Introduction

Companies across a growing number of industries are being threatened by lawsuits alleging that their emissions of greenhouse gases (“GHG”) are contributing to global warming. These suits are trending more toward private plaintiffs seeking monetary relief for damages allegedly caused by global warming (e.g., stronger hurricane storms, rising tides, melting snow cap, etc.), rather than states and municipalities seeking to reduce a company’s future GHG emissions. The rise of private, often class-action, lawsuits has the potential to greatly increase the exposure of all affected companies. This Alert will focus on potential liability insurance coverage issues raised by private plaintiff claims for damages arising from global warming.

In the past, insurance coverage for these types of private plaintiff suits may have been an afterthought because, typically, courts have granted preliminary motions to dismiss the suits on the ground, among others, that the plaintiffs lacked standing to pursue such claims. That mindset may change, however, given two recent federal circuit court decisions, ruling that the plaintiffs may have standing to pursue causes of action against industrial defendants that have emitted GHG. See Comer v. Murphy Oil USA, No. 07-60756, 2009 WL 3321493 (5th Cir. Oct. 16, 2009), and consolidated cases of State of Connecticut v. American Elec. Power Co., Inc. and Open Space Inst. v. American Elec. Power Co., Inc., Nos. 05-5104-CV and 05-5119-CV, 2009 WL 2996729 (2d Cir. Sept. 21, 2009) (for a further discussion of these decisions see “Emissions of Greenhouse Gases & Global Warming – Regulation through Litigation? Who is Liable for Damages Arising from Global Warming?”). Allegations like those in Comer – i.e., that GHG emitted by the defendants contributed to higher sea levels and air and water temperature, which, in turn, increased the severity of the damage caused to plaintiffs’ property by Hurricane Katrina – may trigger general liability insurance coverage.1 As a result, there are several preliminary insurance issues that every policyholder should consider when confronted with such a claim.

Defense Costs

No court has yet imposed liability for private-party damage allegedly caused by GHG. However, that fact has not saved defendants in such cases from incurring significant legal fees defending against such claims. The defendant company’s general liability policy may provide coverage for such defense costs.

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1 Depending on the nature of the specific claims alleged and the specific parties named as defendants, other types of liability insurance, such as directors and officers coverage or errors and omissions coverage, may also be implicated by such claims.
Specifically, primary liability policies often impose on the insurer a duty to defend the policyholder from any claims that may arguably fall within the terms of the insurance policy. It is generally recognized that an insurer’s duty to defend is broader than its duty to indemnify. Thus, an insurer may be required to defend an action for which it ultimately may not be required to indemnify the insured.

In the case of global warming claims, an insurer would be obligated to provide a defense to the policyholder so long as the allegations of the plaintiff’s claim, if proven, would be within the coverage provided by the insurer. In cases like Comer, the basic allegations that the policyholder’s actions caused property damage to the plaintiff may be sufficient to trigger the insurer’s duty to defend. It does not matter that liability may not ultimately be imposed on the policyholder or that the insurer may raise a successful defense to coverage. Until such time as the insurer proves that the entire claim is excluded from coverage, the insurer typically must provide a defense to the policyholder. Thus, a liability policy’s defense duty may provide coverage for all or at least a significant portion of a company’s defense costs, including expert fees, incurred in defending global warming claims.

A policyholder should consider providing notice under any and every policy that may be triggered by the lawsuit based on the factual allegations presented (e.g., time period of the alleged injury or damage at issue) and the amount of potential damages sought (e.g., does the amount of potential damages exceed the limits of the policyholder’s primary policy?). To determine which particular insurance policies may potentially provide coverage for a claim, both the current liability insurance program, including excess coverage, as well as historical policies should be reviewed. Many historical general liability policies were written on an “occurrence” basis and could provide coverage if the plaintiff’s claim alleges property damage having taken place during a long-since-expired policy period, regardless of when the claim is subsequently asserted. For example, if a plaintiff alleges that the policyholder’s emission of GHG has been causing property damage since 1965, the policyholder has an argument for accessing coverage from every liability policy providing coverage since that year. As such, it is important for a policyholder to conduct a detailed review of the allegations in the complaint to make sure that any potential insurers are put on notice of the claim, regardless of whether the policy is ultimately called upon to indemnify the policyholder.

**Possible Insurer Defenses to Coverage**

Insurance companies can be expected to raise a number of defenses to coverage for claims related to global warming, including:

- **Lack of Fortuity** – Insurers frequently contend that insurance policies have an express or implied concept of fortuity, i.e., the policy insures only chance occurrences or events. Insurer-side commentators have already argued that a policyholder’s emission of GHG may not be a fortuitous occurrence since companies have long known they were emitting GHG and nonetheless continued to do so. An insurer’s fortuity argument could come in several forms, including arguing:

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2 Similarly, umbrella and excess policies often impose on the insurer a duty to reimburse the policyholder for its legal fees and costs in defending a claim.

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that there is no “occurrence” under the policy language because the alleged damage was not the result of an accident, but rather was caused by its deliberate actions; or (ii) that the damage done by the GHG was expected or intended by the policyholder; or (iii) the damage done by the GHG was a known loss to the policyholder at the time that the policy was purchased.

The policyholder has potentially successful responses to these defenses. In many jurisdictions, the critical issue is not whether the policyholder expected or intended the action giving rise to the alleged damage, but rather whether the policyholder expected or intended the resulting damage. In those jurisdictions, a policyholder may be able to overcome an insurer’s “lack-of-accident” and “expected-or-intended” defenses if it did not expect or intend that its emissions were causing the alleged damage or injury for which it has been sued. Similarly, the policyholder may be able to overcome an insurer’s “known loss” defense if it was unaware of the alleged injury at the time that it purchased the policy.

**Timing of Damage** – Many commercial liability policies in effect currently are written on a “claims-made” basis, meaning that they provide coverage if the claim is made against the policyholder during the time period covered by the policy. Therefore, a policyholder that is sued for alleged injury arising from GHG emissions may seek coverage under the claims-made policy on the risk when the claim is asserted against the policyholder, even if the alleged damage pre-dated the policy period.

Depending on the allegations of the complaint and the facts, the policyholder may also be able to obtain coverage from its current and/or historical “occurrence”-based liability policies. Under such policies, a claim may be covered if some part of the alleged property damage or bodily injury occurs during the policy period, regardless of when the claim is asserted. Thus, if the plaintiff alleges that the GHG emissions have caused property damage over the last thirty years, the policyholder may be able to seek coverage from every occurrence policy on the risk from the late 1970s through the date of the last such policy. Of course, in the absence of an allegation of property damage taking place during previous policy periods, it will be difficult to obtain a defense from those historical policies.

**Pollution Exclusion** – Prior to 1970, most general liability policies did not contain any provision purporting to exclude coverage for damage allegedly caused by pollution. Beginning around 1970, many liability policies included what has been called the “qualified pollution exclusion.” Although the language of these exclusions varied to some degree, they essentially purported to preclude coverage for property damage or bodily injury allegedly resulting from pollution, unless the pollution was “sudden and accidental” or “sudden, unexpected and unintended.” Beginning around the mid-1980s, most insurers began including an “absolute pollution exclusion” in their policies, which purports to exclude coverage for any liability arising from pollution-caused damage, regardless of whether the pollution incident was sudden and accidental.

Policyholders who are sued in GHG emission cases will need to determine whether their liability policies that may otherwise provide coverage contain a pollution exclusion and, if so, the particular type of exclusion. If the policies at issue contain any type of pollution exclusion, the insurers for those policies will likely argue that they bar coverage. However, policyholders have reasonable arguments in response.

The most basic issue regarding a pollution exclusion’s application is whether GHG and carbon dioxide are “pollutants” under the definitions in the policies. In this regard, insurers may point to the decision in Massachusetts v. Environmental Protection Agency, 549 U.S. 497 (2007), wherein the Supreme Court of the United States held that carbon dioxide emissions were a pollutant under the Clean Air Act. That ruling, however, is not dispositive of the issue. First, the Massachusetts decision had nothing to do with the application of the pollution exclusion in a liability policy, but instead was focused on the EPA’s ability to regulate GHG. Second, most insurance policies define “pollutant” more narrowly than the Clean Air Act. As the Court in Massachusetts stated, “[t]he 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.’”  Id. at 528-29 (emphasis in original). Insurance policies, by contrast, generally define “pollutants” as “any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste.” Thus, for insurance purposes, a “pollutant” must be an irritant or contaminant. Carbon dioxide arguably falls outside those categories; further, it cannot be neatly classified into any of the specified forms of pollutants in the definition, either. If a policyholder is seeking coverage under a policy that has a qualified pollution exclusion, it may be able to avoid the exclusion if it can establish that the alleged contamination of the environment was “sudden and accidental.” Various jurisdictions have interpreted this phrase differently. Although many courts have agreed that the word “accidental” means “unintended,” courts disagree regarding the proper meaning of the word “sudden.” Some courts have ruled that it means “instantaneous.” Thus, under this interpretation, the policyholder can only avoid the qualified pollution exclusion if it can prove that the contamination occurred abruptly, and not gradually. A policyholder confronting the typical GHG emission claim may find it difficult to satisfy this requirement. Nonetheless, many other courts have interpreted “sudden” to mean “unexpected.” Under this view, a policyholder may be able to obtain coverage notwithstanding the qualified pollution exclusion if it can establish that it did not expect or intend the alleged contamination of the environment arising from its GHG emissions.

Finally, there are other arguments policyholders may assert against the application of the pollution exclusion. For example, some courts have interpreted the pollution exclusion not to apply to product liability hazards because such hazards were not intended to be the subject of the exclusion. Likewise, some commentators have argued that the pollution exclusion would not apply to global warming liabilities because the reasonable expectations of the policyholder in procuring liability coverage would be that such claims are not excluded.

Conclusion

As the above discussion makes clear: (i) insurers are likely to challenge claims for coverage for GHG emissions claims; (ii) they will seek to rely on certain provisions of their policies in asserting defenses to coverage; (iii) policyholders may have effective arguments in response to the insurers’ defenses regarding such claims; (iv) the allegations of the complaint, the actual facts, and the specific language of the policies at issue will be critical in the determination whether coverage is available; and (v) different jurisdictions interpret key policy language differently, and the choice-of-law determination in the coverage dispute may be critical.

Whether the recent Comer and American Electric Power decisions will open the floodgates of global warming litigation as many commentators predict remains to be seen. What is known, though, is that companies that are named defendants in these lawsuits may be able to look to their general liability policies to respond to such claims and provide some protection.

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