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Emerging Issues: Global Warming Claims And Coverage Issues

By Robert D. Allen, Scott M. Seaman, and John E. DeLascio

I. AN INTRODUCTION TO THE POLARIZING AREA OF GLOBAL WARMING

THE ISSUE of global warming or climate change remains a polarizing subject and a continuing source of heated political, social, and economic debate. On one end of the spectrum, there are those who subscribe to the belief that global warming poses a devastating threat to continued life on the planet. This group points to the intensified hurricanes that have battered the South in the last few years (Katrina, Rita, and others), flooding coastlines, the raging wildfires in the West, the El Niño phenomenon, droughts in Africa, rising sea levels in Asia, and a host of other matters as signs of a serious existing problem and as frightening signals of things yet to come. It has been argued in some American courtrooms that human-induced global warming has, among other things, reduced California's snow pack — a vital source of fresh water, raised sea levels along California's coastline, increased ozone pollution in urban areas, increased the threat of wildfires, and cost the State of California millions of dollars in assessing those impacts and preparing for future impacts.[1] On the other end of the spectrum, there are those who maintain that the "threat of catastrophic global warming [is] the greatest hoax ever perpetrated on the American people."[2]

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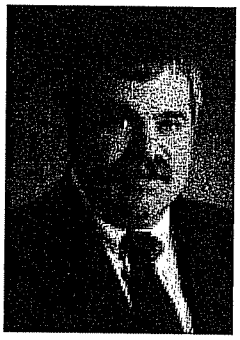

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[1] Second Amended Complaint at 7-12, California v. General Motors Corp., No. C06-05755 (N.D. Cal. filed Sept. 20, 2006), *available at* 2006 WL 3069165.

[2] *See* Press Release, Climate Change Update, Senate Floor Statement by U.S. Sen. James M. Inhofe (R-Okla) (Jan 4, 2005), http://inhofe.senate.gov/press releases/climateupdate.htm (last visited Nov. 16, 2008).

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This article is not a foray into the political debate on global warming; but instead, it is intended to provide insurance and reinsurance professionals and practitioners with an overview of global warming, the legal theories, defenses, and early results in underlying litigation predicated upon global warming, and some of the coverage issues and defenses that may be presented by global warming claims. Global warming is an emerging, dynamic area with enormous implications to the insurance industry.

Understandably, much of the focus on the impact of climate change has been on first-party policies in view of the recent hurricane experiences. Many of the early underlying cases have involved efforts to require governmental entities to regulate such things as emissions of greenhouse gasses – which generally do not name corporate policyholders and, viewed properly, generally should not be covered under their liability policies – or actions by private parties or government entities seeking declaratory and injunctive relief as opposed to damages. As the focus shifts to claims seeking damages against corporate policyholders and professionals based upon alleged culpable conduct, more companies and professionals will turn to their liability insurers, seeking to be defended in lawsuits and indemnified for resulting settlements and judgments. As the allegations may implicate conduct, knowledge, and damages dating back in time, the potential exists for policyholders to seek to implicate policies issued years or decades earlier. Yet, insurers will have substantial coverage defenses to many such claims.

II. THE GLOBAL WARMING PHENOMENON 101: THE BASICS

A. "Climate Change"–A Consensus Emerges

The U.S. Environmental Protection Agency ("EPA") defines the term "climate change" as "any significant change in measures of climate (such as temperature, precipitation, or wind) lasting for an extended period (decades or longer)."[3] According to the United Nations Framework Convention on Climate Change, climate change is, "a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods."[4] At its core, the fundamental premise of global warming is that energy from the sun heats the earth, which radiates

[3] United States Environmental Protection Agency, Basic Information on Climate Change, http://www.epa.gov/climatechange/basicinfo.html (last visited Nov. 16, 2008).

[4] United Nations Framework Convention On Climate Change, at 3 (Art. 1, Definitions) (1992), http://unfccc.int/resource/docs/convkp/conveng.pdf (last visited Nov. 16, 2008).

the energy into the earth's atmosphere[5] Atmospheric greenhouse gasses, such as carbon dioxide, trap some of the outgoing heat in the earth's atmosphere. Carbon dioxide emissions are reported to persist in the atmosphere for several centuries and, thus, have a lasting effect on climate.

The World Economic Forum recently stated that "climate change" is one of the most important global risks that key decision makers will face in the years to come.[6] There appears to be a "clear scientific consensus" that global warming has begun and that most of the current global warming is caused by emissions of greenhouse gasses, primarily carbon dioxide, from fossil fuel combustion. This emerging consensus has been expressed in official reports from the United States and international scientific bodies. For example, the Intergovernmental Panel on Climate Change ("IPCC") concluded in its 2001 Report that: "[m]ost of [the] observed warming over [the] last 50 years [is] likely [to have been] due to [the] increases in greenhouse gas concentrations due to human activities."[7] The IPCC and other relevant professional scientific societies have concluded that there will be an acceleration of global warming, and of its impacts, as carbon dioxide levels rise. The issue is one of international concern. The European Union developed a carbon trading market, the European Union Greenhouse Gas Emissions Trading Scheme, in an effort to address the problem.[8]

Many now argue, as did the State of California in recent global warming-related litigation, that the scientific debate "is over" as to whether a massive atmospheric increase in carbon dioxide and other greenhouse gasses resulting from human activity has changed the climate and will further change the climate over the next decades.[9]

The United States Supreme Court has recognized the existence of global warming. In *Massachusetts v. Environmental Protection Agency*, the leading case involving authority to regulate greenhouse gasses, the Supreme Court observed that, based upon "respected scientific opinion . . . a well-documented rise in global temperatures and attendant climatological and environmental changes have resulted from a significant increase in the atmospheric concentration of 'greenhouse gasses.'"[10] The Supreme Court further noted that a "well-documented rise in global temperatures has coincided with a significant increase in the concentration of carbon dioxide in the atmosphere."[11] The Court acknowledged it is widely understood that, when carbon dioxide is released into the atmosphere, it acts like a ceiling of a greenhouse, trapping solar energy and retarding the escape of reflected heat.[12]

The far-reaching ramifications and potential aftermath of this landmark decision will be felt in many arenas. On April 2, 2008, officials of 18 states, including Illinois and Massachusetts, brought a petition in the

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[5] United States Environmental Protection Agency, Global Warming: Climate, http://yosemite.epa.gov/oar/globalwarming.nsf/content/climate.html (last visited Nov. 16, 2008).

[6] World Economic Forum, Global Risks 2007, at 4 (2007), http://www.weforum.org /pdf/CSI/Global_Risks_2007.pdf (last visited Nov. 16, 2008).

[7] Intergovernmental Panel on Climate Change, Climate Change 2001: Synthesis Report, at 31 (2001), http://www.ipcc.ch/pdf/climate-changes-2001/synthesis-spm/synthesis-spm-en.pdf (last visited Nov. 16, 2008).

[8] *See* Europa: Gateway to the European Union, Emission Trading Scheme (EU ETS), http://ec.europa.eu/environment/climat/emission.htm (last visited Nov. 16, 2008).

[9] California v. General Motors Corp., No. C06-05755, 2006 WL 2882313 (N.D. Cal. filed Sept. 20, 2006); *see also* Ross Gelbspan, *Katrina's Real Name*, BOSTON GLOBE, Aug. 30, 2005, *available at* http://www.boston.com/news/weather/articles/2005/08/30/katrinas_real_name/ (suggesting that, although the National Weather Service nicknamed the hurricane that ravaged New Orleans "Katrina," the hurricane's "real name is global warming") (last visited Nov. 16, 2008).

[10] Massachusetts v. E.P.A., 549 U.S. 497, 127 S. Ct. 1438, 1440, 1446 (2007).

[11] *Massachusetts*, 127 S. Ct. at 1446.

[12] *Id.*

United States Court of Appeals for the District of Columbia seeking an order compelling the EPA to comply with the Supreme Court's decision. The petitioners assert that the EPA has done nothing to comply with the Supreme Court's 5-4 decision.[13] Massachusetts Attorney General, Martha Coakley, a petitioner in the newly-filed case, has stated that: "The EPA's failure to act in the face of these incontestable dangers is a shameful dereliction of duty."[14]

On August 25, 2008, New York Attorney General Andrew M. Cuomo and a coalition of twelve states, the District of Columbia, and the City of New York filed suit against the EPA in the Federal Court of Appeals for the District of Columbia for failing to adopt regulations to control emissions of global warming pollution from oil refineries.[15]

B. The Potential Impact of Global Warming

The far-reaching impact of global warming may include heat deaths, exposure to infectious disease, wildfires, mud slides, disruption of water supply, flooding, and more dramatic weather events with a heightened intensity due to increased energy in the atmospheric system, disruption of and damage to forests and ecosystems, additional sea level rise, beach erosion, salt infiltration of fresh water drinking supplies, damage to and breaches of levees, and the general reduction of water availability. By way of illustration, one lawsuit alleged that "Glacier National Park already lost two-thirds of the more than 150 glaciers it had in the 19th Century" and that, at the present rate, "there will be no glaciers at all in approximately 30 years."[16]

Hurricanes Katrina and Rita are considered the most powerful and damaging hurricanes in U.S. history and have been described as a dramatic example of the sweeping impacts weather and extreme climate change will have on broad sectors of the economy.[17] Insurers were reportedly hit with $45 billion in insured losses from Hurricane Katrina alone.[18] It has been reported that there have been numerous weather-related disasters since 1980 that have each caused at least one billion dollars worth of damage in the United States. These include droughts, fires, tornados, heat waves, and floods. Collectively, these 78 weather-related disasters have cost over $600 billion.[19] Industries beyond just the property insurance industry have felt the impact of these disasters. Nearly half of the largest 100 Standard & Poor's companies reported losses from Hurricanes Katrina and Rita.[20]

There is no clear consensus as to the likely costs to U.S. and/or international industry as a result of global warming-related claims. The Stern Report from the United Kingdom calculates that, each year, climate change eventually could cost the equivalent of between 5% and 20% of the global gross domestic product.[21] Nicholas Stern, the British government's chief economist, estimates that

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[13] Jay Lindsay, *States Suing EPA Over Global Warming*, ASSOCIATED PRESS, Apr. 3, 2008, http://www.lexisone.com/news/ap/ap040308d.html (last visited Nov. 16, 2008).

[14] *Id.*

[15] *See* Cuomo Files Lawsuit To Force Bush EPA To Control Global Warming Pollution From Big Oil Refineries,http://www.oag.state.ny.us/media_center/2008/aug/aug25b_o8.html. (last visited Nov. 16, 2008).

[16] Complaint at 22, Open Space Inst., Inc. v. Am. Elec. Power Co., No. 04-CV-05670 (S.D.N.Y. filed July 21, 2004), *available at* 2004 WL 5614409.

[17] *David Gardiner et al., Climate Risk Disclosure by the S&P 500*, 2007 CERES REPORTS, www.ceres.org (follow "PUBLICATIONS" hyperlink; then follow "2007 Reports" hyperlink; then follow "Climate Risk Disclosure by the S&P 500" hyperlink) (last visited Nov. 16, 2008).

[18] *Id.* at i.

[19] National Climactic Data Center, *Billion Dollar U.S. Weather Disasters*, www.ncdc.noaa..gov/oa/reports/billionz.html (last visited Nov. 16, 2008).

[20] *See* Gardiner et al., *supra* note 17, at i.

[21] *See* NICHOLAS STERN, STERN REVIEW: THE ECONOMICS OF CLIMATE CHANGE (2006), http://www.hm-treasury.gov.uk/stern_review_final_report.htm (last visited Nov. 16, 2008).

global warming may cost the world as much as $9.6 trillion by the next century.[22] According to ISO's Property Claim Services' January 16, 2007 press release, catastrophic losses cost the U.S. insurance industry $62 billion in 2005, up from an average of $4 billion a year in the 1950s and $40 billion a year in the 1990s.[23] It has also been reported that the insurance industry paid out a record $58 billion in weather-related disasters in 2005.[24] Whatever forecasting limitations exist, it is clear that the costs of global warming claims will be enormous.

The potential cost of third-party global warming claims to liability insurers is difficult to determine. Some policyholder advocates are already touting global warming as the next asbestos.[25] Yet, there are several reasons to believe that many such claims will not prove to be covered under third-party liability policies.

C. Global Warming Legislation in The United States

There are several pieces of legislation before Congress addressing global climate change that may impact the legal landscape. The proposed bills include: Climate Stewardship and Innovation Act of 2007, Lieberman/McCain Bill (S. 280); The Low Carbon Economy Act of 2007, Bingaman-Specter (S. 1776); The Electric Utility Cap and Trade Act of 2007, Feinstein-Carper (S. 317); The Climate Stewardship Act of 2007, Oliver-Gilchrest (H.R. greenhouse gas emissions); The Safe Climate Act of 2007, Waxman-Allen Bill (H.R. 1590); The Global Warming Pollution Reduction Act of 2007, Kerry-Snowe (S. 485); and Global Warming Pollution Reduction Act, Sanders-Boxer (S. 309).[26] Notably, some of the legislative proposals have goals of not only attempting to stop human-induced climate change, but also seek to address the expense, cost allocation, and harm distribution related to global warming.[27]

It is likely that a new statutory framework will be put in place in this topic area. In addition to the pending legislation before the United States Congress, climate change is also reportedly the subject of 300 bills in 40 different state legislatures.[28]

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[22] *See* Alex Morales, *Climate Change May Cost World $9.6 Trillion, U.K. Report Says*, Bloomberg.com: U.K. & Ireland, Oct. 30, 2006, http://www.bloomberg.com/apps/news?pid=20601102&sid=aHuSMugNhnFw&refer=uk (last visited Nov. 16, 2008).

[23] Press Release, ISO Property Claim Services, The PCS Review of 2006 Catastrophes and Insured Losses (Jan. 16, 2007), http://www.iso.com/press_releases/2007/The-PCS-Review-of-2006-Catastrophes-and-Insured-Losses.html (last visited Nov. 16, 2008); Munich Re, *Topics 2000: Natural Catastrophes – The Current Position*, http://www.munichre.com/publications/302-02354_en.pdf (last visited Nov. 16, 2008).

[24] John Simons, *Risky Business: With $58 Billion in Claims to Pay for Last Year Alone, U.S. Insurers are Jacking Rates, Canceling Policies and Learning to Cope with Climate Change*, FORTUNE, Nov. 2, 2006, http://money.cnn.com/magazines/fortune/fortune_archive/2006/09/04/8384736/index.htm (last visited Nov. 16, 2008).

[25] *See* James M. Davis & Noel C. Paul, *Managing The Risks Of Global Warming: Avoiding The Mass Tort Template And Insurance Coverage Implications*, 17 COVERAGE 1, May/June 2007; *see also* Noel C. Paul, *The Price Of Emission: Will Liability Insurance Cover Damages Resulting From Global Warming?*, 19 LOY. CONSUMER L. REV. 468, 471 (2007), *available at* http://www.luc.edu/law/activities/publications/clrdocs/vol19issue4/noel_paul.pdf.

[26] *See* Resources For the Future, Key Congressional Climate Change Legislation Compared in Latest RFF Document, Jan. 11, 2008, www.rff.org/rff/News/Releases/Pages/CC_LegislationUpdate.aspx (last visited Nov. 16, 2008).

[27] Victor B. Flatt, *Taking The Legislative Temperature: Which Federal Climate Change Legislative Proposal Is "Best"?*, 102 NW. U. L. REV. 123, 126 (2007), *available at* http://www.law.northwestern.edu/lawreview/colloquy/2007/32/LRColl2007n32Flatt.pdf.

[28] *See* Clyde M. Hettrick, *The Coming Storm – Potential Global Warming Liability And The Insurance Assets Available For Companies' Defense And Indemnification*, 22 MEALEY'S LITIGATION REPORT: INSURANCE, 23 (April 13, 2008).

D. States Join In the Fight against Global Warming

Several states have joined to fight global warming by developing regional targets for reducing greenhouse gas emissions.[29] For example, several northeastern states have announced a regional program aimed at reducing carbon dioxide emissions through a cap-and-trade system called the Regional Greenhouse Gas Initiative ("RGGI").[30] In 2006, California Governor Arnold Schwarzenegger announced that California, along with Arizona, New Mexico, Oregon, and Washington, signed a memorandum of understanding to reduce greenhouse emissions through market-based efforts such as a regional cap and trade program.[31]

In 2008, numerous governors formed task forces to address global warming issues.[32] In January of 2008, New York Attorney General Andrew M. Cuomo announced that he is leading a 15-state coalition challenging the federal government's position that states such as New York do not have the right to regulate greenhouse gas emissions from automobiles.[33] Also, Attorney General Cuomo's office subpoenaed five large energy companies to investigate whether their investors were informed about the potential financial risks posed by coal-burning plants which release global warming pollution emissions.[34] On August 27, 2008, Attorney General Cuomo announced a landmark settlement agreement with Xcel Energy, as the first-ever binding and enforceable agreement requiring a major national energy company to disclose the financial risks that climate change poses to its investors.[35]

III. GLOBAL WARMING LITIGATION

Because global warming problems permeate so many industries and touch upon so many aspects of human life and geography, global warming litigation may be brought by enumerable putative plaintiffs, against numerous defendant targets, and may be predicated upon various theories of liability. Experience has taught us that the plaintiffs' bar does not suffer from a lack of creativity, resourcefulness, or appetite and that it always is searching for hospitable courtrooms and contingent fee recoveries.

Tort litigation in the United States involving global warming-related claims still is in its earliest stages. However, a publication by an American Bar Association Committee On Insurance Coverage Litigation publication suggests the "[f]lood gates of U.S. courts are beginning to open to global warming litigation with profound implications for companies across a broad swath of industries."[36] The shape of future litigation will depend, in part, upon the results of early litigation. This is an area that will require monitoring, action, and adjustment in the foreseeable future from the defendant companies' professionals and their insurers.

Generally speaking, the allegations attempting to link corporate business practices to the impacts of global warming have fallen into two main categories. First, there are regulatory actions. These cases are brought

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[29] *5 States Join To Reduce Greenhouse Gas Emissions*, 20 MEALEY'S POLLUTION LIAB. REPORT 22, Mar. 12, 2007.

[30] *See* Gardiner et al., *supra* note 17, at 26, 28, 32.

[31] *Id.* at 32.

[32] *See, e.g.*, Michigan GREEN, *Governor Granholm Takes Actions to Address Climate Change, Global Warming in MI*, (Nov. 14, 2007), *available at* www.michigangreen.org/article202.html (last visited Nov. 16, 2008).

[33] *See* Press Release, Office of the New York State Attorney General, Andrew M. Cuomo, Cuomo Leads Coalition of 15 States Against EPA in Battle for States' Right to Fight Global Warming (Jan. 2, 2008), http://www.oag.state.ny.us/media_center/2008/jan/jan02a_08.html (last visited Nov. 16, 2008).

[34] *Id.*

[35] *See* Press Release, Office of the New York State Attorney General, Andrew M. Cuomo, Cuomo Reaches Landmark Agreement With Major Energy Company, Xcel Energy, To Require Disclosure of Financial Risks of Climate Change To Investors, (Aug. 27, 2008) http://www.oag.state.ny.us/media_center/2008/aug/aug27a_08.html (last visited Nov. 16, 2008).

[36] Davis & Paul, *supra* note 25.

against governmental regulatory authorities seeking to compel the adoption of environmental regulations that would require corporate entities to reduce their emissions of greenhouse gasses. *Massachusetts v. Environmental Protection Agency* is the leading case in this category.[37] There are also cases in which governmental agencies seek to have companies comply with regulations.

Second, there are various claims against greenhouse gas emitters alleging that a defendant's or an industry's conduct caused or contributed to climate change. The specific theories can range from nuisance, negligence, products liability, conspiracy, misrepresentation, fraud, intentional misconduct, to actions for declaratory judgment or injunctive relief. In one global warming lawsuit, *Comer v. Nationwide Mutual Insurance Co.*, the plaintiffs, in suing for Hurricane Katrina-related claims, alleged that the "demonstratable changes" to the Earth's climate included higher and rapidly-increasing water temperatures; rapidly-rising sea levels; melting of Arctic, Antarctic, and Alpine glaciers; more severe droughts; increased El Niño events; and increased weather-related economic losses.[38]

A. Regulatory Issues and Litigation

1. The United States Supreme Court Decision in *Massachusetts v. EPA*

The Supreme Court's 5-4 decision in *Massachusetts v. Environmental Protection Agency*, 127 S. Ct. 1438, 1440 (2007) serves as a useful starting point for the discussion on global warming regulation. In that case, a group of private organizations petitioned the EPA to begin regulating the emission of greenhouse gasses, including carbon dioxide, under Section 202(a)(1) of the Clean Air Act ("CAA"). The CAA requires that the EPA "shall by regulation prescribe . . . standards applicable to the emission of any air pollutant from any class . . . of new motor vehicles . . . which . . . cause[s], or contribute[s] to, air pollution . . . reasonably . . . anticipated to endanger public health or welfare."[39] The CAA defines "air pollutant" to include "any air pollution agent . . . including any physical, chemical . . . substance . . . emitted into . . . the ambient air."[40]

The EPA had denied the petition reasoning that the CAA does not authorize the issuance of mandatory regulations to address global climate change and pointed out that, even if it had the authority to set greenhouse gas emission standards, it would have been unwise to do so at the time because the "causal link" between greenhouse gasses and the increase in global surface air temperatures was not unequivocally established.[41] The EPA characterized any EPA regulation of motor vehicle emissions as a "piecemeal approach to climate change" that would conflict with the President's comprehensive approach involving additional support for technological innovation, the creation of non-regulatory programs to encourage voluntary private-sector reductions in greenhouse gas emissions, and further research on climate change, and might hamper the President's ability to persuade key developing nations to reduce emissions.[42]

The petitioners, joined by the Commonwealth of Massachusetts and other state and local governments, sought review of the EPA's ruling before the D.C. Circuit. Two of the three judges on that panel agreed that the EPA Administrator properly exercised his discretion in denying the petition. One judge on that panel concluded that the Administrator's exercise of judgment

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[37] Massachusetts v. E.P.A., 549 U.S. 497, 127 S. Ct. 1438 (2007)

[38] Third Amended Complaint at 14, Comer v. Nationwide Mut. Ins. Co., No. 05 CV 436, 2006 WL 1066645 (S.D. Miss. Feb. 23, 2006), *available at* 2006 WL 1474089.

[39] 42 U.S.C. § 7521(a)(1) (2006).

[40] 42 U.S.C. § 7602(g) (2006).

[41] *Massachusetts*, 127 S. Ct. at 1441.

[42] *Id.*

as to whether the "pollutant" could reasonably be anticipated to endanger public health and welfare, could be based on scientific uncertainty, as well as other factors, including a concern that unilateral U.S. regulation on motor vehicle emissions could weaken efforts to reduce other countries' greenhouse gas emissions.

The United States Supreme Court reversed the D.C. Circuit ruling, finding that the CAA authorizes the EPA to regulate greenhouse gas emissions from new vehicles in the event it forms a judgment that such emissions contribute to climate change. The majority noted that the "EPA does not dispute the existence of a causal connection between man-made greenhouse gas emissions and global warming," but does not believe that any realistic probability exists that the relief petitioners seek would mitigate global climate change and remedy the injuries.[43] The Supreme Court ruled that deference to agency discretion did not permit the EPA to ignore its statutory mandate.

Justice Scalia issued a blistering dissent (joined by Justice Thomas and Justice Alito). He disagreed with the majority's interpretation of the term "air pollutant" under the CAA and noted that the majority's alarm over global warming may or may not be justified, but it ought not distort the outcome of this litigation. Justice Scalia explained that, "[n]o matter how important the underlying policy issues at stake, this Court has no business substituting its own desired outcome for the reasoned judgment of the responsible agency."[44] Justice Scalia criticized the majority's reasoning, noting that it would mean that everything airborne, "from Frisbees to flatulence, qualifies as an 'air pollutant.'"[45]

Massachusetts v. Environmental Protection Agency is likely to have a significant impact on the future of global warming litigation. The Supreme Court's decision has set the stage for further EPA regulation of greenhouse gas emissions and may open the door to additional litigation, regulation, and debate. For insurers, the Supreme Court's opinion provides an additional argument that greenhouse gasses are pollutants that may be used to bolster other strong arguments that pollution exclusions bar coverage for such claims. The potential costs of regulation to policyholders is resulting in marketing activities on the part of policyholder lawyers, suggesting policyholders likely will seek to saddle insurers with a portion of the tab.[46]

2. Other Claims against Governments/Regulatory Actions

There have been several lawsuits filed against governmental entities regarding regulations relating to global warming. In one case, environmental groups accused the Bush Administration of suppressing global warming information.[47] U.S. Senator John Kerry and U.S. Representative Jay Inslee sought permission to intervene in the litigation on the plaintiffs' side. On August 21, 2007, the court denied Sen. Kerry's and Congressman Inslee's motion to intervene.[48] The court also denied the motion to dismiss based on "lack of standing" expressly finding that the plaintiffs, an environmental advocacy group, had standing.[49] The court also granted the plaintiffs' motion for summary judgment and ordered the federal government to comply with the Global Change Research Act of 1990 and produce two "overdue" reports assessing

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[43] *Id.* at 1457.

[44] *Id.* at 1472.

[45] *Id.* at 1476, n.2.

[46] *See* Davis & Paul, *supra* note 25.

[47] Ctr. for Biological Diversity v. Brennan, 571 F. Supp. 2d 1105, 1113 (N.D. Cal. 2007).

[48] *Brennan*, 571 F. Supp. 2d 1105 (N.D. Cal. 2007) (order denying motion to intervene at 22-28), *available at* http://www.biologicaldiversity.org/swcbd/PROGRAMS/policy/energy/ccsp-order-08-21-2007.pdf (last visited Nov. 16, 2008).

[49] *Id.* at 4-22 (order denying motion to dismiss based on lack of standing).

the impact of greenhouse gasses in the United States.[50]

In November of 2007, the United States Court of Appeals for the Ninth Circuit in *Center For Biological Diversity v. National Highway Safety Administration* reversed the district court's findings and, following the Supreme Court's lead in *Massachusetts v. Environmental Protection Agency*, embraced the "science" behind the global warming "alarms." The Ninth Circuit concluded that the National Highway Traffic Safety Administration's ("NHTSA") failure to monetize the benefits of greenhouse gas emissions reduction in connection with setting corporate average fuel economy ("CAFE") standards for light trucks was "arbitrary and capricious."[51]

Originally, the Ninth Circuit had reasoned that "[m]ore recent evidence shows that there have already been severe impacts in the Arctic due to warming, including sea ice decline" and that "[g]lobal warming has already affected plants, animals, and ecosystems around the world."[52] The Ninth Circuit noted that "[s]ome scientists predict that 'on the basis of midrange climate-warming scenarios for 2050, that 15-37% of species in our sample of regions . . . will be committed to extinction.'"[53] It noted the warnings of some scientists that, "there will be serious consequences for human health, including the spread of infectious and respiratory diseases, if worldwide emissions continue on current trajectories" and "[s]ea level rise and increased ocean temperatures are also associated with increasing weather variability and heightened intensity of storms such as hurricanes."[54]

The Ninth Circuit was critical of the NHTSA, explaining that "[e]ven if NHTSA may use a cost-benefit analysis to determine the 'maximum feasible' fuel economy standard, it cannot put a thumb on the scale by undervaluing the benefits and overvaluing the costs of more stringent standards."[55] Ultimately, the Ninth Circuit concluded that the NHTSA failed to include in its analysis the benefit of carbon emissions reduction in either quantitative or qualitative form and further noted that it did, however, "include an analysis of the employment and sales impacts of more stringent standards on manufacturers."[56]

On August 18, 2008, the Ninth Circuit reversed itself and vacated that decision.[57] In the substituted opinion, the Ninth Circuit remanded the matter to the NHTSA to promulgate new standards as expeditiously as possible and to prepare a revised Environmental Assessment or Environmental Impact Statement.[58]

The United States District Court for the District of Maryland ruled in favor of the United States Federal Highway Administration ("FHWA") in an action brought by environmental advocacy groups over the FHWA's approval of a highway construction project.[59] The court found that the aggregate emission methodology used by the FHWA when considering health risks associated with mobile source air toxics ("MSAT"), was "reasonable" under the National Environmental Policy Act ("NEPA"). In this case, environmental advocacy groups argued that FHWA failed to study important adverse impacts and mitigation measures and failed to disclose the adverse "climate change" impacts resulting from the proposed project. The court noted that the FHWA believed it was not useful to "consider greenhouse gas emissions as part of the project-level planning and development

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[50] *Id.* at 29-37 (order granting plaintiffs' motion for summary judgment).

[51] Ctr. for Biological Diversity v. Nat'l Highway Safety Admin., 508 F.3d 508, 557 (9th Cir. 2007).

[52] *Id.* at 523 (citations omitted).

[53] *Id.* (citations omitted).

[54] *Id.*

[55] *Id.* at 531.

[56] *Nat'l Highway Safety Admin.*, 508 F.3d at 531.

[57] Ctr. For Biological Diversity v. Nat'l. Highway Safety Admin., 538 F.3d 1172 (9th Cir. 2008).

[58] *Id.* at 1178.

[59] Audubon Naturalist Soc'y of the Cent. Atl. States, Inc. v. United States Dep't of Transp., 524 F. Supp. 2d 642 (D. Md. 2007).

process" because there are "no national regulatory thresholds for greenhouse gas emissions or concentrations that have been established through law or regulation."[60] The court concluded that the FHWA did not act arbitrarily or capriciously in concluding that no particular mitigation was needed here for the supposed impacts of a single stretch of highway on the global problem of climate change.[61]

Other recent examples of these regulatory-related cases include *Center for Biological Diversity & Pacific Environment v. Kempthorne*, where plaintiffs sought declaratory or injunctive relief alleging that Dirk Kempthorne, United States Secretary of the Interior and the United States Fish And Wildlife Service, failed to comply with federal statutes and alleging an "incidental taking" of polar bears and the Pacific walruses, resulting from oil and gas industry activities.[62]

In *North Slope Borough v. Minerals Management Service*, a federal court in Alaska ruled against the Alaska Eskimo Whaling Commission and other plaintiffs with regard to a claim against the Mineral Management Services and the U.S. Department of Interior in connection with a lease and sale of property.[63] The court held that the public interest in energy development favored upholding such sales and refused to "engage in multiple levels of speculation regarding climate change, animal migration, and economics . . . ."[64]

Regulatory actions also have been brought against state and local governmental entities. For example, the State of California and three environmental groups filed petitions for writs of mandate against San Bernardino County for approving a long-term growth plan that did not take global warming aspects into account.[65] On August 21, 2007, the State of California and County of San Bernardino reached a settlement under which the county will establish a unique greenhouse gas reduction plan that will identify sources of emissions and set feasible reduction targets.[66]

3. Injunctive and Declaratory Relief

Injunctive and declaratory relief claims have been asserted in connection with global warming claims. For example, in *Friends Of The Earth v. Mosbacher*, environmental groups sought injunctive relief against Overseas Private Investment Corporation for not conducting adequate environmental review of international fossil fuel projects.[67] The federal court in California denied the plaintiffs' motion for summary judgment on the basis of the existence of fact issues. The case has been certified for interlocutory appeal to the Ninth Circuit.

4. Although the Regulatory Actions Do Not Directly Impact Business Liability Insurance, They Arguably May Have an Indirect, Yet Significant, Impact

The regulatory issues, although interesting, should not directly implicate

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[60] *Id.* at 708.

[61] *Id.* at 709.

[62] Ctr. for Biological Diversity & Pac. Env't v. Kempthorne, No. C-07-0894, 2007 WL 2023515 (N.D. Cal. July 12, 2007). *See also* Mont. Envtl. Info. Ctr. v. Johanns, No. 07-cv-01311 (D.D.C. filed July 23, 2007); Friends of Earth, Inc. v. Mosbacher, 488 F. Supp. 2d 889 (N.D. Cal. 2007); Friends of Earth, Inc. v. Watson, No. C 02-4106, 2005 WL 2035596, 35 Envtl. L. Rep. 20,179 (N.D. Cal. Aug. 23, 2005) (denying motion for summary judgment based on lack of standing).

[63] N. Slope Borough v. Minerals Mgmt. Serv., No. 07-cv-0045, 2008 WL 110889 (D. Alaska Jan. 8, 2008).

[64] *Id.* at *4.

[65] People v. County Of San Bernardino, No. 07-00329 (Cal. Super. Ct. 2007), http://ag.ca.gov/global warming/pdf/SanBernardino_complaint.pdf.

[66] *California Reaches Landmark Global Warming Settlement On County's Growth Plan*, 20 MEALEY'S POLLUTION LIABILITY REPORT 12, Sept. 2007; People v. County of San Bernadino, No. 07-00329 (Cal Super. Ct. 2007), http://ag.ca.gov/cms_pdfs/press/2007-08-21_San_Bernardino_settlement_agreement.pdf (settlement agreement).

[67] Friends of Earth, Inc. v. Mosbacher, 488 F. Supp. 2d 889 (N.D. Cal. 2007).

business liability insurance such as general or professional liability policies insofar as such matters do not name corporate or professional policyholders. Where the governmental entities seek enforcement of regulations on corporate policyholders, those policyholders may attempt to seek coverage for costs of compliance or for re-characterization of such costs. In such instances, strong arguments against coverage exist. The acceptance by courts of the science of global warming in the regulatory context will be cited by parties advocating that science in the context of monetary claims against private parties.

B. Emerging Theories of Tort Liability in Which Damages May Be Sought

Cases involving global warming-related tort claims against industry defendants still are in their infancy, but several theories have been, and likely will be, asserted.

1. Nuisance

One theory of liability for global warming-related claims is the "public nuisance" claims. These claims have been brought against power companies, automakers, and the oil and coal industries. To date, this particular theory of liability has not been warmly received by courts. Plaintiffs have brought nuisance claims under both state and federal law. As noted below, a trio of nuisance cases, *AEP*, *Comer*, and *General Motors* all have been dismissed at the trial court level. Nonetheless, it does not appear that plaintiffs are prepared to give up on their pursuit of such claims anytime soon.

In *Connecticut v. American Electric Power Co.* ("*AEP*"), several states and non-profit land trusts sought the abatement of the public nuisance of global warming.[68] Plaintiffs alleged that the power facilities of the defendant utilities constituted a public nuisance under the state and federal common law and sought to have defendants abate carbon dioxide emissions at each of their plants. Plaintiffs, claiming to represent more than 77,000,000 people, sought an order holding each of the utility defendants jointly and severally liable for contributing to the ongoing public nuisance of global warming. According to plaintiffs, defendants are "the five largest emitters of carbon dioxide in the United States," and their emissions "constitute approximately one quarter of the U.S. electric power sector's carbon dioxide emissions."[69] Plaintiffs alleged that carbon dioxide levels increased approximately 34% since the Industrial Revolution began, causing increased temperatures.[70]

Plaintiffs further alleged that, because the planet's natural systems take hundreds of years to absorb carbon dioxide, the defendants' "past, present, and future emissions will remain in the atmosphere and contribute to global warming for many decades, and possibly centuries."[71] The *AEP* court expressly noted that, although plaintiffs acknowledged that there is some dispute about the rate and intensity of the process of global climate change, plaintiffs allege that "official reports from American and international scientific bodies demonstrate the clear scientific consensus that global warming has begun, altering the natural world . . . ."[72] The federal district court in New York granted defendants' motion to dismiss holding that the suit raised non-justiciable "political questions" that were beyond the limits of the court's jurisdiction.

In *California v. General Motors Corp.*, the State of California brought suit against six major motor vehicle manufacturers, General Motors, Ford, Toyota, Honda, Chrysler, and Nissan.[73] The complaint alleged a host of injuries to California, its environment, its economy, and the health and well-being of its

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[68] Connecticut v. Am. Elec. Power Co., 406 F. Supp. 2d 265 (S.D.N.Y. 2005).

[69] *Id.* at 268.

[70] *Id.*

[71] *Id.*

[72] *Id.*

[73] California v. General Motors Corp., No. C06-05755, 2007 WL 2726871 (N.D. Cal. 2007).

citizens caused by defendants' production of millions of automobiles that collectively, and in mass quantities, released carbon dioxide in the atmosphere and contributed to an elevated level of carbon dioxide in the environment.[74]

More specifically, the State of California alleged that the six defendant automakers produce vehicles that emit over 289 million metric tons of carbon dioxide, constituting over 20% of human-generated carbon dioxide emissions in the United States and over 30% of such emissions in California.[75] Plaintiffs alleged that: "[h]uman-induced emissions of carbon dioxide, such as those from motor vehicles, are causing global warming." The State also alleged that the impact of global warming had resulted in an increase in the winter temperature in the Sierra Nevada region, causing a reduction in the snow-pack, which serves as 35% of the state's water. It further alleged that, as the snow pack melts earlier in the Spring, it results in an "increased risk of flooding within the State," as well as rising sea levels that have increased erosion along California's 1,075 miles of coastline.[76] It also asserted that global warming increased the frequency and duration of extreme heat events, increasing the risk and intensity of wildfires, among other things.[77] The State sought a declaratory judgment that defendant automakers are liable for future monetary damages to California caused by defendants' past and ongoing contributions to global warming.[78]

The court granted defendants' motion to dismiss on the grounds that the complaint raised non-justiciable political questions that were beyond the federal court's jurisdiction. The court noted that, as these claims touched upon public policy, foreign policy, and political issues, it is "tempting to jump to the conclusion that such claims are barred by the political question doctrine."[79]

A class action against 121 oil and energy companies was filed by a putative class of Mississippi residents and property owners in the aftermath of Hurricane Katrina.[80] The *Comer* plaintiffs alleged that oil companies, coal companies, and chemical manufacturers "knowingly and willfully" engaged in activities that contributed to global warming. The complaint asserted claims of nuisance, negligence, and a number of other torts including trespass, negligence, civil conspiracy, unjust enrichment, fraudulent misrepresentation, and concealment. The claims were predicated upon the "demonstrable changes" in the Earth's climate as a result of the defendants' greenhouse gas emissions. In August of 2006, the federal court denied the motion for class certification. On August 30, 2007, the court dismissed the complaint based on the "political question" doctrine. An appeal is currently pending before the United States Court of Appeals for the Fifth Circuit.

The emerging nuisance cases concerning global warming claims generally are requesting money damages in addition to the traditional abatement or injunctive relief. For example, in *General Motors*, the state of California sought billions of dollars in damages including funds for remediation and compensation for California's public spending for responding to the global warming threat.[81] Similarly, in *AEP*, the plaintiff states and land trusts brought the nuisance lawsuit against five of the purported largest carbon dioxide emitters in the world and sought not only to have the court enjoin each defendant power plant to abate its emissions, but also sought to have each

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[74] Complaint, *General Motors*. 2007 WL 2726871, *available at http://ag.ca.gov.globalwarming/pdf/California_GeneralMotors_Complaint_2006Sep20.pdf* (last visited Nov. 16, 2008).

[75] *Id. at* 9.

[76] *Id. at* 11.

[77] *General Motors*, 2007 WL 2726871, at *1.

[78] *Id.* at *2.

[79] *Id.* at *8.

[80] Comer v. Nationwide Mut. Ins. Co., No. 05 CV 436, 2006 WL 1066645 (S.D. Miss. Feb. 23, 2006) (the name of this case is now styled Comer v. Murphy Oil, U.S.A.).

[81] *See* Second Amended Complaint, *General Motors*, 2007 WL 2726871, *available at* 2006 WL 3069165.

defendant held jointly and severally liable for damages.[82]

To date, the public nuisance claims have not been met with much success. Many public nuisance claims in the lead paint context have met with a similar fate.[83] Yet, it appears that plaintiffs will continue to assert such claims in search of favorable decisions and friendly venues.

2. Negligence and Strict Liability

Plaintiffs are likely to pursue products liability claims under a negligence or strict liability theory. Products liability claims may be predicated upon manufacturing defects, design defects, or defects in warnings. Similarly, negligence claims may be asserted against a wide array of defendants resulting from products, operations, actions, and omissions.

3. Conspiracy, Fraud, and Intentional Misconduct

Plaintiffs likely will attempt to develop evidence and assert claims of conspiracy (*e.g.*, conspiracy to suppress information about global warming), fraud, and intentional misconduct such as that alleged in *Comer*.

4. Professional Liability Claims

Legal professionals, accountants, engineers, and corporate officers and directors likely will be targeted for global warming-related claims. In the post-Enron environment, corporate officers face heightened scrutiny and potential liabilities for undisclosed corporate risks or for activities that plaintiffs attempt to link to global warming. In the past two decades, U.S. companies have spent billions of dollars as a result of increased enforcement of environmental regulations.[84] Publicly-traded companies will have to contend with shareholder litigation arising out of the requirement that they file disclosures with the Securities and Exchange Commission identifying "'known trends, events, and uncertainties' likely to have an impact on liquid assets as well as earnings."[85] One commentator has observed that, "[t]hrough arm-twisting, the federal government has forced corporations to disclose environmental liabilities since the catastrophic mid-twentieth century collision between securities and environmental law."[86]

Although, at present, companies have not yet been found liable for any damages resulting from global warming, "global warming still presents a serious concern to companies simply due to their disclosure obligations to shareholders and possible investors."[87] It should be noted that companies operating in countries that have ratified the

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[82] Connecticut v. Am. Elec. Power Co., 406 F. Supp. 2d 265, 267-69 (S.D.N.Y. 2005).

[83] For the most part, claims of public nuisance brought against lead paint manufacturers ultimately have not faired well. *See In re* Lead Paint Litigation, 924 A.2d 484 (N.J. 2007) (rejecting the public nuisance claims against paint manufacturers); St. Louis v. Benjamin Moore & Co., 226 S.W.3d 110 (Mo. 2007) finding that the city-plaintiff failed to prove the particular defendant company was responsible for lead paint poisoning); State v. Lead Indus. Ass'n, Inc., 951 A.2d 428 (R.I. 2008) (reversing multi-billion dollar jury's verdict which held three paint companies liable for creating a public nuisance due to the manufacture of lead pigment).

[84] Richard M. Schwartz & Donna Mussio, *Environmental Disclosure Requirements Under the Federal Securities Laws*, *in* CONDUCTING DUE DILIGENCE IN M&A & SECURITIES OFFERINGS 2007, at 111 (June 2007) (Course Handbook, Practicing Law Institute, PLI Order No. 10830).

[85] J. Wylie Donald & Loly Garcia Tor, *Climate Change and the D&O Pollution Exclusion*, 41 TORT TRIAL & INS. PRAC. L.J. 1033, 1038 (2006).

[86] Michael J. Viscuso, Note, *Scrubbing the Books Green: A Temporal Evaluation of Corporate Environmental Disclosure Requirements*, 32 DEL. J. CORP. L 879, 879 (2007).

[87] Clyde M. Hettrick, *As Global Warming Raises The Temperature In Corporate Boardrooms, Companies Should Check Whether Their Directors & Officers Insurance Coverage Insulates Their Directors And Officers Against Liability And The Cost Of Defending Any Global Warming Claim*, 13 MEALEY'S EMERGING INSURANCE DISPUTES 12 (June 18, 2008).

Kyoto Protocol or in states that have agreed to implement emission reductions need to consider whether they are required to disclose their projected costs of compliance with the Kyoto Protocol or state limitations.[88]

With an increasing focus on full disclosure of environmental risks, a number of companies are disclosing the implications of the Kyoto Protocol.[89] A July 2004 report titled, "Third Survey of Climate Change Disclosure and SEC Filings of Automotive, Insurance, Oil & Gas, Petrochemical and Utilities Companies," prepared by the Friends of the Earth, concluded that many companies in these industries are failing to disclose material environmental impacts from climate change.[90]

The proliferation of shareholder resolutions relating to global warming and activist investor strategies also are suggestive of future claims and litigation.[91] Shareholder groups, including large institutional investors, along with environmental advocacy groups, are pressing publicly-traded companies for disclosure. For example, "the Investor Network on Climate Risk ('INCR') convened a summit in New York in May 2005, where leading European and U.S. institutional investors managing over $3 trillion in assets released a '10-point action plan that calls on U.S. companies, Wall Street firms and the SEC to intensify efforts to provide investors with comprehensive analysis and disclosure about the financial risks presented by climate change.'"[92]

Claims based upon breach of statutory duties (under federal securities laws for example), fiduciary duties, or mismanagement may be asserted against corporate officers and directors and the professionals that advise them. Global warming litigation against companies by third parties may spawn shareholder litigation. Similarly, architects, engineers, and other professionals are likely to face mold claims, construction defect claims, and other claims related to global warming assertions.

C. Defenses To and the Issues Surrounding the Global Warming Claims

Potential defenses to the climate change cases exist and, at this early stage, have been fairly successful.

1. Political Question/ Justiciability

Trial courts have applied the "political question" doctrine to dismiss global warming claims in *General Motors*, *Comer*, and *AEP*. In *General Motors*, the court granted defendants' motion to dismiss, noting that it was mindful that the federal common law nuisance claim in *AEP* sought only equitable relief and that plaintiffs in *General Motors* brought a federal common law nuisance claim that also sought damages.[93] The court concluded that, despite this difference, the same justiciability concerns predominate and significantly constrained the court's ability to properly adjudicate the current claim. Regardless of the type of relief sought, a court still would be required to make an initial policy decision in deciding whether there was an unreasonable interference with the right common to the general public.[94]

Plaintiffs argued that the court would not be required to determine whether defendants' actions were unreasonable, but instead whether the interference suffered by California was unreasonable. The court was

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[88] The Kyoto Protocol is an international treaty that over 175 countries, including the European Union, have ratified, aimed at reducing global warming linked to greenhouse gas emissions. The United States has been credited with helping shape the treaty, but President Bush did not sign the treaty. *See* Schwartz & Mussio, *supra* note 84, at 138.

[89] *See* Schwartz & Mussio, *supra* note 84, at 138.

[90] *Id.* at 139.

[91] *See* Investor Network on Climate Risk, www.incr.com.

[92] Donald & Tor, *supra* note 85, at 1040.

[93] California v. General Motors Corp., No. C06-05755, 2007 WL 2726871, at *8 (N.D. Cal. 2007).

[94] *Id.*

unimpressed by this distinction, recognizing that, regardless of the relief sought, the court was left to make an initial decision as to what is unreasonable in the context of carbon dioxide emissions. The court further elaborated that "[s]uch an exercise would require it to create a quotient or standard in order to quantify any potential damages that flow from defendants' alleged act of contributing thirty percent of California's carbon dioxide emissions."[95] This would require the court to balance the competing interests of reducing global warming emissions and the interests of advancing and preserving economic and industrial development in adjudicating plaintiffs' claims. The court found that the balancing of those competing interests is the type of initial policy determination to be made by the political branches and not the court.[96] According to the court, an examination of the political branches' consideration of the issues surrounding global climate change counsels against initial policy determinations being made by the courts.

2. Standing

Standing issues have been raised in several of the cases. In *Center for Biological Diversity v. Abraham*, environmental groups sued sixteen federal agencies for violating the Energy Policy Act of 1992 by failing to report on and purchase alternative fuel vehicles.[97] The district court ruled that plaintiffs had standing to litigate the case based on the plaintiffs' air quality concerns, but it found that the plaintiffs' concerns regarding global warming were "too general" and unsubstantiated and were unlikely to have been caused by the defendants' conduct or to have been redressed by the relief sought to confer standing on that basis.[98]

Other courts have conferred standing.[99] In *Northwest Environmental Defense Center v. Owens Corning Corp.*, the court held plaintiffs had standing to challenge defendant's construction of a polystyrene foam insulation plant without having obtained the necessary pre-construction CAA permit.[100] The court stated that issues such as global warming and ozone depletion may be of wide public significance, but they are neither abstract questions nor mere generalized grievances. The court reasoned that an injury is not beyond the reach of court simply because it is widespread.

The United States Supreme Court addressed the issue of standing in *Massachusetts v. Environmental Protection Agency*.[101] The Court determined that the Commonwealth of Massachusetts had standing, recognizing the fact that the climate changes are widely shared does not minimize Massachusetts' interest in the outcome of the litigation.

As rising seas have impacted coastal land the Commonwealth of Massachusetts owns, it has particularized injury in its capacity as a landowner.[102] The Court emphasized that the fact that since it was a sovereign state rather than a private party, seeking review figured prominently in its standing decision. Although private litigants may rely upon the decision, there are good reasons why the standing decision may be inapplicable to private litigants. Issues of standing likely will continue to be presented in future cases.

Similarly, challenges may be raised regarding claims seeking preventative or

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[95] *Id.*

[96] *Id.* at *11-12.

[97] Ctr. for Biological Diversity v. Abraham, 218 F. Supp. 2d 1143 (N.D. Cal. 2002).

[98] *Id.* at 1155.

[99] *See, e.g.*, Ctr. For Biological Diversity v. Brennan, No. 06-7062, 2007 WL 2408901 (N.D. Cal. Aug. 21, 2007) (finding environmental groups had standing to pursue global warming-related claim); Friends of Earth, Inc. v. Watson, No. C. 02-4106, 2005 WL 2035596, 35 Envtl. L. Rep. 20,179 (N.D. Cal. Aug. 23, 2005).

[100] Nw. Envtl. Def. Ctr. v. Owens Corning Corp., 434 F. Supp. 2d 957 (D. Or. 2006).

[101] Massachusetts v. E.P.A., 549 U.S. 497, 127 S. Ct. at 1440 (2007).

[102] *Id.* at 1456.

anticipatory damages for potential future harm.

3. Requiring Plaintiffs to Meet Their Burden Of Establishing Causation And Other Requisite Elements Of The Asserted Causes Of Action

Numerous factual and legal hurdles may prevent plaintiffs from prevailing on various global warming claims. Causation issues, for example, constitute a substantial hurdle for plaintiffs asserting global warming claims. Under most theories of liability, plaintiffs would be required to establish a sufficient link between the given defendant's conduct (*i.e.* releasing carbon dioxide emissions) and climate change *and* the particular damage (*i.e.* flood). Plaintiffs' claims and the future of the litigation will turn not only on the "science" of global warming, but the ability to establish cause in fact and proximate cause between the alleged conduct and the alleged injury.

In *Comer v. Nationwide Mutual Insurance Co.*, a class action lawsuit against oil companies and coal companies for Hurricane Katrina-related property damage, the court acknowledged that a critical issue was the extent to which plaintiffs could prove that the emissions of greenhouse gasses by defendants, through the phenomenon of global warming, intensified or otherwise affected the weather system that produced Hurricane Katrina.[103] In dismissing the complaint with leave to file another amended complaint as against some defendants, the court stated:

> Without in any way expressing an opinion on the merits of the plaintiffs' claims against these defendants, I will observe that there exists a sharp difference of opinion in the scientific community concerning the causes of global warming, and I foresee daunting evidentiary problems for anyone who undertakes to prove, by a preponderance of the evidence, the degree to which global warming is caused by the emission of greenhouse gasses; the degree to which the actions of any individual oil company, any individual chemical company, or the collective action of these corporations contribute, through the emission of greenhouse gasses, to global warming; and the extent to which the emission of greenhouse gasses by these defendants, through the phenomenon of global warming, intensified or otherwise affected the weather system that produced Hurricane Katrina. This is a task that the plaintiffs are free to undertake if that is their intention, and I am confident that due consideration will be given to the requirements of Rule 11, Fed. R. Civ. P. Under Rule 20, Fed. R. Civ. P., these claims cannot be litigated in a single action that also includes the plaintiffs' contractual claims against their insurers and their mortgage lenders.[104]

The court recognized that the plaintiffs faced "daunting evidentiary problems" including proving by a preponderance of the evidence "the degree to which global warming is caused by the emission of greenhouse gasses . . . and the extent to which the emission of greenhouse gasses by these defendants . . . intensified or otherwise affected the weather system that produced Hurricane Katrina."[105]

Accordingly, even acceptance of global warming as a theory does not obviate the need to establish proximate cause and address issues of supervening and intervening causation. Other elements of the particular torts alleged may present major obstacles to recovery. For example, elements such as whether a duty exists or was breached and notions of foreseeability could prevent

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[103] Comer v. Nationwide Mut. Ins. Co., No. 05 CV 436, 2006 WL 1066645 (S.D. Miss. Feb. 23, 2006) (the name of this case is now styled Comer v. Murphy Oil, U.S.A.).

[104] *Id.* at *4.

[105] *Id.*

recovery as a matter of law or as a matter of proof with respect to the particular lawsuits.

4. Preemption Issues

Although a detailed discussion of preemption is beyond the scope of this article, there are numerous potential preemption arguments available in the context of global warming claims. For example, *Central Valley Chrysler-Jeep v. Witherspoon*, involves a challenge by the automobile industry to California's rule requiring all motor vehicles sold in the state to meet certain emission standards for carbon dioxide, methane, nitrous oxide, and hydro-fluorocarbons.[106] In that case, the plaintiffs assert that the rule is preempted by the Energy Policy and Conservation Act ("EPCA"), which authorizes the "corporate average fuel economy" standards.[107] On September 25, 2006, the court issued a memorandum opinion and order granting in part and denying in part defendants' motion for judgment on the pleadings. The court found that "[p]laintiffs have stated a claim for preemption of the regulations based on their actual conflict with the EPCA," and consequently declined to "decide at this stage whether the other theories of preemption have merit."[108]

In *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, new motor vehicle dealers and automobile manufacturers brought an action seeking declaratory and injunctive relief from Vermont regulations adopting California's greenhouse gas emission standards for new automobiles.[109] The court engaged in an extensive preemption analysis and ultimately concluded that the preemption doctrines did not apply to the interplay between the EPA's authority and the National Highway Traffic Safety Administration's authority under the EPCA to regulate greenhouse gasses from new motor vehicles under the CAA.[110] The court found that Vermont law (the regulations on greenhouse emissions) was not preempted by federal law.

In *Central Valley Chrysler-Jeep, Inc. v. Goldstene*, a federal court in California wrestled with the express preemption, conflict preemption, and foreign policy preemption analysis.[111] The case involved a claim for injunctive and declaratory relief sought by automobile industry plaintiffs against defendant, James Goldstene, in his official capacity as Executive Director of the California Air Resources Board ("CARB"). The industry sought summary judgment on its claim that the EPCA preempted regulations promulgated by CARB aimed at regulating greenhouse gas emissions, principally carbon dioxide, by motor vehicles. The government defendants cross-moved on plaintiffs' claim that CARB's proposed regulations were preempted by the foreign policy of the United States.

The court recognized that the EPA's congressionally-established purpose is to protect the public's health and welfare, a task the EPA can and must undertake, independent of NHTSA's duty to set mileage standards.[112] The court concluded that, where the EPA determines that regulation of pollutants under the CAA is necessary and where such regulation conflicts with average mileage standards established pursuant to EPCA, the EPA is not precluded from promulgating such regulation. The court further concluded the agency designated by EPCA to formulate average mileage standards is obliged to consider such regulations and is further obliged to harmonize average fuel efficiency standards under EPCA with the standards promulgated by EPA.[113]

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[106] Central Valley Chrysler-Jeep v. Witherspoon, 456 F. Supp. 2d 1160 (E.D. Cal. 2006).

[107] 49 U.S.C. § 3902(a), (c) (2006).

[108] *Witherspoon*, 456 F. Supp. 2d at 1167.

[109] Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie, 508 F. Supp. 2d 295 (D. Vt. 2007).

[110] *Id.* at 398.

[111] Central Valley Chrysler-Jeep, Inc. v. Goldstene, 529 F. Supp. 2d 1151 (E.D. Cal. 2007).

[112] *Id.* at 1166-67. *See also* Massachusetts v. E.P.A., 549 U.S. 497, 127 S. Ct. 1438, 1462 (2007).

[113] *Goldstene*, 529 F. Supp. 2d at 1170.

As for foreign policy preemption, the court concluded that *Zschernig v. Miller*[114] and its progeny hold that a party asserting preemption on the ground of foreign policy preemption must show a "clear conflict" between a state law or program and the functioning of some agreement, treaty, or program that is the product of negotiations between the administrative branch and a foreign government.[115] In the context of this case, plaintiffs were required to show what the policy of the United States was and precisely how California's regulations would interfere with the foreign policy of the United States. The court found that there was no indication of any "policy" by the President or Secretary of State to differentiate efforts to decrease greenhouse gas emissions from automobiles from efforts to decrease greenhouse gas emissions from any other source; and they found no evidence of any "policy" on the part of the Administration to restrain state-based activities to curb greenhouse gas emissions in order to leverage international cooperation.[116] The court concluded that the plaintiffs' foreign policy preemption claim failed because the evidence submitted did not identify any "policy" with which California's regulations might conflict.

We expect preemption issues will be raised with respect to a variety of suits.

5. Battle of the Experts

Defendants are likely to make *Daubert*[117] challenges to plaintiffs' experts' opinions on issues such as the "science" behind the global warming theories; issues of causation; company and industry alleged knowledge of their actions; and the potential impact on climate, duty and breach of duty; and damages to the extent claims survive dispositive motions.

Expert opinion was a focus of a decision by a federal court in Idaho, in the context of the Western Watersheds Project's request for administrative review of the Fish and Wildlife Service's ("FWS") rejection of a petition to list the sage-grouse under the Endangered Species Act.[118] A report by the Conservation Assessment ("CA") was issued by a group of state agency wildlife biologists and had been peer-reviewed by an independent group of scientists selected by the Ecological Society of America.[119] The court in discussing the "science" and expert opinions, noted that "[b]oth the number of fires and the total area burned have increased dramatically in the last decade when compared with the past 100 years."[120] The court acknowledged that the "CA warned that periods of drought and global climate change could further facilitate cheatgrass invasion or exacerbate the fire regime, and thus 'accelerate the loss of sagebrush habitats.'"[121] The court criticized the failure of the FWS to recognize the expert opinions, explaining that "[t]he consequences of this failure were compounded when the FWS excluded the experts from the listing determination" and that "[r]ight at the moment where the 'best science' was most needed, it was locked out of the room."[122]

In *In re Otter Tail Power Co.*, the Supreme Court of South Dakota held that the evidence submitted by the electric utility company was sufficient to establish that the coal-fire conversion facility would not pose a threat of serious injury to the environment, even though it would emit 4.7 million tons of carbon dioxide annually.[123] In *Otter Tail Power Co.*, environmental group interveners submitted the expert testimony of Dr. Ezra Hausman, a Ph.D. in atmospheric science

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[114] Zschernig v. Miller, 389 U.S. 429, 440-441 (1968).

[115] *Goldstene*, 529 F. Supp. 2d at 1184.

[116] *Id.* at 1186-89.

[117] Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993).

[118] W. Watersheds Project v. Fish & Wildlife Serv., 535 F. Supp. 2d 1173 (D. Idaho 2007).

[119] *Id. at* 1178.

[120] *Id.* at 1179.

[121] *Id.*

[122] *Id.* at 1185.

[123] *In re* Otter Tail Power Co. *ex rel.* Big Stone II, 744 N.W.2d 594, 604 (S.D. 2008).

from Harvard University, who testified that: "[h]uman induced climate change is a grave and increasing threat to the environment and to human societies around the globe."[124] According to Dr. Hausman, "an increase in many greenhouse gasses has caused a 0.6 [degree Celsius] increase in global temperature in the twentieth century."[125] Dr. Hausman also opined that this meant that "the planet as a whole does not lose heat to space as efficiently as it otherwise would, so the system as a whole is warming up" and the increase in global temperature "has come primarily from the burning of fossil fuels (coal, oil, and natural gas), and also from changes in land use such as deforestation."[126] As for the fossil fuels, Dr. Hausman specifically opined that "coal emits the most CO_2 per unit of energy obtained" and that "[t]here is an unequivocal scientific consensus on many aspects of the issue of global climate change."[127] Dr. Hausman concluded that:

> the emissions from Big Stone II [a coal-fire power plant] will cause "a significant and irreversible impact on the environment, both globally and in South Dakota. . . . My opinion is that this facility will have a cumulative effect, in combination with other operating energy conversion facilities, both existing and under construction, of causing the level of atmospheric carbon dioxide to be significantly elevated relative to what it would be without this plant. . . . In my opinion the environmental effects of the facility will pose a threat of serious injury to the environment in South Dakota and in the broader region."[128]

In response to Dr. Hausman's testimony, the utility company presented a rebuttal testimony of Ward Uggerud, Otter Tail Power Company's Senior Vice President. Mr. Uggerud testified that Dr. Hausman's opinion that Big Stone II will have a significant adverse impact on South Dakota, "lack[ed] perspective."[129] Although Mr. Uggerud conceded that the Big Stone II facility would emit approximately 4.7 million short tons of carbon dioxide per year, the U.S. anthropogenic carbon dioxide emissions for 2010 were projected to be 6,365 million metric tons. This meant that Big Stone II's share of the total U.S. anthropogenic carbon dioxide emissions in 2010, assuming the plant came on line, would be 0.0007 (0.07%, or seven hundredths of one percent).[130]

The South Dakota Supreme Court concluded that, although global warming presents a momentous and complex threat to our planet, a resolution for the problem cannot be made in the isolation of particular judicial proceedings.[131] The court found that the social, economic, and environmental consequences of global warming implicate policy decisions constitutionally reserved for the executive and legislative branches and that no CO_2 emissions standards have been enacted by our political leaders.[132] Congress has recognized that carbon dioxide emissions caused global warming and that global warming will have severe impacts on the United States, but it has declined to impose any formal limits on such emissions.[133] The South Dakota Supreme Court decided to refrain from settling policy questions more properly left for the Governor, the Legislature, and Congress.

One would expect expert battles not only regarding the science of global warming, but also regarding issues of knowledge, contributions, culpability, and causation in cases involving claims of private parties for damages.

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[124] *Id.* at 599.
[125] *Id.*
[126] *Id.*
[127] *Id.* at 599-600.
[128] *Big Stone II*, 744 N.W.2d at 600-01.
[129] *Id. at* 601.
[130] *Id.*
[131] *Id.* at 603.
[132] *Id.*
[133] *Big Stone II*, 744 N.W.2d at 603. (citations omitted).

6. Numerous Other Claims, Defenses, and Issues

Numerous other claims, defenses, and issues such as choice of law, proper forum, and venue can be expected to be raised as well. To the extent class actions are asserted, numerous issues relating to the propriety of a case proceeding as a class action will be presented. In *Comer*, the court dismissed claims against the property insurers (the initial defendants) and mortgage lenders, recognizing that the plaintiffs' attempt to combine actions against three disparate groups of defendants based upon distinct legal theories rendered the case unmanageable.[134]

IV. GLOBAL WARMING INSURANCE ISSUES

A. Impact on the Insurance Industry

The National Association of Insurance Commissioners ("NAIC") formed the Climate Change and Global Warming ("EX") Task Force, which has been charged with the responsibility of drafting an overview of the potential insurance-related impacts of climate change on insurance consumers, insurers, and insurance regulators.[135] The NAIC adopted a "white paper" entitled *The Potential Impact of Climate Change on Insurance Regulation*, noting that "[g]lobal warming and the associated climate change represent a significant challenge for Americans. As regulators of one of the largest American industries, the insurance industry, it is essential that we assess and, to the extent possible, mitigate the impact global warming will have on insurance."[136] The NAIC report also notes that "[g]lobal warming and the resultant climate change will have impacts across multiple lines of insurance."[137]

Apart from claims and litigation, global warming has resulted in the introduction of new insurance products and loss control services and activities. For example, several insurers have developed "green coverages" and some automobile insurers are reportedly structuring coverages and premiums related to miles driven in an effort to reduce greenhouse gas emissions. The Ceres Report published in August of 2006, entitled *From Risk to Opportunity: How Insurers Can Proactively and Profitably Manage Climate Change*, argues that the insurance industry has a long-term interest in addressing global warming risks and designing products designed to mitigate against climate change.[138]

This summer an insurer filed what may be the first declaratory judgment action regarding insurance coverage for global warming-related claims.[139] The insurer filed an action in a Virginia state court seeking a declaration that it is not obligated to provide a

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[134] *See* Comer v. Nationwide Mut. Ins. Co., No. 05 CV 436, 2006 WL 1066645 (S.D. Miss. Feb. 23, 2006) (the name of this case is now styled Comer v. Murphy Oil, U.S.A.).

[135] *See* National Association of Insurance Commissioners: Climate Change and Global Warming (EX) Task Force, http://www.naic.org/committees_ex_climate.htm (last visited Nov. 16, 2008).

[136] NAIC: Climate Change and Global Warming (EX) Task Force, *The Potential Impact of Climate Change on Insurance Regulation* (May 28, 2008), http://www.climateandinsurance.org/news/080528_NAICdisclosure.pdf (last visited Nov. 16, 2008). *See also* Press Release, National Association of Insurance Commissioners, Climate Change Study Focuses on Insurance Impact (June 2, 2008), http://www.naic.org/Releases/2008_docs/climate_study.htm (last visited Nov. 16, 2008).

[137] NAIC: Climate Change and Global Warming (EX) Task Force, *supra* note 136, at 15.

[138] Evan Mills & Eugene Lecomte, *From Risk to Opportunity: How Insurers Can Proactively and Profitably Manage Climate Change*, 2006 CERES REPORTS, www.ceres.org (follow "PUBLICATIONS" hyperlink; then follow "2006 Reports" hyperlink; then follow "From Risk to Opportunity . . ." hyperlink). *See also* Marc Gunther, *Insurance Companies Take on Global Warming*, FORTUNE, Aug. 24, 2006, http://money.cnn.com/2006/08/22/news/economy/pluggedin_gunther.fortune/index.htm (last visited Nov. 16, 2008).

[139] *Steadfast Ins. Co. v. AES Corp.*, Case No. 2008-858 (Circuit Court of Arlington County Virginia filed July 9, 2008).

defense or indemnity to its policyholder, AES Corporation, in connection with an underlying global warming case styled *Native Village of Kivalina v. Exxon Mobil Corp, et al.*, CV-08-1138 SBA (N.D. Cal.) (hereinafter, the "Kivalina lawsuit").

The underlying plaintiffs contend that global warming is destroying the land upon which Kivalina is located because of massive erosion caused by the reduction and melting of arctic ice that formerly acted as a protective barrier to coastal winter storms, storm waves, and surges. The plaintiffs allege that the results of global warming are necessitating the urgent abandonment and relocation of the village at an estimated cost of between $95 million and $400 million.[140] The plaintiffs allege that AES Corporation and other defendants named in the underlying complaint collectively contributed to global warming by emitting large quantities of greenhouse gasses into the earth's atmosphere; and, therefore, they are responsible for the resulting damages.

The insurer, Steadfast Insurance Company, which issued Commercial General Liability policies in effect from 2003 to 2008, agreed to defend the case under a reservation of rights and filed the declaratory judgment action. In the declaratory judgment action, Steadfast Insurance Company has asked the court to find that Steadfast Insurance Company does not owe coverage on the grounds that global warming is not the result of an "accident," given the energy industry's long-standing knowledge of risks associated with greenhouse gasses. More specifically, Steadfast contends that the underlying complaint does not allege property damage caused by an "occurrence" and seeks a declaration that the loss in progress endorsement in its policy precludes coverage. Steadfast also maintains the pollution exclusion bars coverage under the policies. This case is likely to be closely monitored by interested factions.

[140] Complaint at 1, Native Villiage of Kivalina v. Exxon Mobil Corp, No. CV-08-1138 SBA (N.D. Cal filed Feb. 26, 2008).

B. First-Party Claims

A principle focus of the insurance industry to date has been on first-party property exposures associated with global warming claims and the alleged causal connection between global warming and natural disasters such as Hurricane Katrina. Plaintiffs have sought coverage under homeowners' policies; property policies; and business interruption policies for property damage, lost profits, and other damages allegedly stemming from events linked to global warming.

Some trial courts, in response to claims relating to hurricane disasters from Hurricanes Rita, Irene, and Katrina have issued broad coverage rulings.[141] For example, in *Mierzwa v. Florida Windstorm Underwriting Association*, the court held that the Florida statute (the "valued policy law") mandated that, if a building is insured as to a covered peril and is a total loss, the insurer was liable to the owner for the full face amount of the policy no matter what other factors caused or contributed to the loss.[142] In *Mierzwa*, the insured property owner had wind insurance with one insurer and flood insurance with another. The wind insurer's policy had an anti-concurrent cause clause that excluded coverage for any damage other than wind. Florida's valued policy statute

[141] Unprincipled rulings in favor of coverage can be as short-sighted as they are wrong. A 2007 Ceres Report notes that, in Louisiana and Florida alone, more than 600,000 homeowners' property policies have been cancelled or were not renewed in the past year. Among the impacts is a stronger reliance on governmental entities as insurers of last resort. At one point, it was reported that Florida's state insurance pool swelled to about 1.5 million policyholders and it required a $715 million bailout from the Florida legislature to cover its losses. Mississippi's Wind Pool, which insures coastal property owners, suffered a $745 million loss from Hurricane Katrina, $100 million of which was paid back with a federal grant. Past experience also teaches that insurer insolvencies pose significant problems as well.

[142] Mierzwa v. Fla. Windstorm Underwriting Ass'n, 877 So. 2d 774, 778 (Fla. Dist. Ct. App. 2004).

stated that "[i]n the event of the total loss of any building . . . the insurer's liability, if any, under the policy for such total loss shall be in the amount of money for which such property was so insured."[143] The court concluded that the valued policy law did not require that a covered peril cause the entire loss. Under this reasoning, if the insured property was a total loss, the insurer was obligated to pay the face value of the policy, even if one of the causes of the loss was explicitly excluded from the policy. As a result of this decision, the Florida legislature amended the statute to specify that the face value of the policy is owed only if the loss actually resulted from the covered peril.

In *Landry v. Louisiana Citizens Property Insurance Co.*, the trial court held that the insurer must pay the full value of the homeowner's policy when part of the loss is covered and part of the loss is excluded, unless the method of calculating any deduction for excluded loss is set forth in the policy application.[144] On appeal, the Louisiana Court of Appeals reversed the trial court's judgment granting summary judgment in favor of the plaintiffs' and remanded the case for a determination of whether the insurer could prove that flood water (the non-covered peril) was the "efficient or proximate cause" of the total loss of plaintiffs' home.[145] Upon writ applications from both parties, the Louisiana Supreme Court granted certiorari and affirmed the decision of the appellate court.[146] The Louisiana Supreme Court found that the insurer validly set forth a different method of loss computation as allowed by Louisiana's Valued Policy Law, rendering the provisions of the statute at issue "inapplicable."[147] Therefore, the court held that the insurer was not obligated to pay the face value of the policy to the plaintiffs.

In *Ganier v. Specialty Risk Associates, Inc.*, the Louisiana Court of Appeals affirmed a trial court's holding that exclusions for wind and wind-driven water were clear and unambiguous, and barred coverage for Hurricane Katrina-related claims.[148] The *Ganier* court was divided and two dissenting opinions were issued arguing the exclusions were ambiguous.

In June 2008, a federal judge entered a $21.6 million dollar judgment in favor of a grocery store owner for property damage and business interruption losses sustained as a result of Hurricane Katrina.[149] The case is on appeal.

After some unfavorable developments to insurers at the federal trial court level in Katrina coverage litigation, the United States Court of Appeals for the Fifth Circuit has rendered a couple of decisions favorable to insurers. In *Tuepker v. State Farm*, the Fifth Circuit found that State Farm's anti-concurrent causation clause was not ambiguous or unenforceable and that a "storm surge" accompanying Hurricane Katrina was within a homeowner's policy's water damage exclusion.[150] Specifically, the Fifth Circuit held that: (1) the storm surge accompanying the hurricane was within the homeowner's policy's water damage exclusion; (2) the policy's anticoncurrent-causation clause was not rendered ambiguous and unenforceable by virtue of the policy's express coverage for wind damage; (3) the policy was not rendered ambiguous by the policy's Hurricane Deductible Endorsement; and (4) the policy

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[143] FLA. STAT. ANN. § 627.702(1) (West 2008).

[144] Landry v. La. Citizens Prop. Ins. Co., No. 85571-D (La. Dist. Ct., Vermilion Parish, Jan. 4, 2007) (granting plaintiffs' Partial Motion for Summary Judgment, finding insurer liable for the full value of the policy under Louisiana's Valued Policy Law, because the insurer had not set forth an alternative method of loss computation in the application).

[145] Landry v. La. Citizens Prop. Ins. Co., 964 So. 2d 463, 484 (La. Ct. App. 2007).

[146] Landry v. La. Citizens Prop. Ins. Co., 983 So. 2d 66 (La. 2008).

[147] *Landry*, 983 So. 2d at 82-83.

[148] Ganier v. Specialty Risk Associates, Inc., 977 So. 2d 1089 (La. Ct. App. 2008).

[149] Marketfare Annunciation, LLC v. United Fire & Casualty Co., nos. 06-7232, 06-7639, 06-7641, 06-7643, 06-7644, 2007 WL 4144944 (E.D. La. 2007)

[150] Tuepker v. State Farm Fire & Cas. Co., 507 F.3d 346 (5th Cir. 2007).

language controlled over the efficient proximate cause doctrine.[151]

In *In re Katrina Canal Breaches Litigation*, the Fifth Circuit, in addressing several consolidated insurance actions, held that flood exclusions in homeowners', renters', and commercial-property policies barred coverage for damage arising from flooding resulting from breaches or overtopping of levees, which occurred in the aftermath of Hurricane Katrina.[152] The court concluded that, even if the plaintiffs could prove that the levees were negligently designed, constructed or maintained, and that the breaches of those levels were due to this negligence, the flood exclusions in the plaintiffs' policies unambiguously precluded recovery.[153] The court found that, regardless of what caused the failure of the flood-control structures that were in place to prevent such a catastrophe, their failure resulted in wide-spread flooding and damaged the plaintiffs' property; and it further found that this event was excluded from coverage under the plaintiffs' insurance policies. The court rejected the policyholders' argument that, because the insurers could have more explicitly excluded floods that are caused in part by negligence, their failure to do so made the flood exclusions ambiguous. Some plaintiffs also pointed to policy forms that more explicitly excluded floods caused in part by actions or negligence of man. The Fifth Circuit concluded that the fact that an exclusion could have been worded more explicitly did not make it ambiguous.[154] On February 21, 2008, the United States Supreme Court denied certification.[155]

Most recently, the United States Court of Appeals for the Ninth Circuit in *Northrop Grumman Corporation v. Factory Mutual Insurance Company,* reversed the federal trial, and held that a flood exclusion contained in an excess property insurance policy applied to bar coverage for water damage in the wake of Hurricane Katrina to the insured's shipyard when the shipyard was covered in ten feet of water.[156]

C. General Liability Insurance

Many global warming claims for which policyholders may seek coverage may resemble in *some* respects and raise many of the same issues as "long-tail" coverage claims such as pollution, asbestos, or toxic tort claims. After all, global warming is not a phenomenon that is limited in time, space, and place. Instead, global warming developed over time; and the allegations will likely be that it was caused, at least in part, by acts or omissions of policyholders such as emitting or manufacturing or selling products that emitted greenhouse gasses over many decades. Similar to many pollution and toxic tort claims, the acts, omissions, and knowledge of many companies will be implicated by plaintiffs' allegations. Insurers can draw from prior claims and coverage litigation experience, particularly environmental and mass tort claims. For this reason, many insurers are turning to outside counsel that have served them well in those areas, to represent them in global warming coverage litigation. Similarly, many are using their environmental and mass tort claim departments to adjust claims and provide for an appropriate level of review and consistency. Care must be taken, however, not to assume that global warming coverage

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[151] *Id. See also* Leonard v. Nationwide Mut. Ins. Co., 499 F.3d 419, 430 (5th Cir. 2007) (holding that the policy's anti-concurrent causation clause was not ambiguous in context of Hurricane Katrina claims), *cert. denied*, 128 S.Ct. 1873 (2008).

[152] *In re* Katrina Canal Breaches Litig., 495 F.3d 191, 220-21 (5th Cir. 2007).

[153] *Id.* at 220-21.

[154] *Id.* at 210.

[155] Chehardy v. Allstate Indem. Co., 128 S. Ct. 1231 (2008); Xavier Univ. of La. v. Travelers Cas. Prop. Co. of Am., 128 S. Ct. 1230 (2008).

[156] Grumman Corp. v. Factory Mut. Ins. Co., 538 F.3d 1090 (9th Cir. 2008).

claims will be analogous to long-tail claims of the past in all respects.

1. Duty to Defend

The substantial legal and evidentiary hurdles plaintiffs face with respect to global warming claims with the potential to impact liability policies issued to corporate policyholders likely will be a substantial limiting factor on the indemnity obligations of liability insurers, even in the absence of coverage issues or defenses. Regardless of whether or not indemnity payments ultimately are made on behalf of a corporate policyholder, primary commercial general liability policies with defense obligations may be required in particular cases to defend the policyholder or to pay for the defense of the policyholder where there is a potential for coverage based upon the allegations of the underlying complaint, depending upon the law and policy language. Other issues may be presented such as whether the insurer may control the defense, whether the policyholder may select defense counsel and obtain reimbursement in a *Peppers* or *Cumis* situation, and the division of responsibilities among multiple insurers with defense obligations and the policyholder. In many instances, the insurer may have strong arguments that there is no duty to defend because the allegations do not implicate a policy or an exclusion bars coverage.

One case illustrates that, in some instances, there may be a duty to defend. A Texas court ruled that commercial general liability insurers must defend a policyholder in connection with the damage from sand erosion, finding that erosion was an "occurrence" and that the known-loss doctrine did not bar coverage.[157] In that case, the underlying suits alleged that, beginning in 1954, the club and others together began dredging nearby beaches for fishing purposes, which accelerated erosion of adjoining beaches. The suit claimed that the club and others were aware for at least twenty years that dredging was causing massive erosion and changes in the environment that threatened property and caused permanent and temporary loss of land.[158] Jefferson Insurance Group and Monticello Insurance Group agreed to defend the suits against the club. Westchester and U.S. Fire denied coverage, arguing that they had no duty to defend because the underlying suits alleged intentional acts, and there was no "occurrence," and that the loss-in-progress doctrine barred coverage. The policyholder gun club also filed a motion for summary judgment arguing that the allegations of negligence triggered coverage, there was an occurrence, and that the loss-in-progress doctrine did not apply because the club was unaware of any liability when it purchased the policies. The First District Texas Court of Appeals held that the underlying suits alleged an occurrence for purposes of triggering the duty to defend.[159]

2. Trigger of Coverage

The trigger of coverage issue is likely to be an important issue with respect to global warming-related claims. Generally speaking, trigger of coverage determines which, if any, insurance policies are potentially available to respond to a claim. Most occurrence-based general liability policies potentially respond only for "injuries" or "damages" that take place during the policy period.[160]

Although plaintiffs may allege conduct going back for several decades in terms of greenhouse gas emissions or other conduct contributing to climate change, that does not mean that policies going back that far are triggered by claims, even in jurisdictions that have applied continuous or multiple policy triggers in the context of asbestos or

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[157] Westchester Fire Ins. Co. v. Gulf Coast Rod, Reel & Gun Club, 64 S.W.3d 609, 613 (Tex. App. 2001).

[158] *Id.* at 610.

[159] *Id.* at 613.

[160] *See generally* SCOTT M. SEAMAN & JASON R. SCHULZE, ALLOCATION OF LOSSES IN COMPLEX INSURANCE COVERAGE CLAIMS, at Chapter 2 (2d ed. 2006 & Supp. 2007).

environmental claims. This is one area in which asbestos claims and global warming claims are not analogous.

At least in most global warming claims, it is not the global warming that is the injury or damage itself for which recovery is sought; nor is it the emissions themselves. Rather, it is the damage or injury that takes place relatively recently for which damages are sought. Indeed, there typically would be gaps between the emissions, the cumulative effect producing climate change, the event (such as a hurricane), and the injury or damage for which recovery is sought. Thus, the trigger period properly may be limited, for example, to the time after the commencement of the damage-causing storm or portion of time thereof.

The corporate defendant's knowledge, emissions, and activities may be relevant to other coverage issues such as whether there was an occurrence, but it should not trigger coverage under general liability policies. In sum, trigger of coverage is an area in which parties and courts must consider the particular global warming claim without rote application of cases decided in the context of asbestos or traditional environmental claims.

For claims-made contracts, satisfaction of the "claims made" requirements and any retroactive date is required.

3. "Occurrence" And Fortuity Issues

The policyholder bears the burden of establishing the existence of an "occurrence." The policyholder must demonstrate that the damage or injury resulted from an occurrence which is defined, for example, by the 1973 ISO form as "an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured." Damages or injuries expected or intended by the policyholder do not satisfy the "occurrence" definition or are otherwise excluded by the policy and/or by governing law. In many cases, insurers will argue that no coverage is available to corporate policyholders because they knew about the greenhouse emissions, yet continued to engage in activities that contributed to global warming.

In *Comer v. Nationwide Mutual Insurance Co.*, plaintiffs attempted to establish a causal chain between defendants' continuing greenhouse gas emissions and the creation of climatic conditions allowing Hurricane Katrina to develop and cause damage.[161] Substantial questions arose as to whether the policyholder's greenhouse gas emitting activities, or manufacture of emission-generating products, constituted an "occurrence," and whether the damage was "expected or intended." The pleadings in *Comer* alleged that corporate defendants, despite their "knowledge of warnings" concerning the linkage between greenhouse gas emissions and climate change, "knowingly" and "intentionally" continued to engage in activities that caused such emissions and/or continued to manufacture emissions-generating products.[162]

In addition, many states, such as California, bar insurance coverage for willful actions, either by virtue of statute or common law. For example, California Insurance Code Section 533 provides: "An insurer is not liable for a loss caused by the willful act of the insured."[163]

4. The Issue of Number of Occurrences and Limits Issues

Assuming the policyholder is able to establish the existence of an occurrence, issues may be presented as to how many occurrences are implicated by a loss for

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[161] Comer v. Nationwide Mut. Ins. Co., No. 05 CV 436, 2006 WL 1066645 (S.D. Miss. Feb. 23, 2006) (the name of this case is now styled Comer v. Murphy Oil, U.S.A.).

[162] *See* Third Amended Complaint, *Comer*, 2006 WL 1066645, *available at* 2006 WL 1474089.

[163] CAL. INS. CODE § 533 (West 2007).

purposes of limits, applications of deductibles, or self-insured retentions.[164]

5. Allocation Issues

Assuming one or more insurance policies are implicated by a loss, issues concerning the proper allocation between the policyholder and the various insurers may be presented.[165]

6. "As Damages"/Property Damage Caused By an Occurrence

Most general liability policies provide coverage for "damages" because of "property damage" or "injuries" caused by an "occurrence." Some global warming claims simply may not be covered because they do not satisfy these fundamental elements.

In *Cinergy Corp. v. Associated Electric & Gas Insurance Services, Ltd.*, the Indiana Supreme Court considered this precise issue.[166] In *Cinergy*, several insurers filed a declaratory judgment action against Cinergy seeking to determine the extent of coverage obligations for an underlying lawsuit brought by the United States and several intervening parties asserting claims for injunctive relief to force Cinergy to comply with the Clean Air Act ("CAA") by installing pollution control equipment to reduce future emissions of pollutants and seeking the imposition of fines and penalties for Cinergy's failure to comply with the CAA.[167] Cinergy filed a motion for summary judgment against one of its primary insurers, AEGIS, seeking payment of past defense costs, pre-judgment interest, and an order directing AEGIS to pay future defense costs as incurred. The trial court denied the motion and the matter ultimately was decided by the Indiana Supreme Court.

In affirming, the Indiana Supreme Court noted the insurance policy provided coverage for damages "because of bodily injury or property damage '*caused by* an OCCURRENCE.'"[168] The court explained:

> The clear and unmistakable import of the phrase "caused by" is that the accident, event, or exposure to conditions must have preceded the damages claimed – here, the costs of installing emission control equipment.
>
> But what the power companies here claim to be covered, the installation costs for equipment to prevent future emissions, is not caused by the *happening* of an accident, event, or exposure to conditions but rather result from the *prevention* of such an occurrence. We cannot read the policy requirement that covered damages result from the happening of an occurrence to mean that coverage extends to damages that result from the prevention of an occurrence. . . . [W]e discern no ambiguity here that would permit the occurrence requirement reasonably to be understood to allow coverage for damages in the form of installation costs for government mandated equipment intended to reduce future emissions of pollutants and to prevent future environmental harm.[169]

Cinergy claimed that plaintiffs also sought damages to clean up past harm caused by Cinergy's prior emissions. The court rejected this argument:

> Notwithstanding the federal lawsuit's various references to seeking relief that would "remedy" past violations and harm to public health, the power companies acknowledge that the injunctive remedy sought by the federal lawsuit

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[164] *See generally* SEAMAN & SCHULZE, *supra* note 160, at Chapter 7.

[165] *See generally* SEAMAN & SCHULZE, *supra* note 160.

[166] Cinergy Corp. v. Associated Elec. & Gas Ins. Services, Ltd., 865 N.E.2d 571 (Ind. 2007).

[167] *Id.* at 572.

[168] *Id.* at 582.

[169] *Id.* at 581.

> is "to force Cinergy to install equipment to contain any *further* excess emissions and allow the environment to recover." The federal lawsuit is directed at preventing future public harm, not at obtaining control, mitigation, or compensation for past or existing environmentally hazardous emissions.[170]

Similarly, several cases have recognized that costs of doing business, maintenance, facility improvements, civil penalties, economic loss, and regulatory compliance costs generally are not covered under third-party liability contracts.[171]

7. Application of Exclusions

There are numerous exclusions that may apply to preclude coverage, depending upon the particular claim, policy, and applicable State's law.

Pollution exclusions – whether the "sudden and accidental," "absolute," or "total" – are likely to apply to bar coverage for many global warming claims. Greenhouse gas emissions would seem to fit squarely within the definition of "pollutant." Indeed, the Supreme Court now has ruled that greenhouse gasses are pollutants and subject to regulation by the EPA.[172] Other exclusions also may apply.

8. Settlement and Release

Insurers presented with a global warming claim by a policyholder should carefully review any prior settlement agreements entered into with the policyholder to determine the scope of the release. Prior settlements involving pollution or long-tail claims, for example, may operate to release the claims.

9. Compliance with Policy Conditions

Compliance with policy conditions, such as notice provisions, likely will present issues in many cases.

D. Professional Liability Coverage

1. Corporate Disclosure of Global Warming Risks

Given the recent attention in the corporate boardroom to climate change concerns, the heightened SEC disclosure requirements, and the current legal and political climate, the threat of global warming-related claims in this context is apparent. Potential threats in this context include claims of breach of fiduciary duties on the part of directors and officers and derivative claims on behalf of the corporate entity. There is also the potential for claims of non-disclosure or inadequate disclosure of climate change risks. Such claims could take various forms. For example, shareholders could allege a breach of the duty of care in managing the affairs of the corporation so as to avoid liability for global warming-related claims or they could allege such a breach in connection with expected regulatory violations. There also is a threat of inadequate disclosure to security holders of the corporation on the risks posed by the global warming exposures.

Notably, the disclosure obligations on corporations are significant. Regulation S-K, Item 101 (c)(1)(xii) requires companies to disclose the current and anticipated "material effects" of compliance with environmental regulations:

> Appropriate disclosure also shall be made as to the material effects that compliance with Federal, State, and local provisions which have been enacted or adopted regulating the discharge of materials into the environment, or

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[170] *Id.* at 582 (citation omitted).

[171] *See generally* SEAMAN & SCHULZE, *supra* note 160, at Chapter 10.

[172] *See* Massachusetts v. E.P.A., 549 U.S. 497, 127 S. Ct. 1438, 1440, 1446 (2007).

> otherwise relating to the protection of the environment, may have upon the capital expenditures, earnings and competitive position of the registrant and its subsidiaries. The registrant shall disclose any material estimated capital expenditures for environmental control facilities for the remainder of its current fiscal year and its succeeding fiscal year and for such further periods as the registrant may deem materials.[173]

Item 303 requires companies to "describe any known trends or uncertainties that have had or that the registrant reasonably expects will have a material favorable or unfavorable impact on net sales or revenues or income from continuing operations."[174]

Climate change risks are among the many criteria many insurers now use to evaluate exposures under corporate D&O policies.[175] These exposures include regulatory risks and the costs of compliance, non-disclosure of investment risks, and reputation risk. Insurers may inquire into such items as policyholder responses to the Carbon Disclosure Project, countries/jurisdictions of company operations, accounting and reporting systems in place for greenhouse gas emissions, identity of gasses that are accounted for in the greenhouse gas reporting system, company intentions to address potential liabilities from emissions reduction related regulation (*e.g.*, the Kyoto Protocol or the European Union Emissions Trading Scheme), and gross greenhouse gas emissions.

2. D&O's And Other Professionals May Be Targets To Global Warming-Related Claims; However, Several Policy Exclusions May Be Invoked

Professionals such as architects, engineers, accountants, and lawyers may be subject to a variety of global warming-related claims as well.

D&O and professional liability claims in the context of global warming are also likely to present significant coverage issues. For example, pollution exclusions are common in the modern D&O market.[176] A D&O policy's pollution exclusion is likely to serve as a significant coverage defense in many instances. Some D&O policies have pollution exclusions with carve-outs to the extent the pollution claim is a shareholder claim.

Other significant coverage issues include intentional conduct exclusions, which apply typically to intentional conduct outside the scope of the corporation, whether claims are regarded as uninsurable as a matter of law or public policy, and prior act exclusions. In addition, compliance with policy terms and claims made requirements as well as issues of non-disclosure and misrepresentation may be presented.[177]

V. CONCLUSION

Global warming and global warming-related claims will present numerous challenges to insurers and their corporate and professional policyholders. These challenges include actuary, underwriting and risk management, loss control and safety practices, claims handling, defending underlying cases, and coverage litigation. This is an emerging area for which monitoring and adjustment will be required. Claims must be evaluated based upon the claim's specific facts, policy language, and controlling law. The foregoing is intended to provide an overview of developments and some of the issues that may be presented.

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[173] 17 C.F.R. § 229.101(c)(1)(xii) (2008).

[174] 17 C.F.R. § 229.303(a)(3)(ii) (2008).

[175] *See, e.g.*, www.ceres.org/news/pf.php?nid=124.

[176] *See, e.g.*, National Union Fire Ins. Co. of Pittsburgh, Pa. v. U.S. Liquids, Inc., 88 Fed. App'x 725 (5th Cir. 2004); Danis v. Great Am. Ins. Co., 823 N.E.2d 59 (Ohio Ct. App. 2004).

[177] *See, e.g.*, Level 3 Communications, Inc. v. Fed. Ins. Co., 272 F.3d 908 (7th Cir. 2001); *D&O Litigation Teleconference Update: Global Warming, Stock Options Backdating Sub-Prime Lending*, MEALEY'S, Aug. 15, 2007.