There is an interesting question surrounding the present generation of climate change lawsuits currently working their way through the court system. Specifically, where are the duty to defend actions related to these suits?

**Background**

By way of background, there are two types of climate change lawsuits currently working their way through the courts:

1. Those filed by government entities that seek to hold energy companies responsible for the costs that government entities are forced to expend in adapting to climate change, and which could be susceptible to coverage litigation; and
2. Those filed by various groups of young people against specific government entities alleging violations of their constitutional rights to a healthy environment and sustainable future, which would not involve such coverage litigation.

To date, 15 state, county, and city governments have filed lawsuits against fossil fuel producers, while approximately 10 suits have been filed by young people against various federal and state government entities.[1]

The primary motivation behind most of the government suits has been the growing concern over the mounting costs of responding to damages related to climate change coupled with the reluctance of the federal government to address climate change seriously. The first eight government suits were filed in California in 2017 and early 2018, followed quickly by:

- The City of New York (January 2018);
- The City of Boulder, Boulder County, and San Miguel County in Colorado (April 2018);
- King County Washington [Seattle] (May 2018);
- The State of Rhode Island (July 2018); and
- The City of Baltimore (July 2018).

Yet, despite the number of climate change suits that have been filed and the several years that the litigation has been active, no coverage cases have been forthcoming.

The government entities, which allege that the defendants’ greenhouse gas (GHG) products are directly responsible for current and future physical impacts in their communities, seek to recover under theories of public nuisance, trespass, unjust enrichment, and in some instances, under additional claims of strict liability akin to product liability claims — failure to warn and product design defect. This current group of suits takes a different approach to
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climate change litigation then the “first generation” of unsuccessful climate change suits, such as Native Village of Kivalina v. ExxonMobile Corp., 696 F.3d 849 (9th Cir. 2012).

Kivalina based their allegations primarily on state law claims, rather than on federal common law, and, it is important to note, attempted to hold the sued entities liable for damages based on their production rather than their emissions. Kivalina is important, not only in the defenses the case has provided the currently sued energy corporations, but also in the fact that the only coverage action related to a climate change suit to date, AES Corp. v. Steadfast Ins. Co., 725 S.E. 2d 532 (Va. 2012), arose out of the Kivalina case.

In Steadfast, the Virginia Supreme Court held that AES Corporation was not entitled to a defense because the complaint “plainly alleges that AES intentionally released carbon dioxide into the atmosphere as a regular part of its energy-producing activities,” and “the natural and probable consequence of such emissions is global warming and damages such as [what] Kivalina [had] suffered.” Id. at 537. As a result, “if an insured knew or should have known that certain results were the natural or probable consequences of intentional acts or omissions, there is no ‘occurrence’ within the meaning of a CGL policy.” Id. at 538.

Conclusion

So, why are there no coverage actions? Given that the energy companies sued are among the largest corporations in the world, it might be as simple as the level of self-insured retention required to be satisfied before a duty to defend is triggered. While no climate change suit has yet been successful, the stakes are high for both the insureds and the insurance industry as a whole, given the potential enormous magnitude of indemnification costs. One successful suit brings the potential for a wealth of additional suits, not just against energy companies, but also against transport companies, agricultural businesses, and other manufacturers such as the cement industry, a major source of GHG emissions.

Interestingly, while the Steadfast court is clear that knowledge of the “natural or probable” consequences of intentionally releasing GHGs into the environment, an allegation leveled against all the sued energy producers, means that there is no occurrence under a standard CGL policy, the current generation of climate change suits are based on the sued entity’s production and not its emissions. While the defense in the underlying suits has claimed that production versus emissions is a “distinction without a difference,” this distinction could be significant for the insurance industry, as the applicability of standard defenses – pollution exclusion, known loss, expected or intended injury, products completed operations, trigger – could vary based on a products theory versus direct emission of a pollutant. In any event, for both the insurance industry as a whole and any corporation likely to be sued as a result of
their GHG emissions, given the urgency to respond to climate change, much is riding on the outcome of these government suits.

[1] Current information on each of these cases, as well as links to important filings, can be found here. Links to the case dockets can be obtained through Law360.