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FEATURE STORIES

Absolutely Not—Absolute Pollution Exclusion Shouldn't Apply to Greenhouse Gases

By Diana Shafter Gliedman and Rizwan Qureshi

With all the increased media attention on the effects of greenhouse gases—thank you, Al Gore!—it should be no surprise that lawsuits alleging damages arising out of greenhouse gases (“GHGs”) have already begun to be filed. Given that development, it is likely just a matter of time before some (if not all) insurance companies seek to argue that lawsuits involving GHGs are excluded from coverage under CGL policies by provisions such as the so-called “absolute pollution exclusion.” Under the common law of most states, however, policyholders with a reasonable expectation of coverage for liabilities arising out their normal business operations *must be granted that coverage*. Put differently, if a company’s normal business operations involve the release of GHGs, and GHGs are not regulated emissions, then that company can reasonably expect its insurance policy will cover lawsuits relating to GHGs.

Even attorneys representing insurance companies have acknowledged that the “absolute pollution exclusion” is likely not to be applied to global warming claims. Reynolds Porter Chamberlain, a leading insurers’ counsel, has urged the insurance industry to address the lack of an exclusion for global warming damages and has stated that the status quo is “unlikely to be effective in meeting claims relating to climate change.” See “Climate Change Claims Could Hit Insurers Hard,” *Financial Times* (Oct. 25, 2006).

In order to carry out the “purpose or object” of the insurance that a policyholder purchases, courts determine a policyholder’s reasonable expectations of coverage with reference to three major factors: (1) the type of insurance purchased; (2) whether exclusionary language is “conspicuous, plain and clear” in describing what precisely is excluded from being insured; and (3) the basis of the policyholder’s liability, including whether that liability arose out of the policyholder’s normal business operations. See *Mackinnon v. Truck Ins. Exch.*, 73 P.3d 1205, 1216 (Cal. 2003). The California Supreme Court, for example, has unequivocally stated that general liability insurance policies of the kind sold to corporate policyholders are intended to provide very broad insurance for a wide variety of circumstances:

The purpose of CGL policies is to provide the insured with the *broadest spectrum* of protection against liability for unintentional and unexpected personal injury or property damage arising out of the conduct of the insured’s business.

Mackinnon, 73 P.3d at 1217, quoting Michael W. Peters, *Insurance Coverage for the Superfund Liability: A Plain Meaning Approach to the Pollution Exclusion Clause* 27 Washburn L.J. 161, 166 (1987) (emphasis added).

The court further held that the current pollution exclusion, including the meaning of the word “pollutant,” is not plain and clear in what it purports to exclude. *Id.* at 1216. Under the “reasonable policyholder” standard,

therefore, the insured must understand that the cause of the injury or damage for which the policyholder is liable is an "irritant or contaminant commonly thought of as...environmental pollution." *Id.* at 263. Whether a reasonable policyholder would consider an irritant or contaminant to be "environmental pollution" can be determined by reference to the laws that regulate the irritant or contaminant at issue, if any, as they are applied to the policyholder's operations. *Id.*

Indeed, of the six separate statutes in which Congress addressed global warming, each states that Congress wished to study the issue but *did not authorize regulation of GHGs*. Even though the CAA does describe GHGs as pollutants, it is evident that a reasonable policyholder would have no reason to believe that such emissions would constitute "environmental pollution" subject to a pollution exclusion. Thus, coverage should be afforded.

It is likely that future insurance policies may explicitly exclude coverage for damage related to GHGs. As for current CGL policies, however, it is highly likely that coverage for global warming lawsuits will not be excluded—regardless of what insurance companies say. 

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