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Global Warming Litigation Raises Liability Insurance Issues

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EPA findings that became effective January 14, 2010 declared that greenhouse gases endanger the public health and welfare of current and future generations, and the emission of greenhouse gases by new motor vehicles and engines contributes to the pollution. Together with recent decisions permitting lawsuits against corporate entities alleging damages based on their emission of greenhouse gases, these developments open a new window for tort litigation, and inevitably litigation and disputes over insurance liability coverage for global warming liabilities will follow.

Recent developments

On December 15, 2009, the EPA's "Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act" were published in the Federal Register. These findings come over two and a half years after the Supreme Court ruled in *Massachusetts v. EPA*, 549 U.S. 497 (2007), that greenhouse gases fall under the sweeping definition of "air pollutants" in the Clean Air Act (CAA), and that the EPA must determine whether the emission of greenhouse gases from new motor vehicles causes or contributes to air pollution which may reasonably be anticipated to endanger public health or welfare. (Under Section 202(a) of the CAA, the EPA must regulate standards for the emission of air pollutants from new motor vehicles and engines that in its judgment "cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.") The EPA found that elevated concentrations of greenhouse gases and associated climate change endanger the public health through risks associated with changes in air quality, increases in temperatures, changes in extreme weather events, increases in food- and water-borne pathogens, and changes in aeroallergens. The EPA also found that the elevated concentrations of greenhouse gases endanger the public welfare through risks to food production and agriculture, forestry, water resources, sea level rise and coastal areas, energy, infrastructure and settlements, and ecosystems and wildlife. Finally, the EPA found that the air pollution (which it defined as carbon dioxide and five other "well-mixed greenhouse gases") emitted by the transportation sources under Section 202(a) (passenger cars, trucks, motorcycles and buses) contributes to the endangerment to public health and welfare. The level of contribution the EPA had to find was left largely to its discretion; while more than de minimus, it did not need to rise to the level of significant.

The EPA findings come on the heels of three significant federal decisions in 2009 addressing global warming litigation. In September, in *Connecticut v. Am. Elec. Power Co. Inc.*, 582 F.3d 309 (2d Cir. 2009), the Court of Appeals for the Second Circuit vacated the district court's dismissal of two complaints filed by eight states and three land trusts against various energy companies seeking to abate the alleged public nuisance caused by their carbon dioxide emissions. The district court had determined that the complaints raised a non-justiciable political question. The Court of Appeals disagreed, and also found the states had standing to sue both in their capacities as property owners and to safeguard the public health and their resources. Among the injuries alleged were current harm from the reduced size of the California snowpack (declining water supplies and flooding injuring property), and future injuries resulting from a rise in sea levels (harming coastal and low-lying property and infrastructure, disrupting hydropower production, salinizing marshes and causing saltwater intrusion into groundwater), and warmer temperatures (heat waves increasing crop risk, disrupting ecosystems).

In October, the Fifth Circuit followed suit in *Comer v. Murphy Oil*, 585 F.3d 855 (5th Cir. 2009), finding that residents and owners of land along the Mississippi Gulf Coast had standing to assert claims of public and private nuisance, trespass and negligence against various oil and energy companies for alleged injury to their private property and loss of use of public property resulting from defendants' greenhouse gas emissions (claiming the rise in sea level and added ferocity of Hurricane Katrina destroyed their property). The Fifth Circuit held that the claims did not present non-justiciable political questions but rather issues inherent in the adjudication of common-law tort claims for damages.

By contrast, in September of 2009, the Northern District of California explicitly declined to follow the Second Circuit's holding in *Am. Elec. Power Co.* In *Native Village of Kivalina v. ExxonMobil Corp.*, 2009 WL 3326113 (N.D. Cal. 2009), an Eskimo village and city on the northwest coast of Alaska brought a public nuisance suit against twenty-four oil, energy and utility companies for damages resulting from their excessive emission of carbon dioxide and other greenhouse gases. They alleged that the Arctic Sea ice that protects their coast from winter storms has diminished, and that the resulting erosion and destruction will require the relocation of the city's residents. The district court held that the claims raised a non-justiciable political question because there were no judicially discoverable or manageable standards to evaluate the global warming claims (based on emissions from innumerable sources throughout the world, affecting the entire planet, and involving a series of events disconnected from the discharge itself) and that the plaintiffs lacked standing because they could not show "causation" as required by Article III of the U.S. Constitution. The decision is under appeal.

Implications for insurance coverage claims arising out of global warming-related litigation

These recent developments suggest that global warming-related litigation may have its day in court, applying traditional tort theories of negligence, nuisance and trespass to the conduct of those whose businesses involve the emission of greenhouse gases. Corporations that find themselves defendants in global warming lawsuits by plaintiffs seeking money damages also may find themselves in dispute with their liability insurers over coverage obligations. Insurers may assert that the pollution exclusion clauses in their policies shield them from liability coverage. However, there may, in fact, be coverage, the answer depending heavily on the precise language of the exclusion and whether the greenhouse gases at issue fall within the policy's definition of excluded "pollutants." For example, the ISO's Commercial General Liability policy form excludes property damage or personal injury arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants" and defines "pollutants" as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste." Whether greenhouse gases, which include substances that are naturally occurring and necessary elements in the atmosphere, fall within a pollution exclusion has yet to be decided and will depend on the precise language of the exclusion as well as the court considering it. That is, the interpretation of pollution exclusion clauses has historically varied across jurisdictions, with some courts interpreting the clauses narrowly to irritants and contaminants commonly thought of as pollutants, and other courts applying a broader interpretation to include a wide range of substances that contaminate or irritate. The recent EPA findings would not likely be determinative of the question (the parties' intent controls over any regulatory definitions), and, in any case, the definition of "air pollutant" in the CAA is much more sweeping than what would be found in a typical pollution exclusion clause. (Section 302(g) of the CAA defines an "air pollutant" as "any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive (including source material, special nuclear material, and byproduct material) substance or matter which is emitted into or otherwise enters the ambient air.") The EPA findings defined "air pollution" under the Act as the combined mix of six greenhouse gases and assessed the risks and impacts associated with that combination of gases, not on an individual gas basis.

Conclusion

Corporations and their liability insurers should be paying close attention to the recent developments in global warming-related litigation and to the potential that there may be an emerging set of claims which will implicate coverage under liability insurance policies and raise new disputes about the scope of pollution exclusions. While the very recent decisions on whether global warming lawsuits must be dismissed as non-justiciable and whether parties have standing to bring such suits are only in the very initial stages of litigation and do not suggest that the hurdles of causation and damages in these cases can be overcome, they do indicate that these lawsuits may last longer than expected, depending on the court in which the suit is brought, and that an insurer's duty to defend may kick in depending on the law that will apply to the pollution exclusion clause.

If you have any questions concerning this client alert, environmental litigation, sustainability or environmental law issues, or insurance coverage issues, please contact your Proskauer relationship attorney or any of the attorneys listed.

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- **Robert J. Kafin**