

Climate Change & Catastrophic Losses

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Fort McMurray Fires

- Insured losses stemming from the fires have been estimated at approximately \$4 billion
- 45,000 claims had been tendered to insurers seeking coverage for fire losses
- 2016's \$210 billion in losses from natural catastrophes one of the highest totals on record
- Climate Change to Blame?

Climate Change and Coverages

- Property
- Business Interruption
- Environmental Liability
- Personal Injury
- Municipal Liability
- Professional Errors & Omissions
- Product Liability

Climate Change Litigation

Comer

- First significant “global warming” litigation in North America
- Residents filed class action complaint seeking damages caused by “global warming”.
- Dozens of the largest American companies in energy and chemical industries named
- Alleged that defendants’ operations and emission of harmful gasses contributed to global warming

Comer

- Dismissed at trial without a written opinion
- Courtroom no place for climate change “debate” prior to legislation outlining appropriate standards
- Court of Appeals, 5th Circuit held that claims were traceable to defendants’ conduct, plaintiffs had standing to advance certain claims
- Finding was vacated, Supreme Court denied plaintiff’s petition for a writ of mandamus
- “Comer II” litigation also unsuccessful

Native Village of Kivalina v. ExxonMobil Corp

- Alaskan village sued energy utilities, oil companies and a coal company
- Alleged that defendants were responsible for excess emissions of greenhouse gases which contributed to global warming
- Plaintiffs sought redress in the form of the costs of relocating their village

Native Village of Kivalina v. ExxonMobil Corp

- The Ninth Circuit Court of Appeals reviewed the American common law of nuisance and the doctrine of displacement
- “under current Supreme Court jurisprudence, if a cause of action is displaced, displacement is extended to all remedies”
- “Congressional action, not executive action, is the touchstone of displacement analysis.”

Lessons from Climate Change Litigation

- Plaintiffs may have standing or traceable claims to “global warming” causes of action
- However, litigation likely to fail until governments enact legislation containing standards to measure conduct
- Future “statutory” causes of action in climate change litigation?

Climate Change Insurance Coverage Litigation

AES Corp. v. Steadfast Insurance

- Duty to defend litigation related to the Kivalina case
- AES named defendant in underlying litigation, allegations concerned intentional emission of greenhouse gasses
- Alleged to have “intentionally” and “negligently” violated federal and state laws
- Steadfast provided defense under reservation of rights and filed a duty to defend application.
- Trial: no “occurrence” alleged in underlying complaint.”

AES Corp. v. Steadfast Insurance

- On appeal, Steadfast argued that “occurrence” was defined as an “accident” and that complaint alleged intentional conduct
- AES asserted alternative allegation was that AES “knew or should have known” (thus an “accident”)
- Decision: No duty to defend as insured knew or should have known consequences of actions, there is no occurrence and therefore no coverage.”
- Rehearing: harm caused was a “natural or probable consequence” of the acts, thus not an “accident”.

Climate Change, Policy Wording & Exclusions

Occurrence

- Is the failure to update building materials an accident?
- Does the failure to contemplate climate change during building constitute defective construction?
- Is the failure to act pre-emptively in anticipation of future severe weather an occurrence?
- Could climate change itself be an occurrence?

“Pollution Exclusion”

- “Bodily injury” or “property damage” arising out of the actual, alleged or threatened discharge, dispersal, release or escape of pollutants”
- What is “pollution”?
- Is carbon dioxide pollution?
- Climate change is expected to exacerbate “traditional” pollution (smog, smoke, etc.)

“Intentional Acts” Exclusion

- Many policies exclude injury or damage that was expected or intended from insured’s standpoint
- Are the effects of climate change “*intended*” when a business pollutes?
- Are the effects of climate change “*expected*” when businesses act in a certain way?

Climate Change Legislation and Regulation

Canadian Legislation

- December 2016: *Pan-Canadian Framework on Clean Growth and Climate Change*
- Requires all provinces and territories to have carbon pricing initiatives in effect by 2018
- Jurisdictions that fail to establish their own programs subject to mandatory pricing system

Ontario Legislation

- *Climate Change Mitigation and Low Carbon Economy Act, 2016*
- Regulated entities include industrial/institutional emitters, natural gas distributors, petroleum product distributors, electricity importers
- Entities with 25,000+ tonnes of CO₂ emissions are mandatory participants

Future

- Courts want climate change legislation before prosecuting “climate change”
- Unclear whether new legislation/policies can be expected under new US administration
- Canada appears to be moving towards greater regulation/legislation

Questions?