Climate Change Litigation and Liability Insurance Claims

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**I. Introduction**

 This paper discusses the potential legal and factual issues arising from third-party insurance claims asserting liability for damages because of climate change, particularly in the context of commercial general liability and environmental impairment policies, including commonly implicated provisions, exclusions, and other coverage and claims handling issues. In Part II, this paper identifies emerging trends in climate change litigation, including the increased prevalence of third-party liability claims. Part III discusses coverage issues unique to commercial liability and environmental impairment policies, and Part IV offers some practical insights into best-practice for managing risk and proper claims handling. Part V concludes.

**II. Emerging Trends in Climate Change Claims**

 Regardless of any scientific or political dispute concerning the causes or existence of climate change, climate change litigation presents unique challenges for the insurance industry globally. We have already seen an increased prevalence of first-party insurance claims arising out of severe weather events, particularly in southern and coastal regions of the United States. For example, in response to Hurricane Katrine, which destroyed more than 200,000 homes and is estimated to be responsible for between $75 billion to more than $150 billion in damage,[[1]](#footnote-1) insurers paid more than $45 billion in insured losses,[[2]](#footnote-2) including more than $16 billion in loss paid on more than 150,000 flood insurance claims.[[3]](#footnote-3) In 2017 alone, Hurricanes Harvey, Maria, and Irma caused more than $300 billion in damage,[[4]](#footnote-4) and the total insurable loss from those storms remains uncertain.

 Although, historically, climate change related claims have presented in the context of first-party property coverage, third-party liability claims seeking compensation from major carbon producers are beginning to take center stage. In the early 2000s, a small number of high profile climate change cases were litigated against oil, gas, and electric companies. Although their suits were high profile, these plaintiffs universally encountered procedural and substantive hurdles that were fatal to their claims.[[5]](#footnote-5) Enthusiastic plaintiffs have not been discouraged by early precedent, however, and some courts have already begun to tear down those procedural barriers.[[6]](#footnote-6) Governmental entities, commercial manufacturers, fossil fuel emitters, land developers, and livestock farmers, among others, may face the ire of third-party claimants alleging that those insureds are responsible for damages caused by their contribution to climate change.

 The nature of climate change claims presents difficult challenges for insurers. Who has standing to bring a valid climate change claim, and how can that claimant prove that a particular insured is liable for damage allegedly caused by that insured’s contribution to climate change? When did the alleged damage actually occur, and how can that loss be allocated between multiple insurers? These questions are not novel, however, and the existing landscape of applicable law can help guide insurers better understand the risks commonly associated with this new species of claim.

**III. Liability Coverage Questions: CGL and EIL Policies**

 Third-party liability claims may potentially implicate coverage under commercial general liability (CGL) and environmental impairment liability (EIL) policies. Generally speaking, CGL policies insure against accidental “bodily injury” and “property damage,” and EIL policies insure against “bodily injury” and “property damage” that was caused by a “pollution condition.” These common policy forms provide a useful template for understanding the lens through which climate change claims should be managed. In particular, an insurer’s evaluation of its rights and obligations under a standard CGL or EIL policy often turns on (1) whether the insured is legally obligated to pay for the claimant’s damage, (2) whether the damage was caused by an occurrence, (3) whether the damage occurred during the applicable policy period, (4) whether any other insurers are liable for the loss, and (5) whether any exclusions apply.[[7]](#footnote-7)

**(1) Is the insured legally obligated to pay for the damage?**

 Under both CGL and EIL policies, an insurer agrees generally to indemnify its insured against covered losses that the insured becomes legally obligated to pay. A typical CGL policy, for example, contains the following insuring agreement, which states:

 **SECTION I – COVERAGES**

**COVERAGE A BODILY INJURY AND PROPERTY**

**DAMAGE LIABILITY**

**1. Insuring Agreement**

**a.** We will pay those sums that the insured becomes legally obligated to pay as damages because of “bodily injury”[[8]](#footnote-8) and “property damage”[[9]](#footnote-9) to which this insurance applies. We will have the right and duty to defend the insured against any “suit” seeking those damages. However, we will have no duty to defend the insured against any “suit” seeking damages for “bodily injury” or “property damage” to which this insurance does not apply. We may, at our discretion, investigate any “occurrence” and settle any claim or “suit” that may result. But:

**(1)** The amount we will pay for damages is limited as described in Section **III** – Limits Of Insurance; and

**(2)** Our right and duty to defend ends when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverage **A** or **B** or medical expenses under Coverage **C**.

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Supplementary Payments – Coverages **A** and **B**.

**b.** This insurance applies to “bodily injury” and “property damage” only if:

**(1)** This “bodily injury” or “property damage” is caused by an occurrence that takes place in the “coverage territory”;

**(2)** The “bodily injury” or “property damage” occurs during the policy period; and

**(3)** Prior to the policy period, no insured listed under Paragraph **1.** of Section **II** – Who Is An Insured and no “employee” authorized by you to give or received notice of an “occurrence” or claim, knew that the “bodily injury” or “property damage” had occurred, in whole or in part. If such a listed insured or authorized “employee” knew, prior to the policy period, that the “bodily injury” or “property damage” occurred, then any continuation, change or resumption of such “bodily injury” or “property damage” during or after the policy period will be deemed to have been known prior to the policy period.

**c.** “Bodily injury” or “property damage” which occurs during the policy period and was not, prior to the policy period, known to have occurred by any insured listed under Paragraph **1**. of Section **II** – Who Is An Insured or any “employee” authorized by you to give or receive notice of an “occurrence” or claim, includes any continuation, change or resumption of that “bodily injury” or “property damage” after the end of the policy period.

**d.** “Bodily injury” or “property damage” will be deemed to have been known to have occurred at the earliest time when any insured listed under Paragraph **1.** of Section **II** – Who Is An Insured or any “employee” authorized by you to give or receive notice of an “occurrence” or claim:

**(1)** Reports all, or any part, of the “bodily injury” or “property damage” to us or to any other insurer;

**(2)** Receives a written or verbal demand or claim for damages because of the “bodily injury” or “property damage”; or

**(3)** Becomes aware by any other means that “bodily injury” or “property damage” has occurred or has begun to occur.

**e.** Damages because of “bodily injury” include damages claimed by any person or organization for care, loss of services or death resulting at any time from the “bodily injury”.

By comparison, EIL policies often contain numerous insuring agreements extending various coverages, including the following, which, in relevant part, states:

**SECTION I – COVERAGES**

**A. Insuring Agreements:**

\* \* \*

**1. Bodily Injury And Property Damage Resulting From Pollution Conditions**

We will pay those sums you become legally obligated to pay for “bodily injury”, “property damage” or “defense costs” resulting from covered “pollution conditions”[[10]](#footnote-10) first occurring during the policy period or subsequent to the retroactive date shown in the Declarations at, on, under or migrating from a “covered location”. “Claims” for “bodily injury”, “property damage” or “defense costs” must be first made against you and reported to us in writing during the policy period or any applicable extended reporting period, provided that the “claim” is covered by this Coverage Form and arises from “pollution conditions” that commenced before the end of the policy period.

 Essentially, a liability insurer has no obligation to indemnify an insured unless a claimant is able to prove that the insured is legally obligated to pay for the claimant’s damages. In grappling with climate change cases, courts have consistently identified two threshold barriers to the claimant’s ability to prove its claim: standing and causation.

 **(a) Standing**

 A claimant cannot prove that an insured is liable for its damages if the claimant does not have actually standing to bring the suit.[[11]](#footnote-11) Historically, Plaintiffs seeking new regulations requiring commercial polluters to curb greenhouse gas emissions have been unable to sustain claims against federal regulatory agencies, especially in establishing the minimum standard of justiciability.[[12]](#footnote-12) The Supreme Court first addressed the issue of standing in *Massachusetts v. E.P.A.* in which it held that petitioners had standing to challenge an EPA order denying a rulemaking petition regarding the regulation of greenhouse gases.[[13]](#footnote-13) However, the Supreme Court’s decision on standing depended on the “special solicitude” of a single petitioner, the Commonwealth of Massachusetts, to protect its quasi-sovereign interests, leaving the question of standing as it relates to private claims largely unanswered.[[14]](#footnote-14)

 In 2009, the United States Court of Appeals for the Second Circuit endeavored to apply the *Massachusetts* ruling in the context of claims against private companies. In *Connecticut v. Am. Elec. Power Co.*, eight states, a city, and three land trusts sued six electric power companies that operated fossil-fuel-fired power plants in twenty states, seeking abatement of defendants’ ongoing contribution to the public nuisance of global warming.[[15]](#footnote-15) Defendants moved to dismiss plaintiffs’ claims on grounds that they did not “have standing to sue on account of global warming.”[[16]](#footnote-16) The *Connecticut* court evaluated plaintiffs’ standing both under the doctrine of *parens patriae*, which controlled the Supreme Court’s decision in *Massachusetts v. E.P.A.*, and more broadly under Article III’s case-or-controversy requirement.[[17]](#footnote-17) The court, ultimately concluding that all plaintiffs had standing to maintain their actions, set out the following, three-part standard:

First, the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.[[18]](#footnote-18)

 In applying the test to these plaintiffs, the *Connecticut* court found (1) that plaintiffs’ alleged future injury was sufficient to constitute an injury-in-fact, (2) that by alleging that defendants’ emissions contributed to their injuries, plaintiffs’ future injuries were fairly traceable to the defendants’ conduct, and (3) that, even though defendants’ carbon emissions had global effects, the magnitude of plaintiffs’ injuries would be decreased if the court imposed a remedy requiring that defendants’ reduced their emissions.[[19]](#footnote-19)

 Although *Connecticut* recognized potential standing for various public and quasi-public plaintiffs other than because of the “special solicitude” recognized in *Massachusetts v. E.P.A.*, few cases discuss the standing of solely private plaintiffs to bring a climate change claim against private defendants. However, the United States District Court for the District of Oregon tackled that exact question in *Nw. Envtl. Def. Ctr. v. Owens Corning Corp.*[[20]](#footnote-20) In *Owens Corning*, several private environmental groups brought a claim against a single, private manufacturer of foam insulation for violation of the federal Clean Air Act.[[21]](#footnote-21) The defendant manufacturer moved to dismiss plaintiffs’ claims for lack of standing.[[22]](#footnote-22) Applying the same three-part test from *Connecticut*, the court held that plaintiffs’ had standing to maintain their claims because they satisfied the injury-in-fact, fairly traceable, and redressability requirements.[[23]](#footnote-23)

 Later, in 2015, a coalition of young climate change activists filed suit against the United States in the United States District Court for the District of Oregon, seeking an order compelling the federal government to “phase-down CO2 emissions . . . develop a natural plan to restore Earth’s energy balance, and implement that national plan so as to stabilize the climate system.”[[24]](#footnote-24) In November 2016, the district court denied the government’s motion to dismiss for lack of jurisdiction and for failure to state a claim, concluding that “the world has suffered” because federal courts “too often have been cautious and overly deferential in the arena of environmental law” and that, even “when a case implicates hotly contested political issues, the judiciary must not shrink from its role as a coequal branch of government.”[[25]](#footnote-25) The Supreme Court, on November 2, 2018, denied the government’s requests to stay the suit and allowed the 9th Circuit proceedings to continue.[[26]](#footnote-26)

 Although lack of standing has historically proven fatal for claimants asserting climate change claims, courts are increasingly recognizing the justiciability of these claims against public and private entities alike. Demonstrating standing is but the first requirement to show that an insured is liable for a claimant’s alleged damages, however. Once it has been established that a claimant has standing to maintain a climate change claim against an insured, claimants must also prove that the insured actually caused their damages.

 **(b) Causation**

Moving forward, proving causation, by and large, will be the most important issue controlling potential coverage for third-party liability claims involving climate change. Demonstrating a link between the defendant-insured’s conduct and the climate-related harm alleged is essential for claimants to prove causation. Claimants must be able to actually show that a particular insured’s carbon emissions produced an effect on the climate sufficient to cause an individual claimant’s particular loss. But courts may be reluctant to accept climate change as a legal and proximate cause of a plaintiff’s injury. Following Hurricane Katrina, for example, the United States District Court for the Southern District of Mississippi expressed an extreme aversion to plaintiffs’ claim because of the evidentiary issues inherent in climate change claims:

I foresee daunting evidentiary problems for anyone who undertakes to prove, by a preponderance of the evidence, the degree to which global warming is caused by the emission of greenhouse gasses; the degree to which the actions of any individual oil company, any individual chemical company, or the collective action of these corporations contribute, through the emission of greenhouse gasses, to global warming; and the extent to which the emission of greenhouse gasses by these defendants, through the phenomenon of global warming, intensified or otherwise affected the weather system that produced Hurricane Katrina.[[27]](#footnote-27)

 This attitude reflects the prevailing view that demonstrating causation in the climate change context is virtually impossible. Any theory through which plaintiffs may meet their burden of causation would likely be so far reaching that it would be rejected by many courts. But while there is no precedent for proving that a commercial insured actually caused a claimant’s climate change related damages, future advances in technology may help claimants overcome causation challenges in the climate change context.[[28]](#footnote-28) In this respect, climate change litigation largely mirrors the development of other bodies of mass tort litigation that historically faced similar obstacles related to causation, including, for example, asbestos litigation. Early asbestos claimants frequently encountered the problem that they had been exposed to asbestos many years prior to presenting symptoms of disease. They were unable to prove with precision how much exposure they received from any particular defendant’s product, and courts struggled to formulate causation rules in light of those issues. Novel expert testimony and scientific advances eventually helped courts develop a framework to address the issue of causation in that context. Generally, causation depends upon the test used by the specific jurisdiction to prove an actual causal connection between the defendant’s conduct and the resulting harm. However, the prevailing rule now requires that toxic tort plaintiffs show that the actions of one or more individual defendant were a substantial factor in causing their injury.[[29]](#footnote-29)

 Although a claimant’s inability to prove causation has historically been seen as the death knell for climate change claims, some courts have demonstrated an increasing willingness to recognize causation in this context as public attitudes shift and the science used to support climate change claims continues to evolve. Recent trends suggest that the threshold barriers of standing and causation will alone be insufficient for an insured to escape liability in climate change claims. In light of this shifting landscape, insurers must be prepared to grapple with traditional insurance coverage issues in the context of these new claims.

**(2) Was the damage caused by an occurrence?**

CGL and certain other environmental policies generally apply only to accidental injury. CGL policies, for example, require that a claimant’s alleged “bodily injury” or “property damage” be caused by an “occurrence,” which is traditionally defined as “an accident, including continuous or repeated exposure to the same general harmful conditions.” The same requirement is typically included in insuring agreements for contractors pollution liability coverage, which requires that damages for “bodily injury” or “property damage” resulting from a “pollution condition” be caused by an “occurrence.” EIL policies, by comparison, usually do not require that the claimant’s injury be caused by an “occurrence.” Many claimants asserting liability against insureds for damages allegedly arising out of climate change concern an insured’s intentional emissions as part of their standard business practices, posing the question: Can a claim sounding in climate change ever involve accidental injury?

Consider, for example, the view embodied by the United States District Court for the Southern District of Mississippi in *U.S. Fid. & Guar. Co. v. T.K. Stanley, Inc.*[[30]](#footnote-30) *T.K. Stanley* concerned whether a defendant’s emission of hydrogen sulfide gas as part of its regular wastewater disposal was an “occurrence” that caused plaintiff’s alleged injuries.[[31]](#footnote-31) Before suit was filed, state regulators advised the defendant to take corrective measures to control its hydrogen sulfide gas emissions, but the defendant failed to comply.[[32]](#footnote-32) The court ultimately held that because the defendant failed to take necessary corrective measures, the defendant’s release of the hydrogen sulfide gas was an intentional act and therefore did not constitute an “occurrence” under the policy.[[33]](#footnote-33) The court reasoned:

[T]he focus of the occurrence definition is on whether the act is expected or intended, and not whether the resulting damage is expected or intended . . . . The question of intent does not relate to whether the defendant intended to harm the plaintiff but rather to whether the defendant intended to take the action that caused the harm . . . . [I]t is clear that [the insured’s] act of releasing [pollutants] . . . was not an accident, and hence was not an occurrence within the policy definition.[[34]](#footnote-34)

 Under this rule, insurers have a strong argument that there is no coverage for “property damage” or “bodily injury” caused by an insured’s intentional emissions of chemicals or pollutants. However, most jurisdictions do not determine whether there has been an “occurrence” by evaluating the insured’s intent with respect to the act causing the harm, e.g. an industrial manufacturer’s emission of greenhouse gases. Instead, most other states evaluate whether an injury was caused by an “occurrence” by focusing on whether the damage itself was accidental.

Many jurisdictions hold that damage is caused by an “occurrence,” or is accidental, if from the viewpoint of the insured, it is not the natural and probable consequence of the action or occurrence which produced the injury.[[35]](#footnote-35) For example, in *Mid-Century Ins. Co. of Tex. v. Lindsey*, a young boy was climbing into a truck through its back window and, in doing so, accidentally discharged buckshot from a shotgun that struck an individual in an adjacent vehicle.[[36]](#footnote-36) The court reasoned that the only intentional act at issue was the young boy attempting to gain entry to the vehicle.[[37]](#footnote-37) Because the discharge of the shotgun and plaintiff’s resulting injury were not foreseeable by the insured, any “bodily injury” was caused by an “occurrence.”[[38]](#footnote-38)

Other states determine whether an injury was caused by an “occurrence” by evaluating whether the resulting injury or damage was expected or intended by the injured party, rather than by the insured.[[39]](#footnote-39) A Louisiana Court of Appeal faithfully applied this approach in *Sova v. Cove Homeowner’s Ass’n, Inc.*[[40]](#footnote-40) In *Sova*, the plaintiff sued his homeowners association for improperly placing a lien on his home in enforcing violations of certain subdivision restrictions.[[41]](#footnote-41)Plaintiff sought to recover damages for his mental anguish as a result of the association’s intentional harassment.[[42]](#footnote-42) The *Sova* court concluded that because plaintiff had actual knowledge of the subdivision restrictions, plaintiff could not “validly claim that enforcement of the restrictions and assessment of fines and penalties against him was unexpected or unforeseeable.”[[43]](#footnote-43) The court reasoned that because Louisiana jurisprudence holds an accident to be “an event that is unforeseeable and unexpected by the person acted on or affected by the event,” the plaintiff’s alleged damages were not caused by an “occurrence.”[[44]](#footnote-44)

Accordingly, when considering whether a climate change claimant’s alleged damages were caused by an “occurrence,” insurers should understand the importance of the role that local law plays in making that determination.

**(3) When did the damage occur?**

In addition to the requirement that damage be caused by an “occurrence,” the insuring agreements in CGL and many pollution liability policies mandate that the “bodily injury” or “property damage” occur during the policy period. EIL policies, by comparison, generally include an insuring agreement that requires the “bodily injury” or “property damage” resulting from “pollution conditions” to first occur[[45]](#footnote-45) during the policy period. Determining when the claimant’s alleged injury actually took place is an extremely important aspect of evaluating coverage in the context of any claim. But because climate change claims typically involve injuries resulting from an insured’s emissions or other contributions to climate change over a long period of time, it can be difficult to assess when the claimant’s alleged damage actually occurred. Although climate change claims present some interesting conceptual challenges regarding the timing of alleged damage, courts addressing this question in the context of various other long latency injury claims have developed various “trigger” theories to resolve the issue.

 **(a) The Injury-in-Fact Theory**

A majority of jurisdictions have adopted the “injury-in-fact” approach.[[46]](#footnote-46) Under this theory, coverage is triggered on the date when the damage actually occurs even if the damage has not been discovered or become manifest.[[47]](#footnote-47)

 **(b) The Manifestation Theory**

Under the manifestation theory, damage occurs when the damage manifests itself or when the claimant discovers the damage.[[48]](#footnote-48) Some jurisdictions have adopted the manifestation theory particularly with respect to long latency property damage claims.[[49]](#footnote-49) Under the manifestation theory, property damage occurs when it manifests, regardless of when the act from which it resulted occurred.

 **(c) The Exposure Theory**

The exposure theory, by comparison, holds that damage occurs upon first exposure to the harmful condition. Some jurisdictions have adopted this approach when dealing particularly with long latency diseases like asbestosis, explaining that, although the insurance industry “doubtless did not foresee the extent of the liability problem asbestosis cases would present,” the exposure theory represents “both a literal construction of the policy language and the construction that maximize coverage.”[[50]](#footnote-50)

**(4) How is liability between insurers allocated?**

Due to its nature, a climate change claim may implicate multiple policies because the injury or damage is continuous over several years. Long-tail liability claims arise from circumstances involving continuous or progressive injury over a period of time. Because long-tail claims may extend over multiple years, may implicate multiple policies, and often involve significant sums, the concept of allocation among multiple responding policies is of immense importance to both insureds and their insurers. Allocation becomes an issue any time that more than one policy may respond to a risk, where the loss fits into more than one category of insurance, or where an insured is held liable for both covered and non-covered claims. Proper allocation of loss may result in an insurer having no liability for certain claims. The primary standards applied by courts in determining the allocation of loss between multiple policies include (1) joint and several liability, (2) pro-ration by years, and (3) pro-ration by years and limits.[[51]](#footnote-51)

Allocation by joint and several liability is the theory typically asserted by policyholders. Under this theory, policyholders utilize the “all sums” language of the policy to select a single insurer of a triggered policy to provide the initial indemnity obligation.[[52]](#footnote-52) The selected insurer then becomes liable for the policy limits that it is legally obligated to pay, which may include any amount for “bodily injury” or “property damage” that could have also occurred outside of that policy period.[[53]](#footnote-53) Then, the onus is on the selected insurer to pursue cross-claims against other carriers whose policies were also exposed.[[54]](#footnote-54) In *Keene Corp. v. Insurance Co. of North America*,[[55]](#footnote-55) for example, the court held that once a particular CGL policy is triggered, the insurer is required to fully indemnify the policyholder for the entire loss up to its policy limits even though part of the injury may have occurred during another policy period or while the policyholder was uninsured.[[56]](#footnote-56) The court concluded that because each policy issued from the date of initial asbestos inhalation until the date of manifestation had been triggered, each insurer had an obligation to provide the policyholder with full coverage.[[57]](#footnote-57)

 Another allocation method utilized is pro-ration by years, alternatively known as “time on the risk.” This theory rejects the interpretation that the “all sums” language in standard liability policies obligates the carrier to exhaust policy limits for losses that occurred outside the policy period.[[58]](#footnote-58) Under this theory, each triggered policy bears a share of the total damages proportionate to the number of years it was “on the risk,” relative to the total number of years of triggered coverage.[[59]](#footnote-59) The Sixth Circuit evaluated the pro rata by years approach in *Insurance Co. of North America v. Forty-Eight Insulations, Inc.*, where it held that indemnification and defense costs should be split among all of the insurance companies that were on the risk while the injured victim was exposed to asbestos.[[60]](#footnote-60) Courts in a number of jurisdictions have adopted this approach based on a belief that public policy demands a more equal approach given the nature of the harm.[[61]](#footnote-61)

 Other jurisdictions apply a slightly different rule of pro-ration by years and limits. Recognizing that pro-ration by years could result in a policy with comparatively low limits being disproportionately liable for the same amount as a policy with much greater limits, some courts have modified the basic pro rata by years standard.[[62]](#footnote-62) As the name suggests, the pro rata by years and limits model allocates insurers’ indemnity obligations based on both the number of years a particular policy is “on the risk” *and* that policy’s limits of liability.[[63]](#footnote-63) Each insurer’s liability is determined by comparing its particular exposure to the total exposure assumed by all insurers under the applicable policies, yielding a percentage that is then applied to the amount of loss the policyholder sustained.[[64]](#footnote-64) In a seminal case, *Owens-Illinois, Inc. v. United Ins. Co.*, the Supreme Court of New Jersey looked to public policy for guidance when it found that the applicable insurance policies failed to consider long latency claims involving mass torts.[[65]](#footnote-65) Motivated principally by the efficient use of resources in response to mass torts, the *Owens-Illinois* court found the straight line progression in the pro rata by years model to be inappropriate, instead holding that allocation among insurers should be “on the basis of the extent of the risk assumed.”[[66]](#footnote-66)

 By way of example, the Texas Supreme Court’s decision in *American Physicians Insurance Exchange v. Garcia* offers a comprehensive discussion concerning the proper allocation of indivisible injuries across multiple policy periods.[[67]](#footnote-67) The *Garcia* court reasoned:

If a single occurrence triggers more than one policy, covering different policy periods, then different limits may have applied at different times. In such a case, the insured’s indemnity limit should be whatever limit applied at the single point in time during the coverage periods of the triggered policies when the insured’s limit was highest. The insured is generally in the best position to identify the policy or policies that would maximize coverage. Once the applicable limit is identified, all insurers whose policies are triggered must allocate funding of the indemnity limit among themselves according to their subrogation rights.[[68]](#footnote-68)

The Texas Supreme Court has also more recently addressed the indivisible nature of property damage, as discussed in *Garcia*, in *Lennar Corp. v. Markel American Insurance Co*.[[69]](#footnote-69) In *Lennar*, the insurer was found liable for damage that occurred before its period due because of both the “practically impossible” task of segregating the damage and because of the reallocation mechanisms made available by *Garcia.[[70]](#footnote-70)* The *Lennar* court accordingly established a theory of vertical, as opposed to horizontal, exhaustion—essentially the opposite of a pro rata approach.[[71]](#footnote-71) Notwithstanding, the Texas Supreme Court stated that an insurer who pays on an insured’s behalf keeps its equitable subrogation and contribution rights, potentially leaving the insurer with functionally the same outcome as under the pro rata approach.[[72]](#footnote-72)

Like with any long latency claim, how much damage occurred and when is an extremely important inquiry in properly assessing an insurer’s exposure, particularly when the insurer is entitled to offset from insurers that issued policies applicable to the same loss. Each of the primary methods of allocation discussed here is frequently applied in other contexts, and while their application specifically in the context of climate change is untested, there is little reason to doubt that courts will follow established insurance coverage jurisprudence even in unfamiliar cases.

**(5) Concurrent Causation**

 An insured is only entitled to recover damages that the policy covers. When covered and non-covered perils combine to cause an insured’s loss, it is important to look to the jurisdiction’s rule on concurrent causation. Anti-concurrent causation clauses, which are most often found preceding exclusions in first-party property policies, apply to preclude coverage when excluded and covered perils combine to cause the same loss. Typical anti-concurrent causation clauses state:

We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss.

Anti-concurrent causation clauses may be relevant in assessing coverage for climate change related claims depending on the particular damage alleged. Generally, those states acknowledging anti-concurrent causation clauses as valid have cited respect for the freedom of contract by enforcing unambiguous policy language. By contrast, some states, including California and North Dakota, have found that the statutorily embodied doctrine of efficient primary cause—applied by many jurisdictions as a matter of common law—preempts anti-concurrent causation clauses.[[73]](#footnote-73) Relatedly, the Supreme Courts of both Washington[[74]](#footnote-74) and Virginia[[75]](#footnote-75) found that an insurer could not contract around the common law doctrine of efficient proximate cause, holding that the reasonable expectation of insureds takes precedence over the principle of freedom to contract.

 By way of example, the Texas Supreme Court has held that concurrent causation exists, and that an exclusion subject to an anti-concurrent causation clause applies, when excluded and covered events combine to cause a loss and the two causes cannot be separated.[[76]](#footnote-76) In that case, an insurer would have no duty to provide coverage.[[77]](#footnote-77) However, when a covered and an excluded event each independently cause a loss, separate and independent causation exists, and the insurer must pay for covered loss despite any exclusionary language.[[78]](#footnote-78) It is the insured’s burden to segregate covered and non-covered damages.[[79]](#footnote-79)

 In the Texas case of *JAW The Pointe, LLC v. Lexington Insurance Company*, a hurricane caused both covered wind damage and uncovered flood damage to the claimant’s apartment building, which together combined to cause enforcement of city ordinances that ultimately required the claimant to demolish and rebuild its property.[[80]](#footnote-80) The applicable policy’s anti-concurrent causation clause excluded coverage for loss in connection with demolishing and rebuilding apartment building in order to comply with city ordinances. The policy covered the cost of complying with city ordinances, but the coverage applied only if the policy covered the property damage that triggered the enforcement of the ordinances, and, pursuant to the anti-concurrent causation clause, the policy did not cover damage caused by the hurricane, as the policy excluded flood damage, which was a concurrent cause of the damage to the building. The Texas Supreme Court accordingly upheld the exclusion.

**(6) Do any exclusions apply?**

 Certain exclusions may be particularly relevant to evaluating potential coverage for climate change claims. The treatment of these issues is ultimately state-specific and often turns on the particular facts of the case and the precise language of the applicable policy.

 **(a) The Pollution Exclusions**

Pollution exclusions, in particular, will almost always be implicated by the allegations in a typical liability claim involving damages because of climate change. Pollution exclusions broadly apply to preclude coverage for damage caused by a pollutant. The two most common types include “absolute” and “total” pollution exclusions. The standard “absolute” pollution exclusion states:

This insurance does not apply to:

**f. (1)** “Bodily injury” or “property damage” arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants:

**(a)** At or from any premises you own, rent or occupy;

**(b)** At or from any site or location used by or for you for the handling, storage, disposal, processing or treatment of waste;

**(c)** Which are or were at any time transported, handled, stored, treated, disposed of, or processed as waste by or for you or any person or organization for whom you may be legally responsible; or

**(d)** At or from any site or location on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations:

**(i)** if the pollutants are brought on or to the site or location in connection with such operations; or

**(ii)** if the operations are to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize the pollutants.

**(2)** Any loss, cost or expense arising out of any governmental direction or request that you test for, monitor, clean up, remove, contain, treat, detoxify or neutralize pollutants.

Pollutants means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.

By comparison, a typical “total” pollution exclusion states:

Exclusion f. under Paragraph 2., Exclusions of Section I – Coverage A – Bodily Injury and Property Damage Liability is replaced by the following:

This insurance does not apply to:

**f. Pollution**

**(1)** “Bodily injury” or “property damage” which would not have occurred in whole or in part but for the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of “pollutants” at any time.

**(2)** Any loss, cost or expense arising out of any:

**(a)** Request, demand, order or statutory or regulatory requirement that any insured or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of “pollutants;” or

**(b)** Claim or suit by or on behalf of a governmental authority for damages because of testing for, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing, or in any way responding to, or assessing the effects of, “pollutants.”

 Texas law embodies the majority rule regarding the application of pollution exclusions. The Texas Supreme Court has held that “total” or “absolute” pollution exclusions are clear and unambiguous.[[81]](#footnote-81) Texas courts have held that similar “absolute” pollution exclusions bar coverage for all injuries caused by exposure to pollutants that have been dispersed, discharged, or released in some fashion that causes exposure.[[82]](#footnote-82) For example, a federal court applying Texas law held that coverage for residents’ alleged injury from exposure to well water contaminated with toxic and hazardous substances, including benzene, was barred by the absolute pollution exclusion in the applicable CGL policy.[[83]](#footnote-83) The court upheld the exclusion as a bar to coverage even though the underlying suits against the company alleged various theories of liability, including negligence.[[84]](#footnote-84) The court found that the residents’ claims fell within the “absolute” pollution exclusion because these claims arose out of discharge of pollutants that escaped from a well operated and tested by the company.[[85]](#footnote-85) Other jurisdictions, by comparison, have found that pollution exclusions apply strictly to environmental pollution.[[86]](#footnote-86) In either case, pollution exclusions may potentially apply, at least in part, to alleged damages arising out of an insured’s purported contribution to climate change.

 **(b) The Expected or Intended Exclusion**

 As discussed above, many climate change claims will involve damages purportedly caused by an insured’s intentional acts carried out in the regular course of the insured’s business. Many liability policies, including standard CGL policies, include an exclusion for damage expected or intended from an insured’s standpoint. For example, the standard Expected or Intended Injury exclusion in CGL policies states:

 This insurance does not apply to:

**a. Expected Or Intended Injury**

“Bodily injury” or “property damage” expected or intended from the standpoint of the insured. This exclusion does not apply to “bodily injury” resulting from the use of reasonable force to protect persons or property.

 Whether an Expected or Intended Injury exclusion applies to a claimant’s alleged damage depends upon the jurisdiction. Under the majority rule, as embodied by Texas law, injury is expected or intended by an insured when “circumstances confirm that the resulting damage was the natural and expected result of the insured’s actions, that is, was highly probable.”[[87]](#footnote-87) The exclusion applies when the insured intends injury resulting from its actions, not merely to intentional conduct itself.[[88]](#footnote-88) It is presumed that an insured intended injury in cases of intentional torts.[[89]](#footnote-89) However, the exclusion does not apply to damage arising out of the insured’s negligent or grossly negligent conduct.[[90]](#footnote-90) In these jurisdictions, an Expected or Intended Injury exclusion would not likely apply to alleged damage arising out of climate change because, even if the insured intended its purported contribution to climate change, it is very unlikely that the insured actually intended any resulting damage to the claimant. As discussed above, however, other jurisdictions evaluate whether damage is intended by evaluating whether the insured intended the underlying conduct resulting in damages.[[91]](#footnote-91) In those jurisdictions, an Expected or Intended Injury exclusion may preclude coverage for damage allegedly caused by climate change even if the insured intended only the underlying pollution activity. Because the Expected or Intended Injury exclusion, and other similar exclusions, have been applied in such drastically different ways by different courts, understanding the law of the relevant jurisdiction as it applies to coverage for allegedly intentional injury is imperative.

 **(c) Known Conditions**

 Many third-party claimants may allege that an insured knew that its actions have caused damage. The insuring agreement in a typical CGL policy bars coverage if, before the applicable policy period, an insured knew that any “bodily injury” or “property damage” had already occurred. Similarly, EIL policies usually include a “Known Conditions” exclusion, which provides that the policy does not apply to any “claim” or “loss caused by, arising out of, or in any way related to pollution conditions,” including any subsequent continuation or resumption of or changes in such “pollution conditions,” that existed prior to the policy period or that were known to any insured at any time before the inception of the policy period. In claims where the claimant has alleged that the insured had pre-policy knowledge of damage that continued into the policy period, an insurer should evaluate whether a known conditions provisions in the applicable policy precludes coverage.

 In Texas, for example, the known conditions provision requires that the insured actually have knowledge of the alleged damage.[[92]](#footnote-92) This provision also precludes coverage only if (1) the insured with pre-policy knowledge of the damage is an insured under Paragraph 1 of Section II – Who Is An Insured, which includes generally the Named Insured and its downstream members, partners, and managers or (2) if an “employee” authorized to give or receive notice of a claim had pre-policy knowledge of the damage. Texas courts have strictly applied this requirement, “invoking the principle that contracts must be interpreted in a way that gives meaning to every term.”[[93]](#footnote-93) In evaluating its duty to defend, however, an insurer may not disclaim coverage if the insured allegedly had knowledge of only some, and not all, of the damage at issue.[[94]](#footnote-94)

**IV. Claims Handling and Risk Management**

A typical climate change claim will likely be factually and legally complex, and it is possible that multiple local, state, and federal agencies may ultimately become involved in any associated litigation. When handling these complex climate change claims, there are several strategies that insurers should keep in mind to ensure that the claims are properly investigated and administered.

**(1) Establish the Scope of All Available Coverage.**

The early stages of claims handling are in many ways the most important, particularly when an insurer anticipates that there may be a significant coverage issue. From the outset, insurers should work with their insureds to identify any and all coverages that might be available to the insured and to confirm that any other insurers have been put on notice of the claim. In the climate change context, the most relevant types of coverages will include commercial liability and environmental liability policies, including environmental impairment and contractors pollution liability policies. Insurers should also know that in some jurisdictions, including, for example, Texas, they may not have a right of subrogation or contribution against other insurers with respect to an insurer’s own indemnity payments.[[95]](#footnote-95) The Texas Supreme Court has held that an insurer who fully indemnifies an insured cannot recover a pro rata contribution or seek subrogation from a non-paying insurer despite the standard “other insurance” clause in CGL policies.[[96]](#footnote-96) In addition, it is unclear, based on recent case law from the Fifth Circuit and the Austin Court of Appeals whether there is also a right to seek subrogation or contribution from other carriers of any defense costs that an insurer believes it is overpaying due to another carrier’s refusal to participate in the defense**.[[97]](#footnote-97)**

**(2) Identify Your Jurisdiction.**

Insurance coverage law differs from jurisdiction to jurisdiction, sometimes dramatically. An insurer evaluating coverage under a CGL or EIL policy will certainly encounter a number of policy provisions, standard or otherwise, that have been implicated by the claim. Pollution exclusions and exclusions related to hazardous materials could very well apply to preclude coverage in a climate change claim. But because different jurisdictions have interpreted and applied many common policy provisions in such different ways, understanding the applicable law of the relevant jurisdiction is essential for an insurer to properly evaluate potential coverage for any given claim.

**(3) Handling Multiple Claims**

 Climate change claims may involve claims from multiple parties for damages that exceed the total available limits of applicable insurance. Various state and federal remedies exist to ensure that an insurer acting in good faith is not held liable for more than the amount of loss insured. In Texas, for example, the *Soriano* Doctrine protects insurers faced with multiple claims and insufficient insurance proceeds. *Texas Farmers Insurance Company v. Soriano*[[98]](#footnote-98) sets forth a relatively clear standard for cases involving multiple claimant settlement demands:

[W]hen faced with a settlement demand arising out of multiple claims and inadequate proceeds, an insurer may enter into a reasonable settlement with one of the several claimants even though such settlement exhausts or diminishes the proceeds available to satisfy other claims. Such an approach, we believe, promotes settlement of lawsuits and encourages claimants to make their claims promptly.[[99]](#footnote-99)

The “reasonableness” examination focuses solely on the merits of the settled claim. In the abstract, if the insurer determines that a purported *Stowers[[100]](#footnote-100)* demand is (1) for a covered claim, (2) within policy limits, and (3) one that an ordinarily prudent insurer would accept, then *Soriano* may protect the insurer from subsequent claims alleging that the insurer failed to protect its insured from a judgment in excess of the limits of insurance.[[101]](#footnote-101)

 An insurer might also consider, if available, a federal or state interpleader action to manage multiple claims. An interpleader action is an equitable remedy that enables a neutral stakeholder, usually an insurance company or a bank, to shield itself from liability for paying over the stake to the wrong party.[[102]](#footnote-102) If the party seeking interpleader satisfies the interpleader requirements, it may seek dismissal from the action.[[103]](#footnote-103) The district court will then make a determination of the respective rights of the claimants.[[104]](#footnote-104) In an interpleader action, the district court may also enter an order restraining the claimants from instituting any proceeding affecting the property until further order of the court.[[105]](#footnote-105)

 A stakeholder may bring an interpleader action under Federal Rule of Civil Procedure 22 or under 28 U.S.C. § 1335. In the absence of federal question jurisdiction, a Rule 22 action requires independent diversity jurisdiction, with complete diversity between the stakeholder and all claimants.[[106]](#footnote-106) This requires *complete* diversity—not among claimants, but as between the interpleader plaintiff on one side and all claimants on the other.[[107]](#footnote-107) In contrast, section 1335 actions provide independent jurisdiction and require only minimal diversity.[[108]](#footnote-108) Further, a section 1335 stakeholder must actually deposit the funds into the court’s registry to maintain the action.[[109]](#footnote-109)

 In Texas, Rule 43 of the Texas Rules of Civil Procedure authorizes a party faced with competing claims to property in its possession to join all claimants in one lawsuit and deposit the disputed property into the registry of the court. A party is entitled to interpleader relief if three elements are met: (1) it is either subject to, or has reasonable grounds to anticipate, rival claims to the same funds, (2) it has not unreasonably delayed filing its action for interpleader, and (3) it has unconditionally tendered the funds into the registry of the court.[[110]](#footnote-110) When insurers receive notice of adverse bona fide claims, they are not required to act as judge and jury or to pay one claim and risk liability on the other. Instead, if a reasonable doubt exists in law or fact as to whom the proceeds belong, an insurer should interplead them and let the courts decide.[[111]](#footnote-111) By interpleading the funds, the defendant obtains a discharge of liability of the competing claims.[[112]](#footnote-112)

 In aid of its jurisdiction in the matter of interpleader, the court may enjoin the prosecution of an action or the enforcement of a judgment that relates to the subject matter of the interpleader.[[113]](#footnote-113) Furthermore, a claimant who opts out of the interpleader action may not maintain a subsequent claim for the interpleaded property.[[114]](#footnote-114)

 Texas Courts have yet to apply Rule 43 interpleader in the context of an insurer faced with multiple valid claims that, together, exceed policy limits. However, insurers in Texas regularly use interpleader actions under Rule 43 to settle disputes among claimants.[[115]](#footnote-115) Moreover, “Texas courts have uniformly held that an insurer will not be liable for statutory penalties or attorney’s fees for interpleading insurance proceeds due to conflicting claims.”[[116]](#footnote-116)

**(4) Dealing with Regulatory Bodies and the Press**

 Inevitably, some climate change claims will involve the press, as well as local, state, and federal regulatory bodies. In both cases, insurers should be careful to protect both their own interests and the interests of their insureds. Insurers, where appropriate, can direct members of the press to emergency officials or to defense counsel. Moreover, when dealing with regulatory bodies and other government officials, while insurers certainly should cooperate within the bounds of their legal obligations, they should also be mindful to protect any information that is confidential or privileged as to the insurer and its insureds. Knowledgeable local counsel or defense counsel can help in anticipating and addressing relevant issues. Any insurer that does not have general protocols in place for corresponding with the press or regulatory agencies should work with its legal counsel to prepare such protocols so as to not be caught off-guard.

**V. Conclusion**

 Although climate change claims present some unique challenges for insurers, the apparent novelty of these claims has often already been addressed within the broader framework of insurance coverage law. However, insurers should still be aware of the pitfalls that climate change claims potentially present, and they should understand the full breadth of their potential obligations. Fortunately, the existing framework of insurance coverage law provides ample guidance for understanding this new species of claim. Some questions remain unanswered, and the lack of total clarity will inevitably invite unwanted coverage disputes. But, in light of the existing tools at their disposal, insurers are well-positioned to properly handle these claims.

1. R. Brent Cooper, *Hurricanes Katrina and Rita: Effect on Rating and Underwriting,
IRMI*, May 2006, https://www.irmi.com/articles/expert-commentary/hurricanes-katrina-and-rita-effect-on-rating-and-underwriting; National Oceanic and Atmospheric Administration Office for Coastal Management, Hurricane Costs, https://coast.noaa.gov/states/fast-facts/hurricane-costs.html (last visited September 10, 2019). [↑](#footnote-ref-1)
2. Robert D. Allen et al., *Emerging Issues: Global Warming Claims and Coverage Issues*, Defense Counsel Journal, January 2009, at 15. [↑](#footnote-ref-2)
3. Cooper, *supra* note 1. [↑](#footnote-ref-3)
4. Hurricane Costs, *supra* note 1. [↑](#footnote-ref-4)
5. Geetanjali Ganguly, *If at First You Don’t Succeed: Suing Corporations for Climate Change*, 38 Oxford J. Legal Stud. 841, 843 (2018), *available at* https://academic.oup.com/ojls/article/38/4/841/5140101. [↑](#footnote-ref-5)
6. *Id*. [↑](#footnote-ref-6)
7. This paper references various provisions that are contained within standard form policies. We emphasize, however, that although examination of this language is useful for developing a broad understanding of these issues, insurers should rely on the terms and conditions of the policy applicable to a particular claim. Manuscript policies and policies issued by surplus lines insurers, in particular, may contain significantly different language than that used in standard forms. [↑](#footnote-ref-7)
8. CGL and EIL policies typically define “bodily injury” as physical injury, sickness, disease, mental anguish, or emotional distress sustain by any person, including death. [↑](#footnote-ref-8)
9. CGL and EIL policies typically define “property damage” as physical injury to tangible property, including all resulting loss of use of that property, and loss of use of tangible property that is not physically injured. [↑](#footnote-ref-9)
10. EIL policies typically define “pollution condition” as the discharge, dispersal, seepage, migration, release, or escape of “pollutants,” which are usually defined as “any solid, liquid, gaseous, biological or thermal irritants or contaminants, including but not limited to smoke, vapors, soot, fumes, acids, alkalis, chemicals, hazardous substances, petroleum hydrocarbons, waste materials, including medical, infectious and pathological waste, legionella pneumophilia, electromagnetic fields, ‘lower-level radiotactive waste’ and ‘mixed waste’ materials, at levels in excess of those naturally occurring. Waste includes materials to be recycled, reconditioned or reclaimed.” [↑](#footnote-ref-10)
11. “Article III, § 2, of the Constitution limits the federal judicial power to the adjudication of ‘Cases’ and ‘Controversies.’ If a dispute is not a proper case or controversy, the courts have no business deciding it, or expounding the law in the course of doing so. Standing to sue is part of the common understanding of what it takes to make a justiciable case.” Massachusetts v. E.P.A., 549 U.S. 497, 535 (2007) (Roberts, Scalia, Thomas, and Alito, JJ., dissenting). [↑](#footnote-ref-11)
12. *See id.* (“Apparently dissatisfied with the pace of progress on this issue in the elected branches, petitioners have come to the courts claiming broad-ranging injury, and attempting to tie that injury to the Government’s alleged failure to comply with a rather narrow statutory provision. I would reject these challenges as nonjusticiable. Such a conclusion involves no judgment on whether global warming exists, what causes it, or the extent of the problem. Nor does it render petitioners without recourse. This Court’s standing jurisprudence simply recognizes that redress of grievances of the sort at issue here ‘is the function of Congress and the Chief Executive,’ not the federal courts.”); *see* People of State of California v. Gen. Motors Corp., No. C06-05755 MJJ, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007); *see* Native Vill. of Kivalina v. ExxonMobil Corp., 696 F.3d 849 (9th Cir. 2012); *see* Comer v. Murphy Oil USA, 607 F.3d 1049 (5th Cir. 2010). [↑](#footnote-ref-12)
13. *Massachusetts*, 549 U.S. at 497. [↑](#footnote-ref-13)
14. *Id*. at 520. [↑](#footnote-ref-14)
15. Connecticut v. Am. Elec. Power Co., 582 F.3d 309 (2d Cir. 2009), *rev’d on other grounds*, 564 U.S. 410 (2011); *see Connecticut*,564 U.S. at 411-14 (citing preemption of federal statute). [↑](#footnote-ref-15)
16. *Connecticut*, 582 F.3d at 319. [↑](#footnote-ref-16)
17. *Id*. at 334. [↑](#footnote-ref-17)
18. *Id*. at 339 (citing Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992))(cleaned up). [↑](#footnote-ref-18)
19. *See generally id.* at 332-49(outlining the basis for the court’s holding on standing). [↑](#footnote-ref-19)
20. Nw. Envtl. Def. Ctr. v. Owens Corning Corp., 434 F. Supp.2d 957 (D. Or. 2006). [↑](#footnote-ref-20)
21. *Id*. [↑](#footnote-ref-21)
22. *Id*. [↑](#footnote-ref-22)
23. *Id*. at 971. [↑](#footnote-ref-23)
24. Complaint at 7, Juliana, et al. v. United States, et al., No. 6:15-cv-01517 (D. Or. Aug. 12, 2015). [↑](#footnote-ref-24)
25. Juliana v. United States, 217 F. Supp.3d 1224, 1262-63 (D. Or. 2016). [↑](#footnote-ref-25)
26. Robert Barnes & Brady Dennis, *Supreme Court Refuses to Block Young People’s Climate Lawsuit Against U.S. Government*, The Washington Post, Nov. 2, 2018, *available at* https://www.washingtonpost.com
/politics/courts\_law/supreme-court-refuses-to-block-kids-climate-lawsuit-against-us-government/2018/11/02/‌34bd7ee6-d7af-11e8-83a2-d1c3da28d6b6\_story.html?arc404=true. [↑](#footnote-ref-26)
27. Comer v. Nationwide Mut. Ins., No. 1:05 CV 436 LTD RHW, 2006 WL 1066645, at \*4 (S.D. Miss. Feb. 23, 2006). [↑](#footnote-ref-27)
28. In 2014, *Climate Change* published a study that calculated a percentage figure for the individual contribution of various major polluters with respect to more than two-thirds of all anthropogenic climate change. That study also showed that more than half of those polluters’ total contribution to climate change was after 1988, further dissolving the difficulties in tracing the roots of climate change injury. *See generally* Richard Heede, *Tracing Anthropogenic Carbon Dioxide and Methane Emissions to Fossil Fuel and Cement Producers, 1854-2010*, 122 Climate Change 229 (2014). [↑](#footnote-ref-28)
29. *See, e.g.*, Lohrmann v. Pittsburgh Corning Corp., 782 F.2d 1156 (4th Cir. 1986). [↑](#footnote-ref-29)
30. U.S. Fid. & Guar. Co. v. T.K. Stanley, Inc., 764 F. Supp. 81 (S.D. Miss. 1991)); *see also* Sheehan Constr. Co., Inc. v. Continental Cas. Co., 935 N.E.2d 160 (Ind. 2010); *see also* Navigators Specialty Ins. Co. v. Moorefield Constr., Inc., 6 Cal. App. 5th 1258, 1278 (Cal. Ct. App. 2016) (finding no coverage for damage to concrete slab where insured made intentional decision to install tiles that exceed moisture vapor emission rate as such intentional conduct did not constitute an accident). [↑](#footnote-ref-30)
31. *T.K. Stanley*, 764 F. Supp. at 81. [↑](#footnote-ref-31)
32. *Id*. [↑](#footnote-ref-32)
33. *Id*. at 84. [↑](#footnote-ref-33)
34. *Id*. at 82-84. [↑](#footnote-ref-34)
35. *See* Mid-Century Ins. Co. of Tex. v. Lindsey, 997 S.W.2d 153, 155 (Tex. 1999) (holding that injury or damage is “accidental” if, from the viewpoint of the insured, the damage is not the natural and probable consequence of the action or occurrence which produced the damage); *see* State Farm Fire & Casualty Co. v. CTC Dev. Corp., 720 So. 2d 1072, 1076 (Fla. 1998) (finding the term “accident” encompasses not only accidental events but also injuries or damages neither expected nor intended from the standpoint of the insured; thus, unintentional or unexpected injury or damage from the insured’s intentional acts is an accident); *see* High Country Associates v. New Hampshire Ins. Co., 647 So. 2d 474 (N.H. 1994) (finding an “accident” means “circumstances, not necessarily a sudden and identifiable event, that were unexpected or unintended from the standpoint of the insured”); *see* Med. Malpractice Joint Underwriting Ass’n of Rhode Island v. Charlesgate Nursing Ctr., L.P., 135 A.3d 998, 1005 (R.I. 2015) (“The plain and ordinary meaning of the term ‘accident’ as ‘an unintended and unforeseen injurious occurrence’ from the perspective of the insureds”); *see* Lee Builders, Inc v. Farm Bureau Mut. Ins. Co., 137 P.3d 486 (Kan. 2006) (finding an occurrence is “an undersigned, sudden and unexpected event, usually of an afflictive or unfortunate nature” and the dispositive issues is “whether the resulting damage, not the act performed that led to the damage was intentionally caused by the insured.”). [↑](#footnote-ref-35)
36. *Lindsey*, 997 S.W.2d at 154. [↑](#footnote-ref-36)
37. *Id*. [↑](#footnote-ref-37)
38. *Id.* at 155-56. [↑](#footnote-ref-38)
39. *See* American Empire Surplus Lines Ins. Co. v. Hathaway Dev. Co., 707 S.E.2d 369 (Ga. 2011); *see* Brosnahan Builders, Inc. v. Harleysville Mut. Ins. Co., 137 F. Supp.2d 517 (D. Del. 2001) (finding that an “occurrence” or “accident” is “an event happening without human agency, or if happening through human agency, an event, which under circumstances, is unusual and not expected by the person to whom it happens”); *see* Sova v. Cove Homeowner’s Ass’n, Inc., 102 So. 3d 863, 872 (La. App. 1st Cir. 9/7/12) (citing Knight v. L.H. Bossier, Inc., 118 So. 2d 700 (La. App. 1st Cir. 1960)) (holding that an event that is unforeseeable and unexpected by the person acted on or affected by the event); *see* Hawkeye-Security Ins. Co. v. Vector Constr. Co., 460 N.W.2d 329 (Mich. Ct. App. 1990) (finding an accident “may be anything that begins to be, that happens, or that is a result which is not anticipated and is unforeseen and unexpected by the person injured or affected thereby-that is takes place without the insured’s foresight or expectation and without design or intentional causation on his part.”). [↑](#footnote-ref-39)
40. *Sova*, 102 So. 3d 863. [↑](#footnote-ref-40)
41. *Id*. at 865. [↑](#footnote-ref-41)
42. *Id*. at 870. [↑](#footnote-ref-42)
43. *Id*. at 872. [↑](#footnote-ref-43)
44. *Id*. [↑](#footnote-ref-44)
45. EIL policies are “claims made” meaning that the claim must be made against the insured and reported to the insurer during the policy period, or an extended reporting period. [↑](#footnote-ref-45)
46. *See* Don’s Bldg. Supply, Inc. v. OneBeacon Ins. Co., 267 S.W.3d 20, 25 (Tex. 2008). [↑](#footnote-ref-46)
47. *See id*. at 25, n.22. [↑](#footnote-ref-47)
48. Korossy v. Sunrise Homes, Inc., 94-473 (La. App. 5th Cir. 3/15/95), 653 So. 2d 1215, 1225, *writs denied*, 95-1522, 1536 (La. 9/29/95), 660 So. 2d 878. [↑](#footnote-ref-48)
49. *See* Mangerchine v. Reaves, 10-1052 (La. App. 1st Cir. 3/25/11), 63 So. 3d 1049, 1058. [↑](#footnote-ref-49)
50. *See* Ins. Co. of N. Am. v. Forty-Eight Insulations, Inc., 633 F.2d 1212, 1223 (6th Cir. 1980). [↑](#footnote-ref-50)
51. Although there are a number of allocation methods besides these, they have been discarded or are only utilized by a slim minority. Depending upon the jurisdiction, the allocation scheme will be determined by the particular language of the applicable policy or stands on previous case law. *Compare* Keyspan Gas East Corporation v. Munich Reinsurance America, Inc., 96 N.E.3d 113 (N.Y. 2018) (“[W]e have not adopted a strict pro rata or sums allocation rule. Rather, the method of allocation is governed foremost by the particular language of the relevant insurance policy”), *with* EnergyNorth Natural Gas, Inc. v. Certain Underwriters at Lloyd’s, 934 A.2d 517, 526-27 (N.H. 2007) (“[W]e need not select a particular method of pro-ration in this case, [but] we observe that in future cases, trial courts should, where practicable apply the pro-ration by years and limits method”). [↑](#footnote-ref-51)
52. *See* Keene Corp. v. Insurance Co. of North America, 667 F.2d 1049 (D.C. Cir. 1981). *See also* J.H. France Refractories Co. v. Allstate Ins. Co., 626 A.2d 502, 508 (Pa. 1993) (applying allocation by joint and several liability, citing standard language in the policy’s insuring agreement). [↑](#footnote-ref-52)
53. *Keene*, 667 F.2d at 1049. [↑](#footnote-ref-53)
54. *Id*. [↑](#footnote-ref-54)
55. *Id*. at 1034. A number of courts have come to rely on Keene as the guiding authority for applying allocation on a joint and several basis. *See* In re Viking Pump, Inc., 52 N.E.3d 1144, 1150 (N.Y. 2016); *see* State of California v. Continental Ins. Co., 281 P.3d 1000, 1007 (Cal. 2012); *see* Plastics Eng’g Co. v. Liberty Mut. Ins. Co., 759 N.W.2d 613, 626 (Wis. 2009); *see* Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co., 769 N.E.2d 835, 840 (Ohio 2002); *see* Hercules, Inc. v. AIU Ins. Co., 784 A.2d 481, 491 (Del. 2001); *see* American Physicians Ins. Exch. v. Garcia, 876 S.W.2d 842, 855 (Tex. 1994). [↑](#footnote-ref-55)
56. *Id*. at 1038. [↑](#footnote-ref-56)
57. *Id*. at 1050. [↑](#footnote-ref-57)
58. *Forty-Eight Insulations*, 633 F.2d at 1224. [↑](#footnote-ref-58)
59. *Id*. [↑](#footnote-ref-59)
60. *Id*. [↑](#footnote-ref-60)
61. *See* Boston Gas Co. v. Century Indem. Co., 910 N.E.2d 290, 310 (Mass. 2009) (holding that pro rata by years is not only consistent with the policy language but also “serves important public policy objectives”); *see* EnergyNorth, 934 A.2d at 517; *see also* Public Serv. Co. of Colorado v. Wallis & Cos., 986 P.2d 924, 940 (Colo. 1999). [↑](#footnote-ref-61)
62. *See* Owens-Illinois, Inc. v. United Ins. Co., 650 A.2d 974, 993 (N.J. 1994). [↑](#footnote-ref-62)
63. *Id*. at 994. [↑](#footnote-ref-63)
64. *See id.* (providing a sample calculation). [↑](#footnote-ref-64)
65. *See Id.* at 991-92 (observing that the traditional techniques of contract interpretation cannot produce a coherent result). [↑](#footnote-ref-65)
66. *Id*. at 993. [↑](#footnote-ref-66)
67. *Garcia*, 876 S.W.2d at 842. [↑](#footnote-ref-67)
68. *Id*. at 855. [↑](#footnote-ref-68)
69. Lennar Corp. v. Markel American Insurance Co., 413 S.W.3d 750 (Tex. 2013). [↑](#footnote-ref-69)
70. *Id*. at 758. [↑](#footnote-ref-70)
71. *See id.* at 759. [↑](#footnote-ref-71)
72. *See id*. [↑](#footnote-ref-72)
73. *See id*. at 29-30; *compare* Garvey v. State Farm Fire & Cas. Co., 770 P.2d 704 (Cal. 1989), *and* W. Nat. Mut. Ins. Co. v. Univ. of N. Dakota, 643 N.W.2d 4 (N.D. 2002), *with* JAW The Pointe, LLC v. Lexington Insurance Company, 460 S.W.3d 597 (rejecting the common law doctrine of efficient proximate cause in favor of the insurance contract’s unambiguous language, including its anti-concurrent causation clause). [↑](#footnote-ref-73)
74. Safeco Ins. Co. of Am. v. Hirschmann, 773 P.2d 413 (Wash. 1989). [↑](#footnote-ref-74)
75. Murray v. State Farm Fire & Cas. Co., 509 S.E.2d 1 (W. Va. 1998). [↑](#footnote-ref-75)
76. *JAW the Pointe*, 460 S.W.3d at 609 (citing Utica Nat. Ins. Co. of Tex. v. Am. Indem. Co., 141 S.W.3d 198, 204 (Tex.2004)). [↑](#footnote-ref-76)
77. *Id*. [↑](#footnote-ref-77)
78. *Id*. [↑](#footnote-ref-78)
79. *See e.g.*,Dallas National Insurance Company v. Calitex Corp., 458 S.W.3d 210 (Tex. App.–Dallas, 2015). [↑](#footnote-ref-79)
80. *JAW The Pointe*, 460 S.W.3d at 609. [↑](#footnote-ref-80)
81. CBI Indus., Inc. v. National Union Fire Ins. Co., 907 S.W.2d 517 (Tex. 1995) (holding that policyholder was not permitted to conduct discovery into drafting history of pollution exclusion where policy language was unambiguous). In Louisiana, on the other thand, the pollution exclusion has been judicially limited to apply only to traditional environmental pollution on the basis of an insured’s reasonable expectations. *See* Doerr v. Mobil Oil Corp., 00-0947 (La. 12/19/00), 774 So. 2d 119, 135. [↑](#footnote-ref-81)
82. *See e.g.,* Hamm v. Allstate Ins. Co., 286 F.2d 790 (N.D. Tex. 2003) (holding that an insurer had no duty to defend claim of exposure to noxious fumes released within building during remodeling); *see also* Zaiontz v. Trinity Universal Ins. Co., 87 S.W.2d 565 (Tex. App. – San Antonio 2002, pet. denied) (insurer had no duty to defend claim of injury due to exposure to substances released from fire extinguisher on airplane). [↑](#footnote-ref-82)
83. Northbrook Indem. Ins. Co. v. Water Dist. Mgmt. Co., Inc., 892 F. Supp. 170, 171 (S.D. Tex. 1995). [↑](#footnote-ref-83)
84. *Id*. [↑](#footnote-ref-84)
85. *Id*. [↑](#footnote-ref-85)
86. *Doerr*, 774 So. 2d at 135 (finding “that the total pollution exclusion was neither designed nor intended to be read strictly to exclude coverage for all interactions with irritants or contaminants of any kind” and that its “general purpose . . . is to exclude coverage for environmental pollution”) (internal quotations and citations removed). [↑](#footnote-ref-86)
87. Mid-Continent Cas. Co. v. BFH Min., Ltd., No. CIV.A. H-14-0849, 2015 WL 2124767, at \*3 (S.D. Tex. May 6, 2015) (citing Lamar Homes, Inc. v. Mid-Continent Cas. Co., 242 S.W.3d 1, 9 (Tex. 2007)). [↑](#footnote-ref-87)
88. *See* Trinity Universal Ins. Co. v. Cowan, 945 S.W.2d 819, 828 (Tex. 1997) (recognizing that a deliberate act can result in accidental damage); *see also* Dallas Nat. Ins. Co. v. Sabic Americas, Inc., 355 S.W.3d 111, 120 (Tex. App.—Houston [1st Dist.] 2011, pet. denied). [↑](#footnote-ref-88)
89. *Lamar*, 242 S.W.3d at 9. [↑](#footnote-ref-89)
90. *See* Philadelphia Indem. Ins. Co. v. Stebbins Five Companies, No. CIV.A. 302CV1279M, 2004 WL 210636, at \*4 (N.D. Tex. Jan. 27, 2004) (citing Am. Home Assur. Co. v. Safway Steel Products Co., Inc., A Div. of Figgie Intern., Inc., 743 S.W.2d 693, 701, n. 8 (Tex. App.—Austin 1987, writ denied)). [↑](#footnote-ref-90)
91. *See, e.g.*, *T.K. Stanley*, 764 F. Supp. at 81-84. [↑](#footnote-ref-91)
92. Bitco Gen. Ins. Corp. v. Monroe Guar. Ins. Co., No. SA18CV00325FBESC, 2019 WL 3459248, at \*7 (W.D. Tex. July 31, 2019) (finding that evidence demonstrating the existence of a harmful condition does not impute knowledge of that condition). [↑](#footnote-ref-92)
93. Am. Guarantee & Liab. Ins. Co. v. United States Fire Ins. Co., 255 F. Supp.3d 677, 692 (S.D. Tex. 2017), *aff’d sub nom.* Satterfield & Pontikes Constr., Inc. v. United States Fire Ins. Co., 898 F.3d 574 (5th Cir. 2018). [↑](#footnote-ref-93)
94. Bain Enterprises LLC v. Mountain States Mut. Cas. Co*.*, 267 F. Supp. 3d 796, 812 (W.D. Tex. 2016) (finding that, although the insured was aware of some alleged damage, it was unclear whether all damage alleged was related to the damage of which the insured had pre-policy knowledge and holding that the insurer therefore had a duty to defend). [↑](#footnote-ref-94)
95. *See* Mid-Continent Ins. Co. v. Liberty Mut. Ins. Co., 236 S.W.3d 765 (Tex. 2007). [↑](#footnote-ref-95)
96. *Id.* [↑](#footnote-ref-96)
97. *Compare* Trinity Univ. Ins. Co. v. Employers Mut. Cas. Co., 592 F.3d. 687 (5th Cir. 2010), *with* Truck Insurance Exchange v. Mid-Continent Cas. Co., 320 S.W.3d (Tex. App.—Austin 2010). [↑](#footnote-ref-97)
98. 881 S.W.2d 312 (Tex. 1994). [↑](#footnote-ref-98)
99. *Id*. at 314. [↑](#footnote-ref-99)
100. *See generally* G.A. Stowers Furniture Co. v. American Indem. Co*.*, 15 S.W.2d 544 (Tex. Comm’n App. 1929) (imposing an extracontractual duty on insurers requiring generally that they accept reasonable settlement offers within policy limits). [↑](#footnote-ref-100)
101. *Stowers*, 15 S.W.2d at 544; State Farm Lloyds Ins. Co. v. Maldonado, 963 S.W.2d 38, 41 (Tex. 1998). [↑](#footnote-ref-101)
102. Underwriters Group, Inc. v. Clear Creek Indep. Sch. Dist., No. CIV.A. G-05-334, 2006 WL 1852254, \*3 (S.D. Tex. June 30, 2006). [↑](#footnote-ref-102)
103. *Id*. [↑](#footnote-ref-103)
104. Rhoades v. Casey, 196 F.3d 592, 600 (5th Cir. 1999). [↑](#footnote-ref-104)
105. *Id*. [↑](#footnote-ref-105)
106. Chaucer Corporate Capital, No. 2 Ltd. v. Vill. Contractors, Inc., No. CIV.A. 09-2701, 2010 WL 3702609 (S.D. Tex. Sept. 15, 2010). [↑](#footnote-ref-106)
107. *See* Travelers Ins. Co. v. First Nat’l Bank of Shreveport, 675 F.2d 633, 637, n.9 (5th Cir. 1982). [↑](#footnote-ref-107)
108. *See* State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523 (1967). [↑](#footnote-ref-108)
109. *Chaucer*, 2010 WL 3702609 at \*3. [↑](#footnote-ref-109)
110. Young v. Gumfory, 322 S.W.3d 731 (Tex. App.—Dallas 2010). [↑](#footnote-ref-110)
111. State Farm Life Ins. Co. v. Martinez, 216 S.W.3d 799 (Tex. 2007). [↑](#footnote-ref-111)
112. Heggy v. American Trading Employee Retirement Account Plan, 123 S.W.3d 770, 775 (Tex. App.—Houston [14th Dist.] 2003, pet. denied). [↑](#footnote-ref-112)
113. *See* Rochelle v. Pac. Exp. Co., 120 S.W. 543 (Tex. Civ. App. 1909, no writ). Gillespie v. Citizens Nat. Bank of Weatherford, 97 S.W.2d 310 (Tex. Civ. App. Texarkana 1936); Van Slyck v. Dallas Bank & Trust Co., 45 S.W.2d 641 (Tex. Civ. App. Dallas 1931). [↑](#footnote-ref-113)
114. *See* Petro Source v. 3-B Rattlesnake Refining, 905 S.W.2d 371, 378-379 (Tex. App.—El Paso 1995, writ denied). [↑](#footnote-ref-114)
115. *See, e.g.*,Cable Communications Network, Inc. v. Aetna Casualty & Surety Co., 838 S.W.2d 947, 950–51 (Tex. App.—Houston [14th Dist.] 1992, no writ). [↑](#footnote-ref-115)
116. *Id*. (citing Holmquist v. Occidental Life Ins. Co. of Calif., 536 S.W.2d 434, 437 (Tex.Civ.App.—Houston [14th Dist.] 1976, writ ref’d n.r.e)). [↑](#footnote-ref-116)