

Insurance Coverage for Global Warming Liabilities

Presentation to EEI Risk Management Committee - February 22, 2011

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I. Global Warming Claims

- “The harms associated with climate change are serious and well recognized” and the “EPA does not dispute the existence of a causal connection between man-made greenhouse gas emissions and global warming.” *Massachusetts v. Env'tl. Prot. Agency*, 549 U.S. 497, 521, 523 (2007)
- Swiss Re: “[w]e expect ... that climate change-related liability will develop more quickly than asbestos-related claims and believe the frequency and sustainability of climate change-related litigation could become a significant issue within the next couple of years.” See Urs Leimbacher, et al., *The Globalisation of Collective Redress: Consequences for the Insurance Industry*, Swiss Re, at 3 (2009), <http://www.swissre.com>.
- Three lawsuits known to date that have sought damages caused by global warming from industrial companies' greenhouse gas emissions which allegedly contributed to such global warming.
- Are these lawsuits the tip of the iceberg or last of their kind?

I. Global Warming Claims

A. *Connecticut v. American Electric Power Co., Inc.*, Docket Nos. 05-5104-cv, 05-5119-cv (S.D.N.Y. 2005)

- 8 states, New York City, Land Trusts brought suit against six power companies
- Sought injunctive relief against future emissions
- Dismissed in 2005 – nonjusticiable issue
- Second Circuit reversed on September 21, 2009
- En banc rehearing denied March 5, 2010
- Petition for certiorari granted by U.S. Supreme Court on December 6, 2010
- Argument date before Supreme Court pending

I. **Global Warming Claims**

B. *Comer v. Murphy Oil USA*, Case No. 1:05-cv-00436-LTS-RHW (S.D. Miss. Aug. 30, 2007)

- Mississippi Gulf Coast residents allegedly damaged by Hurricane Katrina brought suit against numerous energy and industrial companies
- Lawsuit alleged global warming contributed to increase in strength of Hurricane Katrina
- Dismissed by district court
- Fifth Circuit panel reinstates nuisance, trespass, and negligence claims on October 16, 2009
- En banc hearing granted, but further recusal issues prevented quorum and appeal dismissed
- Writ of mandamus to U.S. Supreme Court denied on January 10, 2011.

I. Global Warming Claims

C. *Native Village of Kivalina v. ExxonMobil Corp.*, Civ. Action No. CV 08 1138 (N.D. Cal. 2009)

- Lawsuit alleges that global warming has led to erosion of island village and damages to relocate are “hundreds of millions of dollars”
- Dismissed by district court on political question grounds
- Plaintiffs appealed to Ninth Circuit
- Briefs have been submitted and await decision by Ninth Circuit
- Is the Ninth Circuit waiting for *AEP* decision from Supreme Court?

I. Global Warming Claims

Steadfast v. AES

- Only reported case involving liability insurance coverage for any of the global warming claims
- Held that the Kivalina claim did not constitute an “occurrence” under the Steadfast policies at issue
- AES appealed to Virginia Supreme Court
- Briefing is closed as of October 2010
- No hearing date set yet, but expected in coming months

II. General Liability Coverage – Key Issues

- A. Duty to Defend
- B. Fortuity Issues
- C. Property Damage/Bodily Injury
- D. “As Damages”
- E. Trigger/Scope
- F. Pollution Exclusion
- G. Notice

A. Duty to Defend

- An insurer's duty to defend is broader than its duty to indemnify.
- The duty to defend is triggered by the tender of a claim that is potentially covered under the policy, which is determined, at the outset, by the allegations of the complaint.
- The global warming claims have only involved defense costs to date.
- If viable, these claims will involve a substantial discovery and litigation process due to the complex causation and proof issues.

B. Fortuity Issues

- Insurers' argument - damage caused by a policyholder's GHG emissions is not "fortuitous" because companies have long known they were emitting GHGs
- Specific Policy Defenses
 - No "accident"/"occurrence" - deliberate actions
 - Damage was "expected or intended"
 - Known loss/loss in progress at time of underwriting

B. Fortuity Issues

- Policyholder's responses
 - No Occurrence/Expected or Intended
 - Most jurisdictions require that the resulting damage be expected and intended by the policyholder
 - Specific damage v. any damage expected or intended
 - Subjective v. objective standard
 - Known Loss
 - If applicable, known Loss is a first-party concept
 - "Loss" covered by GL policy is the legal obligation to pay damages
 - Issue is whether the policyholder was aware of the legal liability at the inception of the policy

B. Fortuity Issues

Steadfast v. AES Decision

- Steadfast raised three primary defenses:
 - No occurrence
 - Loss in progress
 - Pollution exclusion
- Trial Court decided only on “occurrence” issue and did not reach other two defenses
- Impact of *Steadfast* unclear
 - No written opinion
 - AES has appealed to VA Supreme Court

Steadfast v. AES Decision

- Steadfast argued Virginia law does not require proof that policyholder intended damage.
- Court based decision on VA's "8-corners" rule – court looks to 4 corners of complaint to see if allegations, if proven, would provide a basis for coverage under 4 corners of policy
- *Kivalina* complaint arguably provides basis for liability in negligence or at least raises issues of fact on policyholder's intent

Steadfast v. AES Decision

- Decision arguably limited to AES
 - Complaint alleged facts about statements in AES' annual reports regarding GHG emissions
 - Allegations against other companies do not refer to annual reports
- *Steadfast* limited to *Kivalina* Claim
 - *AEP* nuisance claims based on allegations that defendants negligently or intentionally created and contributed to global warming
 - *Comer* contains negligence count. Neither trespass nor nuisance claims allege defendants intentionally caused damage

C. Property Damage/Bodily Injury

- “Property damage” - “physical injury to tangible property, including all resulting loss of use of that property.”
- “Bodily injury” - “bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.”
- ***Kivalina Complaint, ¶¶ 3-4***: “Global warming is destroying Kivalina through the melting of Arctic sea ice that formerly protected the village from winter storms The result of the increased storm damage is a massive erosion problem. Houses and buildings are in imminent danger of falling into the sea as the village is battered by storms and its ground crumbles from underneath it.”

C. Property Damage/Bodily Injury

- **Comer Complaint, ¶ 30:** “The Defendants’ GHG emissions have contributed to sea level rise, which has a number of severe consequences including, but not limited to the following: (a) Direct loss of private property as land is subsumed under rising sea levels and destroyed by saltwater intrusion; (b) Loss of use and quiet enjoyment of private property caused by rising sea levels, saltwater intrusion, increased water temperatures, increased tropical storm activity, loss of habitat used for hunting and fishing and other recreation, and numerous other forms of property damage; (c) Loss of the use and enjoyment of public property caused by the subsumption and erosion of public beaches; (d) Loss of the use and enjoyment of public trust resources caused by subsumption of and saltwater intrusion into habitat for fish and wildlife ...; and (e) Increased risk of property damage and loss as a result of hurricane activity in the Gulf of Mexico.”

D. “As Damages”

- Most standard general liability policies cover sums that the policyholder is “legally obligated to pay as damages” because of property damage or bodily injury
- Insurers argue that the phrase limits their coverage obligations to only compensatory relief sought by an underlying plaintiff
- *Comer* and *Kivalina*, which seek monetary damages for property damage or bodily injury, appear to meet this definition
- What about injunctive relief as sought in cases like *American Electric Power*?

D. “As Damages”

- In environmental claims context, the majority of courts have rejected the insurers’ narrow reading of “as damages” and have found that government-mandated environmental remediation costs are “damages” under a general liability policy
 - *But see Cinergy Corp. v. Associated Elec. & Gas Ins. Servs., Ltd.*, 865 N.E.2d 571, 581-83 (Ind. 2007) (distinguishing between remediation costs and prophylactic measures under Clean Air Act claims).

E. Trigger/Scope

- Claims-made policies – triggered by claim made during policy period.
- Occurrence-based policies - some part of the alleged property damage or bodily injury takes place during the policy period, regardless of when the claim is asserted
- Two main issues will impact a policyholder's ability to access historical insurance coverage: (1) the allegations of the underlying complaint; and (2) the governing jurisdiction's law regarding trigger of coverage.
- There is a reasonable argument that historical occurrence-based policies are triggered by these current claims because the alleged damage caused by GHG emissions has been ongoing for decades
- If multiple policy years are triggered, jurisdictions differ regarding the scope of each policy year's coverage responsibility

F. Pollution Exclusion

1. History of Pollution Exclusion in Liability Policies
 - No pollution exclusions prior to 1970
 - Qualified (sudden and accidental) pollution exclusion between 1970 and 1985
 - Absolute pollution exclusion after 1985

F. Pollution Exclusion

2. Are GHG “Pollutants”?

- Policy language controls whether GHGs constitute “pollutants” under a pollution exclusion
 - “Pollutants” typically defined as “any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste.”
- No cases have ruled directly on whether GHG are “pollutants” under a CGL policy exclusion
- Carbon dioxide – which is typically the most prevalent of the regulated GHGs emitted –not traditionally considered as an irritant, contaminant, or pollutant.
- However, *Massachusetts v. EPA* decision held that emitted carbon dioxide was a pollutant under the Clean Air Act
- Steadfast also argued that Kivalina Complaint characterizes GHG’s as pollutants or pollution

F. Pollution Exclusion

Massachusetts v. EPA

- Focus was EPA's regulation of GHGs, not pollution exclusion
- Policies define "pollutant" more narrowly than does the Clean Air Act.
 - CAA's sweeping definition 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..."
 - Scalia dissent: "it follows [from the majority opinion's holding] that everything airborne, from Frisbees to flatulence, qualifies as an 'air pollutant."
- Cases in other contexts have held carbon dioxide is not a "pollutant"

F. Pollution Exclusion

3. Ambiguity Issues

- Most courts addressing the application of the pollution exclusion to carbon dioxide or other similar gases have held that the pollution exclusion is ambiguous
- Ambiguous language is given an interpretation most favorable to the insured.
- Exclusions in policies are to be construed strictly against the insurer.
- Reasonable expectations of insured as to coverage

G. Notice

- Many policies require notice of claims or occurrences as soon as practicable
- Policyholders should provide notice and seek coverage under every policy that possibly may be triggered by the factual allegations of the given lawsuit:
 - policy periods of the alleged injury or damage (historical policies)
 - policy period in which claim was made
 - amount of potential damages sought (e.g., excess coverage)
- Failure to provide timely notice provides insurers with another defense
- Insurer responses
 - Reservation of Rights
 - Denials of Coverage

G. Notice

- Insurers seem more aggressive in denying global warming claims
- Denial of coverage arguably starts limitations period for insurance claim, which can vary widely from state to state
 - Mississippi & North Carolina – 3 years
 - Pennsylvania – 4 years
 - New Jersey & New York – 6 years
 - Indiana – 10 years
 - Ohio – 15 years
- Tolling Agreements can toll running of limitations periods

Recommendations For Policyholders

- Analyze all historical and recent liability policies for potential coverage for global warming claims
- Place all potential liability insurers on notice
- Carefully analyze insurers' responses for denials of coverage
- If an insurer has denied coverage, take action to avoid running of the statute of limitations