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On the Horizon: Could Insurers be Held Liable for Climate Change?

Joanne Zimolzak and Kristin Landis[1]
McKenna Long & Aldridge LLP

Although the science regarding climate change is still evolving, scientists and the public alike increasingly are acknowledging that climate change is occurring and that its effects have the potential to be significant. And, just as where there is smoke there is typically fire, where there are significant effects there are usually plaintiffs (and their lawyers) seeking to assign blame. Insurers will need to be proactive and take concrete steps to avoid becoming targets as the climate change-related litigation landscape develops. In order to do so, insurers should look to the past, where the development of litigation in the analogous asbestos context provides lessons that -- if followed -- may allow insurers to avoid such a fate.

Current and Anticipated Climate Change-Related Litigation: Background

In 2004, the first climate change-related lawsuit was filed by several states and not for profit land trusts against multiple power companies, alleging that these companies are "substantial contributors to elevated levels of carbon dioxide and global warming" and seeking an order requiring them to abate the public nuisance of global warming.[2] Although the U.S. District Court for the Southern District of New York initially dismissed the lawsuit on the ground that the case presented non-justiciable political questions, the Second Circuit recently

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[1] Joanne Zimolzak is a partner in the Washington, D.C. office of McKenna Long & Aldridge LLP ("McKenna"). Ms. Zimolzak is the 2010 Climate Change Subcommittee Vice-Chair for the ABA Tort Trial & Insurance Practice Section, Insurance Coverage Litigation Committee. Kristin Landis is an associate in the Washington, D.C. office of McKenna. Ms. Landis's practice focuses principally on complex business litigation, with a particular focus on insurance litigation.

[2] *Conn. v. Am. Elec. Power Co.*, 582 F.3d 309, 316 (2nd Cir. 2009). The plaintiff group is coalition of states (CT, NY, CA, IA, NJ, RI, VT, WI), the City of New York, and three land trusts.

reversed this ruling, allowing the case to go forward.[3] Since 2004, multiple similar suits have been filed and are pending, including *Native Village of Kivalina v. ExxonMobil Corp.*,[4] and *Comer v. Murphy Oil, USA*,[5] to name just a few. In addition, other climate change-related suits, such as those relating to "green building" and "greenwashing," are on the rise. And, with the SEC's recent focus on climate change disclosures, disclosure-related climate change lawsuits are a distinct possibility.

That the climate change phenomenon has spawned litigation is hardly news to the insurance industry. To the contrary, insurers already have fielded numerous requests for defense in connection with climate change-related litigation against their insureds, and, in one instance, an insurer has asked a court to define the scope of its coverage obligations for climate change-related claims.[6] Insurers are also acutely aware of possible liability risk attached to both their own and their insureds' climate change-related disclosures.[7] What may not be apparent,

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[3] *Id.* at 332.

[4] *Native Village of Kivalina v. ExxonMobil Corp.*, No. CV-08-1138 SBA (N.D. Cal.), was instituted by an Alaskan village of Inupiat Eskimos against a number of power companies, claiming that the companies' contributions to global warming are leading to the destruction of their village and causing erosion to the land that will eventually put the entire community under water.

[5] *Comer v. Nationwide Mut. Ins. Co.*, No. 1:05 CV 436 LTD RHW, 2006 WL 1066645 (S.D. Miss. Feb. 23, 2006), restyled on appeal as *Comer v. Murphy Oil, U.S.A.*, No. 07-60756 (5th Cir. 2009), is a public nuisance suit brought by private party plaintiffs against the chemical, oil and gas, and utility industries for claims involving climate change and alleged damages caused by Hurricane Katrina.

[6] *See Steadfast Ins. Co. v. AES Corp.* (Cir. Ct. of Arlington Cty. Va. No. 2008-858).

[7] In March 2009, the National Association of Insurance Commissioners (NAIC) Climate Change Task Force adopted a mandatory requirement that insurance companies disclose to regulators the financial risks they face from climate change, as well as actions the companies are taking to respond to those risks. In addition, the SEC has recently formed an Investor Advisory Committee to review its climate change disclosure requirements. The SEC has turned to Wisconsin Insurance Commissioner Sean Dilweg (former Chair of the NAIC Climate Risk Disclosure Working Group and proponent of the NAIC climate risk disclosure survey) to assist it with developing climate change disclosure guidance.

however, is that third parties could seek to directly blame insurers for the damaging effects of climate change.

Attempting to assign blame in this manner may take many forms, at least two of which present very real threats to insurers. First, should plaintiffs (such as those in *Kivalina*, *Comer*, or *AEP*) prove unable to recover from the targeted greenhouse gas emitters, plaintiffs may, as they did with asbestos, seek direct recovery from insurers on the basis that insurers knew of the harm being caused by their insureds' emissions and had a duty to disclose such information to third parties. Although direct action lawsuits against insurers in the asbestos context to date have been unsuccessful, they nonetheless have cost insurers hundreds of millions of dollars in defense and settlement costs and are still ongoing.[8] Second, insurers could also find themselves defendants in suits by third parties for alleged errors and omissions arising out of climate change-related risk engineering services. Plaintiffs in this second category of lawsuits might assert that through risk engineering activities, insurers directly assume a duty to the public to abate the effects of climate change and protect against the damages of episodic climatic events. Again, although such suits may not ultimately be successful, defense and settlement costs could be enormous. The insurance industry simply cannot ignore these risks.

[8] *See In re Allianz Global Risk US*, Nos. 01-06-00165-CV, 01-06-00166-CV, 2008 WL 596859 (Tex. Civ. App. Feb. 29, 2008). The State of Texas filed an Amicus Curiae brief noting the trend of filing direct action suits against insurance companies for failing to disclose to the general public information about the hazards of asbestos associated with their policyholders' business operations and opposing the "duty to warn the world" approach advocated by plaintiffs, noting that its acceptance would contravene several provisions of the Texas Insurance Code protecting the confidentiality of insurer-insured communications. Notwithstanding the brief submitted by the State, the Texas First Court of Appeals declined to grant a mandamus petition directing the trial court to issue an order dismissing the lawsuit with prejudice, and the case remains ongoing.

Failure to Warn and the Lessons Taught by Asbestos

"What's good about the approach that I'm taking is that the tobacco litigation—and before that the asbestos litigation—demonstrates that one case can cause a gigantic litigation problem for corporations. It's pretty much accepted history that asbestos and tobacco are the role models for climate change litigation now."[9]

Gerald Maples, June 20, 2009

If Gerald Maples (who is the lead plaintiffs' attorney in the *Comer* case) is correct, and climate change litigation follows a trajectory similar to that of asbestos, insurers need to be prepared for suits by third party plaintiffs alleging violations of common law duties to disclose similar to those alleged in asbestos cases. In the asbestos context, plaintiffs' allegations included claims that insurers had violated statutorily defined duties by suppressing information about asbestos hazards during settlement negotiations[10] and/or had violated common law duties by conspiring with insureds to withhold information,[11] as well as claims for fraudulently concealing

[9] Paddy Manning interviewing Gerald Maples, *You are at Risk*, The Sydney Morning Herald, Business Day (June 20, 2009), *available at* http://www.smh.com.au/business/you-are-at-risk-20090620-crk4.html.

[10] *See In re Johns Manville Corporation*, 517 F.3d 52, 57-58 (2d Cir. 2008) (plaintiffs alleged that Travelers Ins. Co. "suppressed information about asbestos related hazards and intentionally propagated an allegedly-fraudulent 'state of the art' defense to frustrate the claimants' rights").

[11] *See Bevan Group 9 v. A-Best Prods. Co.*, Nos. 502694, et al., 2004 WL 1191713 at *1 (Ohio Com. Pl., Cuyahoga County May 17, 2004) (plaintiffs alleged that insureds were liable under conspiracy and concert of action claims because the defendants "knew of the hazards of asbestos and worked in concert to suppress this knowledge from the general public").

or misstating information, [12] negligently undertaking to assist the public,[13] or failing to disclose relevant information or warn the public of dangers related to asbestos.[14]

Generally, these third-party asbestos claims against insurers have been unsuccessful.[15] In the rare cases that did not settle, courts dismissed these types of claims primarily because plaintiffs could not establish any duty of care owed to them by an insurer, could not establish that the actions of an insurer increased the plaintiffs' risk of harm from asbestos, and could not establish that plaintiffs relied on acts or omissions committed by insurers.[16] Despite plaintiffs' lack of success in the courts, these suits were devastating to the insurers involved. For example, Travelers Insurance Co. paid approximately $500 million (on top of the $100 million paid in association with defense and indemnity obligations) to settle suits with third parties relating to

[12] *See Metropolitan Life Ins. Co. v. Aetna Cas. & Sur. Co.*, 255 Conn. 295, 298-300 (Conn. 2001) (discussing previous claims in which third-party plaintiffs alleged that Metropolitan distorted or misstated the results of testing it conducted in various articles and reports).

[13] *See Bevan Group, 9,* 2004 WL 1191713, at *1. Negligent undertaking, more commonly referred to as the "Good Samaritan" Rule, applies to volunteers undertaking to provide services to aid another, but failing to exercise due care. In *Bevan,* plaintiffs alleged that insurance defendants "undertook to make safe the premises of its insureds and to establish standards for workers' safety" and therefore "assumed the duty to do so non-negligently".

[14] *Metropolitan*, 255 Conn. at 298-300 (discussing previous claims in which plaintiffs alleged that Metropolitan assumed a duty to disclose to the public when it undertook its research regarding asbestos and breached that duty by failing to warn the public by publishing the results of its studies).

[15] *See Bevan Group 9,* 2004 WL 1191713, at *5, *10 ("There is nothing so special about the contractual relationship that transfers an obligation to the world to control the actions of the insured. In short, there is nothing there to justify direct actions against insurance companies"); *Bope v. A.W. Chesterton Co*., No. 85215, 2005 WL 2562913, at *2 (Ohio Ct. App. Oct. 13, 2005) ("[plaintiff's] claims, whether cloaked as negligence or fraud, have one gaping hole in that they establish no connection whatsoever" between themselves and the insurance companies); *Bugg v. AM. Standard, Inc.*, No. 84829, 2005 WL 1245043, at *2 (Ohio Ct. App. May 26, 2005) ("insurance defendants and the [plaintiffs] had no special relationship" and "insurance defendants had no duty to protect the [plaintiffs] from the hazards of asbestos, despite their alleged knowledge of the risks").

[16] *See id.*

asbestos manufactured by its insured Johns Manville Corporation.[17] Metropolitan Life Insurance Co. has settled approximately one half of the 200,000 direct liability suits against it for a nuisance value averaging $2,500 per claim.[18]

The risks to insurers in such direct duty to disclose claims in the area of climate change are threefold. First, as shown in the asbestos cases, defending and settling such suits, even if just for nuisance value, can still be costly.

Second, failure to disclose claims may not be limited to those relating simply to the harmful effects of greenhouse gases. Such claims could stem from activities attendant to climate change, such as green building. Insurers are increasingly offering "green" replacement incentives for property policies. If green materials or green buildings do not abate climate change or are unsafe in another manner, claims in the property, CGL, or professional liability contexts may begin to arise.[19] As insurers begin to process such claims, insurers likely will develop knowledge of the long-term viability and safety of green building materials and projects. Down the road, claimants in any lawsuits relating to these issues might try to accuse insurers of breaching a common law duty to injured parties by withholding relevant information from the public. Again, regardless of the ultimate outcome of such cases, insurers could incur substantial costs litigating even claims eventually proven to be baseless.

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[17] *In re Johns Manville Corp.*, 517 F.3d 52, 57 (2nd Cir. 2008); *In re Johns Manville Corp*., Nos. Nos. 82 B 11656, 82 B 11657, 82 B 11660, 82 B 11661, 82 B 11665, 82 B 11673, 82 B 11675, 82 B 11676 (BRL), 2004 WL 1876046, at *21-23 (Bankr. S.D.N.Y. Aug. 1, 2004).

[18] *Metropolitan Life Ins. Co. v. Aetna Cas. & Sur. Co.*, 255 Conn. 295, 298-300 (Conn. 2000).

[19] Green building liability disputes are already emerging. *See S. Builders, Inc. v. Shaw Dev., LLC*, Case No. 19 C-07-011405 (Md. Cir. Ct. Somerset County 2007) (dispute in which contractor of 23-unit condominium filed a $54,000 mechanics lien against developer, who in turn filed a counterclaim for breach of green building requirements of the contract and negligence, seeking $635,000 in lost tax credits).

Third, insurers are uniquely situated to possess a large body of confidential information regarding their insureds' operations that could -- if plaintiffs overcome their hurdle of proving that insurers owe a duty to third parties -- potentially be imputed to the insurer. Insurers might obtain such knowledge in various ways, including through an insured's (or potential insured's) climate change-related disclosures required to obtain D&O, property, or CGL policies. Insurers might also glean information incident to the provision of climate change-related risk engineering services, such as those regarding greenhouse gas abatement. If scientific consensus is reached regarding the harmful effects of climate change, insurers may have unique knowledge that could potentially support a duty to disclose claim. Consequently, insurers must be sensitive regarding the kind of climate change-related information collected from insureds and potential insureds alike, as well as the treatment and handling of such information.

The Potential Perils of Risk Engineering with regard to Climate Change

In addition to providing insurers with knowledge that may be used against them in a duty to disclose claim, risk engineering activities may in themselves provide a basis for third parties to seek climate change-related damages from insurers. As insurers continue to offer and expand their enterprise risk management services in the climate change area—for example, with regard to green building issues of green compliance and certification—it bears noting that holding themselves out as experts in climate change risk management may potentially expose insurers to direct third party claims. Indeed, in many jurisdictions, risk engineers will be held to owe an independent common law duty to the public.[20] Such an independent duty arises when the circumstances are such that there is a danger of injury to persons or property if the engineer fails

[20] *See e.g., Simon v. Omaha Public Power Dist*., 202 N.W.2d 157 (Neb. 1972); Montijo v. Swift, 219 Cal.App.2d 351 (Ca. Ct. App. 1963).

to exercise the requisite degree of care in performing the services it contracted to perform.[21] In the climate change context, errors in providing services relating to carbon foot printing, greenhouse gas mitigation plans, and/or green building designs, could result in no emissions reductions or even increased emissions, thus providing third party plaintiffs with a potential public nuisance cause of action similar to *Kivalina*, *Comer*, and *AEP*.

In addition to possible public nuisance-type claims, plaintiffs may have a cause of action against risk engineers in the event of an episodic climatic event, specifically if a risk engineer fails to make recommendations or take actions that would have reduced the severity of the damage caused by the episodic event. Indeed, suits by property owners around the Mississippi River Gulf Outlet against engineers and contractors alleging that their activities exacerbated the storm surge after Hurricane Katrina have had some success.[22] If a risk engineer is held liable for exacerbating the effects or damages caused by a climatic event, the liability could be astronomical. Indeed, damages could well run into the hundreds of millions of dollars.[23]

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[21] *See generally* Restatement Second, Torts § 324A (a contractor who fails to exercise reasonable care in performing services to another may be liable for injury or loss suffered by a third party if the contractor's actions caused increased risk of such harm).

[22] *See In Re Katrina Canal Breaches Consolidated Litigation, Berthelot et. al. v. Boh Brothers Const. Co., LLC, et al.*, No. 05-4182, 2009 WL 3856346 (Nov. 18, 2009) (holding the Army Corps of Engineers liable for negligent operation and maintenance of the Mississippi River Gulf Outlet and that such negligent maintenance and operation caused a breach of the levies contributing to the catastrophic flooding after Hurricane Katrina); *see also In Re Katrina Canal Breaches Litigation*, No. 07-30272 (5th Cir. Nov. 25, 2009) (dismissing claims against thirty-two contractors alleging that dredging of Mississippi River Gulf Outlet exacerbated storm such after Hurricane Katrina on the basis of the government-contractor immunity doctrine).

[23] For instance, although not a suit against a risk engineer, *Turner v. Murphy Oil USA* demonstrates the magnitude of liability risk engineers potentially face. In *Turner*, plaintiff homeowners and business owners affected by a massive oil spill from the Murphy Oil refinery in Louisiana, sued Murphy Oil alleging that the spill occurred due to Murphy Oil's failure to properly secure and maintain above ground oil tanks to withstand the effects of Hurricane Katrina. Prior to the trial on liability and causation, Murphy Oil settled with plaintiffs for over $330 million. *See Turner v. Murphy Oil USA, Inc.*, 472 F. Supp. 2d 830, 845 (E.D. La. 2007). If a risk engineer was responsible for securing the tanks, such risk engineer could have been a party to that suit and shared in the settlement.

Even if climate change-related suits against risk engineers ultimately fail to be meritorious, the sheer magnitude of possible suits should make the industry take notice. As in third party duty to disclose suits, defense and settlement costs will mount. To protect against defense costs and possible liability obligations, insurers who provide risk engineering services may want to consider ensuring that their contracts contain provisions for indemnification for climate change-related work.

Conclusion

The tide of litigation surrounding climate change has just begun. Right now, the focus appears to be on those companies that have historically emitted large quantities of greenhouse gasses, such as energy companies. The insurance industry, however, cannot expect that focus to remain static. Indeed, if climate change litigation follows a path similar to that of asbestos, insurers can expect to see suits claiming insurers should be held directly liable for the damaging effects of climate change. Such claims may cost the insurance industry hundreds of millions of dollars in defense costs alone. In order to stem the tide of such claims, insurers would do well to evaluate their current practices with regard to gathering and processing climate change-related information and consider how best to protect themselves from possible direct liability when conducting risk engineering activities related to climate change.