

Legal Update

Climate change and the liability insurer

In light of recent developments in the debate concerning climate change liability, is it time for a climate change exclusion?

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Climate change has been the subject of intense debate in the insurance industry, particularly over the last 12 months. The focus of that debate, understandably, has been on the exposure of property insurers to catastrophe weather events. Such events are now expected to be more frequent and more intense due to climate change, the human contribution to which is now acknowledged by the majority of the scientific community. Accordingly, property insurers are in the front line when it comes to the immediate exposure to the consequences of climate change. However, where there is costly damage to property, there is the inevitable question of whether anyone might be considered to blame, at which point the debate shifts to whether there are any potential liability exposures.

Setting aside issues of duty of care and breach of duty (which it is not expected that courts will struggle with in light of the continuing increase in knowledge of the causes and effects of

global warming) the key issue for establishing liability on the part of a climate change defendant is causation: how are the actions of a particular entity to be proven to have caused loss to the particular climate change claimant or class of claimants? However, it appears that advances are now being made by the climate change scientists in the area of probabilistic event attribution (see the comments of Celine Herweijer, director of the Climate Change Practice at Risk Management Solutions reported in *Insurance Day* on 4 February). Consequently, the time when specific weather events may be attributed to the activities of a class of potential climate change defendants may be approaching. Where this is coupled with the willingness of the courts, particularly in the US, to adopt a 'market share' approach to the apportionment of liability, the stage is set for a serious risk of exposure for liability insurers. That there are potential claimants prepared to take on cases of this scale and complexity is already clear from the not insignificant



Recent climate change litigation

- In February 2008, a coastal native Inupiat village in Alaska filed a claim alleging that 20 oil, coal and electric utility companies are responsible for thinning sea ice and increased storm surges which are forcing their village to relocate. They seek damages from the defendants for their contribution to global warming, alleging public nuisance through their emissions of greenhouse gases and conspiracy to create a misinformation campaign intended to deceive the public about the science of global warming. The case continues.
- In 2006, the most significant climate change litigation was brought by the Attorney General of California against major car manufacturing companies. The defendants were accused of causing injury to the State of California by knowingly creating or contributing to the problem of global warming. Judgment was sought on an ongoing basis so that manufacturers would be liable to pay damages every

level of climate change litigation that has been instigated in various jurisdictions around the globe. Large sums will inevitably be incurred in defence of such claims in any event.

In the past, when faced with a real liability risk of uncertain scale and extent, the insurance market has introduced common exclusionary language. Asbestos, tobacco and pollution are obvious examples of such exclusions. The last is of particular interest since it is anticipated that insurers will, in due course, seek to place some reliance upon the pollution exclusion in response to climate change claims. However, there are real doubts that the language of such clauses will be effective to meet the specific risks of climate change, of which the draftsmen were not even conscious when the current exclusions were formulated. Whilst, for example, certain 'greenhouse gases' such as CFCs may be regarded as pollutants, others, such as carbon dioxide, may not. In the circumstances, now may be the time for such clauses to be reviewed and for new wording to be introduced.

It might be argued that it is already too late for a climate change exclusion as the damage (ie in terms of global warming to date) has already been done. However, this is to pre-judge the debate in any individual case as to what is the occurrence and what is the damage for the purpose of the relevant policy. If the climate change scientists are correct, the damage yet to occur both on a global and local scale, is still significant.

Of course, academic discussions about changes to policy wordings are subject to the realities of the market and the question arises whether the market will bear it. The current soft state of the market would indicate not. However, there have, over recent years, been a number of clarion calls to the market to price and reserve for the inevitable costs of climate change that it will be required to meet. The FSA is also now taking an interest in this issue. In this context, a wording review seems entirely appropriate.

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year. The judge dismissed the case, ruling that the court was unable to properly adjudicate the claim because authority to regulate carbon dioxide emissions lies with the federal government. The appeal is currently pending.

- A class action was brought by homeowners in and around New Orleans against major oil companies in 2005. The defendants were accused of gross negligence in ignoring scientific evidence and engaging in actions that have led to or contributed to global warming, resulting in Hurricane Katrina. The court found it had no jurisdiction to rule on such political questions and considered that the claimants had no standing grounds. The claimants' appeal is pending.
- In 2004, eight US states brought an action against five major power companies, alleging that their failure to use practical and economically feasible options to reduce their emissions had caused nuisance. Instead of damages, the claimants sought an order forcing the defendants to reduce their emissions. The court declined to hear the action because it presented non-justiciable political questions. The claimants have appealed the dismissal.

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