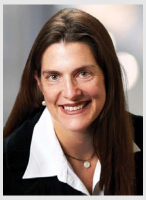
Climate litigation risk

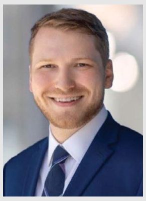
Is there shelter from the storm?

Climate litigation

Exploring the impact of climate litigation risk on the insurance market.


Susan Doering
Senior Director, Head of Climate Risk Management Solutions and Global Client Advocate


Michelle Radcliffe
Director, Climate Analytics, Insurance Consulting & Technology. Climate & Insurance law SME


Martin Lockman
Climate Law Fellow and Associate Research Scholar at the Sabin Center for Climate Change Law

In this paper, launched to coincide with New York Climate Week 2023, we combine the expertise of WTW's Susan Doering and Michelle Radcliffe (Corporate Risk & Broking and Insurance Consulting & Technology respectively), along with Martin Lockman, Climate Law Fellow at the Sabin Center for Climate Change Law and Associate Research Scholar at Columbia Law School, to focus on the relatively less well documented impact of climate litigation on the insurance market.

As regulators, shareholders, and investors increasingly focus on the risk of climate litigation, it is crucial for (re)insurers to understand their potential exposure to climate litigation across different lines of business.

The paper aims to help non-life (re)insurers understand the scope of private sector climate litigation, highlight its potential impact on different policy lines, and present (re)insurers with an overview of coverage considerations, risk assessment measures, and areas for future innovation. We also identify how reinsurers can be proactive in addressing the global climate transition. Many categories of climate litigation arise from companies' failure to plan for and protect against the impacts of global climate change. By building tools, scenarios and systems to identify, assess, and mitigate climate litigation risk, (re)insurers can work with their clients to identify and mitigate risk, resulting in a mutually beneficial outcome for all parties.

We focus on a high-level discussion of risks, mitigants, and opportunities, and do not provide any legal advice. The question of whether any specific cost will be covered under a particular policy will depend on a number of factors, including details of the underlying climate lawsuit, the wording of any relevant policies, and the governing law of the applicable jurisdiction. The high-level frameworks discussed in this paper emphasize one point: while climate litigation is often novel, it is rarely unpredictable. With the requisite knowledge, care, and diligence, (re)insurers can work with their clients to reduce risks across their portfolios and in the real world.

With the requisite knowledge... (re)insurers can work with their clients to reduce risks across their portfolios and in the real world.

Introduction

Since the United Nations Environment Programme began surveying global climate litigation in 2017, the volume of climate lawsuits worldwide has more than doubled. As of December 31, 2022, the UN reported that excess of 2,180 climate lawsuits had been filed in more than 65 jurisdictions across the world.[1] While the majority of climate lawsuits target governments, an increasing number of lawsuits are being brought against private sector companies under a growing variety of legal theories.[2] While much of this litigation is in its early stages, significant defense costs are already being incurred by defendant entities.[3]

This growing litigation risk has caught the attention of insurance regulators around the world. The Bank of England's 2021 climate stress-test found that insurers often struggle to estimate their exposure to climate litigation risk.[4] In 2023, Canada's federal insurance regulator emphasized the need for insurers to prepare for "climate-related claims under liability policies," and warned that insurers and their directors and officers may face liability for neglecting climate-related risks.[5]

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What is climate litigation?

To understand the scope of climate litigation risk, we need to first answer a deceptively complicated question: what is climate litigation?

The news is dominated by high-profile lawsuits that bring broad, society-changing claims about greenhouse gas (GHG) emissions and seek to assign responsibility for climate change itself or hold fossil fuel companies responsible for the harms associated with their products. These cases are hugely important, but just as important for insurers are the myriad of other disputes driven by climate change: contracts thrown into confusion by unanticipated weather, climate-stressed infrastructure failing with calamitous effect, directors and officers sued by shareholders for ignoring corporate climate risks.

For the purposes of this paper, "climate litigation" refers to disputes that arise from, or are related to:

1.	2.	3.
A party's contribution to climate change	The physical consequences of climate change	Laws, regulations, and legal duties related to climate change.[6]

Within this definition, private sector climate litigation can be sorted into three broad categories:

1.	2.	3.
Mitigation claims	Adaptation claims	Governance and regulatory claims.

Two of these categories match terms used in climate change policy: "mitigation" refers to efforts to slow, halt, or reverse climate change itself, while "adaptation" looks at efforts to adapt to the physical, societal, economic, and legal changes associated with climate change.[7] Unsurprisingly, these policy goals are identifiable in the associated categories of litigation. "Mitigation claims" can arise either from a defendant's historic GHG emissions or attempt to prevent future GHG emissions. "Adaptation claims," arise from a defendant's failure to plan for or adapt to climate change. "Governance and regulatory claims," arise from a defendant's breach of established legal duties related to climate change. These legal duties can originate from many sources.

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In some cases, the relevant laws and legal duties might have been explicitly designed with climate change in mind — for instance, an upstream natural gas company that vents methane into the atmosphere might be sued for violating emissions permits in a jurisdiction that regulates GHG emissions. Other governance and regulatory suits might claim that a defendant breached a generally applicable law in a way that raises issues of law or fact related to the science of climate change. For example, "greenwashing" suits alleging that a defendant misrepresented the climate benefits of a product often arise under longstanding consumer protection laws, some of which are now being updated to reflect the intricacies of alleged 'greenwashing' suits.

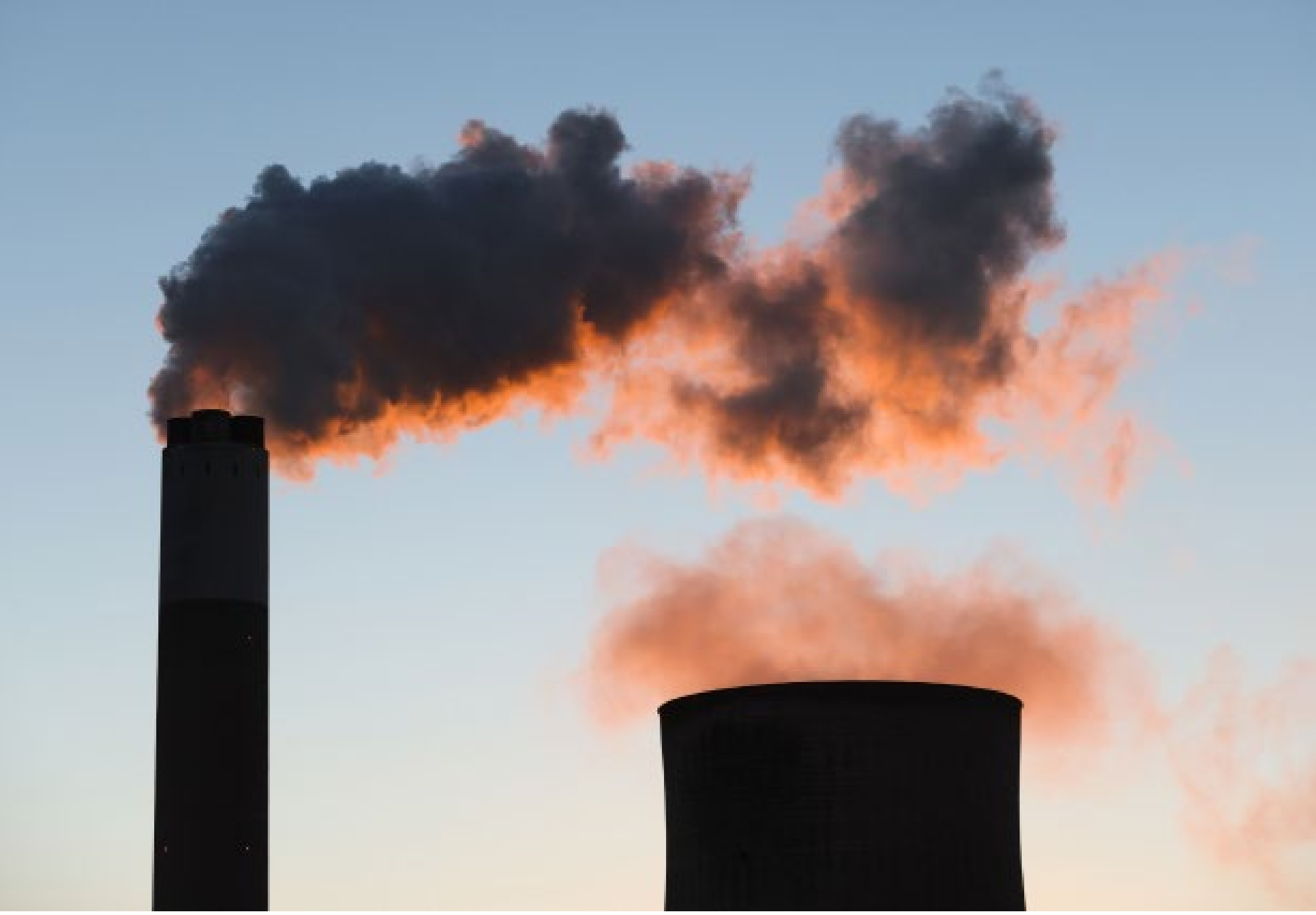


Table 1: Types of climate litigation

Dispute type	Definition	Examples
Mitigation	Disputes that arise from a defendant's contribution to climate change or a plaintiff's attempt to limit future GHG emissions.	• Emissions suits alleging that a company's activities or products contributed to climate change. • Financed emissions suits alleging that a company actively contributed to another entity's GHG-emitting activities by providing capital investment, advisory services, or other support. These claims may target financial sector actors, risk advisors, or strategic consultants, and may include direct suits against (re)insurers.
Adaptation	Disputes that arise from a defendant's failure to plan for or adapt to the physical, societal, or legal impacts of climate change.	• Suits against the owners or operators of infrastructure following climate-driven disasters (for example, dam collapses or wildfires). • Claims against directors and officers who make corporate investments in GHG-emitting infrastructure that face legal or economic risk from the climate transition. • Professional liability or product liability claims against architects, engineers, or manufacturers who fail to consider the changing climate when designing buildings or products.
Governance & Regulatory	Disputes arising from breaches of legal duties that raise issues of law or fact related to the science of climate change.	• "Greenwashing" suits alleging that a company made misstatements or misrepresentations about the impact of its activities on climate change. • Securities litigation alleging that a company failed to disclose material climate-related risks to its business. • Government enforcement actions alleging that a company breached climate-related laws, like emissions permitting schemes.

Affected product lines

(Re)insurers, like other financial sector firms, face numerous risks from climate litigation, including operation and investment risks that could result in losses, direct lawsuits arising from their own corporate activities, and regulatory action. However, this section focuses on a unique risk to the (re)insurance industry: the industry's exposure to climate litigation risk arising from current portfolios of underwritten policies.

While a rapidly evolving risk, climate litigation is increasingly significant for a number of policy lines, including:

- Commercial general liability ("CGL")[8]
- Directors & officers ("D&O") policies
- Environmental liability policies
- Professional liability or professional indemnity policies
- Product liability
- Worker's compensation or employer's liability policies, among others.

Climate litigation has already triggered prominent notices, coverage, and coverage disputes under CGL and environmental liability policies. In addition, the Bank of England's 2021 Climate Biennial Exploratory Scenario (also called the "climate stress test") identified D&O policies and professional indemnity policies as being particularly exposed to climate litigation.[9] Claims under other policy lines, like product liability and employer liability, may rarely use the phrase "climate change," but may nevertheless be impacted by changing climate conditions and extreme weather events.

> **70% of global climate lawsuits,** and most of the prominent coverage disputes related to climate litigation, are filed in the U.S.[10]

This section classifies and analyzes policies according to the standards and language prevailing in North American insurance markets, and primarily (but not exclusively) cites litigation from the United States. This is largely a practical choice — 70% of global climate lawsuits, and most of the prominent coverage disputes related to climate litigation, are filed in the U.S.[10] However, the factual circumstances and theories of harm underlying these claims will be relevant to a broader swathe of markets, subject to local laws and policy language.

Commercial general liability

Mitigation	Defendants in mitigation litigation often attempt to claim a right to defense and indemnification under general liability policies. As mitigation litigation often alleges cumulative harm from decades of emissions, these claims can result in notifications under historic CGL policies. (See page 7: The Aloha Petroleum Litigation).
Adaptation	Adaptation litigation may result in claims under CGL policies when a client's alleged failure to adapt to climate change causes harm to third parties. For example, the U.S. Army Corps of Engineers has faced lawsuits arising from its operation of dams and water control infrastructure during Hurricane Harvey in 2017. These suits allege that the Army Corps failed to appropriately revise its water control plans to reflect known flood risks, and subsequently destroyed neighboring properties when its reservoirs overflowed during the hurricane. (See Fort Bend Cnty. v. United States Army Corps of Engineers, 59 F.4th 180, 186 (5th Cir. 2023)).
Governance & Regulatory	Impact not apparent, but may emerge based on policy language and jurisdictional characteristics.

The Aloha petroleum litigation

Some climate defendants have already submitted claims for indemnity in respect of defense costs associated with climate litigation, and some of those claims have led to significant coverage disputes between policyholders and their insurers. In 2020, the City and County of Honolulu[1] and the County of Maui[2] brought claims against a number of fossil fuel companies. These plaintiffs allege that the companies hid the known harmful effects of the products they sold, and seek damages and other relief arising from their climate-related harms.

One of the defendants, Aloha Petroleum, Inc., brought a coverage suit against its insurer, National Union Fire Insurance Co. of Pittsburgh ("National Union"). In the case (Aloha Petroleum v. National Union Fire Insurance Co. of Pittsburgh), Aloha Petroleum claims that it is entitled to defense and indemnification under four Commercial General Liability policies, which cover four discrete one-year periods between 1980 and 1986.[3] Following discovery, Aloha Petroleum filed an Amended Complaint, in which an additional 19 insurance policies are listed, all issued between 1980 and 2009 (by either National Union or another insurer, American Home Assurance Company ("American Home")), in respect of which Aloha Petroleum now seeks indemnity.[4]

The Amended Complaint also contains a claim against National Union for its purportedly "bad faith" denial of Aloha Petroleum's initial claims, which alleges that National Union's initial coverage denial was based solely on a pollution exclusion in a 1985 commercial general liability policy. Aloha Petroleum further claims that National Union now concedes that some of the policies in respect of which indemnity is sought do not contain such a pollution exclusion, such that the insurer "has no reasonable basis for refusing and/or failing to defend Aloha under [three of the policies]."[5]

While this lawsuit remains unresolved, it illustrates the types of coverage disputes that can arise from climate litigation.

Footnotes:

[1]Complaint, City & County of Honolulu v. Sunoco LP, Civ. No. 20-380 (Haw. 1st Cir. Ct. filed Mar. 9, 2020).

[2]Complaint, County of Maui v. Sunoco LP, Civ. No. 20-380 (Haw. 2nd Cir. Ct. filed Oct. 12, 2020).

[3]See Complaint, Aloha Petroleum Ltd. v. National Union Fire Insurance Co. of Pittsburgh, Civ. No. 22-372 (D. Haw. filed Aug. 10, 2022).

[4]See First Am. Complaint ¶¶ 8–32., Aloha Petroleum Ltd. v. National Union Fire Insurance Co. of Pittsburgh, Civ. No. 22-372 (D. Haw. filed Aug. 10, 2022).

[5]Id. ¶¶ 91–95.

[i]As a government entity, the Army Corps of Engineers is subject to a significantly different set of legal claims than private companies. However, the factual allegations — the Army Corps' alleged failure to adapt its operations to changing physical conditions — illustrate an archetypical adaptation claim.

Environmental insurance

Mitigation	Mitigation claims arise from or allege the harmful emission of GHGs, which are colloquially (and often legally) considered a pollutant. However, environmental policies often cover a narrow range of harms, and some modern environmental policies explicitly exclude claims related to the emission of GHGs.[11] The question of whether a mitigation claim is covered under CGL policies, environmental policies, or neither will require significant analysis of both the specific claim and the language of any applicable policies. (See page 11: "Exclusionary Language" and "Definition of Pollution").
Adaptation	Climate change is driving an increase in secondary perils like hurricanes, wildfires, and floods. If companies fail to appropriately prepare for such increased risks, these disasters can result in significant pollution. Following a pollution event, third-party lawsuits and government enforcement actions under general environmental laws may result in claims against environmental policies.
Governance & Regulatory	For example, in 2017 flooding related to Hurricane Harvey caused an explosion at a chemical facility in Texas, resulting in a series of lawsuits, regulatory enforcement actions, and criminal prosecutions. In 2023, the facility's owner revealed that the costs associated with these disputes had been largely covered by environmental insurance policies. (See page 10: The Arkema Chemical Factory Explosion).

Directors and officers insurance

Mitigation	The directors and officers of companies whose business models rely on GHG emissions may face a variety of mitigation claims. For example, in 2023 ClientEarth (a U.K. nonprofit) filed a shareholder derivate action against the board of directors of Shell, alleging that the directors "breached their legal duties under the [U.K.] Companies Act by failing to adopt and implement an energy transition strategy that aligns with the Paris Agreement."[12] While ClientEarth's case was dismissed, and English courts have, to date, "showed reluctance" to accept these claims, legal commentators have suggested that cases like this may reflect a wider, and growing, trend in suits against directors.[13]
Adaptation	The directors and officers of a wide variety of companies may face adaptation claims alleging that they have failed to consider, or prepare for, the physical, legal, economic, and societal risks associated with climate change. For example, in McVeigh v. Retail Employees Superannuation Trust, an Australian pension fund member sued the Retail Employees Superannuation Trust, alleging that the fund violated various fiduciary duties set forth in Australian law "by failing to provide information related to climate change business risks and any plans to address those risks." (See Amended Concise Statement, McVeigh v. Retail Employees Superannuation Trust, Federal Court of Australia, NSD1333/2018, (filed Sept. 21, 2018) (Austl.)). McVeigh settled before trial, following a number of governance concessions by the Trust related to its climate change risk-assessment procedures.[14]
Governance & Regulatory	Directors and officers may also face claims arising under general corporate law that ostensibly have little to do with either corporate emissions or climate risk. For example, in November 2022 shareholders of Envivia, a company that manufactured purportedly sustainable biofuel pellets, sued the company and several directors for "misrepresent[ing] the environmental sustainability" of its products, which a market report issued shortly before the suit had described as "flagrantly greenwash[ed]." The release of the market report caused the price of Envivia's stock to fall dramatically. (See Complaint, Fagen v. Envivia, Civ. No. 22-2844 (D. Md. filed Nov. 3, 2022)).

Professional liability/professional indemnity

Mitigation	Impact not apparent in current climate litigation, but may emerge in industries with significant contributions to GHG emissions.
Adaptation	Professional liability policies may be exposed to adaptation claims asserting that an insured professional failed to adequately consider the impacts of climate change.[15] For example, following Hurricane Harvey hundreds of homeowners in a Texas housing development sued the engineering firm Costello, Inc. for its allegedly flawed design of a levee protecting the neighborhood. The founder of Costello, Inc. noted that the levees were designed to a 100-year flood standard that Hurricane Harvey demonstrated was inadequate.[16]
Governance & Regulatory	Impact not apparent in current climate litigation, but may emerge based on policy language and jurisdictional characteristics.

Product liability

Mitigation	Mitigation claims may implicate product liability policies where the underlying claim alleges a defect causing, or risk arising from, a product's GHG emissions. For example, municipalities in Hawaii are currently suing a number of fossil fuel companies for damages associated with their products' GHG emissions. Among other claims, the suits assert "failure to warn" claims — a theory of product liability which alleges that a harm resulted from a manufacturer or distributor's failure to warn purchasers of the potential risks of using a product. (See page 7: The Aloha Petroleum Litigation.)
Adaptation	Product liability policies may also be impacted by claims that a product's failure to consider the impact of climate change renders it unfit for its purpose or recommended use. Products as diverse as sandals, electronics packaging, and power substations may be vulnerable to increased heat and extreme weather events.
Governance & Regulatory	Impact not apparent in current climate litigation, but may emerge based on policy language and jurisdictional characteristics.

Worker's compensation/employer's liability

Mitigation	Impact not apparent in current climate litigation, but may emerge in select industries with significant contributions to GHG emissions.
Adaptation **Governance & Regulatory**	Climate change exposes employees to increasing physical risks in the workplace, like heatwaves and other extreme weather events.[17] Employers who fail to adequately protect their workforces against these risks may face lawsuits from injured workers and enforcement actions from governments alleging violations of worker safety laws.[18]

The Arkema chemical factory explosion

Arkema Inc. is the owner and operator of a chemical facility in Crosby, Texas. A 2016 report written by Arkema's insurer identified that the Arkema facility was vulnerable to flooding, among other risks, because insurance flood zones had shifted since the facility was built. Although the insurance report identified the flood risk, it did not make any recommendations to Arkema to address flooding hazards. Following unrelated changes to the Crosby facility, Arkema's insurer indicated that it was satisfied with the facility's risk profile.[1]

In August of 2017, the Crosby chemical facility was flooded following heavy rainfall caused by Hurricane Harvey. Arkema's flooded facility lost power and its chemical refrigeration systems failed, which in turn led to fires, an explosion, and unauthorized toxic air emissions.[2] Following the explosion, Arkema and its executives were subject to a series of private lawsuits, regulatory enforcement actions, and criminal prosecutions.[3] The majority of these claims have been covered by Arkema's environmental insurance policies.[4]

Footnotes:

[1]U.S. Chemical Safety & Hazard Investigation Board, Organic Peroxide Decomposition, Release, and Fire at Arkema Crosby Following Hurricane Harvey Flooding 81–82 (May 2018), https://www.csb.gov/arkema-inc-chemical-plant-fire-/.

[2]Complaint, County of Maui v. Sunoco LP, Civ. No. 20-380 (Haw. 2nd Cir. Ct. filed Oct. 12, 2020).

[3]For an overview of these lawsuits, see Martin Lockman, Modelling Climate Litigation Risk for (Re)Insurers, Sabin Center for Climate Change Law Annex 3 (July 18, 2023), https://scholarship.law.columbia.edu/sabin_climate_change/201.

[4]Arkema, 2022 Universal Registration Document 329 (Mar. 28, 2023).

Climate litigation coverage considerations

Key policy terms affecting coverage

Faced with the risk of climate litigation, it is important for (re)insurers and their clients to understand the extent to which climate litigation may be covered by their current and historic policies, and to understand the coverage implications of newly written policies. This section addresses key policy terms affecting climate litigation coverage. It is important to note that the discussion of policy terms in this section is general, and that the question of whether a specific climate litigation claim will be covered under a specific insurance policy requires a nuanced and jurisdiction-specific analysis. Within these limitations, however, several terms have been identified as particularly important for understanding climate litigation risk.

General terms

A number of generally applicable policy terms are highly relevant in the context of climate litigation. For example, mitigation claims related to long-term GHG emissions often allege that harm was caused and suffered over many years or decades, and policyholders are likely to seek indemnity across multiple policy periods. If a jurisdiction allows claims across multiple policy periods to be applied to multiple insurance policies, and the relevant policies do not have anti-stacking or non-cumulation clauses that limit coverage, long-term mitigation claims will likely significantly exceed the limits of a single policy.[19] Likewise, these long-tail claims mean that policies with “claims-made” triggers may be less exposed to mitigation claims than policies with “losses-occurring” or “occurrence” triggers.[20] Defense cost provisions, including coverage triggers, limits, and sub-limits, are also crucial to assessments of climate litigation coverage. Climate litigation is often fact-intensive and reliant on expert evidence, so even lawsuits claiming relatively minor damages can result in significant legal fees.

Exclusionary language

Given the serious uncertainties surrounding climate litigation and the potential scale of climate damages, many (re)insurers may want to entirely exclude climate claims from coverage. Several organizations have developed exclusionary language designed to limit (re)insurer exposure to various kinds of climate liability risk.[21] However, while sample exclusions are available, the (re) insurance industry’s willingness to adopt such exclusions will depend on:

1. the ease of identifying climate claims,
2. the ease of distinguishing climate claims from other, covered claims, and
3. the willingness of clients to accept policies with climate litigation exclusions, or indeed (re)insurers appetite to write them.

As a practical matter, some climate claims will be much easier to exclude from coverage than others. Mitigation claims are relatively easy to identify — although they may take a variety of forms,[ii] they arise from a defendant’s involvement in the emission of a specific set of GHG pollutants. Adaptation claims, on the other hand, are likely to be intertwined with other claims that are not obviously climate-related. If a new housing development is undermined by unanticipated flooding, for example, it may take years of complex litigation before the parties (and their insurers) determine that the collapse was caused by a failure of the builder to plan for the changing climate. Other climate claims, like some governance and regulatory claims against directors and officers, may be easy to identify as climate-related but hard to exclude for commercial reasons. While (re)insurers may easily identify lawsuits alleging greenwashing, for example, these suits are ultimately very similar to other corporate misrepresentation risks that are generally considered insurable. To preserve broad coverage and meet client expectations, D&O carriers have historically preferred to use risk selection practices over categorical exclusions.[22]

Table 2: Climate claims — Exclusions

Claim	Is it identifiable?	Is it excludable?	Are (re)insurers excluding?
Mitigation	Generally easy to identify.	Relatively easy to exclude, and exclusion may be commercially viable where pollution exclusions are common.	Yes.
Adaptation	Can be difficult to identify.	Difficult to exclude, and may be limited by commercial viability for policies that otherwise cover claims related to risk assessment.	Exclusions are not yet common.
Governance & Regulatory	Generally easy to identify.	May be limited by commercial viability for policies that otherwise cover governance and regulatory risk.	Exclusions are not yet common.

[ii]For example, the mitigation lawsuits underlying the Aloha Petroleum coverage dispute allege that the plaintiffs suffered harm from GHG emissions associated with the products sold by the defendant fossil fuel companies. However, several core claims in the underlying case allege that the defendants engaged in greenwashing around their products, and might be treated as general “governance and regulatory” claims if the underlying harmful activity did not specifically relate to the defendants’ contributions to GHG emissions. (See page 7: The Aloha Petroleum Litigation; see also Complaint, County of Maui v. Sunoco LP, Civ. No. 20-380 (Haw. 2nd Cir. Ct. filed Oct. 12, 2020)).

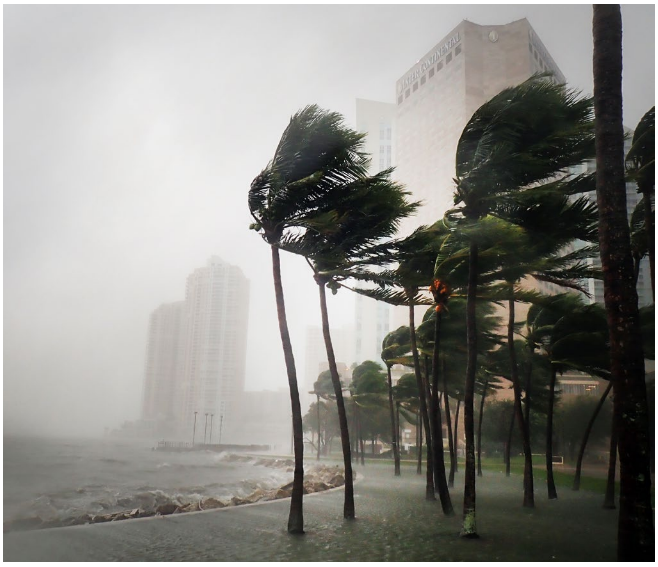
For competitive reasons, carriers may be unwilling to lead the industry in applying climate litigation exclusions until significant losses arise from climate-related claims. However, if and when carriers begin to sustain meaningful climate-related losses, consideration of the viability of exclusionary language will likely become more commonplace, especially for 'at risk' sectors and jurisdictions.

Definition of "Occurrence" & fortuity principles

Insurers holding a portfolio of "occurrence-based" policies may be exposed to mitigation claims where such claims include losses for damages as a result of long-term corporate GHG emissions.[23] In such cases, (re)insurers and clients will have to closely examine both the underlying climate litigation claims and any relevant policies to determine whether a specific claim is covered. Climate-related damage that naturally arises from the intentional acts of a defendant, like burning or selling fossil fuels, may fall outside of policy "occurrence" definitions (see: Fortuity, "Occurrence," and Steadfast Insurance Co. v. AES Corp. below). Equally, fortuity principles, whether explicitly included in an insurance policy or present in a jurisdiction's law, may mean that cover is not afforded to third-party climate claims that were the probable consequence of a defendant's own actions. However, while fortuity principles vary between jurisdictions, fortuity is an affirmative defense to coverage that is notoriously challenging for insurers to bring successfully. As companies become increasingly aware of specific climate-related risks and associated damage, however, adaptation "fortuity" defenses may become more viable.

Definition of Pollutant

While GHGs are considered "pollutants" under a number of legal frameworks, (re)insurers and clients may struggle to determine whether GHGs are considered "pollutants" for the purpose of applying pollution exclusions or narrowly defined pollutant coverage.[24] There is significant uncertainty around whether "pollution exclusions" in existing policies cover GHG-related claims,[25] and different jurisdictions may take a variety of approaches to interpreting policy language. Even if GHGs are deemed a covered "pollutant" under the terms of a specific policy, some policies may only cover pollutant-related claims arising from accidental spills and contamination, and may not cover claims arising from GHGs that were intentionally or knowingly emitted from a mitigation defendant's activities.



Fortuity, "Occurrence," and Steadfast Insurance Co. v. AES Corp.

In Steadfast Insurance Co. v. AES Corp., the most prominent coverage dispute arising from a climate litigation case, an insurance company sought a declaratory judgment that it was not required to defend or indemnify its policyholder, AES Corp., against a lawsuit seeking climate change-related damages. The allegations in the underlying case, Native Village of Kivalina v. ExxonMobil Corp., claimed that the plaintiffs were harmed by the intentional GHG emissions from the defendant's power plants.

The Virginia Supreme Court affirmed a ruling in favor of the insurance company. The court held that harms arising from intentional GHG emissions did not represent an "accident" or "occurrence" under the terms of the commercial general liability policy that AES Corp. had purchased, because the emissions, and the resulting injury to the Kivalina villagers were alleged to be the "natural or probable consequences of an intentional act."[1]

Footnote:
[1]AES Corp. v. Steadfast Insurance Co., 283 Va. 609, 621 (2012); see also Steadfast Insurance Co. v. AES Corp., Climate Change Litigation Database (n.d.), http://climatecasechart.com/case/steadfast-insurance-co-v-the-aes-corporation/.

Table 3: Summary of policy terms and principles affecting climate litigation coverage

Risk mitigant	Mitigation claims	Adaptation claims	Regulatory & Governance claims
General terms (policy duration, policy triggers, anti-stacking, defense cost limits)	Highly relevant to coverage.	Highly relevant to coverage.	Highly relevant to coverage.
Climate exclusionary language	Highly relevant to coverage.	Some exclusions may be possible.	Difficult to apply climate-specific exclusions.
Definition of "Occurrence"	Highly relevant to coverage.	Limited relevance to coverage.	Limited relevance to coverage.
Fortuity principles	Highly relevant to claim assessment, but could trigger difficult coverage disputes.	May become increasingly relevant as climate adaptation becomes more common.	Limited relevance to coverage.
Definition of "Pollutant"	Highly relevant to coverage.	Limited relevance to coverage.	Limited relevance to coverage.

Table 4: Summary of risk assessment practices affecting climate litigation exposure

Risk assessment	Mitigation claims	Adaptation claims	Regulatory & Governance claims
Risk selection	Increasingly viable, because information about client GHG emissions is increasingly available.	Viable, because companies have significantly different processes for identifying and responding to climate risks.	Viable, because companies have significantly different processes for identifying and responding to climate risks.
Market selection	Viable, because at present, mitigation claims target relatively few industries.	Bespoke assessment required due to the broad scope of potential claims and defendants.	Bespoke assessment required due to the broad scope of potential claims and defendants.
Client engagement	Engagement around GHG reductions and net zero planning viable in many industries, but may be difficult for the most prominent targets of mitigation lawsuits (e.g., fossil fuel companies) that have built their business models around GHG emissions.	Viable, since clients are incentivized (and may increasingly be mandated) to assess climate threats to their businesses.	Viable, since clients are highly incentivized to identify regulatory risks to their business.

Risk assessment and risk selection

While it is crucial for (re)insurers and their clients to understand how climate litigation is addressed under current and historic policies, (re)insurers also have the opportunity to adopt sophisticated and proactive responses towards risk in newly written policies. As initial steps, (re)insurers can focus on risk awareness, and ensure that knowledge and understanding of climate litigation risk filters across their organizations (and particularly their underwriting teams). Armed with the industry's growing understanding of climate litigation risk, (re)insurers can then begin to adopt bespoke risk selection practices. These practices may include creating portfolio-wide risk models, client-specific risk selection practices, corporate underwriting guidelines, and climate litigation protocols.

Portfolio risk assessment

(Re)insurers should carry out assessments of their portfolios' exposure to climate litigation. This is not just good practice — insurance regulators are increasingly requiring (re)insurers to quantify their exposure to climate litigation risk.[26] This assessment must include a significant retrospective analysis, because as previously discussed many (re)insurers face legacy risk from long-tail claims like mitigation lawsuits. Fortunately, the growth in climate litigation, (and particularly of climate litigation that is likely to result in notifications to insurers) has been accompanied by a growing number of quantitative and qualitative tools to model climate litigation risk.[27] Given the complex and dynamic nature of climate change, and the correspondingly complex litigation landscape, such models cannot be static; any model based on a pre-defined universe of litigation risks would soon become obsolete.[28] The output of such modelling exercises will be of wide-use to (re)insurers, feeding into their underwriting, claims, capital, pricing, reserving and exposure management.

Risk selection practices

Insurers that develop expertise in assessing climate litigation risk can begin to implement climate underwriting risk selection practices for new policies. Such practices can raise client awareness about their exposure to climate litigation risk, and may allow (re)insurers to price new climate litigation coverage by identifying the riskiest jurisdictions, industries, and clients. However, the wide range of climate litigation risks means that insurers may have to adopt a variety of risk selection processes.

In some areas, risk identification may rely on relatively few variables. The exposure of a sector to mitigation litigation, for example, will be closely tied to its relationship to GHG-emitting activities.[iii] Other kinds of climate litigation, on the other hand, can be highly nuanced and tied to client-specific factors. Companies each have unique adaptation needs based on the details of their businesses and the physical characteristics of their operations. Similarly, most companies will have unique governance and compliance needs, based on the regulations that they are subject to and the climate-related risks that they face. Understanding the different risk profiles of policyholders will help insurers assess the likely frequency and severity of climate claims that they may face.

(Re)insurers should carry out assessments of their portfolios' exposure to climate litigation. This is not just good practice — insurance regulators are increasingly requiring (re)insurers to quantify their exposure to climate litigation risk.

Underwriting guidelines and climate litigation protocols

When armed with the requisite knowledge, underwriters are able to include climate risk exposure in their underwriting guidelines and frameworks, content varying, for example, by reference to line of business, sector and jurisdiction. Understanding the different risk profiles of policyholders will assist underwriters in assessing the likely frequency and severity of climate litigation claims, and underwriters may need to collect some client-specific data about activities, climate policies, and governance processes.[29] While no entity can completely control whether it will face a third-party lawsuit, engagement and transparency around climate litigation risk will help both underwriters and policyholders assess their exposure to climate litigation.

[iii](Re)insurers should be wary of relying entirely on reported emissions, like the GHG Protocol's "Scope 1, 2, and 3" measurements, because mitigation defendants often contribute to GHG emissions through a variety of channels. Some targets of mitigation litigation, like fossil fuel companies, energy utilities, and chemical manufacturers may emit GHGs directly or through their products. However, some mitigation litigation has been targeted towards companies that advise or finance GHG-emitting industries but do not themselves create significant GHG emissions. See, e.g., Complaint ¶ 200, County of Multnomah v. Exxon Mobil Corp. et al., Civ. No. 22-25164, Or. Cir. Ct. (filed June 22, 2023) (suing the consulting firm McKinsey, among other companies, for "coordinat[ing] and participat[ing] in a deliberate misinformation campaign" around climate change at the behest of GHG-emitting companies).

Innovation in climate litigation coverage

The evolving landscape of climate litigation risk offers many opportunities for the insurance industry to create innovative coverage products and risk control solutions. As corporations awaken to the increasing risk of climate litigation, insurers are already facing a growing demand for climate related risk management services.[30] In response, insurers and brokers can develop new climate based financial products, advisory services, analytics, and risk control mechanisms to meet their clients' needs.

Product development

Climate litigation creates a number of new areas of uncertainty. Where policyholders are looking to mitigate or offset their own risks, insurers have the opportunity to provide new risk transfer solutions. For example, in response to legal uncertainty in carbon offset markets, a number of insurers have begun to develop products that insure pre-vetted emissions offsets "against risks like invalidation, third-party negligence and fraud."[31] Similarly, the World Bank's Multilateral Investment Guarantee Agency has begun to offer project-specific political risk insurance to protect investment in "carbon offset projects in developing countries."[32] Given the uncertainty surrounding climate litigation, and the insurance industry's traditional reliance upon past performance to determine insurability and costs for risk transfer, carriers may initially be reluctant to accept large swathes of climate litigation risk. As with all areas of emerging risk, specialist underwriting, and market collaboration may be needed to meet industry capacity demand.

Risk identification and client engagement

Controlling climate litigation risk will also require significant innovation from the insurance industry. (Re)insurers must build new and innovative risk models and develop climate risk selection practices to identify legacy risks embedded in their existing portfolios and price risk in new policies. The expertise and analytical techniques that will allow carriers to identify and quantify climate litigation risk will also be incredibly valuable to companies seeking to understand their own exposure to climate litigation. Risk assessment tools designed to evaluate a prospective client's insurability can also help insurers engage with their clients to identify opportunities for loss control.

Climate litigation loss control may have significant benefits for insurers, clients, and the broader world, because much of climate litigation is downstream of real-world harm. Many companies will be able to reduce their climate litigation risk by adopting practices, policies, and systems that comply with relevant laws, whilst also taking steps to minimize the risks that their activities pose to society. Engineering firms that adapt their practices to the changing climate, for example, may significantly reduce their risk of adaptation litigation. Similarly, publicly traded companies that apply industry best practices to evaluate their exposure to climate change may reduce the exposure of their directors and officers to governance and regulatory litigation. Engagement is not a panacea — some climate litigation risks, like historic GHG emissions, cannot easily be reduced through client engagement. However, for many categories of climate litigation, client engagement around loss control will reduce risk by making the world more resilient to the impacts of climate change.

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Conclusion

Climate litigation is a complex and rapidly growing threat to the insurance industry, and it is crucial to understand the potential threat that policyholders face from mitigation litigation, adaptation litigation and governance and regulatory litigation. Each category of climate litigation has different characteristics, targets different defendants, and impacts insurance products in very different ways. To address all three, (re)insurers will need to adopt risk assessment tools, guidelines, and protocols that are tailored to the jurisdictions, policy lines, and sectors where they write business. Climate litigation is not random. (Re)insurers who understand the scope and impact of climate litigation will be well-positioned to not only limit their own historic liabilities but understand new risk exposures, build new coverage lines, risk transfer products, and services. In doing so, (re)insurers can help their clients plan for and adapt to foreseeable climate risks, while providing risk transfer products to help protect them against unforeseeable ones.

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