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Will Global Warming Tort Claims Increase Coverage Litigation?

By J. Robert Renner

With the future of federal legislation and Environmental Protection Agency regulation unclear, a number of states and other parties have initiated common law tort actions based on global warming claims. While the number of such actions remains small and the reasons for these actions may be as much political as economic, the trend should nevertheless be of concern to comprehensive general liability insurers. If any of the current crop of cases meet with success, more will surely follow. And many of the defendants can be expected to tender the defense of these claims to their comprehensive general liability insurers, particularly if the defendants have substantial portfolios of historic, occurrence-based liability policies.

At least five global warming tort actions have been filed to date, four of which remain pending. All five were filed in the federal courts. The oldest and furthest advanced is *Connecticut v. American Electric Power Co. Inc.*, 582 F.3d 309 (2d Cir. 2009), actually involving two separate complaints filed in 2004 by eight states, New York City, and three land trusts against six electric power companies. The defendants are alleged to account for approximately 10 percent of human-generated carbon dioxide emissions in the U.S. The plaintiffs allege a federal common law nuisance (or state nuisance claim in the alternative) and seek injunctive relief in the form of an immediate cap and future, staged reductions in the defendants' carbon dioxide emissions. The district court dismissed the complaints as presenting non-justiciable political questions, but the 2nd U.S. Circuit Court of Appeals reversed on Sept. 21, 2009, ruling that the complaints did not present political questions, the plaintiffs had standing and had stated a claim under the federal common law of nuisance, and the common law claims were not displaced by any federal statute. (Judge Sonia Sotomayor was originally a member of the panel but did not participate in the final decision because of her elevation to the U.S. Supreme Court.) Rehearing en banc was denied, and petitions for *certiorari* to the U.S. Supreme Court are anticipated. A very similar case was filed by the state of California (one of the state plaintiffs in *American Electric Power*) against six automakers in 2006, *California v. General Motors Corp.*, 2007 U.S. Dist. LEXIS 68547 (N.D Cal. 2007). The defendants were alleged to produce vehicles accounting for more than 20 percent of U.S. carbon dioxide emissions. California alleged a public nuisance under federal and California laws, and sought monetary damages and declaratory relief. The district court dismissed the complaint as presenting non-justiciable political questions. Although California initially pursued an appeal, it voluntarily dismissed its appeal in June 2009.

Two other pending common law actions do not involve states as parties. In *Comer v. Murphy Oil USA*, 2010 U.S. App. LEXIS 11019 (5th Cir. 2010), a number of residents and private landowners along the Mississippi Gulf Coast filled a putative class action in 2005 against numerous energy and chemicals companies, alleging that global warming had aggravated the effects of Hurricane Katrina, resulting in damage to plaintiffs' property. The plaintiffs allege Mississippi common law claims of public and private nuisance, trespass, negligence, unjust enrichment, misrepresentation, and

conspiracy. The district court dismissed the complaint as presenting non-justiciable political questions. A three-judge panel of the 5th U.S. Circuit Court of Appeals reversed with respect to the nuisance, trespass, and negligence claims, but this opinion was vacated by the grant of rehearing en banc, and the entire appeal was later dismissed (on May 28, 2010) when the en banc court lost its quorum due to the recusal of judges, resulting in the restoration of the original dismissal by the district court. A petition for *certiorari* to the U.S. Supreme Court seems likely. Another case is currently pending before the 9th U.S. Circuit Court of Appeals, *Native Village of Kivalina v. ExxonMobil Corp.*, 633 F.Supp.2d 863 (N.D. Cal. 2009). In a complaint filed in 2008, the *Kivalina* plaintiffs allege that their Alaskan village must be relocated because of erosion resulting from the loss of protective sea ice, a consequence of global warming. The defendants are 24 energy and utility companies. The complaint seeks damages based on a federal common law claim of nuisance, as well as state law claims. The district court dismissed the complaint as presenting non-justiciable political questions and for lack of standing under Article III. Plaintiffs have appealed.

Although none of these cases have progressed beyond the pleading stage, there are grounds for concern about liability exposure, particularly in light of the 2nd Circuit's opinion in *American Electric Power*. Even if the U.S. Supreme Court eventually rules that global warming tort claims are non-justiciable or inconsistent with federal court standing requirements, a path may still be open to plaintiffs in the state courts. While causation is certainly a problem, the substantive standards for nuisance claims are malleable and vague, and vary between jurisdictions. The best long-term solution for defendants may be federal legislative preemption.

From the standpoint of comprehensive general liability insurers, claims seeking monetary damages are of far greater concern than claims seeking purely injunctive relief. In most jurisdictions, claims for injunctive relief do not trigger a duty to defend under comprehensive general liability policies. Claims for injunctive relief, moreover, are likely to implicate present and future greenhouse gas emissions, rather than the historic emissions potentially implicated by a claim for damages.

Numerous coverage defenses will potentially be available to an insurer confronted with the tender of a global warming tort claim, although which specific defenses will be relevant in a given case will depend on the facts of the claim, the policy language, and the law of the governing jurisdiction. Defenses likely to be significant include the absence of an "accident" or "occurrence" under the language of the policy's insuring clause, the absence of damages during the policy period, that the damages were expected or intended from the standpoint of the insured, and the presence of pollution exclusions in the policies. Although it might be thought a matter of common sense that greenhouse gases emitted as a waste product of industrial operations constitute "pollution," this fact will undoubtedly be contested by some insureds. In this regard, the Supreme Court's opinion in *Massachusetts v. Environmental Protection Agency*, 549 U.S. 497 (2007), holding that greenhouse gas emissions constitute "air pollutants" within the meaning of the Clean Air Act, may prove helpful.

If global warming tort claims continue, a wave of coverage litigation will follow. As of February, one insurer had already obtained a trial court order in a declaratory judgment action that the *Kivalina* litigation did not give rise to an "occurrence" within the meaning of that insurer's liability policies. *Steadfast Insurance Co. v. The AES Corp.*, 2010 Va. Cir. LEXIS 35. This order is the first of what may be many judicial rulings on the subject of insurance coverage for global warming tort claims.

The opinions expressed are those of the author and do not necessarily reflect the views of the firm or its clients.

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