APCIA Environmental Insurance Topic Brief: Climate Change and Insurance

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EXECUTIVE SUMMARY

Climate change is a significant concern to the property casualty insurance industry, as our nation faces increased frequency and severity of major natural disasters including hurricanes, wildfires, floods, and extreme temperatures. Insurers are among some of the leading companies in the world that have taken bold and progressive actions relating to climate risk mitigation. Many insurers have adopted corporate environmental priorities that demonstrate a commitment to reducing their carbon footprint and have begun to adjust their business models accordingly. This might include, for example, revising underwriting criteria and investment strategies, enhancing modeling capabilities, and developing innovative products and incentives for policyholders to mitigate the risks posed by climate-related catastrophes.

Climate change has also significantly impacted insurers in a number of ways. Some of the challenges that may result in potential adverse enterprise impacts include investment losses due to severe weather, regulatory activity with respect to underwriting and pricing, and increased compliance costs from disclosure and reporting requirements. As industries adjust their business models to address climate change risks, insurers may continue to see increased demand for insurance products that will facilitate that transition. Insurers may also have increased opportunities to develop new products and services supporting emerging energy markets, technologies, and related infrastructure in the U.S. and globally.

Among the greatest risks and challenges insurers may face stem from increased claim activity and associated litigation costs as the legal environment continues to evolve in response to disputes associated with climate change.[2] Physical, transition, and related accountability risks may impact different lines of insurance, and that impact could vary greatly as the legal environment pertaining to climate change evolves.

This paper provides a background on climate change risks, deeper examination of legal and regulatory activity, theories of liability, potential enterprise and coverage exposures, and insights on property and casualty coverage products that may be implicated. The document is intended to serve as an evergreen resource for APCIA and our members.

1 **NOTICE**: This document is the work product of the American Property Casualty Insurance Association. It does not represent or express the views of members (either individually or collectively), their officers, directors, or employees. It is intended to advance public policy dialogue of importance to insurers. The views expressed here neither profess nor represent any definitive opinions or recommendations on legal, coverage, or liability issues. Insurance coverage is determined by the facts of individual claims, the specific policy wording at issue and the applicable law. This document does not constitute and should not be relied upon as legal or business advice.

2 See "Climate Change Litigation: Insights into the evolving global landscape," Maryam Golnaraghi, coordinating author, The Geneva Association, at p. 6. "According to the International Panel on Climate Change (IPCC), the most significant physical effects of climate change will not materialize for some time. Although physical risks are already creating loss, it appears that it will be the transition to a net-zero economy that will have the largest impact over the next decade."

TABLE OF CONTENTS

BACKGROUND 3

TYPES AND SOURCES OF INSURER CLIMATE EXPOSURES 4

ENTERPRISE EXPOSURES: INVESTMENT RISKS, REPORTING REQUIREMENTS, AND UNDERWRITING AND PRICING CONSTRAINTS 4

LIABILITY COVERAGE EXPOSURES: PHYSICAL, TRANSITION, AND ACCOUNTABILITY RISKS 7

SOURCES OF LIABILITY EXPOSURES 8

EXPANDING STATUTORY LIABILITY 9

INCREASING REGULATION 9

COMMON LAW CLAIMS 10

Private and Public Nuisance 10

Public Trust Doctrine and Due Process Initiatives 12

COVERAGE—LINES & ISSUES 14

COMMERCIAL GENERAL LIABILITY (CGL) 15

OCCURRENCE AND COVERAGE REQUIREMENTS 16

EXPECTED OR INTENDED INJURY EXCLUSION 16

POLLUTION EXCLUSIONS 16

LLOYD’S CLIMATE CHANGE EXCLUSION 17

ENVIRONMENTAL IMPAIRMENT LIABILITY (EIL) 17

CLAIMS MADE LIMITATION 18

KNOWN CONDITIONS EXCLUSION 18

DIRECTORS AND OFFICERS LIABILITY (D&O) 18

PROFESSIONAL LIABILITY (PL) 20

PROPERTY INSURANCE 21

BUSINESS INTERRUPTION (BI) 21

CONCLUSION 21

BACKGROUND

Climate change-related litigation is a growing concern for the insurance industry. Over the past two decades, several plaintiff groups have filed lawsuits seeking damages from both large energy companies and consumers of fossil fuels, such as electric power generators, related to the impacts of climate change. Related complaints have asserted many legal theories (e.g., public nuisance, private nuisance, trespass, failure to warn, design defect, negligence, and false and misleading statements prohibited by securities laws), though they are generally based on the same set of factual allegations.

These lawsuits generally allege that the production of fossil fuels by the defendants (typically large energy companies, though other industries have also been targeted) has created greenhouse gas (GHG) pollution (including carbon dioxide, methane, and nitrous oxide), which is causing higher global average temperatures. The plaintiffs further allege that the defendants have known about their contributions to climate change since at least the 1970s and therefore should be liable for the resulting damages (i.e., rising sea levels, wildfires, landslides, extreme precipitation events, drought, and public health impacts). For defendants that are publicly traded companies, further allegations are made that these companies failed to disclose, and in some cases indeed affirmatively concealed, these impacts, making them liable for fraud and other securities law violations.

While the initial climate change suits against corporations tended to be brought by environmental activists, an increasing number of lawsuits have been filed by state and local governments, including jurisdictions in California, Colorado, Maryland, Hawaii, New York, Rhode Island, and Washington. Energy companies have denied these claims and, in some cases, have been successful in obtaining dismissals on jurisdictional and other grounds.[3] To date, no defendant has been required to pay damages related to climate change claims.[4]

The total number of U.S. and international cases grounded in climate change-related allegations tracked by legal scholars exceeds 2,200 with nearly two thirds of the cases filed in the U.S. This total does not include cases in which climate change may be peripheral or incidental to the case. Thus far, the U.S. cases appear to be more politically or ideologically motivated than intended to recover damages.[5,6] However, the number of cases is growing, and the geographic scope of these cases is also expanding as novel legal approaches are being tested by plaintiffs. While the U.S. and the E.U. account for a reported 90 percent of climate-related lawsuits globally since 2000, cases are starting to move into new territories and have recently been filed in 54 countries across North and South America, Europe, Asia Pacific, and Africa.[7]

> ***The total number of U.S. and international cases grounded in climate change-related allegations exceeds 2,200 …***

In addition to potential liability and coverage exposures presented by the tort environment, insurers also face the multi-front challenge of increased physical risks from severe weather events and transition risks. While physical risks are self-evident, transition risks relate to policy and regulatory changes, market dynamics, technological innovation, and reputational factors. In addition, climate change impacts may encourage regulators to take action with respect to underwriting terms and pricing, which may impact insurers' ability to insure the energy sector and constrain coverage of other industries.

3 *"Climate Change and Insurance: Litigation Risks for Insurers,"* Jason Reeves and Jose Umbert (January 23, 2019), **www.zelle.com/news-publications-626.** See also, Juliana v. United States, 947 F.3rd 1159 (9th Cir. 2020(dismissed for lack of standing).

4 *"In battle against climate change, courts become a new frontier,"* Anushree Fadnavis, Reuters (January 26, 2021), **www.unep.org/news-and-stories/story/battle-against-climate-change-courts-become-new-frontier**.

5 *Climate Change Litigation Database,* Sabin Center for Climate Change Law, accessed online (May 2, 2022), **climatecasechart.com/climate-change-litigation/**.

6 *"Is the Law the New Arena for Climate Change Action?"* Felicia Jackson, Forbes on-line (July 12, 2021), **www.forbes.com/sites/feliciajackson/2021/07/12/is-the-law-the-next-climate-change-battleground/**.

7 *"Climate litigation woes rise for energy firms at home, but legal jeopardy set to go global."* Franca Wolf and Liz Hypes, Environmental Risk Outlook 2021 (May 28, 2021), **www.maplecroft.com/insights/analysis/carbon-heavy-corporates-in-crosshairs-as-risks-of-climate-lawsuits-grow/**.

TYPES AND SOURCES OF INSURER CLIMATE EXPOSURES

ENTERPRISE EXPOSURES: INVESTMENT RISKS, REPORTING REQUIREMENTS, AND UNDERWRITING AND PRICING CONSTRAINTS

Climate change disclosures and GHG emissions have traditionally been synonymous with the "E" element of environmental, social, and governance (ESG) topics used to measure corporate responsibility and/or sustainability. However, ESG reporting criteria are expanding to include more detailed disclosures such as climate scenario analysis and stress testing, and the consideration of other environmental issues that are interrelated with climate change such as sustainability and nature-related risks. Regulatory actions mandating climate and related environmental disclosures are becoming a significant compliance obligation for non-insurance businesses and insurers alike.[8] Interestingly, insurers are also seeing a proliferation of ESG push-back legislation at the state level that would prohibit the use of ESG scoring criteria or any actions deemed "discriminatory" against energy-intensive industries.

Regulatory actions mandating climate-related disclosures are becoming a significant compliance obligation for non-insurance businesses and insurers alike.

An overarching driver for the disclosure of GHG emissions and climate-related impacts is the Paris Agreement, an international treaty on climate change negotiated at the 2015 United Nations (U.N.) Climate Change Conference. The Paris Agreement's goal is to limit the rise in mean global temperature to well below 2°C and preferably limit the warming to 1.5°C. Scientists estimate that GHG emissions would need to be cut by 50 percent by 2030 and reach net-zero by 2050 to achieve the 1.5°C target. Although the Paris Agreement does not prescribe what emissions reductions countries must make, it has been used in international climate litigation to strengthen climate action.[9]

At the state level, the Insurer Climate Risk Disclosure Survey ("survey"), adopted by the National Association of Insurance Commissioners (NAIC) in 2010, collects information related to climate-related risks from insurers on an annual basis. In 2022, the original eight question survey was updated to align with recommendations from the Taskforce on Climate-related Financial Disclosures (TCFD), a widely adopted international framework for disclosing climate-related risks. That year, 15 states adopted the new narrative-based reporting standard for insurance companies with over $100 million in annual direct premium, capturing roughly 80 percent of the market. The updated survey for reporting year 2022 was sent to those insurers for the first time in July 2023. Separately, the NAIC is also considering a comprehensive property casualty data call in 2024 and the future role of climate scenario analysis.

In late 2023, the Governor of California signed into law climate reporting bills mandating the disclosure of GHG emissions and climate-related risk from companies doing business in the state. Under SB 253, GHG emission disclosures are required from companies with annual revenues in excess of $1 billion and under SB 261, companies with greater than $500 million in revenue are required to report details about their climate-related financial risks. Insurers would be exempt from complying with the requirements in SB 261 since they are subject to the NAIC climate disclosure survey. In January 2024, the U.S. Chamber of Commerce and other business groups sued California over the new disclosure laws stating they violate the First Amendment, which bars California from compelling a business to engage in subjective speech, and the federal Clean Air Act, which preempts a state's ability to regulate emissions in other states.[10]

8 *"How insurance companies can prepare for risk from climate change, industry regulators sharpen their focus,"* Deloitte Center for Financial Services, p. 9. **www2.deloitte.com**.

9 *"Shell's board of directors sued over climate strategy in first-of-its-kind lawsuit",* CNBC (February 9, 2023). **https://www.cnbc.com/2023/02/09/oil-shell-board-of-directors-sued-by-investors-over-climate-strategy.html**

10 *"U.S. Chamber Sues California Over Climate Disclosure Laws"* U.S. Chamber (January 30, 2024), **https://www.uschamber.com/climate-change/u-s-chamber-sues-california-over-climate-disclosure-laws.**

At the federal level, the President issued Executive Order 14008 (Tackling the Climate Crisis at Home and Abroad) in early 2021, outlining a "whole-of-government approach" to addressing climate change. Following this direction from the White House, virtually all federal regulatory agencies began pursuing or expanded aggressive goals on climate change. Of great concern are the extensive proposed climate disclosure mandates issued by the Securities and Exchange Commission (SEC) in March 2022 that are loosely based on the TCFD framework and Greenhouse Gas Protocol.

The SEC's proposed climate disclosure rule would require registrants to include climate-related disclosures in their registration statements and reports, including: (1) information about risks and risk management processes over the short-, medium- and long-term; (2) GHG emissions for its direct (Scope 1) and indirect (Scope 2 and Scope 3) emissions; (3) financial statement metrics; and (4) information about climate-related targets and goals. The rule is expected to be finalized in the first half of 2024 and, when it is, it is widely believed that it will generate litigation; accordingly, it is unclear what final form the rule will take. To the extent that the rule is finalized substantially as proposed, the far-reaching disclosures are likely to pose significant compliance burdens on reporting companies. Disclosing Scope 3 GHG emissions, which could include indirect emissions from the investment and underwriting portfolios of insurers, are particularly problematic due to a lack of accurate data. Further, climate-related disclosures have the potential to create unique liability exposure for insurers as the underwriters for companies that may be subject to litigation for incomplete or inaccurate climate disclosure, if pollution-related disclosures are within the scope of that coverage.[11]

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In June 2023, the Federal Insurance Office (FIO) released "Insurance Supervision and Regulation of Climate-Related Risks," a report on how state insurance regulation is dealing with climate risk.[12] The report contains 20 recommendations for enhancements to solvency, corporate governance, macroprudential, market conduct, and reporting requirements. In November 2023, FIO announced that they are moving ahead with a proposed data call to collect insurers' historical underwriting data on homeowners insurance from companies that collectively underwrite around 70 percent of homeowners premiums nationwide. FIO intends to use the zip-code level data in efforts to assess climate- related financial risk and the potential impacts of climate on insurance availability and affordability.[13]

At the international level, the European Union's (E.U.) Corporate Sustainability Reporting Directive (CSRD) went into effect in January 2023. Companies subject to the CSRD, including an estimated 10,000 companies headquartered outside the E.U., will have to report climate- and sustainability-related information according to the European Sustainability Reporting Standards (ESRS) for the first time in 2024. The CSRD will also apply on a worldwide basis to non-E.U. companies with E.U. affiliates with more than EUR 150 million annually in turnover, beginning in 2028.

In June 2023, the IFRS Foundation's International Sustainability Standards Board (ISSB) issued their inaugural global standards for disclosure of sustainability (IFRS S1) and climate-related (IFRS S2) information. The ISSB is considering additional standard-setting research projects including sustainability-related risks associated with the topics of biodiversity and ecosystems. Following the release of

11 *Id.*

12 *"Treasury's Federal Insurance Office Releases Report Assessing Climate-Related Risk, Gaps in Insurance Supervision",* U.S. Department of the Treasury (June 27, 2023), **https://home.treasury.gov/news/press-releases/jy1579**

13 *"Treasury's Federal Insurance Office Advances First Insurer Data Call to Assess Climate-Related Financial Risk to Consumers"*, U.S. Department of the Treasury (November 1, 2023), **https://home.treasury.gov/news/press-releases/jy1867**

IFRS S1 and IFRS S2, the Financial Stability Board asked the IFRS Foundation to take over the monitoring and progress of companies' climate-related disclosures from the TCFD. Additionally, following a similar structure as the TCFD, the Taskforce on Nature-Related Financial Disclosures (TNFD) finalized a framework for disclosing nature- and biodiversity-related risks at the corporate level in late 2023. The framework is designed to complement existing efforts by the TCFD and ISSB. However, unlike climate impacts which can be quantified by GHG emissions, there is currently no widely adopted metric to assess nature impacts, and data availability remains a major concern.

Along with this evolving landscape of sustainability and climate-related disclosures at the state, federal, and international levels, insurers may be expected to take on additional adaptation activities to mitigate risk impacts.

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Enterprise risks also include potential regulatory actions limiting insurers' ability to utilize risk-based pricing methodologies.[14] If the frequency and severity of climate-related hazards continue to increase, policymakers may, and in fact some have, sought to constrain underwriting and rates in a seeming effort to maintain availability and affordability for consumers. For example, the postponement of rate increases for a wind and hailstorm insurance residual market pool in Texas, done to maintain affordability for policyholders along the Gulf Coast, highlights the vulnerability of the insurance industry to these types of regulatory actions.[15] Similarly, California has imposed cancellation and non-renewal moratoriums following wildfires in the state and mandated premium discounts for wildfire mitigation.[16, 17] In November 2022, California, in collaboration with the U.N., released a "Sustainable Insurance Roadmap," which describes insurance's role as "actively helping reduce emissions and increase community resilience while better aiding recovery from climate-linked disasters."[18] Future action by lawmakers or regulators may seek to constrain underwriting of or investment in carbon-intensive companies or other business activities of insurers.

The U.S. Congress, state officials, and legislatures are also becoming increasingly involved in climate and ESG issues affecting insurance company operations. Members of Congress have written to the CEOs of over a dozen large insurance companies asking them to stop underwriting fossil fuel projects,[19] while other members of Congress wrote to insurers urging them to continue to support traditional energy.[20] In June 2023, Senate Democrats launched an investigation into how the U.S. insurance industry evaluates climate-related risks, decides to invest in or underwrite fossil fuel projects, and what plans they have to divest fossil fuel-related investments.[21] Meanwhile, the House Financial Services Committee established a Republican ESG Working Group with the stated mission "to combat the threat to our capital markets posed by those on the far-left pushing ESG proposals."[22] And in May 2023, 23 Republican state attorneys general sent a letter to members of the U.N.'s Net-Zero Insurance Alliance (NZIA) warning of potential antitrust and other federal and state law violations and threatening legal action. In recent legislative

14 *Id*.

15 *Id*., at p. 7.

16 *"Commissioner Lara protects insurance coverage for 325,000 Northern California wildfire survivors",* California Department of Insurance (September 20, 2021), **www.insurance.ca.gov/0400-news/0100-press-releases/2021/release095-2021.cfm.**

17 *"Commissioner Lara enforces nation's first wildfire safety regulation to help drive down cost of insurance",* California Department of Insurance (October 17, 2022), **https://www.insurance.ca.gov/0400-news/0100-press-releases/2022/release076-2022.cfm**

18 *"The Sustainable Insurance Roadmap"*, California Department of Insurance (November 2022), **https://www.insurance.ca.gov/01-consumers/180-climate-change/The-Sustainable-Insurance-Roadmap.cfm**

19 *"U.S. Lawmakers Push Insurers to Stop Underwriting Fossil Fuels,"* Bloomberg (April 27, 2022), **www.bloomberg.com/news/articles/2022-04-27/u-s-lawmakers-push-insurers-to-stop-underwriting-fossil-fuels**.

20 *Id*.

21 *"Budget Committee Launches Investigation into Major Insurance Companies' Climate RIsk Evaluation, Fossil Fuel Support"*, Senate Committee on the Budget (June 9, 2023), **https://www.budget.senate.gov/chairman/newsroom/press/budget-committee-launches-investigation-into-major-insurance-companies-climate-risk-evaluation-fossil-fuel-support-**

22 *"Republican ESG Working Group Releases Interim Report"*, House Financial Services Committee (June 23, 2023), **https://financialservices.house.gov/news/documentsingle.aspx?DocumentID=408886**

sessions, Democratic and Republican-controlled state legislatures have introduced numerous competing ESG-related bills affecting the way insurers do business.

In November 2023, three inquiries were launched into the property insurance industry by the Treasury Department, two U.S. senators and the NAIC looking into how climate change is allegedly causing premiums to increase and/or pushing some insurers to withdraw from at-risk regions.[23] The simultaneous investigations, point to growing concern that climate change may destabilize the industry and force property owners to pay much higher rates or forgo coverage.

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For example, outside of formal legislative and regulatory threats, insurance companies face mounting pressure from external groups and stakeholders to divest from and stop underwriting fossil fuel-related industries and to align their operations with a net-zero approach. Activist groups are increasingly targeting insurers who invest in traditional energy companies and write policies for fossil fuel-related projects. Some investors have similarly increased their pressure on insurers, including through the use of shareholder proposals, to cease underwriting and investing in fossil fuel companies or commit to a net-zero approach for their underwriting and investment portfolios. Conversely, there are some state efforts to penalize insurers that make commitments to reduce underwriting or investment in the energy sector.[24]

LIABILITY COVERAGE EXPOSURES: PHYSICAL, TRANSITION, AND ACCOUNTABILITY RISKS

Climate change liability coverage exposures for insurers may arise from physical and transition risk. Property and casualty insurers have already observed an increased **physical risk** exposure, and resulting claims, due to increasingly severe weather events and natural catastrophes.[25] The loss potential for hazards associated with severe weather is highlighted by the insolvency of Merced Property & Casualty in 2018, which resulted from California wildfire claims, as well as multiple insurers in Louisiana from 2021 – 2023, due in part to the severity of hurricane losses.[26]

Transition risk can arise from many factors, including changes in legislation, regulation, and evolving common law standards of care as economies move toward a "lower carbon" future.[27] Stakeholders, including regulators, may require insurers to "go beyond traditional risk transfer to explicitly address risk mitigation."[28] This could give rise to potential transitional liability transcending the liability that might otherwise arise from traditional risk transfer alone.

23 *"Insurers Face Wave of Inquiries Over Climate Risks"*, E&E News (Nov. 3, 2023), **https://subscriber.politicopro.com/article/eenews/2023/11/03/insurers-face-wave-of-inquiries-over-climate-risks-00125110**

24 *"Texas Republicans Bucking ESG Turn Focus to Insurance Industry"*, Bloomberg (May 31, 2023), **https://news.bloomberglaw.com/in-house-counsel/insurers-targeted-by-state-anti-esg-efforts-in-texas-and-beyond.**

25 *"Climate Change Risk Assessment for the Insurance Industry, a holistic decision-making framework and key considerations for both sides of the balance sheet,"* Geneva Association Task Force on Climate Change Risk Assessment for the Insurance Industry, Maryam Golnaraghi, Coordinating Author, The Geneva Association (February 2021), p. 8. Insurers are exposed to both types of risk on both the liability and asset sides of the industry. The Geneva Association further categorizes "physical risks" as either chronic (progressive shifts in climate patterns) or "acute risks" (extreme weather).

26 *"Louisiana's Insurance Crisis Grew After 2020-21 Hurricanes",* Insurance Information Institute (Mach 28, 2023), **https://www.iii.org/press-release/triple-i-louisianas-insurance-crisis-grew-after-2020-21-hurricanes-032823**

27 *"'Increasingly Likely Climate Change Liability Risks,"* Kevin LaCroix, The D&O Diary (July 18, 2019), **www.dandodiary.com**.

28 *"Climate change and P&C insurance: The threat and opportunity,"* McKinsey & Company (November 19, 2020), **www.mckinsey.com/industries/financial-services/our-insights/climate-change-and-p-and-c-insurance-the-threat-and-opportunity.**

In 2021, the New York Department of Financial Services (DFS) assessed transition risks of insurers operating in the state.[29] The study found that single digit percentages of property and casualty insurer assets were invested in carbon intensive sectors as of the end of 2019 and offered strategies for mitigating transition risks. Similarly, the California Department of Insurance (CDI) began requiring insurers operating in the state with more than $100 million in annual premiums to disclose their investments in fossil fuels effective December 31, 2015. The CDI published compilations of fossil fuel exposure by insurer on a public website in 2022 for the years 2018 and 2019.[30] In early 2024, the CDI published a scenario analysis report on the investments of insurers licensed in California, Oregon, and Washington based upon financial data from year-end 2021.[31]

Investment data have been used by lawmakers,[32] activist groups,[33] and advocacy organizations[34] to draw attention to insurance companies that have exposure to traditional energy companies, fossil fuel-related businesses, and other enterprises that underpin the energy sector. In some cases, the groups have conflated fossil fuel-related investment by life insurers with property casualty insurers limiting coverage in disaster-prone regions.[35] Disclosure of insurer investments and other climate-related business activities may provide material for opportunistic litigants and may be used by groups attempting to cause reputational harm to insurers and investors seeking to pressure publicly traded insurers to take additional climate action.

Liability risk includes a third type of exposure, closely related to transition risk and termed **accountability risks**. This occurs when the government requires organizations to adhere to transparency or other financial responsibility measures related to climate change that give rise to liability independent of any actual climate change impacts.[36] Governments may expressly impose liability related to transparency or financial responsibility requirements. For instance, legislation introduced in the U.S. House in 2021 requires evidence of financial responsibility by Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, or "Superfund") facilities for releases due to climate change or severe weather, but it also expressly states that entities experiencing an environmental release due to the "plausible causal connection to climate change and its effects" may not invoke an "act of God" defense and "are not shielded from liability."[37]

SOURCES OF LIABILITY EXPOSURES

Policyholders face liability arising from various aspects of climate change. There are several categories of statutory and other legal standards that are a focus of climate activists, state authorities, and others, including:

i. Federal environmental statutes and parallel state laws.
ii. Federal or state financial reporting requirements.
iii. Federal or state financial responsibility or resiliency requirements.
iv. Nuisance and other common law causes of action.

29 *"An Analysis of New York Domestic Insurers' Exposure to Transition Risks and Opportunities from Climate Change,"* 2 Degrees Investing Initiative (June 10, 2021), **2degrees-investing.org/resource/an-analysis-of-new-york-domestic-insurers-exposure-to-transition-risks-and-opportunities-from-climate-change/.**

30 **https://interactive.web.insurance.ca.gov/apex_extprd/f?p=260:**1

31 *"The hidden cost of delaying climate action for West Coast insurance markets"*, California Department of Insurance et al. (February 2024), **https://www.insurance.ca.gov/01-consumers/180-climate-change/ScenarioAnalysis.cfm**

32 **https://schiff.house.gov/news/press-releases/reps-schiff-tlaib-introduce-bill-to-require-insurance-companies-to-disclose-fossil-fuel-investments**

33 *"Investing in Climate Chaos: North American Fossil Fuel Insurers' Investments in Coal, Oil, and Gas"*, Insure Our Future (July 2022), **https://global.insure-our-future.com/wp-content/uploads/sites/2/2022/08/Investing-in-Climate-Chaos-Brief.pdf**

34 *"Changing Climate for the Insurance Sector: Research and Insights"*, Ceres, Persefoni, and ERM (August 2023), **https://www.ceres.org/news-center/press-releases/new-research-shows-insurance-sector-has-significant-exposure-fossil-fuel**

35 *Id.*

36 An example of this type of liability is federal legislation introduced earlier this year that requires organizations subject to CERCLA to maintain evidence of financial responsibility for any discharges related to extreme weather events and potentially climate change. H.R. 1512, Clean Future Act, Section 631. See also, Letter to Congressmen Tomko and McKinney from Nathaniel Wienecke, APCIA, May 13, 2021.

37 House Energy & Commerce Committee staff memo on H.R. 1512, May 13, 2021, p. 4.

Expanding Statutory Liability

Policyholder liability in civil suits frequently arises from duties imposed by environmental statutes. For example, environmental discharges barred by federal or state statutes that result from climate change-related extreme weather may give rise to liability. Federal environmental statutes such as the Clean Air Act, Clean Water Act, and Endangered Species Act could give rise to liability related to climate change.

Liability may also arise from claims of deceptive trade practices, with states alleging that major carbon emitters — specifically fossil fuel companies — misled the public about their products and the underlying risk resulted in damage to the environment.[38] Beginning in 2019, the District of Columbia, Connecticut, the City of New York, Massachusetts, Minnesota and Vermont, and a public interest organization filed lawsuits in state courts against fossil fuel producers for allegedly misrepresenting the threat of climate change and the role of hydrocarbons in causing climate change, as well as engaging in false and misleading "greenwashing" campaigns.[39] Generally, these actions allege violation of state consumer protection, false advertising, and deceptive trade practices statutes in the defendants' advertising and public statements. The cases seek civil penalties, restitution, disgorgement of profits, and attorney fees.

In support of efforts to remove these cases to federal court, the defendants contend that the cases raise disputed federal questions, involve federal common law, implicate foreign affairs powers, arise out of federal enclaves and invoke federal officer removal jurisdiction, and that jurisdiction exists under the Outer Continental Shelf Lands Act and the Class Action Fairness Act. A ruling by the Supreme Court in April 2023 allowed cases brought by cities and municipalities to be heard in state instead of federal court, a development seen as potentially favorable to government plaintiffs.[40] Similar to the progress of the public and private nuisance litigation described below, the initial activity in these cases has been confined to the issue of federal jurisdiction and no court has yet considered the merits of these claims.

Another possible angle on greenwashing litigation involves whether companies are forthcoming to investors on their governance and oversight processes. For insurers, direct liability risks from alleged greenwashing may be tied to an insurer's financial products, such as green bonds or funds, or to its climate and sustainability reporting. As noted above, climate- and sustainability-related disclosure requirements, such as the SEC's proposed climate disclosure rule, have the potential to pose unique risks for insurers as the underwriters of other companies.

Increasing Regulation

Insurance regulators are acting in response to climate change, and extreme weather events are likely to increase the risk of insurer regulation. Regulatory objectives will vary by jurisdiction but may include: (1) protection of policyholders; (2) availability and affordability of insurance and reinsurance; (3) development of insurance markets; (4) raising risk awareness; (5) environmental stewardship; and (6) financial stability.[41] While disclosure requirements related to financial activity and resiliency measures may not give rise to substantial financial liability, they could serve as a foundation for imposing a related duty of care on directors, officers, and others. The U.K. Prudential Regulatory Authority has already added climate risk to insurers' stress tests, seeking to improve financial resilience.[42]

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38 *"Vermont sues 4 oil companies, alleges false info on climate,"* Associated Press (September 14, 2021). The Vermont Attorney General's lawsuit is based on the claim that the Vermont Consumer Protection Act creates a duty for companies to share with the public information about the damage their products do to the environment. The AP story reports that Center for Climate Integrity says Vermont is the seventh state to file a lawsuit against oil and gas companies related to their role in climate change.

39 "Oil and Coal Firms Guilty of 'Great Deception' Through Greenwashing, Say Climate Lawyers," David Vetter, Forbes on-line, April 19, 2021. "Environmental law organization ClientEarth compared adverts from some of the world's largest fossil fuel firms . . . with their actual activities and business models." UK-based ClientEarth argues these contrasting claims and activities make the case for a UK ban on their advertising.

40 *"Supreme Court deals blow to oil companies by turning away climate cases."* Lawrence Hurley, NBC News (April 23, 2023), https://www.nbcnews.com/politics/supreme-court/supreme-court-rejects-oil-companies-appeals-climate-change-disputes-rcna49823

41 *"Insurance Industry Perspectives on Regulatory Approaches to Climate Risk Assessment,"* The Geneva Association (June 28, 2021), p. 10.

42 *"Climate risk: Regulators sharpen their focus,"* Deloitte Center for Financial Services (2019).

At the state level, the New York DFS in July 2021 issued a lengthy report on management of climate-related financial risks, which highlighted "good practices" on climate disclosure by insurers and stated that "[g]lobally there is an increasing focus on climate-related disclosure. Insurers are likely to face stronger disclosure requirements on climate risks."[43] Connecticut adopted Public Act 21-2 that requires the Insurance Department to report biannually to the General Assembly on the Department's progress toward addressing climate-related risks within the insurance industry along with regulatory and supervisory actions to bolster the resilience of insurers to the physical impacts of climate change. Subsequently, the Insurance Department issued **Bulletin No. FS-44** in September 2022 that outlines their climate-related expectations for insurers related to (1) risk culture and governance; (2) risk management and controls; and (3) public disclosure.

An increasing number of regulators and standard setters including the NAIC, TCFD, and ISSB are also exploring the use of quantitative modeling and scenario analysis to examine insurers' climate-related risks under different future climate trajectories. The European Parliament recently suggested insurers should conduct scenario analysis every three years.[44] Despite the many initiatives by various regulatory stakeholders, the Geneva Association acknowledges that "considerable work still lies ahead to converge on best practices for conducting forward-looking climate risk assessment and scenario analysis."[45]

Common Law Claims

Private and public nuisance

Many U.S. tort claims related to climate change are based on expansive and, in some situations, aspirational views of the law of private and public nuisance. See, e.g., In re Peabody Energy Corporation, 958 F.3rd 717 (8th Cir. 2020). Most of these cases involve a negligence theory, with the duty of care arising from placing products on the market and common-law theories of liability springing from the duty, for example relating to a failure to warn, strict liability, design defect, trespass, and private nuisance. These nuisance claims are generally brought by third parties against insureds and generally parallel prominent opioid and lead paint nuisance litigation claims.

Public nuisance claims may arise for products or activities that are legal and useful for society, such as the production of energy, despite there being no sufficient alternative. In 2022, 79 percent of energy consumption in the U.S. came from fossil fuel sources that generate GHG emissions.[46] While a transition to lower carbon energy sources is underway, and renewables are the fastest growing sources of new energy, fossil fuels will remain a major part of the global economy for decades to come.[47]

Prior to July 2017, climate change tort litigation was confined to a small number of federal cases. The only issues litigated in those cases were the justiciability of the claims in light of federal standing requirements, the political question doctrine, and the potential preemption or displacement of the common law underlying climate change tort claims. Each of the pre-2017 cases, all of which were based on federal and state common law nuisance theories, was dismissed at either the district court or appellate level on one or more of these grounds or for purely procedural reasons. One case reached the U.S. Supreme Court in 2011, resulting in a favorable ruling that federal common law nuisance claims were displaced by the Clean Air Act. American Electric Power v. Connecticut, 564 U.S. 410, 423 (2011).

43 *"New York Domestic Insurers' Management of the Financial Risks from Climate Change*, An Analysis of NAIC Climate Risk Disclosure Survey Responses and Other Reporting," New York Department of Financial Services (July 2021), p. 3.

44 Econ approves Solvency II amendments and recovery and resolution package", InsuranceERM (July 18, 2023), https://www.insuranceerm.com/news-comment/econ-approves-solvency-ii-amendments-and-recovery-and-resolution-package.html

45 "Insurance Industry Perspectives on Regulatory Approaches to Climate Risk Assessment," The Geneva Association (June 28, 2021), p. 9.

46 U.S. Energy Facts Explained, U.S. Energy Information Administration, **www.eia.gov/energyexplained/us-energy-facts/**.

47 By current Department of Energy estimates, even by 2050, the majority of U.S. energy will likely continue to come from fossil fuel sources. Annual Energy Outlook 2023, U.S. Energy Information Administration (March 16, 2023), **www.eia.gov/outlooks/aeo/**

Since 2017, approximately 30 suits seeking damages for impacts related to climate change have been filed, most by a single group of attorneys, including on behalf of Colorado, Delaware, Hawaii, Maryland, New Jersey, Rhode Island, South Carolina, Washington (this suit was subsequently voluntarily dismissed), and various cities and counties in California. All the defendants in these suits are oil, gas, and coal producers. The state of California joined these cases filing suit against five oil companies in September 2023.[48] The focus of these complaints is that the defendants were aware of environmental hazards (including global warming and consequent rising sea levels) associated with the extraction, production, and use of fossil fuels, failed to disclose those hazards to the public, conspired to suppress information related to these hazards, conspired to avoid government regulation of fossil fuels, and conspired to prevent development of alternative sources of energy. The complaints allege that the defendants have created a public and/or private nuisance and variously seek compensatory damages, punitive damages, and/or the creation of a fund to address the consequences of climate change, including damage to public infrastructure or a need to adapt infrastructure to avoid damage. These new suits differ from the pre-2017 climate change tort litigation in that the plaintiffs have not named electrical power generators or other consumers of fossil fuels, but rather focused on the producers of those fuels. In addition, the new suits in this category are predicated largely on state law-based public nuisance theories, and all except one were filed in state courts.

Since 2017, approximately 30 suits seeking damages for impacts related to climate change have been filed…

With respect to the single case in this category originally filed in federal court, all of the plaintiff's claims against several major oil companies were dismissed on grounds that federal common law displaces state law-based claims of nuisance and trespass, that those federal common law claims were themselves displaced by the Clean Air Act (as held by the U.S. Supreme Court in 2011), and that adjudication of the claims would violate the doctrine of separation-of-powers by interfering with the conduct of foreign affairs by the Executive and Legislative branches. That holding was affirmed by the U.S. Court of Appeals and the plaintiff did not seek further review of this decision in the U.S. Supreme Court.

The only issues addressed to date in the remaining state court cases are federal jurisdiction, justiciability, and preemption, and no court has yet considered the substantive merits of the plaintiffs' claims. Additionally, because the defendants removed all the cases filed in state court to federal court, asserting various grounds for federal jurisdiction, and the plaintiffs moved to remand each of these cases to state court, this litigation to date has largely been confined to the issue of federal jurisdiction. To date, the Courts of Appeals for the 1st, 2nd 4th, 9th and 10th Circuits have affirmed the remand of previously removed cases filed.

In a further blow to defendants, in April 2023, the U.S. Supreme Court in BP PLC. v. Mayor & City Council of Baltimore, No. 22A84, declined to hear a jurisdictional question from oil companies fighting a multimillion-dollar lawsuit brought by the city of Baltimore over climate change. The Supreme Court's denial of certiorari appears to be a victory for Baltimore and for other state and local governments that have repeatedly sought to keep their climate change lawsuits in state courts, where both sides agree the governments stand a better chance of winning large damages than in federal court. The lawsuit accuses fossil fuel companies of misleading the public about the harmful contributions that their energy-generating activities made toward climate change.

Now that these cases are proceeding in state courts, more decisions should begin to emerge in 2024 that show how the state courts will view the merits of state and local governments' claims. So far, the case has advanced farthest is *In re Hawai'i Electric Light Co.*[49] with the Hawaii's Supreme Court issuing a decision on October 31, 2023, rejecting a fossil fuel companies' appeal of a trial court's denial of their

48 *California Sues Giant Oil Companies, Citing Decades of Deception*, New York Time, (September 15, 2023) at **https://www.nytimes.com/2023/09/15/business/california-oil-lawsuit-newsom.html** (the lawsuit names Exxon Mobil, Shell, BP, Conoco Phillp, Chevron and even the American Petroleum Institute as defendants).

49 In re Hawai'i Elec. Light Co., 526 P.3d 329 (March 13, 2023).

motion to dismiss. The case was brought by youth plaintiffs who asserted that Hawaii's fossil fuel-based transportation system violates the state constitution's public trust doctrine and right to a clean and healthful environment. The youth plaintiffs are represented by the public interest group Our Children's Trust, and trial is scheduled for June 24–July 12, 2024.

Another notable state court climate change ruling for youth plaintiffs was handed down in a Montana trial court in the youths' state constitutional rights claims in 2023. In *Held v. Montana*[50] a trial court in Montana heard testimony from the youth plaintiffs and their expert witnesses on topics that included the effects of greenhouse gas emissions (GHG) and climate change on the state, and in August, 2023, the court ruled that a provision of Montana law that prohibited consideration of GHG emissions and corresponding climate change impacts in environmental reviews violated the plaintiffs' right to a clean and healthful environment under the Montana Constitution. The State defendants have appealed the trial court's decision to the Montana Supreme Court. Two threshold legal obstacles have slowed third-party plaintiffs' lawsuits against insureds: standing and preemption.[51] The question of standing was resolved in favor of third-party claimants by at least two federal courts in climate cases, upon findings that: (i) there was an injury in fact; (ii) there was a causal connection between the injury and conduct complained of; (iii) the injury was not the result of an independent action by another party; and (iv) the injury will be redressed by a favorable decision. Connecticut v. Am. Electric Power Co., 582 F. 3rd. 309 (2nd Cir. 2009), reversed on other grounds, 564 U.S. 410 (2011); Northwest Env. Def. Ctr v. Owens Corning Corp., 434 F. Supp. 2nd 957 (D. Or. 2006). However, more recently, in a Public Trust Doctrine case (Juliana v. United States discussed below) the 9th Circuit Court of Appeals dismissed the plaintiffs' complaint on the basis that they did not have standing to sue.[52] As discussed below, from a liability perspective if plaintiffs overcome the jurisdictional, justiciability, preemption, and procedural hurdles presented by these types of cases, they must still prove causation, meaning they must prove the alleged injury or damage was the result of anthropogenic climate change as opposed to natural climate variability, and whether any particular defendant was responsible for that climate change. Establishing causation continues to be the biggest hurdle to these types of suits[53] and may be the most important issue impacting potential coverage exposure related to third-party climate change liability claims.[54] While courts have been reluctant to reach or recognize causation in climate change cases,[55] they could become more sympathetic to these claims in the future as climate change attribution science and other factors evolve.

> ***While courts have been reluctant to reach or recognize causation in climate change cases,[55] they could become more sympathetic to these claims in the future as climate change attribution science and other factors evolve.***

Public Trust Doctrine and Due Process Initiatives

Beginning in 2011, a network of environmental activists filed suits and administrative petitions against all 50 states and the federal government, seeking to compel various governmental entities to regulate GHG emissions based on the public trust doctrine — the theory that various state and federal governmental entities have a constitutional and common law duty to protect the atmosphere — and/or on the theory that the failure to regulate emissions constitutes a violation of the due process and equal protection rights afforded under the Constitution. To date, all appellate courts that have ruled on these issues found variously that the public trust doctrine does not apply to the atmosphere, that these claims are

50 Held v. Montana, No. CDV-2020-307 (1st Dist. Ct. Mont., Aug. 14, 2023).

51 *Id.*, at p. 6.

52 Juliana v. United States, D.C. No. 7:15-cv-01517-AA (dismissed via February 10, 2021, en banc order).

53 *"Climate Change Liability – New Litigation Risks,"* Thomas Lennarz, International Disputes Digest (August 2019), www.cms.law.

54 "Climate Change Litigation and Liability Insurance Claims," p. 8. "Demonstrating a link between the … insured's conduct and the climate-related harm is essential to prove causation."

55 *See* Comer v. Nationwide Mut. Ins., 2006 WL 1066645 (S.D. Miss. February 23, 2006).

non-justiciable political questions, that the plaintiffs lack standing, or that the public trust doctrine is preempted by federal and state statutes. In October 2021 the Washington Supreme Court declined a petition for further review of the dismissal of claims by a group of youths that the State of Washington infringed on their right to a stable climate system. In dismissing the case, the intermediate appellate court found that judicial resolution of the youths' claims would violate the separation-of-powers doctrine in that the courts would be required to order the legislative and executive branches to create and implement a climate recovery plan.

As noted above, this past summer a Montana trial court ruled in *Held v. Montana*[56] that a provision of state law prohibiting consideration of GHG emissions and corresponding climate change impacts in environmental reviews violated the plaintiffs' right to a clean and healthful environment under the Montana Constitution. The State defendants have appealed to the Montana Supreme Court. Even as consequently public trust matter, as the suit is premised on a unique provision of the state constitution, it is not clear how precedential Held may be though we continue to follow the case.

The Public Trust Doctrine initiatives aimed at the states directly appear to present no immediate potential insurance coverage implications, although rulings with respect to the justiciability of these cases, displacement of the common law, and the substantive merits of the plaintiffs' claims may potentially impact future climate change tort litigation.

56 *Held v. Montana*, No. CDV-2020-307 (1st Dist. Ct. Mont., Aug. 14, 2023).

COVERAGE—LINES & ISSUES

Climate change-related coverage issues arise in various lines of insurance, including commercial general liability (CGL), environmental impairment liability (EIL), director & officer (D&O), professional liability (PL), and property insurance, including business interruption (BI) coverage. From an insurance coverage standpoint, it's been suggested that climate change coverage claims will involve issues that have arisen repeatedly in legacy pollution and asbestos claims.[57]

According to the New York DFS analysis of the NAIC's Climate Risk Disclosure Survey responses and other reporting, one insurer group analyzed the key climate change risks of the insurance products it offered as falling into the following categories.[58]

- Property – Increased first party property damage and possible business interruption related losses due to increased frequency and severity of weather events. We insure property globally, and this is addressed through underwriting, policy language, and our extensive use of catastrophe modeling.
- General Liability – Potential litigation against insureds found liable for contributing either directly or indirectly to climate change or pollution. This is addressed through underwriting, rating, and policy conditions.
- D&O – Potential D&O litigation based on how a company recognizes, analyzes, manages, and discloses environmental and climate-related risks. Potential litigation includes claims alleging breaches of fiduciary duties, claims under climate change legislation, and securities disclosure claims. This is addressed through underwriting.
- Environmental – Potential liability from companies emitting contaminants. This is addressed through underwriting, rating, and policy conditions.
- Aviation – Potential liability from aircraft emissions, or companies that contribute to the manufacture of aircraft products.
- Marine – Increased potential property damage exposure to natural catastrophe; potential exposure from opening of arctic sea lanes where 'new' weather patterns emerge (new risks); potential liability from shipping emissions, or from companies that contribute to the manufacture of ship building. This is addressed through underwriting.
- Energy – Potential increased offshore energy first party property damage loss and liability exposure.
- Equine, Livestock & Aquaculture – Potential exposure to losses from water scarcity and animal health and welfare; aquaculture exposed to losses arising from changing ocean temperature, acidification of certain regions and pathogens. This is addressed through underwriting.
- Accident & Health – Potential exposure to pandemics through the spread of vector borne diseases as regional climates shift.
- Crop – The risks of climate change, such as higher temperatures, changes in precipitation, increased climate variability, and extreme weather events can result in significant impacts on agriculture, forestry, and rural areas. Climate change can affect growing seasons, precipitation, evaporation patterns, pest infestations, and weather variability all of which can impact the ultimate underwriting results. This risk is addressed through underwriting.

The above description may not be representative of what insurers consider to be the key climate change risks of their insurance products though it is illustrative of how a leading insurance regulator summarized one insurer's views on the subject.

57 *"Commercial General Liability Coverage for Climate Change-Related Civil Litigation: A Policyholder's Perspective,"* Seth D. Lamden of Neal, Gerber & Eisenberg LLP (undated), www.nge.com.

58 *"New York Domestic Insurers' Management of the Financial Risks from Climate Change*, An Analysis of NAIC Climate Risk Disclosure Survey Responses and Other Reporting," p. 31, 48.

While this paper focuses on the types of policies that might be implicated in climate-related insurance coverage claims, the content will be updated regularly to consider implications for additional lines of insurance, including industry-specific lines of insurance highlighted above.

COMMERCIAL GENERAL LIABILITY (CGL)

CGL policies generally insure against liability sought in a suit for damages because of "bodily injury" and "property damage,"[59] during the policy period, caused by an "occurrence" and which are not otherwise excluded. The policyholder seeking coverage must also comply with all applicable policy conditions.[60]

The many issues that could arise with demands under CGL policies for coverage of climate change claims asserted against a policyholder include (but are certainly not limited to):

- whether the suit seeks potentially covered damages, as opposed to equitable or injunctive remedies or other relief;
- whether the damages sought are because of "bodily injury" actually or allegedly sustained by a natural person;
- whether the damages sought are because of "property damage," generally defined as physical injury to tangible property or loss of use of tangible property that is not physically injured;
- whether any such "bodily injury" or "property damage" was caused by an "occurrence," generally defined as an "accident";
- whether any such "bodily injury" or "property damage" occurred during the policy period;
- whether any such "bodily injury" or "property damage" was known to the policyholder and/or commenced prior to the inception of the policy period;
- whether any such "bodily injury" or "property damage" is excluded. By way of example, CGL policies generally exclude "bodily injury" and "property damage" i) "expected or intended" from the standpoint of the policyholder; or ii) arising out of pollution such as environmental contamination, (carbon dioxide and other GHGs are generally recognized as "air pollutants"), and other exclusions may also be applicable to damages sought with respect to climate change[61];
- whether the policyholder has complied with its contractual obligations under the CGL policy. By way of example, the policyholder is generally obligated to provide timely and proper notice of occurrences, claims and/or suits, to cooperate with the insurer, and to obtain the insurer's consent before making or incurring any voluntary payment or obligation; and
- disputes regarding allocation among policies and exhaustion of applicable policy limits.[62]

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59 CGL policies also generally provide insurance for damages because of enumerated offenses under the policy definitions of "personal injury" and "advertising injury."

60 Environmental Impairment Liability (EIL) policies often insure against "bodily injury" and "property damage" which may be caused by a "pollution condition."

61 Some policies may contain additional exclusions specifically directed to climate change or "climate harm".

62 *See e.g.*, "Climate Change Litigation and Liability Insurance Claims," p. 3.

Occurrence and Coverage Requirements

Climate change claims will present questions of whether any alleged "bodily injury" or "property damage" occurred during the relevant policy. In other contexts, including environmental damage claims, Courts have applied varied "trigger" theories. At least four theories — injury in fact, manifestation, exposure, and continuous or so-called triple trigger — are often examined by courts to determine if bodily injury or property damage has "occurred" during a particular policy's period of coverage.

While there is currently little final caselaw arising from climate change disputes, the Virginia Supreme Court ruled that where a "reasonably anticipated consequence" (the climate change impact) was the natural or probable consequence of the insured's intentional acts, there is no "occurrence" within the meaning of a CGL policy. AES Corp. v. Steadfast Insurance Co., 283 Va. 609, 621 (2012) (citing Barry R. Ostrager and Thomas R. Newman, Handbook on Insurance Coverage Disputes §8.03 (c) (15th ed. 2011) and others).[63]

In a matter of first impression in state high courts, the Hawaii Supreme Court will consider whether insurers have to bear the costs of abating the alleged public nuisance created by oil and gas companies after the U.S. District Court for Hawaii certified two questions related to whether an occurrence can include recklessness and whether greenhouse gases are pollutants for purpose of an occurrence insurance policy excluding coverage of "pollution".[64] This is the first case since the AES case was decided in the Virginia Supreme Court to take on the issues of whether recklessness is an "occurrence" and, if so, whether the "pollution exclusion" precludes a duty to defend climate change cases. It is anticipated that the Hawaii Supreme Court will accept the certified questions from the lower court.[65] The case raises issues important to the insurance industry at large, including: (a) the fundamental insurance principle of fortuity; and (b) whether climate change-related damages are subject to standard pollution exclusions.

Expected or Intended Injury Exclusion

Connected to the question of whether there was an occurrence is an exclusion in CGL policies concerning whether the insured intended or expected bodily injury or property damage ("exclusion a – Expected or Intended Injury"). Though we are not currently aware of any court holdings on the subject regarding climate change-related litigation, in other contexts, courts have divided on when to apply the exclusion, particularly in the "regular course of business context" and whether the insured intended to cause the harm or expected the harm to result.[66]

Pollution Exclusions

While the issue of whether there was an occurrence may continue to be hotly litigated, a central safeguard from CGL exposure for insurers is the prevalence of pollution exclusions in these policies. Should a climate-related claim be found within the coverage grant, the application of pollution exclusions may be a hotly litigated issue. Given that the U.S. Supreme Court ruled in 2007, and the U.S. Environmental Protection Agency found in 2009, that carbon dioxide and other GHGs are "air pollutants" under the Clean Air Act[67], this should apply well in the context of this coverage question.[68] Nonetheless,

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63 The Virginia Supreme Court ruled that the environmental releases by AES alleged to have caused climate impacts were an "intentional act that is neither an 'occurrence' nor 'accident' and therefore is not covered by the standard policy," consistent with prior opinions. AES, pg. 10. To date, Virginia may be the only state to rule on this issue of "occurrence" in the context of climate-change liability claims.

64 Aloha Petroleum, Ltd. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 2023 U.S. Dist. LEXIS 156211 (D. Haw. Sept. 5, 2023).

65 Supra.

66 *"I Did Not Expect That! The CGL Exclusion for Expected or Intended Injury,"* Craig Stanovich, IRMI (2008), www.irmi.com.

67 *See* Massachusetts v. EPA, 549 U.S. 248 (2007), 74 Fed. Reg. 66496 (December 15, 2009).

68 *See* "Global Insurance Perspectives on Climate Change," John Dickenson, Ryan Kelly, Jonathan Toren, Cozen O'Connor law firm (July 23, 2021), **www.jdsupra.com/legalnews/global-insurance-perspectives-on-1214682/**. ("[P]ollution exclusions may provide a vehicle for insurers to disclaim coverage of climate change related liability.")

we have seen pollution exclusions treated unexpectedly and contrary to underwriting intent in other coverage litigation. Consequently, until the case law develops it cannot be said with certainty that such exclusions will succeed. As we noted above, *Aloha Petroleum*[69] is now before the Hawaii Supreme Court and the Court may certify the question of whether GHGs are pollutants covered by pollution exclusions. We are following this matter closely and filed a prospective amicus with the Hawaii Supreme Court in November.

Lloyd's Climate Change Exclusion

To further reinforce the coverage intent and seemingly in response to the possibility courts will hold that coverage for GHG emissions is not barred by one or more other exclusions, out of an abundance of caution regarding transition liability, at least one insurer has developed a "climate change exclusion." Lloyd's of London introduce a climate change exclusion in November of 2021.[70] Very recently, a London based insurance advisor, DAC Beachcroft, reported that some liability insurers are exploring climate change exclusions.[71]

The immediate question is whether this exclusion serves a purpose not already served by the U.S. Supreme Court's definition of pollutants and the current success of the pollution exclusions. The Lloyd's exclusion may be more the product of its particular emphasis on so-called "bespoke insurance" contract wording, which is essentially custom made and negotiated policy wording,[72] and the absence of strong decisional law in the United Kingdom on what constitutes air pollutants.

The following resources may be useful affirmations of existing pollution exclusions based on their underlying premise – namely, that injuries resulting from climate change are uninsurable:

- *"Exclusions from Insurance Coverage for Climate Harms, Connor's Clause,"* The Chancery Lane Project (Published September 1, 2020; updated August 19, 2021), **https://chancerylaneproject.org/climate-clauses/exclusions-from-insurance-coverage-for-climate-harms/**.
- *"Exclusion from Insurance Coverage for Climate Harms,"* Nigel Brock and Harry Little, Clyde & Co. (April 9, 2021), **www.connectedworld.cyldeco.com**.

ENVIRONMENTAL IMPAIRMENT LIABILITY (EIL)

Environmental Impairment Liability (EIL) insurance is a specialized product that addresses liability and sometimes statutorily required cleanup costs associated with pollution as provided by the relevant policy wording. It provides pollution coverage for contractors and premises owners, and can include coverage for business interruption ("BI") claims resulting from pollution incidents.[73] These policies are often purchased by mortgage lenders and real estate agencies to protect against risks connected with "historic contamination or operational issues," such as mold, lead paint, Legionella, or poor indoor air quality.[74]

69 *Aloha Petroleum, Ltd.*, No. 1:22-cv-00372 (D. Haw.) (Otake, J.).

70 *LMA Model Climate Change Exclusion*, Lloyd's Market Association Bulletin, LMA21-0410DP, **www.lmalloyds.com/LMA/News/LMA_bulletins/LMA_Bulletins/LMA21-041-DP.aspx.**

71 Liability insurers to explore climate change exclusions: DAC Beachcroft, ESG Insurer (January 19, 2024) at **https://www.esg-insurer.com/news/liability-insurers-to-explore-climate-change-exclusions-dac-beachcroft/**

72 *"Benefits of bespoke insurance,"* Oncover Insurance (last updated October 13, 2020), **www.oncoverinsurance.co.uk/post/benefits-of-bespoke-insurance**.

73 "The Impact of Climate Change on P&C Insurance," Arthur Lu (February 11, 2019), www.PropertyCasualty360.com.

74 *"Environmental Insurance,"* NAIC (last updated July 9, 2021), www.content.naic.org.

EIL policies are typically designed to respond to identifiable pollution events, either sudden or long-term, and to support clean-up or related third party nuisance claims. The key coverage issues are whether an event is unintended and "whether the claimant can draw a sufficiently strong causal link" between the triggering event and the injury.

Claims Made Limitation

EIL policies typically provide "claims-made" insurance that requires claims be both made against the insured and reported to the insurer during the policy period.[75] This limits insurer exposure to unknown (and potentially evolving) future claims.

Known Conditions Exclusion

The "known conditions" exclusion in EIL policies may be a significant defense to a submitted claim. The exclusion provides that a policy does not apply to a claim or loss caused by the pollution condition if the condition or a related condition existed and was known to a designated type of insured prior to the policy period. Presumably for any number of climate-related claims, the conditions giving rise to liability were known to the insured in advance of the policy period. The application of this exclusion could be limited by courts if the insured is required to have actual knowledge of the damage specifically alleged in the claims against the insured.[76]

DIRECTORS AND OFFICERS LIABILITY (D&O)

Coverage for damages sought in climate change litigation could be requested under D&O policies. "The primary risk to which D&O insurers and their policyholders have been exposed are lawsuits alleging that a corporation has not properly disclosed its climate change-related vulnerabilities to investors under state and federal regulations."[77] Such litigation could be bolstered by the SEC's February 2010 "Guidance Regarding Disclosure Related to Climate Change," which clarified disclosure obligations regarding climate change matters and the SEC's March 2022 proposed "Rules to Enhance and Standardize Climate-Related Disclosures for Investors," which are summarized in the section: Types and Sources of Insurance Climate Exposures, above.

As the SEC continues to increase its focus on ESG reporting, it is likely that other regulatory bodies will follow suit. Impending regulation, however, is not the only reason companies need to manage the consistency and supportability of their ESG disclosures. Investors, advocacy groups, and other stakeholders are all actively filing public complaints, lawsuits, and proxy battles alleging misleading reporting by companies on ESG-related matters.[78] Accordingly, reputational and regulatory risks will increase.

Aside from recent and pending lawsuits alleging investor fraud, some legal academics have suggested that directors may be exposed to liability for alleged climate-related failures in light of their fiduciary duties to the corporation.[79] Conversely, a company's pro-active ESG initiatives may also present exposure in light of recent "ESG backlash" claims.[80]

75 "Climate Change Litigation and Liability Insurance Claims," p. 12.

76 *Id.*, at p. 21.

77 "Global Insurance Perspectives on Climate Change," p. 2.

78 https://merage.uci.edu/news/2023/05/Guest-Post-SEC-Steps-up-Enforcement-on-ESG-Reporting-with-Climate-Disclosure-Rules-Looming.html

79 https://blogs.law.columbia.edu/climatechange/2023/02/15/the-fiduciary-duty-of-directors-to-manage-climate-risk-an-expansion-of-corporate-liability-through-litigation/

80 https://www.forbes.com/sites/edwardsegal/2023/09/25/how-the-backlash-to-esg-can-create-a-crisis-for-companies/?sh=16a4722d8023

Assuming the SEC's proposed climate disclosure rule is finalized and withstands legal challenges, these two sources of guidance will likely be used to push for potential D&O liability.[81] Theories being tested in court relevant to directors' duties include: failure to mitigate GHG emissions; failure to adapt to physical impacts of climate change or to adapt investment strategies; failure to disclose risks; and failure to comply with regulatory obligations.[82] At this point, however, while D&O exposure may be "significant" and has had an impact on insurance policies,[83] substantial claims volume related to climate change has not yet materialized.[84]

Increased emphasis on ESG policies and procedure point to heightened litigation in the D&O space. For example, investors have been targeting boards of directors over a lack of emphasis on ESG matters, often alleging a breach of duty to stakeholders. In addition to investor-led litigation, another major concern has been the litigation around allegations of "greenwashing," a misleading statement aimed at deceiving stakeholders into misperceptions about an entity's environmental impact, especially involving the use of the terms "sustainable," "carbon neutral" and "net zero".[85]

Exclusions that come into play in D&O coverage litigation include: (1) exclusions for knowingly wrongful conduct by directors or officers; (2) pollution exclusions; and (3) exclusions for property damage and bodily injury, including death and mental anguish.[86] Notably, at least one state court in an asbestos case found the pollution exclusion in a D&O policy that did not expressly apply to disclosures because the claim arose out of the financial statements instead of the pollution itself. See Sealed Air Corp. v. Royal Indemnity Co. , N.J. Super. 363 (2008).

Considering the potential D&O liability, it is increasingly important to directors and officers that insureds demonstrate that material climate risks have been considered, that actions have been taken to mitigate them where necessary, and that asset values are properly represented in balance sheets.[87] These assurances, among others, may be appropriate for consideration as components of related underwriting protocols

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81 "Climate risk: Regulators sharpen their focus," Deloitte Center for Financial Services (2019).

82 "Climate change litigation threats to directors and officers," Willis Towers Watson blog post (Nov. 27, 2019).

83 *Id.*

84 *"'Increasingly Likely Climate Change Liability Risks,"* LaCroix, The D&O Diary (July 18, 2019). See also "Climate change litigation threats to directors and officers," Willis Towers Watson blog post (Nov. 27, 2019) "Although no company has been found liable for the effects of climate change, the growing number of pending cases...has had an impact on ...D&O liability insurance policies."

85 https://www.insurancebusinessmag.com/ca/news/professional-liability/evolving-dynamics-in-the-management-liability-market-461613.aspx

86 "Climate change litigation and D&O insurance: What you need to know," (February 19, 2020), www.cfcunderwriting.com.

87 *See* "'Increasingly Likely' Climate Change Liability Risks, LaCroix, The D&O Diary (July 18, 2019)

PROFESSIONAL LIABILITY (PL)

Professionals who design products or projects may see liability arising from harm caused by their work.[88] Architects, engineers, builders, and others involved in construction could be targets of climate change-related claims due to rising sea levels and extreme weather and may seek coverage under professional liability insurance policies. Some of these policies have pollution exclusions and other exclusions that could limit or bar coverage for such claims. In addition, knowledge-based coverage defenses, such as a lack of fortuity, non-disclosure, and misrepresentation, are likely to be asserted. Issues involving allocation and coordination of coverage will also figure into this liability.[89]

These defenses were apparently first asserted in the courts in 2014, in Illinois Farmers Insurance Co. v. Metropolitan Water Reclamation District of Greater Chicago, in the United States Northern District of Illinois. Illinois Farmers Insurance alleged that the defendant governments knew that their water systems were impacted by climate change and, despite that knowledge, designed their systems inadequately to manage increased stormwater. The action was criticized at the time for having the potential to establish a duty of care for design professionals whose work is impacted by climate change.[90]

More recently, after the Surfside Condominium collapse in Florida, claims of design and construction malfeasance abounded as did questions related to water action-derived structural subsidence. Though that matter recently settled[91], it underscores the potential for increasing focus on professional services and how they stand up to climate change risks and climate-resilient standards.

While claims alleging professional liability for climate change impacts are still limited, the treatment of lawsuits alleging the foreseeability of micro-climate impacts suggests a path forward in these suits. In lawsuits against the U.S. Army Corps of Engineers related to Hurricane Katrina, plaintiffs argued that it was foreseeable that a navigation channel changed the local microclimate, which in turn exacerbated hurricane damage.[92]

More recently, the American Institute of Architects and Building Green have both emphasized the need to account for climate change in professional design to reduce potential liability. "If you aren't accounting for future climate changes and extreme weather events in your designs, you could be held professionally liable in the future, according to The American Institute of Architects (AIA)."[93] We expect the professional liability aspect of climate change risk to continue to grow.

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88 *"Background on: Climate change and insurance issues,"* Insurance Information Institute (Nov. 1, 2019), **www.iii.org**.

89 *"Professional Liability and Global Warming Claims,"* Scott Seaman and John DeLascio, Liability for Climate Change? Experts' views on a potential emerging risk (2010), Munich Re, p. 16-18.

90 *"Negligent Operation of a Storm Sewer: A New Theory of Climate Change Liability,* J. Wylie Donald, McCarter & English climate lawyer's blog (May 2, 2014), www.jdsupra.com. The lawsuit was later voluntarily dismissed.

91 *"Florida judge finalizes settlement for victims of Surfside condo collapse,"* Reuters (June 23, 2022), **www.reuters.com/world/us/florida-judge-finalizes-settlement-victims-surfside-condo-collapse-2022-06-23/**.

92 *"Are design professionals liable for failing to anticipate the effects of climate change?"* Letter to the Editor, Larry Dany and Nick Boyd, The Architect's Newspaper (May 9, 2019) citing St. Bernard Parish Gov't. v. U.S., 121 Fed. Cl. 687, 721 (2015) reversed on other grounds, 887 F.3rd 1354 (Fed. Cir. 2018).

93 *"Future Climate and Professional Liability: AIA Weighs In"*, Building Green (March 27, 2022), **https://www.buildinggreen.com/newsbrief/future-climate-and-professional-liability-aia-weighs (Citing the AIA's examination of climate impact of professional liability)**.

PROPERTY INSURANCE

With Florida accounting for over three-quarters of all homeowner lawsuits against insurers arising from eight percent of claims nationally[94] and California and other western state wildfires driving up claims,[95] property insurance will likely be at the forefront in extreme weather-related claims, particularly in coastal and western states. The NAIC highlights that with an increase in natural catastrophes, property claims can also be expected to increase due to post-event shortages and post-event surges in restoration and living expense demands.[96]

Once a court finds a significant "carbon major" defendant (i.e., an energy company) liable for causing damage to the property of a private plaintiff or government entity, at least one commentator believes the "litigation flood gates will open" and "me too" lawsuits will follow, perhaps by property insurers bringing subrogation actions.[97] These subrogation actions have the potential to turn climate change claims into a "circling firing squad where everyone attempts to blame someone else."[98]

BUSINESS INTERRUPTION (BI)

Business-related property insurance claims are potentially impacted by climate change. As an extension of property insurance, business interruption claims can arise from a variety of climate-related extreme weather events. Losses related to business interruption can comprise up to 40 percent of claims related to extreme weather events, including hurricanes.[99]

CONCLUSION

Climate change has the potential to significantly impact insurers.

We have sought to present a comprehensive yet accessible examination of the many important issues impacting climate change risks including related legal and regulatory activity, theories of liability, recovery, and defense, potential enterprise and coverage exposures, and potentially implicated property and casualty coverage products.

This paper is intended as an evergreen resource for APCIA and our members. Consequently, we welcome your comments and feedback.

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94 "NAIC Data: Florida Property Lawsuits Total 76% of Insurer Litigation in U.S.," Amy O'Connor, Insurance Journal online (April 14, 2021).

95 *"Planning, modeling for catastrophic fires take on renewed urgency as losses mount,"* Matthew Lerner, Business Insurance, November 2020, p. 10. "Wildfires have become an increasing concern for the insurance industry, as losses over the past few years have grown into tens of billions of dollars annually."

96 *"The Potential Impact of Climate Change on Insurance Regulation,"* NAIC (2008), p. 6.

97 *"Climate Change and Insurance: Insurers' Subrogation Claims,"* Zelle LLP (July 15, 2019), **www.jdsupra.com/legalnews/climate-change-and-insurance-insurers-69017/**

98 *Id.*

99 "The Potential Impact of Climate Change on Insurance Regulation," NAIC (2008), p. 6.

American Property Casualty Insurance Association[SM]

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