



CLIMATE CHANGE AND ITS IMPLICATIONS FOR INSURANCE COVERAGE RISKS

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Implications of Climate Change: Insurance Coverage Issues

Incorporating climate-sensitive decision-making into risk management means more than encouraging a reduction in insurer – and policyholder – carbon footprints by reducing company fleet size, adopting paperless claim handling, minimizing greenhouse gas emissions, practicing energy conservation and adopting green building techniques.

Climate change presents a host of coverage issues for insurers, including a wide range of concerns under property, D&O and liability insurance policies.

Key Insurance Coverage Risks Posed By Climate Change

- Property Coverage
- D&O Coverage
- General Liability Coverage

Property Insurance Coverage

- A projected increase in the frequency and severity of natural disasters such as hurricanes, floods, snow and hail storms, tornadoes and drought-related forest fires means more homeowner and business property and business interruption losses, including supply chain losses.
- Coverage issues will be presented, including flood vs. wind coverage disputes and questions about the scope of business loss coverages and especially contingent business interruption coverages.

Property Insurance Coverage (cont'd)

- Possible Property Insurance Contract Modifications (apart from the possible withdrawal from certain geographic markets) include: changes in premium-calculation methodologies; new products for green building and carbon-trading; mileage-based automobile coverage and discounts for hybrids or fuel-efficient vehicles.
- Insurer Actions and Activism may include: promoting stricter building code requirements; flood insurance reforms; and possible responses to the politicization of exclusions and deductibles (e.g., “Superstorm” vs. Hurricane Sandy).

D&O Insurance Coverage

- The increasing number of shareholder resolutions relating to climate change may mean a greater risk of D&O exposure. Moreover, SEC reporting is increasingly including climate-change related risks. Example: 2010 SEC Guidance on application to climate change of existing disclosure requirements.
- Clearly, there are increased regulatory compliance risks and transactional risks. Is there also an increased possibility of share decline from (possibly belated) disclosure of climate-change related issues? Is the stage set for shareholder suits?
- Shareholder suits would pose D&O coverage issues such as the application of principles of rescission; retroactive date provisions; dishonesty, fraud and willful acts exclusions; and exclusions for pollution-related loss.

General Liability Insurance Coverage

- Lawsuits targeting companies for contributing to climate change that allegedly causes bodily injury or property damage have been brought under a number of theories, as will be discussed in further detail.
- GL coverage issues posed include: “occurrence;” pollution exclusions; long-tail trigger of coverage theories; proof of policies; expected or intended clause; notice of occurrence; bodily injury or property damage; and the possible application of the personal injury coverage part.
- Also, there are potential issues concerning the scope of any applicable coverage; aggregate limits, number of occurrences; stacking and allocation.

What is the status and future of litigation seeking to impose liability for climate-change related harm?

- Major climate change tort suits targeting private industry to date include: *California v. General Motors Corp.*; *American Elec. Power Co. v. Connecticut*; *Comer v. Murphy Oil USA, Inc.*; and *Native Village of Kivalina v. ExxonMobile Corp.*.
- Given the threshold justiciability, standing and causation issues posed in these suits, does industry face a continuing risk of exposure to climate change liability suits? If so, who are the likely plaintiffs and defendants in such suits?

Tort Litigation Seeking Relief For Climate-Change Related Harm

- *California v. General Motors Corp.*, No. C06–05755, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007).
 - Action against “Big 6” automakers for contributing to global warming and harm to California. Sought money damages.
 - Dismissed on justiciability grounds (political question doctrine) in trial court; appeal voluntarily dismissed.

Tort Litigation Seeking Relief for Climate-Change Related Harm

- *Am. Elec. Power Co. v. Connecticut*, 564 U. S. ____, 131 S. Ct. 2527 (2011).
 - Suit against the five largest emitters of carbon dioxide in the United States (four private power companies and the federal Tennessee Valley Authority).
 - Clean Air Act gives EPA authority to regulate carbon dioxide emissions from power plants. It thus displaces federal common law public nuisance claims. Federal judges may not set limits on greenhouse gas emissions given law empowering the EPA to do so.
 - However, the question of the viability of tort suits for monetary damages was left open.

Tort Litigation Seeking Relief for Climate-Change Related Harm

- *Comer v. Murphy Oil USA, Inc.*, No. 1:11cv220-HSO-JMR, 2007 WL 6942285 (S.D. Miss. Aug. 30, 2007), *appeal dismissed*, 607 F.3d 1049 (5th Cir.2010) (en banc).
 - The trial court ruled that plaintiffs (Hurricane Katrina victims) did not have standing because unable to prove that their alleged injuries were fairly traceable to the defendants (oil companies). It also found that the claims were really non-justiciable political questions and the entire suit had been displaced by Clean Air Act.
 - On appeal, the Fifth Circuit reversed and remanded, but then granted en banc rehearing, vacating the panel decision. Before rehearing en banc, the court lost its quorum due to recusals, and lacking jurisdiction to hear the case, dismissed the appeal. *Comer v. Murphy Oil USA*, 585 F.3d 855, 880 (5th Cir. 2009), *vacated*, 607 F.3d 1049 (5th Cir.2010) (en banc).
 - A petition for mandamus to the US Supreme Court was denied. *In re Comer*, — U.S. —, 131 S.Ct. 902, 178 L.Ed.2d 807 (2011).

Tort Litigation Seeking Relief for Climate-Change Related Harm

- *Comer v. Murphy Oil USA, Inc*, 839 F. Supp. 849 (S.D. Miss. 2012), affirmed, No. 12-60291, 2013 WL 1975849 (5th Cir. May 14, 2013).
 - The Comer plaintiffs refiled their suit, alleging a link between emissions by energy companies and global warming caused hurricane damages.
 - The district court held: that their claims were barred by the doctrine of res judicata, and the applicable statute of limitations; that their claims raised nonjusticiable political questions; that their claims were preempted by the Clean Air Act; that they could not establish proximate causation; and that they lacked Article III standing.
 - The Fifth Circuit affirmed on principles of res judicata, ruling that a federal court may not abrogate principles of res judicata out of equitable concerns.

Tort Litigation Seeking Relief for Climate-Change Related Harm

- *Native Village of Kivalina v. ExxonMobile Corp.*, No. 09-17490, 2012 U.S. App. LEXIS 19870 (9th Cir. Sept. 21, 2012), *cert. denied*, No. 12-1072, 2013 U.S. LEXIS 3929 (U.S. May 20, 2013).
 - Native village and city located north of the Arctic Circle sought damages from multiple oil, energy and utility companies, alleging that, as a result of the defendants' emissions of greenhouse gases, global warming had caused the erosion of the plaintiffs' land.
 - Ninth Circuit relied on the Supreme Court's 2011 *AEP v. Connecticut* decision in ruling that federal public nuisance claims had been displaced by the Clean Air Act.
 - Petition for rehearing denied; certiorari denied.
 - Plaintiffs may still pursue public nuisance claims under state law (if they are not preempted by the Clean Air Act) because they were dismissed without prejudice early in the suit.

Tort Litigation Seeking Relief for Climate-Change Related Harm

- What tort claims may remain after the rulings in *AEP*, *Comer*, and *Kivalina*? Possible state common law claims, which were not disposed of in the earlier rulings, and whose viability is unresolved.

- Other Future Tort Suits Against Private Party Defendants?
 - Possible plaintiffs: property owners (farmers, ocean-front homeowners); natural resource users (such as ski resorts, commercial fishermen); state attorneys general
 - Possible defendants: Fossil fuel producers, manufacturers running fossil fuel plants or otherwise emitting GHGs, manufacturers of products emitting GHGs (automakers)

Tort Litigation Seeking Relief for Climate-Change Related Harm

- Also pending throughout the country is a new wave of climate-change related litigation: Public Trust Doctrine Lawsuits.
 - Multiple suits in a number of states, including California, Montana, Iowa, Texas, Minnesota, Arizona, Washington, Alaska, New Mexico, Oregon, Kansas and Massachusetts, but no private industry defendants.
 - Does the State have an obligation to protect the atmosphere under public trust doctrine requiring government to protect shared resources fundamental for human health and survival?
 - Viability of these suits remains unclear.
- Potential for Derivative Claims against Private Industry?

Climate Change Liability Landscape

- Although the landscape currently is unclear, it is likely that climate change lawsuits are far from over and that new theories of liability and causes of action will be developed and tested in the courts.
- The assignment and apportionment of liability to a particular defendant, or even a single industry, may, however, raise thorny questions, given the existence of a multitude of “greenhouse gas emitters” on the planet.

General Liability Coverage Issues In Climate Change-Related Litigation

- To date, there has been only one litigated coverage dispute, which will be discussed further below.
- However, other cases have resulted in claims for coverage and defense exposure for insurers.
- Future cases also may present defense and possibly indemnity exposure to general liability insurers, depending on numerous factors, including the nature of the claim, details of the complaint, coverage provisions of the applicable policy or policies, jurisdiction of suit and governing law.

The AES Corporation v. Steadfast Insurance Co., 283 Va. 609, 725 S.E.2d 532 (Va. 2012).

- This case presented the Virginia Supreme Court with the question whether the policyholder was entitled to coverage for the Kivalina lawsuit alleging property damage as a result of the emission of greenhouse gases that allegedly caused global warming.
- The insurer denied coverage based on the definition of “occurrence” and the pollution exclusions in the policies, pursuing both issues in the trial court and on appeal to the Virginia high court.

The AES Corporation v. Steadfast Insurance Co., 283 Va. 609, 725 S.E.2d 532 (Va. 2012).

- The Virginia Supreme Court did not reach the pollution exclusion issue. It held that the underlying complaint did not allege an “occurrence” as defined by the policies
- The Virginia Supreme Court found that the case concerned allegations of intentional release of greenhouse gases into the atmosphere where global warming, and ultimately the harm to Kivalina, was the natural and probable consequence of those actions. Thus, the policyholder knew or should have known of the consequences of its actions.

The AES Corporation v. Steadfast Insurance Co., 283 Va. 609, 725 S.E.2d 532 (Va. 2012).

- The Virginia Supreme Court granted a petition for rehearing filed by the policyholder on the “occurrence” issue. The prior opinion, reported at 282 Va. 252, 715 S.E.2d 28 (2011), was set aside and withdrawn by Order dated January 17, 2012.
- But, on rehearing, the Court adhered to its finding of no coverage. As the insurer and its amici argued, the *Kivalina* complaint alleged that AES acted unreasonably not because its emission of greenhouse gases risked causing global warming, but because its emission of greenhouse gases inherently caused global warming.

General Liability Insurance Coverage:

- Will there be a continuation of tort litigation? Will future suits allege intentional acts with known consequences?
- Key coverage issues: Pollution exclusions? Defense exposure?
- Policy Modifications – possible changes in premium-calculation; exclusion for injury allegedly caused by GHG emissions; possible revisions to allocation and aggregate limit provisions
- Insurer Actions: little activism to date, especially among small and mid-size insurers; future efforts to address GHG emission standards?



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Questions?

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