Focus INSURANCE

Extreme weather puts onus on policy language

Nicole Mangan

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Extreme weather events and changes are making news headlines. The cause can be debated but insurance is an industry that has had to take notice. For insurers, anticipating and responding to extreme weather translates to proper business management and dollars and cents. The insurance industry has responded to the impacts and threats of climate change in numerous ways, including offering new kinds of coverage, changing or developing policy exclusions to meet changing conditions, and participating with governments, business and individuals on education and response strategies. Insurance counsel need to be responsive too, because climate change can present numerous legal issues. A few basic insurance principles that might apply to these issues are summarized here.

Lawyers may be consulted by policyholders or insurers seeking advice on whether coverage exists for first-party losses caused by a particular weather-related event. A standard "all-risks" property policy, for example, typically references certain weather-related elements as "excluded perils." Floods, tsunamis, windstorms and hail are possible examples. Detailed analysis of "causation" in relation to the policy's exclusion language and the evidence is typically critical to assessing such coverage. Of particular importance with excluded perils is whether the policy language references damage caused "directly" or "indirectly," and how "concurrent" causes will be treated.

Wynward Insurance Group v. *MS Developments Inc.* [2015] B.C.J. No. 561 provides a useful, recent example of a case where the application of an exclusion for "loss or damage caused directly or indirectly…by changes in or extremes of temperature, heating or freezing" was considered by the court. Ultimately, the court concluded freezing was an indirect cause of the policyholder's claim and the exclusion in the policy applied. However, another exclusion related to "seepage…of water from natural sources" was found to be ambiguous.

Plaintiffs in some novel claims in the U.S. have sued corporate defendants, alleging their emissions contributed to pollution that, in turn, caused a particular destructive weather event to occur or cause damage to property over time. Third-party liability claims raise questions for defendants and their insurers concerning whether an insurer has a duty to defend or indemnify a claim for such losses. Would there be coverage? Clearly, the answer depends on each individual policy, but thinking about a standard commercial general liability policy helps frame a few of the issues insurers and counsel would need to consider.

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The word "occurrence" is typically defined or interpreted to mean an accident. Some companies, often categorized as "active polluters," will have both current and past knowledge of the pollutants they emit as part of conducting their business, and will have continued on with conducting that business. Known emissions and intentional conduct could result in arguments that prevent a policyholder from demonstrating there has been "occurrence."

Whether allegations relate to "property damage" or "bodily injury" and "compensatory damages" are other relevant considerations at the insuring-agreement stage of analysis. However, depending on how a claim is framed, these criteria could be much more easily met.

If the elements of an insuring agreement were met, the language of any potentially relevant exclusions would need to be considered. A pollution exclusion is one component of a standard CGL policy. The "qualified" pollution exclusion, which in the standard ISO language contained an exception for a "discharge, dispersal, release or escape" that was "sudden and accidental," was changed approximately 30 years ago to "absolute" pollution exclusion language. Ten years ago this "absolute" pollution exclusion language was modified to terms that were less restrictive. Each form of the exclusion relates to "pollutants." Carbon dioxide can be naturally occurring, but is also a greenhouse gas that can be emitted by various industries and forms of transportation. Would this meet the definition of "pollutant?" The current standard "pollutant" definition requires that the substance be an "irritant or contaminant." These same words are often contained in the definition of "pollutants" in all-risks policies, which also typically contain a pollution exclusion. One case in the United States concluded carbon dioxide was not a "pollutant;" however, more recently, U.S. legislation has defined this gas as an "air pollutant." It is also on the "list of toxic substances" for the *Canadian Environmental Protection Act*. Whether this would change a court's interpretation of policy wording is not yet known.

Arguments that ambiguity exists in policy language have frequently been raised, and often been successful, in cases where pollution exclusions require interpretation. Carefully assessing a policy for ambiguity will be a very important aspect of an analysis where climate change allegations are raised, whether the claim is a novel third-party one or a more common first-party claim.

For novel claims we have more questions than answers and basic principles will serve as the starting point, but for first-party coverage the case law provides guidance so counsel will be ready to respond to climate change claims.

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Risk: Paying up often the only way to save lives and property

Continued from page 11

insurer did not have to pay.

In response to an argument that payment of ransom to pirates is contrary to public policy, the court noted that, while payment of ransom does encourage piracy and kidnapping, if people and property are to be taken out of harm's way, often the only option is to pay the ransom, especially when diplomatic and military intervention is either not practically possible or might endanger the hostages. The court noted that kidnap and ransom coverage is a long-standing feature of the insurance market, but also noted that kidnap and ransom coverage could be recovered as a sue and labour expense. It's a usual term (express or implied) of many kinds of insurance that the insured person must do anything a prudent uninsured person would do to minimize the loss, including legal action (the "sue" part) or doing work and incurring expenses (the "labour" part). In other words, even if my employees and property are taken by pirates or kidnappers, and the employees are insured people or the property is insured property, or both, and the prudent thing to do is pay a ransom to get everyone and everything out of harm's way, I can pay the ransom and recover the money from my insurers.

In *Canelhas Comercio v. Nicholas Wooldridge* [2004] EWHC 643 (Comm.), the court considered a case in which Canelhas, the managing director of a company that cut and polished emeralds, was kidnapped along with his wife, his mother and his son. The kidnappers explained to Canelhas that it would be best if he were to go to his company's offices, collect his entire stock of emeralds, and deliver them up in exchange for the safety of his family. Canelhas delivered up the emeralds and claimed for the value of the stock under his "all risks" commercial insurance policy. The defendant insurer argued that policy was not a kidnap and ransom policy. The court found that an "all risks" policy could cover kidnap and ransom.

What is the moral of the story? If you're doing business in a dangerous part of the world, talk to your broker.

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