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# Key Insurance Issues Likely To Arise From NY Superfund Law

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On Dec. 26, New York Gov. Kathy Hochul signed into law New York's Climate Change Superfund Act. The statute imposes a massive $75 billion in liabilities on companies engaged in the fossil fuel business. Companies can be expected to look to their insurers for coverage, and this newly burgeoning category of environmental liabilities raises a slew of coverage issues, both old and new.

This statute, which is the second of its kind in the U.S.,[1] represents a cutting-edge legal development aimed at holding GHG producers financially accountable for their contributions to climate change. Passed in late 2024, this legislation seeks to address escalating climate-related damages by imposing significant financial obligations on fossil fuel companies that have historically emitted substantial quantities of GHGs.

At its core, the Climate Change Superfund Act mandates that fossil fuel companies with historical GHG emissions exceeding a specified threshold contribute to a state-managed fund designed to finance climate mitigation and adaptation projects.

The act establishes a "climate change adaptation cost recovery program" that will apportion liability of responsible parties, issue cost recovery demands, collect payment and equitably disburse funds to selected projects. This program targets companies that emitted more than 1 billion metric tons of GHGs between 2000 and 2018, and will be operated by the New York Department of Environmental

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Targeted companies must collectively pay $75 billion over 25 years, amounting to $3 billion annually. Under the statute, the "responsible parties" are businesses that extracted or refined crude oil that the DEC determines to be responsible for more than 1 billion tons of GHG emissions.[3]

A responsible party's share of New York's $75 billion recovery is intended to be proportional to that party's share of GHG emissions in excess of 1 billion metric tons.[4] If a responsible party is a refiner, it may pass along its liability to a responsible extractor provided that it can trace the covered GHG emissions to a specific responsible extractor.[5]

The DEC will begin to assess "recovery demands" in 2026, with the first payments due by Sept. 30, 2026. The funds are earmarked for projects aimed at reducing the state's vulnerability to climate change, including upgrading stormwater systems, restoring wetlands and enhancing coastal defenses. The DEC oversees the allocation of funds, ensuring they support infrastructure improvements and community resilience against climate risks, such as flooding and heat waves.

New York's Climate Change Superfund Act is second only to Vermont's, which — unlike New York's — is focused on specific regional pollution issues. For a state whose economy is roughly the size of Canada's, New York's law aims to address systemic global emissions. Regardless of reach, both laws signify a shift toward state-level initiatives to fill perceived gaps in federal climate policies.

Indeed, in California, a similar "Polluters Pay Climate Cost Recovery Act" was introduced in the 2023-2024 legislative session, and reintroduced on Feb. 21.[6] Massachusetts has similar legislation that has been referred to the legislative committee on Environment and Natural Resources, and has been pending since 2023.[7] More states may follow this trend.

The New York law is currently facing two challenges, one filed by the Chamber of Commerce in the U.S. District Court for the Southern District of New York on March 3, and another filed by a coalition of 22 states in the U.S. District Court for the Northern District of New York on Feb. 6.

**Coverage Implications Under Commercial General Liability Policies**

Climate change legislation is bound to generate a flood of insurance claims and coverage disputes across the full spectrum of insurance programs. This article briefly touches upon key issues likely to arise in the context of comprehensive general liability policies in light of the New York act.

**Occurrence**

Generally, climate change litigation involves allegations that a GHG emitter has damaged a particular geography, principally through erosion and flooding caused by sea-level rises.[8] As a result, plaintiffs seek compensatory damages for some sort of loss. Cost recovery demands issued under the Climate Change Superfund Act are different.

Whether a general liability policy is written on a claims-made or occurrence basis, a prerequisite to coverage under CGL policies is a triggering event that falls within the policy's insuring terms.[9] Typically, these are styled as "occurrences," which are generally defined as "an accident, including a continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured," according to Couch on Insurance.[10]

Under the act, a payment demand is based on a responsible party's historical GHG emissions exceeding 1 billion metric tons during a defined period. These emissions are attributed to the use of fossil fuels, which are inherently tied to the policyholder's business operations.

The act states that its purpose is to "secure compensatory payments from responsible parties" in order to fund climate change adaptive infrastructure projects necessary due to climate change.

Most of these projects do not seek to compensate for loss in the form of bodily injury or property damage. Instead, they generally are intended to improve infrastructure, including projects such as "upgrading storm water drainage systems" and "installing energy efficient cooling systems" in public buildings.

These demands are inherently economic in nature, designed to fund infrastructure projects rather than address immediate physical injury or property damage caused by a specific event.

Nonetheless, some projects could be construed as compensatory in nature, including "providing medical care to treat illness or injury caused by the effects of climate change" and "recovering from hurricanes and other extreme weather events." These example projects — in theory — seek to remedy bodily injury or property damage caused by the responsible parties' GHG emissions.

Not only is an insured required to demonstrate loss, but an insured must generally also demonstrate that such loss is neither expected nor intended from the standpoint of the insured. There is split case law in jurisdictions as to whether this requires the harmful impact to be expected or intended, or whether only the action resulting in the loss be expected or intended.[11]

In New York, the law is clear that recovery is barred "only when the insured intended the damages," according to the New York Court of Appeals' 1993 decision in *Continental Casualty Company v. Rapid-American Corp.*[12] According to that ruling, "[r]esulting damage can be unintended even though the act leading to the damage was intentional."[13] This is a high bar and insurers will have to show that their insureds subject to the act knew that their GHG emissions cause climate change.

Coverage actions for traditional environmental claims such as ground and water contamination over the past several decades often turned on the industry awareness of the harm being caused, with some courts imposing a "reasonable person" objective standard to the state of knowledge — generally with less awareness in earlier decades and more awareness in later decades given advances in science and environmental regulations.

Some jurisdictions, however, assessed the insureds' expectation or intent on a more subjective basis, requiring a higher level of proof for insurers to prevail on the "occurrence" definition or "intentional acts" exclusions.

The act's focus on emissions between the years 2000 and 2018 increases the likelihood that, for most large-scale industrial GHG emitters, insurers will have abundant evidence of the industry's, and likely the specific policyholder's, knowledge of the damage caused by GHGs.

Moreover, the act operates on the principle that harm caused by GHG emissions was foreseeable based on decades of scientific evidence.[14] Insurers will echo those arguments.

**Intentional Acts Exclusions**

General liability policies typically contain exclusions for intentional acts. Under New York law, this exclusion is interpreted similarly to language in the definition of "occurrence" that proscribes coverage for damage that is intended or expected from the standpoint of the insured.

Indeed, the intentional acts exclusion will only apply when injury is a natural and ordinary consequence.[15] It will not bar coverage when unintended though foreseeable injury flows from an intentional act.[16] In other words, it does not bar coverage for damage that is unintended although the original act leading to the damage was intended.[17]

This too is a high bar and insurers will have to show that their insureds subject to the act knew that their GHG emissions cause climate change, particularly for entities found to have actively misrepresented climate science, which is possible under the act.[18]

**Fines and Penalties Exclusions**

CGL policies typically exclude fines and penalties from covered losses. Whether insurance coverage implications played any part in the New York act's phrasing, the act describes the costs imposed on the responsible parties as "compensatory payments."

However, the act's tenuous connection to precise damages or a specific cleanup cost appears different from the response costs imposed under the Comprehensive Environmental Response, Compensation and Liability Act, also known as the Superfund Act, or similar state regulations in which a contaminated site (typically soil or a body of water, including groundwater) is identified and a remediation plan — with projected costs — is developed and implemented.[19]

Absent a remedial plan with identifiable costs, insurers may be able to make a compelling argument that the act's financial impact is more akin to a fine, penalty or tax, rather than damages for specific bodily injuries or property damages covered by CGL insurance.

**Pollution Exclusions**

As environmental liabilities evolved over numerous decades, so did the insurance industry's efforts to shield itself from those exposures. Many insurers with historical CGL policies from the early and mid-20th century, written on occurrence bases and with no pollution exclusions, were overwhelmed by coverage actions in the 1980s and 1990s after the newly created U.S. Environmental Protection Agency and similar state environmental agencies began the long process of addressing contamination left behind from decades of industrial operations.

By 1973, various forms of "sudden and accidental" pollution exclusions became common in most CGL policies, with the intended purpose of excluding coverage for long-term environmental contamination while allowing coverage for sudden and accidental events. Coverage actions over those exclusions were voluminous and costly, with victories and losses on both sides.

Insurers with duty to defend obligations often paid millions of dollars in investigation and defense costs on the basis that the underlying complaints and/or agency actions might be based in part on sudden and accidental releases, or at the very least, the applicability of the sudden and accidental exclusion might not be known until the case was resolved. As a result, insurers — and the Insurance Services Office — introduced absolute pollution exclusions in 1985.

The introduction of absolute pollution exclusions did not end the onslaught of environmental coverage cases, but it did provide insurers with the new exclusions an upper hand, and forced policyholders to focus their efforts on earlier CGL policies with sudden and accidental pollution exclusions or no pollution exclusions at all.

The focus of New York's act on emissions between the years 2000 and 2018 would seem to suggest that affected policyholders may not be able to make claims against earlier policies that did not contain absolute pollution exclusions. As such, the path forward for such policyholders on coverage actions could prove difficult.

Plotting how coverage actions relating to climate change legislation may play out could be a fool's errand; therefore, we've attempted to limit our focus to highlighting some of the coverage issues likely to arise while noting how these issues generally have been addressed in similar contexts, such as with Superfund liabilities.

Coverage counsel on both sides have decades worth of competing precedent in their arsenal to bring to bear in this latest setting.

[1] Vermont's legislature passed it's a Climate Superfund Act in May 2024, making it the first such legislation in the country. See Climate Superfund Act, S.B. 259, 2023-2024 Leg., Reg. Sess. (Vt. 2024), available at https://legislature.vermont.gov/Documents/2024/Docs/ACTS/ACT122/ACT122%20As%20Enacted.pdf.

[2] Climate Change Superfund Act, S.B. 2129, 2023-2024 Leg., Reg. Sess. (N.Y. 2024), available here.

[3] Id.

[4] Id.

[5] Id.

[6] Polluters Pay Climate Cost Recovery Act of 2024, S.B. 1497, 2023–2024 Leg., Reg. Sess. (Cal. 2024) (as introduced Feb. 16, 2024), available at https://legiscan.com/CA/text/SB1497/id/2932777.

[7] Climate Change Adaptation Cost Recovery Act, S.B. 481, 193rd Gen. Ct., Reg. Sess. (Mass. 2023) (as introduced Feb. 16, 2023), available at https://malegislature.gov/Bills/193/S481.

[8] Dave Anning & Jeffrey Davis, Climate Change, Sea Level Rise, and Groundwater: Legal Implications and Environmental Challenges for Attorneys, JDSupra (May 26, 2023), https://www.jdsupra.com/legalnews/climate-change-sea-level-rise-and-5285476/.

[9] Jordan Plitt, et al., 9 Couch on Insurance § 126:25 (3d ed. 1995).

[10] Id. § 126:29.

[11] Id. § 103:27.

[12] Cont'l Cas. Co. v. Rapid-Am. Corp. , 80 N.Y.2d 640, 649, 609 N.E.2d 506, 510 (1993).

[13] Id.

[14] N.Y. Env't Conservation Law §76-0103(3)(a) (2024).

[15] Mary & Alice Ford Nursing Home Co. v. Fireman's Ins. Co. of Newark , 446 N.Y.S.2d 599, 601, 86 A.D.2d 736, 737 (1982), aff'd, 57 N.Y.2d 656, 439 N.E.2d 883 (1982).

[16] Id.

[17] Id.

[18] N.Y. Env't Conservation Law §76-0103(5)(b).

[19] CERCLA, 42 U.S.C. §§ 9601-28.