

Commercial General Liability Coverage for Climate Change-Related Civil Litigation: A Policyholder's Perspective

By Seth D. Lamden¹

Introduction

It is far too early to tell whether private 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. But 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. Any of the handful of currently pending private climate change lawsuits has the potential to be the equivalent for climate change litigation as *Borel v. Fibreboard Paper Products Corp.* was to asbestos litigation.² 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. Even if there is never a climate change *Borel* decision, companies likely should expect to incur substantial legal expenses defending against such suits. For the reasons discussed below, depending on the allegations in climate change lawsuits, commercial general liability³ (CGL) insurers should expect to fund the defense of at least some of these suits, as there are compelling arguments that such suits may trigger CGL insurers' duties to defend. This article provides an overview of several of the key potentially disputed issues likely to arise in coverage disputes between CGL insurers and their policyholders regarding climate change lawsuits.

A. Climate Change Lawsuits Have Been Filed by Cities Against Fossil Fuel Companies in New York and California.

Although the United States Supreme Court held in *American Electric Power Co. v. Connecticut*,⁴ 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,

¹ Mr. Lamden is a partner in the Insurance Policyholder Practice Group of the Chicago law firm of Neal, Gerber & Eisenberg LLP. He focuses his practice on helping policyholders and claimants understand and enforce their rights to insurance coverage.

² The 1973 *Borel* decision by the Fifth Circuit Court of Appeals was the first to find that asbestos manufacturers were strictly liable for asbestos-related injuries and spawned an avalanche of tens of thousands of similar lawsuits that continue to be filed today.

³ Referred to as "comprehensive general liability" policies from the 1960s to 1986, when the Insurance Services Organization, Inc. released Commercial General Liability form No. CG 00 01 11 85.

⁴ 564 U.S. 410 (2011).

in January 2018, the City of New York filed a lawsuit against BP, Chevron, ConocoPhillips, Exxon Mobil, and Shell in the United States District Court for the Southern District of New York,⁵ 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 were: (1) public nuisance; (2) private nuisance; and (3) trespass. Among the relief sought by New York City was compensatory damages for the costs incurred by the City, and the costs that will be incurred by the City, “to protect infrastructure and property, and to protect the public health, safety, and property of its residents from the impacts of climate change.” 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.⁶

B. Commercial General Liability Insurance Policies Require Insurers to Defend Any Suit Alleging Potential Third-Party Property Damage Caused by an Occurrence.

Subject to a series of enumerated exclusions, CGL policies insure against, among other things, liability for damages because of “property damage” that happens during the policy period and is caused by an “occurrence.” 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.”⁷ Put differently, “the duty to defend arises whenever allegations in a suit brought against the insured create the potential for covered liability.”⁸ 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;⁹ (2) because of physical injury to tangible property (such as the environment) that may have happened during the policy period; (3) caused by

⁵ Case No. 18 cv 182.

⁶ 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.

⁷ 3-17 New Appelman on Insurance Law Library Edition 17[2][b][i].

⁸ *Id.*

⁹ 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.’”)

an accident or continuous exposure to conditions (such as rising water levels or the emission of greenhouse gases).

C. Erosion or Other Damage to the Environment Allegedly Caused by Climate Change May Constitute 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.”¹⁰ Thus, 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.

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 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”¹¹

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 alleging was occurring. In one such case, an appellate court in Hawai’i held that many years of CGL policies were triggered by an underlying lawsuit arising out a dam breach because, among other things, there were allegations of “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.¹² 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 all of the emitter’s CGL policies in effect since the 1970s.

D. The Emission of Greenhouse Gases Will Constitute an “Occurrence” In Many Jurisdictions.

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.” Since 1986, most CGL policies have defined “occurrence,” to mean, in part, “accident, including continuous

¹⁰ See, e.g., ISO form No. CG 00 01 04 13.

¹¹ *Oak Ford Owners Ass’n v. Auto-Owners Ins. Co.*, 510 F. Supp. 2d 812, 817 (M.D. Fla. 2007).

¹² *C. Brewer & Co. v. Indus. Indem. Co.*, No. 28958, 2013 Haw. App. LEXIS 472, at *43 (Ct. App. Aug. 7, 2013).

or repeated exposure to substantially the same general harmful conditions.”¹³ CGL policies in effect from 1966 to 1986 contained similar definitions of “occurrence” that included exposure to conditions. 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, for example, 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. To date, the Virginia Supreme Court is only court to address this issue in the context of climate change. In that decision, 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.”¹⁴ 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.¹⁵

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.¹⁶ Indeed, in a

¹³ *See, e.g.*, ISO CGL form No. CG 00 01 11 85.

¹⁴ *AES Corp. v. Steadfast Ins. Co.*, 283 Va. 609, 621 (2012).

¹⁵ *See id.*

¹⁶ *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

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, and found 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.

E. CGL Pollution Exclusions May Not Apply to Climate Change Suits.

Since 1986, many CGL policies have contained pollution exclusions at least as broad as the following: “[t]his 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”¹⁷ 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.”¹⁸ 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 there is coverage only when the discharges occurred abruptly over a short period of time,¹⁹ other courts have found coverage even for gradual discharges so long as the insured did not expect or intend the damage caused by the discharges.²⁰

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, and the answer to this question typically will be jurisdiction-specific. The main greenhouse gases emitted by human activity are: carbon dioxide (CO₂); methane (CH₄); and nitrous oxide (N₂O). Although most jurisdictions have not

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 . . .”).

¹⁷ See, e.g., CG 00 01 11 88; CG 00 01 07 98.

¹⁸ See *id.*

¹⁹ See, e.g., *N. Pac. Ins. Co. v. Mai*, 939 P.2d 570 (Idaho 1997); *New Castle Cty. v. Hartford Accident & Indem. Co.*, 933 F.2d 1162 (3rd Cir. 1991).

²⁰ See, e.g., *Sunbeam Corp. v. Liberty Mut. Ins. Co.*, 781 A.2d 1189 (Pa. 2001).

directly addressed whether these substances constitute “pollutants” for purposes of a CGL pollution exclusion, courts have split on whether carbon dioxide is a pollutant²¹ and at least one court found that methane is a pollutant.²²

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.”²³ 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 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.”²⁴ Thus, a climate change coverage dispute litigated under Florida 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 in 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 USEPA have held that greenhouse gases qualify as “pollutants” under the Clean Air Act.²⁵ 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.²⁶ Moreover, even policyholders in jurisdictions that enforce pollution exclusions may nevertheless 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

²¹ See *Essex Ins. Co. v. Tri-Town Corp.*, 863 F. Supp. 39 (D. Mass. 1994) (C2O is a pollutant); *Donaldson v. Urban Land Interests, Inc.*, 564 N.W.2d 728 (Wis. 1997) (C2O is not a pollutant).

²² See *O’Brien Energy Sys., Inc. v. Am. Emps. Ins. Co.*, 629 A.2d 957 (Pa. Super. Ct. 1993).

²³ See *Chestnut Assocs. v. Assurance Co. of Am.*, 17 F. Supp. 3d 1203 (M.D. Fla. 2014).

²⁴ *Am. States Ins. Co. v. Kiger*, 662 N.E.2d 945 (Ind. 1996).

²⁵ See *Mass. v. EPA*, 549 U.S. 248 (2007); 74 Fed. Reg. 66496 (Dec. 15, 2009).

²⁶ See, e.g., *Donaldson v. Urban Land Interests*, 211 Wis. 2d 224, 232 (1997)

Agency air permit constitute traditional environmental pollution excluded under the policy.”²⁷

Even if greenhouse gases are deemed to be “pollutants,” there may be other reasons for which pollution exclusions do not eliminate coverage. In addition to coverage for third-party bodily injury and property damage, which is found in “Coverage A” in a standard-form CGL policy, CGL policies also contain a “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 ISO 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’ conduct constitutes a continuing, unauthorized intrusion and a continuing trespass onto the City’s property.” 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 a “wrongful entry” as contemplated by the definition of “personal injury.”²⁸ 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

²⁷ *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. Sep. 7, 2017) (same); *Country Mut. Ins. Co. v. Bible Pork, Inc.*, 2015 IL App (5th) 140211, ¶ 41 (same).

²⁸ *See Pipefitters Welfare Educational Fund v. Westchester Fire Ins. Co.*, 976 F.2d 1037 (7th Cir. 1992); *Great N. Nekoosa Corp. v. Aetna Cas. & Surety Co.*, 921 F. Supp. 401 (N.D. Miss. 1996); *Hirschberg v. Lumbermens Mut. Cas.*, 798 F. Supp. 600, 604 (N.D. Cal. 1992) (“At 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. Assoc. of Ill. v. Graham Oil Co.*, 668 N.E.2d 223 (App. Ct. Ill. 1996).

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.

F. Coverage Litigation Relating to Climate Change Suits Will Involve Numerous 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) number of applicable limits or deductibles; (4) proving 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.

G. D&O Policies May Provide Coverage for Certain Types of Climate Change Lawsuits, Such as Suits Brought by Shareholders.

This paper focuses on coverage under CGL policies. 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.²⁹

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 on these issues 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 should be little doubt that those lawsuits will generate insurance coverage disputes for years to come.

²⁹ See *Sealed Air Corp. v. Royal Indem. Co.*, 404 N.J. Super. 363, 372 (2008).