



Global Warming Litigation and D&O Insurance Coverage Issues

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EXECUTIVE SUMMARY

Former U.S. Vice President Al Gore starred in the documentary film “An Inconvenient Truth” that detailed his efforts to educate people about global warming issues. In the movie, he discusses the effects of global warming and the potential consequences of climate change if greenhouse gas emissions are not reduced in the future. The film won the 2007 Academy Award for Documentary Feature.¹ For this and his other environmental efforts, Gore and the Intergovernmental Panel on Climate Change jointly shared the Nobel Peace Prize in December 2007.

Now, “Global Warming” may be off the big screen and coming to a courtroom near you. Global warming lawsuits have been compared to suits against the tobacco companies.² Notably, these cases may have a similar impact, and lead to industry settlements and additional governmental regulation.³ In any event, there is an increasing awareness by the public and the courts in addressing global warming claims.

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Plaintiffs have filed suits against government agencies or officials seeking to address climate change through the enforcement of various regulatory or statutory schemes. These claims involve actions against governmental agencies for acts or omissions relating to the emission of greenhouse gases. A more recent trend involves lawsuits aimed directly at the companies and industries that allegedly contribute the release of greenhouse gases. Plaintiffs have asserted claims based on nuisance and other tort theories. Arising out of these suits against these companies, plaintiffs may eventually file claims against corporate directors and officers for their roles in company emissions and climate change-related disclosures. It can be argued that directors and officers have a duty to monitor global warming issues, evaluate such risks, and take action to minimize the risks. Indeed, directors and officers may face liability if a company suffers financial harm as a result of a breach of care, or fails to make required disclosures.

Although the viability of global warming lawsuits is still yet to be decided, these suits will create challenges to companies that intend to seek coverage from their insurance carriers to cover the defense costs or liabilities arising from such lawsuits. Notably, determinations will be complicated in determining if a company’s directors and officers insurance policies provide coverage for such individuals, if they are named as parties to lawsuits. It is clearly time for companies and their directors and officers to act in preparing for the potential increase in global warming litigation in order to protect their businesses.

¹ For his work on the film and his other environmental efforts, Gore and the Intergovernmental Panel on Climate Change jointly shared the Nobel Peace Prize in December of 2007.

² See John Schwartz, “Courts as Battlefields in Climate Fights,” The New York Times, Jan. 26, 2010, <http://www.nytimes.com/2010/01/27/business/energy-environment/27lawsuits.html> (last visited Feb. 11, 2010).

³ See *id.* (quoting James E. Tierney, the director of the National State Attorneys General program at Columbia Law School, who notes that the existence and production of e-mail messages and memorandums during discovery could be the “hammer” to drive industries to the negotiating table).

INTRODUCTION

In the past several years, global warming has been widely discussed and brought an increased public awareness to environmental issues.⁴ It has been fueled by people from different walks of life, and not only limited to scientists and environmentalists. The issue of global warming affects how people live and how businesses conduct their operations. It has also become an increasingly hot topic in litigation as it applies to oil, gas, energy companies, and certain manufacturers. The threat of global warming may also harm corporations in other ways besides lawsuits: corporations may become constrained by environmental regulations, negative reputations arising out of bad publicity, and market effects that impact their bottom lines.

Recent court holdings suggest that global warming litigation, applying traditional tort theories of negligence, nuisance, and trespass, will affect companies that involve the emission of greenhouse gases. With the likelihood of increased global warming litigation, there will also be more lawsuits against corporations and their directors and officers. In response to such claims, directors and officers will seek coverage under existing directors and officers (D&O) insurance policies. However, insurance companies will likely try to deny or limit coverage, and will principally rely on the “pollution” exclusion found in most insurance policies. In many instances, the threshold issue will be whether greenhouse gases, such as carbon dioxide, fall within the pollution exclusion and will depend on the precise language of the exclusion. Accordingly, corporations and insurers are paying close attention to recent developments in the law regarding global warming litigation.⁵

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I. Emerging Global Warming Issues

A. Environmental Protection Agency findings declare that greenhouse gases endanger public health and welfare.

On Dec. 15, 2009, the Environmental Protection Agency’s (EPA) “Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act” were published in the Federal Register. Federal Register, Vol. 74 No. 239, Dec. 15, 2009, Rules and Regulations.⁶ The EPA findings include that “elevated concentrations of greenhouse gases in the atmosphere may reasonably be anticipated to endanger the public health and to endanger the public welfare of current and future generations.” *Id.* at 66516. Further, the EPA found “that the air pollution is the combined mix of six key directly emitted, long-lived and well-mixed greenhouse gases ... which together, constitute the root cause of human-induced climate change and the resulting impacts on public health and welfare.” *Id.* The six greenhouse gases are carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride. *See id.*

⁴ The phrase “global warming” is also often times used interchangeably with the phrase “climate change.” Both refer to an increase in global temperatures caused by an increase in greenhouse gases such as carbon dioxide. See EPA web site, “Climate Change.” <http://www.epa.gov/climatechange/basicinfo.html> (last visited Feb. 8, 2010) (The term climate change is often used interchangeably with the term global warming, but according to the National Academy of Sciences, “the phrase ‘climate change’ is growing in preferred use to ‘global warming’ because it helps convey that there are [other] changes in addition to rising temperatures.”).

⁵ The recent court decisions, discussed *infra*, primarily involve cases in their preliminary stages of litigation and whether global warming lawsuits must be dismissed as non-judicial or whether plaintiffs have standing to bring such suits. Of course, plaintiffs, if successful, at this initial stage still have to ultimately prove causation and damages.

⁶ The EPA findings became effective on January 14, 2010.

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B. Disclosure requirements may increase possibility of litigation.

Shareholders are calling for resolutions regarding the disclosure of potential global warming effects on the stability of the company. See <http://www.ceres.org/Page.aspx?pid=428> (last visited Feb. 8, 2010) (Ceres website stating: "As large shareholders, pension funds, endowments, mutual funds, and other institutional investors are well positioned to insist that companies disclose more information on the risks of global warming and how they plan to respond.").⁷ The Securities and Exchange Commission (SEC) enacted an agency rule that permits shareholders to request information about environmental issues and the associated financial risks to the company.⁸ As companies are required to make climate change disclosures in their filings with governmental agencies such as the SEC, lawsuits will likely follow alleging false or incomplete disclosures. See Regulation S-K Item 303, 17 C.F.R. § 229.303 (2009) (mandating disclosures of "known certainties" that "are reasonably likely to have a material impact on liquidity, capital, sales, revenues or income"); see, e.g., *Owens Corning v. National Union Fire Ins. Co.*, 1998 U.S. App. LEXIS 26233 (6th Cir. 1998) (finding pollution exclusion did not apply in D&O policy in suit alleging deficient disclosure of environmental liabilities) and *National Union Fire Ins. Co. v. US Liquids, Inc.*, 88 F. App'x 725 (5th Cir. 2004) (per curiam) (finding D&O pollution exclusion did apply).

C. Disclosure requirements for insurers.

The National Association of Insurance Commissioners (NAIC) Climate Change and Global Warming Task Force adopted an Insurer Climate Risk Disclosure Survey. See http://www.naic.org/committees_ex_climate.htm (last visited Jan. 27, 2010). In connection with the disclosure survey, the NAIC adopted a requirement for 2009 that insurance companies with \$500 million in premiums disclose global warming risks to state regulators. See *id.* ("The objective is for mandatory disclosure by applicable insurers to begin for the financial reporting year 2009 for insurance groups that meet or exceed direct written premium of \$500 million.") For the financial reporting year 2010, the premium threshold is \$300 million. See *id.*

II. D&O Liability and Coverage for Global Warming Lawsuits

Corporations and companies purchase D&O insurance to provide coverage for their directors and officers in case they are sued in a business capacity. Generally, the insurer is responsible for advancing defense costs as soon as attorney's fees are incurred. See *In re WorldCom, Inc. Sec. Litig.*, 354 F. Supp. 2d 455, 464 (S.D. NY 2005). However, the insurer may deny or limit coverage through policy exclusions. In some instances, the application of the exclusion will be very clear. Other times, coverage under a policy must be litigated by the insurer and the insured, especially if the pertinent policy language contains ambiguous terms. Plaintiffs alleging, among other things, breach of fiduciary duties and disclosure claims will

⁷ Ceres, "a national network of investors, environmental organizations and other public interest groups working with companies and investors to address sustainability challenges such as global climate change," noted global warming efforts by the following U.S. companies: Ford, Centex, KB Home, ConocoPhillips & Chevron, ExxonMobil, and Kroger. *Id.*

⁸ At its open meeting on Jan. 27, 2010, the SEC "voted to provide public companies with interpretive guidance on existing SEC disclosure requirements as they apply to business or legal developments relating to the issue of climate change." SEC web site, "SEC Issues Interpretive Guidance on Disclosure Related to Business or Legal Developments Regarding Climate Change," <http://www.sec.gov/news/press/2010/2010-15.htm> (last visited January 28, 2010). This guidance would be effective immediately, including for companies in the midst of preparing their annual reports on Form 10-K for the year ending Dec. 31, 2009.

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force corporate policy holders to challenge coverage under existing D&O policies. Although ultimate liability may be difficult to prove, defense fees and settlements will be costly.

With regard to pollution exclusions, the issue may be whether certain substances are excluded. *Compare Assicurazioni Generali, S.p.A. v. Neil*, 160 F.3d 997 (4th Cir. 1998) (finding carbon monoxide to be a pollutant under the pollution exclusion in general liability insurance policy) and *Reg'l Bank of Col., N.A. v. St. Paul Fire and Marine Ins. Co.*, 35 F.3d 494 (10th Cir. 1994) (finding carbon monoxide not to be a pollutant in policy). Although there is no standard pollution exclusion language, the following D&O pollution exclusion language is at issue in *Nat'l Union Fire Ins. Co. v. U.S. Liquids, Inc.*, 88 Fed. Appx. 725, 726 (5th Cir. 2004), is an example of denying coverage for any claim,

(l) alleging, arising out of, based upon, attributable to, or in any way involving, directly or indirectly:

(1) the actual, alleged or threatened discharge, dispersal, release or escape of pollutants; or

(2) any direction or request to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize pollutants, including but not limited to a claim alleging damage to the company or its securities holders.

Pollutants include (but are not limited to) any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste.⁹

Also, various D&O policies contain securities and shareholder derivative suit “carve outs” that may provide an exception to the pollution exclusion.

III. Recent Case Law Impacting Global Warming Litigation

A. The increase in global litigation lawsuits.

Lawsuits alleging damages related to global warming are now common. See, e.g., *Friends of the Earth, Inc. v. Mosbacher*, 488 F. Supp. 2d 889 (N.D. Cal. 2007) (“The Court does not doubt that the consequences of global warming will remain a matter of public interest for some time, and it recognizes the importance of the issues raised by this case.”). In the future, there may be an increased risk of suits involving global warming litigation where plaintiff shareholders allege liability for losses to the company itself as a result of the directors’ and officers’ failure to properly disclose the company’s climate change risks or failure to make required governmental or agency disclosures. These suits will be easier to bring in light of several recent federal court decisions. With the likelihood of increased global warming litigation, the threshold issue in global warming cases and coverage under D&O insurance policies may be whether carbon dioxide is a “pollutant.” Thus, insurance companies will have to provide coverage and advance costs associated with defending the directors and officers, unless the insurer can show that an exclusion applies. See, generally, *Perdue Farms, Inc. v. National Union Fire Ins.*

⁹ The following language appears in one carrier’s D&O policy:
The Insurer shall not be liable to make any payment for loss in connection with any claim made against the Directors or Officers ... arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste material or other irritants, contaminants or pollutants into or upon land, the atmosphere or any watercourse or body of water.

Co., 197 F. Supp. 2d 370, 376-77 (D. Md. 2002) (stating that insurers “have the burden of proving the applicability of any exclusions contained in the policy”); *Transcon. Ins. Co. v. RBMW. Inc.*, 262 Va. 502, 512, 551 S.E.2d 313, 318 (Va. 2001) (stating “the burden is upon the insurer to prove that an exclusion applies”); *Virginia Electric and Power Co. v. Northbrook Property and Casualty Ins. Co.*, 475 S.E.2d 264, 266 (Va. 1996) (same).

B. Supreme Court finds carbon dioxide to be a pollutant under EPA regulations related to the Clean Air Act.

In *Massachusetts v. EPA*, the Supreme Court held that the Clean Air Act, 42 U.S.C. §§ 7401 *et seq.*, expressly authorized the EPA to regulate carbon dioxide emissions. As noted by the EPA, carbon dioxide is one of six greenhouse gases that contribute to global warming and “impact public health and welfare.” The Supreme Court’s decision is significant in that it addressed the issue of global warming and found that carbon dioxide emissions are the main contributor to the rise in global temperature.¹⁰ Although the Supreme Court classified carbon dioxide as a pollutant as to EPA regulation, this holding most likely is not relevant in interpreting language in an insurance policy.

C. Recent federal court decisions indicate plaintiffs have standing to bring climate change lawsuits.

The 2nd Circuit in *Connecticut v. American Electric Power Co., Inc.*, 582 F.3d 309 (2nd Cir. 2009), found plaintiffs had standing to bring their claims and vacated dismissals by the district court. In district court, two groups of plaintiffs (one consisting of eight states and New York City, and the other consisting of three land trusts) separately filed suit under nuisance laws against six power companies seeking abatement of the defendants’ alleged ongoing contributions to the public nuisance of global warming. *See id.* at 314. The plaintiffs alleged that defendants, as the five largest emitters of carbon dioxide in the United States, caused and will continue to cause serious harm to humans and the earth’s natural resources. *See id.* The district court dismissed the complaints on the basis that plaintiffs’ claims presented a non-justiciable political question. *See id.* The 2nd Circuit disagreed with the district court’s determination and held that the plaintiffs sufficiently alleged injury and “sufficiently alleged that their current and future injuries are ‘fairly traceable’ to [d]efendants’ conduct.” *See id.* at 340-44, 347.

In *Comer v. Murphy Oil USA*, 585 F.3d 855 (5th Cir. 2009), the 5th Circuit determined that residents and property owners along the Mississippi Gulf Coast had standing to assert public and private nuisance, trespass, and negligence claims against various defendant corporations based on the defendants’ operations that “caused the emission of greenhouse gases that contributed to global warming, *viz.*, the increase in global surface air and water temperatures, that in turn caused a rise in sea levels and added to the ferocity of Hurricane Katrina, which combined to destroy the plaintiffs’ private property, as well as public property useful to them.” *Id.* at 859. In reversing the district court’s decision to dismiss these claims, the appellate court made reference to *Massachusetts v. EPA* and found the chain of causation to be sufficient at the



¹⁰ This case also illustrates the ambiguities in connection with global warming litigation and the classification of carbon dioxide as “pollutant” in the insurance context. In his dissent, Justice Scalia states: “[R]egulating the buildup of [carbon dioxide] and other greenhouse gases in the upper reaches of the atmosphere, which is alleged to be causing global climate change, is not akin to regulating the concentration of some substance that is *polluting the air.*” 549 U.S. at 559 (emphasis in original).

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pleading stage of the case. See *id.* at 864-67. The 5th Circuit also held that the claims were not nonjusticiable political questions, but based upon common law tort claims. See *id.* at 869-70.

In *Native Village of Kivalina v. ExxonMobil Corp.*, 2009 U.S. Dist. LEXIS 99563 (N.D. Cal. Sept. 30, 2009), plaintiffs (a village of approximately 400 people) filed a public nuisance suit against 24 oil, energy, and utility companies alleging a federal common law claim of nuisance for defendants' alleged contribution to excessive emission of carbon dioxide and other greenhouse gases causing global warming. According to plaintiffs, global warming caused the Arctic sea ice to diminish and will require the relocation of the village residents. See *id.* at *4-5.

However, the California district court did not follow the 2nd Circuit's ruling in *American Electric Power Co.*, and dismissed plaintiffs' complaint on non-justiciable political question grounds. The court also held that the plaintiffs lacked standing because they could not show causation. See *id.* at *34-46. The court explained:

[T]he harm from global warming involves a series of events disconnected from the discharge itself. In a global warming scenario, emitted greenhouse gases combine with other gases in the atmosphere which *in turn* results in the planet retaining heat, which *in turn* causes the ice caps to melt and the oceans to rise, which *in turn* causes the Arctic sea ice to melt, which *in turn* allegedly renders Kivalina vulnerable to erosion and deterioration resulting from winter storms.

* * *

In view of the Plaintiffs' allegations as to the undifferentiated nature of greenhouse gas emissions from all global sources and their worldwide accumulation over long periods of time, the pleadings make clear that there is no realistic possibility of tracing any particular alleged effect of global warming to any particular emissions by any specific person, entity, group, at any particular point in time.

Id. at *28, 44. The plaintiffs filed a notice of appeal on Nov. 5, 2009.

The *Kivalina* Court ruling may be reconcilable to the other cases in that *Comer v. Murphy Oil* and *Connecticut v. American Electric Power Co., Inc.* involved a discrete number of polluters who were identified as causing a specific injury to a specific area. In contrast, however, the *Kivalina* suit is "based on the emission of greenhouse gases from innumerable sources located throughout the world and *affecting the entire planet and its atmosphere.*" 2009 U.S. Dist. LEXIS 99563 at *27. Nonetheless, these recent federal court cases evidence that plaintiffs will have standing to bring climate change lawsuits against corporations, and also their directors and officers. The rulings in these cases evidence a potential increased risk of D&O claims and the costs associated with defending against such suits.¹¹

¹¹ Although *Kivalina* is not a D&O insurance case, it spawned the first coverage action. See *Steadfast Ins. Co. v. AES Corp.*, Arlington County Circuit Court (Virginia), Case No. CL08000858-00. This Virginia case is a complaint for declaratory relief related to *Kivalina* whereby Plaintiff Steadfast Insurance filed suit to seek "a declaration that it is not obligated to provide either defense or indemnity coverage to AES," pursuant to a series of commercial general liability policies issued by Steadfast to AES, for "claims asserted against AES in the *Kivalina* Lawsuit." *Id.*

IV. Companies Need to Address the Issue of Global Warming

As corporations protect themselves against global warming litigation, directors and officers of these companies must also protect themselves against potential liability. Plaintiffs may bring suits against corporations alleging that a company's actions contributed to global warming, *see, e.g., Comer v. Murphy, supra*, and also file suit against the directors and officers of the corporation for making business decisions over environmental concerns, or failing to fully disclose the company's global warming risks and liabilities. Shareholders may also file suit against directors and officers for their alleged failure to decrease carbon dioxide emissions. Indeed, courts may be willing to hold corporate decision makers individually liable for their business decisions. *See, e.g., U.S. v. Walsh*, 8 F.3d 659 (9th Cir. 1993) (finding personal liability as "operator" for civil penalties in connection with asbestos clean-up).



The increase in disclosure requirements will inevitably also increase the number of lawsuits against companies and their directors and officers for inadequate disclosures. Although it may be argued that a D&O policy's pollution exclusion should not bar coverage for global warming lawsuits because disclosure related suits are triggered by the business decision in connection with the disclosure and not by the actual pollution, insurers will assert that pollution exclusions are broadly written to exclude coverage for global warming lawsuits. Nonetheless, companies and insurers are sure to engage in litigation to resolve this uncertainty.

In 2008, Liberty International Underwriters, an affiliate of Liberty Mutual Group, created Private Advantage Company Combo policy to provide additional D&O coverage for pollution defense. *See Liberty Mutual Group, "Liberty International Underwriters Creates Directors and Officers Insurance Policy That Protects Against Global Warming Litigation," July 30, 2008.*¹² According to the insurer, the policy was created to "help eliminate much of the uncertainty around global warming exposures." *Id.* The policy is designed as a basic D&O policy which allows insureds to add coverage enhancements which include:

- Side A pollution derivative suit coverage
- Pollution defense costs coverage, inclusive of entity coverage and global warming protection
- Private placement protection including defense costs coverage for global-warming related misrepresentation
- Defense cost coverage associated with formal administrative and regulatory investigative proceedings against insured persons with respect to global warming

Id.

Director and officer policies and forms, like most insurance policies, will vary among insurers. Thus, it is important to determine what global warming coverage is being offered and what coverage is needed, as well as the potential risks and liabilities.¹³ Otherwise, there is still a great deal of uncertainty as to

¹² Zurich offers "Zurich D&O Select" which provides: "Environmental Mismanagement claims extension, including coverage for climate change and global warming disclosure claims, restricts the pollution exclusion so that it does not apply to traditional management liability exposures such as securities claims, retaliation claims against insured persons and all Side A coverage claims of any nature." *See Zurich American Insurance Company, "Zurich Corporate Directors & Officers Liability Insurance: Zurich D&O Select," 2009.*

¹³ For example, as to disclosure requirements, companies should err on the side of disclosure, if possible and practicable.

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whether there is D&O coverage for global warming related claims. Indeed, there is considerable ambiguity in D&O policy language addressing coverage for such climate change claims. Global warming litigation will continue to take place, and either the companies or their insurers, or both, will have to pay for defending and resolving lawsuits. Accordingly, companies should be cognizant of emerging global warming issues, and they should ensure that their officers and directors are adequately protected.

CONCLUSION

The future surrounding climate change regulation and litigation remains uncertain. All indications are that many developments are underway on both fronts. President Barack Obama has just called for a new Office of Climate Change. Legislation also continues to work its way through Congress. The recent cases in the federal court system are being appealed in various ways. No doubt, the business sector needs to remain ahead of the curve in structuring their insurance programs to maximize insurance coverage. A critical component of any insurance program is D&O insurance, and that is more important in light of the current environment surrounding global warming litigation and the potential increase in climate change lawsuits directed at companies.

About McGuireWoods and the Authors

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Insurance is a universal fact of business life. Everyone has to have it; common sense requires it. McGuireWoods knows getting the most from it requires strategic decisions about coverage and claims. We assist clients with every aspect of insurance, from advice on the appropriate coverage and risk management strategies, to assistance with claims processing and negotiation, through litigation, if necessary.

More than two dozen lawyers in multiple offices handle everything from coverage advice to trial. McGuireWoods' insurance coverage counseling and litigation group provides advice and handles disputes over the following types of policies, including dealing with the London and Bermuda markets:

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