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Property Owners Need to Look Closely at Global Warming Coverage

Lawsuits from private plaintiffs are seeking monetary relief for damages caused by greenhouse gas emissions that may not be covered by insurance policies

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Two federal Court of Appeals cases are going after large emitters of greenhouse gases, but this time around the plaintiffs are not looking for a list of mitigation efforts. They want monetary damages awarded.

While the cases have not been resolved, the plaintiffs have jumped a significant hurdle in the next phase of greenhouse gas litigation forcing companies to take a harder look at their insurance policies to see if they are protected from this new breed of claims.

Decisions in the two cases, *Comer v. Murphy Oil USA* and *Connecticut v. American Electric Power Co. Inc.*, were handed down in October and September, respectively. In both cases, the private-party plaintiffs filed lawsuits alleging the defendants' greenhouse gas emissions in some way caused some sort of public harm.

Federal Circuit Court judges ruled in both cases that the plaintiffs did have standing to pursue their cases, reversing lower court decisions that had dismissed the complaints.

"This case is a critical milestone, allowing global warming cases to be decided by the courts, just as they decide complex water pollution, air pollution and toxic dumping cases," said California Attorney General Jerry Brown.

Brown was referring to the state of Connecticut case in which California participated as a plaintiff.

"You really have two types of lawsuits," said Jonathan B. Sokol, a partner in the Los Angeles office of **Greenberg Glusker Fields Claman & Machtinger LLP**. "You have lawsuits brought on by cities and states to regulate greenhouse gas emissions against particular emitters because the federal government isn't doing anything about it. Then you have a separate body of lawsuits that is more of an emerging one, which is private parties saying, 'I've been damaged.'"

In the first category of lawsuits, when the U.S. Environmental Protection Agency starts regulating emissions or the federal government starts passing more comprehensive litigation, there will not be as much of a need for cities and states to do anything, Sokol said.

"In the second category, it depends on whether there is a lucrative structure in place to file these things," he said. "If there's more and more of these decisions recognizing that these parties have standing, there is more of an incentive for class actions to be filed."

These two court decisions call into question the outcome of yet another global warming case in the California court system involving the village of Kivalina against 24 oil, energy and utility companies, including ExxonMobil Corp. and Chevron Corp. The village's lawsuit alleges that global warming caused the ice protecting its coast to melt, forcing some residents to move.

The case was dismissed in the U.S. District Court's Oakland division, but that was before the two federal Circuit Court decisions.

"The issue in all three of those cases is whether these private parties have standing to assert these types of common law claims or whether the court should entertain them based on the political question it raises," Sokol said.

Pollution Policy Exclusion

In light of these cases, the EPA's endangerment finding and the accord reached during the Copenhagen Climate Conference in December it could force the issue of global warming insurance coverage even more in the short term.

"Right now, most of the focus has not been on the liability risk for real estate," said John Green, a partner in the San Francisco office of **Farella Braun + Martel LLP**. "A lot of the focus in the insurance industry has been on increased exposure for natural disasters, whether it's flooding in coastal areas, winter storms, a drought [or] brush fires. That's sort of the focus of the industry, and those kinds of losses right now are already covered."

General liability insurance policy holders will likely have to take a closer look at their existing policies and what year their policies went into effect. In some cases, general liability insurance may cover costs associated with litigation. In other cases, some policies may have a pollution exclusion, which does not cover global-warming claims.

Beginning in 1973, most general liability policies contained pollution exclusions with the exception of emissions deemed sudden or accidental.

"The issues that are going to come up, if the allegations [in a global warming case] are that there's been historical releases of greenhouse gases that have caused long-term damage, that could trigger coverage under older policies that didn't have the pollution exclusions," Sokol said.

To make matters more confusing, general liability insurance policies issued in 1985 and after included absolute pollution exclusions, which removed the sudden or accidental exclusions.

If a company is sued and there were allegations that the officers didn't manage the operations properly, that might trigger directors' and officers' liability insurance. But even those policies, at some point, have pollution exclusions.

Sokol said he expects that new products will be developed to address climate change litigation.

"We saw, years ago, when everybody was concerned with Y2K liability and endorsed policies with a Y2K exclusions," Sokol said. "We could see policies getting endorsed with climate-change exclusions."

A proposed piece of legislation called the California Green Insurance Act of 2010 could force the industry to start addressing the issue sooner rather than later. Assembly Bill 1011, authored by Dave Jones, D-Sacramento, would cover a number of green insurance-related issues. The bill is in the Senate.

Among other things, Jones' proposal would require property insurers to offer coverage for green building replacements and would force the insurance commissioner to study and hold hearings on the claims and costs related to green building.

Because global warming issues have not been solved in the context of insurance coverage, Green said it makes sense for individual building owners to do a greenhouse gas inventory.

"Right now, since there aren't a lot of insurance products out there or other risk management techniques assessing your exposure, it's important," Green said. "I think business owners have to look at their inventory of properties and think about if there's a loss of property."

Green also said property owners should think about what is happening at the municipal building code level and the future of green building and make sure they have code updates in place.

"One of their key components of their response right now ought to be assessing what future building requirements are and making sure they have adequate code coverage so they can build to greener standards that are coming into play," he said.

Cause for Alarm?

Ultimately, because global warming litigation has not reached the point of awarding damages to private party claims, it will take time before there is a response from the insurance industry.

"If some of these lawsuits go to a jury and have a judgment against emitters you might see some of the huge insurance companies start to think about policies to protect them," said Stephen Velyvis, senior counsel in the Walnut Creek office of **Miller Starr Regalia**.

According to Velyvis, he does not see the industry developing or offering products to cover global warming claims because the cases in the pipeline are in their infancy.

"They all are still at their initial pleading stage," he said. "It hasn't trickled down to the smaller or individual landowners who are emitting their greenhouse gas emissions on their property."

At the same time, Velyvis said, large industrial companies being targeted in these class action lawsuits are large emitters. For example, in the *Connecticut v. American Electric Power Co.* case, the defendants were emitters of a combined 650 million tons of emissions annually, amounting to 10 percent of the nation's annual emissions.

In other words, the plaintiffs were going after the biggest polluters, Velyvis said.

"I don't believe that smaller-size landowners in California have to put potential lawsuits under these public nuisance theories on their radar screens," he said. "California is already regulating emitters. That's a very interesting point here in terms of questions of whether California landowners should worry about these lawsuits."

While property owners may want to prepare for a potential global warming liability, plaintiffs in these types of cases have their own challenges to win in court.

Velyvis said he is not seeing an increase in lawsuits from private plaintiffs looking for monetary damage for greenhouse gas emissions.

"The reason that is the case is, one, an individual would have trouble providing significant damages just to him or her," he said. "That's why the cases are being brought under the public nuisance theory. Two is because there's not really a need because the state is moving so fast to regulate greenhouse gas emissions in California."

In the two federal Circuit Court cases, the defendants argued the claims were based on political questions that shouldn't be decided in private-party litigation.

Now that the two parties have cleared this first hurdle proving that these types of claims can be heard in court, they will have to show cause for damages in court.

"It's not clear how they'll deal with the causal issue," Sokol said of the plaintiffs. "On the one hand, these petitioning private-party litigants are seeking private-party damages, but there's still subhurdles for them."

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