The Price Of Emission: Will Liability Insurance Cover Damages Resulting From Global Warming?

By Noel C. Paul*

I. INTRODUCTION

In the wake of the Supreme Court’s holding in *Massachusetts v. E.P.A*¹, it has become increasingly clear that US federal courts may soon experience a significant increase in litigation over global warming.² For oil companies, utilities, and automakers – the most likely targets of such suits – one of the most vital legal questions left unaddressed is whether their insurance will cover resulting damages.³ The stakes are very high, not only in light of the potential for enormous corporate liability, but because of the central role these industries

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² Jonathan H. Adler, *Hot Times in the High Court: Ruling could drive climate-change policy for years to come*, NATIONAL REVIEW ONLINE, April 3, 2007, available at http://article.nationalreview.com/?q=NmU0ZDBmMmEwZTlkNDBmOTQ3ZTg0YzY5MTM3OTIwNTg (last visited May 16, 2007).

play in the national and global economy.\footnote{Id.}

This article, therefore, aims to provide a fuller understanding of the issues related to insurance coverage for liabilities resulting from global warming. Section II of this article briefly describes the growing interest and concern over global warming in the public and among potentially liable corporations. Section III canvases the state and federal court cases related to global warming litigation and discusses the theories of liability asserted by plaintiffs. Section IV discusses historical efforts by insurance companies to exclude coverage for environmental pollution. Section V analyzes whether these exclusions will block coverage for companies found liable for global warming. Section VI of this article discusses the impact on consumers of courts’ decisions regarding insurance coverage for global warming. Section VII provides a brief conclusion. Overall, this article concludes that most companies’ Commercial General Liability ("CGL") policies will provide coverage for liabilities resulting from contributions to global warming, and that coverage for these liabilities will ultimately benefit consumers.

\section*{II. DISCUSSION OF PUBLIC OPINION AND CORPORATE RESPONSE}

The energy industry must consistently address severe threats to its short and long-term stability – from political instability and terrorism, to the influence of cartels and limited product supply.\footnote{Peter Coy, \textit{The Trouble With Gushing Oil Demand}, \textit{BUSINESSWEEK}, Apr. 26, 2004, \textit{available at} \url{http://www.businessweek.com/magazine/content/04_17/b3880054.htm}.} Yet the phenomenon of global warming,\footnote{Global warming is a scientific phenomenon in which Chlorofluorocarbons, methane, and CO$_2$ (greenhouse gases) allow visible light to pass through the atmosphere, but also trap heat radiated back from the Earth as infrared rays. The net effect is global warming. The concentration of CO$_2$ in the atmosphere has increased by about 30 percent since the mid-18th century. Scientists generally agree that human activities have caused the rapid increase in CO$_2$ concentration. Fossil fuel combustion releases CO$_2$, with coal releasing about twice as much energy as natural gas, and oil somewhere between coal and gas. Robert Percival, et al., \textit{Environmental Regulation: Law, Science, and Policy}, pp. 1122-23 (Third Edition 2000).} and the political and social upheavals resulting therefrom, arguably pose the greatest threat to the industry over the long term.\footnote{John Carey & Lorraine Woellert, \textit{Global Warming: Here Come The Lawyers}, \textit{BUSINESSWEEK}, Oct. 30, 2006 [hereinafter \textit{The Lawyers}].} While some scientists and advocacy
groups have pointed to the dangers of global warming for several decades, energy companies have historically disclaimed responsibility and admonished against shoddy science and snap political decisions. Yet anecdotal evidence suggests a sharp rise in global warming coverage in the media, and broader discussion of the issue in popular culture. Public opinion polls, moreover, reveal a significant up-tick in public awareness regarding global warming, and an increase in public unease.

Energy companies appear to have taken notice. Consider Exxon Mobil’s response in early 2007 to a report by the Union of Concerned Scientists. The organization’s paper accused Exxon Mobil of distorting the public debate over global warming in a fashion similar to tobacco companies’ tactics during the 1990s. Exxon Mobil first responded by calling the report an “attempt to smear our name and confuse the discussion.” Twenty minutes later, however, the company withdrew its statement and issued a shocking revision. “It is clear today,” the press release stated, “that greenhouse gas emissions are one of the factors that contribute to climate change, and


9 Westlaw’s “All News” database returns 6,608 articles published the past year with “global warming” in the headline – nearly double the 3,390 published the year prior. The considerable success of Al Gore’s documentary film and book “An Inconvenient Truth” also, perhaps, points to growing public interest and awareness regarding the issue. The film is one of the highest grossing documentaries of all time, having earned more than $48 million; the book sat atop the New York Times Bestseller’s list during the summer of 2006 and is currently 23rd. See William J. Broad, From a Rapt Audience, a Call to Cool the Hype, N. Y. TIMES, March 13, 2007, available at http://www.nytimes.com/2007/03/13/science/13gore.html?ex=1176177600&en=a6de09d1be443ae1&ei=5070 (subscription needed); see generally Best Sellers, N. Y. TIMES, available at http://www.nytimes.com/pages/books/bestseller/ (follow hyperlink to “Paperback Nonfiction”; then follow hyperlink to “Complete Paperback Nonfiction List”.

10 A Jan. 30 Fox News/Opinion Dynamics Poll reported that 82 percent of those asked “Do you believe global warming exists?” responded “yes” – a 5 percent increase from Oct. 25, 2005; A Jan. 18, 2007 CBS News Poll found that 70 percent of those asked believe global warming is an environmental problem causing a serious impact now – a 3 percent jump over the previous six months, available at http://www.pollingreport.com/enviro.htm.

11 Adler, supra note 8.

12 Id.

13 Id.
that the use of fossil fuels is a major source of these emissions.”

The company’s CEO has since stated that technological advances and a global political strategy are necessary to combat the rise in carbon dioxide (“CO₂”) emissions. Shortly after the Massachusetts decision by the Supreme Court, oil titan ConocoPhillips became the first US oil company to call for a federal global-warming emission cap. The move resulted, analysts said, from mounting political and consumer concern about global warming and rising gasoline prices. European-based oil giant BP had earlier endorsed adopting a similar cap. This dramatic about-face by some of the most vocal critics of mandatory reductions of CO₂ emissions no doubt results, in part, from a growing scientific consensus that human activities are largely responsible for global warming. But it is also likely rooted in a more specific trend: a spike in global warming-related litigation. At least 16 cases related to global warming are pending in state and federal courts. Each seeks, through a variety of legal theories, a legal acknowledgement of global warming, and either government action or monetary damages. For example, 14 plaintiffs brought a class action suit last year against 8 oil companies, 100 unnamed oil companies, and 31 coal companies for damages to their property resulting from Hurricane Katrina. They contend that CO₂ emissions resulting from these companies’ products contributed significantly to global warming, which intensified or otherwise affected Hurricane Katrina. The State of California, conversely, is seeking billions of dollars in dam-

14 Id.
17 Id.
18 Id.
20 The Lawyers, supra note 7.
22 Id.
24 Id. at 1.
ages from 6 automobile manufacturers, arguing that these companies are responsible for significant amounts of CO₂ emissions. According to its complaint, California’s injuries include the melting of its snow pack, the loss of water supply, a greater risk of flooding, and the loss of coastline, among other damages. The Supreme Court’s recent watershed holding in Massachusetts – which states that plaintiffs have standing to bring suit for global warming damages – could open the federal courts to such suits for years to come.

Some observers credit the spike in global warming litigation to the failure of the federal government to regulate the emissions of greenhouse gases. Several commentators, moreover, have argued that civil torts against the largest contributors of CO₂ will fill the void of state and federal regulation. If courts allow civil suits related to global warming to proceed – which Massachusetts appears to dictate – the largest corporate emitters could be on the hook for enormous damages. Some commentators compare these companies’ potential liability to damages suffered by tobacco companies’ resulting from litigation brought during the 1990s. The $300 billion settlement to tobacco manufacturers paid out to states’ attorneys general for healthcare costs could be quite small, however, compared to the damages

26 Id. at 9-12.
27 See Adler, supra note 2.
30 See The Lawyers, supra note 7.
sought by a coalition of states alleging loss of coastline, drinking water, and other seemingly catastrophic losses.\textsuperscript{32}

Directors and officers of the largest emitters of greenhouse gases could also be vulnerable to litigation.\textsuperscript{33} Some groups have argued that officers and directors would be lax in their fiduciary duties in failing to address possible liability stemming from greenhouse gas emissions.\textsuperscript{34} Indeed, there already is significant evidence of shareholder concern over climate change.\textsuperscript{35} Shareholders introduced 19 resolutions on the subject of climate change at annual corporate shareholder meetings in 2002.\textsuperscript{36} Resolutions at General Electric and American Electric Power received support from 23 and 27 percent of voting shareholders, respectively.\textsuperscript{37} Interestingly, a 2002 shareholder proposal at Exxon Mobil argued that the then chairman and CEO’s statements regarding global warming threatened the company’s reputation and shareholder value.\textsuperscript{38}

As the clouds of litigation loom over the energy industry, it is not surprising that significant concern has gripped another of the nation’s largest industries: insurers.\textsuperscript{39} One example: the world’s second largest re-insurer, Swiss Re, has begun treating climate change as a liability risk.\textsuperscript{40} Courts and policymakers will confront myriad complex legal issues as litigation for global warming proceeds, but none may be more significant for consumers than whether insurers – or energy companies, among others – pay for decades of harmful emissions. The issue is particularly significant given the sensitivity of the global economy to energy prices, which would almost certainly be

\textsuperscript{32} The Lawyers, supra note 7.


\textsuperscript{35} See Healy & Tapick, supra note 33, at 105.

\textsuperscript{36} Id.

\textsuperscript{37} Id. at 106.

\textsuperscript{38} Hancock, supra note 33, at 250.

\textsuperscript{39} Healy & Tapick, supra note 33, at 102.

\textsuperscript{40} Id.
dramatically affected by massive litigation.\textsuperscript{41}

\section*{III. DISCUSSION OF CASES}

Observers have broken down global warming litigation into several general categories, ranging from suits brought against government agencies for failure to comply with congressional legislation, to civil nuisance suits brought by private litigants.\textsuperscript{42} This article is primarily concerned with the prospect of public and private civil suits stating causes of action for nuisance.\textsuperscript{43} However, because some cases regarding compliance with the Clean Air Act (“CAA”) and the National Environmental Policy Act (“NEPA”) shed considerable light on the issue of insurance coverage, I will canvass the relevant issues they present.

\subsection*{A. CLEAN AIR ACT LITIGATION}

A watershed environmental law case recently decided by the US Supreme Court confronted two of the most significant legal issues regarding global warming: 1) the threshold requirement for standing; and 2) whether the Environmental Protection Agency has authority to regulate greenhouse gases.\textsuperscript{44} The first issue was arguably the most important, given that a finding against standing would likely have shuttered plaintiffs’ efforts to sue for global-warming related damages in federal court.\textsuperscript{45} The Court decided the case in favor of the state and municipal plaintiffs on each point, however, holding that Massachusetts had standing to bring suit, and that the EPA had authority to regulate greenhouse gases under the CAA.\textsuperscript{46}

On the standing issue, the EPA had argued that the widespread harm wrought by global warming did not amount to the kind

\begin{footnotesize}
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\item 42 Pidot, \textit{supra} note 21, at 1.
\item 43 See, e.g., \textit{General Motors}, No. 3:06CV05755 at 13.
\item 44 \textit{Massachusetts}, at * 10-11 (U.S. 2007) (citing DC Circuit Court of Appeals’ decision holding in \textit{Massachusetts v. EPA}, 415 F.3d 50 (D.C. Cir. 2005).
\item 46 \textit{Massachusetts}, 2007 WL 95733, at * 22.
\end{itemize}
\end{footnotesize}
of particularized injury a plaintiff must show to achieve standing.\textsuperscript{47} The Court disagreed.\textsuperscript{48} Writing for the majority, Justice Stevens stated that Massachusetts, among other states, possessed “quasi-sovereign interests” in protecting its land and citizens from global warming.\textsuperscript{49} Massachusetts also could bring suit, the Court held, in order to protect its interests as a major landholder.\textsuperscript{50} “Because the Commonwealth owns a substantial portion of the state’s coastal property,” the majority opinion reasoned, “it has alleged a particularized injury in its capacity as a landowner.”\textsuperscript{51}

The state’s interest in bringing the suit was not minimized, according to the Court, because the primary risk of rising sea levels was widely shared among states and real property owners.\textsuperscript{52} Nor was the Court concerned by the likelihood that regulation by the EPA would only slow or reduce plaintiffs’ injuries, rather than entirely eliminate them.\textsuperscript{53}

Regarding its ability to regulate greenhouse gases, the EPA argued that 1) it lacked congressional authority and 2) even if it had such authority, it properly decided not to regulate.\textsuperscript{54} Congress first mentioned carbon dioxide in the CAA in the 1990 amendments.\textsuperscript{55} However, Congress went out of its way in the amendments, the EPA argued, to say that the EPA only had non-regulatory authority over the substance, and that nothing in the section could provide a basis for air pollution control requirements.\textsuperscript{56} Indeed, the 6 separate statutes in which Congress addressed the issue of global warming only advise Congress to study the issue, not to regulate.\textsuperscript{57} As counsel for EPA stated in oral argument before the Supreme Court, “Congress did not intend to hide elephants in mouse holes” by failing to promulgate specific regulation of greenhouse gases, which are a direct

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\textsuperscript{47} Id. at 13.
\textsuperscript{48} Id.
\textsuperscript{49} Id. at 17.
\textsuperscript{50} Id. at 19-20.
\textsuperscript{51} Id.
\textsuperscript{52} Id. at 19.
\textsuperscript{53} Id. at 22.
\textsuperscript{54} Id. at 8.
\textsuperscript{55} Massachusetts, 415 F.3d at 70.
\textsuperscript{56} Id.
\textsuperscript{57} Id.
}
product of about 85 percent of the national economy.\textsuperscript{58}

The Court also disagreed with the EPA’s conclusions regarding the CAA, holding that the legislation’s plain meaning permitted regulation.\textsuperscript{59} The CAA’s definition of air pollutant was sweeping and comprehensive, according to Stevens, and clearly embraced “all airborne compounds of whatever stripe.”\textsuperscript{60} Congressional failure to regulate greenhouse gases did not, according to the Court, alter the EPA’s original mandate under the CAA to regulate “any air pollutant” that may endanger the public welfare.\textsuperscript{61} The Court concluded that the EPA could only refuse a petition to regulate greenhouse gases after determining that greenhouse gases do not contribute to climate change, or by providing a reasonable explanation of why it could not make a determination.\textsuperscript{62}

The effect of the Court’s decision on the future of global warming litigation is difficult to overstate.\textsuperscript{63} Indeed, one commentator has predicted that the Court’s holding would ensure “that federal courts will play a role in [the climate-change debate] for years to come.”\textsuperscript{64} Although the decision will undoubtedly pressure the EPA to regulate greenhouse gases, the opinion does not require such action.\textsuperscript{65} Moreover, even if the EPA chooses to regulate, it would retain considerable discretion in delaying such regulation for several years.\textsuperscript{66} The Court’s decision on standing, alternatively, could usher in a period of extensive civil litigation over global warming.\textsuperscript{67} Because the Court’s opinion arguably confers standing on large landholders - as well as the 50 states - prospective plaintiffs could range from ski resorts suffering from fewer snow days to coastal golf re-

\textsuperscript{58} Transcript of Oral Argument at 47-48, \textit{Massachusetts}, 126 S.Ct. 2960 (No. 05-1120).

\textsuperscript{59} \textit{Massachusetts}, 2007 WL 95733, at * 10-11.

\textsuperscript{60} \textit{Id.} at 26.

\textsuperscript{61} \textit{Id.} at 27.

\textsuperscript{62} \textit{Id.} at 30.

\textsuperscript{63} See Adler, supra note 2.

\textsuperscript{64} \textit{Id.}


\textsuperscript{66} \textit{Id.}

sors threatened by increasing sea levels and sea-borne storms.\footnote{68}{Id.}

\section*{B. NEPA ENFORCEMENT}

Before the Supreme Court decided whether a plaintiff could bring suit for global warming, one federal court already had held that a plaintiff established standing by alleging that global warming threatened real property that he owns and uses.\footnote{69}{See \textit{Friends of the Earth, Inc. v. Watson}, 2005 WL 2035596 (N.D. Cal. 2005), \textit{sub nom Friends of the Earth, Inc. v. Mosbacher}.} In its holding, the Northern District of California denied summary judgment to two government-agency defendants, the Export Import Bank ("EIB") and the Overseas Private Investment Corporation ("OPIC").\footnote{70}{Id. at *1.} Plaintiffs argue the agencies violated the National Environmental Policy Act, by failing to evaluate the potential global warming impacts within the US of the projects they finance overseas.\footnote{71}{\textit{Id.} at *2.} (Between 1990 and 2001, the EIB provided more than $25 billion in loans and financial guarantees to overseas energy projects that produce 204 million tons of CO\textsubscript{2} annually; OPIC supported projects between 1990 and 2000 that emitted more than 56 million tons of CO\textsubscript{2} annually.)\footnote{72}{\textit{Id.} at *3.} The agencies counter that NEPA does not apply to general environmental harms to the US that originate overseas.\footnote{73}{\textit{Id.}}

The court held that "it was reasonably probable that emissions from projects supported by OPIC and Ex-Im will threaten plaintiffs’ concrete interests."\footnote{74}{\textit{Id.} at *1.} Therefore, the court found that the plaintiffs, including Greenpeace and the cities of Boulder, Co. and Oakland, Calif., had standing to bring their claims.\footnote{75}{\textit{Id.} at *3.} In support of its decision, the court cited evidence that projects financed by the defendants contributed 8 percent of global CO\textsubscript{2} emissions.\footnote{76}{\textit{Id.} at *3.} Furthermore, the court held that plaintiffs’ injury was redressable if the agencies’ decisions to fund the projects could merely be influenced by a global warming
analysis.\textsuperscript{77}

\section*{C. NUISANCE LITIGATION}

Other claims, however, have failed to advance beyond the pleading stage.\textsuperscript{78} The District Court for the Southern District of New York dismissed a nuisance claim brought by 8 states, the city of New York, and several land trusts against the 5 largest CO\textsubscript{2} emitters in the US.\textsuperscript{79} Defendants operate 174 fossil-fuel powered power plants that emit about 650 million tons of CO\textsubscript{2} annually.\textsuperscript{80} Plaintiffs argued that the plants constituted a public nuisance, because they contribute about one quarter of the nation’s electric power sector’s CO\textsubscript{2} emissions.\textsuperscript{81} The plaintiffs further alleged that US electric power plants are responsible for 10 percent of world wide CO\textsubscript{2} emissions resulting from human activity.\textsuperscript{82}

They asked that defendants be held jointly and severally liable, that the court enjoin each defendant to abate its emissions, and that the court require each to reduce its emissions by a specific percentage over the next decade.\textsuperscript{83} The court held, however, that it lacked jurisdiction to hear the claim, citing the “political question” doctrine.\textsuperscript{84} Because deciding the case would have required the court to have made an “initial policy determination” it believed the judicial branch was not suited to make, the court dismissed the suit.\textsuperscript{85} The political branches, according to the court, would have to take up the issue in order for it to be resolved in the fashion desired by plaintiffs.\textsuperscript{86} The court announced its holding before the Supreme Court’s ruling in \textit{Massachusetts}.

California’s suit against the automakers, alternatively, seeks

\begin{itemize}
\item \textsuperscript{77} \textit{Id.} at *4.
\item \textsuperscript{79} \textit{Id.} at 267.
\item \textsuperscript{80} Pidot, \textit{supra} note 21, at 15.
\item \textsuperscript{81} \textit{Connecticut}, 406 F.Supp.2d at 268.
\item \textsuperscript{82} \textit{Id.}
\item \textsuperscript{83} \textit{Id.} at 270.
\item \textsuperscript{84} \textit{Id.} at 272.
\item \textsuperscript{85} \textit{Id.}
\item \textsuperscript{86} \textit{Id.}
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billions of dollars in damages. The state is also seeking a declaratory judgment stating that the carmakers are liable for all future damages arising from greenhouse gases emitted by their products. California alleges in its September 2006 complaint that defendants’ emissions comprise 9 percent of the world’s CO₂ emissions, and more than 30 percent of emissions from sources in California. The case could be a bellwether of states’ attorneys general efforts to combat global warming through the courts. Oil and coal producers, alternatively, have become targets of private litigants. The suit brought against 8 named oil companies, 100 unnamed oil companies, and 31 coal companies for damages resulting from Katrina, however, is not likely to survive defendants’ motion to dismiss. In its holding on an earlier motion, the court stated that plaintiffs faced “daunting evidentiary problems” in proving by a preponderance of the evidence “the degree to which global warming is caused by the emission of greenhouse gases . . . and the extent to which the emission of greenhouse gases by these defendants . . . intensified or otherwise affected the weather system that produced Hurricane Katrina.” The Supreme Court’s recent expansion of its standing doctrine in Massachusetts, however, could significantly alter the landscape of this and other litigation.

IV. ENVIRONMENTAL POLLUTION EXCLUSIONS

A. THE 1973 POLLUTION EXCLUSION

At the close of the 1960s, the insurance industry began to respond to its growing exposure to liabilities resulting from environmental pollution. Part of its problem lay in the general nature of the coverage it granted its policyholders. The title of its standard cov-

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87 General Motors, No. 3:06CV05755) at *3.
88 Id. at 3.
89 Id. at 2.
91 Id. at 4.
92 Id.
94 R. Stephen Burke, Pollution Exclusion Clauses: The Agony, the Ecstasy, and the Irony for Insurance Companies, Comment, 17 N. Ky. L. Rev. 443, 447 (Winter
verage, the Comprehensive General Liability policy, suggested maximum coverage for the full gamut of liabilities for third-party damages.\textsuperscript{95} The critical limitation of coverage had been the requirement that covered risks be “caused by an accident.”\textsuperscript{96} Insurers and courts had widely understood this requirement to mean that insurers would not cover risks voluntarily assumed by the insured, nor risks the insured knowingly or intentionally incurred.\textsuperscript{97} In 1966, insurers responded to demand for broader coverage by offering coverage for an “occurrence,” which it defined as an “accident, including continued or repeated exposure to conditions, which results, during the policy period, in bodily injury or property damage neither expected nor intended from the standpoint of the insured.”\textsuperscript{98} This language ostensibly would cover a manufacturer’s continuous release of pollution, as long as the manufacturer did not intend harm to result to third parties by way of the release.\textsuperscript{99}

However, Congressional efforts to combat air and water pollution, as well high-profile liabilities resulting from environmental disaster, soon prompted insurers to attempt to limit this coverage.\textsuperscript{100} The industry developed and promulgated a new exclusion for: . . . bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids, or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.\textsuperscript{101}

Insurers added the wording to CGL policies in 1973.\textsuperscript{102} The exclusion appeared to indicate a significant reduction of coverage.\textsuperscript{103} While the pre-exclusion CGL policy covered continuous release of pollution, the exclusion appeared to withdraw coverage for any occurrence that was not “sudden,” perhaps implying a limitation on the

\textsuperscript{95} Id.

\textsuperscript{96} Id. at 448.

\textsuperscript{97} Id.

\textsuperscript{98} Id.

\textsuperscript{99} Id.

\textsuperscript{100} Id. at 449.

\textsuperscript{101} Williams, supra note 93, at 417.

\textsuperscript{102} Burke, supra note 94, at 450.

\textsuperscript{103} Id.
length of time and frequency of release.\textsuperscript{104} Moreover, while the CGL policy denied coverage only in the event of \textit{intentional harm to third parties}, the exclusion appeared to deny coverage for harm to third parties arising from any \textit{intentional release}.\textsuperscript{105}

Despite this seemingly significant change, the insurance industry represented the exclusion as a mere clarification and continuation of coverage under the CGL policy.\textsuperscript{106} The Insurance Rating Board, an industry rating and drafting organization, submitted memoranda to state insurance commissioners that would have given these regulators little reason to withhold their approval of the exclusion. The memorandum submitted to the West Virginia Insurance Commissioner, for example, provides:

Coverage for pollution or contamination is not provided in most cases under present policies because the damages can be said to be expected or intended and thus are excluded by the definition of occurrence. The above exclusion clause clarifies this situation so as to avoid any question of intent. Coverage is continued for pollution or contamination caused injuries when the pollution or contamination results from an accident. . . .\textsuperscript{107}

The Commissioner entered an order approving the new exclusion, stating that the new exclusions “are merely clarification of existing coverages as defined and limited in the definitions of the term ‘occurrence’. . . .”\textsuperscript{108} Several other examples of memoranda submitted to state insurance commissioners, and commissioners’ responses to those memoranda, demonstrate that the same understanding between the industry and regulators existed in many states.\textsuperscript{109}

The debate over the meaning of the exclusion has since been the focus of considerable litigation, legal analysis, and judicial opinions.\textsuperscript{110} Early cases addressing the meaning of the 1973 pollution ex-

\begin{flushleft}
\textsuperscript{104} Id.
\textsuperscript{105} Id.
\textsuperscript{106} Williams, \textit{supra} note 93, at 423-28.
\textsuperscript{107} Id. at 424-25.
\textsuperscript{108} Id. at 427.
\textsuperscript{110} See \textit{Morton Int’l., Inc. v. Gen. Accident Ins. Co. of Am.}, 629 A.2d 831, 855 (N.J., 1993) (stating “an enormous outpouring of judicial energy already has been expended in attempting to fathom how this exclusion should be interpreted.”).
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clusion overwhelmingly favored policyholders. Between 1981 and 1986, 27 of 35 pollution exclusion cases resulted in holdings favorable to the insured. These holdings generally were based on one of two methods of interpretation. Courts in Florida, Georgia, Illinois, Louisiana, Minnesota, New Jersey, New York, and Washington, for example, have looked at the industry’s portrayal of the exclusion to regulators as an indication of the original intent behind the exclusion. The New Jersey Supreme Court, for one, stated that [enforcing the plain meaning of the exclusion]

would contravene this State’s public policy requiring regulatory approval of standard industry-wide policy forms to assure fairness in rates and in policy content, and would condone the industry’s misrepresentation to regulators in New Jersey and other states concerning the effect of the clause. According to the New Jersey Court, the insurer was estopped from asserting an interpretation of the 1973 exclusion that contradicted statements made by the insurance industry in promoting the exclusion to state regulators. This was particularly necessary, given that policyholders continued to pay the same premiums, despite an alleged reduction in coverage. But policyholders have not solely relied on this theory of “regulatory estoppel” in litigating the meaning of the exclusion. Standard doctrines of insurance policy interpretation also have provided a reasonable basis for coverage under the exclusion. First, under the doctrine of contra proferentem, ambiguities in contracts are construed against the drafter, typically the insurer. This is the case

111 Burke, supra note 94, at 455.
112 Id.
113 See generally Amy Timmer, Are They Lying Now or Were They Lying Then? The Insurance Industry’s Ambiguous Pollution Exclusion: Why the Insurer, and Not the Innocent Insured, Should Pay for Pollution Caused by Prior Landowners, 46 BAYLOR L. REV. 355, 363-65 (Spring 1994).
114 Id. at 363.
115 Morton Int’l., Inc., 629 A.2d at 848.
116 Id.
117 Id. at 852-53.
118 Timmer, supra note 113, at 373.
119 Id.
because, unlike a negotiated business contract, insurance policies use standardized language drafted by the industry. A second basis for policyholder coverage is the reasonable expectations doctrine. This doctrine requires that an insurance policy be interpreted in accordance with the reasonable expectations of the insured. The doctrine applies regardless of whether the policy language is ambiguous or clear – it simply asks: “Would a reasonable insured in this position expect coverage?” From one point of view, the doctrine essentially provides a public policy basis for modifying contracts when the plain language does not comply with the court’s sense of justice. As of 1996, 38 states recognized the reasonable expectations doctrine. Finally, courts also accept the general proposition that a previous holding regarding the meaning of contract terminology is presumed to be the meaning of the same terminology written into a later insurance policy.

There are several justifications for these canons of policy interpretation. First, insurance policies are “contracts of adhesion” which prompt the court to place the onus of clarity on the insurer. Second, these canons give insurers an incentive to draft clear policy language, which ultimately reduces litigation over coverage. Moreover, as a matter of public policy, forfeiture of coverage is dis-

121 Id.


123 Id.

124 Id.


126 See Hamel, supra note 122, at 1107.

127 Id. at 1094-95.

128 Id.

129 Id.

130 Id.
favored.\textsuperscript{131}

Perhaps the greatest source of ambiguity in the 1973 exclusion is the requirement that the release of pollution be “sudden and accidental” in order for coverage to exist.\textsuperscript{132} To resolve the issue, some courts pointed to holdings previous to 1970 that held “sudden and accidental” in boiler and machinery policies to mean “unexpected and unintended.”\textsuperscript{133} Furthermore, many federal courts of appeal have held that a reasonable meaning of “sudden” is “unexpected,” and therefore the “sudden and accidental” requirement is ambiguous and must be resolved in favor of the insured.\textsuperscript{134} The Georgia Supreme Court’s discussion of “sudden” is often cited in pro-policyholder opinions:

[O]n reflection, one realizes that, even in its popular usage, “sudden” does not usually describe the duration of an event, but rather its unexpectedness: a sudden storm, a sudden turn in the road, sudden death. Even when it is used to describe the onset of an event, the word has an elastic temporal connotation that varies with expectations: Suddenly, it’s spring.\textsuperscript{135}

Insurers argue, alternatively, that because “accidental” commonly means “unexpected and unintended,” construing “sudden” to mean the same would render the phrase a mere redundancy.\textsuperscript{136} Following this logic, many courts have held that the exclusion is unambiguous, and should be interpreted to bar coverage for damage resulting from gradual environmental pollution.\textsuperscript{137} A federal district court applying Kansas law, for example, rejected the argument that sudden could be construed to mean “unexpected.”\textsuperscript{138}

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\item \textsuperscript{131} John S. Vishneski, III et al., The Insurance Industry’s 1970 Pollution Exclusion: An Exercise in Ambiguity, 23 LOY. U. CHI. L.J. 67, 72 (Fall 1991).
\item \textsuperscript{132} Id.
\item \textsuperscript{133} Hamel, supra note 122, at 1094.
\item \textsuperscript{135} Claussen v. Aetna Cas. & Surety Co., 380 S.E.2d 686, 688 (Ga. 1989).
\item \textsuperscript{137} Anderson, supra note 109, at 15-77.
\end{itemize}
No use of the word ‘sudden’ or ‘suddenly’ could be consistent with an event which happened gradually or over an extended period of time, nor could it be consistent with an event which was anticipated or predictable.\(^{139}\)

**B. THE 1986 POLLUTION EXCLUSION**

During the mid-1980s, the insurance industry adopted broader pollution exclusion language.\(^{140}\) The industry drafted the new exclusion because of concern over judicial decisions holding that the 1973 exclusion\(^{141}\) did not preclude coverage for continuous or gradual pollution.\(^{142}\) Insurers also were concerned that they would be required to indemnify numerous policyholders for enormous liabilities under the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”).\(^{143}\) Adopted by Congress in 1980, CERCLA regulated existing, inactive, and abandoned hazardous waste.\(^{144}\) The legislation also held a range of parties strictly liable for cleanup and response costs.\(^{145}\)

At first, insurers naturally fought to deny coverage for these liabilities.\(^{146}\) Over time, however, they crafted the new exclusion to explicitly eliminate coverage for liabilities resulting from the unintentional, but prolonged release of pollutants.\(^{147}\) According to one commentator, a review of the published proceedings of the National Association of Insurance Commissioners (“NAIC”) between 1980 and 1988 revealed that the industry developed the exclusion solely for the purpose of addressing CERCLA-type liability.\(^{148}\) Indeed, written communications from the American Insurance Association (“AIA”)

\(^{139}\) Id. at 1428-29.

\(^{140}\) Jeffrey W. Stempel, *Reason And Pollution: Correctly Construing the “Absolute” Exclusion in Context and in Accord with its Purpose and Party Expectations*, 34 TORT & INS. L.J. 1 (Fall 1998).

\(^{141}\) See infra pp. 13-19.

\(^{142}\) Stempel, *supra* note 140, at 5.

\(^{143}\) Id.


\(^{145}\) Id. at 154.

\(^{146}\) Stempel, *supra* note 140, at 5.

\(^{147}\) Id.

to the NAIC and the Treasury Department solely evinced a concern with liability to insurers resulting from CERCLA.\textsuperscript{149}

The standard form CGL policy’s “absolute” pollution exclusion has since denied coverage for bodily injury or property damage “arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release, or escape of pollutants.”\textsuperscript{150} The standard form policy’s definition of pollutant also is quite broad.\textsuperscript{151} Like the 1973 pollution exclusion, the 1986 exclusion has been the subject of intense legal debate and litigation.\textsuperscript{152} While insurers generally argue that the exclusion eliminates coverage for all toxic torts causing third-party property damage or bodily injury, policyholders often contend the exclusion is limited to long-term environmental pollution of the type CERCLA was meant to regulate.\textsuperscript{153} Many courts have since held that the exclusion eliminates coverage even for abrupt, unexpected releases.\textsuperscript{154} Courts across the US remain divided, however, over the type of pollution that is excluded.\textsuperscript{155}

In examining the eight enumerated pollutants in the exclusion, the District of Columbia Court of Appeals commented that they “collectively bring to mind byproducts of industrial pollution.”\textsuperscript{156} Moreover, the Supreme Court of California has held that “the broadening of the pollution exclusion was intended primarily to exclude traditional environmental pollution rather than all injuries from toxic substances.”\textsuperscript{157} The Illinois Supreme Court stated, similarly, that it would be remiss “to simply look to the bare words of the exclusion, ignore its raison d’ être, and apply it to situations which do not remotely resemble traditional environmental contamination.”\textsuperscript{158} Even

\begin{itemize}
  \item \textsuperscript{149} Id. at 15-97.
  \item \textsuperscript{150} Id.
  \item \textsuperscript{151} Id. “[A]ny solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals, and waste.”
  \item \textsuperscript{152} See, e.g., \textit{Porterfield v. Audubon Indem. Co.}, No. 1010894, 2002 WL 31630705, at *10 (Ala. 2002) (commenting that “[r]arely has any issue spawned as many, and as variant in rationales and results, court decisions as has the pollution exclusion clause.”).
  \item \textsuperscript{153} Stempel, \textit{supra} note 140, at 5.
  \item \textsuperscript{154} Id.
  \item \textsuperscript{155} Id.
  \item \textsuperscript{157} \textit{MacKinnon v. Truck Ins. Exch.}, 73 P.3d 1205, 1210 (Cal. 2003).
  \item \textsuperscript{158} \textit{Am. States Ins. Co. v. Koloms}, 687 N.E.2d 72, 81 (Ill. 1997).
\end{itemize}
though the exclusion omits the previous requirement that the release occur on land, in a body of water, or into the atmosphere, courts have held that such an omission cannot change the overall environmental nature of the exclusion.\(^{159}\)

Other courts have looked more closely at the plain meaning of the exclusion, and held that it applies to virtually any release of a pollutant, regardless of whether the pollution originated in an industrial context, or even if it occurred indoors.\(^{160}\) The Fifth Circuit Court of Appeals rejected a policyholder’s argument that the exclusion did not apply to releases occurring indoors.\(^{161}\) The court concluded that the exclusion “does not limit its application to only those discharges causing environmental harm; in contrast, it speaks broadly of ‘[l]iability for any bodily or personal injury.’”\(^{162}\) Some courts have gone so far as to extend the exclusion to liabilities resulting from exposure to lead paint. A Minnesota appeals court, for example, held that “the chipping and flaking of lead paint qualifies as a ‘discharge,’ ‘dispersal,’ or ‘release.’”\(^{163}\) Alternatively, others have ruled in favor of the insured, holding that the exclusion is ambiguous regarding coverage for incidents such as lead paint ingestion.\(^{164}\)

An important aspect of interpretation for some courts in determining ambiguity has been the sheer lack of agreement among courts in general.\(^{165}\) These courts recognize that the pollution exclusion is de facto ambiguous, simply because so many courts have interpreted it so differently.\(^{166}\) Moreover, several documents written around the time of the exclusion’s adoption, point to confusion within the insurance industry itself regarding its application and scope.\(^{167}\) The Independent Insurance Agents of America, for example, criti-
cized the exclusion in 1985 and 1986 on the grounds that it could be interpreted to exclude coverage for an accidental or “hostile” fire.\textsuperscript{168} Hence, many courts have found coverage, ruling that the exclusion is ambiguous in light of the facts of the specific case, and therefore must be construed against the insurer.\textsuperscript{169}

Noting that a literal application of the exclusion would encompass the release of carbon monoxide from a small business owner’s delivery truck – and other “absurd results” – the Supreme Court of Louisiana also held that the exclusion was ambiguous.\textsuperscript{170} The court stated that in interpreting the exclusion, it would look at the realities which precipitated the need for the pollution exclusions – “the federal government’s war on active polluters.”\textsuperscript{171} The Eastern District of Pennsylvania, moreover, held that “heating oil” is not a pollutant within the meaning of the exclusion, because 1) the pollution exclusion never mentioned heating oil and 2) neither CERCLA nor its Pennsylvania equivalent specifically excluded petroleum products from their definitions of “pollutant” and “contaminant.”\textsuperscript{172}

C. ADDITIONAL CONSIDERATIONS REGARDING INTERPRETATION

Analysis of these exclusions will often require examination of several other standard insurance doctrines and coverage provisions.\textsuperscript{173} The “suitability principle” – adopted by the Supreme Court in 1828 – holds that an insurance company is deemed to have sold a policy suitable for the policyholder’s standard operations.\textsuperscript{174} Under the principle, tort liabilities resulting from a company’s standard operations are generally covered, regardless of applicable exclusions.\textsuperscript{175}

\textsuperscript{168} Id.
\textsuperscript{170} Doerr v. Mobil Oil Corp., 774 So. 2d 119, 124-25 (La. 2000).
\textsuperscript{171} Id. at 127.
\textsuperscript{174} Buck & Hedrick v. Chesapeake Ins. Co., 26 U.S. 151 (1828).
\textsuperscript{175} John N. Ellison, Richard P. Lewis & Nicholas M. Insua, Recent Developments in the Law Regarding the “Absolute” and “Total” Pollution Exclusions, the “Sudden and Accidental” Pollution Exclusion and Treatment of the “Occurrence”
Other courts essentially apply the “suitability principle” by requiring that a policyholder’s insurance cover liabilities arising out of its “normal business operations.”

Insurers, alternatively, often rely on the so-called non-fortuity doctrines of “known loss,” “loss-in-progress,” and “known risk.” The purpose of these doctrines is to preserve the fundamental tenet of insurance that losses are contingent and not already known. The known loss doctrine is applied when the insured has knowledge of the threat of an immediate economic loss and that loss is certain to occur. The loss-in-progress doctrine, according to one commentator, applies when the loss is still occurring when the policy becomes effective. Although many insurers have asserted a “known risk” defense to coverage, many courts have refused to follow this reasoning.

Moreover, courts generally distinguish between first- and third-party insurance in applying these doctrines. Unlike first-party insurance, third-party losses generally occur after the injurious event, and only become a certainty or “known loss” if and when “the multitude of contingencies associated with a determination of liability are removed” by a legal determination of liability for damages. Some courts, however, have determined that the known loss doctrine precludes coverage if the insured knew or had reason to know of the “substantial probability” of the relevant loss. The Supreme Court of Illinois, for example, held that an insured had knowledge that it would suffer a probable loss when it received an administrative order from the EPA regarding pollutant contamination.

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178 Id. at 15-136.

179 Id. at 15-137.

180 Id.

181 Id. citing Kenneth Abraham, Environmental Liability Insurance, 144 (1991) (“[T]he mere fact that the insured knew of a risk at the time of purchase is not a basis, standing alone, for denying coverage of liability for harm resulting from risk.”).

182 Id. at 15-138.1.


184 Anderson, supra note 109, at 15-138.5.

Finally, many policyholders will be able to fall-back on an additional grant of coverage within the standard CGL policy: indemnification for personal injury suffered by a third party. Unlike insurance policy provisions covering bodily injury or property damage, personal injury liability (“PIL”) coverage generally is not subject to pollution exclusions. The CGL policy generally defines “personal injury” as “wrongful entry or eviction or other invasion of the right of private occupancy.” Several courts have held that causes of action for trespass or nuisance constitute claims for “wrongful entry,” and therefore trigger a policyholder’s PIL coverage. Moreover, courts have also determined that “the right of private occupancy” includes the right to enjoyment free from interference. Nuisance and trespass suits, according to modern legal theories, can be brought for acts that interfere with such rights. Therefore, both aspects of PIL coverage likely will apply — depending on the facts of the case — to claims sounding in nuisance and trespass. Several courts have found PIL coverage in the context of environmental pollution, either holding that the grant of coverage is clear or that it is ambiguous, and have therefore construed in favor of coverage.

V. THE EXCLUSIONS & GLOBAL WARMING LIABILITY

Stephen D. Susman of Susman Godfrey LLP defended Phillip Morris Co. in the 1990s against tobacco lawsuits filed by numerous

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187 Id. at 41.
188 Anderson, supra note 109, at 15-148.
189 Id.
190 Id.
191 Id.
192 Id.
states’ attorneys general.194 Now, he is teaching a symposium on global warming at the University of Houston Law Center.195 He also recently represented several Texas cities in their successful effort to assure cleaner power plants, a victory he calls his “first climate change lawsuit.”196 Susman at first believed the states’ theories against the tobacco makers were bizarre at best.197 His past mistake has influenced his current perception of the future of global warming litigation: “It turns out that I was the fool, and I’m not going to let that take place again.”198

The prospect of a tobacco-type mass tort hitting energy and utility companies is, perhaps, directly tied to whether the federal government regulates greenhouse gas emissions.199 But the fact that one of the country’s top trial lawyers has shifted his practice in anticipation of such litigation is just one significant sign that “regulation through tort” may not be far off.200 It is no coincidence, moreover, that many of the plaintiffs in current global warming litigation are states of the Union.201 The central argument behind the Court’s finding of standing for the plaintiffs in Massachusetts was what the court called the states’ “quasi-sovereign interests” in bringing suit.202 In its nuisance complaint against automakers, California similarly alleged harm in the form of its melting snow pack, the loss of water supply, a greater risk of flooding, as well as the loss of coastline.203

The Court’s holding in Massachusetts arguably recognizes that large landholders have standing to bring suit for global warming.204 Yet if damages in the form of prospective harm to real property are deemed insufficiently concrete, a state might also be able to

194 The Lawyers, supra note 7.
195 Id.
197 The Lawyers, supra note 7.
198 Id.
199 Id.
200 Id.
201 See infra Section III.
202 Massachusetts, 2007 WL 95733, at * 17.
203 General Motors, No. 3:06CV05755, at *13.
204 Massachusetts, 2007 WL 95733, at * 19-20.
show damages related to the costs of implementing comprehensive monitoring programs, as well as various prophylactic measures.\textsuperscript{205} Moreover, states likely suffer more “uncertainty costs” than private litigants, in that they are likely delaying or redesigning different policies or programs because of the possibility that the state will suffer severe environmental damages resulting from global warming.\textsuperscript{206} Because federal law arguably preempts states’ ability to regulate greenhouse gases, such a suit would provide an outlet for pseudo-regulation.\textsuperscript{207} Even if the court dismissed such a suit, it would provide a tool by which states could bring public pressure to bear on the federal government to regulate.\textsuperscript{208} A class action suit on the part of US attorneys general – in the manner of the suit brought against tobacco makers during the 1990s – represents, therefore, a reasonable scenario for regulation through tort.\textsuperscript{209}

Such “tobacco-like” litigation would likely allege state and federal public nuisance claims in the fashion of California’s complaint.\textsuperscript{210} This is largely the case because nuisance is easier to prove than negligence, and the elements of public nuisance are easier to prove than those for private nuisance.\textsuperscript{211} A representative of one state attorney general already has intimated that states may soon adopt the tobacco litigation as a model for suing over climate change.\textsuperscript{212}

To be liable for a public nuisance, defendants must carry on, or participate to a substantial extent in carrying on, activities that create an unreasonable interference with a right common to the general

\textsuperscript{205} \textit{General Motors}, No. 3:06CV05755, at *13.

\textsuperscript{206} For a discussion of the application of “uncertainty costs” as damages in pollution suits, see Frank I. Michelman, \textit{Pollution as a Tort: A Non-Accidental Perspective on Calabresi’s Costs}, 80 Yale L.J. 647, 684 (1971); see also Daniel A. Farber, \textit{Uncertainty As A Basis For Standing}, 33 Hofstra L. Rev. 1123 (2005).

\textsuperscript{207} Transcript, \textit{supra} note 58, at 16-17.

\textsuperscript{208} See \textit{The Lawyers}, \textit{supra} note 7.

\textsuperscript{209} Id.

\textsuperscript{210} Grossman, \textit{supra} note 29, at 52.

\textsuperscript{211} Id.

\textsuperscript{212} See Healy & Tapic, \textit{supra} note 33, at 101, (quoting a representative of a state attorney general: “States have long used common law to protect their citizens, and … they are less restricted in doing so than private parties, as they are able to direct lawsuits against public as well as private nuisances. Using the tobacco litigation as a model, states might sue major emitters to recover the costs of coping with climate change: the costs of flooding, for example, or expenditures for the development of new water supplies.”).
public.\textsuperscript{213} Second, defendants’ interference with the public right must be unreasonable.\textsuperscript{214} Unreasonableness can be established on three independent and sufficient grounds: 1) defendants’ conduct significantly interferes with the public safety, health, peace, comfort, or convenience; 2) it is continuing conduct, or has produced a permanent or long-lasting effect, and defendants know or have reason to know that it has a significant effect upon the public right; or 3) defendants’ conduct is unlawful.\textsuperscript{215}

It is not difficult to see how a court or jury would find emitters of greenhouse gases to have carried on activities that create an unreasonable interference with a public right.\textsuperscript{216} Participating in an activity that causes the melting of a state’s snow pack arguably meets this standard.\textsuperscript{217} Moreover, such conduct would arguably interfere with public safety and health, and at the very least public comfort and convenience.\textsuperscript{218} The question remains, however, whether defendants’ post-1973 and post-1986 insurance policies would provide coverage for their liabilities.\textsuperscript{219}

\textbf{A. COVERAGE UNDER POST-1973 CGL POLICY}

Under the plain meaning of the 1973 pollution exclusion, it is uncertain whether CO\textsubscript{2} would fall under the list of excluded materials.\textsuperscript{220} Although CO\textsubscript{2} might generally be considered a “waste material,” it would not easily be classified as an irritant or contaminant.\textsuperscript{221} Moreover, the EPA traditionally has stated that CO\textsubscript{2} is not a pollutant.\textsuperscript{222} Yet policyholders should not have to rely on this aspect of the

\textsuperscript{213} Id. at 53.
\textsuperscript{214} Id. at 54.
\textsuperscript{215} Id.
\textsuperscript{216} Id. at 53-54.
\textsuperscript{217} Healy & Tapic, supra note 33, at 53-54.
\textsuperscript{218} Id. at 54.
\textsuperscript{219} See infra Section IV.
\textsuperscript{220} See Williams, supra note 93.
\textsuperscript{222} Id.
exclusion in order to secure coverage. By deferring to standard doctrines of insurance policy interpretation, courts should construe the exclusion in a manner favorable to the insured. First, courts should follow the ruling of the Supreme Court of New Jersey by es-topping any effort by an insurer to limit coverage beyond the scope of coverage represented by the industry to regulators. Even if courts choose to honor the exclusion, however, they should recognize that the meaning of the phrase “sudden and accidental” is susceptible to varying interpretations and is inherently ambiguous. Because ambiguities should be resolved in favor of the insured, the exclusion should be held inapplicable to suits for global warming.

Moreover, courts in most states honor the reasonable expectations of the insured. The Supreme Court of California, for example, created three factors by which courts could determine a policyholder’s reasonable expectations: 1) the type of insurance purchased; 2) whether exclusionary language precisely describes what is excluded from coverage; and 3) the basis of the policyholder’s liability, including whether that liability arose out of the policyholder’s normal business operations. Companies’ CGL policies are intended to provide the widest possible protection to policyholders. In addition, the 1973 pollution exclusion is ambiguous on its face, and its meaning is further complicated by its regulatory history. Companies’ potential liability for CO2 emissions, furthermore, will result from their normal business activities; i.e., energy companies’ raison d’être is to harvest fossil fuels, most utilities produce power by consuming fossil fuels, and nearly all automobiles work only by burning fossil fuels.

A reasonable policyholder would expect coverage unless the cause of the damage are “irritants or contaminants commonly thought

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223 See Johnson, supra note 120; Hamel, supra note 122.
224 Id.
226 See, e.g., Trico Indus., 853 F.Supp. at 1193; Remington Arms Co., 810 F.Supp. at 1411; Sokoloski, 980 P.2d at 1043.
227 Johnson, supra note 120.
228 Hamel, supra note 122.
229 Mackinnon, 73 P.3d at 1210.
230 Id. at 1208.
231 See Borenstein, supra note 221; Johnson, supra note 120.
of as . . . pollution.” Whether a reasonable policy holder would expect a particular irritant or contaminant to be environmental pollution can be determined by looking at the laws, if any, that regulate the substance. After the Supreme Court’s recent holding in *Massachusetts*, a reasonable policyholder would at least have significant cause for concern that greenhouse gases would constitute “irritants or contaminants commonly thought of as pollution.” Yet the debate over policyholders’ coverage for emissions occurring *before Massachusetts* – which would constitute the overwhelming bulk of their emissions – must focus on laws and regulations that preceded the decision.

First, the EPA traditionally has stated that CO₂ is *not* a pollutant. Second, all direct references to CO₂ or global warming in the CAA appear in nonregulatory provisions. In addition, congressional acts that discuss the issue of global warming only instruct agencies to study the issue. Indeed, Congress has several times rejected efforts to regulate greenhouse gases. Yet Congress has chosen to regulate other atmospheric phenomenon, like acid rain, by assigning it a discrete title under the CAA. Given this nonregulatory posture on the part of the federal government, a reasonable policyholder prior to the decision in *Massachusetts* would have assumed that its third-party insurance would cover claims for liabilities resulting from its greenhouse gas emissions.

Finally, a liable corporate policyholder also should receive coverage under its insurance for personal injury. Many courts have recognized that nuisance claims fall under the “wrongful entry” and “any other invasion of the right of private occupancy” language

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232 *Mackinnon*, 73 P.3d at 1210.
233 *Id.*
235 See Borenstein, *supra* note 222.
236 *Massachusetts*, 415 F.3d at 70.
237 *Id.*
238 *Id.*
240 See generally *MacKinnon*, 73 P.3d at 1205.
in policies’ coverage for PIL. 242 Additionally, courts have not hesitated to recognize PIL coverage for nuisance claims in the context of pollution.243 Indeed, some courts have held that PIL coverage is triggered even without a tangible interference or invasion of property.244

A public nuisance claim for damages resulting from global warming, such as melting snow pack and loss of water supply – or even uncertainty costs such as delayed construction of beachside reality – would arguably constitute a “wrongful entry” or “any other invasion of the right of private occupancy.” The First Circuit Court of Appeals has held that allegations alleging interference with quiet enjoyment of a homestead – because of noxious odors, noise and light emanating from a sewage treatment plan – constituted an “invasion of the right of private occupancy.”245 At the very least, several courts have held that the term “wrongful entry” and “any other invasion…” are ambiguous and require interpretation in favor of the policyholders.246 Therefore, even if courts fail to properly apply standard principles of insurance policy interpretation to post-1973 policies, PIL coverage should provide a minimum level of insurance for liable greenhouse gas emitters.

B. COVERAGE UNDER POST-1986 CGL POLICY

Liability resulting from the emission of greenhouse gases is not the CERCLA-type liability the 1986 pollution exclusion was meant to exclude. It is true that the pollution exclusion attempted to address industrial environmental pollution.247 Large energy companies like Exxon Mobil, for example, have the capacity to generate industrial CERCLA-type pollution.248 However, CO2 emissions are of a distinctly different character.249 The difference is summed up, in

242 Id.

243 Id.


249 Borenstein, supra note 222.
part, by a comment by the spokesperson for the Alliance of Automobile Manufacturers: “Why would you regulate a pollutant,” he asked “that is an inert gas that is vital to plant photosynthesis and that people exhale when they breathe?”

CERCLA is concerned with preventing and cleaning up hazardous waste disposal sites. Congress clearly hoped the legislation would help prevent a repeat of environmental disasters like the Love Canal and Times Beach incidents. Reclamation of hazardous waste sites is a unique process with specific cleanup standards and remedy selection procedures. The average reclamation cost of a Superfund site under CERCLA is $20 million. While the procedures for cleanup and the costs of remediation of a hazardous waste site are relatively clear, they would appear to have little to no application in an effort to restrict greenhouse gas emissions, or reverse the rise of sea levels or loss of snow pack. Nor has Congress attempted to regulate global warming or climate change in a manner similar to CERCLA, or even at all. It seems clear, therefore, that courts should not apply the expansive language of the exclusion to claims related to global warming. The regulatory history of the 1986 pollution exclusion would seem to support this conclusion.

In crafting their new pollution exclusion, after all, insurers were almost exclusively concerned with preventing coverage for liability under CERCLA.

Viewed in this light, the 1986 pollution exclusion is at best ambiguous in regards to coverage for a public nuisance claim for global warming. The plain meaning of the exclusion is also ambiguous, because the EPA traditionally has stated that CO\textsubscript{2} does not qualify as a pollutant. Since the exclusion only applies to pollut-

\begin{itemize}
\item Id.
\item Id.
\item Id.
\item See infra pp. 33-34.
\item Anderson, supra note 109, at 15-97.
\item Id.
\item See infra p. 29.
\item Borenstein, supra note 221.
\end{itemize}
ants, its application to a public nuisance suit for damages stemming from emissions of CO$_2$ would be dubious at best in regards to pre-
Massachusetts emissions. The fissure among courts regarding the meaning of the exclusion also hints at the exclusion’s ultimate ambiguity.

Like the analysis of the 1973 pollution exclusion, application of the canons of insurance policy interpretation supports this conclusion. A reasonable insured would not expect liability arising from its normal business operations – i.e., emissions of greenhouse gases from the burning of fossil fuels – to be excluded from coverage under its CGL policy. The most important point undergirding these expectations: CO$_2$ emissions have never been regulated by Congress. Insurers may argue in the alternative that liability for greenhouse gas emissions was a known loss, and therefore is exempt from coverage. For this theory to work, however, insurers must show that liable companies knew or had reason to know of the “substantial probability” of the relevant loss. Target companies no doubt are now aware of the possibility of losses related to global warming litigation. To deny coverage for emissions occurring before the Supreme Court’s recent decision, however, insurers would have to show that these companies should have known there was a substantial probability of losses from global warming litigation. Failing these arguments, however, policyholders should receive PIL coverage under policies in which such coverage is provided.

VI. IMPACT ON CONSUMERS

Requiring insurers to cover claims resulting from global warming will ultimately benefit consumers by protecting the long-

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261 Stempel, supra note 140, at 5.
262 Hamel, supra note 120, at 108-09.
263 Id. at 108.
264 See infra p. 31.
266 Anderson, supra note 109, at 15-138.5.
267 The Lawyers, supra note 7.
268 Id.
term stability of the national and global economy. The oil industry is experiencing record profits never before seen in corporate America. Exxon Mobil, for example, reported an annual profit of $39.5 billion for 2006 — the company’s second consecutive annual record. The windfall marked the largest profit ever reported by a US company. Royal Dutch Shell reported profits of $25.44 billion, and ConocoPhillips reported profits of $15.55 billion. Moreover, the oil industry has significant money to spare. Between January 2005 and September 2006, the five largest oil companies spent $112 billion buying back stock and paying dividends. Many politicians and consumer advocates have called for a tax on energy profits, or admonished these companies to devote more earnings to developing alternative energy sources. Oil companies, therefore, appear able to absorb significant financial penalties imposed by a lawsuit or settlement.

Yet the insurance industry also is in a position of considerable financial strength. Despite Hurricane Katrina and other big storms, insurance companies made a record $44.8 billion profit in 2005. Moreover, the industry raised its surplus to about $427 billion — a 7 percent increase over the previous year. Insurers performed so

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270 Coy, supra note 5.
272 Id.
273 Id.
274 Id.
277 Id.
278 Id.
279 Id.
281 Id.
282 Id.
well, according to some analysts, because they had previously distributed the risk of catastrophic losses to reinsurers. But others explain the industry’s stability by citing a significant trend unfolding for more than 20 years: insurers have significantly reduced their exposure on various lines of coverage.

While insurers historically have covered about 60 percent of total disaster-related losses under homeowners insurance, they initially only covered about 30 percent in the wake of Hurricane Katrina. The industry also has significantly curtailed coverage under CGL policies. The original “comprehensive” general liability policy contained only 5 exclusions. Today, there are a minimum of 15, as well as additional “endorsements” that contain more exclusions. The various iterations of pollution exclusions crafted by the industry represent the most assertive effort to curtail insurers’ exposure to risk. Despite these reductions in coverage, insurers have continued to hike premiums. Premiums for homeowners insurance, for example, have increased by more than half since the early 1990s.

Although energy companies and insurers appear flush with cash, holding insurers responsible for coverage will ultimately benefit consumers. First, these companies already have paid for third-party liability coverage in the form of increasingly high premiums on CGL policies. Not allowing these companies to receive the benefit of their bargain would further undermine third-party liability insurance, thereby causing increasing premiums and litigation. Disproportionate premiums and skyrocketing litigation costs ultimately will be passed on to consumers in the form of higher prices for both energy and insurance.

283 Id.
285 Id.
286 Abraham, supra note 284.
287 Id. at 104-05.
288 Id. at 92.
289 Gosselin, supra note 280.
290 Id.
291 See infra pp. 35-37.
292 Abraham, supra note 284.
293 Id. at 102-03.
Furthermore, insurers already have evaluated the risks they assumed in providing CGL coverage to their policyholders.\textsuperscript{294} They are able to spread these risks - including that of global warming liability - through reinsurance, or retain the risks by pooling policies from similar policyholders.\textsuperscript{295} Although oil companies have enormous financial reserves, liabilities ranging from several billion to hundreds of billions likely would significantly affect the pricing of volatile consumer products like gasoline and heating oil.\textsuperscript{296} Combined with slowing production in Latin America and Russia, and rising demand in China and India, billions in liabilities could result in an enormous spike in oil prices.\textsuperscript{297} Consumers would likely experience price hikes in airline tickets, at the pump, and in home heating costs.\textsuperscript{298} Therefore, these losses will more efficiently be spread among various parties, and impact the marketplace and consumers less severely, by assigning liability to insurers.

Significantly, insurance coverage for oil companies’ liabilities for global warming would not eliminate the deterrent effect of private suits.\textsuperscript{299} Oil companies would be forced to internalize part of the cost of their past emissions in the form of deductible payments and higher premiums on their insurance.\textsuperscript{300} Of course, these costs also could be passed on to consumers, but such costs would likely be significantly reduced. Moreover, the application of insurance helps reduce moral hazards; i.e., irresponsible corporate behavior.\textsuperscript{301} In order to maintain their coverage despite the arguable presence of a “known loss,” major greenhouse gas emitters will be forced to unilaterally reduce their emissions to an acceptable level.\textsuperscript{302} This form of “voluntary” regulation is arguably the most economically efficient, in that it does not require federal regulation and allows the emitter to determine the

\textsuperscript{295} Id.
\textsuperscript{296} Coy, supra note 5.
\textsuperscript{297} Krauss, supra note 271.
\textsuperscript{298} Coy, supra note 5.
\textsuperscript{299} Grossman, supra note 29.
\textsuperscript{300} Eubank, supra note 294, at 194-95.
\textsuperscript{301} Id. at 193.
\textsuperscript{302} Grossman, supra note 29.
most efficient way to reach acceptable emission levels.\textsuperscript{303}

In addition, growing anger regarding oil companies’ record profits supports the theory that suits related to global warming could entail significant punitive damages.\textsuperscript{304} As a matter of public policy, however, most states do not allow insurers to cover punitive damages.\textsuperscript{305} Therefore, it is possible that insurers’ duty to indemnify their policyholders will be significant reduced. Overall, it seems clear that companies responsible for massive greenhouse gas emissions will still be held accountable for their emissions, and will likely be forced to dramatically reduce the emissions they cause.

Voluntary regulation could hurt consumers in the short term, as companies implement costly technology and, perhaps, reduce production. However, it is difficult to conceive of a national response to global warming that is equitable and effective, and that does not result in significant economic costs. The utility industry, for example, already is considering a plan to pay for new carbon-dioxide-trapping technology by increasing customers’ rates by .05 cents per kilowatt hour.\textsuperscript{306} That would increase consumers’ monthly electric bills by about .5 percent, to $89.07 from $88.60.\textsuperscript{307} The worst case scenario for consumers might be federal legislation that exempts the industry from lawsuits, in exchange for its support of a national cap-and-trade program.\textsuperscript{308} Such a deal would not allow states to recoup their costs related to global warming – thereby leaving taxpayers with the bill – yet would still require corporate cutbacks affecting production and prices. Consumers would arguably benefit by “regulation through tort,” therefore, because states would have the opportunity to recoup some costs, and industry would be able to regulate itself in the most efficient manner possible.

\begin{footnotes}
\item[303] Michelman, \textit{supra} note 206.
\item[304] For examples of proposals to penalize or punish oil companies in response to their record profits, see generally Robert B. Reich, \textit{Inherit the Windfall: Tax oil company profits to pay for alternative energy initiatives}, \textsc{American Prospect Online}, Feb. 7, 2007, available at http://www.prospect.org/web/page.ww?section=root&name=ViewWeb&articleId=12441.
\item[307] \textit{Id.}
\item[308] McKibben, \textit{supra} note 31.
\end{footnotes}
VII. CONCLUSION

Global warming has become a subject of common interest and concern in popular culture. 309 Energy companies appear to have taken notice, as evidenced by a significant shift in their public statements regarding global warming and its basis in human activities. 310 However, this about-face also is likely rooted in a surge in litigation over global warming. 311 At least 16 cases are currently in state and federal court, with plaintiffs seeking injunction and monetary damages, among other remedies. 312 Indeed, the Supreme Court’s decision in Massachusetts could significantly spur further litigation. 313 As the clouds of litigation gather, and some commentators hint at the onset of the next mass tort, insurers are taking notice. 314 Yet surprisingly absent from the debate over global warming litigation thus far has been discussion of whether companies are covered for damages resulting from civil suit. 315 The question is significant, given the industry’s historic practice of denying claims for acts generally described as environmental pollution. 316

Since the early 1970s, the insurance industry has twice incorporated into its standard CGL policy new exclusions for liabilities resulting from pollution. 317 Policyholders, insurers and courts have since expended an enormous amount of time and resources litigating the meaning of these exclusions. 318 Many courts applying the strict meaning of these exclusions have denied policyholders’ coverage for liabilities resulting from pollution. 319 Other courts, however, have held that the exclusions are ambiguous, or that their application would undermine a policyholder’s reasonable expectation for cover-

309 See infra Section II.
311 The Lawyers, supra note 7.
312 Pidot, supra note 21, at 13.
314 Healy & Tapick, supra note 33, at 102.
315 See infra pp. 5.
316 Abraham, supra note 284.
317 Id. at 94-95.
318 Id. at 96-98.
319 See infra Section IV.
It is not unlikely that emitters of greenhouse gases will ultimately face a public nuisance suit on the part of states’ attorneys general, similar to the tobacco litigation brought against cigarette manufacturers in the 1990s. If plaintiffs prevail on this or similar suits then liable defendants should receive coverage under their standard CGL policies. This result is rooted in the original purpose of the exclusions, the manner in which they were approved by state officials, their ambiguous wording, and the reasonable expectations of policyholders. Consumers ultimately will benefit from insurers assuming these liabilities, primarily because they are more able to spread the liability by pooling policies or through reinsurance. If energy companies were saddled with the liability, however, prices on a range of consumer products – from gasoline to airline tickets – could spike dramatically. Insurance coverage for liable parties would also benefit consumers in that corporate emitters would be forced to voluntarily reduce greenhouse gas emissions. This arguably is a more preferable form of “regulation,” in that the companies themselves are more likely to find the most efficient way to reduce emissions.

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320 Id.
321 See Healy & Tapic, supra note 33, at 101 (quoting a representative of a state attorney general).
322 See infra Section IV.
323 Id.
324 See Section VI.
325 Id.
326 Id.
327 Id.