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The Observer highlights significant developments in insurance recovery and risk management

No, Virginia, There Is No Greenhouse-Gas Clause

By Marc Mayerson

Apocalyptic reports seemingly abound: worldwide catastrophe losses in 2011—from earthquakes, tsunamis, floods, tornadoes, and storms—are the highest on record. In the first half of 2011, there was more than $17 billion of insured losses in the U.S. alone from more than 100 catastrophe events. The October snowstorm in the northeast might have been the eleventh billion-dollar loss this year. And the recent flooding in Thailand produced insured losses in excess of $13 billion.

Environmentalists speculate that global warming and the emission of so-called greenhouse gases are significant contributing factors to these losses. Plaintiffs' lawyers increasingly are focused on pursuing legal theories that seek to make private industry legally responsible for the consequences of global warming. The new global-warming claims follow a long history of air-pollution liability suits. From the 1948 "death cloud" of smog enveloping Donora, Pennsylvania, to "public nuisance" cases launched against, in particular, energy and chemical companies over the past few years—and the EPA's announcement that carbon dioxide was a regulated pollutant under the Clean Air Act—corporations have faced claims for compensation from private and public parties for damage and injury alleged to have resulted from effluents from smokestacks and the byproducts of other industrial activities.

Where liability goes, insurance should follow.

Please click here to read the entire article.

Recent Decision – U.S. District Court Limits Coverage Available Under Employment Practices Liability Policy

By Mark Plumer

In *Cracker Barrel Old Country Store v. Cincinnati Ins. Co.*, No. 3:07–00303 (M.D. Tenn., Sept. 16, 2011), the U.S. District Court for the Middle District of Tennessee recently held that an insurer had no duty to indemnify or defend Cracker Barrel under an Employment Practices Liability (EPL) policy for a suit brought by the Equal Employment Opportunity Commission (EEOC) alleging discriminatory practices. The decision hinged on the policy's definition of "claim," which the court found limited coverage to proceedings brought by current, former, or prospective employees, but not the EEOC.

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The case arose out of discrimination charges filed by ten Cracker Barrel employees with the Illinois Department of Human Rights and the EEOC alleging sexual or racial discrimination. The EEOC filed suit against Cracker Barrel, and Cracker Barrel provided Cincinnati Insurance Company ("Cincinnati") notice of the complaint. Cincinnati denied coverage. Cracker Barrel and the EEOC settled the matter. Thereafter, Cracker Barrel brought suit against Cincinnati seeking reimbursement of its defense costs and the settlement amount.

On summary judgment in the coverage case, the court looked to the policy definitions, which defined a claim as, "a civil, administrative or arbitration proceeding commenced by the service of a complaint or charge, which is brought by any past, present, or prospective 'employee(s)'…." Cincinnati argued that there was no coverage, because the suit was brought by the EEOC and not any current, present, or prospective employees. Cracker Barrel argued that to deny coverage for a suit brought by the EEOC would defeat a primary purpose of the policy. However, the Court adopted a "plain meaning" reading of the definition, which it considered clear and unambiguous. The Court cited several examples of other policies that contained broader definitions of "claim," including policies that explicitly covered actions brought by the EEOC. The Court reasoned that because policies were available that clearly provided coverage for the EEOC suit, it would not stretch the plain meaning of the Cincinnati policy to find coverage that Cracker Barrel expected but did not actually purchase.

What Companies Should Know

In light of this decision, policyholders should carefully examine the language of their current and future EPL policies to ensure that lawsuits by the EEOC are included in the definition of "claim." The language considered in the *Cracker Barrel* case is not the industry standard. EPL language usually is written to include EEOC suits. For example, even narrowly drawn policies often include within the definition of "claim" actions brought "by or on behalf" of employees. *Cracker Barrel* is nonetheless a reminder that intent and policy wording are not always in sync.

Eleventh Circuit Upholds Trial Court Ruling that D&O Policy Does Not Cover Costs of Informal SEC Investigation

In a closely watched appeal of a controversial October 2010 Southern District of Florida opinion, the Eleventh Circuit recently ruled that millions of dollars of legal fees and costs incurred by Office Depot to cooperate with an informal SEC inquiry are not covered under Office Depot's D&O insurance. [*Office Depot v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, No. 11-10814 (11th Cir. Oct. 13, 2011).] The facts in the Office Depot case are not unique. After a news report suggested that Office Depot had improperly disclosed certain nonpublic information, Office Depot provided its D&O insurers with "notice of circumstances" that a claim might be filed against it. Shortly thereafter, Office Depot received a letter from the SEC advising it that the SEC would conduct an inquiry to determine whether Office Depot had violated federal securities laws. Office Depot cooperated with the SEC by providing requested documents, making witnesses available for interviews, conducting an internal investigation, and reporting the findings of its internal investigation to the SEC. Nearly 18 months after the SEC commenced its informal inquiry, it issued a formal order of investigation, indicating that the Commission had information suggesting that Office Depot had violated securities laws. Pursuant to the formal order, the SEC issued subpoenas to certain Office Depot officers and directors and "Wells Notices" recommending civil action against three officers. Office Depot incurred approximately $23 million in responding to the SEC, but only $1.1 million of that amount was incurred after service of the formal SEC subpoenas and Wells Notices. The Eleventh Circuit upheld the trial court ruling that the bulk of the $23 million incurred in response to the informal investigation was not covered. Approximately $1.1 million incurred in response to the formal investigation was covered, but that amount did not exceed the policy's retention. Although the result in the *Office Depot* case is troubling, because the Eleventh Circuit relied heavily on specific and unique language in the Office Depot D&O policies, the application of the decision in future cases is likely to be limited. Additionally, the Eleventh Circuit's decision is designated "Do Not Publish," and therefore is of limited precedential effect. Nevertheless, policyholders should be aware that insurers are likely to take the position that "informal investigation" costs are not covered under D&O policies.

Deepwater Horizon: Federal Judge Rules BP Is Not an Additional Insured

A federal district judge in Louisiana ruled on November 15, 2011 that BP is not entitled to coverage as an additional insured under policies issued to Transocean Offshore Deepwater Drilling, Inc., the owner of the oil rig Deepwater Horizon. Certain Underwriters at Lloyd's, London sued BP, the owner of the well where the catastrophic explosion and spill occurred on April 20, 2010, seeking a

declaration that Lloyd's is not required to cover BP's loss as an additional insured under policies that Lloyd's issued to rig owner, Transocean. BP moved for judgment on the pleadings, arguing that it was expressly named as an additional insured under the policies. However, U.S. District Judge Carl Barbier ruled that BP's rights to coverage under the policies must be determined based on Transocean's obligation under its underlying drilling contract to provide insurance to BP, and that obligation extended only to liabilities stemming from Transocean's drilling equipment, not BP's well, from which the release emanated. A copy of the decision can be found at the link. [*In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico on April 20, 2010,* No. 2179 (E.D. La. Nov. 15, 2011).]

Idaho Federal Court Rules that Administrative Proceedings Initiated by PRP Letters Constitute "Suits" Under Primary Comprehensive Liability Policies, Triggering the Duty to Defend, and RI/FS Costs are "Defense Costs"

In *Wells Cargo, Inc. v. Transport Ins. Co.*, Case 4:08-CV-00491-BLW (D. Id. Oct. 26, 2011), the policyholder, Wells Cargo, sought coverage from its historical liability insurers, Transport, for costs arising out of Wells Cargo's liability under CERCLA. Wells Cargo faced liability because it conducted mining operations at the North Maybe Mine in Southeast Idaho from 1965 to 1967. The court addressed two issues not yet decided by Idaho state courts: (1) whether a PRP letter falls within the meaning of the term "suit" in a commercial general liability policy, and (2) whether costs to conduct a Remedial Investigation/Feasibility Study ("RI/FS") under CERCLA constitute defense costs or indemnity. First, the court found that a PRP letter is similar to a complaint, and "is therefore the effective commencement of a 'suit' which triggers the duty to defend." The court rejected the formalistic distinction between a complaint and a letter commencing administrative proceedings, reasoning that "coverage should not depend upon whether the EPA chose to proceed with its administrative remedies or go directly to litigation." Second, the court held that costs incurred by Wells Cargo to conduct the RI/FS were defense costs, as "Wells Cargo has prudently participated in the RI/FS process as a means of defending the CERCLA action." This holding is significant for policyholders, as defense costs under primary liability policies typically do not erode the limits of the policy.

Magistrate Judge Recommends Allowing 9/11 Insurers' Default Judgment Against Al-Qaeda

U.S. Magistrate Judge Frank Maas of the Southern District of New York on October 14, 2011 issued a report recommending that insurers who paid damages to policyholders who sustained property damage, business interruption and other losses because of the 9/11 terror attacks are entitled treble damages from Al-Qaeda pursuant to the Anti-Terrorism Act. Five insurers—AXA Life Insurance Co., Chubb Custom Insurance Co., American Alternative Insurance Corp., OneBeacon Insurance Group, and TIG Insurance Co.—obtained a default judgment of some $9.4 billion against Al-Qaeda in 2006. Judge Maas recommended approving nearly all of the claimed damages, withholding only a small amount of loss adjustment expenses claimed by OneBeacon. The recommendation is to be considered by U.S. District Judge Alvin K. Hellerstein. [*In re Terrorist Attacks on September 11, 2001,* No. 03-1570 (S.D. N.Y. Oct. 14, 2011.]

Greenberg Sues New York Fed and AIG Over Government Takeover

Three years after the U.S. Government intervened to rescue insurance behemoth AIG in the throes of the 2008 financial meltdown, Maurice Greenberg, AIG's former CEO, has filed suit against the Federal Reserve Bank of New York and AIG. The complaint alleges that the Government's intervention interfered with shareholder rights, in violation of the Takings Clause of the U.S. Constitution. Greenberg's company, Starr International Co., which was AIG's largest investor, on November 21, 2011 filed a class action and derivative actions simultaneously in the U.S. Court of Federal Claims and the U.S. District Court for the Southern District of New York. Starr argues that, instead of assuming a direct equity interest in AIG, the government should have given the insurer unlimited access to the Federal Reserve's discount window and support under the Trouble Asset Relief Program—support that was accorded other companies caught in the financial crisis. The company is seeking $25 billion in damages. The cases are *Starr Int'l Co. Inc. v. United States,* No. 11-779 (Ct. Fed. Cl. Nov. 19, 2011) and *Starr Int'l Co. Inc. v. Federal Reserve Bank of N.Y. et al.*, No. 11-8422 (S.D.N.Y. Nov. 19, 2011).

Florida Federal Court Holds Pollution and Bacteria Exclusions Do Not Bar Liability Coverage for Legionnaire's Disease

A federal judge in Florida has rebuffed an insurer's attempt to deny coverage to a hotel for liability arising after three guests became ill and one died of Legionnaire's disease. The insurer contended that it was not obliged to provide a defense or indemnity both because

the Legionella bacillus is a pollutant within the meaning of its policy's pollution exclusion, and because the policy's separate bacteria and fungi exclusion barred coverage. Judge John Antoon II ruled that the pollution exclusion does not apply to bacteria—a conclusion supported by the fact that the policy included a separate bacteria exclusion. Further, he noted that the bacteria and fungi exclusion contained an exception for "any 'fungi' or bacteria that are, are on, or are contained in, a good or product intended for bodily consumption." Judge Antoon ruled that water contained in the hotel's systems, alleged to be contaminated with the Legionella bacillus, fit within the exception to the exclusion because it was intended for bodily consumption. [*Westport Ins. Corp. v. VN Hotel Group LLC*, No. 10-222 (M.D. Fla., Oct. 11, 2011).]

OIC and The London and Overseas Insurance Company Limited Scheme of Arrangement Increases Dividend to 55%

On October 10, 2011, OIC Run-Off Limited ("Orion") and The London and Overseas Insurance Company Limited ("L&O"), insolvent London Market insurers, announced a 2% dividend to creditors with agreed claims, increasing the total dividend from 53% to 55%. Creditors with agreed claims should receive payment within 90 days from the date of the increase (i.e., by January 9, 2012). The companies' existing Schemes of Arrangement were established in 1997, and the initial dividend was 15%. Currently, no bar date has been set for submitting claims to the Scheme.