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A Change in Climate: The Chilling Effect of Global Warming

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I. INTRODUCTION

In August 2005, Hurricane Katrina ripped through Louisiana and Mississippi leaving behind a wake of destruction that still affects the region. Classified as the costliest natural disaster in United States history, economic damages resulting from Hurricane Katrina are estimated to exceed $10 billion (US). Not surprisingly, environmentalists and scientists immediately attributed Hurricane Katrina's severity to one cause – global warming.

Hurricane Katrina is but one example cited by environmentalists and scientists in support of the devastating effects of global warming. In August 2007, eight straight days of torrential rains in the Midwest of the United States resulted in unprecedented flooding, 18 deaths and in excess of $115 million (US) in property damage. A prolonged heat wave in the western United States this past summer caused temperatures to soar above 100 degrees Fahrenheit, resulting in devastating droughts, wildfires, freeway closures, property damage, and deaths. Similar destruction has occurred across the globe. The Indian Ocean Tsunami of 2004 resulted in approximately 300,000 deaths and in excess of $10 billion (US) in damage. In each of these cases, global warming was cited as a contributing factor.

The question remains, however, to what extent will the insurance industry feel the economic heat of "climate change litigation," tabbed by plaintiffs' attorneys as the next tobacco litigation? To date, climate change litigation in the United States has been slow to develop. The initial climate change lawsuits were instituted by environmental groups, states and even private citizens against public agencies seeking to secure equitable and legal relief from the effects of climate change in light of legislative inaction. To a lesser extent, climate change lawsuits have been instituted against private entities such as automobile manufacturers, chemical companies and power companies. Inasmuch as the United States is the world's largest global warming

polluter, legal prognosticators anticipate an increase in climate change lawsuits against industrial companies whose products, facilities and plants emit greenhouse gases ("GHG"). For those who insure this targeted class, it is with bated breath that they await action by the United States' government and courts as to whether such lawsuits are viable.

The United States Supreme Court's landmark decision in Massachusetts v. EPA[1] has the potential to drastically alter the course and impact of climate change litigation in the United States. As discussed in greater detail below, the Supreme Court's decision could open the door to lawsuits against private entities on the theory that they caused global warming through GHG emissions. If that occurs, the insurance industry can anticipate a landslide of claims by the target defendants seeking coverage for their actions that allegedly contribute to global warming.

In this paper, we discuss the development of climate change litigation in the United States. Our discussion includes a breakdown of the reported decisions against both governmental and private entities, as well as a detailed discussion of the Supreme Court's decision in Massachusetts v. EPA and its potential impact on future climate change litigation. Finally, we discuss the imminent influence of climate change lawsuits on casualty insurers. In particular, we discuss the applicability of pollution exclusions to global warming claims and the implications on directors and officers ("D&O") insurance policies stemming from the failure to disclose and/or reduce GHG emissions.

II. CLIMATE CHANGE LITIGATION

Climate change is "any significant change in measures of climate (such as temperature, precipitation, or wind) lasting for an extended period (decades or longer)."[2] The term climate change is used interchangeably with global warming to refer to the rise in the Earth's atmospheric temperature as a result of an increase in heat-trapping greenhouse gases (e.g. carbon

dioxide, methane, and nitrous oxide).[3] From 1990 to 2005, GHG emissions rose 16%.[4] Carbon dioxide alone, the leading GHG emission, rose 20%.[5] The effects of climate change range from catastrophic weather events to "sea level rise, shrinking glaciers, changes in the range and distribution of plants and animals, trees blooming earlier, lengthening of growing seasons, ice on rivers and lakes freezing later and breaking up earlier, and thawing of permafrost."[6] Climate change even affects societies' environments and lifestyles.[7]

The pervasive effects of climate change prompted queries into the appropriate responsive measures. In the past, environmental crises were addressed by the legislature through initiatives such as the Clean Air Act ("CAA"). However, climate change has gone unchecked by federal, state and local legislatures. For example, the United States Environmental Protection Agency ("EPA") was petitioned by several states and environmental groups on October 20, 1999, to exercise its authority under the CAA to regulate the GHG emissions of new motor vehicles.[8] The EPA's denial of the petition on September 8, 2003, prompted the lawsuit and subsequent Supreme Court decision in Massachusetts v. EPA.[9] Despite these recent events, Congress and federal agencies remain hesitant to directly address the problem.[10] As a result, "[l]awsuits are proliferating [and likely will continue] in the absence of federal regulatory action."[11]

III. THE LEGAL THEORIES OF CLIMATE CHANGE LITIGATION

The current view of climate change litigation, particularly in the wake of Massachusetts v. EPA, is that it has the potential to be the next series of tobacco cases. To consider the potential of this litigation, we must review prior climate change litigation – the theories used and the success rates. For ease of discussion, this section is broken down into two parts:

(A) suits against public agencies to compel regulation of GHG emissions; and

(B) suits against private entities for injunctive relief and monetary damages.

The following is a non-exhaustive list of climate change lawsuits filed to date. Analysis of the legal theories employed and impediments faced by litigants will foster a better understanding of the potentials and the pitfalls of this new litigation.

A. Suits Against Public Agencies to Compel Regulation of GHG Emissions

Litigation to enforce regulation of global warming was conceived in the early 1990s. Though the science underlying climate change litigation is ever-evolving, the nature of climate change litigation has changed little since then. Major obstacles faced by litigants remain, including standing and justiciability challenges.

In Los Angeles v. Nat'l Highway Traffic Safety Admin.,[12] petitioners, including cities, states, and environmental groups, challenged a federal agency's decision not to prepare an environmental impact statement addressing the global warming impact of relaxing the Corporate Average Fuel Economy ("CAFÉ") standards for automobile model years in the late 1980s.[13] The court found petitioners had standing to sue based upon their obligations under the CAA and the National Environmental Protection Act ("NEPA"). A party has standing to sue if he or she has a personal stake in the outcome of the litigation in the form of a concrete injury causally connected to the defendant's actions that is capable of redress that does not assert a political question or generalized grievance for which the court lacks jurisdiction to review.[14] In finding that the GHG emissions conferred standing, the majority stated, "the evidence in the record suggests that we cannot afford to ignore even modest contributions to global warming."[15]

Conversely, in Foundation on Economic Trends v. Watkins,[16] the court held that environmental organizations did not have standing to assert a claim against several federal agencies that were alleged to have failed to adequately address the effects of federal reactions to global warming as required under the NEPA. The court found plaintiffs' claim for

"informational injury to be virtually indistinguishable from an ideological interest in the problem of global warming that, without more, is insufficient to confer standing."[17] Despite these inconsistent rulings on the issue of standing, such lawsuits continued. In fact, climate change lawsuits even flourished due to global environmental initiatives such as the Kyoto Protocol and increased public awareness.

The most common lawsuits filed regarding enforcement of environmental regulations arise out of the provisions of the CAA or CAA-based state emissions standards. For example, in Coke Oven Environmental Task Force v. EPA,[18] various states, major cities, and environmental groups sued the EPA, alleging it failed to establish a new source performance standard as required under the CAA. Similarly, in Central Valley Chrysler-Jeep, Inc. v. Witherspoon.,[19] several automobile manufacturers and dealers challenged a California law requiring all motor vehicles sold in the state to meet emission standards for carbon dioxide, methane, nitrous oxide, and hydrofluorocarbons. Both cases were stayed in light of the decision pending in Massachusetts v. EPA which also dealt with the EPA's authority to regulate global warming pursuant to the provisions of the CAA. As of the date of this paper, Witherspoon is expected to be remanded and Coke Oven is scheduled for rehearing October 2007.[20]

The provisions of the CAA were also considered in Northwest Environmental Defense Center et al. v. Owens Corning.[21] Environmental organizations sued Owens Corning for building a facility without a preconstruction permit required under the CAA. Owens Corning moved to dismiss for lack of standing. The Oregon District Court found plaintiffs had standing to sue based on (1) the facility's contribution to global warming, (2) the facility's harm to members of plaintiffs' organizations, and (3) plaintiffs' sufficiently concrete and particularized injury though it was of "wide public significance."[22] Ultimately, this case settled; Owens

Corning agreed to concessions including withdrawal of the permit and payment of monies toward environmental projects in Oregon.[23]

Finally, the decisions in Border Power Plant Working Group v. Department of Energy[24] and Center for Biological Diversity v. Abraham[25] signaled a potential turning point on the issue of standing. In Border Power Plant, environmentalists alleged that the Department of Energy's ("DOE") failure to appreciate the environmental impact of electrical lines installed across the US-Mexican border violated federal regulations, including the NEPA. Plaintiffs' geographic proximity to the proposed electric lines and the interest in protecting the public health conferred standing. Specifically, the Border Power Plant court, forecasting the holding reached in Massachusetts v. EPA in relation to the EPA's regulation duties pursuant to the CAA, held that the DOE's environmental analysis was inadequate because it failed to address the emissions impact of carbon dioxide emissions.[26]

The California courts went even further in Abraham. Environmental organizations alleged that various federal agencies failed to enforce the provisions of the Energy Policy Act of 1992 related to alternative fuel vehicles. Plaintiffs' concerns about global warming were deemed "too general, too unsubstantiated, too unlikely to be caused by defendants' conduct, and/or too unlikely to be redressed by the relief sought to confer standing."[27] Nonetheless, the court found plaintiffs had standing to sue because pollution would be lessened if the agencies fulfilled their obligations under the Act. Hence, the courts opened the door to expand the standing requirements and the rationale was adopted by the Supreme Court in Massachusetts v. EPA.

B. Suits Against Private Entities for Injunctive Relief and Monetary Damages

Though less prevalent than cases seeking enforcement of environmental regulations, lawsuits against private entities are acutely significant due to their potential impact on insurers.

To comprehend the current state of climate change litigation, it is important to understand the courts' position on tort damages pre-Massachusetts v. EPA, and the potential changes flowing from that decision.

In Connecticut v. American Electric Power, Inc.,[28] eight states and New York City brought suit pursuant to federal common law public nuisance and sovereign interests against the five largest emitters of carbon dioxide among electricity generators. Each of these electric companies is considered a private entity. The consolidated case alleged that defendants' carbon dioxide emissions contribute to global warming. The Court for the Southern District of New York dismissed the complaint as a non-justiciable political question, finding that resolution of the issues requires "identification and balancing of economic, environmental, foreign policy, and national security interests."[29] The decision has been appealed.[30]

In Barasich v. Columbia Gulf Transmission Co.,[31] Louisiana residents sued various privately-held companies in the wake of Hurricane Katrina for tort damages caused by erosion to Louisiana's coastal wetlands. The United States District Court for the Eastern District of Louisiana found that plaintiffs asserted a justiciable question, noting that the plaintiffs in Barasich, unlike the plaintiffs in Amer. Elec. Power, Inc.,[32] sought damages rather than injunctive relief that did not require extensive policy determinations rising to the level of a non-justiciable political question.[33] The case was nevertheless dismissed for failure to state a cause of action under Louisiana law.

The foregoing cases illustrate the issues that have to date plagued climate change litigation, including questions of standing, the authority to regulate GHG emissions, and the tort rights arising from global warming. But as illustrated in the next section, the pivotal case of

Massachusetts v. EPA (partially) resolved these obstacles and has the potential to greatly impact climate change litigation in the United States.

IV. MASSACHUSETTS V. EPA

A. Summary of Massachusetts v. EPA

The catalyst for this watershed decision was a rule-making petition that was filed "[o]n October 20, 1999, [by] a group of 19 private organizations . . . asking EPA to regulate 'greenhouse gas emissions from new motor vehicles under § 202 of the Clean Air Act.'"[34] As background, the CAA was first enacted in 1970 and most recently amended in 1990 in response to the growing problem of air pollution. The CAA, in pertinent part, sets forth the EPA's authority to act with regard to motor vehicle air pollution, stating:

> The Administrator shall by regulation prescribe (and from time to time revise) in accordance with the provisions of this section, standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.[35]

Further, the CAA defines an "air pollutant" as "any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive . . . substance or matter which is emitted into or otherwise enters the ambient air."[36] These provisions of the CAA were relied upon to petition the EPA as to GHG emissions. After much delay, the EPA ultimately denied the petition, claiming that it lacked the authority under the CAA to regulate climate change and, even if it had the authority, the exercise of same was improper.[37] As a result, the petitioners filed suit in the United States District Court for the District of Columbia. The questions ultimately certified to the United States Supreme Court were "whether EPA has the statutory authority to regulate greenhouse gas emissions from new motor vehicles; and if so, whether its stated reasons for refusing to do so are consistent with the statute."[38]

The threshold issue that the Supreme Court considered was whether the petitioners had standing to sue. As outlined above, for a party to have standing to sue, he or she must have a personal stake in the outcome of the litigation in the form of a concrete injury causally connected to the defendant's actions that is capable of redress.[39] Also, "[w]hen a litigant is vested with a procedural right, that litigant has standing if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant."[40]

Pursuant to the aforementioned standard, the Supreme Court concluded that Massachusetts had standing to sue. First, petitioners have a right to challenge the EPA's actions pursuant to the CAA. Second, the Court found petitioners had standing to sue because of "Massachusetts' stake in protecting its quasi-sovereign interests"[41] and its "particularized injury [of coastal erosion] in its capacity as a landowner."[42] Of particular note is the Court's finding that even though climate change risks are widely shared and regulation may only slow GHG emissions, Massachusetts still had a particularized injury capable of redress.[43] In sum, the Court determined that the alleged injuries of coastal erosion suffered by petitioners were concrete and sufficiently causally related to motor vehicle GHG emissions such that it was appropriate for petitioners to challenge the EPA's actions pursuant to the CAA.

The next question before the Court was whether the EPA has authority to regulate GHG emissions pursuant to the CAA. Based upon the definition of "air pollutant" in the CAA,[44] the Court concluded that it does. Though the Legislature may not have appreciated the possibility of global warming when the CAA was originally enacted in 1970, the broad definition of airborne compounds includes carbon dioxide.[45] There was no basis to construe the term in another way. Therefore, the Court held that the "EPA has the statutory authority to regulate the emission of such gases from new motor vehicles."[46] As a result, the Court remanded the matter for the EPA

to reconsider the petition and base its reasoning for denying or approving the petition on the language of the CAA.[47]

B. The Impact of Massachusetts v. EPA

The impact of Massachusetts v. EPA on climate change litigation cannot be overstated. As demonstrated in Part III of this paper, prior litigation was oftentimes marred by problems of standing and allegations that federal agencies lacked authority to act, but the Supreme Court dealt with these problems in Massachusetts v. EPA. Hence, analysis of this watershed decision is important to deduce what problems were resolved and what questions remain unanswered.

First, the Supreme Court determined that the EPA had authority to control GHG emissions pursuant to the CAA. This precedential decision can therefore be extended to reach similar conclusions with regard to the CAA in other contexts and other statutory frameworks that were enacted to combat particular environmental ills. For example, in Green Mt. Chrysler Plymouth Dodge Jeep v. Dalmasse,[48] automobile manufacturers and local dealers challenged Vermont's adoption of California's GHG automobile emission regulations as preempted or violative of federal regulations including the CAA. The court found standing to sue based upon plaintiffs' allegations of "[p]robable economic injury resulting from governmental action that alters competitive conditions."[49]

Importantly, after determining that plaintiffs' had standing to sue, the United States District Court of the District of Vermont rendered one of the first post-Massachusetts v. EPA decisions. The court analyzed the Massachusetts v. EPA ruling and held that the CAA-derived state regulations of Vermont, imitating California's laws,[50] were neither preempted by, nor impermissible under federal law.[51] As a result, there is a reasonable basis for the proliferation of

climate change lawsuits against federal, state and local agencies to compel regulation of GHG emissions.

Second, the Supreme Court resolved the standing issue in relation to climate change litigation asserted against public agencies. Prior courts under similar circumstances determined that litigants lacked standing because they asserted only generalized grievances.[52] In response, the Court cautioned that just because "climate-change risks are 'widely shared' does not minimize" standing[53] and reduction in emissions to slow global warming provides a sufficient impetus to warrant action.[54] This conclusion was reached despite the fact that there was no absolute causal connection, the possibility of other contributing factors, and the reality that regulation of motor vehicle emissions would not reverse global warming.[55] Thus, it appears that the Court may have lowered the standing requirement for climate change litigants.[56]

On the other hand, the Court's standing conclusion created a "special status" for state sovereigns that may have limited applicability.[57] In fact, a major question remains unresolved – can private litigants sue in tort for damages premised on global warming and GHG emissions? In the wake of Massachusetts v. EPA, it was universally believed that "[t]he decision is likely to embolden climate change litigants." [58] Nevertheless, the few decisions applying Massachusetts v. EPA suggest that the courts may be disinclined to extend "standing" to private tort litigants.

In California v. GMC,[59] the California court expressly denied the right to seek tort damages for global warming. This suit was filed on behalf of the people of California against the six major automobile manufacturers, alleging that under federal and state common law the defendants created a public nuisance. Upon review after the decision in Massachusetts v. EPA, the California court held that plaintiffs' claims presented non-justiciable issues.[60] The California court found that the Supreme Court's decision emphasized the importance of initial policy

determinations that have not been made by the Legislature in relation to tort claims.[61] Specifically, the California court held that "[w]hile the Supreme Court did not expressly address the issue of justiciability [in Massachusetts v. EPA], it certainly did not sanction the justiciability of the interstate global warming damages tort claim now before this Court."[62] The decision may be appealed.[63]

In the well publicized case of Comer v. Nationwide Mut. Ins. Co.,[64] Louisiana property owners sought damages from their insurance companies for failing to reimburse plaintiffs for property damage caused by Hurricane Katrina. The suit also included allegations against three privately-held chemical companies for damages sustained during the hurricane that were allegedly partially a result of GHG emissions. The United States District Court for the Southern District of Mississippi required the individual plaintiffs to file separate actions against their insurers because of the particular facts relevant to each claim. The court further noted the difficulty of proving causality with regard to the global warming claims, and decided these claims also had to be filed separate from the insurance claims. Significantly, after the Supreme Court's decision in Massachusetts v. EPA, the United States District Court for the Southern District of Mississippi dismissed plaintiffs' claims for lack of standing and plaintiffs' assertion of non-justiciable claims pursuant to the political question doctrine.[65] Like California v. GMC, the decision may be appealed.[66]

In light of these recent turn of events, it will be important to see how the courts continue to proceed in this landscape. Although the initial reaction of the courts appears to be rejection of tort lawsuits premised on global warming, it would be unwise to presume that States, public interest groups, private entities, citizens, and the plaintiffs' bar will be deterred from instituting future tort lawsuits. In fact, law firms in the United States and internationally have already

begun to form climate change teams and have commenced marketing that practice area. It can be expected that plaintiffs' attorneys will continue to file these lawsuits to stretch the bounds of climate change litigation.

V. CLIMATE CHANGE LITIGATION AND INSURANCE

As with other mass tort litigation, climate change litigation against private entities will necessarily have an impact on the insurance industry. Insurers will undoubtedly be asked to provide coverage to GHG polluters for claims asserting liability for their contribution to global warming and the purported damages arising therefrom. As noted by one commentator, insurers can no longer treat "global climate change as a peripheral concern."[67] In fact, as the industry braces for the impact of climate change litigation, it is important to understand the crisis and anticipate the areas of greatest potential exposure to coverage. Although it is far from certain what legal theories and causes of action will be advanced against alleged GHG polluters, it is anticipated that two types of cases will emerge: (1) public nuisance lawsuits; and (2) shareholder lawsuits against directors and officers. The question presented is whether commercial general liability ("CGL") insurance policies and D&O insurance policies provide coverage for such claims. Of course, the answer to that question may rest in part on whether the pollution exclusions incorporated in such policies will be interpreted by courts to exclude coverage for claims premised on GHG emissions.

A. Tort Lawsuits, CGL Policies and the Absolute Pollution Exclusion

Although only a few tort lawsuits have been filed against companies alleged to be responsible for GHG emissions, the claims asserted in those lawsuits are instructive on the types of claims expected in future climate change lawsuits. For example, in Comer v. Nationwide Mut. Ins. Co.,[68] plaintiffs sued three chemical companies and five major oil companies alleging

they caused damage to plaintiffs' property through their contributions to global warming. In California v. GMC,[69] the State of California sued various automakers under the legal theory of public nuisance. It was alleged that the defendants created and contributed to global warming by producing vehicles that emit high levels of carbon dioxide, which contributes to global warming. The State of California sought damages to study, plan for, monitor and respond to the impact of global warming, which allegedly reduced the supply of water, increased the risk of flooding, eroded California's coastline, and produced extreme heat events that increased the risk and intensity of wildfires.

Indeed, the erosion of the United States' coastlines due to a rising sea level allegedly caused by global warming could prove to be the biggest climate change exposure to GHG polluters and their insurers. The EPA has estimated that a one meter rise in the sea level could result in costs to the United States between $270 billion and $450 billion (US). It is not unrealistic to believe that coastline States will institute climate change lawsuits against GHG polluters seeking damages to rebuild, restore, protect and monitor their coastlines. As noted above, California has already sought such relief from various automakers in California v. GMC.

Under the traditional CGL policy, both of the aforementioned lawsuits would arguably trigger coverage since an element of the claims includes "property damage" allegedly caused by the defendants' activities that purportedly contributed to global warming. While it can be anticipated that tort lawsuits premised on global warming will include a component of damages for "property damage," it is also possible that tort lawsuits will include damages for "bodily injury" suffered by victims of catastrophic weather events linked to global warming or outbreaks of infectious diseases purportedly caused by global warming conditions. As with any claim tendered to an insurer, each lawsuit and the allegations asserted therein must be assessed on a

case-by-case basis to determine whether coverage is even triggered in the first instance. Such an analysis will not only include whether "bodily injury" and/or "property damage" are alleged, but also whether there was an "occurrence" during the policy period that resulted in "bodily injury" and/or "property damage."

Presuming that the basic insuring agreement is satisfied by the particular allegations of a tort lawsuit premised on global warming, without doubt insureds and their insurers will once again stand toe-to-toe and debate the meaning and intent of the absolute pollution exclusion utilized in CGL policies. The absolute pollution exclusion, introduced by the insurance industry in 1986, provides that coverage is excluded for:

> f. (1) "Bodily injury" or "property damage" arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants:
>
> (a) At or from premises, site or location which is or was at any time owned or occupied by, or rented or loaned to, any insured;
>
> * * *
>
> (2) Any loss, cost or expense arising out of any:
>
> (a) Request, demand or order that any insured or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of pollutants; or
>
> (b) Claim or suit by or on behalf of a governmental authority for damages because of testing for, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing, or in any way responding to, or assessing the effects of pollutants.
>
> Pollutants means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.

While some absolute pollution exclusions vary in form and language, the above-quoted language is standard.

Despite the seemingly broad nature of the absolute pollution exclusion, the debate has already begun as to whether it applies to claims arising out of GHG emissions. Prior to the Supreme Court's decision in Massachusetts v. EPA, GHGs were not considered "pollutants" by the EPA. However, now that the Supreme Court has classified GHGs as "pollutants,"[70] the absolute pollution exclusion will once again be scrutinized as to its meaning and scope. That is, courts will be called upon to determine whether the absolute pollution exclusion can be fairly interpreted to include claims premised on GHG emissions.

Unfortunately, there is no clear answer to this question. While the absolute pollution exclusion is arguably intended to exclude all claims arising out of the release of a pollutant, courts are split as to whether its scope extends beyond the hazards associated with traditional industrial environmental pollution. The highest courts in several states have expressly limited the scope of the absolute pollution exclusion to traditional environmental pollution by industrial polluters.[71] Those courts declined to extend the scope of the absolute pollution exclusion to claims that do not involve traditional industrial environmental pollution. For example, the New Jersey Supreme Court declined to interpret the absolute pollution exclusion to bar coverage to an insured that was sued for personal injuries due to exposure to fumes emitted from the insured's painting, coating and floor sealing work.[72] Similarly, the California Supreme Court held that the absolute pollution exclusion did not apply to claims arising out of injuries caused by exposure to pesticides.[73] On the other hand, some courts have construed the absolute pollution exclusion to unambiguously encompass any claim that results from the release of pollutants.[74]

Undoubtedly, insurers will have a persuasive argument that GHG emissions are "traditional industrial environmental pollution" since the Supreme Court classified GHGs as a "pollutant," the emission of GHGs has a harmful effect on the environment, and GHG emissions occur in the industrial setting. Moreover, the broad language of the absolute pollution exclusion includes the "release" or "escape" of pollutants. Insureds will likely counter that argument by taking the position that the intent of the exclusion could not include GHG emissions since it was drafted prior to the Supreme Court's decision in Massachusetts v. EPA. In this regard, insureds will almost certainly argue that it was not within their reasonable expectations that the absolute pollution exclusion would apply to tort lawsuits premised on GHG emissions and global warming. At least one prominent policyholder's law firm suggested that insureds will also cite to the following facts in support of such an argument: (1) GHG emissions arise from their normal business operations (burning of fossil fuels) and not from the intentional pollution of the environment, as was the case in the past environmental pollution lawsuits; (2) Congress has never regulated GHG emissions; and (3) the EPA has traditionally stated that GHGs do not qualify as pollutants. Moreover, insureds will likely assert that the absolute pollution exclusion was drafted and incorporated in CGL policies in response to traditional industrial environmental pollution claims involving hazardous waste triggering the remedies afforded under the Comprehensive Environmental Response, Compensation & Liability Act ("CERCLA"), and not in contemplation of claims premised on GHG emissions and global warming.

It can therefore be expected that insurers and insureds will once again be at odds with respect to the applicability of the absolute pollution exclusion should climate change lawsuits against private companies proliferate. As was the case with respect to past environmental pollution coverage cases, the ultimate outcome of the applicability of the absolute pollution

exclusion may be dependent on the particular jurisdiction and its historical interpretation of the absolute pollution exclusion.

While the absolute pollution exclusion may prove to be the critical dispute between insurers and insureds with respect to climate change lawsuits, other coverage defenses may also be available to insurers. Such defenses could include the "known loss doctrine" and the applicability of the expected and intended exclusion. With respect to the "known loss doctrine," insurers may have an argument that their insureds who contribute to GHG emissions have been aware of GHGs' adverse effect on the environment and have already been placed on notice of claims emanating from their activities. Similarly, insurers may be able to advance the argument that their insureds were aware of the harmful effects of GHG emissions and nevertheless continued with their activities that contributed to global warming. Finally, it can be anticipated that trigger of coverage issues will also arise in the context of climate change lawsuits. For example, with respect to a claim for damages for coastline erosion, insureds would likely argue that a continuous trigger applies to implicate multiple policy years due to the progressive and indivisible nature of the erosion of the coastline.

In summary, should the courts or United States government open the doors for tort lawsuits premised on GHG emissions and global warming, CGL insurers will likely be called upon to defend and indemnify their insureds who have contributed to global warming. Given the nature of such lawsuits, it can be reasonably anticipated that CGL insurers and their insureds will be at odds as whether such claims are covered under a CGL policy.

B. Directors and Officers Insurance Policies

A second type of insurance policy that will be vulnerable to claims stemming from GHG emissions and global warming is the D&O liability policy.[75] D&O policies are meant to insulate

directors and officers from lawsuits filed against them regarding actions taken in their professional capacities. These policies generally also contain broad provisions excluding coverage for pollution.[76] However, the Supreme Court's conclusion that GHG emissions are "air pollutants" under the CAA is likely to encourage shareholders and private litigants to increase the pressure on companies regarding their contribution and response to global warming.[77]

The potential liabilities are two-fold. First, claims may be filed alleging directors and officers breached the fiduciary duties owed to the corporation and the shareholders. The alleged breach may relate to a failure to avoid legal and/or regulatory liability.[78] As proposed by one practitioner, potential allegations include violating regulations in "their plant operations or manufacturing processes, declining to invest more in research and development to curb greenhouse gases in order to maximize short-term profits from increased sales of their products, and unnecessarily protracting litigation."[79]

Second, claims may allege that directors and officers failed to satisfy disclosure obligations. Pursuant to Item 101 of the Securities Exchange Commission Regulation S-K, "publicly traded companies must disclose current and anticipated material effects from compliance with environmental regulations."[80] Further, Item 303 requires disclosure of "any known trends or uncertainties that could impact business operations."[81] These disclosure obligations stimulate shareholders to pose questions to a company as to how it "recognizes, analyzes and discloses environmental or climate risk."[82] For example, 2006 saw the filing of nearly two dozen shareholder resolutions with U.S. companies regarding GHG emissions.[83] Without a doubt, the change in the regulatory environment in light of the decision in Massachusetts v. EPA that GHG emissions are "air pollutants"[84] will make these disclosures more difficult to satisfy and shareholders' questions harder to answer.

One common reaction to global warming is policy initiatives. Amid the increased concern over global warming generally and the looming liability for directors and officers specifically, companies have implemented plans to reduce GHG emissions.[85] Though these initiatives are not enough to reverse global warming, many believe that proactive efforts will, at minimum, lessen potential liability and coverage exposure.[86] As this new horizon comes into focus, insurance companies must begin to appreciate the significance of climate change. Additionally, insurers must anticipate how courts will interpret the provisions of D&O policies and how certain provisions can be improved to insulate against prospective exposures.

VI. CONCLUSION

The debate over global warming – its causes and its consequences – will always exist. The burning questions for insurers are the implications of global warming and the litigation stemming therefrom. Many insurance industry experts believe that it is time for insurance companies to respond to the uncertainties about policy interpretation, shareholder concerns, and SEC disclosure issues related to global warming. For example, it has been suggested that underwriters ask their prospective insureds questions such as:

> Does your company allocate responsibility for the management of climate-related risks? Are there independent board members tasked with addressing climate-related issues? What progress, if any, has your company made in quantifying, disclosing and/or reporting its emissions profile and planning for future regulatory scenarios?[87]

Though modifications to policies may be interpreted as an admission that prior policies failed to adequately address this risk, the cost of not responding to the acknowledged risk is perceived as a far greater threat and exposure. Without proper precautions, insurers could be faced with the devastation wreaked upon the insurance industry by other mass tort litigation. The time has come to understand global warming and to what extent its cause and effects are insured.

[1] 127 S. Ct. 1438 (2007).

[2] U.S. E.P.A., "Climate Change: Basic Information", at http://www.epa.gov/climatechange/basicinfo.html (last visited Sept. 26, 2007).

[3] Id.; Robert Percival, et al., Environmental Regulation: Law, Science, and Policy, pp. 1122-23 (3rd Ed. 2000).

[4] U.S. E.P.A., "U.S. Inventory of Greenhouse Gas Emissions and Sinks: 1990-2005: Fast Facts", USEPA #430-R-07-002, at 1 (Apr 2007), at http://www.epa.gov/climatechange/emissions/usinventoryreport.html (last visited Sept. 26, 2007).

[5] See U.S. E.P.A., "Climate Change: Health and Environmental Effects", at http://www.epa.gov/climatechange/effects/index.html (last visited Sept. 26, 2007).

[6] "Climate Change: Basic Information", supra note 2.

[7] See Id. See e.g. Tenth Session of the Conference of Parties to the United Nations Framework Convention on Climate Change (Dec. 2004), at http://unfccc.int/meetings/cop10/items/2944.php (last visited Sept. 27, 2007), for a discussion of the affect on the Inuit environment and the strategies formulated in response to what is alleged to be a violation of their human rights.

[8] Massachusetts, 127 S. Ct. at 1449. In the rule-making petition, the petitioners alleged that GHG emissions had significantly increased climate change and an important contributor to the acceleration was human activity. Id. (citation omitted).

[9] Id. at 1450 (citing 68 Fed. Reg. 52922).

[10] Jonathan H. Adler, "Hot Times in the High Court: Ruling could drive climate-change policy for years to come", National Review Online (Apr. 3, 2007), at http://article.nationalreview.com/?q=NmU0ZDBmMmEwZTlkNDBmOTQ3ZTg0YzY5MTM3OTIwNTg (last visited Sept. 26, 2007).

[11] Gary Bryner, "The Rapid Evolution of Climate Change Law", 20 Utah Bar J. 22 (Mar/Apr 2007).

[12] 912 F.2d 478 (D.C. Cir. 1990).

[13] A similar challenge was filed by various states and environmental groups in Center for Biological Diversity v. Nat'l Highway Trans. Safety Admin., No. 06-71891 (9th Cir. Apr. 6, 2006) regarding CAFÉ standards for trucks.

[14] Baker v. Carr, 369 U.S. 186, 204 (1962).

[15] Los Angeles v. Nat'l Highway Traffic Safety Admin., 912 F.2d at 501.

[16] 794 F. Supp. 395 (D.D.C. 1992).

[17] Watkins, 794 F. Supp. at 399.

[18] 2006 U.S. App. LEXIS 23499 (D.C. Cir. Sept. 13, 2006).

[19] 2006 U.S. Dist. LEXIS 48892 (E.D. Cal. Jul. 7, 2006).

[20] Environment and Energy Daily, "Climate Change: Domestic Debate – Global Warming Court Cases", at http://www.eenews.net/special_reports/climate_change_domestic/case_chart/ (last visited Oct. 4, 2007).

[21] 434 F. Supp. 2d 957 (D.Or. 2006).

[22] Northwest Environ. Defense Ctr., 434 F. Supp. 2d at 969.

[23] Community Rights Counsel, "Legal Resources: Global Warming Litigation: Clean Air Act Cases", Apr. 2007, at http://www.communityrights.org/legalresources/PetitionsForCertiorari/GWC%20and%20Materials%20CAA.asp (last visited Oct. 9, 2007).

[24] 260 F. Supp. 2d 997 (S.D. Cal. 2003).

[25] 218 F. Supp. 2d 1143 (N.D. Cal. 2002).

[26] Border Power Plant Working Group, 260 F. Supp. 2d at 1028.

[27] Abraham, 218 F. Supp. 2d at 1155.

[28] 406 F. Supp. 2d 265 (S.D.N.Y. 2005).

[29] Amer. Electric Power, Inc., 406 F. Supp. 2d at 274.

[30] Beveridge & Diamond P.C., "Court Dismisses Global Warming Nuisance Suit on Political Question Grounds", dated Sept. 20, 2007, at http://www.bdlaw.com/assets/attachments/Court_Dismisses_Global_Warming_Nuisance_Claim_on_Political_Question_Grounds.pdf (last visited Oct. 9, 2007).

[31] 467 F. Supp. 2d 676 (E.D.La. 2006).

[32] 406 F. Supp. 2d at 265.

[33] Barasich, 467 F. Supp. 2d at 685-86.

[34] Massachusetts, 127 S. Ct. at 1449 (citation omitted).

[35] 42 U.S.C. § 7521(a)(1).

[36] 42 U.S.C. § 7602(g).

[37] Massachusetts, 127 S. Ct. at 1450 (citing 68 Fed. Reg. at 52929-52931).

[38] Id. at 1446.

[39] Baker, 369 U.S. at 204.

[40] Massachusetts, 127 S. Ct. at 1453. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 572 (1992).

[41] Id. at 1454-55.

[42] Id. at 1456-58.

[43] Id.

[44] See 42 U.S.C. § 7602(g).

[45] Massachusetts, 127 S. Ct. at 1460-62.

[46] Id. at 1462.

[47] See Massachusetts, 127 S. Ct. at 1463; Massachusetts v. EPA, 2007 U.S. App. LEXIS 22174 (D.D.C. Sept. 14, 2007).

[48] 2006 U.S. Dist. LEXIS 86805 (D. Vt. Nov. 30, 2006).

[49] Dalmasse, 2006 U.S. Dist. LEXIS 86805, at *14.

[50] The United States District Court of the District of Vermont referred to related litigation involving similar emissions regulations as originally promulgated by California. See e.g. Central Valley Chrysler-Jeep, Inc. v. Witherspoon, 2007 U.S. Dist. LEXIS 3002 (E.D. Cal. Jan. 16, 2007); Ass'n of Int'l Auto. Manufacturers v. Sullivan, No. 06-CV-69 (D.R.I. Feb. 13, 2006). It is reasonable to anticipate that these other cases will be decided in a similar fashion.

[51] Green Mt. Chrysler Plymouth Dodge Jeep v. Crombie, 2007 U.S. Dist. LEXIS 67617 (D. Vt. Sept. 12, 2007) (consolidated action).

[52] See e.g. Abraham, 218 F. Supp. 2d at 1143; Utsey v. Coos County, 32 P.3d 933 (Or. Ct. App. 2001); Watkins, 794 F. Supp. at 395.

[53] Massachusetts, 127 S. Ct. at 1456.

[54] Id. at 1458.

[55] See generally Id. at 1438.

[56] Adler, supra note 10. See e.g. Nulankeyutmonen Nkihtaqmikon v. Impson, 2007 U.S. App. LEXIS 22053, at *11-18 (1st Cir. Me. Sept. 14, 2007) (found standing to pursue procedural claims under various statutes including the NEPA pursuant to the standing requirement enunciated in Massachusetts v. EPA).

[57] Massachusetts, 127 S.Ct. at 1471 (Roberts, dissenting).

[58] Allens Arthur Robinson, "Focus: Climate Change Litigation – April 2007", at http://www.aar.com.au/pubs/ldr/focclapr07.htm (last visited Sept. 27, 2007).

[59] 2007 U.S. Dist. LEXIS 68547 (N.D. Cal. Sept. 17, 2007).

[60] See Id.

[61] Id. at *33-34.

[62] Id. at *36.

[63] "Climate Change: Domestic Debate – Global Warming Court Cases", supra note 20; "Court Dismisses Global Warming Nuisance Suit on Political Question Grounds", supra note 30.

[64] 2006 U.S. Dist. LEXIS 33123 (S.D. Miss. Feb. 23, 2006).

[65] Order of the United Stated District Court for the Southern District of Mississippi in Comer v. Nationwide Mut. Ins. Co., dated Aug. 30, 2007, available at http://www.bdlaw.com/assets/attachments/Comer_v_Murphy_Oil_opinion.pdf (last visited Oct. 9, 2007).

[66] "Court Dismisses Global Warming Nuisance Suit on Political Question Grounds", supra note 30.

[67] Kevin LaCroix, "Climate Change: Directors' and officers' risk ahead?", Insurance Journal, Jun. 4, 2007, available at http://www.insurancejournal.com/magazines/west/2007/06/04/ideaexchange/81279.htm (last visited Oct. 4, 2007).

[68] 2006 U.S. Dist. LEXIS 33123.

[69] 2007 U.S. Dist. LEXIS 68547.

[70] Massachusetts, 127 S. Ct. at 1460-62.

[71] See e.g. MacKinnon v. Truck Ins. Exchange, 73 P.3d 1205 (Ca. 2003); Am. States Ins. Co. v. Koloms, 687 N.E.2d 72 (Ill. 1997); W. Alliance Ins. Co. v. Gill, 686 N.E.2d 997 (Mass. 1997); Andersen v. Highland House Co., 757 N.E.2d 329 (Ohio 2001); Belt Painting Corp. v. TIG Ins. Co., 795 N.E.2d 15 (N.Y. 2003); Kent Farms v. Zurich Ins. Co., 998 P.2d 292 (Wash. 2000); Nav-Its, Inc. v. Selective Ins. Co., 183 N.J. 110 (2005).

[72] Nav-Its, Inc., 183 N.J. at 110.

[73] MacKinnon, 73 P.3d at 1205.

[74] See e.g., Cont'l Cas. Co. v. Advance Terrazzo & Tile Co., 462 F.3d 1002 (8th Cir. 2006); Nat'l Elec. Mfrs. Ass'n v. Gulf Underwriters Ins. Co., 162 F.3d 821 (4th Cir. 1998); W. Am. Ins. Co. v. Band & Desenberg, 138 F.3d 1428 (11th Cir. 1998); Reliance Ins. Co. v. Moessner, 121 F.3d 895 (3d Cir. 1997).

[75] Meg Green, "D&O heats up: Directors & Officers writers are paying close attention to the issue of climate change--not just how it could affect Earth, but how it could impact regulations and ultimately lead to future litigation and claims", Best's Review, Aug. 1, 2007, available at http://goliath.ecnext.com/coms2/gi_0199-6850255/D-O-heats-up-Directors.html (last visited Oct. 3, 2007).

[76] Rachel S. Kronowitz, Gilbert Randolph LLP, "United States: Climate Change Exclusion", May 14, 2007, at http://www.mondaq.co.uk/article.asp?articleid=48264&searchresults=1 (last visited Oct. 3, 2007).

[77] See Green, supra note 75; LaCroix, supra note 67.

[78] Joseph P. Monteleone, Tressler, Soderstrom, Maloney & Priess, LLP, "Global Warming – Will There Be Exposures For Directors and Officers and Will it be Covered?", Mealey's Global Warming Litigation Conference, Jun. 6, 2007, at 2, available at http://www.tsmp.com/pdf/TSMPGlobalWarmingArticle.pdf (last visited Oct. 9, 2007).

[79] Id. at 4.

[80] LaCroix, supra note 67.

[81] Id.

[82] Kronowitz, supra note 76.

[83] Marialuisa S. Gallozzi, "Climate Change: Issues for Policyholders", The Insurance Coverage Law Bulletin, Vol. 6, No. 4, May 2007, available at http://www.cov.com/files/Publication/9594b163-512d-4d96-868b-159c28b4eff7/Presentation/PublicationAttachment/d228b807-9251-4dde-86c4-1c46fc74da30/822.pdf (last visited Oct. 4, 2007).

[84] Massachusetts, 127 S. Ct. at 1460-62.

[85] See Green, supra note 75; Adam Aston and Burt Helm, "The Race Against Climate Change: How top companies are reducing emissions of CO2 and other greenhouse gases", BusinessWeek, Dec. 12, 2005, available at http://www.businessweek.com/magazine/content/05_50/b3963401.htm (last visited Oct. 4, 2007). See e.g. MSNBC, "Power firm agrees to record pollution cleanup: American Electric Power to invest $4.6 billion to clear Northeast air", Oct. 9, 2007, available at http://www.msnbc.msn.com/id/21198255/ (last visited Oct. 9, 2007), for a discussion of American Electric Power's agreement to pay $4.6 billion in settlement of a lawsuit alleging violations of the CAA.

[86] See Green, supra note 75.

[87] Sally Roberts, "What D&O insurers want to know about risks", Business Insurance, Aug. 14, 2006, at http://www.businessinsurance.com/cgi-bin/article.pl?articleId=19442 (last visited Oct. 4, 2007). See Gallozzi, supra note 83.