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I. WHAT CAUSES CLIMATE CHANGE?

What causes climate change? The National Resources Defense Council provides a basic explanation:

Q: What causes global warming?

A: Global warming occurs when carbon dioxide (CO2) and other air pollutants and greenhouse gases [("GHGs")], which can last for years to centuries in the atmosphere, trap the heat and cause the planet to get hotter. That’s what’s known as the greenhouse effect.

In the United States, the burning of fossil fuels to make electricity is the largest source of heat-trapping pollution, producing about two billion tons of CO2 every year. Coal-burning power plants are by far the biggest polluters. The country’s second-largest source of carbon pollution is the transportation sector, which generates about 1.7 billion tons of CO2 emissions a year.


The main substances at issue are, in order of most to least abundant:

- **Water vapor.** Changes in the concentration of water vapor come about due to atmospheric warming, and not industrialization itself. “As a greenhouse gas, the higher concentration of water vapor is then able to absorb more thermal infrared energy radiated from the Earth, thus further warming the atmosphere. The warmer atmosphere can then hold more water vapor and so on and so on,” creating a positive feedback loop, which is still poorly measured and poorly understood.

- **CO2.** CO2 is the most abundant GHG, and it can remain in the atmosphere for over a century. CO2 occurs both naturally and as a result of human activity. Human activities have caused its dramatic increase in the atmosphere since the Industrial

Revolution. “It is an inevitable byproduct of the incomplete combustion of fossil fuels, and in particular coal. In 2013, CO2 accounted for about 82 percent of all U.S. greenhouse gas emissions from human activities.”

- **Methane (CH4).** While much less abundant than CO2, methane is about 20% more potent than CO2. Methane has a lifespan of about 12 years. Methane currently stands at about 2.5 times its pre-industrial levels in the atmosphere. Human activities account for over 60% of methane emissions. The main sources include natural gas and petroleum systems, enteric fermentation, landfills, coal mining, and manure management.

- **Nitrous oxide (N2O).** Nitrous oxide occurs naturally, but human activities, namely agriculture, fossil fuel combustion, wastewater management, and industrial processes, are increasing the level of concentration. A pound of nitrous oxide “has the equivalent warming effect of 300 times that of one pound of carbon dioxide.” Its lifespan is about 120 years.

- **Fluorinated gases:** Hydrofluorocarbons (“HFCs”), perfluorocarbons (“PFCs”) and sulfur hexafluoride (SF6). Although the fluorinated gases are emitted in the smallest quantities, they are the most potent GHGs and have the longest lifespans. Their lifespan ranges are up to 270 years for HFCs, 800-50,000 years for PFCs, and about 3,200 years for SF6. Emitters include aluminum and semiconductor manufacturing processes.


II. **POLICY LANGUAGE**

A. **First-Party Property Policies**

Property insurers have borne the brunt of the risk resulting from GHG emissions, as insureds seek coverage for weather events based on climate change. At this time, property policies do not contain provisions that expressly mention climate change.

B. **CGL Policies**

Many CGL policies are now endorsed with a total pollution exclusion, which applies to Coverage A – Bodily Injury and Property Damage Liability. *E.g.*, ISO Form No. CG 21 49 09 99. This endorsement does not contain its own definition of “pollutant.” Rather, the definition of “pollutant” is contained in the policy’s main form, or sometimes on another endorsement. ISO’s main CGL form defines “pollutant” as “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.” ISO Form No. CG 00 01 04 13, at 15.

ISO’s main form also contains a Montrose provision in the insuring agreement, which states:

b. This insurance applies to “bodily injury” and “property damage” only if:

(3) Prior to the policy period, no insured listed under Paragraph 1. of Section II – Who Is An Insured and no “employee” authorized by you to give or receive notice of an “occurrence” or claim, knew that the “bodily injury” or “property damage” had occurred, in whole or in part. If such a listed insured or authorized “employee” knew, prior to the policy period, that the “bodily injury” or “property damage” occurred, then any continuation, change or resumption of such “bodily injury” or “property damage” during or after the policy period will be deemed to have been known prior to the policy period.

c. “Bodily injury” or “property damage” which occurs during the policy period and was not, prior to the policy period, known to have occurred by any insured listed under Paragraph 1. of Section II – Who Is An Insured or any “employee” authorized by you to give or receive notice of an “occurrence” or claim, includes any continuation, change or resumption of that “bodily injury” or “property damage” after the end of the policy period.

d. “Bodily injury” or “property damage” will be deemed to have been known to have occurred at the earliest time when any insured listed under Paragraph 1. of Section II – Who Is An Insured or any “employee” authorized by you to give or receive notice of an “occurrence” or claim:

(1) Reports all, or any part, of the “bodily injury” or “property damage” to us or any other insurer;

(2) Receives a written or verbal demand or claim for damages because of the “bodily injury” or “property damage”; or

(3) Becomes aware by any other means that “bodily injury” or “property damage” has occurred or has begun to occur.
Id., at 1. Insurers may take the position that these provisions supersede the timing language in the definition of “property damage,” as the language in the definition applies to losses without a temporal component. That language provides:

17. “Property damage” means:

a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or

b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the “occurrence” that caused it.

Id., at 15.

With the diametrically opposing trends of greater scientific knowledge and less government regulation, whether there is an “occurrence,” and whether the “expected or intended” exclusion may bar coverage, may be key issues. “‘Occurrence’ means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.” Id. The “expected or intended” exclusion bars coverage for “‘Bodily injury’ or ‘property damage’ expected or intended from the standpoint of the insured.” Id., at 2.

As to Coverage B, ISO’s main CGL form contains a total pollution exclusion and a pollution-related exclusion, briefly summarized as applicable to government-ordered cleanup. ISO Form No. CG 00 01 04 13, at 7. Coverage B contains a “knowing violation” exclusion, which bars coverage for “‘Personal and advertising injury’ caused by or at the direction of the insured with the knowledge that the act would violate the rights of another and would inflict ‘personal and advertising injury’.” Id., at 6.

C. D&O Policies

Although policy forms for D&O policies are not standardized, many policies provide coverage for “Wrongful Acts.” One policy has defined this term to mean “any actual or alleged act, error, omission, misstatement, misleading statement, neglect, or breach of duty by an Insured Person acting in their role with the Company.” AR Capital, LLC v. XL Specialty Ins. Co., C.A. No.: N16C-04-154 WCC CCLD, 2018 Del. Super. LEXIS 1568, at *5 (Dec. 12, 2018).

D. Pollution Liability Policies

Policy forms for pollution liability policies are not standardized. The insuring agreement of one such policy provides coverage for:

Claims for Bodily Injury, Property Damage, or Environmental Damage caused by Pollution Conditions resulting from Covered Operations. The
Pollution Conditions must be unexpected and unintended from the standpoint of the Insured. The Bodily Injury, Property Damage, or Environmental Damage must occur during the Policy Period.

Acuity, A Mut. Ins. Co. v. Chartis Specialty Ins. Co., 861 N.W. 3d 533, at P31 (Wis. 2015). The policy at issue in that case defines “Pollution Conditions” as follows:

Pollution Conditions means the discharge, dispersal, release or escape of any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, medical waste and waste materials into or upon land, or any structure on land, the atmosphere or any watercourse or body of water, including groundwater, provided such conditions are not naturally present in the environment in the concentration or amounts discovered.

Id., at P33.

III. COVERAGE-RELATED CLIMATE CHANGE ISSUES IN THE COURTS

As discussed below, the courts have not yet addressed many coverage-related issues arising out of climate change-related claims asserted in underlying litigation. Nonetheless, there are a few decisions that may foreshadow how courts could address or analyze such issues as they continue to arise.

A. U.S. Supreme Court Addressing Climate Change Issues

Although the U.S. Supreme Court had not addressed coverage disputes surrounding climate change, the Court has grappled with other climate change issues in the past decade that may ultimately have an impact on how insurance disputes surrounding climate change will be addressed.

In 2007, the United States Supreme Court held that federal courts could hear complaints against the federal government on the matter of climate change. Relevant to insurance coverage, the Court considered whether carbon dioxide is a pollutant. Massachusetts v. Environmental Protection Agency, 549 U.S. 497 (2007). When the EPA refused to regulate carbon dioxide, various states and organizations challenged the EPA’s non-action. The Court addressed the impact of global warming in detail while reaching its decision that the EPA had abused its discretion in refusing to regulate carbon dioxide.

Justice Stevens opened his opinion by noting that:

A well-documented rise in global temperatures has coincided with a significant increase in the concentration of carbon dioxide in the atmosphere. Respected scientists believe the two trends are related. For when carbon dioxide is released into the atmosphere, it acts like the ceiling
of a green house, trapping solar energy and retarding the escape of reflected heat. It is therefore a species – the most important species – of a “greenhouse gas.”

*Id.* at 504.

Under the Clean Air Act, the EPA Administrator was directed to adopt regulations setting forth standards applicable to the emission of any air pollutant from motor vehicles “which in his judgment cause, or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare.” *Id.* at 506 (quoting 42 U.S.C. § 752 (a) (1)). The EPA declined, however, to regulate GHG emissions from new motor vehicles, determining that the Clean Air Act did not authorize it to issue mandatory regulations to address global climate change, and even if it had authority to do so, it would be unwise to set GHG emission standards at this time. *Id.* at 510-11. The EPA reasoned that climate change was such an important issue that unless Congress specifically instructed the EPA to act, Congress could not have meant for the Agency to address global warming. *Id.* at 512. Therefore, the EPA believed that GHGs could not be “air pollutants” within the meaning of the Clean Air Act. *Id.* at 513.

The D.C. Circuit Court of Appeals agreed. Reversing, the Supreme Court first determined that the petitioners had standing to challenge EPA’s denial of their rulemaking petition. *Id.* at 526. The Court next determined that the Clean Air Act authorized the EPA to regulate GHG emissions from new motor vehicles even if the EPA formed a judgment that such emissions contributed to climate change. *Id.* at 528. The Clean Air Act’s definition of “air pollutant” was broad and embraced all airborne compounds. *Id.* at 529. Consequently, GHGs fit within the Clean Air Act’s definition of “air pollutant,” and the EPA had the statutory authority to regulate the emission of such gases from new motor vehicles. *Id.* at 532.

Nor did the Court accept the EPA’s reasoning that, even if it had statutory authority to regulate GHGs, it would be unwise to do so. The EPA could avoid taking further action only if it determined that GHGs did not contribute to climate change or if it provided some reasonable explanation as to why it could not exercise its discretion to make the determination. *Id.* at 533. But the EPA had offered no reasoned explanation for its refusal to decide whether GHGs caused or contributed to climate change. The EPA’s actions, therefore, were arbitrary and capricious. *Id.* at 534.

Does the Supreme Court’s decision in *Massachusetts* mean that carbon dioxide emissions are a pollutant under a policy’s absolute pollution exclusion? Future litigation will likely explore this issue, but since the *Massachusetts* decision was issued in 2007, very few cases have addressed the issue.

After the decision in *Massachusetts*, the EPA commenced rulemaking to set limits on GHG emissions from fossil-fuel-fired power plants. Before the EPA completed implementation of its rules, several states, the City of New York, and three private land trusts sued four private power companies and the federal Tennessee Valley Authority under federal common-law public nuisance
claims for carbon-dioxide emissions from the plants. In America Electric Power Co. v. Connecticut, 564 U.S. 410 (2011), the Supreme Court held that corporations could not be sued for GHG emissions under federal common law due to the preemptive effect of the federal Clean Air Act. The plaintiffs alleged that public lands, infrastructure and health were at risk from climate change. Habitats for animals and rare species of trees and plants would be destroyed. As relief, plaintiffs sought a decree setting carbon-dioxide emissions for each defendant at an initial cap, to be further reduced annually.

The Court held that the Clean Air Act and the EPA actions under the Act displaced any federal common-law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired power plants. America Electric, 564 U.S. at 424. In Massachusetts, the court held that emissions of carbon dioxide qualified as air pollution subject to regulation under the Clean Air Act. The Act spoke directly to emissions of carbon dioxide from the defendants’ plants. Because the Act itself provided a means to seek limits on emissions of carbon dioxide from power plants, the plaintiffs were not entitled to seek relief under a parallel track by invoking federal common law. Id. at 426. Moreover, federal judges were not equipped to set limits on GHG emissions in the face of a law empowering the EPA to set the same limits. Id. at 429.

B. Climate Change and Insurance in Lower Courts

The issue of potential coverage for climate-change-related issues has most clearly been litigated in AES Corp. v. Steadfast Insurance Co., 725 S.E.2d 532 (Va. 2012), a coverage matter related to a suit brought by the Alaskan village of Kivalina against ExxonMobil and a host of other oil, coal, and electric utility companies, Native Village of Kivalina v. ExxonMobil Corp., 696 F.3d 849 (9th Cir. 2012). The plaintiffs in Kivalina asserted that the defendants’ GHG emissions contributed to global warming, which in turn melted Arctic sea ice and contributed to the erosion of the Kivalina coastline, rendering the village uninhabitable, for which the plaintiffs sought monetary damages under a theory of public nuisance. Id. at 853. The Ninth Circuit affirmed the trial court’s dismissal of the plaintiffs’ claims, holding that, under the Supreme Court’s decision in American Electric, the “displacement of a federal common law right of action [also] means displacement of [the] remedies” sought by the Kivalina plaintiffs and noting that “the solution to Kivalina’s dire circumstance must rest in the hands of the legislative and executive branches of our government, not the federal common law.” 696 F.3d at 857-58.

AES arose when AES, one of the Kivalina defendants and a Virginia-based company, sought coverage for the Kivalina plaintiffs’ claim under several CGL policies issued by its insurer. AES, 725 S.E.2d at 533. The insurer provided a defense under a reservation of rights, and brought a declaratory judgment action in Virginia state court, seeking a declaration that it had no duty to defend, and hence also no duty to indemnify. Id. The insurer claimed both that the underlying complaint did not allege “property damage” caused by an “occurrence,” and that the claims alleged by the Kivalina plaintiffs fell within the scope of the scope of the policies’ pollution exclusion. Id.

Each of the policies at issue in AES provided coverage for property damage “caused by an ‘occurrence,’” that is, by an “accident, including continuous and repeated exposure to substantially
the same general harmful condition.” Id. at 534 (internal quotation marks omitted). In analyzing whether the insurer had a duty to defend, the Virginia Supreme Court focused, pursuant to Virginia law, on the “eight corners” of the complaint and the relevant policy “to determine whether the allegations in the underlying complaint come within the coverage provided by the policy.” Id. at 535. Recognizing that the duty to defend is broader than the duty to indemnify, the court nonetheless held that Steadfast had no duty to defend, because the Kivalina complaint did not allege property damage resulting from an “occurrence.” Id. at 535, 538. The court’s analysis focused on the fact that an “occurrence” is an “accident,” that is “an event which creates an effect which is not the natural or probably consequence of the means employed and is not intended, designed, or reasonably anticipated.” Id. at 536 (internal quotation marks & citation omitted). The Kivalina complaint alleged the intentional release by AES into the atmosphere of tons of carbon dioxide and other GHGs “as a regular part of its energy-producing activities,” and that “there is clear scientific consensus that the natural and probably consequence of such emissions is global warming and damages such as Kivalina suffered.” Id. at 536-37. Consequently, whether or not AES was negligent in that it should have known that its release of the GHGs would cause the damage alleged in the Kivalina complaint, “the gravamen of Kivalina’s nuisance claim [was] that the damages [Kivalina] sustained were the natural and probably consequences of AES’s intentional emissions.” AES, 725 S.E.2d at 537. “If an insured knew or should have known that certain results were the natural and probably consequences of intentional acts or omissions, there is no ‘occurrence’ within the meaning of a CGL policy,” and the insurer therefore had no duty to defend AES in the underlying action. Id. at 538. Because that conclusion resolved the coverage issue, the court did not address whether GHG emissions constituted “pollution” within the scope of the policy’s pollution exclusion.

AES thus found no coverage for damage caused by GHG emissions because there was no “occurrence.” It should be noted, however, that the Virginia Supreme Court’s holding can be read as a narrow one: the finding of no duty to defend, and no coverage, was premised on the allegations in the underlying complaint, which posited that AES should have known that its business practices would cause damage such as that experienced by the village of Kivalina. Given the newly energized debate about whether there is such a thing as climate change—scientific consensus notwithstanding—the result in a different suit with different allegations could well change.

Another case that may shed some light on how coverage issues may be resolved in the climate-change context is Donaldson v. Urban Land Interests, 564 N.W. 2d 728 (Wis. 1997), a 1997 case before the Wisconsin Supreme Court that addressed whether emissions of carbon dioxide fell under a CGL policy’s pollution exclusion. The plaintiffs in the underlying case alleged that an inadequate air exchange ventilation system in the insurer’s office building had caused an excessive accumulation of carbon dioxide in their work area. Plaintiffs alleged they had, as a result, suffered from headaches, sinus problems, eye irritation, extreme fatigue, upset stomach, asthma, sore throat, nausea, and pounding ears. The trial court granted ’the insurer’s motion for summary judgment, determining that the buildup of carbon dioxide was a “gaseous irritant,” and therefore a “pollutant” under the policy.
The court of appeals affirmed, but the Wisconsin Supreme Court reversed. The court found that both the insurer and the insured intended for the pollution exclusion to have a broad application. But the court nonetheless concluded that the pollution exclusion at issue did not plainly and clearly alert a reasonable insured that coverage was denied for personal injury claims that had their genesis in activities as fundamental as human respiration. *Id.*, 564 N.W.2d at 732. Consequently, the court held that the pollution exclusion was ambiguous because the insured could reasonably expect coverage on the facts of this case. *Id.* This opinion thus both suggests that carbon dioxide emissions could constitute pollution and that there nonetheless may be questions as to whether a particular type of emission falls under the language of a particular pollution exclusion.

IV. **Claims That Could Arise in Climate Change-Related Coverage Suits**

Although, as discussed above, courts have thus far rarely addressed directly the issue of insurance coverage for claims of damages allegedly caused by, *e.g.*, GHG emissions contributing to climate change and global warming, it is likely that the following issues will ultimately need to be addressed by courts as climate-change-related litigation becomes more prevalent. Many of these issues are likely to arise in the context of CGL policies as alleged polluters are sued for damages and injuries allegedly caused by their GHG emissions.

One area in which litigation is likely to continue to arise is the area of state nuisance law, claims under which have not been foreclosed by the Supreme Court’s decision in *Massachusetts* and its progeny. In fact, in January 2018, the City of New York filed a lawsuit against various oil companies including BP and ExxonMobil, alleging that their GHG emissions have damaged New York City in various ways, including through erosion and flooding. *City of New York v. BP P.L.C.*, No. 18-CV-182 (S.D.N.Y. Jan. 2018). The City alleged causes of action including public nuisance, private nuisance, and trespass, and sought both compensatory damages as well as costs the City will incur to protect infrastructure and property as well as public safety and the health of its citizens from the impacts of climate change. *Id.* Similar lawsuits against fossil fuel companies have been brought in California by both municipalities, the State, and coastal communities. *E.g.*, *People of the State of Cal. v. BP P.L.C.*, No. 3:17-CV-182 (N.D. Cal. 2017). And climate change-related lawsuits seeking damages are also being brought by victims of hurricanes, alleging that the defendant oil, electrical, chemical, and coal companies caused or contributed to global warming and climate change that created the conditions fueling devastating hurricanes such as Hurricane Katrina. *E.g.*, *Comer v. Murphy Oil USA, Inc.*, 839 F Supp. 2d 849 (S.D. Miss. 2012) (dismissing suit because plaintiffs lacked standing), *aff’d*, 718 F.3d 430 (5th Cir. 2013); *Turner v. Murphy Oil USA, Inc.*, 472 F. Supp. 2d 830 (E.D. La. 2007).

What coverage issues are likely to arise out of these cases? As seen from the above discussion, there will likely be issues relating to whether the allegations in any given suit trigger the CGL insurer’s duty to defend. One issue in that context will be whether the environmental damage alleged, such as flooding or erosion, constituted covered “property damage” that occurred.

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1 This case is currently on appeal following the district court’s dismissal. *BP P.L.C.*, No. 18-cv-182 (S.D.N.Y. 2018), Dkt. Nos. 153, 155.
during the policy period. Some courts have held that damage to the environment constitutes the requisite damage to “tangible property.” E.g., Weight v. USAA Cas. Ins. Co., 782 F. Supp. 2d 1114, 1123-24 (D. Haw. 2011) (concluding that stream diversion that resulted in “diminished water flow” to plants and fish could constitute damage to “tangible property”); Oak Ford Owners Ass’n v. Auto-Owners Ins. Co., 510 F. Supp. 2d 812, 817 (M.D. Fla. 2007) (finding that creek dredging and deposition of fill on creek bank constituted damage to “tangible property”; noting that in “environmental contamination cases, courts routinely assume that property damage occurs by virtue of the introduction of pollutants into the environment”); Towns v. N. Sec. Ins. Co., 964 A.2d 1150, 1161-62 (Vt. 2008) (determining that groundwater contamination constitutes damage to “tangible property”). And where the complaint alleged continuous and incremental damage to the environment occurring over years of GHG emissions since, e.g., the 1970s, courts in some jurisdictions could find that all of the emitters’ CGL policies since that time are triggered and owe a duty to defend. See, e.g., Fireman’s Fund Ins. Cos. v. Ex-Cell-O Corp., 685 F. Supp. 621, 626 (E.D. Mich. 1987) (holding that “each exposure of the environment to a pollutant constitutes an occurrence and triggers coverage”); Cole v. Celotex Corp., 599 So.2d 1058, 1077-80 (La. 1992) (noting that in “some exposure types of cases involving cumulative injuries, it is possible that more than one policy will afford coverage” because “each policy will afford coverage to the bodily injury or property damage which occurs during the policy period” (internal citation omitted)); C. Brewer & Co. v. Indus. Indem. Co., No. 28958, 2013 WL 4017100, at *10-15, 2013 Haw. App. LEXIS 472, at *43 (Haw. Ct. App. Aug. 7, 2013) (holding that continuous damage to earthen dam over multiple years triggered all policies in effect over period during which damage occurred), aff’d in part, vacated in part sub nom. C. Brewer & Co. v. Marine Indem. Ins. Co., 347 P.3d 163 (Haw. 2015).

If there is property damage, the next issue may be whether that property damage was caused by an “occurrence,” that is “an accident” or “continuous or repeated exposure to substantially the same harmful conditions.” As discussed above, the Virginia Supreme Court concluded in AES that the complaint did not allege an occurrence because it contended that the defendants knew or should have known of the allegedly detrimental consequences of their conduct. But many courts have found, in the context of long-tail environmental cases, that the continuous discharge of pollutants into the environment constitutes an occurrence. E.g., Metro. Life Ins. Co. v. Aetna Cas. & Sur. Co., 765 A.2d 891, 900-09 (Conn. 2001) (collecting cases and concluding that “exposures to asbestos” that “spanned a period of more than sixty years” constitutes “several occurrences”).

By analogy, and absent allegations such as those contained in the Kivalina complaint, courts could well find that the continuous emission of GHGs constitutes an occurrence that triggers coverage under CGL policies. Moreover, many courts outside of Virginia do not consider the objectively natural or probable consequences of an insured’s act when evaluating whether there was an “occurrence,” but rather assess only the insured’s subjective intent or expectation, or the substantial probability of the alleged harm occurring as a result of the insured’s intentional actions. E.g., Nat’l Sur. Co. v. Westlake Invs. LLC, 880 N.W.2d 724, 736 (Iowa 2016) (holding that existence of occurrence “under a modern standard-form CGL policy turns on whether the event itself and the resulting harm were both expected or intended from the standpoint of the insured”); Columbia Cas. Co. v. Westfield Ins. Co., 617 S.E.2d 797, 799 (W. Va. 2005) (similar (collecting cases)); Voorhees v. Preferred Mut. Ins. Co., 607 A.2d 1255, 1264-65 (N.J. 1992) (similar; noting - 11 – Changing Climate, Changing Risks and Policies, Karin S. Aldama, Tred R. Eyerly, Rina Carmel, ABA Insurance Coverage Litigation Committee CLE Seminar (2019)
that the “general trend appears to require an inquiry into the actor’s subjective intent to cause injury”); City of Carter Lake v. Aetna Cas. & Sur. Co., 604 F.2d 1052, 1059 (8th Cir. 1979) (similar; holding that existence of occurrence depends on insured’s actual knowledge); State Farm Fire & Cas. Co. v. Motta, Civil Action No. 18-3956, 2018 U.S. Dist. LEXIS 208472 (E.D. Pa. Dec. 11, 2018) (viewing whether suicide was an accident from the insured’s perspective after he allegedly bullied his classmate).

Another area is whether standard CGL policies’ pollution exclusions bar coverage, and hence obviate the duty to defend, for climate-related claims alleging damage resulting from the emission of GHGs and resulting global warming. Since 1986, CGL policies have included absolute pollution exclusions, and policies issued between 1973 and 1986 contained pollution exclusions with exceptions for “sudden and accidental” discharges of pollutants. These exclusions raise two issues: First, are GHGs “pollutants,” that is, “any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals, and waste”? And second, if GHGs are pollutants, can their emissions over time constitute a “sudden and accidental” release within the meaning of the pre-1986 CGL policies’ exception to the pollution exclusion?

As to the first issue, no court has directly addressed that issue yet. The Supreme Court decision in Massachusetts does suggest that GHGs may be pollutants, but that decision was made under the Clean Air Act’s broad definition of air pollution, not under the definition in standard CGL policies. But other courts have held, Massachusetts v. EPA notwithstanding, that naturally occurring substances such as carbon dioxide, one of the most prevalent GHGs, are not pollutants. E.g., Andersen v. Highland House Co., 757 N.E.2d 329, 333 (Ohio 2001); Donaldson v. Urban Land Interests, 564 N.W.2d 728, 732 (Wis. 1997); W. All. Ins. Co. v. Gill, 686 N.E.2d 997, 999-1001 (Mass. 1997). And even opinions by courts that do not go quite that far range from extremely broad to very narrow interpretations of the pollution exclusion. Compare, e.g., Chestnut Assocs. v. Assurance Co. of Am., 17 F. Supp. 3d 1203, 1214 (M.D. Fla. 2014) (holding that bodily fluids can constitute “pollutant”) with, e.g., Am. States Ins. Co. v. Kiger, 662 N.E.2d 945, 948-49 (Ind. 1996) (holding that gas leaking from a gas station’s underground storage tank was not a pollutant). Whether an insurer’s duty to defend is triggered by allegations of damage caused by GHG emissions thus may depend on the jurisdiction in which the coverage case is brought. And even if the complaint is brought in a jurisdiction with a more expansive view of the pollution exclusion, policyholders may still argue that emissions within regulatory limits cannot constitute pollution—a view that an Illinois appellate court ostensibly agreed with when holding that a pollution exclusion was at least ambiguous when applied to regulatorily permitted levels of discharge of air pollutants. Erie Ins. Exch. v. Imperial Marble Corp., 957 N.E.2d 1214, 1221 (Ill. Ct. App. 2011) (asserting that the pollution exclusion is “arguably ambiguous as to whether the emission of hazardous materials in levels permitted by an [Illinois Environmental Protection Agency] permit constitute traditional environmental pollution excluded under the policy”); Country Mut. Ins. Co. v. Bible Pork, Inc., 42 N.E.3d 958, 970 (Ill. Ct. App. 2015) (similar).

With respect to the second issue, of whether GHG emissions occurring over time—potentially years or decades—can be “sudden or accidental,” decisions similarly run the spectrum from finding coverage only for pollutant discharges that occurred abruptly or over a short period of time to finding coverage also for gradual discharges, at least so long as the insured did not
expect or intend the resulting damages. Compare, e.g., *N. Pac. Ins. Co. v. Mai*, 939 P.2d 570 (Idaho 1997) (finding that “sudden” is unambiguous and concluding that it only “includes reference to an event that happens in a short period of time”) with, e.g., *Sunbeam Corp. v. Lib. Mut. Ins. Co.*, 781 A.2d 1189, 1195 (Pa. 2001) (noting that CGL policies may “provide coverage for both gradual and abrupt pollution or contamination so long as it was unexpected and unintended”). Thus, again, a finding of coverage or no-coverage may depend on where climate-change-related coverage actions are filed.

Another issue that may arise in the context of coverage for GHG-emission-related lawsuits is with respect to complaint that alleges, as did the New York City complaint discussed above, that the GHGs “trespassed” upon the plaintiff’s property—the issue then may become whether that constitutes “wrongful entry” under Coverage B of the standard CGL form. Importantly, Coverage B was not subject to a pollution exclusion until the mid-1990s, when the ISO issued CGL form CG 00 01 01 96. The absence of a pollution exclusion in pre-1996 CGL policies may allow policyholders to argue that Coverage B is available for such wrongful entry claims even if there would be no coverage under Coverage A for the resulting property damage. Such an argument would be particularly likely to be successful in a jurisdiction that has held that trespass onto third-party property by chemicals is akin to wrongful entry and falls under Coverage B. E.g., *Pipefitters Welfare Educ. Fund v. Westchester Fire Ins. Co.*, 976 F.2d 1037, 1042-44 (7th Cir. 1992) (concluding that a CGL policy’s pollution exclusion clause defeats a claim for coverage only when it “applies, by its terms, to the policy’s personal injury provision” and the suit “falls within the purview of the clause”); *Great N. Nekoosa Corp. v. Aetna Cas. & Sur. Co.*, 921 F. Supp. 401, 407 (N.D. Miss. 1996) (holding that the policy’s “pollution exclusion is only applicable to bodily injury and property damage,” not “to liabilities enumerated within the personal injury endorsement”); *Millers Mut. Ins. Ass’n of Ill. v. Graham Oil Co.*, 668 N.E.2d 223, 229 (Ill. App. Ct. 1996) (determining that, because the language of the pollution exclusion refers only to ‘bodily injury’ . . . and ‘property damage,’” and because the court must “construe exclusions strictly against the insurer and in favor of coverage,” the court could not “broaden the pollution exclusion’s express terms to deny coverage for personal injuries caused by pollution”); *Hirschberg v. Lumbermens Mut. Cas. Co.*, 798 F. Supp. 600, 604 (N.D. Cal 1992) (finding that “coverage exists under the personal injury provision” because the complaint alleged “causes of action based on nuisance and trespass”).

Finally, depending on how the allegations in the underlying complaint are framed, the scope of the “expected or intended” exclusion may also come into play. For example, an underlying complaint alleging intentional behavior of the insured in order to preserve an argument for punitive damages is not helpful to the insured’s efforts to secure a defense under the policy.

Of course, coverage issues may also arise under policies other than CGL policies. For example, it is easy to foresee shareholder suits against coal, oil, and utility companies alleging that their consistent emissions of GHGs have exposed the companies to damages claims such as those discussed above, which in turn have resulted in lower share prices. The defendants will likely tender such claims to their D&O insurers, resulting in coverage issues such as whether the D&O policy at issue contains a pollution exclusion, how broad that pollution exclusion is, whether the complaint’s allegations fall under the pollution conclusion and, if they do, whether an exception
applies. Especially if the complaint alleges failure to disclose climate-related risk (as opposed to focusing on the actual emissions), it may well be that courts find that any pollution exclusion in the D&O policy does not apply because the allegations focus on misrepresentation, not pollution.

Similarly, issues may arise under Environmental Liability or Pollution Liability policies. These policies in a way present mirror-images to the CGL policies discussed above—where the CGL policies contain pollution exclusions, Environmental or Pollution Liability policies are designed to specifically cover “pollution events.” Thus, to the extent that courts conclude that GHGs are pollutants for purposes of CGL coverage, they may then also conclude that coverage for damages resulting from the discharge of those pollutants is available under Environmental Liability policies. Of course, the fact that most Environmental Liability policies are claims-made rather than occurrence-based may somewhat mitigate the risk to insurers posed by climate-change-related lawsuits because, unlike with CGL policies, only the policy in effect when the complaint is filed would be triggered.

Finally, the increasing occurrence of extreme climate events potentially triggered by human action and climate change, such as hurricanes or wildfires, may continue to implicate coverage under first-party property policies.

V. **Bad Faith Implications**

As has been true for past emerging coverage issues, courts may likely apply established bad faith principles to the emerging issues. With climate change, the complicating factors may well be political. The current administration’s hostility to science, withdrawal from the Paris Agreement, and rollback of environmental regulations could arguably be used to bolster coverage arguments that GHGs are not pollutants. On the other hand, if emitting large amounts of GHGs is legally permissible, courts may be reluctant to find an “occurrence.”