

# CGL Coverage for Climate Change–Related Civil Litigation



By Seth D. Lamden

It is far too early to tell whether companies currently or formerly engaged in operations that emit greenhouse gases will face civil liability for climate change. Indeed, it is possible that no company will ever be held liable for climate change–related damages. However, although the number of potential defendants in climate change–related suits likely is less than the number of potential asbestos defendants, the number of potential plaintiffs in climate change lawsuits is limitless. And, as any toxic torts trial attorney knows, a single verdict in favor of a private citizen or municipality against a company for climate change–related damages could open the floodgates of follow-on litigation. In fact, any of the handful of currently pending private climate change lawsuits has the potential to be to climate change litigation what *Borel v. Fibreboard Paper Products Corp.* was to asbestos litigation.<sup>1</sup>

Even if there is never a climate change decision equivalent to *Borel*, companies should expect to incur substantial legal expenses defending against such suits. And for the reasons discussed below, depending on the allegations in climate change lawsuits, commercial general liability (CGL)<sup>2</sup> insurers should expect to fund the defense of at least some of these suits because there are compelling arguments that such suits may trigger CGL insurers' duties to defend. This article provides an overview of several key issues likely to arise in coverage disputes between CGL insurers and their policyholders regarding climate change lawsuits.

### CLIMATE CHANGE LAWSUITS AGAINST FOSSIL FUEL COMPANIES

Although the U.S. Supreme Court held in *American Electric Power Co. v. Connecticut*<sup>3</sup> that corporations cannot be sued for greenhouse gas emissions under federal common law due to the preemptive effect of the federal Clean Air Act, it would be unrealistic to conclude that corporations will not face future lawsuits relating to climate change, particularly under state nuisance common law.

Indeed, in January 2018, the City of New York filed a lawsuit against BP, Chevron, ConocoPhillips, ExxonMobil, and Shell in the U.S. District Court for the Southern District of New York,<sup>4</sup> alleging that climate change resulting from greenhouse gas emissions from fossil fuels sold by the defendants had damaged New York City in a variety of ways, including erosion and flooding. The causes of action alleged by New York City included public nuisance, private nuisance, and trespass. Among the relief sought by New York City were compensatory damages for the costs incurred by the city, as well as the costs that will be incurred by the city “to protect City infrastructure and property, and to protect the public health, safety, and property of its residents from the impacts of climate change.”<sup>5</sup> The Southern District of New York dismissed the lawsuit

on July 19, 2018,<sup>6</sup> but the City of New York filed its notice of appeal on July 26, 2018.<sup>7</sup>

In addition, on July 27, 2018, the U.S. District Court for the Northern District of California dismissed a lawsuit brought by the City of Oakland and the People of the State of California against numerous fossil fuel companies.<sup>8</sup> Similar lawsuits have been brought in California state courts by coastal communities alleging that fossil fuel companies knowingly caused the nuisance of global warming and should be liable for, among other things, paying for infrastructure necessary for the cities to adapt to global warming.<sup>9</sup>

### THIRD-PARTY PROPERTY DAMAGE AND DUTY TO DEFEND

Subject to a series of enumerated exclusions, CGL policies insure against, among other things, liability for damages due to “property damage” that happens during the policy period and is caused by an “occurrence.” Furthermore, an underlying lawsuit that alleges the potential—no matter how remote—that property damage happened during the policy period can trigger an insurer's duty to defend.

**Duty to defend.** Although a CGL insurer's liability for damages requires a finding that the liability was based on actual property damage, an insurer's duty to defend against such suits is far broader:

[A CGL policy] imposes a broad obligation on the insurer to defend any suit brought against its insured that presents the possibility that the insured could incur covered legal liability, regardless of the likelihood that the insured ultimately will be held liable for covered damages based on adjudicated facts.<sup>10</sup>

Put differently, “the duty to defend arises whenever allegations in a suit brought against the insured create the potential for covered liability.”<sup>11</sup>

Given the breadth of the duty to defend, even a completely meritless climate change suit could trigger a CGL insurer's duty to defend if the underlying complaint alleges (1) that the insured may be liable for damages<sup>12</sup> (2) because of physical injury to tangible property (such as the environment) that may have happened during the policy period (3) caused by an accident or continuous exposure to conditions (such as rising water levels or the emission of greenhouse gases).

**Covered property damage.** Coverage under a CGL policy is triggered by property damage that happens during the policy period. CGL policies define *property damage* to include “[p]hysical injury to tangible property.”<sup>13</sup>

Damage to the environment caused by erosion or other effects of rising water levels could constitute CGL property damage. For example, a Florida appellate court held that dredging a creek and depositing the fill on the



## TIP

Defendants in climate change lawsuits should request a defense from their CGL insurers.

bank of the creek constituted property damage, noting that

the fact that negative impacts on the environment are not easily quantified, or immediately apparent upon observation, does not change the fact that the underlying cause of these impacts was a physical injury. . . . Similarly, the ordinary person would understand that [the creek] and its surrounds were injured, even though certain potential environmental effects of this injury, such as flooding and erosion, could increase over time. . . .<sup>14</sup>

In many jurisdictions, an underlying complaint alleging that erosion occurred over the course of many years would be deemed to trigger all CGL policies in effect while the erosion alleged was occurring. In one such case, an appellate court in Hawaii held that many years of CGL policies were triggered by an underlying lawsuit arising out of a dam breach because, among other things, there were allegations of a “continuous, incremental and indivisible process of damage to the [dam]” and an expert report indicating that “internal erosion” was a possible cause of the dam failure.<sup>15</sup> Accordingly, a lawsuit against an emitter of greenhouse gases alleging environmental damage caused by erosion due to rising water levels since the 1970s could trigger

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all of the emitter’s CGL policies in effect since the 1970s.

## EMISSION OF GREENHOUSE GASES AND OCCURRENCES

Whether a climate change lawsuit will be deemed to allege an “occurrence” depends on both the specific allegations in the underlying complaint and controlling case law regarding the interpretation of *occurrence*.

**Policy definitions.** Since 1986, most CGL policies have defined *occurrence* to mean, in part, an “accident, including continuous or repeated exposure to substantially the same general harmful conditions.”<sup>16</sup> CGL policies in effect from 1966 to 1986 contained similar definitions of *occurrence* that included exposure to conditions.

**Case law.** In the context of “long-tail” (i.e., occurring over many years) environmental contamination claims, many courts have found that the discharge of pollutants into the environment constitutes an occurrence. In climate change litigation, the occurrence could be the continuous emission of greenhouse gases into the environment, or it could be rising water levels causing erosion or flooding. In many jurisdictions, damage caused by the emission of greenhouse gases would constitute property damage caused by an occurrence unless the insured subjectively expected or intended the results of its greenhouse gas emissions, such as damage caused by rising sea levels. In a minority of jurisdictions, there would be no occurrence, regardless of whether the insured subjectively expected or intended the resulting damage.

**Case law and climate change.** To date, the Virginia Supreme Court is the only court to address this issue in the context of climate change. In *AES Corp. v. Steadfast Insurance Co.*, the court followed the minority view, holding that a lawsuit seeking to hold an energy

company liable for climate change losses allegedly caused by the emission of greenhouse gases did not allege an occurrence because the act of emitting the gases as part of the insured’s energy-generating activities was intentional; and, according to the court, the consequences of those emissions were “the natural and probable consequences of [the insured’s] intentional actions.”<sup>17</sup> This holding is questionable as the underlying plaintiff itself did not even allege that the harm caused by the emissions was the “natural and probable consequence” of the insured’s emissions. Rather, the plaintiff alleged only that the insured “knew or should have known” that harm would result from the emissions.<sup>18</sup>

The precedential weight of the *AES Corp.* decision outside of Virginia likely will be limited for a variety of reasons, one of which is that when evaluating whether a claim alleges damage or injury caused by an occurrence, many courts do not consider the objective natural and probable consequences of the insured’s act. Rather, they consider whether the insured subjectively expected or intended injury or damage caused by its acts or omissions or whether there was a “substantial probability” that harm would result from the insured’s acts.<sup>19</sup> Indeed, in a jurisdiction that applies a subjective standard to determining whether a suit alleges an occurrence, the insured in *AES Corp.* may have been entitled to coverage, or at least a defense, especially in the absence of allegations or evidence that the insured intended the climate-related damage. Along those lines, it is hard to imagine a court concluding that a company emitting greenhouse gases in Ohio, for example, had the intent to cause, or expected to cause, erosion and flooding in New York City or along the California coast. In addition, the *AES Corp.* court limited its duty to defend analysis to

the “eight corners” of the underlying complaint, finding it significant that the complaint alleged that the insured knew or should have known of the consequences of its emissions. Had the complaint in *AES Corp.* alleged negligence, perhaps the result would have been different from a coverage standpoint, even under Virginia law.

#### **CGL POLLUTION EXCLUSIONS AND APPLICATION TO CLIMATE CHANGE SUITS**

**Pollution exclusions.** Since 1986, many CGL policies have contained pollution exclusions at least as broad as the following:

This insurance does not apply to: . . . “Bodily injury” or “property damage” arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of “pollutants”: (a) [a]t 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. . . .<sup>20</sup>

CGL policies define *pollutant* to mean, in part, “any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste.”<sup>21</sup> Policies issued between 1973 and 1986 also contained pollution exclusions, but those exclusions contained exceptions for discharges that were “sudden and accidental.” Although many courts have found that *sudden and accidental* means that there is coverage only when the discharges occurred abruptly over a short period of time,<sup>22</sup> other courts have found coverage even for gradual discharges as long as the insured did not expect or intend the damage caused by the discharges.<sup>23</sup>

**Jurisdiction-specific pollutant determinations.** There have not been any reported insurance coverage decisions specifically addressing whether greenhouse gases would be considered pollutants for purposes

of evaluating coverage for a climate change lawsuit under a CGL pollution exclusion, but the answer to this question likely will be jurisdiction specific. The main greenhouse gases emitted by human activity are carbon dioxide (CO<sub>2</sub>), methane (CH<sub>4</sub>), and nitrous oxide (N<sub>2</sub>O). Most jurisdictions have not directly addressed whether these substances

the leakage of gasoline from a gas station’s underground storage tanks, the Indiana Supreme Court stated that if a pollution exclusion is “read literally it would negate virtually all coverage, including a situation where a visitor slipped on a grease spill.”<sup>27</sup>

Thus, a climate change coverage dispute litigated under Florida

### **MOST JURISDICTIONS HAVE NOT DIRECTLY ADDRESSED WHETHER CO<sub>2</sub>, CH<sub>4</sub>, AND N<sub>2</sub>O CONSTITUTE POLLUTANTS FOR PURPOSES OF A CGL POLLUTION EXCLUSION.**

constitute pollutants for purposes of a CGL pollution exclusion; but courts have split on whether carbon dioxide is a pollutant,<sup>24</sup> and at least one court has found that methane is a pollutant.<sup>25</sup>

**Court interpretations of pollutant.** Some courts have interpreted the term *pollutant* very expansively. For example, a Florida court went so far as to find that a pollution exclusion eliminated coverage for an underlying lawsuit brought by a homeowner who alleged that a

pool service technician removed all of his clothes and entered the pool naked [and] then sexually pleased himself in the pool and brought this sexual behavior to conclusion by casting ejaculate into [the homeowner’s] pool

because the claim alleged the discharge of a pollutant.<sup>26</sup>

At the other end of the continuum, Indiana courts will not enforce a pollution exclusion that does not specify precisely which substances constitute pollutants because the breadth of the standard pollution exclusion renders it ambiguous. Explaining why a pollution exclusion did not eliminate coverage for environmental pollution caused by

law likely could have a different outcome from a climate change coverage dispute litigated in Indiana, at least with regard to the interpretation of the pollution exclusion. Most jurisdictions fall somewhere between Florida and Indiana on this issue.

Insurers are likely to argue that greenhouse gases are pollutants because the U.S. Supreme Court and the U.S. Environmental Protection Agency have held that greenhouse gases qualify as pollutants under the Clean Air Act.<sup>28</sup> However, these determinations were not made in connection with a pollution exclusion, and some courts have held that naturally occurring substances, such as carbon dioxide, are not pollutants.<sup>29</sup>

Moreover, even policyholders in jurisdictions that enforce pollution exclusions may prevail on the argument that air emissions that complied with regulatory permits are not pollutants. For purposes of the duty to defend, for example, an Illinois appellate court agreed with this argument, finding that

the policy’s pollution exclusion is arguably ambiguous as to whether the emission of hazardous materials in levels permitted by an

Illinois Environmental Protection Agency air permit constitute traditional environmental pollution excluded under the policy.<sup>30</sup>

conduct constitutes a continuing, unauthorized intrusion and a continuing trespass onto the City's property.<sup>31</sup>

## SOME COURTS HAVE HELD THAT A CHEMICAL TRESPASS IS EQUIVALENT TO WRONGFUL ENTRY AS CONTEMPLATED BY THE DEFINITION OF *PERSONAL INJURY*.

**Coverage B and pollution exclusions.** Even if greenhouse gases are deemed to be pollutants, there may be other reasons why pollution exclusions do not eliminate coverage—specifically, Coverage B in a standard-form CGL policy. In addition to Coverage A, which provides coverage for third-party bodily injury and property damage, CGL policies also contain Coverage B, which provides coverage for, among other things, damages arising out of a series of enumerated offenses (referred to in the policy as “personal injury” offenses), including “wrongful entry.” Although Coverage A has been subject to some form of pollution exclusion since the 1970s, Coverage B was not subject to a pollution exclusion until the mid-1990s, when the Insurance Services Office, Inc., issued a revised CGL form, numbered CG 00 01 01 96.

The New York City climate change lawsuit discussed above alleges, among other things, that the emission of greenhouse gas from defendants’ fossil fuels

was substantially certain to result in the invasion of property owned by the City, without permission or right of entry, by way of increased heat, sea level rise, storm surge flooding, and flooding from increased intensity and frequency of precipitation. . . . Defendants’

Some courts have held that the absence of a pollution exclusion in the pre-1996 Coverage B requires insurers to cover pollution claims involving the wrongful entry of pollutants onto third-party property, even if the property damage would be excluded under Coverage A. These cases are based, in part, on the premise that the existence of a pollution exclusion in Coverage A, which applies only to bodily injury and property damage, should not affect a policyholder’s right to a defense or coverage for claims that fit within the wrongful entry coverage provided by Coverage B.

With regard to what types of claims may be considered to be a personal injury claim, some courts have held that a chemical trespass is equivalent to wrongful entry as contemplated by the definition of *personal injury*.<sup>32</sup> Although the New York City lawsuit alleges that the rising water levels, and not the greenhouse gases themselves, were the basis of the trespass claim, these cases may provide policyholders with an argument to circumvent the pollution exclusion under older CGL policies, at least for purposes of the duty to defend, by arguing that alleged harm is not property damage caused by pollution but the wrongful entry of water onto property owned by the claimants due to the policyholders’ emissions.

### COVERAGE LITIGATION AND CLIMATE CHANGE SUITS: ADDITIONAL ISSUES

As with coverage litigation involving legacy asbestos exposure and environmental contamination claims, coverage litigation involving climate change lawsuits likely will involve numerous other issues, including (1) whether coverage is precluded if the insured expected or intended the damage caused by the emissions, (2) allocation of defense and indemnity among multiple triggered policies, (3) the number of applicable limits or deductibles, (4) verification of the terms of missing policies, and (5) potential known loss arguments.

While the resolution of these issues will depend heavily on past cases decided in the context of asbestos and environmental coverage disputes, the outcome of these issues is fact specific, thereby making it difficult to predict the outcome with regard to climate change litigation.

### D&O POLICIES: SUITS BROUGHT BY SHAREHOLDERS

This article focuses on coverage under CGL policies. However, other policies also should be considered when evaluating coverage for suits involving climate change. For example, claims against directors and officers alleging damages arising out of climate change may be covered under D&O policies, which provide coverage for damages arising out of the wrongful acts of a director or officer.

Although many D&O policies contain pollution exclusions, at least one court to consider the issue correctly held that a pollution exclusion in a D&O policy did not preclude coverage for a claim alleging that directors and officers had issued misleading financial statements regarding asbestos-related environmental liabilities because the claim arose out of the financial statements, not the pollution.<sup>33</sup> Moreover, pollution exclusions in D&O policies often are subject to exceptions, such as exceptions for misstatements regarding pollution, derivative

actions, or nonindemnifiable Side A claims against individual directors or officers.

## CONCLUSION

From an insurance coverage standpoint, climate change lawsuits should not involve any issues that have not arisen repeatedly in legacy pollution and asbestos claims. Nevertheless, after nearly four decades of hotly contested litigation and thousands of reported decisions regarding these issues, the law in many jurisdictions is still far from settled. Given the complexity of these coverage issues and the billions of dollars potentially at stake, if civil climate change litigation grows, there is little doubt that such lawsuits will generate insurance coverage disputes for years to come. ■

## NOTES

1. 493 F.2d 1076 (5th Cir. 1973). The 1973 *Borel* decision was the first to find that asbestos manufacturers were strictly liable for asbestos-related injuries, spawning an avalanche of tens of thousands of similar lawsuits that continue to be filed today.

2. These policies were referred to as *comprehensive general liability policies* from the 1960s to 1986, when the Insurance Services Office, Inc., released Commercial General Liability Form No. CG 00 01 11 85.

3. 564 U.S. 410 (2011).

4. *City of New York v. BP P.L.C.*, No. 18-cv-182 (S.D.N.Y. Jan. 2018).

5. *Id.* ¶ 13.

6. *BP P.L.C.*, No. 18-cv-182 (ECF Dkt. No. 153).

7. *Id.* (ECF Dkt. No. 155).

8. *People of the State of Cal. v. BP P.L.C.*, No. 3:17-cv-06011 (N.D. Cal. July 27, 2018) (ECF Dkt. No. 283).

9. Whether these suits are meritorious is outside the scope of this article, as are other theories of recovery that citizens and cities may have against fossil fuel companies or corporations relating to climate change.

10. 3-17 NEW APPLEMAN ON INSURANCE LAW LIBRARY EDITION 17[2][b][i] (2018).

11. *Id.*

12. Depending on controlling insurance law, even a claim for only injunctive relief may trigger an insurer's duty to defend. *See, e.g.*, *Country Mut. Ins. Co. v. Bible Pork, Inc.*, 2015 IL App (5th) 140211, ¶ 22 (insurer required to defend suit seeking "equitable relief in the form of the declaration of a nuisance and also 'other relief deemed appropriate'").

13. *See, e.g.*, ISO Form No. CG 00 01 04 13.

14. *Oak Ford Owners Ass'n v. Auto-Owners Ins. Co.*, 510 F. Supp. 2d 812, 817 (M.D. Fla. 2007).

15. *C. Brewer & Co. v. Indus. Indem. Co.*, No. 28958, 2013 Haw. App. LEXIS 472, at \*43 (Aug. 7, 2013).

16. *See, e.g.*, ISO Form No. CG 00 01 11 85.

17. 283 Va. 609, 621 (2012).

18. *Id.*

19. *Nat'l Sur. Corp. v. Westlake Invs., Ltd. Liab. Co.*, 880 N.W.2d 724, 736 (Iowa 2016):

Whether an event amounts to an accident that constitutes an occurrence triggering coverage under a modern standard-form CGL policy turns on whether the event itself and the resulting harm were both expected or intended from the standpoint of the insured.

*Columbia Cas. Co. v. Westfield Ins. Co.*, 217 W. Va. 250, 252 (2005) (citing cases and agreeing with plaintiff that "the clear weight of authority in other jurisdictions" is that the determination of whether a claim involves an occurrence (an accident) "is ordinarily if not always made after considering and giving substantial weight to the perspective or standpoint of the insured"); *City of Carter Lake v. Aetna Cas. & Sur. Co.*, 604 F.2d 1052, 1059 (8th Cir. 1979):

If the insured knew or should have known that there was a substantial probability that certain results would follow his acts or omissions then there has not been an occurrence or accident. . . .

20. *See, e.g.*, ISO Form No. CG 00 01 11 88; ISO Form No. CG 00 01 07 98.

21. *See supra* note 20.

22. *See, e.g.*, *N. Pac. Ins. Co. v. Mai*, 939 P.2d 570 (Idaho 1997); *New Castle Cnty. v. Hartford Accident & Indem. Co.*, 933 F.2d 1162 (3d Cir. 1991).

23. *See, e.g.*, *Sunbeam Corp. v. Liberty Mut. Ins. Co.*, 781 A.2d 1189 (Pa. 2001).

24. *See Essex Ins. Co. v. Tri-Town Corp.*, 863 F. Supp. 39 (D. Mass. 1994) (CO<sub>2</sub> is a pollutant); *Donaldson v. Urban Land Interests, Inc.*, 564 N.W.2d 728 (Wis. 1997) (CO<sub>2</sub> is not a pollutant).

25. *O'Brien Energy Sys., Inc. v. Am. Emp'rs Ins. Co.*, 629 A.2d 957 (Pa. Super. Ct. 1993).

26. *Chestnut Assocs. v. Assurance Co. of Am.*, 17 F. Supp. 3d 1203 (M.D. Fla. 2014).

27. *Am. States Ins. Co. v. Kiger*, 662 N.E.2d 945 (Ind. 1996).

28. *See Mass. v. EPA*, 549 U.S. 248 (2007); *Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act*; Final Rule, 74 Fed. Reg. 66,496 (Dec. 15, 2009).

29. *See, e.g.*, *Donaldson v. Urban Land Interests*, 211 Wis. 2d 224, 232 (1997).

30. *Erie Ins. Exch. v. Imperial Marble Corp.*, 2011 IL App (3d) 100380, ¶ 22; *see also Velsicol Chem., LLC v. Westchester Fire Ins. Co.*, No. 15-CV-2534, 2017 U.S. Dist. LEXIS 144698, at \*27 (N.D. Ill. Sept. 7, 2017) (same); *Country Mut. Ins. Co. v. Bible Pork, Inc.*, 2015 IL App (5th) 140211, ¶ 41 (same).

31. *City of New York v. BP P.L.C.*, No. 18-cv-182, ¶ 132 (S.D.N.Y. Jan. 2018).

32. *See Pipefitters Welfare Educ. Fund v. Westchester Fire Ins. Co.*, 976 F.2d 1037 (7th Cir. 1992); *Great N. Nekoosa Corp. v. Aetna Cas. & Sur. Co.*, 921 F. Supp. 401 (N.D. Miss. 1996); *Hirschberg v. Lumbermens Mut. Cas.*, 798 F. Supp. 600, 604 (N.D. Cal. 1992) (noting that "[a]t a minimum, the term 'other invasion of the right of private occupancy' is ambiguous, and any ambiguity is to be resolved against the insured"); *Millers Mut. Ins. Ass'n of Ill. v. Graham Oil Co.*, 668 N.E.2d 223 (Ill. App. Ct. 1996).

33. *Sealed Air Corp. v. Royal Indem. Co.*, 404 N.J. Super. 363, 372 (2008).