* 127 S. Ct. at 1457.

[47] *Massachusetts,* 127 S. Ct. at 1457.

[48] *Massachusetts,* 127 S. Ct. at 1457 ("Agencies, like legislatures, do not generally resolve massive problems in one fell regulatory swoop . . . . They instead whittle away at them over time, refining their preferred approach as circumstances change and as they develop a more-nuanced understanding of how best to proceed.").

[49] *Massachusetts,* 127 S. Ct. at 1457–58.

[50] *Massachusetts,* 127 S. Ct. at 1458.

[51] *Massachusetts,* 127 S. Ct. at 1458.

[52] James M. Davis & Noel C. Paul, *Managing the Risks of Global Warming: Avoiding the Mass Tort Template and Insurance Coverage Implications,* 17 Coverage 1, May/June 2007, at 10.

[53] James M. Davis & Noel C. Paul, *Managing the Risks of Global Warming: Avoiding the Mass Tort Template and Insurance Coverage Implications,* 17 Coverage 1, May/June 2007, at 11.

[54] *Massachusetts,* 127 S. Ct. at 1454.

[55] *Massachusetts,* 127 S. Ct. at 1463.

[56] See Comer v. Nationwide Mut. Ins. Co., No: 1:05CV436 LTS-RHW, 2006 U.S. Dist. LEXIS 33123, at *12 (S.D. Miss. Feb. 23, 2006). In *Comer,* the court dismissed certain defendants from the case, noting that it foresaw "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 gasses; 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 gasses, to global warming; and the extent to which the emission of greenhouse gasses by these defendants, through the phenomenon of global warming, intensified or otherwise affected the weather system that produced Hurricane Katrina." *Comer,* 2006 U.S. Dist. LEXIS 33123, at *12.

[57] Alfred E. Reichenberger, *The General Liability Insurance Policies—Analysis of 1973 Revisions, in* General Liability Insurance 1973 Revisions 5, 8 (Fred L. Bardenwerper & Donald J. Hirsch, eds.) (emphasis in original).

[58] Alfred E. Reichenberger, *The General Liability Insurance Policies—Analysis of 1973 Revisions, in* General Liability Insurance 1973 Revisions 5, 9 (Fred L. Bardenwerper & Donald J. Hirsch, eds.) (emphasis in original).

[59] Alfred E. Reichenberger, *The General Liability Insurance Policies—Analysis of 1973 Revisions, in* General Liability Insurance 1973 Revisions 5, 10 (Fred L. Bardenwerper & Donald J. Hirsch, eds.) (emphasis in original).

[60] Daniel J. Grimm, Note, *Global Warming and Market Share Liability: A Proposed Model for Allocating Tort Damages Among CO_2 Producers,* 32 Colum. J. Envtl. L. 209, 221 (2007). Grimm explains that "high carbon content fossil fuels account for almost 85 percent of U.S. energy needs." Grimm, 32 Colum. J. Envtl. L. at 222.

[61] For example, in July 1997, the U.S. Senate unanimously passed a resolution stating that "it is the sense of the Senate that . . . the United States should not be a signatory to" any global climate treaty that "would result in serious harm to the economy of the United States." S. Res. 98, 105th Cong. (1997) (enacted), *available at* http://www.nationalcenter.org/KyotoSenate.html. In addition, in March 2001, President George W. Bush rejected the Kyoto treaty on global warming, saying the pact would have "wrecked" the U.S. economy. "Bush: Kyoto Treaty Would Have Hurt Economy," Associated Press, June 30, 2005, *available at* http://www.msnbc.msn.com/id/8422343/. More recently, in December 2006, Representative John Dingell expressed his concerns with balancing climate change solutions with the health of the American economy: "We've got to begin to find out what we can do, and how we can do it without destituting the American society." Amanda Griscom Little, *Dingell Minded,* Grist, Dec. 20, 2006, *available at* http://www.grist.org/cgi-bin/printthis.pl?uri=/news/maindish/2006/12/20/dingell/index.html.

[62] Appleman on Insurance Law and Practice § 117.3 (2d ed. 2007).

[63] *See, e.g.,* Boghos v. Certain Underwriters at Lloyd's of London, 36 Cal. 4th 495, 501 (2005) (explaining that if policy terms are ambiguous, they are interpreted to protect the objectively reasonable expectations of the insured); Prudential Ins. Co. of Am. v. Superior Court, 98 Cal. App. 4th 585, 599 (6th Dist. 2002) ("The plain meaning of a policy provision governs, and an insured's reasonable expectations are not considered except where the policy provisions are ambiguous."); GE Engine Servs. UNC Holding I, Inc. v. Century Indem. Co., 250 F. Supp. 2d 1237, 1241 (C.D. Cal. 2001) (explaining that when court is "faced with ambiguous language" then the court evaluates the reasonable expectations of the insured).

[64] Montrose Chem. Corp. of Cal. v. Admiral Ins. Co., 10 Cal. 4th 645 (1995).

[65] *Montrose,* 10 Cal. 4th at 655 n.2.

[66] *Montrose,* 10 Cal. 4th at 669.

[67] Armstrong World Indus. v. Aetna Cas. & Sur. Co., 45 Cal. App. 4th 1, 36–48 (1st Dist. 1996). The court in *Armstrong* based its conclusion on testimony and evidence "concerning the pathogenesis of asbestos-related conditions" and found, specifically, that post-exposure injury results from the presence of asbestos fibers in one's lungs and the resulting "fibrosis," or "the formation of fibrous tissue . . . more commonly called scarring," which occurs at many discrete points in time. *Armstrong,* 45 Cal. App. 4th at 38.

[68] *Armstrong,* 45 Cal. App. 4th at 39 (emphasis added). *See also* Keene Corp. v. Insurance Co. of N. Am., 667 F.2d 1034, 1042, 1047 (D.C. Cir. 1981) (concluding, in answer to the question "when did 'injury' occur," that "inhalation exposure, exposure in residence

and manifestation [of disease] all trigger coverage under the policies"); Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc., 633 F.2d 1212, 1222 (6th Cir. 1980) (adopting "exposure" trigger theory because of "uncontroverted" medical evidence that " 'bodily injury' in the form of tissue damage takes place at or shortly after the initial inhalation of asbestos fibers).

[69] Comer v. Nationwide Mut. Ins. Co., No. 1:05CV436 LTS-RHW (S.D. Miss.).

[70] *Comer,* No: 1:05CV436 LTS-RHW, Third Am. Compl. ¶ 6.

[71] *Comer,* No: 1:05CV436 LTS-RHW, Third Am. Compl. ¶ 47.

[72] California v. General Motors Corp., No. C 06-05755 (N.D. Cal.).

[73] *General Motors,* No. C 06-05755, Second Am. Compl. ¶ 39.

[74] *General Motors,* No. C 06-05755, Second Am. Compl. ¶ 38.

[75] Stonelight Tile, Inc. v. California Ins. Guarantee Ass'n, 150 Cal. App. 4th 19, 36 (6th Dist. 2007) (quoting Montrose Chem. Corp. of Cal. v. Admiral Ins. Co., 10 Cal. 4th 645, 675 (1995)).

[76] *Stonelight Tile,* 150 Cal. App. 4th at 36 (quoting *Montrose,* 10 Cal. 4th at 675).