

Coverage for Climate Change Claims, An Uphill Fight

By J. Robert Renner

On April 19, the U.S. Supreme Court, in the case of *American Electric Power Co. Inc. v. Connecticut*, No. 10-174, will hear oral argument on the question of whether states and private parties may maintain actions for nuisance under federal common law based on allegations that the defendants, electric utilities, contributed to global warming by their carbon dioxide emissions. The litigation should give pause to both industrial concerns and their liability insurers. Although the defendants advance strong arguments for dismissal before the Supreme Court, these arguments are for the most part specific to the federal forum (e.g., standing, the political question doctrine, the existence of a federal claim). It seems unlikely the Supreme Court will completely close the door on these suits, and climate change litigation, in one form or another, will continue.

In consideration of such lawsuits, do pollution exclusions, as commonly found in commercial general liability insurance policies, exclude coverage for the release of anthropogenic greenhouse gases?

Pollution exclusions were first added to general liability policies in the early 1970s in response to judicial decisions construing such policies as covering damages resulting from the emission of pollutants as a regular or ongoing part of the insured's business. The historical background to the adoption of pollution exclusions was the enactment of new state and federal antipollution laws in the 1960s, 1970s, and 1980s, including the Clean Air Act, the Clean Water Act, and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). There is little dispute that pollution exclusions were adopted, in part, to address the potential liability resulting from such laws.

The specific language of the exclusions varies between policies and has changed over time. Originally, insurers began adding a "qualified" exclusion providing that the policy did not apply to damage arising from the release of pollutants into the environment, unless the release was "sudden and accidental." By the mid-1980s, in response to judicial constructions of the "sudden and accidental" language, this clause was replaced with

an "absolute" exclusion, omitting the "sudden and accidental" carve-out.

In order of importance, the primary anthropogenic greenhouse gases are carbon dioxide, methane, and nitrous oxide. According to the Intergovernmental Panel on Climate Change (IPCC)'s Fourth Assessment Report of 2007, there is very high confidence (at least 90 percent probability) that the global average net effect of human activities since 1750 has been one of warming, and it is very likely (at least 90 percent probability) that the increase in global average temperatures since the mid-20th century is due to the observed increased atmospheric concentrations of anthropogenic greenhouse gases.

Do pollution exclusions, as commonly found in commercial general liability insurance policies, exclude coverage for the release of anthropogenic greenhouse gases?

The increased levels of carbon dioxide primarily result from fossil fuel use, with land-use change and concrete production providing smaller contributions. The increased levels of methane and nitrous oxide primarily result from agriculture, although methane is also emitted by industrial sources. All three are considered long-lived gases. In the case of carbon dioxide, a portion of any emissions will remain in the atmosphere for hundreds or thousands of years.

To date, all climate change litigation involving private parties has focused either on carbon dioxide as a product of fossil fuel consumption, or on carbon dioxide and methane in combination. The defendants have been from the energy, fossil fuels, chemicals, and automotive industries.

An insured seeking coverage for a climate change suit in the face of a pollution exclusion would need to argue that the alleged global warming gas emissions, most likely either carbon dioxide or methane, do not constitute pollutants. This would be an uphill fight.

Setting aside the "sudden and accidental" provision of the qualified exclusion, both the qualified and absolute pollution exclusions have been held to be clear and unambiguous as applied to traditional environmental pollution claims. Although the state Supreme Court has refused to apply the absolute exclusion to cover ordinary acts of negligence in the use or handling of harmful substances, in reaching that result, it distinguished "events commonly thought of as pollution, i.e., environmental pollution," to which the exclusion would apply, based on a recognition that the exclusion's historical objective was the "avoidance of liability for environmental catastrophes related to intentional industrial pollution." *MacKinnon v. Truck Insurance Exchange*, 31 Cal. 4th 635, 653 (2003).

The insured may argue that carbon dioxide and methane cannot be pollutants because they are not normally toxic to humans, and are part of a natural cycle; they are continuously emitted by living organisms and absorbed or broken down through natural processes. In California, however, the case law has never recognized any requirement that a substance be toxic in order to be considered a pollutant under a pollution exclusion. See *Cold Creek Compost Inc. v. State Farm Fire & Casualty Co.*, 156 Cal. App. 4th 1469 (2007) (odors from a compost facility constitute a pollutant within absolute exclusion); *Ortega Rock Quarry v. Golden Eagle Insurance Corp.*, 141 Cal. App. 4th 969 (2006) (dirt and rocks placed in a creek bed constitute a pollutant within absolute exclusion); but see *Donaldson v. Urban Land Interests Inc.*, 564 N.W.2d 728 (Wis. 1997) (exhaled carbon dioxide within an office building not a pollutant within absolute exclusion); *West Bend Mutual Insurance Co. v. Iowa Iron Works Inc.*, 503 N.W.2d 596 (Iowa 1993) (spent foundry sand used for landscaping not a pollutant within absolute exclusion).

More fundamentally, the language of the exclusion must be interpreted in the circumstances of the case, and cannot be found to be ambiguous in the abstract. *MacKinnon*, 31 Cal. 4th at 648. The relevant circumstances include the evolving science of climate change. If the findings of the IPCC's Fourth Assessment Report are taken seriously — admittedly the IPCC has its critics — it is difficult to see how greenhouse gas emissions from industrial or commercial sources could not be viewed as pollutants. According to the IPCC, the damages to be expected by the year 2100 include rising sea levels, increasing acidification of the ocean, more frequent heat waves, increasing intensity of tropical cyclones, and broad changes in regional precipitation patterns.

In this regard, "state and federal environmental laws may provide insight into the scope of the policies' definition of pollutants without being specifically incorporated in those definitions." *Ortega*, 141 Cal. App. 4th at 980. The Supreme Court has already ruled that greenhouse gases are unambiguously within the scope of the Clean Air Act's definition of "air pollutant." *Massachusetts v. Environmental Protection Agency*, 549 U.S. 497, 528-32 (2007). A number of states have also expressly classified greenhouse gases as pollutants, with more likely to follow. Standard pollution exclusions are broadly drafted to anticipate scientific developments and changing laws in the field of environmental pollution. They are not ambiguous as applied to suits based on theories of anthropogenic climate change.

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



J. Robert Renner is a partner with Duane Morris in the firm's Los Angeles office. He can be reached at rrenner@duanemorris.com.