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FEATURE

CLIMATE CHANGE LITIGATION & THE [RE] INSURANCE IMPLICATIONS

By Adam Krauss, Senior Counsel, Traub Lieberman

It is beyond reproach that the Earth's climate is changing in ways that will undoubtedly present negative impacts that will be bourne on some level by every person and business. Many of the scientific models present catastrophic damage scenarios occurring relatively soon - within the lifespan of our children.

The monetary cost of climate change (sometimes called "global warming") – be it for adaptive actions or failure to adapt, will be enormous, eclipsing the GDP of many developed countries for decades to come. Injury and damage to persons, property, businesses, governments, ecosystems and natural resources, to name but a few, are unfortunately unavoidable at some level.

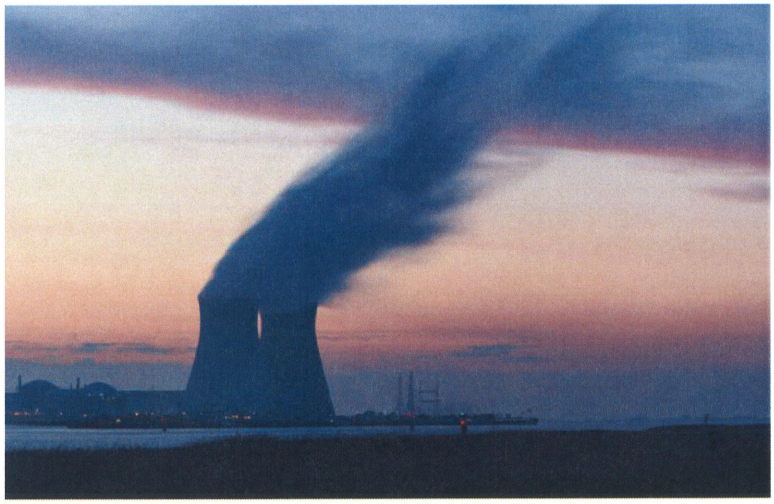
Given the foregoing, lawsuits against fossil fuel companies and other carbon producers seeking to hold them responsible for the effects of climate change are multiplying and will continue to grow. Similarly, suits by stakeholders against public companies and their directors & officers will likely proliferate. These suits could involve damages relating to a company's failure to properly disclose the material impact of climate-related risks or an effort to compel the company to properly "align its business model with a low-carbon future."

Coverage actions and decisional law relating to insurance for climate change liability are virtually non-existent, but that will likely change soon, given the rising prominence of the issue, the staggering cost involved and the increased litigation activity by municipalities and private parties against fossil fuel companies and other target defendants

To date, the underlying plaintiffs have been unsuccessful in seeking to hold the fossil fuel companies liable for climate change – whether it be for monetary damages or orders to compel the company

to modify its behavior in some respect. The federal courts have dismissed these cases on justiciability, displacement, preemption and/or standing grounds - holding that the Clean Air Act ("CAA") supplants any private cause of action for common law nuisance and it is for the USEPA to regulate greenhouse gas ("GHG") emissions, not the courts.

However, in the last few years, there have been a proliferation of new climate change suits, including by municipalities across the U.S. seeking to hold the fossil fuel companies accountable for the past and future costs arising from climate change. There have been no substantive rulings in any of these cases on the merits raised by the plaintiffs.



Even if these climate change suits continue to be dismissed, the defense costs alone to certain insurers could be staggering. Should any of these suits survive motions to dismiss and result in successful judgments, the damages are virtually limitless.

Since GHG emissions do not obey political boundaries, climate change will firmly remain an issue to be grappled with on local, state, national and international levels – and a concern that will, in all likelihood, remain at the forefront for years or even decades to come.

The issues, concerns and financial impact of climate change to insurers and their insureds go way beyond litigation, including: regulatory and legislative initiatives, asset divestiture, stranded assets, reduction of "carbon footprints," supply chain disruption, and mitigative efforts – to name but a few. All of these issues and more are addressed in a recent White Paper co-authored by Traub Lieberman Straus & Shrewsberry LLP and Aspen Re entitled "Climate Change and the [Re] insurance Implications" which can be accessed through the following link: https://www.traublieberman.com/perspectives/traub-lieberman-partners-with-aspen-re-to-publish-white-paper-on-impact-of-climate-change-on-the-reinsurance-market

Climate Change Litigation

Climate litigation has been on a steady increase for the past decade across jurisdictions. In early 2017, there were over 1,200 laws and policies related to climate change in 164 countries, while in 1997 there were only 60. Traditionally, climate cases have been brought against governments, but there is now a steep rise in climate lawsuits brought directly against companies. This rise can be attributed to advancements in science and economics modeling, discovery of companies' climate knowledge, mounting costs related to mitigative efforts, increased public involvement, and collaboration between cities, lawyers, scientists and activists.

In the landmark case of *Massachusetts v. EPA*, 549 U.S. 497 (2007), the United States Supreme Court determined that carbon dioxide was a "pollutant" under the CAA and that the USEPA was remiss in failing to promulgate regulations governing GHG emissions.

Since that time, there have been a handful of federal climate change suits alleging public nuisance, all of which were dismissed on justiciability, displacement, preemption and/or standing grounds, citing to the precedent of *Massachusetts v. EPA* and its progeny and holding that the CAA supplants any private cause of action for federal common law nuisance and it is for the USEPA to regulate GHG's, not the courts.

However, in the last few years, there have been a proliferation of new climate change suits by municipalities across the U.S. seeking to hold the fossil fuel companies accountable for the past and future costs arising from climate change. There have been no substantive rulings in any of these cases on the merits raised by the plaintiffs. All of these cases were filed in state court and removed to federal court by the "fossil fuel" defendants to take advantage of *Massachusetts v.*

EPA and similar federal precedent.

The "big ten" pending climate change suits filed by municipalities are[3]:

- *County of San Mateo v. Chevron, et al.*
- *County of Marin v. Chevron, et al.*
- *City of Santa Cruz v. Chevron, et al.*
- *City of Richmond v. Chevron, et al.*
- *City and County of San Francisco & City of Oakland v. BP, et al*
- *City of New York v. BP, et al*
- *City of Boulder v. Suncor Energy (U.S.A.), et al*
- *King County v. BP p.l.c, et al*
- *Rhode Island v. Chevron, et al.*
- *Mayor & City Council of Baltimore BP p.l.c, et al*

Most of these "big ten" suits name the same 25-30 "fossil fuel" defendants and contain one or more of the following allegations, causes of action and prayers for relief:

- Damage to the municipality's property, as well as to the public at large.
- Nuisance due to sea level rise, increased flooding and intensified storms.
- Trespass due to sea level rise and increased flooding onto property.
- Defendants' historical knowledge of global warming, sea level rise and other climate change.
- Allegations that defendants were directly responsible for 17.5% of total global emissions of carbon dioxide between 1965 and 2015.
- Strict liability (failure to warn and design defect), and negligent failure to warn.
- Unjust enrichment, and deceptive trade practices.
- Compensatory damages, abatement of the alleged nuisance, punitive/treble damages, and disgorgement of profits.
- Order requiring the defendants to abate the nuisance by funding a "climate adaptation program" to build sea walls and other infrastructure necessary to protect public and private property from sea level rise and other climate impacts.
- Loss of income from reduced agricultural productivity.

Notably, there has been a split in the rulings by certain of the federal district courts that have addressed the jurisdictional issue in the "big ten" cases, with seven courts granting plaintiff municipalities' motions to remand back to their respective state courts (San Mateo, Marin, Santa Cruz, Richmond, Baltimore, Boulder and Rhode Island) and one court (San Francisco/Oakland) holding that the removed case should remain in federal court.

The federal district court in the *King County* case has not yet addressed the issue of remand, as the case has been stayed pending decision by the ninth circuit court of appeals in the *San Francisco/Oakland* case, as the district court found there was "substantial overlap" of the issues raised in both cases.

New York City is the only plaintiff in the "big ten" cases to have brought its climate change suit directly in federal court based on diversity jurisdiction, although it asserted state law claims. It is also only one of two "big ten" cases where the law firm of Sher Edling is *not* representing the plaintiff municipality.

The *New York City* and *San Francisco/Oakland* cases were dismissed on the pleadings by the respective federal district courts based on, inter alia, the *Massachusetts v. EPA* precedent and appeals are pending.[4] The remaining "big ten" cases are in various stages of briefing on motions to dismiss or other "procedural" battles and appeals related to same.[5]

To the extent all of the decisions granting/denying remand are appealed , that will result in four separate federal appellate courts simultaneously hearing essentially the same jurisdictional question: first circuit (*Rhode Island*); second circuit (*New York*); fourth circuit (*Baltimore*); and ninth circuit (addressing split in trial court rulings of the "big ten" California cases). Appeal of the *City of Boulde*r case would involve yet another federal appellate court – the tenth circuit. Accordingly, the opportunity for conflicting and contrary rulings is

ripe. Notably, the United States Supreme Court has shown some willingness to accept cases involving climate change issues.[6]

Importantly, appellate review of federal remand orders is "substantially limited" only to cases involving issues of "federal officer removal" or civil rights.[7] Although the "fossil fuel" defendants have asserted that the "federal officer" ground applies because they operate under permits issued by federal officials, the courts granting remand have rejected such ground.[8] Accordingly, this presents a greater likelihood that at least certain of the six cases remanded to state court will remain there – in turn, creating a greater possibility for success on the merits by those plaintiff municipalities seeking redress for climate change liabilities.

At this point, the *City of Oakland/San Francisco* and *New York City* cases upholding removal and granting defendants' motions to dismiss represent the minority position. Those two courts found that "though pled as state-law claims, [they] depend on a global complex of geophysical cause and effect involving all nations of the planet" and were "ultimately based on the "transboundary' emission of greenhouse gas emissions, and thus, "are governed by federal common law" federal common law" which will enable "a uniform standard of decision."[9]

In contrast, the six cases granting remand have found that removal was not supported by federal common law or any of the other bases relied upon by the defendants, emphasizing, inter alia, that the CAA does not *completely* pre-empt plaintiffs' various state law causes of action; and the municipalities do not rely on any federal statutes or regulations in asserting their nuisance claims nor do they seek to modify any regulations, laws or treaties, or to establish national or global standards for GHG emissions.[10]

Given the mounting scientific evidence of climate change impacts and the magnitude of potential damages at stake, it is expected that numerous other states and cities will continue to bring suit against the fossil fuel industry.[11]

New York & Massachusetts Attorney-General Fraud Investigations

New York and Massachusetts AG's have been investigating ExxonMobil for some time with respect to potential investor "climate fraud." New York argues that ExxonMobil allegedly used two different accounting methods – one for communicating climate change to the public and another kept private for internal projections. Massachusetts asserts that ExxonMobil allegedly deceived investors by failing to divulge potential climate change related risks to their investments and violated Massachusetts consumer protection laws by misleading consumers on the impact of its products on climate change.

New York AG concluded its "investigation" and brought suit in October 2018. The suit was brought under several anti-fraud statutes, including New York's Martin Act, one of the toughest such laws in the country. New York seeks an order prohibiting ExxonMobil from continuing to make misrepresentations and forcing the company to correct its past claims. The state also seeks unspecified money damages and a disgorgement of all profit derived from the alleged fraud.[12]

On January 7, 2019, the United States Supreme Court declined to take up ExxonMobil's latest attempt to block Massachusetts' investigation into whether the oil giant misled the public and investors about climate change. The trial court denied Exxon's Motion to Stay the investigation and the Massachusetts Supreme Court affirmed, allowing the investigation to proceed.[13] The decision clears the way for Massachusetts AG Healey to compel Exxon to produce records as her office probes

whether Exxon concealed its knowledge of the role fossil fuels play in global warming. The documents produced by Exxon as part of the AG investigation will undoubtedly be scrutinized by the plaintiffs in the Big Ten climate change cases and other potential litigants.

The Insurance Coverage Implications of Climate Change – A New Frontier

There has been a dearth of coverage actions and decisional law relating to insurance for climate change liability. However, this will likely change soon, given the rising prominence of the issue, the mounting scientific studies, the substantial costs involved and the increased litigation activity by municipalities and private parties against fossil fuel companies and other target defendants. Commercial General Liability, D&O, and Property insurance are all in the sight line of climate change litigation.

AES Corp. v. Steadfast Ins. Co., 725 S.E. 2d 532 (Va. 2012), is the only reported decision involving coverage for climate change liabilities, where the Virginia Supreme Court held that the insurer had no obligation to provide a defense or coverage for the insured's potential climate change-related liabilities arising from the Native Village of Kivalina suit.[14] However, the case was summarily disposed solely on the lack of an "occurrence" issue.

More specifically, the Supreme Court of Virginia found that the underlying allegations asserting that the insured intentionally released tons of carbon dioxide and GHGs into the atmosphere as part of its business operations did not constitute an "occurrence" within the terms of the policies.

Notably, even though the underlying Complaint alleged both negligent and intentional conduct of the insured, the Court held that "whether or not AES's [insured] intentional act constitutes negligence, the natural or probable consequence of that intentional act is not covered."

Below are some of the likely coverage issues to be addressed in the climate change context under a CGL policy:

Do the Climate Change Suits Against the Insureds Seek "Damages"?

The term "damages" is not defined under most CGL policies. Insurers argue the term is limited to "legal" damages and does not include equitable relief. The majority of states have ruled that environmental response costs are "damages" and are covered under the CGL policy.

Monetary relief as compensatory damages sought in the climate change suits should qualify. However, insurers will likely argue that the injunctive relief to abate the nuisance does not qualify as "damages." Certain of the plaintiffs seek an order requiring the companies to pay monies into a "Climate Change Abatement Fund" for future perceived harm, which raises additional issues, particularly if there has been no present finding of "property damage" or "bodily injury." Declaratory and various types of equitable relief sought may also create coverage disputes.

Do the Climate Change Suits Against the Insureds Involve "Property Damage"?

"Property damage" is generally defined in most CGL policies as: "Physical injury to tangible property, or loss of use of that same physically injured tangible property." Some CGL policies also include within the "property damage" definition, the "loss of use of tangible property that is not physically injured."

To determine "physical injury," courts often look at whether the tangible property was altered in appearance, shape, color, or in in another material dimension. Generally environmental damage to property has been found by courts to constitute physical injury to tangible property.

To the extent the climate suits allege water damage to real property, buildings and structures from sea level rise, they may qualify as "property damage." However, mitigative and preventative efforts to curtail or avert "property damage" (e.g. dams, dikes and raising or relocating buildings) may raise disputes. Courts have found coverage for mitigative and prophylactic costs, especially where "property damage" is present and the mitigation is to avoid further damage.[15]

Economic loss alone, without any accompanying damage to or loss of use of tangible property, is not covered property damage. Accordingly, insurers would likely argue that coastal property which has decreased in value due to rising sea level is not covered, unless there is an accompanying damage or loss of use.

Alleged damages in these climate change suits resulting from a decrease in crop yields may not be covered. Courts have sometimes found coverage in other contexts if there was physical damage to the crops. However, coverage denials have been upheld for costs arising from crop failures due to the seeds failing to germinate.[16]

What if the climate change plaintiffs seek damages against the insured to abate the mere presence of excess GHG's in the atmosphere? In *Concord Gen Mut. Ins. Co. v. Green & Co. Bldg. & Dev. Corp.*[17], the Supreme Court of New Hampshire held that there was no requisite physical injury to tangible property, where CO2 was leaking from insured's chimney, as the gases did not physically alter the property and the homeowners were able to continue living in their house, although they could not use their chimney.

Is There "Property Damage" During the Policy Period?

This will undoubtedly be a disputed issue in a climate suit context and often involve a "battle of the experts." If "property damage" has happened, in which year(s) did it take place? Most large target companies have "legacy" liability insurance policies stretching back to the 1940s or earlier. Accordingly, nearly every major insurance company will be implicated if the "property damage" is deemed to have occurred from the 1940s through present.

Not until approximately 2011, did the EPA promulgate "certain" regulations under the CAA to regulate GHG emissions.[18] Additional regulations were promulgated in 2015. Accordingly, there was no emission standard to measure before then.

However, the scientific community and even the fossil fuel companies admit GHGs have been and are causing detrimental physical changes in the earth's climate. But are physical changes to the earth's climate "property damage"?

In certain of the pending climate change suits the plaintiffs are seeking recovery of past costs, although the basis is not specified. If the past costs relate to building a sea wall to mitigate against future erosion of beaches and damage to structures due to rising sea level and more intense weather events, insurers will likely argue no "property damage" during the policy period.

Do the Climate Change suits against the insureds involve "Property Damage" arising from an "Occurrence"?

"Occurrence" is generally defined as:

An accident, including continuous or repeated exposure to substantially the same general harmful conditions which results in injury or damage which is neither expected nor intended from the standpoint of the insured.

"Occurrence" is not the trigger of coverage. Rather, it is the act of the insured (the accident, event or conditions) that results in injury – the cause. It is the resulting injury/damage during the policy period that triggers coverage – the effect.

There are generally four legal issues with respect to an "occurrence" analysis:

(1) Whether the "neither expected nor intended" requirement concerns the offending act or resulting **injury;**

(2) Whether there should be an objective or subjective standard applied in determining "expected or intended" (subjective standard is majority approach);

(3) How to define "expected" (e.g. whether the **insured knew the damage would result, or whether the insured should have known damage would result.); and**

(4) Who bears the burden of proof on the "expected or intended" issue. (This question turns on whether the court will interpret the occurrence requirement as an exclusion or as part of the definition of **coverage.)**

All of the pending U.S. climate change suits allege intentional and knowing conduct on the part of the fossil fuel defendants dating back to at least the 1960s. Such allegations may support a finding of no "occurrence"[19]

How Many Occurrences Are There?

The answer to this question could have huge monetary implications on available policy limits and exhaustion of coverage. The analysis could be exceedingly complex in these climate change suits, where the alleged damages involve both traditional concepts of property damage and bodily injury, as well as injury to ecosystems, marine life, and natural resources separated by time and place.

Typical limits of liability language states "[f]or the purpose of determining the limits of the Company's liability, all injury or damage arising out of continuous or repeated exposure to substantially the same general harmful conditions shall be considered as arising out of one occurrence."

The courts generally apply either the "cause test" or the "effects test" in determining the number of occurrences. Under the "cause" test, the inquiry is whether the diverse injuries or claims share a common, uninterrupted proximate cause? This often results in a one occurrence finding. In contrast, under the "effects test" the focus is on the point at which people or property are damaged by insured's act or omission, which militates in favor of a multiple occurrence finding, should the facts permit.

Two possible outcomes in a climate change coverage action would be: one "occurrence" – the insured's decision to manufacture and supply a "defective" product (fossil fuels which, when burned, release persistent GHGs), or multiple "occurrences" – any isolated discrete injuries separated in place and time.

We raise caution, as the case law addressing number of occurrences is often extremely fact specific, result-oriented, often affected by SIRs/deductibles, and even inconsistent within particular jurisdictions.

Operation of the Products/Completed Operations Hazards

Many CGL policies only contain aggregate policy limits for products/completed operations hazards (as defined). The assertion of strict liability and other "defective product" allegations in the climate change Complaints could implicate this aggregate limitation. Depending on the number of occurrences outcome, the applicability of the products hazard definition could have a significant impact on available policy limits.

Trigger of Coverage

Trigger of coverage refers to what must occur during the policy period to give rise to potential coverage under the specific terms of the policy. There are four main GL trigger theories which could be applied to these climate change suits, the selection of which could have a significant impact on the number of policy years implicate[20]:

1) **Injury in fact** (All policies are triggered if they are in effect during the time the injury or damage is shown to have actually taken place, even if the injury or damage continues over time).

2) **Exposure** (All policies are triggered if they are in effect during exposure to injurious or harmful conditions) (Applied more often in bodily injury cases).

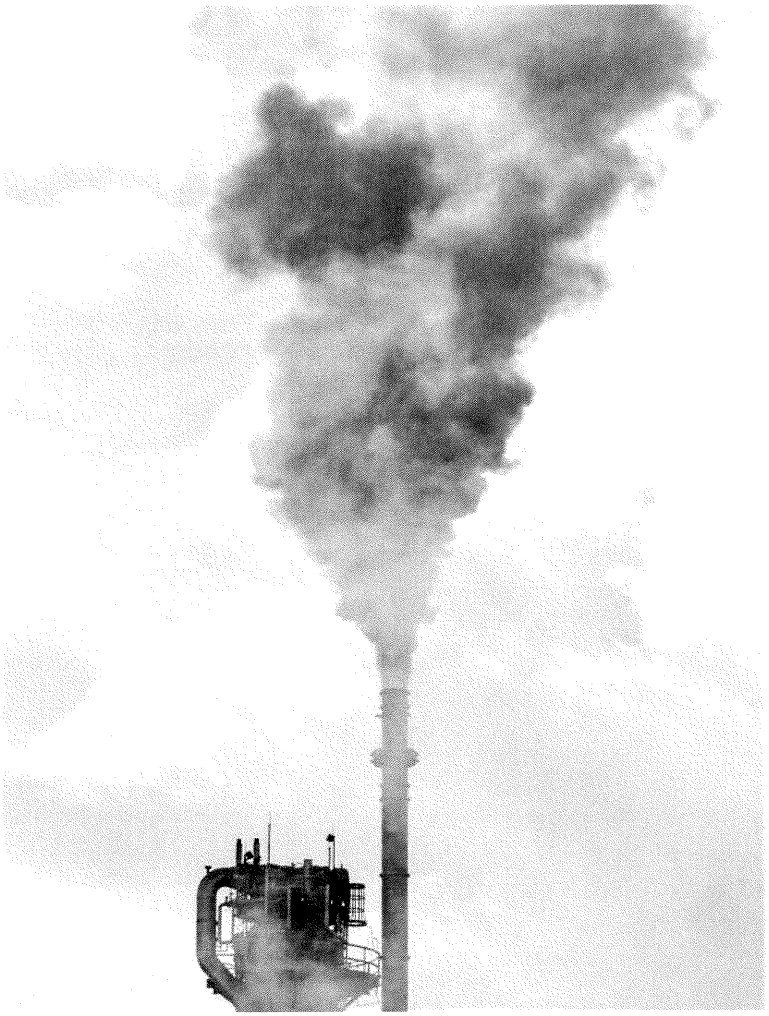
3) **Manifestation** (The policy is triggered when the injury or damage is discovered or manifests itself - or in some cases is capable of being discovered - during the policy period) (Applied more often in first-party property cases).

4) **Continuous** (All policies are triggered if they are in effect during any of the following times: exposure to harmful conditions; actual injury or damage; and upon manifestation of the injury or damage).

Application of Pollution Exclusions

The three main types of pollution exclusions likely to be encountered in climate change coverage actions are: (1) Sudden and Accidental (1973-1985); (2) Absolute (1986 -); and Total (1988-).

All three of these variants, exclude coverage for, inter alia, "property damage" arising out of the discharge of "pollutants..." The term "pollutant" is most commonly defined in a CGL policy as: "Any solid, liquid, gaseous



or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed."

All three types of pollution exclusions require a discharge and a finding that the offending substance (e.g. GHGs, carbon dioxide, methane) falls within the definition of "Pollutant." Courts generally apply either a "traditional environmental pollution" approach or a broader, literal interpretation to the exclusions.

Under the "traditional" approach, courts interpret the exclusion to preclude coverage only for those claims that are commonly considered to arise from "traditional" environmental pollution (e.g. dumping waste at a landfill).

Under the "literal" approach, courts focus on the plain language of the policies and apply the exclusion to all claims arising from contaminants or irritants that cause damage, regardless of whether the claims involve traditionally understood contamination.

Importantly, the U.S. Supreme Court has on multiple occasions held that greenhouse gases (including carbon dioxide and methane) fall within the CAA's definition of "air pollutant."[21]

Insurers should therefore, have a reasonably strong argument that the "pollutant" prong of the exclusion has been met in a climate change coverage action, especially in "traditional" states.

But insured's may argue that carbon dioxide is emitted by every human being as part of normal bodily respiration and thus, should not be considered a "pollutant" under the exclusion.[22]

We expect policyholders will argue in most of the climate change cases that the "discharge" requirement of the pollution exclusion has been met, given, among other things, the offending "pollutant" (GHGs, carbon dioxide, etc.) can be shown to have originated from numerous point sources and were dispersed within the outdoor atmosphere.

Is Climate Change Liability a D&O Issue?

According to a recent Zurich Quarterly Claim Journal (Spring 2018)[23], climate change liability presents significant D&O exposure:

From a D&O perspective it is more than likely that the industry will see an increase in claims in the future as a result of companies failing to adequately manage the risk of climate change on their business and to disclose these risks to investors. With respect to Financial Lines, it is most likely that D&O insurance will take the brunt of the Impact.

It is speculated that we may shortly arrive at a time where the use of fossil fuels is severely restricted. There is therefore an argument that the fossil fuel reserves that currently exist will never be used. The concern is that energy companies and their directors are aware of this risk, however have not taken this into account when stating their reserves, thus massively overstating the value of their business and leaving them open to the risk of actions against them. This may also have a 'carry-over' effect to their advisors, (e.g. actions against their auditors and investment banks).

A Report issued last year by the Grantham Research Institute on Climate Change and the Environment,

remarked that it expects to see an increase in suits asserting liability for "injuries arising from an alleged failure to anticipate and address [the] foreseeable consequences of climate change," given investors and insurers mounting attention to the "growing gap between scientific understanding of climate change and sluggish adaption efforts."[24]

Importantly, in 2010, the S.E.C. issued a twenty-nine page "interpretive guidance" (not a new rule) on existing disclosure requirements regarding how companies are to address the risks posed by climate change in their securities filings.[25]

The "Guidance" stressed that "[t]his interpretive release is intended to remind companies of their obligations under existing federal securities laws and regulations to consider climate change and its consequences as they prepare disclosure documents to be filed with us and provided to investors."

The SEC recently responded to shareholder resolutions sent to Chevron and ExxonMobil requesting disclosure regarding how they plan to "align their business models with a low-carbon economy" – commonly heard buzz words. (In 2017, 62 percent of Exxon shareholders voted to require the company to disclose more about climate risks.). The SEC determined that Exxon had met it disclosure requirements and could "dismiss" the proposal.[26] However, the SEC ruled that Chevron must submit a compliant disclosure for consideration at its upcoming shareholder meeting.[27]

In 2017, shareholders of the Commonwealth Bank of Australia ("CBA") brought suit asserting that CBA failed to address climate risk in its financial disclosures and did not include reference to funding for a coal mine in Queensland, Australia. However, less than a week after the claim was filed, CBA published its Annual Report advising shareholders that climate change posed a significant risk to the bank's operations and it considers climate change as a "significant long-term driver of both financial (credit, market, insurance) and non-financial (operational, compliance, reputation) risks."[28] Had the case proceeded, it would have been the first of its kind to determine how companies are required to disclose climate change-related risks.

A 2018 Report by Carbon Tracker discussing concerns as to global regulatory divergence regarding climate risk disclosure, notes pressure by investors and financial organizations on the International Organization of Securities Commissions ("IOSCO") to prompt a global shift on climate risk reporting in effort to insure consistency and assist investors in this "global economy."[29]

The U.K's largest money manager, Legal and General Investment Management ("LGIM"), recently stated that the world is facing a "climate catastrophe" and businesses around the world must urgently address it.[30] The LGIM report cautioned that if businesses "remain ignorant to this crisis, they face shareholders refusing to back them anymore."[31]

Directors & Officers have been named in securities lawsuits alleging pollution or asbestos-related misrepresentations or omissions. In the resultant coverage actions, the issue of whether the pollution exclusion applied to bar coverage was often addressed.

On at least several occasions, courts have found that the pollution exclusion did not apply where, for example, "the alleged pollution was too attenuated from the damages arising from the alleged misrepresentations..."[32] or where "[a]ny wrongful acts by the insured or its directors or officers in the context of the asbestos personal injury claims did not form a causal link to the class action."[33]

However, in *Nat'l Union Fire Ins. Co. v. U.S. Liquids, Inc.*, a Magistrate held that a pollution exclusion barred coverage to the insured for liabilities arising from an underlying class securities and shareholder derivative action alleging the insured misrepresented and omitted facts related to its acquisition of waste hauler companies. In applying the exclusion, the Magistrate found that the alleged acts of "polluting and misrepresenting were not mutually exclusive but were related and interdependent."[34]

In this age of uncertainty as to potential climate-change liability, Zurich has offered a D&O policy with a coverage extension for "environmental mismanagement" which specifically includes GHG, global warming and climate change.[35]

First-Party Property Insurance

The property insurance market is likewise in the cross-hairs of climate change-related losses.

A 2017 Zillow Report determined that if sea levels rise as predicted by the year 2100, almost 300 U.S. cities would lose at least half their homes, and 36 U.S. cities would be completely lost.[36]

With the projected increases in the frequency and severity of natural disasters such as hurricanes, floods, snow and hail storms, tornadoes and drought-related forest fires, the expectation is that we will see more homeowner and business owner property claims and more business interruption ("BI") losses, including contingent BI losses.

Coverage issues in the first-party realm will include direct physical loss, flood versus wind coverage disputes, actual loss sustained, as well as BI and contingent BI issues such as business income, period of restoration, claims settlement process disputes and insufficient supply chain coverage.

The concern of climate change is increasingly permeating virtually every topic of discussion and is unlikely to dissipate anytime soon. Rightly so, as many of the scientific models present ongoing catastrophic damage scenarios affecting persons, property, businesses, governments, economies, ecosystems and natural resources, to name but a few. The scope and scale of estimated damage from climate change is unprecedented and the costs to mitigate the risk no less daunting. Insurers and their policyholders face high exposure risk from climate change on many fronts. While, to date, there have been minimal coverage actions relating to climate change, we expect that to change, given the increasing number of underlying lawsuits and related activity, coupled with the staggering liability that is at stake.

About the Author

Adam Krauss has more than three decades of experience in insurance coverage counseling and national litigation involving a wide range of policy forms.

A senior counsel in the firm's New York office, Adam Krauss is passionate about obtaining favorable outcomes for his insurance industry clients. With meticulous preparation and candid communication, Adam protects and advances the interests of insurers in general liability, environmental and toxic tort insurance and reinsurance coverage matters and related litigation. He has successfully handled many high-profile, billion-dollar insurance coverage disputes involving Fortune 500 companies.

With more than three decades of experience in insurance coverage counseling and litigation on a national scale, Adam has developed extensive insights and robust knowledge involving a wide range of policy forms, including CGL, products, firstparty, EIL, claims-made, contractor pollution, cost-cap, and site remediation.

Adam graduated from the State University of New York at Brockport with a degree in Earth Science and Environmental Science. Leveraging his educational background and professional experience, Adam has been an active national

speaker and writer on climate change and its implications to the insurance industry. He earned his law degree from St. John's University School of Law, where he served as a Student Editor of the New York State Bar Journal, Environmental Law Section.

When not serving clients, Adam enjoys spending time with his wife and two sons, standing behind the lens of a camera photographing anything and everything, and playing guitar fronting two separate bands.

1 http://www.lse.ac.uk/GranthamInstitute/wp-content/uploads/2018/04/Global-trends-in-climate-change-legislation-and-litigation-2018-snapshot-3.pdf
2 See, Comer v. Murphy Oil USA, 585 F.3d 855 (5th Cir. 2009); Am. Elec. Power, et. al. v. Connecticut, et al, 564 U.S. 410 (2011); Native Village of Kivalina v. ExxonMobil Corp., 696 F.3d 849 (9th Cir. 2012).
3 http://climatecasechart.com/case-category/common-law-claims/
4 http://climatecasechart.com/case-category/common-law-claims/
5 The San Mateo, Marin, Santa Cruz & Richmond suits were remanded back to state court, where appeals by the defendants are pending. http://climatecasechart.com/case-category/common-law-claims/
6 See, Massachusetts v. EPA, 549 U.S. 497 (2007); Juliana, et al. v. United States (2019).
7 Mayor and City Council of Baltimore v. BP P.L.C., et al., No. ELH-18-2357, 2019 WL 3464667 at *3 (7/31/19)
8 Id at *4
9 City of Oakland, et al. v. BP P.L.C., et al. No. WHA-16-6011, 2018 WL 1064293, at *5 (N.D. Cal. Feb. 27, 2018); City of New York v. BP P.L.C., et al., 325 F.Supp.3d 466 (S.D.N.Y. 2018)
10 See, Mayor and City Council of Baltimore, supra.
11 http://www.fljustice.org/fort-lauderdale-considers-suing-big-oil-.html; https://wattsupwiththat.com/2018/11/24/lead-or-sue-pacific-islands-take-twin-tracks-on-climate-change/
There are several other noteworthy pending climate change matters:
- –Pacific Coast Federation of Fishermen's Associations, Inc. v. Chevron Corp., et al., 3:18-cv-07477 (N.D. Cal. 2018)
- –Juliana v. United States, 6:15-cv-01517-AA (U.S. Dist. Or. 2015)
- –WildEarth Guardians v. Zinke, 1:16-cv-01724 (D.D.C 2016)
- –Animal Legal Defense Fund, et al. v. United States, 6:18-cv-01860 (U.S. Dist. Or. 2018)
- –Milieudefensie v. Royal Dutch Shell (Netherlands - Hague Court of Appeals 2019)
- –Colditz v. Woods, et al., 3:19-cv-01067 (N.D. – Tex. 2019)
- –Montini v. Woods, et al., 3:19-cv-01068 (N.D. – Tex. 2019)
- –Saratoga Advantage Trust Energy & Basic Materials Portfolio v. Woods, 3:19-cv-16380 (D.N.J. – 2019)
- –Certain French Communities Formal Notice to Total SA to Comply with Duty of Vigilance Law, French Commercial Code (6/19/19)
- –Commission on Human Rights of the Philippines, National Inquiry on Climate Change

12 https://ag.ny.gov/press-release/ag-underwood-files-lawsuit-against-exxonmobil-defrauding-investors-regarding-financial
13 https://insideclimatenews.org/news/07012019/exxon-climate-fraud-investigation-supreme-court-ruling-massachusetts-attorney-general-healey
14 The underlying suit alleged damages to the residents' native village in Alaska due to rising sea level from global warming/GHGs.
15 See, Oak Ford Owners Ass'n v. Auto-Owners Ins. Co., 510 F. Supp. 2d 812 (M.D. Fla. 2007) (Court held insured's dredging of a creek to make it deeper and wider without proper permit and damage to wetlands constituted damage to tangible property. Court stated "injury has occurred even though the effects such as flooding and erosion would increase over time).
16 See, Farm Bureau Mut. Ins. Co. v. Earthsoils, 812 N.W.2d 873 (Minn. Ct. App. 2012) (Farmer had only half the crop yield due to fertilizer with insufficient nitrogen content. Court ruled no coverage because less than anticipated crop yield did not result from physical injury to the crop itself). But see, W. Heritage Ins. Co. v. Green, 54 P.3d 948 (Idaho 2002) (Alleged misapplication of fertilizer caused some of the potato plants to form yellow foliage, poor root systems and misshapen potatoes. Court found physical injury to plants was a covered loss).
17 8 A.3d 399 (N.H. 2010)
18 https://en.wikipedia.org/wiki/Regulation_of_greenhouse_gases_under_the_Clean_Air_Act
19 See, AES Corp. v. Steadfast Ins. Co., supra (Supreme Court of Virginia found that the underlying allegations asserting that the insured intentionally released tons of carbon dioxide and GHGs into the atmosphere as part of its business operations did not constitute an "occurrence" within the terms of the policies.)
20 Allocation of damages goes hand-in-hand with trigger and could result in the insured being able to select any triggered policy to pay "all sums" (subject to that selected insurer's contribution rights) or each triggered policy solely obligated to pay a pro-rata share of the damage/injury that took place during its policy period. Climate change-related property damage could implicate many years of coverage or a relative few.
21 See, e.g., Am. Elec. Power Co. v. Connecticut, 564 U.S. 410 (2011).
22 See, Donaldson v. Urban Land Interests, Inc., 564 N.W.2d 728 (Wis. 1997) (Court held that exhaled carbon dioxide was not unambiguously a "pollutant" and the "exclusion did not plainly and clearly alert a reasonable insured that coverage was excluded for personal injury claims that had their genesis in activities as fundamental as human respiration.") See also, Motorists Mut. Ins. Co. v. RSJ, Inc., 926 S.W. 2d 679 (Ky. Ct. App. 1996) (finding carbon dioxide leaking from insured's boiler vent stack did not constitute a "pollutant" under the exclusion, and thus suit by neighbor alleging injury was covered). But see, Essex Ins. Co. v. Tri-Town Corp., 863 F. Supp. 38 (D. Mass. 1994) (finding carbon dioxide constitutes "pollutant" under pollution exclusion).
23 https://insider.zurich.co.uk/app/uploads/2018/05/Zurich-Claims-Quarterly-Journal-Spring-2018.pdf
24 http://www.lse.ac.uk/GranthamInstitute/wp-content/uploads/2018/04/Global-trends-in-climate-change-legislation-and-litigation-2018-snapshot-3.pdf
25 https://www.sec.gov/rules/interp/2010/33-9106.pdf
26 https://www.asyousow.org/press-hits/2018/4/11/sec-gives-exxon-a-pass-on-shareholder-climate-proposal-but-not-chevron
27 Chevron had unsuccessfully argued to the SEC that the requested disclosure will aid plaintiffs in the pending climate change suits. Id.
28 https://www.theguardian.com/australia-news/2017/sep/21/commonwealth-bank-shareholders-drop-suit-over-non-disclosure-of-climate-risks
29 https://www.documents.clientearth.org/download/15460/
30 http://www.climateaction.org/news/legal-and-general-investment-bosses-warn-about-climate-catastrophe
31 Id.
32 Sealed Air Corp. v. Royal Indem. Co., 404 N.J. Super. 363 (NJ Sup. Ct., App. Div. 2008).
33 Owens Corning v. Nat. Union Fire Ins. Co., 1998 U.S. App. LEXIS 26233 (6th Cir. 1998) (asbestos exclusion).
34 271 F. Supp. 2d. 926 (S.D. Texas 2003)
35 https://www.zurich.com.au/content/dam/au-documents/business-insurance/financial-lines/directors-and-officers/directors-and-officers-liability-policy.pdf
36 https://www.zillow.com/research/ocean-at-the-door-21931/