Climate Change Litigation Insurance Implications

1. Climate Change Science – The Basics (Slides 1-6)   
   A. What Is The Difference Between Weather & Climate?
   * 1. The difference is a measure of time:
        1. Weather = Conditions of the atmosphere over a short period of time.
        2. Climate = how the atmosphere "behaves" over relatively long periods of time.

B. The Greenhouse Effect

i. Describes how natural gases in the Earth’s atmosphere reduce the amount of heat escaping from the Earth into the atmosphere:

1. Brief History of Climate Change Events – Slides 7-13
2. **1712** - British ironmonger Thomas Newcomen invents the first widely used steam engine, paving the way for the Industrial Revolution and industrial scale use of coal.
3. **1800** - World population reaches one billion.
4. **1886** - Karl Benz unveils the Motorwagen, often regarded as the first true automobile.
5. **1927** - Carbon emissions from fossil fuel burning and industry reach one billion tons per year.
6. **1930** - Human population reaches two billion.
7. 1938 - Guy Callendar is the first to show that CO2 concentrations had increased over the same period, and suggests this caused the warming. The "Callendar effect" is widely dismissed by meteorologists.
8. 1960 - Human population reaches three billion.
9. 1975 - Human population reaches four billion.
10. **1987** - Human population reaches five billion
11. **1989** - Carbon emissions from fossil fuel burning and industry reach six billion tons per year.
12. **1992** - **At the Earth Summit in Rio de Janeiro, governments agree the United Framework Convention on Climate Change**. Its key objective is "stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system". Developed countries agree to return their emissions to 1990 levels.
13. **1998** - Publication of the controversial "hockey stick" graph indicating that modern-day temperature rise in the northern hemisphere is unusual compared with the last 1,000 years. The term hockey stick was coined by the climatologist Jerry D. Mahlman, to describe the pattern this showed, envisaging a graph that is relatively flat to 1900 as forming an ice hockey stick's "shaft", followed by a sharp increase corresponding to the "blade".
14. **1999** - Human population reaches six billion.
15. **2005** - **The Kyoto Protocol becomes international law for those countries which have ratified**.
16. **2006** - Carbon emissions from fossil fuel burning and industry reach eight billion tons per year.
17. **2009** - **China overtakes the US as the world's biggest greenhouse gas emitter - although the US remains well ahead on a *per-capita* basis.**
18. **2010** – EPA issued the final “Timing Rule” which stated that the earliest that GHGs could be subject to regulation is 1/2/2011.
19. **2011** - Human population reaches seven billion.
20. **2015** – **“Paris Agreement” signed by 195 countries. Only Nicaragua & Syria refuse. The parties agree to limit warming to “well below” 3.6 degrees F. (2 degrees Celsius), as measured from pre-industrial levels.**
21. **2017** – **President Trump states that U.S. will pull out of the Paris Agreement. However, under terms of the Agreement, U.S. cannot withdraw until 11/4/2020, the day after the next presidential election.**

1. **Climate Change Litigation raises two common recurring threshold issues: Slides 14-43**
   1. “**Justiciability**”
   2. “**Standing**”

Justiciability refers to the plaintiff’s ability to claim a remedy when a violation of a right either has occurred or is likely to occur. A suit is justiciable if the court is empowered to decide the matter and considers it appropriate to do so. The analysis is both legal and procedural. The controversy must be definite and concrete.

To demonstrate standing, a litigant must show that it has suffered a concrete and particular injury that is either actual or imminent, that the injury is fairly traceable to the defendant, and that a favorable decision will address the injury.

* ***Massachusetts v. EPA,* 549 U.S. 497 (2007)**
  + The U.S. Supreme Court ruled 5-4 that ***GHGs are air pollutants* covered by the CAA.** – (“Greenhouse gases fit well within the CAA’s capacious definition of air pollutant.”) which will support lack of standing arguments.
    - **Dissent** (Roberts, Scalia, Thomas & Alito):

By Roberts:

*Global warming may be a ‘crisis,’ even ‘the most pressing environmental problem of our time.” … It is not a problem, however, that has escaped the attention of policy makers in the Executive and Legislative Branches of our Government, who continue to consider regulatory, legislative, and treaty- based means of addressing global climate change. Apparently dissatisfied with the pace of progress … petitioners have come to the courts claiming broad-ranging injury, and attempting to tie that injury to the Government’s alleged failure to comply with a rather narrow statutory provision.* ***I would reject these challenges as nonjusticiable.***

* ***Comer v. Murphy Oil USA*, 585 F.3d 855 (5th Cir. 2009)**
* **Fifth Circuit held:**

**Court held** that plaintiffs do not have standing because their alleged injuries are not “fairly traceable to the defendants’ conduct.”

* **Moreover, Court found** that the suit presented a non-justiciable political question, **and that all plaintiffs’ claims were preempted by the CAA.**
* The Court further found that “… plaintiffs cannot possibly demonstrate that their injuries were proximately caused by the defendants’ conduct.”
* ***Am. Elec. Power*, et. al*. v. Connecticut, et al,* 564 U.S. 410 (2011)**

**Supreme Court Held:**

* **“Based on EPA's designated authority, it is up to the EPA to decide whether and how to regulate GHGs from power plants.”**
* **Confirms the EPA's primacy as the regulator of GHGs under the CAA and arguably limits the possibility of claiming federal common law/public nuisance for climate change litigation.**
* ***Native Village of Kivalina v. ExxonMobil Corp*., 696 F.3d 849 (9th Cir. 2012)**
* **Alaskan tribal village alleged that their village is being threatened by the effects of climate change** - - specifically, by the reduction in protective sea ice and an increase in storms and flooding and asserted that the 24 oil, energy, and utility companies named as defendants should be held liable for the costs of relocating the village, because they had allegedly contributed to the risks of climate change through their GHGs emissions.
* Brought as a “nuisance” claim under federal common law.
* Only monetary relief sought - $400 million to relocate village.
* 9th Circuit held that Federal Common law claims we displaced by the Clean Water Act. Case dismissed.
* **Other Significant Cases**:

***Korsinsky v. EPA***, 2006 U.S. App. LEXIS 21024 (2nd Cir. 2006)

Finding *pro se* plaintiff’s claim that global warming and carbon dioxide emissions *may* cause him *future* injury too speculative to confer standing.

***People of the State of Calif. v. General Motors, et al.*** – Northern Dist. Of Calif., No. 3:06-cv-05755 (2007)

* Court granted defendants’ motion to dismiss plaintiff’s Federal and State public nuisance claims that the defendant automakers create and contributed to a public nuisance – global warming.
* **The Federal District Court, citing *Mass. v. EPA* stated: “Plaintiff has failed to provide the Court with sufficient explanation or legal support as to how this Court could impose damages against the defendant automakers without unreasonably encroaching into the global warming issues currently under consideration by the political branches.”**

**THE PRESENT - Slides 22-37**I. The Big Ten US Climate Change Lawsuits – You can obtain the citations from the PowerPoint. I will review only some and then only the highlights.

* + ***County of San Mateo v. Chevron, et al****.*, No. 17-CIV-03222, Calif. Sup. Ct. (2017)
  + ***County of Marin v. Chevron, et al****.*, No. 17-CIV-1702586, Calif. Sup. Ct. (2017)
  + ***City of Santa Cruz v. Chevron, et al****.*, No. 17-CIV-03242, Calif. Sup. Ct. (2017)
  + ***City of Richmond v. Chevron, et al***., C18-00055, Calif. Sup. Ct. (2018)
  + ***City and County of San Francisco & City of Oakland*** *v. BP, et al.*, No. 3-cv-06012, N.D. Calif. (2018) (*As removed*)
  + ***City of New York v. BP, et al***., No. 18-cv-00182, S.D.N.Y. (2018)
  + ***City of Boulder, et al. v. Suncor Energy (U.S.A.), et al.,*** 1:18-cv-01672, U.S.D.C., Dist. Of Colorado (2018) (As removed)
  + ***King County v. BP p.l.c, et al***., 2:18-cv-00758, W.D. Wash. (2018) (As removed)
  + **Rhode Island v. Chevron, et al**., 1:18-cv-00395, D.R.I (2018) (As removed)
  + ***Mayor & City Council of Baltimore v. BP p.l.c., et al***., 1:18-cv-02357, D.Md. (2018) (As p**rimary approaches:**
* Generally the courts have held that the issue is not over science. All parties agree that fossil fuels have led to global warming and ocean rise and will continue to do so, and that eventually the navigable waters of the United States will intrude upon Oakland and San Francisco.
* “The issue is a legal one – whether these producers of fossil fuels should pay for anticipate harm that will eventually flow from a rise in sea level.”
* “The scope of plaintiffs’ theory is breathtaking. It would reach the sale of fossil fuels anywhere in the world, including all past and otherwise lawful sales…”
* “Their theory rests on the sweeping proposition that otherwise lawful and everyday sales of fossil fuels, combined with awareness that greenhouse gas emissions lead to increased global temperatures, constitute a public nuisance.”
* Under Federal common law plaintiffs’ public nuisance claim alleging intentional interference of a public right must show the interference is “unreasonable.” This in-turn involves “the weighing of the gravity of the harm against the utility of the conduct.”
* Courts should not decide complex policy questions surrounding climate change. “The problem deserves a solution on a more vast scale than can be supplied by a district judge or jury in a public nuisance case.”
* “Here, plaintiffs seek to impose liability on five companies for their production and sale of fossil fuels worldwide. These claims – through which plaintiffs request billions of dollars to abate the localized effects of an inherently global phenomenon – undoubtedly implicate the interests of countless governments, both foreign and domestic.”
* “Nevertheless, plaintiffs would have a single judge or jury in California impose an abatement fund as a result of overseas behavior.”
* We recommend you review some of the specifics of each case below.

**Other U.S. Climate Change Lawsuits**

* **The Allegations and Relief Sought**
* All suits allege damage to the municipality’s own property, as well as to the public at large.
* All suits allege nuisance due to, *inter alia*, sea level rise, increased flooding and intensified storms.
* The Trespass claims all allege sea level rise and increased flooding onto owned property.
  + All suits allege varying degrees of defendants’ knowledge (going back decades) of global warming, sea level rise and other climate change.

**ALL big ten** suits were removed by defendant fossil fuel companies to Federal Court (except NY suit which was originally brought in Federal).

* ***San Francisco/Oakland Federal Court Suit***

**-** Federal court ***denied*** Plaintiffs’ motions to remand back to state court.

* A Court Ordered three-hour Climate Change Tutorial to educate Judge took place late-March 2018.
* **On 6/25/18, the Court *granted* defendant fossil fuel companies’ Motions to Dismiss the Cities’ Amended Complaint for failure to state a claim.** Court ruled that the CAA displaced Plaintiffs’ nuisance claims and found that the displacement rule applies to the Cities’ claims even though the claims were not based on the defendants’ own GHG emissions but on their sale of fossil fuels to other parties that will eventually burn the fuels.
* **On 7/27/18, the Court *granted* the motions of four fossil fuel companies’ to Dismiss for lack of personal jurisdiction**, finding that it was “manifest that global warming would have continued in the absence of all California-related activities of defendants. Court held that Plaintiff Cities did not satisfy the “but-for” causation standard because they failed to adequately link the four companies’ activities to the alleged climate change harms such as raise in sea level.
* Appeal likely by City Plaintiffs.

* ***New York City Federal Court Suit***
* In March 2018, the parties asked court to defer personal jurisdiction challenges until after the defendants’ motion to dismiss is addressed.
* On 7/19/18, Judge Keenan granted defendant fossil fuel companies’ motion to dismiss, finding the private causes of action were displaced by the CAA and the “problems” were for the legislative and executive branches to address:
* ***King County, Washington Federal Suit***
* Motion to Dismiss for failure to state a claim filed on 7/27/18 by all defendants arguing, *inter alia****,*** CAA displaces private cause of action.
* Motion to Dismiss for lack of personal jurisdiction filed by BP, Chevron and CononoPhillips.
* County’s responses to all Motions due on 9/14/18 and defendants’ replies due on 10/5/18.
* **NO** motion for remand to state court has been filed by the County?
* ***City of Baltimore, MD Federal Suit***
* Notice of Removal to Federal Court filed by defendants on 7/31/18.
* No motions to dismiss or to remand have yet been filed.

**Considerations for all cases**:

* Ideal test cases with distinctly different strategies.
* Both State and Federal Courts involved.
* Will Influence how future climate change litigants approach the issue.
* **Potential for contradictory statements** by same parties in the different cases, undercutting arguments **AND** for conflicting rulings by the Courts.
* Major oil company defendants have ***not denied*** climate change has occurred/is occurring and that it is influenced by GHG’s and mankind’s action.
* **However**, they argue that the causes of action are preempted by CAA; have not met burden of proof to show defendants’ GHG contributions caused damages alleged, nor in the percentages claimed and that there were other intervening causes.
* “It’s not a question of whether climate change is real, but whether you can ascribe blame for it.”
* **Additional Noteworthy Matters:**
* ***New York & Massachusetts AG Fraud Investigations*:**
* NY & MA Attorney Generals are investigating potential investor “climate fraud” by Exxon.

**NY**: Exxon allegedly used two different accounting methods – one for communicating climate change to the public and another kept private for internal projections.

**MA**: Exxon allegedly deceived investors by failing to divulge potential climate change-related risks to their investments and whether Exxon violated Massachusetts consumer protection laws by misleading consumers on the impact of its products on climate change.

Climate Change Litigation --The Present

* **Additional Noteworthy Matters: THE CHILDREN’S CASES**
* ***Juliana, et al, v. United States***, No., 6:15-cv-01517
* **In 2015**, twenty-One youth plaintiffs, environmental group “Earth Guardian” and a “Future Generations” plaintiff represented by climate scientist Dr. James Hansen (former director of NASA Goddard Institute for Space Studies), filed suit in 2015 asserting Constitutional claims against Federal Government for failure to reduce carbon dioxide emissions.
* **Plaintiffs asked the court to compel the defendants to take action to reduce carbon dioxide emissions so that atmospheric CO2 concentrations will be no greater than 350 parts per million by 2100.**

CHILDREN CASES

* Alleged nation’s “climate system” was critical to their rights to life, liberty, and property, and that the defendants had violated their substantive due process rights by allowing fossil fuel production, consumption, and combustion at “dangerous levels.”
* Additional Constitutional causes of action: Equal Protection and Ninth Amendment violations (which Plaintiffs said protects “the right to be sustained by our country’s vital natural systems, including our climate system” and violation of the Public Trust Doctrine.

Court allowed the National Association of Manufacturers (NAM), the American Fuel & Petrochemical Manufacturers (AFPM), and the American Petroleum Institute (API) to intervene as of right. (**Continued** ...)

**In its Motion to Dismiss, the U.S. contended** that the plaintiffs lacked standing because they had not alleged a particularized harm that was traceable to defendants’ actions. The U.S. also said the alleged injuries were not redressable and that the plaintiffs’ claims raised separation of powers issues. The U.S. further argued that Future Generations had alleged no injury in fact. In addition, the U.S. said the plaintiffs had not stated a constitutional claim and that federal courts lacked jurisdiction over public trust doctrine lawsuits because such claims arise under state law.

**In 2016**, **the District Court held that the action was justiciable** because it asked the court to determine whether defendants had violated the plaintiffs’ constitutional rights. The court also concluded that plaintiffs had adequately alleged standing to sue and a due process claim. **The court said that it was not necessary to determine whether the atmosphere was a public trust asset because the plaintiffs had also alleged the claim in connection with the territorial sea, to which the Supreme Court had said “[t]ime and again” that the public trust doctrine applies.** The court also rejected the arguments that the public trust doctrine does not apply to the federal government and that federal environmental statutes displaced public trust claims. The court also held that the public trust claims were substantive due process claims and that the Fifth Amendment provided a right of action.

**In July 2018**, **the United States Supreme Court *denied* the United States’ Application for a Stay of Discovery and Trial, calling the request for relief “premature.”**

* USA had argued that preparing for trial and participating in discovery would be “too burdensome.”
* Justice Kennedy ‘s Ruling cautions that the breadth of plaintiffs’ claims is “striking” and warning that the “justiciability of plaintiffs’ claims presents substantial grounds for difference of opinion” and the District Court should take these concerns into account in assessing burdens of discovery and trial, as well as desirability of a prompt ruling on the Government’s pending dispositive motions.”

- **Trial date set for October 2018 and discovery to proceed, subject to dispositive motion practice**.

**The Future of Climate Change Litigation**

* Climate change cases will likely continue to proliferate at home and abroad, especially to the extent additional supportive scientific data is disseminated and evidence of related damage is disclosed.
* **However**, “Big Ten” U.S. based pending cases will play a significant role in future climate change litigation.
* **One of the most significant issues right now is whether the CAA preempts a state common law nuisance remedy:** 
  + **NY Federal Court 7/19/18 Dismissal Ruling stated “it would … be illogical to allow the City to bring state law claims when courts have found that these matters are areas of federal concern that have been delegated to the executive branch, as they require a uniform, national solution.”**
* U.S. Supreme Court has shown its willingness to accept climate change cases for decision.
* Possible creation of MDL to coordinate discovery in multiple climate change cases that survive motions to dismiss?
* Possible attempt by Legislative branch to address the issue?
* According to the London School of Economics, there are over 1,000 climate change lawsuits, with 800 having been brought in the U.S.

**Climate Change – Damages Slides 44-46**

* **What are the damages and associated costs from climate change?**
  + Two words: Far-reaching and seemingly unquantifiable
* **Impacts from sea level and temperature rise include but are certainly not limited to**:
* Direct damage to real and personal property
* Costs to mitigate against sea level rise (dams, levees, raising/strengthening buildings and structures, relocation, etc.)
* loss of natural resources (e.g. complete submergence of sensitive wetlands, impacts to fish and wildlife)
* Bodily injury
* Increased waterborne pests & associated disease (mosquitos, etc.)
* Damage to crops, soil erosion.
* Salinization and other contamination of potable of water supply.
* Loss of income
* Loss of property value
* Etc.… Etc. … The sky’s the limit (pun intended)
* **Will courts accept a volumetric allocation of fossil fuel companies’ contributions to GHGs to assign fault or perhaps a market share approach?**
* **2017 Report from Zillow determined:**
  + If sea levels rise as predicted by the year 2100, almost 300 U.S. cities would lose at least half their homes, and 36 U.S. cities would be completely lost.
  + One in eight Florida homes would be under water, accounting for nearly half of the lost housing value nationwide.
  + Nationwide, almost 1.9 million homes (or roughly 2 percent of all U.S. homes) – worth a combined **$882 billion** – are at risk of being underwater by 2100.
* **2017 Report from Zillow Reflecting Estimated Damage to N.Y. Homes From 6 Foot Sea Level Rise:**

**“Today’s flood will become tomorrow’s high tide.”**(Margaret Davidson – Founder of NOAA’s Coastal Services Center)

**EPILOGUE**

October 7, 2018 NYT Article reports that a landmark report from the United Nations Scientific panel on climate change now paints a far more dire picture than previously reported and that avoiding damage requires transforming the world economy at a speed and scale that has no documented historical precedent.

The report describes a world of worsening food shortages, wild fires and mass die off of coral reefs as soon as 2040, a period well within the lifetime of the global population.

The authors found that if greenhouse gas emissions continue at the current rate, the atmosphere will warm by as much as 2.7 degrees F (1.5 C) above preindustrial levels by 2040, inundating coastlines and intensifying droughts. Previous reports focused on 3.6 degrees F as the break point but the new report shows that many of those effects will come much sooner at 2.7 degrees.

Damages are estimated to cost $54 Trillion – with a “T”.

While it is possible to achieve the rapid changes required to avoid 2.7 degrees of warming, it is not likely. Trump promises to pull out of the Paris accords as does Jair Bolsonaro, the likely winner of the Brazil election for President, who also suggests he will pull out.

According to this report, in order to avoid 2.7 degrees, GHG must be reduced by 45% by 2030 and 100% by 2050. It also says that there is no way to mitigate climate change without getting rid of coal, a finding not surprisingly disputed by The World Coal Association.

The report concludes that the world is halfway to the 2.7 degree mark. We have caused a warming of about 1.8 degrees since about the 1850’s, the beginning of large scale industrial coal burning.

If we overshoot the target and allow the 2.7 degree mark to be reached, and cool down later, we can save the ice caps as they will again freeze. However, the coral reefs will have died and will not return.