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# Climate Change: Disclosure and Directors' and Officers' Liability Insurance Issues

Webinar sponsored by the Association of  
Corporate Counsel Energy Committee  
Leonardo Guglielmi, Moderator

David B. Martin, Esq.  
Marialuisa S. Gallozzi, Esq.

# Climate Change: Disclosure and Directors' and Officers' Liability Coverage Issues

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Presented By:

David B. Martin, Covington & Burling LLP  
Marialuisa S. Gallozzi, Covington & Burling LLP

Moderated By:

Leonardo Guglielmi, ObjectWin Technology, Inc.

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## Overview

1. Disclosure Requirements Pertaining to Climate Change
2. Directors and Officers Liability Coverage
  - A. In General
  - B. As Applied to Climate Change Liabilities

## Disclosure Issues: Current Requirements

- Description of business [Item 101]
- Legal proceedings [Item 103]
- MD&A [Item 303]
- Risk factors [Item 503(c)]
- Financial statements and disclosure
- All other material information
- Experts

# Disclosure Issues: Significant Developments

- Public policy
  - EPA, Congress and international
- Public/investor interests
- Commercial activities
- Other private ordering – e.g., lists and litigation

## Disclosure Issues: Next Steps for the SEC

- Views from the top
- Rulemaking vs. interpretive guidance
- Comment letters
- Investor Advisory Committee

## Disclosure Issues: Next Steps for Filers

- What companies
  - Electric power, extractive and transportation
  - Insurance and banking
  - Other
- What disclosure
  - Existing precedent
  - Current frameworks

## Disclosure Issues: Next Steps for Filers (*cont'd*)

- Financial risks
  - Regulation
  - Litigation
  - Physical impacts
- Operational risks
- Reputational risks
- Strategies, governance, results and position

# D&O Coverage:

## A. In General

### Who is Insured?

- Side A:  
Direct coverage for D&Os when they are not indemnified
- Side B:  
Coverage for company when it indemnifies Ds and Os.
- Side C:  
Entity coverage for the company for its own liability (frequently limited to securities claims)
- (Note that retentions apply to B and C, not to A).

## D&O Coverage:

### A. In General (cont'd)

#### **Basic Coverage Grant and Key Definitions**

- D&O policy typically covers “Loss” arising from a “Claim” made during the policy period for any “Wrongful Act”
  - “Loss” typically means damages, judgment, settlements, pre- and post-judgment interest and includes defense costs.
    - Civil or criminal fines or penalties, taxes, punitive and multiplied damages and matters uninsurable as a matter of law typically are excluded

## D&O Coverage:

### A. In General (cont'd)

- “Claim” typically means a written demand, or a civil, criminal, administrative, regulatory or arbitration proceeding for monetary or non-monetary relief.
  - Allegation of a Wrongful Act needed to constitute a Claim (compare informal/investigative subpoenas where no “Wells” letter involved)
- “Wrongful Act” typically means:
  - Any breach of duty, neglect, error, misstatement, omission or act.
  - May be limited to “negligent” acts or omissions

# D&O Coverage:

## A. In General (cont'd)

### **Distinctive D&O Policy Features**

- Claims-made trigger
  - strict reporting requirements
- Defense costs within limits and retentions
  - policy can be completely exhausted by defense costs
- Insured defends itself and is reimbursed
- Insurer consents

# D&O Coverage:

## A. In General (cont'd)

### **Examples of Claims Against Ds & Os**

- Improper disclosure and financial reporting
- M&A, spin-off, and corporate control contests
- Sox (esp. 404), whistleblower, code of conduct
- Executive compensation and conduct
- Discrimination or wrongful termination
- Claims by customers or clients
- Competitors' claims
- Derivative and government claims

## D&O Coverage: A. In General (cont'd)

### **Common Coverage Defenses**

- Wrongful acts not committed in insured capacity
- No “Claim” or “Loss” as defined under the policy
- Late Notice (some states require the insurer to show prejudice)
- Policy Exclusions
- Misrepresentation/rescission (nondisclosure in the application)

## D&O Coverage

### B. Applied to Climate Change Issues

#### **Climate-Related Litigation**

- *Massachusetts v. EPA* (US 2007)
  - followed by proposed “endangerment finding” (EPA, April 2009)
- NY AG agreements with Xcel, AEP and others (2008-2009) require disclosure of financial risks that climate change poses to investors
  - including future litigation, regulation and physical impacts, emissions, and related corporate governance actions
- *Connecticut v. AEP* (2d Cir. Sept. 21, 2009)
  - permitted case based on federal common law of nuisance to proceed against 6 electric power companies

## D&O Coverage:

### B. Applied to Climate Change Issues (cont'd)

- *California v. General Motors* (appeal withdrawn July 2009)
  - California AG case against automakers dismissed, appeal withdrawn in 2009
- *Native Village of Kivalina v. ExxonMobil*  
(N.D.Ca., Sept 30, 2009, appealed)
  - dismissed claims against 24 power companies for GMG emissions contributing to global warming, resulting in erosion
  - related insurance litigation (*Steadfast v. AES*)
- *Comer v. Murphy Oil* (5<sup>th</sup> Cir., Oct. 16, 2009)
  - Mississippi residents (Hurricane Katrina victims) had standing to assert nuisance claims against oil, coal and chemical companies based on their contributions to climate change

## D&O Coverage:

### B. Applied to Climate Change Issues (cont'd)

#### **Potential “Wrongful Acts” might include:**

- Failing to address carbon emissions, at all, sufficiently, or in a timely way
- Failing to disclose carbon risks (including selective disclosures or omissions)
- Doing too much to address risks (ahead of the market)

## D&O Coverage:

### B. Applied to Climate Change Issues (cont'd)

#### **Bodily Injury/Property Damage Exclusion**

“for bodily injury, sickness, disease, emotional distress, mental anguish, outrage, humiliation, death ... or for damage to or destruction of any tangible property, including loss of use thereof”

- “for” limits exclusion to claims brought by the party suffering BI/ PD and should not exclude shareholders

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## D&O Coverage:

### B. Applied to Climate Change Issues (cont'd)

#### **Pollution Exclusion**

“for, based upon, arising from, or in any way related to: 1) the actual, alleged or threatened discharge, dispersal, release or escape of pollutants; or 2) any direction, request or voluntary decision to test for, abate, monitor, clean up, remove, contain, treat, detoxify or neutralize pollutants”

- arguably limited to claims for remediation costs, not to claims by shareholders
- can be narrowed explicitly to preserve coverage for shareholders claims

## D&O Coverage:

### B. Applied to Climate Change Issues (cont'd)

#### **Climate/GHG Exclusion**

- None to date

## D&O Coverage:

### B. Applied to Climate Change Issues (cont'd)

#### **Rescission/Misrepresentation**

- Increasingly common defense
- Insurer must show material misrepresentation by the policyholder and reliance by the insurer some states may require the insurer to show the policyholder intended to deceive
- if financial statements are incorporated by reference into the application, misstatements may trigger rescission.
- Severability of application protects insureds
- Insurers may change underwriting practices with respect to climate change
  - e.g. Swiss Re questions in D&O renewal applications

## D&O Coverage:

### B. Applied to Climate Change Issues (cont'd)

#### **Issues that might arise in D&O underwriting**

- Who is responsible for managing climate-related risks?
- How does the company quantify and disclose emissions?
- How does the company plan for costs of regulatory compliance?
- Note that insurers have to comply with climate disclosure requirements mandated by the NAIC and this could require greater understanding of their exposure to climate risks through their potential liabilities to their policyholders

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