Complex and Emerging Issues with Claims-Made Insurance Coverage

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I. Claims Made Policies Generally

Third-party liability insurance policies can be grouped into two major categories: “occurrence” based policies and “claims made” policies. CGL policies are typical “occurrence” based policies. These policies, which are a largely standardized product, provide coverage for “those sums that the insured becomes legally obligated to pay as damages” because of “bodily injury” or “property damage” caused by an “occurrence,” or because of “personal and advertising injury,” which takes place within the coverage territory during the policy period. Thus, under “occurrence” based policies, when the claim is made against the insured is (largely) irrelevant – the determinative factor for which policy applies is when the injury actually took place. ¹

Conversely, “claims made” policies provide coverage for claims that are asserted during the policy period or, in some cases, during certain limited extensions of the policy period. When a claim is “made” for purposes of triggering coverage is often defined as when the insured receives a demand for money or services or is made party to a lawsuit. Claims made policies also frequently include a “retroactive date,” a date in the past which cuts-off coverage for claims that result from wrongful acts or omissions which took place prior to that date, regardless of whether the claim is made during the policy period.

There are several lines of insurance coverage which may be offered – or may only be offered – on a claims made basis. Directors and officers coverage and professional liability insurance are examples of policies that are almost always written on claims made policy forms.

Pollution or environmental coverage may be occurrence based or may be claims made depending on a variety of factors regarding the insured’s insurance portfolio and risk. Although CGL policies are typically occurrence-based, claims made policies are not unheard of in that realm either. It is important to carefully read the policy’s insuring agreement to determine which type of policy is at issue.

As society evolves or, in some cases arguably de-evolves, and as technology and risks change, so do policyholders’ potential liabilities. The past few years have seen an uptick in sales of certain claims-made policies types, which is likely tied to some of the emerging issues facing businesses today. Corporations big and small will need to plan carefully and, most likely, purchase new policy types and/or higher limits than they are used to, in order to prepare for the changing liability landscape of the future.

II. Insuring the Effects of the #MeToo Movement

One example of an emerging area of risk stems from the #MeToo movement. In October 2017, #MeToo began trending on social media, highlighting just how many women had experienced sexual assault and harassment in their professional lives. Employers across the country have begun taking notice, and although “protecting employees from any form of sexual misconduct or harassment should undoubtedly be the primary goal,” employers are also rightfully focused on protecting themselves via their insurance portfolio.

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2 For example, one report indicated that employment practice liability insurance gross written premium in 2017-2018 was over $2.3 billion, a significant jump from the $2.1 billion in gross written premium logged in 2016. Andrea Wells & Amy O’Connor, Today’s Hot Markers: Buyers Hungry for EPLI, Cyber and More, Insurance Journal, Apr. 2, 2018, available at https://www.insurancejournal.com/magazines/mag-cover/2018/04/02/484685.htm.

There are two key sources of coverage for lawsuits arising out of sexual harassment cases: employment practice liability insurance ("EPLI") and directors and officers insurance ("D&O"). EPLI provides coverage for wrongful acts which arise out of the employment process, including not only harassment claims but also wrongful termination, discrimination, and retaliation. \(^4\) EPLI coverage is available as a standalone policy, as part of a package with a company’s D&O policy, or as an endorsement to an existing liability policy. In general, however, EPLI coverages share similar policy provisions and exclusions – most notably, limits which erode through payment of defense fees. In the context of workplace sexual harassment or assault cases, this aspect of EPLI coverage may be most troublesome to business given the high cost of defending against such suits.

D&O coverage often dovetails with EPLI coverage and protects businesses from, among other things, shareholder derivative actions. These types of claims have become increasing common in high-profile sexual harassment and assault claims. In 2018, Wynn Resorts, CVS Corporation, and Papa John’s were all hit with shareholder litigation because of sexual harassment and sexual assault allegations. \(^5\) Presumably, insurance coverage will play a large role in the resolution of these lawsuits, just as it did in November 2017 when a $90 million settlement – paid entirely by insurers – was reached in the derivative action that arose from former-Fox News anchor Gretchen Carlson’s sexual harassment suit against CEO Roger Ailes. \(^6\)

Some insurers, however, are filing suit against their insureds to avoid liability. Harvey Weinstein – whose chronic sexual predation spawned the #MeToo movement – is facing litigation

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\(^5\) See Norfolk County Retirement Sys. v. Wynn Resorts, Ltd., et al., Case No. A-18-769062-B (Nevada District Court, Clark County); Samit v. CBS Corp., et al., Case No. 1:18-cv-07796 (S.D.N.Y.); and Danker v. Papa John’s Int’l, Inc., et al., Case No. 1:18-cv-07927 (S.D.N.Y.).

in both New York and in England against his insurer, Chubb. Chubb alleges that Weinstein’s conduct falls within the scope of the policies’ “intentional acts” exclusions. Chubb also claims that Weinstein concealed prior sexual assault settlements from them and that it therefore does not have to defend or indemnify him in a wide-variety of lawsuits filed against him by his victims in New York, California, Canada, and England.\(^7\)

It will be interesting to see how the insurance coverage suits play out and the impact any court opinions may have on the insurance market in the coming years. Will new policies pop up to fill any gap created by intentional acts or prior acts exclusions?

### III. Insurance Coverage for Climate Change

Classifying climate change as an “emerging issue” may, at this point, be a misnomer. Municipalities and states have been leading the charge for over a decade against various oil and gas companies seeking to hold them accountable for the effects of climate change. Most of these lawsuits, however, have been unsuccessful, with courts tossing out complaints based on lack of standing or failure to show proximate cause. Some notable examples include:

- *Comer v. Murphy Oil USA*, 607 F.3d 1049 (5th Cir. 2010): A group of property owners brought a putative class action against oil and energy companies, claiming that their businesses caused greenhouse gas emissions which contributed to global warming and increased the destructive strength of Hurricane Katrina. On rehearing *en banc*, the Fifth Circuit dismissed the appeal because the court lacked a quorum. In effect, the decision meant that the district’s court’s decision, which found that the plaintiffs lacked standing and that climate change was a political question reserved for Congress, controlled.

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- **American Electric Power Co., Inc. v. Connecticut**, 564 U.S. 410 (2011): Eight states, New York City, and several land trusts sued electric power corporations operating fossil-fuel based power plants on a theory of public nuisance for contributing to global warming. The Supreme Court held that the Clean Air Act authorizes the Environmental Protection Agency to act on such issues, and that therefore there is no federal common law right for individuals or states to seek the relief sought by the plaintiffs.

- **Kivalina v. ExxonMobil Corp.**, 696 F.3d 849 (9th Cir. 2012): Alaskan Native American city sued numerous oil and energy companies for the impacts global warming has had on their land. The Ninth Circuit dismissed the claim, following the decision in **American Electric**, based on lack of subject matter jurisdiction.

Since most of these lawsuits haven’t made it past the motion to dismiss stage, insurance coverage has been mostly an “afterthought.” However, that may change as litigants continue to test the judicial waters with new and varied theories of liability. Notably, in 2014 Illinois Farmers Insurance Company filed several proposed class action lawsuits against Illinois counties and municipalities in which it alleged that the localities failure to increase storm water storage capacity led to widespread flooding for which the insurers were forced to indemnify their insureds. Ultimately, the insurer withdrew its complaint and issued a statement which made it clear the suit was filed to bring awareness to the issue: “We believe our lawsuit brought important issues to the attention of the respective cities and counties, and that our policyholders’ interests will be protected by the local governments going forward.” Just because Illinois Farmers folded, however, doesn’t

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mean that other insurers won’t pursue this course of action, adding an interesting twist to the future of climate change litigation.

D&O coverage may play an increasingly important role vis-à-vis climate change insurance. As shareholder resolutions concerning climate change become increasingly popular, directors and officers may open themselves up to class actions or shareholder derivative actions for misrepresenting, mismanaging, or failing to disclose climate-change related risks. Environmental consultants may also face new liabilities arising from their preparation of environmental impact statements, green building permits, and the like. Pursuit of coverage for these claims will likely be a complex affair which will rise and fall on the interpretation of numerous exclusions – e.g., pollution, punitive damages, and intentional or criminal acts exclusions, to name a few – as well as policy provisions concerning notice and knowledge.

IV. Conclusion

Claims made insurance policies may offer protection for businesses facing sexual assault or harassment claims, or for those companies alleged to contribute to global warming. As these issues continue to take center stage in our nation’s courts we can anticipate more reported decisions analyze how coverage applies to these emerging risks.

12 Id. at 7.