

Climate Change and the Duty to Defend

by Robert M. Horkovich and John G. Nevius

A crucial issue facing today's corporate policyholders is whether the liability insurance policies they already purchased will be available to defend against lawsuits alleging liability based on climate change theories. These suits are proliferating and, for now, at least some federal courts have held that viable "nuisance tort" claims exist. In *Connecticut v. American Electric Power Co., Inc.*, recently taken up by the U.S. Supreme Court, the U.S. Second Circuit in 2009 rejected the political question doctrine and allowed nuisance tort claims filed by various states against major coal-burning electric utilities to proceed. Presently, U.S. Circuit Courts of Appeal are split and the issue of whether nuisance tort claims should be allowed to proceed is ripe for U.S. Supreme Court review.

Whether general liability insurance is available to cover these liabilities is a significant issue. The insurance industry generally is keeping mum, but whether such a duty exists depends upon whether greenhouse gases (GHGs) such as carbon dioxide may be considered exclusively as pollutants for purposes of insurance-coverage exclusions. This issue likely will be litigated state by state unless and until the U.S. Supreme Court or other factors put an end to climate-change "nuisance tort" suits. These coverage battles probably will be very similar to those over prior exclusions involving hazardous waste.

One coverage case to watch is the "nuisance tort" claims brought by the remote Alaskan Village of Kivalina. In *Native Village of Kivalina v. ExxonMobil Corp.*, the village brought suit in the U.S. District Court for the Northern District of California seeking, among other things, relocation costs necessary to avoid the exposures occasioned by a lack of sea ice. The Federal Court subsequently held that the suit involved a nonjusticiable political question. In the meantime, however, the insurance company for one of the defendants, a Zurich subsidiary, Steadfast Insurance Co., filed suit in Virginia state court alleging that it had no duty to defend the underlying claim for three reasons.

First, Steadfast successfully argued that defendants' historic carbon dioxide and GHG emissions over decades were not an "occurrence" - a term undefined in most liability insurance policies. Both this Virginia decision and the federal nuisance claim decision are on appeal. Second, Steadfast argued that the underlying allegations involving emissions barred coverage under

a pollution exclusion. This did not initially lead to summary judgment, but the argument is again being pursued on appeal. Third, Steadfast argued that the alleged loss was "in progress" or sufficiently known so as to not be covered. This defense was not a basis for the summary judgment and has not been pursued further.

The duty to defend is very broad. It generally is triggered when underlying allegations raise any possibility of coverage - no matter how false, fraudulent or frivolous they may be. Is there no possibility that carbon dioxide is something other than a "pollutant"? Only time and continued climate change litigation will tell. Carbon dioxide is in the air and a by-product of breathing. Accordingly, one would expect that those seeking to preclude any possibility of coverage would need to show that the carbon dioxide at issue was not naturally occurring. Moreover, attempts to rely on government regulation of carbon dioxide as an argument that it is intended to fall within the ambit of "pollutants" or "irritants" as the coverage terms are used, likely will meet with mixed results depending on the state. In fact, it only is recently that carbon dioxide has been the subject of government regulation. Accordingly, it should be difficult to argue successfully that carbon dioxide was intended as a "pollutant" when used in standard form insurance policy language that predates such regulation. Nonetheless, both sides of the debate will certainly use these two competing arguments (i.e., naturally occurring v. regulated substance) to their perceived advantage.

This is a topic that all risk managers working for companies that may face climate change based lawsuits should continue to monitor. ■

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