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COVERAGE ISSUES HEAT UP: ARE YOU READY FOR CLIMATE CHANGE LIABILITY?

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In June 2007, the Supreme Court held that global climate change and the more severe weather it engenders could give rise to redressable injury. See *Massachusetts v. E.P.A.*, 549 U.S. 497 (2007). Several cases have come along since, seeking damages from various defendants for alleged injury and nuisance arising out of greenhouse gas emissions and related climate change. At least one of these cases expressly alleges that events like Hurricane Katrina were more severe and caused more damage than they otherwise would have because of atmospheric change wrought by relatively-recent industrial emissions.

These various nuisance claims arising out of climate change have not gotten traction – yet. Whether they eventually do or not, an important issue will be obtaining insurance coverage for their defense and any alleged damages. At this point, however, the most important issue is the duty to defend. Underlying climate-change nuisance claims can be tenuous simply because of the ephemeral and intermittent nature of air emissions. There are numerous additional potential stumbling blocks to establishing a viable claim, including causation, standing and whether the scientific phenomena referred to as “climate change” and “global warming” involve “political” questions that are considered nonjusticiable. Potential stumbling blocks notwithstanding, even frivolous claims must be defended.

In addition to the above nuisance claims, the SEC recently has issued climate-change-related financial disclosure guidelines. These guidelines allow broad latitude with respect to the type of disclosure that may be necessary and are merely advisory. However, the new guidelines appear to have upped the ante so to speak on appropriate disclosure. As a result, the risk that corporate directors and officers may become the targets of governmental and

private lawsuits is becoming greater. Suits based, not only upon nuisance, but also or alternatively upon a company’s climate-change-related disclosures, can now be brought citing government requirements. Accordingly, although the number of governmental actions or shareholder suits against corporations or their directors and officers in relation to climate-change-related disclosure is not yet significant, the seeds of future growth of such actions appear to have been sown.

Nuisance claims generally trigger the duty to defend under most commercial liability insurance. After all, the duty to defend is typically based upon a broad “any possibility-of-coverage” standard. Logically, this standard is met merely when an insurance company reserves its rights. Similarly, lawsuits against directors and officers alleging damages arising out of climate-change-related issues likely will trigger the defense-coverage provisions of D&O insurance policies. A similar broad duty-to-defend standard in the D&O context applies where claims allege “losses” as a result of a director’s or officer’s “wrongful acts.” Insurance companies, however, have already indicated that they likely will take the position – improperly, in this author’s view – that so-called pollution exclusions contained in many D&O policies operate to wholly eliminate even the broad duty-to-defend coverage for underlying claims involving climate change. These pollution exclusions often conflict with other coverage provisions (or a policyholder’s “reasonable expectations”) and purport to exclude claims “based on, arising out of, or in any way involving” “pollution”. Some courts have rejected this overly-broad pollution exclusion language as ambiguous, reasoning that it can lead to absurd results when applied improperly in certain situations such as to products

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used for their intended purpose. See *Belt Painting Corp. v. TIG Ins. Co.*, 99 N.Y.2d 502 (N.Y. 2002). Most courts apply an extremely heavy burden on an insurance company seeking to establish no possibility of coverage using exclusionary language that must be clear and construed narrowly.

Whether courts will agree that such pollution exclusions apply to D&O claims stemming from alleged climate-change disclosure failures is unclear, but obviously depends on the specifics. In at least one analogous case, the court rejected the insurance companies' attempts to avoid all coverage obligations. The court in *Sealed Air Corp. v. Royal Indem. Co.*, 2008 WL 3539964 N.J.Super.AD. 2008) (No. A-5951-06T3) held that a pollution exclusion in a D&O policy did not bar coverage for a lawsuit against directors and officers based upon their alleged misleading financial statements involving asbestos-related environmental liabilities.

However, because the law on these issues is far from settled, corporate policyholders may also want to consider that, with the rise of climate-re D&O litigation, it should be possible to purchase D&O policies specifically carving out climate-change-related securities lawsuits from an insurance policy's "pollution exclusion". A similar carve-out may also be possible for claims against directors and officers for which their corporate employer has not agreed to indemnify them. At least one multi-national brokerage firm has advised that "Best Practices" call for brokers to obtain clarification on these issues before binding coverage.

One of the above-referenced nuisance claims has spawned a bellwether case over the duty to defend climate-change-related lawsuits. In *AES Corp. v. Steadfast Ins. Co.*, 282 Va. 252 (Sep. 16, 2011 No. 100764), a Zurich subsidiary argued that no possibility of coverage existed for underlying climate-change-related nuisance claims brought by a native Alaskan village against an array of energy companies.

Three coverage defenses were asserted initially, and summary judgment subsequently was obtained on one of the defenses. First, Steadfast argued that there was no occurrence, in part, because intentional emissions allegedly could not give rise to a covered claim (i.e., erroneously arguing that the relevant inquiry was the conduct itself, rather than the resulting harm). Second, Steadfast cited a somewhat non-traditional pollution exclusion (the insurance policy at issue expressly provided limited spill coverage) despite that fact that other state courts have refused to hold that carbon dioxide (a component of air and a product of human respiration) is an excluded "pollutant". See, e.g., *Peace v. Northwestern Nat'l Ins. Co.*, 596 N.W.2d 429, 228 Wis.2d 106 (Wis. 1999). Third, Steadfast argued that the alleged damages were somehow excluded as a "known loss" or "loss in progress" based upon a judicially-implied limitation on coverage previously invoked by some courts in reforming policy language to support coverage denial. After a Supreme Court of Virginia panel initially upheld the trial court's determination on summary judgment that there was no occurrence, a different slate of the same court's judges recently agreed to reconsider the earlier holding.

CONCLUSION

Climate change and pollution exclusions do not seem to mix well. This, despite the fact that carbon dioxide is naturally occurring and that standard pollution exclusion language, as introduced to state insurance regulators, was never intended to extend beyond hazardous wastes – whether in general or D&O liability insurance policies. However, to the extent climate change is the new tobacco – or even the next millennium bug -- risk managers of all stripes need clarity on whether, and to what extent, underlying climate-change claims or lawsuits over disclosure obligations, will ultimately be covered or excluded, in whole or in part.

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