Reprinted with permission Executive Counsel magazine Dec 2011/Jan 2012 Volume 8/Number 6.

Insurance Coverage for Climate Change Lawsuits

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Climate change litigation is a reality for many companies today. It began a decade ago, as part of a two-pronged strategy by states and others to force federal action to limit greenhouse gas emissions.

Over the past decade, companies in the energy, chemical and other industries have become the targets of such litigation. Some plaintiff attorneys have opined that it could grow into another wave of litigation similar to that launched against the tobacco industry. Now, many companies, even those not yet facing climate change suits, are looking to their liability insurance policies to see what coverage is provided and the protections they can expect.

In September of 2011, the Supreme Court of Virginia decided the first climate change insurance coverage case, holding in favor of the carrier. The AES Corp. v. Steadfast Insurance Co. decision, however, should have little precedential value. This article examines why, under existing law, policyholders should expect their insurance carriers to honor climate change litigation claims

Coverage Under General Liability

Although no court has yet imposed liability on a defendant for damages allegedly caused by climate change, defendants have incurred millions of dollars defending these claims. Thus, the duty to defend, even without liability, may prove to be valuable to the insured. Since the duty to defend is contractual, whether a policyholder is entitled to coverage will turn on the law of the jurisdiction and the particular insurance contract at issue.

Whether there is a duty to defend is determined at the beginning of litigation. The courts universally adhere to an analysis that considers first whether there is a possibility that any single allegation will give rise to liability that falls within the terms of coverage.

The duty to defend is broader than the duty to indemnify in order to protect the insured from the outset. A delayed defense is, in effect, no defense at all and irreparably harms the insured. Accordingly, carriers are understandably cautious in denying a defense obligation.

Standard form general liability policies require an insurer to defend the policyholder against suits seeking damages for bodily injury, personal injury or property damage caused by an "occurrence," as that term is defined in the policy. Most policies define occurrence as an "accident, including a continuous or repeated exposure to substantially the same general harmful condition."

In determining whether an accident occurred, courts consider whether the alleged damage is unexpected and

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unintended. Jurisdictions differ regarding whether the act or the resulting harm must be unintended and unexpected. In many jurisdictions, negligent harm, or a lack of intent to cause the specific harm alleged, if proven, will constitute an accident or occurrence. In these jurisdictions, allegations of negligent or unintentional harm will trigger the duty to defend.

To date, whenever climate change actions have sought damages, they have alleged property damage which, by nature, occurred over extended periods of time, often decades or more. Accordingly, under most general liability policies, exposure to such long-term, continuous, harmful conditions arguably triggers insurance coverage each year in which the harm is alleged to have occurred.

Duty To Indemnify

General liability policies should also provide indemnity coverage for damages proven to be caused by the policyholders. While no climate change case has concluded with a settlement or judgment, liability resulting from the occurrence could take various forms, including monetary damages, injunctive relief, remediation costs, monitoring expenses, etc. If and when there is an award or settlement, policyholders may consider looking to environmental insurance coverage cases for guidance on recoverable damages for property damage under a general liability policy.

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If a claim is potentially covered, the burden shifts to the insurer to argue whether any policy exclusions apply. Insurers in global warming cases may argue that a policy's pollution exclusion bars coverage, but such an argument is unlikely to succeed.

Three versions of the pollution exclusion are commonly seen in commercial liability policies:

1. The "original pollution exclusion," incorporated into liability policies starting circa 1971, excludes "[b]odily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water," unless the release was sudden and accidental.
2. An "absolute pollution exclusion," incorporated into policies starting circa 1985, excludes "[b]odily injury or property damage arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants: At or from any premises, site or location which is or was at any time owned or occupied by, or rented or loaned to, any insured..."
3. A "total" pollution exclusion excludes "the 'contamination' of any 'environment' by 'pollutants' that are introduced at any time, anywhere, in any way." It also excludes "any 'bodily injury,' 'personal and advertising injury' or 'property damage' arising out of any such 'contamination.'"

But a pollution exclusion is not necessarily a bar to claims arising out of climate change. For instance, as illustrated in California v. General Motors Corp., if the carbon dioxide emissions at issue are released from third-party sources such as automobiles, the claim is outside the scope of an "absolute" pollution exclusion because the emissions are not released at or from an insured's location. Similarly, unintended harm resulting from intentional emissions is generally not barred by an "original pollution exclusion" because such damage is "accidental."

Most important, carbon dioxide may be outside the scope of any pollution exclusion. Although carbon dioxide is the most ubiquitous offender in global warming claims, carbon dioxide also serves many natural and necessary purposes. Indeed, humans exhale carbon dioxide and plants consume carbon dioxide for survival. Therefore, it is unclear how a ubiquitous and necessary substance such as carbon dioxide could ever be considered a pollutant.

This argument poses definite challenges for insurers. If courts find that it is within the reasonable expectation of the insured that carbon dioxide is not a pollutant as that term is used in the insurance context, these existing pollution exclusions will be inapplicable and pose no hurdle to establishing coverage under general liability policies arising out of alleged climate change damages.

In conclusion, whether liability will ever be imposed on a defendant for damages allegedly caused by climate change remains to be seen. In the meantime, however, policyholders named as defendants in such lawsuits should expect their insurance contracts to respond with a defense. ■

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